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Sixth Circuit court lambasts OSI misconduct in Demjanjuk ruling

by Jeffrey Steinberg

On Nov. 17, the U.S. Sixth Circuit Court of Appeals handed down a long-awaited ruling in the case of John Demjanjuk, the retired Cleveland auto worker who was extradited to Israel and tried as the Nazi war criminal "Ivan the Terrible" of the Treblinka, Poland death camp during World War II. After a 15-year ordeal, Demjanjuk was freed by the Israeli Supreme Court, which overturned his death sentence in August, and he was allowed to return temporarily to the United States pending the court review.

In its ruling, the Sixth Circuit said that the Department of Justice Office of Special Investigations (OSI) was guilty of serious prosecutorial misconduct and fraud upon the court. The decision has forced Attorney General Janet Reno to launch an internal review of the OSI. The decision also raises once again the issue of outside interference and criminal misconduct by the Anti-Defamation League of B'nai B'rith (ADL), which is cited by name in the Sixth Circuit ruling for its efforts to build up a witchhunt against Demjanjuk and for paying OSI head Alan Ryan to make a public relations trip to Israel in 1986 on the eve of the Demjanjuk prosecution there.

Because of the unprecedented blast at the OSI and the ADL contained in the Sixth Circuit ruling, and because of the critical issues of constitutional law raised in the 83-page decision, EIR *provides the following excerpts from the decision. Subheads have been added:*

The court decision

The question before the court is whether attorneys in the Office of Special Investigations (OSI), a unit within the Criminal Division of the Department of Justice, engaged in prosecutorial misconduct by failing to disclose to the courts and to the petitioner exculpatory information in their possession during litigation culminating in extradition proceedings, which led to the petitioner's forced departure from the United States and trial on capital charges in the State of Israel. For the reasons stated herein we conclude the OSI did so engage in prosecutorial misconduct that seriously misled the court. . . .

Demjanjuk's claims of misconduct consisted of the government's failure to disclose information that pointed to another Ukrainian guard at Treblinka, Ivan Marchenko, as "Ivan the Terrible." Demjanjuk's denaturalization and deportation orders were based on his alleged misrepresentations concerning his wartime whereabouts and activities at the time he applied for entry into the United States as a displaced person and in his application for citizenship. These orders were based primarily, although not exclusively, on Demjanjuk's failure to disclose his alleged wartime activities as "Ivan the Terrible" at Treblinka. The extradition order was based solely upon the district court's finding that Demjanjuk was Ivan the Terrible. This was the charge on which Israel sought his extradition, and on which he was ultimately tried and convicted by an Israeli trial court. . . .

The master [Special Master Judge Thomas A. Wiseman, appointed in 1992 by the court to hold hearings on the OSI's conduct—ed.] made findings of fact, largely based on credibility determinations, which absolved the government attorneys of deliberately and intentionally failing to disclose information that they considered exculpatory. Judge Wiseman also found that the various proceedings against Demjanjuk were not affected by political pressures from congressional sources and various Jewish groups in the United States.

Undisclosed materials from the former Soviet Union and Poland form the principal basis for Demjanjuk's contention that OSI attorneys engaged in misconduct that amounted to fraud. The Supreme Court of Israel reversed Demjanjuk's conviction as Ivan the Terrible and acquitted him based largely on statements of Ukrainian guards at Treblinka who clearly identified Ivan Marchenko as Ivan the Terrible. The Israeli Supreme Court found that these statements raised a reasonable doubt as to Demjanjuk's guilt. . . .

Demjanjuk maintains . . . that during its investigation prior to the denaturalization trial the government did obtain from official sources in the Soviet Union and Poland documents and statements that should have raised doubts about Demjanjuk's identity as Ivan the Terrible, and some of which named Marchenko as the wanted "Ivan." Because the OSI attorneys consistently followed an unjustifiedly narrow view of the scope of their duty to disclose, and compartmentalized their information in a way that resulted in no investigation of apparently contradictory evidence, Demjanjuk and the court were deprived of information and materials that were critical to building the defense. . . .

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The Fedorenko file

The Fedorenko file, particularly the Leleko and Malagon statements, contain significant evidence tending to show that a person other than Demjanjuk was in fact "Ivan the Terrible of Treblinka." The record contains copies of a letter dated October 23, 1978, from the General Counsel to Martin Mendelsohn, chief of litigation in the "Special Litigation Unit" (SLU) of the Department of Justice, predecessor to OSI. The letter discusses the necessity of winning the Demjanjuk case, and has as attachments all of the SLU's memoranda on Demjanjuk. Among these memoranda is one from Parker and Moscowitz to the State Department requesting assistance in obtaining further information from the Soviet Union. The memorandum notes that the Soviets had sent materials in June 1978 relating to the investigation of Fedorenko (the Fedorenko Protocols), and continues: "Please thank the [Soviet] Ministry for sending these materials which have been very useful." Jt. App. 218. The October 23, 1978 letter shows that a copy was placed in the Demjanjuk file. . . .

There were clear signals that the Fedorenko documents were significant in the Demjanjuk investigation. As we have noted, the Fedorenko Protocols contained, *inter alia,* the statements of Soviet citizens Malagon and Leleko, both guards at Treblinka, who identified Marchenko as an operator of the gas chamber. Leleko's statement clearly said that there were two Ukrainian operators of the gas chambers, "Marchenko and Nikolay," and identified Marchenko as the "motorist" who committed some of the very atrocities with which Demjanjuk was charged. . . . Demjanjuk argues that this evidence provided the strongest possible support for their basic contention in all the proceedings that Demjanjuk was the victim of misidentification. . . . The Israeli Supreme Court considered more eyewitness survivor identifications than the American courts; yet, it found that statements made to Soviet authorities identifying Marchenko as "Ivan" raised sufficient doubt about the identification of Demjanjuk to require reversal of Demjanjuk's conviction and his release. It seems clear that the American courts considering Demjanjuk's fate should have had those documents that were in OSI's possession in 1981 that pointed to Ivan Marchenko as Ivan the Terrible. . . .

The Parker memorandum

After working on the Demjanjuk case for several years, OSI attorney George Parker became convinced that OSI lacked sufficient evidence that Demjanjuk was Ivan the Terrible of Treblinka. On February 28, 1980, Parker wrote a memorandum entitled "Demjanjuk—A Reappraisal," addressed to Walter Rockler, Director, and Alan Ryan, Deputy Director of OSI, setting forth his doubts. . . . Furthermore, Parker's memo pointed out, both the Polish and Soviet governments had compiled lists of guards at Treblinka, and Demjanjuk's name appeared on neither one, though "[t]he two Ukrainians who incessantly worked at the gas chambers were well known." This portion of the memorandum concludes: "Given these circumstances it is disturbing, as Norman Moscowitz has pointed out repeatedly, that Demjanjuk's name does not appear on either list."

After reviewing the available admissible evidence and the "flaws" with the Treblinka evidence, the memorandum sets forth Parker's views of "Strategic Options; Ethical Responsibilities" of OSI as he sees them. This section of the memorandum begins with these words:

"We have little admissible evidence that defendant was at Sobibor yet serious doubts as to whether he was at Treblinka. Even if we may be comforted that we may have the right man for the wrong act, the ethical cannons [sic] probably require us to alter our present position."

. . .While recognizing the significance of the Parker memorandum as a document which raised important questions about the handling of the Demjanjuk case, the Special Master concluded that it was not a "smoking gun" insofar as his inquiry was concerned. The master held that because OSI attorneys acted on the basis of good faith belief in Demjanjuk's guilt as Ivan the Terrible their disagreements with Parker's conclusions were irrelevant with respect to the issue of fraud on the court. While we agree that the Parker memo alone would not be a sufficient basis for a finding of fraud on the court, it raised a clear warning that there were ethical perils in continuing to prosecute Demjanjuk as Ivan the Terrible. When his superiors and colleagues at OSI refused to heed his warning, Parker resigned. . . .

The attitude of the OSI attorneys toward disclosing information to Demjanjuk's counsel was not consistent with the government's obligation to work for justice rather than for a result that favors its attorneys' preconceived ideas of what the outcome of legal proceedings should be. The master found that the OSI attorneys operated on the premise that Demjanjuk was Ivan the Terrible and that this belief caused them to be "inadequately skeptical" of their case when confronted with evidence pointing to Marchenko as Ivan Grozny [Ivan the Terrible]. We do not believe their personal conviction that they had the right man provided an excuse for recklessly disregarding their obligation to provide information specifically requested by Demjanjuk (as found by the master) the withholding of which almost certainly misled his counsel and endangered his ability to mount a defense (as found by the master).

OSI 'reckless disregard'

The OSI attorneys acted with reckless disregard for their duty to the court and their discovery obligations in failing to disclose at least three sets of documents in their possession before the proceedings against Demjanjuk ever reached trial.

1. The Fedorenko Protocols should have been disclosed. They consisted of information provided by a foreign government that supplied some support to Demjanjuk's basic claim from the beginning—that he was a victim of misidentifica-

tion. . . .

2. The list of Ukrainian guards at Treblinka furnished to OSI by the Polish government was certainly exculpatory. . . . The 1979 letter from the Polish Main Commission advised that the Commission had no data concerning Demjanjuk. Jt. App. 502. Among the documents forwarded with the director's letter was a list of known Ukrainian guards who had worked at Treblinka. Both Fedorenko and Marchenko's names appeared on the list. Demjanjuk's name did not appear.

3. Otto Horn's identification of Demjanjuk as Ivan Grozny from photo spreads was extremely important government evidence at the denaturalization trial. What neither Judge Battisti nor Demjanjuk's counsel knew was that the contemporaneous reports of the 1979 Horn interview by the OSI investigator and historian directly conflicted with Horn's testimony at the deposition that when he finally identified Demjanjuk's photograph in the second spread he could not see the first set of pictures. . . .

The record is replete with evidence that Alan Ryan was considering extradition of Nazi war criminals to Israel even before Demjanjuk's denaturalization became final. When that event occurred, the government did not deport Demjanjuk; instead, it sought his extradition for trial as Ivan the Terrible pursuant to Israel's request.

The consequences of denaturalization and extradition equal or exceed those of most criminal convictions. In this case, Demjanjuk was extradited for trial on a charge that carried the death penalty. OSI is part of the Criminal Division of the Department of Justice. The OSI attorneys team with local United States Attorneys in seeking denaturalization and extradition, and they approach these cases as prosecutions. . . . We believe the OSI attorneys had a constitutional duty to produce "all evidence favorable to an accused [Demjanjuk]," which the Special Master found he had requested and that was "material . . . to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87.

Thus, we hold that the OSI attorneys acted with reckless disregard for the truth and for the government's obligation to take no steps that prevent an adversary from presenting his case fully and fairly. This was fraud on the court in the circumstances of this case where, by recklessly assuming Demjanjuk's guilt, they failed to observe their obligation to produce exculpatory materials requested by Demjanjuk.

Political pressure

Although the Special Master found that pressures from outside OSI did not influence the respondents' failure to disclose required information, the presence of such pressure cannot be gainsaid. In August of 1978 Congressman [Joshua] Eilberg, the Chairman of an important committee, wrote then Attorney General [Griffin] Bell a letter insisting that Demjanjuk be prosecuted hard because "we cannot afford the risk of losing" the case. . . . The trial attorney then in charge of the case, Mr. Parker, wrote in his 1980 memorandum that the denaturalization case could not be dismissed because of factors "largely political and obviously considerable." Other lawyers in OSI wrote memos discussing this case as a political "hot potato" that if lost "will raise political problems for us all including the Attorney General." (Mendelsohn, then the Director of the office, to Crosland, September 26, 1978, Pet. Exh. 113.) Mr. Ryan, Director of the office, wrote the Assistant Attorney General of the Criminal Division in 1980 that OSI had "secured the support in Congress, Jewish community organizations, public at large for OSI—press coverage has been substantially favorable and support from Jewish organizations is now secure," but he went on to say that "this support can't be taken for granted and must be reinforced at every opportunity." (Ryan Tr. at 88.) Mr. Ryan 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. . . ." (Ryan Tr. at 90.) It is obvious from the record 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.

Contrast with Israeli prosecutors

The "win at any cost" attitude displayed by some of these record documents and statements contrasts sharply with the attitude and actions of the Israeli prosecutors, who were under domestic political pressures themselves. But for the actions of the Israeli prosecutors, the death sentence against Demjanjuk probably would have been carried out by now. He would have been executed on a charge for which he has now been acquitted.

The Israeli prosecutors did not learn of the exculpatory evidence from Russia until after the accused was found guilty and sentenced to death in the Israel trial court. They had prosecuted the case over many months and obtained the conviction and death sentence. The Israeli prosecutors then learned that there was Russian information suggesting that the charges against the accused may be false. Instead of withholding the information, the prosecutors travelled to Russia to investigate the matter thoroughly. They marshalled the exculpatory evidence, brought it back to Israel; and in the face of extremely strong popular feelings against the accused, publicly turned it over to the Supreme Court of Israel. Basically, the Israeli prosecutors confessed error in the face of intense political pressure to get a conviction. Relying on this newly discovered exculpatory evidence developed by the prosecutors, the Supreme Court of Israel reversed the conviction which those same prosecutors had obtained five years earlier.

For the reasons set out herein we vacate the judgment of the district court and the judgment of this court in the extradition proceedings on the ground that the judgments were wrongly procured as a result of prosecutorial misconduct that constituted fraud on the court.