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DEMJANJUK

An Analysis of the Sixth Circuit Court of Appeals Decision in *Demjanjuk v. Petrovsky, et al.*

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Some of the earliest Holocaust denial was personal, not political. SS members, concentration camp guards, and many others lied about their wartime activities in order to gain entrance to other countries, including the United States. They lied, they gained admittance, eventually became citizens, and lived quiet lives until, decades later, in 1979, the U.S. government established an arm of the Department of Justice called the Office of Special Investigations (OSI). OSI's mandate — to track down Nazis — was a moral, if belated, one. America's cold-war obsession with communism had left it with a blind eye toward Nazi murderers in our midst for too long.

John Demjanjuk was one of those Nazis.

A retired auto worker living in Cleveland, Ohio, he was first denaturalized for lying to gain entry to, and citizenship in, the United States. He said he had been a farmer at Sobibor, Poland, from 1937 to 1943, then a prisoner of war. Instead, the U.S. district court found, he had been an SS guard at two camps — Trawniki and Treblinka. Part of the proof of Demjanjuk's tenure at Trawniki (where death camp guards were trained) was a German document, an identification card (number 1393). Demjanjuk claimed that the Trawniki card was a forgery of the Soviets designed to malign a poor, innocent, anticommunist Ukrainian émigré. The card,

however, was verified by the paymaster at Trawniki, and every court that has considered the card has determined it to be authentic. Demjanjuk's service at Trawniki was sufficient, by itself, for his denaturalization, as his citizenship was "illegally procured" by "concealment of a material fact or by willful misrepresentation."[1]

Demjanjuk was denaturalized both for his Trawniki "service," as well as for his tenure at Treblinka, where he was found to be "Ivan the Terrible." He was then ordered deported.[2] The Sixth Circuit Court of Appeals affirmed the immigration judge's deportation order, holding that the "record in this case clearly supported the conclusion based on clear, convincing, and unequivocal evidence that Demjanjuk served with the SS at Trawniki and Treblinka and, further, that he misrepresented his wartime activities during the immigration process."[3] The court also noted that Demjanjuk was deportable "based solely on the concession he made," to wit:

> [Demjanjuk] conceded that he was a member of the Vlassov [sic] army while under the jurisdiction of the German army as a prisoner of war. [Demjanjuk] freely concedes that he had blood type markings [such as those given to members of the SS]. He conceded that he did not truthfully state his places of residence, the locations of places where he was interned by the German army, and the places and dates of his activities during the crucial years. . . . He further concedes that the information contained in his immigrant visa used for entry into the United States does not contain accurate or truthful information regarding these matters.[4]

In 1986, after Demjanjuk was denaturalized and found deportable, he was extradited to Israel to stand trial on the charge that he was the particularly sadistic Treblinka gas chamber operator "Ivan the Terrible." Demjanjuk was tried in Israel, convicted, and sentenced to death. He appealed.

While the appeal was pending, the Israeli prosecutor came upon documents from the former Soviet Union that suggested that another Ivan — a Treblinka guard named Ivan Marchenko — was "Ivan the Terrible." The Israeli Supreme Court considered these newly discovered documents and, as one commentator

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[1] See 8 U.S.C. 1451 (a) and *United States v. Demjanjuk*, 518 F. Supp. 1362, 1365-69 (N.D. Ohio, 1981).

[2] See *Matter of Demjanjuk*, A8 237 417, op. at 9 (Immigration Court May 3, 1984), *aff'd*, *Matter of Demjanjuk*, A8 237 417 (BIA Feb. 14, 1985).

[3] *United States v. Demjanjuk*, 767 F.2d 922 (6th Cir., 1985), *cert. denied*, 474 U.S. 1034 (1985).

[4] *Ibid.*

wrote, "cast doubt after doubt upon [them]. Their authenticity was not established. Their authorship was unknown. The questions that produced these identifications were not specified. The witnesses were not subject to cross-examination."[5]

Any prisoner on an American death row would not have been able to avoid execution based on the caliber of this "new" evidence, given federal court rulings on new evidence and postconviction relief.[6] Yet the Israeli court ruled that Demjanjuk's conviction must be overturned because the new evidence was not "inconsistent with any rational conclusion" other than Demjanjuk's guilt; a much higher, and much more moral, standard. In effect, the court found a "reasonable doubt" and therefore acquitted him.

The Israeli court's 405-page opinion, however, did not exonerate Demjanjuk on the "Ivan the Terrible" charges. Rather, it concluded that Demjanjuk was most probably "Ivan the Terrible" (nearly half the court's opinion was concerned with — and supported — the testimony of survivors and a German guard who had identified Demjanjuk as "Ivan the Terrible"). It also found that, rather than an innocent, there was compelling evidence that he had been a Nazi guard at Trawniki and Sobibor. But since Demjanjuk had neither been extradited nor tried on charges other than the Treblinka-based allegations, Demjanjuk was set free.

Meanwhile, back in the United States, the panel of the Sixth Circuit Court of Appeals (which had upheld Demjanjuk's extradition to Israel[7]) took the extraordinary step of *sua sponte* (on their own) reopening the extradition case. After reading "numerous recent press reports and articles in the United States [that] indicate that the extradition warrant . . . may have been improvidently issued because it was based on wrong information,"[8] the court ordered OSI to disclose any and all information it had tending to show that Demjanjuk was not "Ivan the Terrible," and conversely, any information it had suggesting that Ivan Marchenko was "Ivan the Terrible."

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[5] Nathan Lewin, "Demjanjuk's End Game," *Forward*, Aug. 12, 1993.

[6] See, for example, *United States v. Peltier*, 800 F.2d 772 (8th Cir., 1986). The defendant was convicted of murder. After the trial, the defense discovered that the prosecution had conducted a test on a shell casing that proved the defendant could not have fired the fatal shot, and had suppressed the test results. The court of appeals found the defendant was not entitled to a new trial, because even though the new evidence might have led to an acquittal, it could not be said with certainty that the suppressed evidence would *probably* have led the jury to a different result.

[7] See *Demjanjuk v. Petrovsky, et al.*, 776 F.2d 571 (6th Cir., 1985).

[8] See *Demjanjuk v. Petrovsky, et al.*, Opinion Upon Reconsideration (6th Cir., 1993), Slip Opinion of Nov. 17, 1993 (hereinafter "Slip Opinion") at 41.

After OSI answered the court's order, the panel heard argument, then appointed Judge Thomas A. Wiseman, Jr., a U.S. district court judge from Tennessee, to serve as special master of the court. Wiseman's job was to take sworn testimony from OSI attorneys, hear any other relevant evidence, and write a report about whether OSI had committed "fraud upon the court" by failure to disclose exculpatory evidence (that is, evidence favorable to the defense).

Judge Wiseman issued his report on June 30, 1993. Although Wiseman was critical of OSI's handling of the case, he "absolved the government attorneys of deliberately and intentionally failing to disclose information that they considered exculpatory."[9] As the Sixth Circuit panel noted, Judge Wiseman considered six instances of alleged governmental suppression of exculpatory information, and, in "each instance . . . the master exonerated the government attorneys. . . ."[10] The special master also noted that, even without the exoneration of the government attorneys on the allegation that they committed "fraud on the court," Demjanjuk's deportation was still valid "because the Trawniki allegations formed an independent ground for Mr. Demjanjuk's denaturalization and deportation."[11]

The Sixth Circuit reviewed claims about five undisclosed documents, noting that:

(1) The "Fedorenko Protocols" consisted of "statements of two former Treblinka guards, Malagon and Lelko, . . . both [of whom] name a man other than the accused as . . . Ivan the Terrible."

(2) The "Danilchenko Protocols" included "a second statement from the former Treblinka guard Malagon who stated that an 'Ivan Demedyuk or Ivan Dem'yanyuk' worked at Treblinka as a cook,[12] that a guard named Marchenko

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[9] Slip Opinion at 4.

[10] The exoneration was based "on one or more of the following findings: either that the attorneys did not believe the materials were within the scope of outstanding discovery requests; that they believed in good faith that the materials did not relate to Demjanjuk; or that a particular attorney then responsible for complying with requests was not aware of the existence of specified materials even though other attorneys who worked on the Demjanjuk cases did know of and had seen the materials." Slip Opinion at 5.

[11] Government's Petition for Rehearing, at 2.

[12] According to OSI, Malagon, although unable to identify Demjanjuk from a photospread, also said that this cook — Demjanjuk — later went on to become a gas chamber operator at Treblinka. The court neglected to mention this later part of Malagon's testimony in its decision. "Analysis of Demjanjuk NYTIMES Op-Ed Piece By F. Dannen (7/16/93)," OSI memorandum dated July 21, 1993, p. 2.

operated the gas chambers. . . . Danilchenko, a guard [at Sobibor] stated that Demjanjuk was a fellow guard at Sobibor and that they were transferred from Sobibor to Flossenburg, Germany, together."

(3) The "Dorofeev Protocols" consisted of "statements of five Soviets who served at Trawniki. . . . Only one individual recalled the name Demjanjuk and although he identified two of Demjanjuk's photos . . . he qualified his identification by stating that his recollection of Demjanjuk was poor."

(4) The "Polish Main Commission List" was an article which "partially list[ed] names of known guards at Treblinka. The name Ivan Marchenko appears on the list. Demjanjuk's name does not."

(5) The "Otto Horn Interview Memoranda" were two reports from OSI personnel about an interview with Horn, a former SS guard from Treblinka, who identified Demjanjuk. "Both wrote in separate memoranda that this identification occurred only after Horn noted that Demjanjuk's photo appeared in both of two photospreads and while Demjanjuk's photo from the first photospread lay facing up during the examination of the second photospread. . . . The statements were not produced to Demjanjuk or disclosed to the district court in the denaturalization proceedings when that court received a videotaped deposition of Horn taken some time after the initial identification from the two photospreads. In the videotaped deposition Horn stated that he did not see the two photospreads at the same time — that the first one was put away out of his sight before he examined the second one."[13]

The Sixth Circuit was bound by the special master's findings that the failure to disclose these materials was not fraud on the court, unless those findings were "clearly erroneous." The court also accepted the special master's definition of the elements of "fraud upon the court."[14] Nonetheless, the court overturned the master's exoneration based on the following reasoning (for which it offered no authority):

> We have trouble squaring this definition [of recklessness in the third element — *see* fn. 14] with the master's ultimate conclusion. The master stated that "a careful reading of Mr. Demjanjuk's discovery requests

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[13] Slip Opinion at 9-13.

[14] The special master determined that "fraud on the court" consists of the following elements: "1. On the part of an officer of the court; 2. That is directed to the 'judicial machinery' itself; 3. That is intentionally false, willfully blind to the truth, or is in reckless disregard of the truth; 4. That is a positive averment or is concealment when one is under a duty to disclose; 5. That deceives the court." Slip Opinion at 22-23.

> demonstrates that he asked for virtually every piece of evidence that is at issue in these proceedings," but the government did not provide the evidence because it believed it was under no duty to do so. . . . The master also faulted Demjanjuk's attorneys for failing to pursue every lead provided by the responses that the government did make. That may be a correct assessment as to some leads, but Demjanjuk's attorneys were depending on government attorneys to root out information in the possession of foreign nations and to provide it.[15]

What are the problems with the court's overturning of the special master's failure to find recklessness? First, it is one thing to find that the government has an obligation of care when it comes to information that may have some exculpatory character; it is quite another for the court to impose upon the prosecution the functional duty of playing defense counsel as well — especially when, as here, the court all but ignores the careless job of Demjanjuk's attorneys regarding discovery.[16]

Second, the court's reasoning is tautological. It found that the special master "based his ultimate conclusion that Demjanjuk failed to prove fraud on the court almost exclusively on his finding that the OSI attorneys acted in good faith. While he stated that they were not reckless, *he did not discuss his finding at all*" (emphasis added). If the special master did not sufficiently elucidate why he did not find recklessness, that finding is not "clearly erroneous," but merely insufficiently addressed. It would be one thing if the special master fully discussed his factual findings rejecting recklessness, and the Court of Appeals disagreed with the master's legal analysis of the facts. It is quite another — in fact, it is startling — that an appellate panel would overturn a finding as "clearly erroneous" where it admits, in the same paragraph, that it does not have a full presentation of the facts supporting the determination it believes was made in error. In any event, the determination whether an attorney acted recklessly seems more a question of fact than law, and the special master therefore should have been given greater deference by the panel.

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[15] Slip Opinion at 23.

[16] "Discovery" is both the process by which one side to a legal proceeding has the right to demand the other side disclose information, and the information gained thereby. As Nat Lewin noted in his *Forward* commentary: "No matter that the Justice Department lawyers diligently replied to four sets of interrogatories served by Demjanjuk's lawyers during the 1980-82 proceedings to revoke Demjanjuk's citizenship and his right to live in the U.S. In 16 sets of answers they listed the names, addresses and other relevant information concerning 73 potential witnesses — including a significant number who were unable, after passage of time, to identify Demjanjuk. And no matter that the government lawyers told the defense repeatedly that they had managed to retrieve some documents from the Soviet Union. Rather than asking to see the documents, Demjanjuk's lawyers complained that they already had 'hundreds of pages' to 'sift through,' and they wanted to see only written statements of Soviets whom the Justice Department intended to call as witnesses."

The court also erroneously evaluated the exculpatory nature of the five documents, and their legal significance.

The panel conveniently failed to point out that none of the allegedly suppressed documents were "smoking guns," proving that Demjanjuk was not either a Nazi death camp guard, or "Ivan the Terrible," for that matter. The Fedorenko Protocols, for example, place Demjanjuk at Treblinka, although one witness says he was a cook, rather than "Ivan the Terrible" there. Demjanjuk, remember, claimed — both when lying about his wartime years when he came to the United States and during his court proceedings — that he was not there at all. The exculpatory nature of the Fedorenko Protocols, then, is of the nature of a person being tried for armed bank robbery who says he was at home in bed during the time of the crime, but complains on appeal that the prosecutor did not provide him a witness statement that identifies him in the same bank, taking part in the robbery, but holding a bag instead of a gun.[17]

Certainly, OSI would have been well advised to turn over the list of names of Ukrainian guards at Treblinka that had Marchenko's name and not Demjanjuk's. But the court itself found that the list was only "partial," and it failed to note that Demjanjuk himself had provided the name "Marczenko" as his mother's maiden name on his U.S. visa application.[18]

Likewise, the court stretched OSI's mistakes regarding the Horn identification beyond all recognition. The reports of the two OSI personnel conflicted with Horn's testimony on a relatively minor point — regarding where the first photospread was placed during his view of the second photospread. Although the government attorney certainly should have given defense counsel this information (if he was aware of it — he says he was not), this again was not a

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[17] Despite his acquittal in Israel on the "Ivan the Terrible" charge, there is still forthcoming evidence showing that Demjanjuk was at Treblinka. For example, OSI refers to "newly uncovered testimony (concealed by the Demjanjuk defense team until earlier this year) of Melania Nezdiymynoha, a Ukrainian woman who worked inside the Treblinka death camp and who told Demjanjuk's representatives that she recalled Demjanjuk — by name — as one of the Treblinka SS guards. The Justice Department exposed this cover-up earlier this year when it obtained a copy of an audiotape of the Demjanjuk defense team's interview of the witness."

Incidentally, Jerome Brentar, a fundraiser for and confidant of Demjanjuk, wrote a letter on Mar. 26, 1982, asking for assistance in finding Demjanjuk's "original military [sic] ID, issued in Camp Treblinka. . . . " "Analysis of Demjanjuk NYTIMES Op-Ed Piece," p. 2.

[18] Also, according to OSI, "Kazimerz Dudek, a witness in a village near the Treblinka camp, testified that he often saw a violent Ukrainian guard carousing in town, that the guard was nicknamed 'Ivan the Terrible,' and that the man presented himself as Ivan Marchenko. Dudek, however, identified a photo of Demjanjuk as being that of the man he remembered." *Ibid.*

"smoking gun." Assuming the reports had been given to the defense, and Horn had been cross-examined with them, he would either have said that the reports refreshed his recollection, or that the reports were wrong. Even if the value of his testimony was reduced thereby, it would not have mattered because other eyewitnesses identified Demjanjuk as well. Again, to use the bank robbery analogy, it is as if one of a half-dozen people who positively identify the bank robber (who claims he was home in bed) was shown to have some inconsistency with a part of his identification. If this were a criminal case, the word the court would use to describe this error is "harmless."

And this brings us to one of the more unusual aspects of the court's ruling. Here before it was a civil case, where the burden of proof is less than in a criminal case, and where the court was at most making a probable cause determination on the extradition matter — in other words, was there enough evidence to warrant the extradition of Demjanjuk to stand trial. In its November 17, 1993, decision overturning the extradition order and finding fraud by OSI, the court created a rule of law unavailable to any *criminal* defendant, whose conviction must be supported by even more certain proof.

In a criminal appeal, the court does not throw out a conviction if there was *any* error below. A defendant, it has been said, deserves a fair trial, not a perfect one. Courts uniformly hold that a person should not be freed, or even given a new trial, if the error committed was a "harmless" one or — as stated in case law involving disclosure of evidence — if the defendant suffered little "prejudice." In fact, the U.S. Supreme Court has refused to overturn a criminal conviction even if the suppressed evidence should have been disclosed, would have been helpful, and might have even led the jury to acquit a defendant. In order for a conviction to be overturned, the suppressed evidence must be so material that "there is a *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[19]

The Sixth Circuit's ruling is astounding in that it offers no analysis of the magnitude or impact of OSI's alleged errors in failing to disclose this "exculpatory" information — much of which was more inculpatory than exculpatory anyway. Without citing any authority, the court applied the Supreme Court's criminal ruling in *Brady v. Maryland*[20] (requiring the government to provide "favorable" evidence to defendants) to denaturalization and extradition actions such as this. But even if the ruling was predicated on an analysis of prosecutorial misconduct rather than a violation of the holding in *Brady*, the notion of how much harm withholding of this evidence would cause a defendant would be essential to any analysis of

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[19] *United States v. Bagley*, 473 U.S. 667, 682, 87 L.Ed.2d 481 (1985); emphasis added.

[20] 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).

"recklessness" necessary for a finding of "fraud on the court." For example, it would have been reckless for OSI to fail to understand the exculpatory significance of a document that put Demjanjuk on a farm (as he claimed) or in a prisoner of war camp (as he claimed) — but not a document that puts him at Treblinka as a cook, or to suggest that one eyewitness out of many was mistaken about the placement of a photo spread.[21] The court never engaged in this absolutely necessary analysis.

CONCLUSION

Part of the Sixth Circuit panel's problem with the Demjanjuk case came from its grotesque misunderstanding of OSI's mission. "It is obvious from the record," the panel tellingly wrote, "that the prevailing mindset at OSI was that the office must try to please and maintain very close relationships with various interest groups because their continued existence depended upon it." In other words, the court viewed OSI as not serving a mandate for the general good (i.e., denaturalizing and deporting Nazi murderers), but in sacrificing people in order to please "interest groups" (which, the context makes clear, means Jews).[22] As offensive as this statement is about OSI and its mission, the implication that Jews would want vengeance against anyone accused of Nazism, without regard to proof, is even more obscene.

Born of its misunderstanding of, and — given its extraordinary opinion one can suggest also — hostility to, OSI, the court fashioned a remedy that is, at best, mysterious. No armed robber, car thief, or burglar receives the benefit of the type of ruling this panel imposed on OSI for the benefit of a Nazi camp guard.

Demjanjuk is now back in the United States, again because of the holding of this Sixth Circuit panel. It ruled that Demjanjuk be brought back to assist his counsel — an extraordinary ruling in that it required the federal government to ignore laws prohibiting Nazis from entering the United States. The Justice

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[21] The court also never analyzed the evidentiary impact of the documents putting Demjanjuk at Sobibor or Flossenberg. These would have been of little benefit to Demjanjuk at denaturalization or deportation proceedings, but might have been somewhat exculpatory on the extradition matter if they suggested that he could not have been at both Treblinka and these other camps at the same time. To continue our analogy, it *would* be a defense to the charge of robbing bank A if there was evidence that the defendant was robbing bank B at the time; but no defense if he or she could have robbed *both* banks.

[22] The panel noted, in the sentence before it mentioned "interest groups," that "Mr. Ryan [the OSI director] also testified that 'in 1986, which was the year before the [Israeli] trial [of Demjanjuk], I went to Israel for about 10 days on a lecture tour that was sponsored by the Antidefamation League.'" Slip Opinion at 37. In fact, Ryan was no longer the head of OSI, but a private citizen, when he went to Israel in 1986.

Department is now deciding what to do. On the one hand, it would be well advised to seek to overturn the panel's decision, not only because it was a wrong opinion that unfairly tarnished the mission and credibility of OSI, but also because criminal defense attorneys will use the language, if not the holding, of the panel to attack convictions without regard to prejudice suffered.

On the other hand, the Justice Department might be well advised to leave the matter alone. Demjanjuk's litigation of the extradition matter is now over. The panel's ability to make mischief is seemingly at an end. And nowhere, in any judicial proceeding, has Demjanjuk's role as a camp guard trained at Trawniki been called into question. In fact, new evidence also suggests that he was stationed as well at camps in Sobibor and Flossenberg.

By all logic and morality, Demjanjuk — still under a deportation order for lying about his role as a camp guard at Trawniki when he came to the United States — should be deported immediately. That is what the AJC has called upon Attorney General Reno to do. The question is whether the government has the political will to do what the law commands.

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