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They Study Exempting Defendants' Legal Fees

By **ARNOLD H. LUBASCH**

All 12 active judges on a Federal appeals court held a hearing yesterday on whether the Government could prevent defendants from hiring the lawyers of their choice by freezing the defendants' assets, including the money they intended to use for legal fees.

The issue involves a 1984 law permitting the Government to freeze the assets of indicted defendants before they have been convicted in Federal racketeering and narcotics cases. It is an issue that has attracted intense interest in the legal community.

After listening to the legal arguments, the United States Court of Appeals for the Second Circuit reserved decision. Attending the hearing were about 200 spectators, many standing in the aisles of the large 17th-floor courtroom of the Federal courthouse in Manhattan.

Relatively Rare Procedure

The full court of 12 judges must decide whether to overturn a 2-to-1 decision that a panel of the court issued in December. The panel refused to exempt legal fees from the law that allows the Government to freeze assets before trial and confiscate them after conviction.

It was a measure of the importance attached to the issue that the court agreed to rehear the case, sitting en banc with all the judges hearing the arguments, a relatively rare procedure.

Arguing first was Edward M. Chikofsky, a defense lawyer who contended that the disputed law did not make it clear whether fees for lawyers were exempt from the provisions to freeze and confiscate the assets of defendants.

Mr. Chikofsky also stressed "the much larger question of constitutionality" of a law depriving defendants of the right to counsel of their choice. He originally represented a narcotics defendant, Peter Monsanto, who recently went to trial with a court-appointed lawyer after his assets were frozen under the law.

'Alice in Wonderland' Concept

Speaking for several bar associations and legal groups, Arthur L. Liman argued that the disputed law, the Comprehensive Forfeiture Act, included an "Alice in Wonderland" concept of "sentence first, verdict afterward."

Mr. Liman noted that the original panel's decision in the case added a new provision requiring that before a defendant's assets can be frozen, the trial judge must hold a "mini-hearing" in which the Government must show that the defendant will probably be convicted.

"I concede that the panel improved this act," Mr. Liman told the judges.

But he said that Congress had passed an unconstitutional law and that "you ought to

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declare it unconstitutional."

A Federal prosecutor, John F. Savarese, argued for the Government that the full court should affirm the panel's decision, which he described as "fair and appropriate."

"Congress clearly has the power," he said, "to prevent defendants from using the illegal proceeds of narcotics trafficking for any purpose, including attorneys' fees."

Mr. Savarese argued that defendants who were prevented from hiring their own lawyers were provided with court-appointed lawyers paid for by the Government under the Criminal Justice Act. "There are sound, able counsel available in the C.J.A. pool," he added, referring to the group of lawyers who agree to work for hourly fees set by the Government.

In a brief rebuttal argument, Mr. Liman asserted that the Government would not be justified in preventing defendants from choosing their own lawyers, even if every court-appointed lawyer were another Clarence Darrow.

Peppered With Questions

The lawyers who argued the case were peppered with questions by the judges, who focused on a variety of complex legal issues.

Chief Judge Wilfred Feinberg, who presided over the session, ended the hearing by thanking the lawyers and announcing that "we will take the matter under advisement."

Among the judges at the hearing were the members of the panel that originally heard the case. They were J. Daniel Mahoney, who wrote the majority decision for the panel; Richard J. Cardamone, who concurred in the

decision, and James L. Oakes, who wrote a strongly worded dissent.

The other judges were Francis X. Altimari, Amalya L. Kearse, Thomas J. Meskill, Roger J. Miner, Jon O. Newman, Lawrence W. Pierce, George C. Pratt and Ralph K. Winter.

Conflicting Decisions

The lawyers in the case observed during the arguments that several courts throughout the country have rendered conflicting decisions on the dispute over freezing and confiscating the assets of defendants. The issue is expected to wind up in the United States Supreme Court.

During yesterday's arguments, Judge Oakes asked Mr. Savarese if the constitutional right to a fair trial would entitle a defendant in a long, complicated racketeering trial to hire a lawyer with the kind of experience that commanded a high legal fee.

Mr. Savarese replied that the pool of court-appointed lawyers included many highly qualified members who represented defendants for lower fees in major racketeering trials.

Another judge interjected that court-appointed lawyers paid by the Government in long trials sometimes fared better than privately hired lawyers, who were not always able to collect their fees.

"The United States Treasury is a little more reliable," Mr. Savarese responded, providing one of the hearing's few moments of laughter.