CASE NO. 12-3114

IN THE UNITED STATES COURT Of APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Appellee

-vs-

VERA DEMJANJUK, as Executrix of the
ESTATE OF JOHN DEMJANJUK, Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PETITION OF APPELLANT FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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ARGUMENT IN SUPPORT OF PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Vera Demjanjuk, as Executrix of the Estate of John Demjanjuk, the appellant in this case, petitions this Court for a panel rehearing or a rehearing en banc of the opinion issued on June 28, 2012 granting the government's motion to dismiss this appeal. Exh. A. This panel decision conflicts with earlier decisions of this Court in this same proceeding involving the same litigants. Consideration by the full Court is, therefore, necessary to secure and maintain uniformity of the Court's decisions.

Furthermore, this proceeding involves questions of exceptional importance, namely: (a) whether the government can evade its disclosure obligations by compartmentalizing its information; (b) whether a well-supported claim of fraud on the court can be disposed of without benefit of a hearing, discovery or cross-examination; (c) whether this Court's inherent power to correct fraud in its processes is mooted by the death of a litigant; and (d) whether the prospect that a deceased litigant's estate may benefit from a favorable decision means the case is not moot. On these issues, the panel decision conflicts with authoritative decisions of this Court and the Supreme Court.

I. THE PANEL DECISION IS AT ODDS WITH THIS COURT'S PRIOR DECISIONS IN LITIGATION INVOLVING THE SAME PARTIES AND ISSUES.

The panel noted that "our Court has already decided that [Mr. Demjanjuk's] denaturalization should not be revoked," and that "[o]ver three decades, we have repeatedly rejected Demjanjuk's challenges to the authenticity of the Trawniki card." Op. at 2. These two statements fail to honor this Court's prior decisions, principally *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), *cert. denied sub nom*. *Rison v. Demjanjuk*, 513 U.S. 914 (1994). The procedural history of that case tells the story.

On June 5, 1992, this Court ordered briefing on whether the Department of Justice had withheld exculpatory evidence from Mr. Demjanjuk and his defense team. On August 17, 1992, this Court held oral argument on that issue. The Department of Justice made two principal assertions. First, it claimed that although "mistakes were made" in failing to make disclosures, nothing further should be done. *Demjanjuk v. Petrovsky*, *supra*, 10 F.3d at 358. Second, the Department claimed that since Mr. Demjanjuk was on trial in Israel, this Court lacked judicial power to act. In fact, two of the government lawyers tried to stop the process through mandamus actions in the Supreme Court. *In re Moscowitz*, 508 U.S. 938 (1993); *In re Parker*, 506 U.S. 938 (1993).

This Court rejected both claims. On the first, it ordered an evidentiary hearing

so that the nature of what had been withheld, and the responsibility for it, could be assessed. On the second, it held that its inherent power to redress culpable misconduct by litigants provided the necessary power, even if its decision would not have an effect in Israel. That is the law of this case – the *Demjanjuk* case. It was, and remains, the law of this Circuit, and indeed of federal courts generally. Neither the ritualistic invocation of "finality" nor a claim by the alleged wrongdoer that the Court lacks power can or should impede judicial duty.

Thus, this Court had indeed decided Mr. Demjanjuk's first denaturalization should not be revoked, *see United States v. Demjanjuk*, 680 F.2d 32 (6th Cir. 1982), but only until Mr. Demjanjuk successfully demonstrated that the government had committed fraud on the court. This Court then changed its ruling, which in turn led the district court to change its ruling.

> Thus we hold that the OSI attorneys acted with reckless disregard for the truth and for the government's obligations 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.

United States v. Demjanjuk, 1998 U.S. Dist. Lexis 4047 (N.D. Ohio Feb. 20, 1998), *citing Demjanjuk v. Petrovsky*, 10 F.3d 338, 354 (6th Cir. 1993). That this Court has already made a ruling regarding denaturalization does not, therefore, end the story,

especially in this case.

The material the government admits to having withheld in this instance is at least as troubling as the information that led to the 1992 order, and in many ways more so. The utility of a hearing to get the "rest of the story" is equally evident. The Trawniki card is of central importance. The government's expert, Dr. Charles Sydnor, testified that if the card is not authentic, or not depicting this particular Demjanjuk, then none of the other record would refer to him as well. Denat. 2, Tr. 673-74.

If "finality" had the power the panel opinion seems to suggest, then collateral attack would not exist, Rule 60(b) could be dispensed with, and cases such as *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944), and others we cite in our briefing regarding fraud on the court being raised post-judgment could be expunged from the law books. And, as we have suggested, *Demjanjuk v. Petrovsky* would not have been decided, and would not have become the iconic case that it is.

The panel's third statement – "[o]ver three decades, we have repeatedly rejected . . . fraud on the court," Op. at 2 – similarly conflicts with an earlier opinion of this Court. This Court carefully listened to and ultimately adopted Mr. Demjanjuk's earlier claims of fraud on the court committed by the government. "[W]e conclude that OSI did so engage in prosecutorial misconduct that seriously misled the court." *Demjanjuk v. Petrovsky*, *supra*, 10 F.3d at 339. This Court found OSI attorneys had

failed in their obligations to the Court, to the defense, and to the public.

> 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.
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> * * * * *
>
> 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.

Id. at 349-50.

In the end, this Court vacated its own prior judgment and the judgment of the district 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." *Id*. at 356. Rehearing is, therefore, required to correct these statements that conflict with prior opinions of this Court.

II. THE PANEL DECISION THAT THE APPEAL IS MOOT DUE TO MR. DEMJANJUK'S DEATH CONFLICTS WITH DECISIONS OF THIS COURT AND THE SUPREME COURT, AND OVERLOOKS QUESTIONS OF EXCEPTIONAL IMPORTANCE.

The panel said without analysis that our invocation of "capable of repetition, yet evading review" doctrine is "completely frivolous." Op. at 2. We hesitate to challenge a ruling made so emphatically. Our decades of experience as lawyers in the

federal system, however, lead us with deference and respect to do so, knowing that the issue we have raised in the court below and now in this Court calls into question the very integrity of our judicial process. Moreover, rehearing is appropriate even without reaching the "capable of repetition" doctrine on at least two other grounds.

First, there is some debate whether the law of mootness is entirely or only partly rooted in the case and controversy requirement of Art. III of our Constitution. That debate need not detain us. A court always has power to summon attorneys and litigants to account for their behavior when well-pleaded concerns are raised about potential fraud. That is the law of this case, and of all cases, and this Court has so held. As we pointed out in our reply brief, that power by necessity must survive the death of a litigant, even dismissal of the litigation itself. *See, e.g.,* Reply Br. at 5-20, filed Jun. 1, 2012. Otherwise, certain misdeeds undermining the integrity of our system would never be uncovered or adjudicated, the wrongdoer would go unpunished, and the system would never be corrected.

Second, we noted in our prior briefs that Mr. Demjanjuk's estate stands to benefit from withheld Social Security payments that were denied him when he was deported. Opening Br. at p.1, filed Apr. 12, 2012; Reply Br. at 5-6. The panel opinion says that such benefits would flow to the family and not the estate, and that therefore Mrs. Demjanjuk lacks capacity to pursue the appeal. This holding is

contrary to what has already occurred at prior phases of this litigation, and is in any case irrelevant to the mootness doctrine.

When Mr. Demjanjuk was returned to the United States in 1993, the Social Security administration sent *him* the withheld benefits. He would therefore have sought similar treatment if and when Rule 60(b) relief was granted and he was able to return again to his home. Perhaps his family would be entitled to benefits as well, but the exact capacity in which Mrs. Demjanjuk would receive a check would await an actual controversy with the Social Security Administration. This Court's statutory exploration is at most an advisory opinion on a hypothetical. And this is exactly the reason why mootness does not defeat this appeal. The Supreme Court held in *Honig v. Doe*, 484 U.S. 305 (1988), that the reasonable possibility that a decision will enable the appellant to gain an advantage is enough to prevent a finding of mootness. *See also* WRIGHT & KANE, FEDERAL COURTS § 12, at 64 n.17 (6th ed. 2000) (relaxation of mootness requirement).

Finally, we turn to the "capable of repetition" doctrine. The misconduct here is not only "capable of repetition," but the record shows a high likelihood that it has been repeated against the same litigant by the *same lawyers*, given that the FBI findings on the Trawniki card date to the 1980s. Moreover, these same lawyers had already been warned by this Court in its 1992 decision that they must meet a high

standard. *Accord United States v. Balsys*, 524 U.S. 666, 716 (1998) ("experience suggests that the possibility of governmental abuses in cases like this one – where the United States has an admittedly keen interest in the later, foreign prosecution – is not totally speculative") (Breyer, J., dissenting) (citing *Demjanjuk v. Petrovsky*, *supra*, 10 F.3d 338).

This case brings to mind such authorities as *Roe v. Wade*, 410 U.S. 113 (1973), and the other Supreme Court and Circuit Court cases cited in our prior briefing. *See, e.g.,* Reply Br. at 6-12. In *Roe*, Texas argued that because Ms. Roe was no longer pregnant, her case was moot. The Court invoked the "capable of repetition" doctrine. Of course, Ms. Roe might become pregnant again and want an abortion. But beyond that, many women of child-bearing age lived in Dallas County, Texas, and the redoubtable district attorney Henry Wade was determined to prevent any of them from having an abortion. The Court noted the issue was of iconic significance, and rejected this mootness argument.

The panel here held that this appeal is moot due to Mr. Demjanjuk's death. Op. at 2. Death of a party litigant, however, does not moot inquiry as to fraud on the court. In *Demjanjuk v. Petrovsky*, *supra*, this Court addressed its inherent powers to rectify fraud on the court. Although Mr. Demjanjuk was alive at that time, the Court did not limit its own ability to ferret out fraud on the court merely because of the death

of a party litigant. Fraud is fraud. It does not die with the litigants. Given the breadth of the inherent authority of any court to address fraud on the court, one can safely presume this Court, like any other court, would not have allowed the fraud to go unaddressed even if Mr. Demjanjuk had been deceased at that time. Fraud on the court and how courts go about rectifying that taint on our system of justice are simply too weighty to moot on that ground.

> The Supreme Court has recognized a court's inherent power to grant relief, for "after-discovered fraud," from an earlier judgment "regardless of the term of [its] entry." *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 244, 64 S. Ct. 997, 1000, 88 L. Ed. 1250 (1944). See also *Chambers v. NASCO, Inc.*, 501 U.S. 32, ---, 111 S. Ct. 2123, 2132, 115 L. Ed. 2d 27 (1991). Rule 60(b) recognizes this authority as well in noting that "[t]his rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . . or to set aside a judgment for fraud upon the court."

Demjanjuk v. Petrovsky, *supra*, 10 F.3d at 356.

Had Mr. Demjanjuk died during the pendency of that appeal in 1993, it seems unthinkable that the Court would have dismissed the case on mootness grounds and left unaddressed the fraud that was committed upon it. This conclusion becomes even more compelling if it were shown that his death was caused by negligent treatment he had received from his doctors. If the conclusion that the fraud on the court would not have been tolerated in 1993 even if Mr. Demjanjuk had died, no reason exists for

varying that analysis here. And, as before, this conclusion becomes even more compelling if medical malpractice led to Mr. Demjanjuk's death.[1]

It is because of the Court's broad authority to address and punish fraud upon it and other litigant misconduct that corrective action can be taken even after the case is dismissed and the litigant deceased. This broad authority is illustrated in the criminal case involving the late Senator Ted Stevens and the subsequent special master report addressing governmental misconduct which issued after the Senator had died. *See United States v. Stevens*, Case No. 1:08-cr-00231 (D.D.C.). *See also* Reply Br. at 18.

In *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, one of the cases we cite in prior briefing, the defendant had enjoyed the benefits of a glass making process since about 1926, and had solidified its legal position by a 1932 judgment. Yet, in 1944, the Supreme Court said that because this decades-long accepted truth was based on a deliberate and significant nondisclosure of material evidence, the ordinary rules of finality must be swept aside and relief granted.

To be sure, finality is an important value in the judicial system. But the entire system of collateral attack – habeas corpus, equitable relief, and the "fraud on the

[1] *See* D. Rising, *Demjanjuk Attorney Files Complaint Against Doctors*, Associated Press, Jun. 13, 2012, http://bigstory.ap.org/article/demjanjuk-attorney-files-complaint-against-doctors.

court" provisions of Fed. R. Civ. P. 60(b) – expressly provides that falsehood does not ripen into the truth simply by growing older, and that courts must always be vigilant when a litigant's long-held victory turns out to have been tarnished by fraud. This is so even when the legal consequences are unsettling to one of the parties involved. *See, e.g., D'Ambrosio v. Bagley,* 688 F. Supp. 2d 709 (N.D. Ohio 2010), *aff'd*, 656 F.3d 379 (6th Cir. 2011), *cert. denied sub nom. Bobby v. D'Ambrosio*, ___ U.S. ___, 132 S. Ct. 1150 (2012) (remedy for discovery violations ultimately returned death row inmate to freedom). *See also Keenan v. Bagley*, Case No. 1:01CV2139, slip op. 2012 WL 1424751 (N.D. Ohio Apr. 24, 2012) (requiring retrial for co-defendant on death row).

That cautionary note is particularly true here. As noted above, the government's own expert testified that if the Trawniki card were not authentic, or not depicting this particular Demjanjuk, then none of the other records would be relevant to him as well. Denat. 2, Tr. 673-74. Therefore, ***any*** governmental documents casting doubt on that link were relevant at the time of the denaturalization hearing and should have been disclosed to counsel for Mr. Demjanjuk. That did not happen. The government instead told the court below that there was not now and never had been any evidence to contradict the Trawniki card's authenticity. That turned out not to be so. To the contrary, the documents at issue here describe in detail how FBI agents had

previously concluded the card was probably a KGB forgery. The government never produced those documents when it counted. Mr. Demjanjuk's death does not alleviate that fraud.

Moreover, allowing the government's explanation to stand as to why it never produced these materials – the FBI was not a part of the prosecution team – conflicts with a key holding in precedents from this Court and the Supreme Court. *See Demjanjuk v. Petrovsky*, *supra*, 10 F.3d at 342 (finding that OSI attorneys "compartmentalized their information in a way that resulted in no investigation of apparently contradictory evidence" and thereby deprived Mr. Demjanjuk and the court "of information and materials that were critical to building the defense"). "The [Supreme] Court has also made plain that the prosecution cannot escape its disclosure obligation by compartmentalizing information or failing to inform others in the office of relevant information." *Id*., 10 F.3d at 353 (discussing *Giglio v. United States*, 405 U.S. 150 (1972)). No one denies the FBI is part of the government. No one denies relevant and responsive materials in FBI files were never timely produced. No one denies plaintiff had the capability to produce those materials in a timely manner.

That this Court now dismisses this appeal without any of the parties ever having the benefit of any hearing or further discovery also conflicts with prior decisions and actions of this Court. The court below and the panel that dismissed this appeal took

on face value the facts as outlined by the government without subjecting its position to any cross-examination. The principal relief sought in the court below was an evidentiary hearing.

In a matter of this gravity, and given its lengthy history, law from this Circuit is clear on how one must proceed. One need look no further than earlier proceedings in this case for binding precedent. The proceedings that led to the Court's opinion in *Demjanjuk v. Petrovsky* involved extensive evidentiary hearings before a special master appointed by this Court. Only after such hearings did this Court have the proper tools to assess the merits of whether the government had committed fraud on the court. Those hearings were based on a well-founded suspicion that Mr. Demjanjuk was not "Ivan the Terrible." As Judge Lively's opinion shows, it was at those hearings, with compulsory process on both sides, that the true nature and extent of the fraud was uncovered.

A similar well-founded suspicion is again present – a suspicion that the government withheld for decades relevant and material documents that showed a divided government view on the authenticity of the Trawniki card. We only ask that the same due process be accorded the litigants this time, too.

CONCLUSION

For the foregoing reasons, the appellant in this case requests a rehearing.

Respectfully submitted,

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August 13, 2012

CERTIFICATE OF SERVICE

I hereby certify that the Petition of Appellant for Rehearing with Suggestion for Rehearing En Banc was filed on this 13th day of August, 2012 using the Court's ECF system, which will send a notice of this filing to all counsel of record indicated on the electronic receipt.

/s/ Dennis G. Terez
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EXHIBIT A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 12a0688n.06

No. 12-3114

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 28, 2012
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. VERA DEMJANJUK, Executrix of the Estate of John Demjanjuk Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: MARTIN and CLAY, Circuit Judges; HOOD, District Judge.*

PER CURIAM. John Demjanjuk, the defendant below, appealed the denial of his Federal Rule of Civil Procedure 60 motion to vacate a judgment of denaturalization. On March 17, 2012, while the appeal was pending, John Demjanjuk died. His wife Vera, as the executrix of John Demjanjuk's estate, has been substituted as the appellant. The United States moves to dismiss the appeal as moot based on John Demjanjuk's death. Vera Demjanjuk opposes the motion to dismiss.

An appeal should be dismissed as moot "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party…." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (interna quotation marks and citation omitted). The government argues that with the death of John Demjanjuk there is no

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* The Honorable Joseph M. Hood, Senior United States District Judge of the Eastern District of Kentucky, sitting by designation.

effective relief that can be granted by the Court. Vera Demjanjuk claims that if the denaturalization order is vacated, either the estate or John Demjanjuk's survivors may be entitled to the payment of withheld social security benefits and other entitlements. She also argues that even if there is no longer a live case or controversy concerning John Demjanjuk's denaturalization, the Court retains jurisdiction to address issues of fraud on the court. We disagree, concluding that the case is moot.

The current appeal is meritless, because our Court has already decided that his denaturalization should not be revoked, *United States v. Demjanjuk*, 367 F.3d 623 (6th Cir.), *cert. denied* 543 U.S. 970 (2004), and nothing in Demjanjuk's current appeal warrants relief. Over three decades, we have repeatedly rejected Demjanjuk's challenges to the authenticity of the Trawniki card and fraud on the court. Moreover, the appeal is moot due to Demjanjuk's death—despite his family's arguments that the Social Security benefits issue keeps the case alive. The Social Security Administration (SSA) terminated its payments to Demjanjuk because he was removed from the country, and the SSA is not authorized to recommence payments until he is lawfully admitted to the country as a permanent resident. *See* 42 U.S.C. § 402(n); 20 C.F.R. § 404.464(a). Demjanjuk's death obviously forecloses that possibility. In any event, an award of benefits would be repaid to Demjanjuk's family members in their personal capacities, but those family members are not party to this appeal. *See* 42 U.S.C. § 404(d); 20 C.F.R. § 404.503(b). His wife Vera is a party to the appeal only in her position as executrix of Demjanjuk's estate, but Demjanjuk's estate does not have standing to challenge the issue of benefits to the family members. *See id.* Finally, Vera's arguments with respect to the "capable of repetition, yet evading review" doctrine are completely frivolous.

Accordingly, the motion to dismiss the appeal as moot is **GRANTED.**