

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,	:	Case No. 1:99CV1193
	:	
Plaintiff,	:	Judge Dan Aaron Polster
	:	
-vs-	:	<u>MOTION OF JOHN DEMJANJUK</u>
	:	<u>PURSUANT TO FED. R. CIV. P. 60</u>
JOHN DEMJANJUK,	:	
	:	
Defendant.	:	

John Demjanjuk, by his undersigned counsel, moves this Court pursuant to Fed. R. Civ. P. 60(b)(6) and 60(d)(1) and (3) for relief from the final judgment and order in this case, and to set aside that final judgment that ultimately led to Mr. Demjanjuk’s denaturalization and deportation to the Federal Republic of Germany where he now resides. As more fully set out in the supporting memorandum of law, this motion rests upon the persistent failure of the government to comply with orders and other unambiguous obligations requiring disclosure of discovery materials to the defense. It also rests upon what the undersigned believe support a finding of fraud on the court for a remarkable third time — once as previously found by the United States Court of Appeals for the Sixth Circuit, once by this Court in prior proceedings, and now the circumstances that give rise to this motion.

The defense does not file this motion hastily, nor out of a cavalier sense that this is Mr. Demjanjuk's last dying chance to win a reprieve in a case that has already brought numerous though short-lived reprieves for him. Instead, on behalf of their 91-year-old client who is in frail health and has already been in and out of a hospital since his conviction by a German court on May 12, 2011, the defense brings this motion out of obligation to their client and to the Court.

The government took its first steps in this Court to strip Mr. Demjanjuk of his United States citizenship in 1977. Successful in that proceeding four years later, the government next moved to deport Mr. Demjanjuk to the former Soviet Union, but shifted its strategy to have him extradited to Israel, which it achieved in 1986. Two years later an Israeli court found Mr. Demjanjuk to be "Ivan the Terrible" of Treblinka, and placed him on death row. In 1993, the Supreme Court of Israel reversed his conviction, determining that Mr. Demjanjuk was not "Ivan the Terrible" of Treblinka after all. Shortly thereafter, the United States Court of Appeals for the Sixth Circuit and then this Court found the government to have committed fraud on the court multiple times. Mr. Demjanjuk's citizenship and freedom were restored.

That reprieve, too, was short-lived. On May 19, 1999, the government filed a second round of denaturalization proceedings, which it won on March 21, 2002. After substantial litigation in the Court of Appeals and this Court, the denaturalization order was upheld, finding that Mr. Demjanjuk was a Nazi camp guard during World War II in the Polish town of Sobibor. The government removed Mr. Demjanjuk to Germany — which by then had issued a warrant for his arrest after Poland and Mr. Demjanjuk's native Ukraine refused to take him. Upon his deportation to Germany in 2009, the German government detained Mr. Demjanjuk in Stadelheim Prison until a German court in Munich convicted him on May 12, 2011 for complicity in the murder of at least 28,060 Jews at

the Nazi's Sobibor camp. That same day, the German court sentenced Mr. Demjanjuk to a five-year term of imprisonment with credit for time served (approximately two years), and released him finding no risk of flight due to his frail health and the absence of any travel documents or passport.¹

Over three decades of litigation, the same apparent refusal to disclose all relevant materials to defense counsel persists. Let there be no mistake about it: the government, which started out on this legal odyssey claiming Mr. Demjanjuk was someone he was not, has produced large numbers of documents across the span of these three decades. And the defense has, through its own independent diligence, persistence, and sometimes simple good fortune, obtained more relevant materials on its own.

But how is it, then, that especially after a finding of fraud on the court for failure to disclose key information about the true identity of Mr. Demjanjuk, the government still failed to turn over to the defense a recently declassified March 4, 1985 memorandum authored by a special agent in the Federal Bureau of Investigation's Cleveland Office concerning the most crucial evidence against Mr. Demjanjuk?² The memorandum concludes that the principal evidence against Mr. Demjanjuk is "quite likely fabricated" by the KGB.

How is it that after all this, the government's own produced materials, including the above memorandum, still have key parts redacted, and, thus, not subject to review at all by the defense?

How is it that after all this, the government apparently has still not disclosed any classified materials to any defense lawyer or court on this case, despite the fact that litigants routinely handle

¹ Under German law, Mr. Demjanjuk's conviction is not legally binding until the appeal is resolved.

² The report, along with a two-page explanatory transmittal addressed to, among others, the Director of the FBI, appears to have been authored by the Special Agent in Charge of the FBI's Cleveland Office.

classified materials through the appropriate protections of the Classified Information Procedures Act, 18 U.S.C. App. III, §§1-16, in criminal cases or through security clearances and protective orders in civil cases so that discovery obligations are not skirted?

How is it that after all this, the government just this spring revealed to the defense new documents from a file in the Cleveland FBI office that it claimed it had never reviewed before, and that it first learned in early May 2011 of the file having been retained in the Cleveland FBI office? After over thirty years of litigation that started in Cleveland, Ohio, we have no assurances that this is the only retained file that just came to the government's attention. Why it was retained and by whom are still unanswered questions, though it is at least curious if not troubling that some of the materials were apparently written by the Special Agent in Charge of that office and sent to the Director of the FBI. Why weren't those materials available to the defense when they were authored or gathered in the 1980s, especially since they plainly did not remain in Cleveland but were sent to Washington?

How is it that after all this, about a half-decade worth of work by the Cleveland FBI Office and individuals in Washington investigating the key issue at the heart of the defense's position — that the evidence by which Mr. Demjanjuk was stripped of his United States citizenship (twice) extradited (once), deported (twice), convicted (twice), and imprisoned (multiple times) was forged — does not appear to have surfaced in any of the materials produced to date?

How is it that after all this, the government's storage of documents at the National Archives and Record Administration in College Park, Maryland still includes "withdrawal notice" slips where an apparently relevant document was originally located? It is not an issue of one or two, but rather hundreds of these slips, some substituting for presumably relevant materials given the fact that many

“withdrawal notice” slips state “re: John Demjanjuk.” Moreover, why were they withdrawn for the most part over the last couple of years according to dates printed on the slips? It is impossible to determine whether any of these “withdrawn” materials were ever turned over to the defense, since the descriptions of the withdrawn materials are too abbreviated. It is also impossible to determine the sum total of relevant materials withdrawn, since what appear to be possibly relevant materials are under broad categories such as “war crimes” and the like.³

How is it that after all this, the government has turned over only six sheets, apparently obtained from either the former Soviet Union or present-day Russia, referring to another “Ivan Demjanjuk” who was born in the same town where the defendant was born one year earlier and who apparently committed suicide in either 1970 or 1971 when he was told that the KGB was coming to investigate him?

In a similar vein, how is that the government has turned over interviews of other camp guards who were tortured and interrogated in the former Soviet Union as early as 1960, and yet the translations of those protocols were made available to the defense only after Mr. Demjanjuk had been stripped of his citizenship for a second time in this case?

To allow the government to take away from one of our citizens all the rights that attach to the status of being a citizen of this country, to render him stateless, and then to have him removed from this country while so many questions remain is a major miscarriage of justice, especially when there are strong indications Mr. Demjanjuk is innocent of the charges against him. Thus, by this motion, Mr. Demjanjuk requests that:

³ As an aside, it seems remarkable that defense counsel should even have to pick through voluminous materials at NARA, literally making educated guesses as to what might be and might not be relevant materials when it is the government’s obligation to produce discovery, not the defense’s task to search it out.

1. The Court order the government to respond to this motion within a specific time frame, and allow for the filing of a reply by the defense;
2. The Court schedule this matter for oral argument upon completion of all briefing;
3. As in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), *cert. denied sub nom. Rison v. Demjanjuk*, 513 U.S. 914 (1994), the Court authorize such further discovery and order factual hearings as are necessary to complete the record on the claims presented in the instant motion; and
4. Upon the conclusion of such proceedings, the Court set aside the judgment of denaturalization with prejudice.

Mr. Demjanjuk has been litigating these issues since 1977. It is not a just reward to give our government or any other country's government a third chance to put this man on trial. In 1993 the Court of Appeals found that the Department of Justice's Office of Special Investigations had committed fraud on the court. The Court took that occasion to set clear standards of conduct for the government. Yet, even as the Court was writing its opinion in 1993, significant exculpatory materials — challenging key evidence that could have been instrumental to the defense — were known to the OSI, were sitting in government files, and were being withheld from the defense and this Court. In the ensuing 18 years of litigation, the government has kept these materials hidden from view, and has repeatedly violated unambiguous orders and discovery obligations that all relevant information be produced. Indeed, it made a promise to this Court that it would comply with those orders. The government has failed in this promise. It is time to right the scales of justice, clear Mr. Demjanjuk's name, and bring him home to this country to live out the remainder of his life with his family.

Accordingly, for the foregoing reasons as set forth more fully in the supporting memorandum, Mr. Demjanjuk requests that this Court grant his motion.

Respectfully submitted,

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Attorneys for John Demjanjuk

July 19, 2011

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2011, a copy of the foregoing Motion of John Demjanjuk Pursuant to Fed. R. Civ. P. 60 (together with the supporting memorandum and exhibits) was filed electronically or by filing with the Office of the Clerk digital media containing Exhibits A and B. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's system. In light of the fact that voluminous exhibits and electronically formatted exhibits were filed with the Court on digital media (Exhs. A and B), I further certify that on the above date a copy of this motion, its supporting memorandum and exhibits, and Exhs. A and B filed separately with the Office of the Clerk were also provided to counsel of record by overnight courier.

/s/ Dennis G. Terez
Dennis G. Terez
One of the Attorneys for John Demjanjuk