Appeal court's tie vote could become issue in Mandel case

By TIMOTHY M. PHELPS

How could a tie vote among six appeals court judges mean that Marvin Mandel is once again facing four years in jail, when his conviction already had been overturned once?

The key is in the decision three months ago by the United States Fourth Circuit Court of Appeals to hold an unusual rehearing of the case en banc—that is, the full court sitting together.

That announcement literally wiped out the 2-to-1 decision handed down in January by a three-member panel of the appeals courts, which had overturned the convictions and granted a new trial to Mandel and his co-defendants.

At that point, the ex-governor was no better off than he was on August 23, 1977, when a jury convicted him.

In effect, the "en banc" hearing swallowed up and superseded the 2-to-1 ruling, leaving as the last legal landmark in the case the jury's decision that Mandel and his five co-defendants were guilty of mail fraud and racketeering.

According to lawyers familiar with the case, it is traditional in the law that a tie vote by an appeals court lets the decision of the lower court stand. In this case, the lower court was the District Court in Baltimore where Mandel was found guilty.

When the appeals court decided to rehear the case in April, Mandel knew that two of the six judges were likely to be on his side—H. Emory Widener, Jr., and Donald S. Russell, the judges who had voted in January to overturn the conviction.

The prosecution could count on only one judge, John D. Butzner, Jr., who had dissented from the panel's holding. But because a tie vote would uphold the District Court conviction, it was clear last April that the government only needed the votes of two of the remaining four judges to win its case.

The court's seventh judge at the time, Harrison Winter, of Baltimore, excused himself from the case and did not sit with the court when it heard arguments June 5.

The series of events that climaxed yesterday would appear to leave the Mandel defense in a difficult legal position.

The arguments made by Arnold Weiner, Mandel's lawyer, to the three-judge panel a year ago had centered on the contention that the prosecution had misused the mail fraud laws for a purpose that was never intended by its drafters.

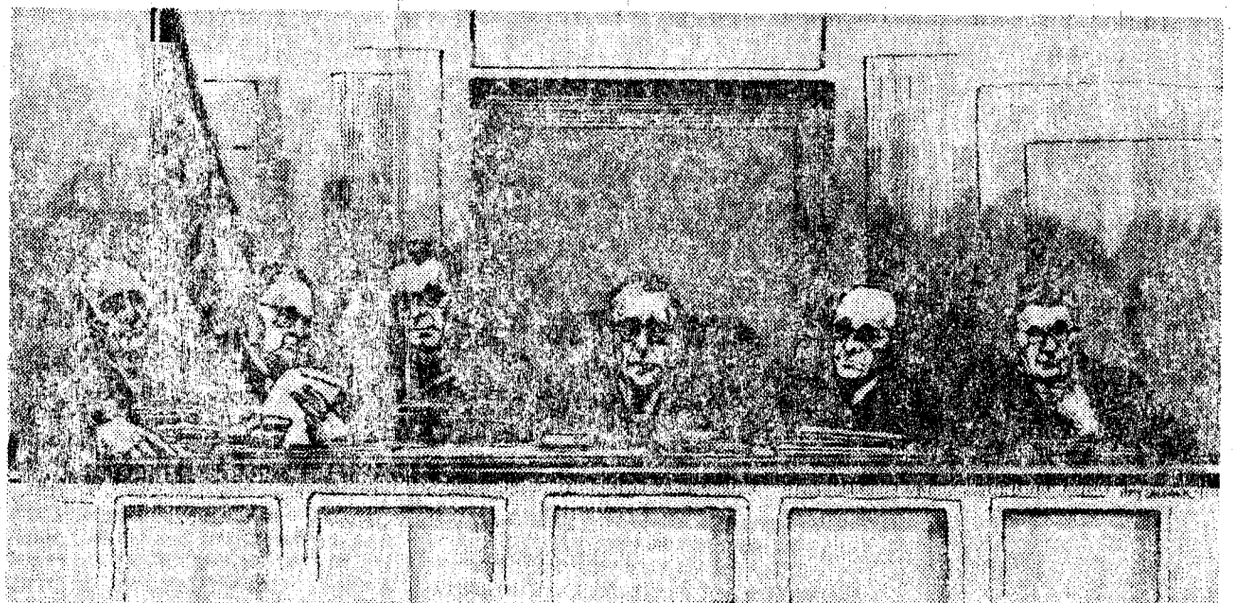
But the judges were much more interested in questions that Mr. Weiner had raised only in passing—procedural decisions made by Judge Robert L. Taylor, who presided over the trial. This was the basis for the reversal of the conviction by two judges on the panel of three.

When the conviction was first overturned, the legal betting was that the U.S. Supreme Court would not agree to hear the case because of the focus on procedural questions—rather than the sweeping questions of law that it is the Supreme Court's function to resolve.

That same factor is now at play in the reverse. Legal experts, including Professor Abraham Dash of the University of Maryland Law School, said yesterday that they doubted the Supreme Court will agree to hear the case.

Sources close to the defense, however, point out that in persuading the appeals court to rehear arguments in the case en banc, the government had told the judges that there were extremely important issues that needed to be resolved.

Mr. Weiner is likely to adopt the government's position in trying to urge the Supreme Court to take the case.



Members of the United States Fourth Circuit Court of Appeals who heard the Mandel case are (from left) J. Dixon Phillips, Jr., H. Emory Widener, Jr., John D. Butzner, Jr., Clement F. Haynsworth, Jr., Donald S. Russell and Kenneth K. Hall.

"The government will be hard pressed to argue at the next stage that the case is unimportant or involved unimportant issues," one of these sources said.

The Mandel defense can always return, in any appeal to the Supreme Court, to its original arguments attacking what they saw as the government's misuse of the mail fraud statutes.

This is of broader national importance, especially because appeals courts around the country have issued conflicting opinions on that very question.

Judge Widener, in his dissent from yesterday's decision, seemed to suggest that possibility. He pointed out that the original three-judge panel had not seriously considered some of the broader questions because they didn't need to—they had already found grounds for reversal on the procedural issues.

The judge seemed to be laying the framework in his dissent for an appeal to the Supreme Court. Lawyers say that if it is unusual for such an important case as this to be decided by a two-paragraph unsigned opinion for the court, it is just as unusual to have a signed dissent following an unsigned opinion.

Professor Dash, once a federal prosecutor himself, pointed out that the Supreme Court has avoided taking on the mail fraud issue since prosecutors began making broader use of the laws as a device to attack political corruption.

By using mail fraud, federal prosecutors have gained jurisdiction over cases that were once left to their state counterparts to pursue. Mr Weiner has repeatedly challenged this policy as overreaching.

Professor Dash predicted that because of all the time that has been devoted to the case, with two trials and two appellate proceedings, the Supreme Court justices are likely to say "enough," and call a halt to the lengthy case.

But Mr Weiner is already talking about an entirely new basis for an appeal to the Supreme Court, an appeal that would break new legal ground if the court agreed to hear it. It would be based on a challenge to the "legal tradition" that a tie vote upholds a conviction—in a criminal case.

The Baltimore lawyer said that after a quick check yesterday of the lawbooks, he has yet to find a single case where a federal appeals court has upheld a criminal conviction on the basis of a tie vote.

It is not all that uncommon at the Supreme Court, he says. But he thinks it is extremly rare, if not unique, in appeals courts.

"A decision involves reaching a conclusion," Mr Weiner quotes from a decision of the Court of Appeals for the District of Columbia. "Where no conclusion is reached nothing is decided."

"Even in judicial proceedings," Mr. Weiner asserts, "the action of a divided court is not a decision."

"By announcing that it is divided 3-3 the court has said it is unable to decide the appeal," Mr. Weiner contends. "They are saying, 'We cannot decide this case. We are divided equally.' "

"We intend to argue that a defendant is entitled to an appeal in a criminal case as a matter of right. The right to an appeal includes the right to have that appeal decided. Since the announcement of an equally divided court is merely an announcement that the appeals court is unable to decide the appeal, the defendant's right to an appellate decision is not fulfilled."