

New court evidence confirms innocence of John Demjanjuk

by Jeffrey Steinberg

Special Master Thomas Wiseman, a federal district court judge from Nashville, Tennessee, will hold oral arguments later this month in the final phase of his probe of alleged "fraud upon the court" by officials of the Department of Justice's Office of Special Investigations (OSI) in the case of John Demjanjuk. Demjanjuk, a Ukrainian-born naturalized American citizen, was accused in 1978 of being the Treblinka, Poland Nazi concentration camp guard "Ivan the Terrible" who was responsible for the murders of an estimated 80,000 prisoners, mostly Jews, during 1942-43.

In the mid-1980s, Demjanjuk went through a series of denaturalization, deportation, and extradition trials in federal court in his home state of Ohio, leading to his 1986 extradition to Israel. In 1988, he was tried in Israel, found guilty, and sentenced to death. The Demjanjuk trial was shown on national television in Israel and was the biggest "show trial" since the early 1960s trial of Adolf Eichmann. His case is now on appeal before the Israeli Supreme Court, which has delayed its ruling for almost a year.

Several years ago, however, through the efforts of his friends, relatives, and U.S. Rep. James Traficant (D-Ohio), Demjanjuk began to assemble a mass of evidence showing that the U.S. government had been in possession of evidence as early as 1978 casting strong doubts on his guilt. Correspondence between Rep. Joshua Eilberg (D-Pa.), a sponsor of the OSI unit, and the Department of Justice revealed that the unit and its patrons were desperate for a high-profile prosecution following a series of failed efforts to deport accused Nazi war criminals at the time the Demjanjuk case was launched. At the time, the Israeli government had also formally written to the OSI expressing strong interest in the unit's continued effort to find and prosecute Nazi war criminals. All of these interventions created a climate in which the OSI attorneys were under pressure to win a big case "no matter what." One OSI attorney, George Parker, who was involved in the early phase of the Demjanjuk probe, quit the unit after his warnings that the Demjanjuk prosecution was horribly flawed were ignored by senior OSI officials.

New evidence obtained since the collapse of the Iron Curtain and the opening up of some East bloc security files leaves virtually no doubt that John Demjanjuk was the wrong man.

Judicial review launched

In January 1992, the Sixth Circuit Court of Appeals, sitting in Cincinnati, Ohio, began an informal review of the Demjanjuk case, motivated by news accounts indicating that the government had withheld key evidence from defense attorneys that would have proven at the outset that Demjanjuk was not "Ivan the Terrible of Treblinka." Leonard Green, clerk of the Sixth Circuit, wrote a series of letters to the Department of Justice requesting copies of the prosecution files in the Demjanjuk case. Deputy Attorney General John Mueller refused on at least two occasions to even respond to the court query.

Finally, in June 1992, after repeated rebuffs by the Department of Justice, the Sixth Circuit reopened the Demjanjuk case and invited attorneys for Demjanjuk to present their evidence and suggest possible remedies.

At a hearing in August 1992, prominent civil rights attorney Michael Tigar, representing Demjanjuk, urged the court to launch a review of the Demjanjuk proceedings on the grounds that standing Supreme Court precedents provided for retrial in cases where willful fraud had been committed against the court.

The Sixth Circuit decided a week later to adopt Tigar's argument. They appointed Judge Wiseman to serve as Special Master for the Circuit, responsible for gathering evidence on whether the Justice Department had committed willful fraud in withholding key evidence from the defense and the court during the original denaturalization and extradition hearings.

For the next six months, Judge Wiseman held a series of evidentiary hearings at which officials of the Office of Special Investigations and other government lawyers were questioned by Demjanjuk's lawyers and Department of Justice attorneys. The purpose of the fact-finding effort was to determine whether OSI attorneys knowingly withheld evidence from the court and Demjanjuk's attorneys which would have indicated his innocence. The last of the hearings and depositions took place early this year, and on March 30, both the government and lawyers for Demjanjuk submitted proposed findings of fact and conclusions of law, which formed the basis of Wiseman's report to the Sixth Circuit Court of Appeals.

Mountains of evidence

The 166-page brief submitted to the court by Demjanjuk's attorneys Tigar and Edward F. Marek contains devastating evidence that the Justice Department buried critical evidence of Demjanjuk's innocence.

As early as 1950, eyewitness accounts of the Treblinka concentration camp had established that during the 1942-43 period when Demjanjuk was allegedly running the diesel engines of the gas chambers, there were only two men in that position. One of the two men, Nikolai Shalayev, was interviewed by Soviet authorities in 1950 after he was already sentenced to death for his war crimes. Shalayev had nothing to gain by lying about the identity of his co-operator. He identified the other man as Ivan Marchenko. Records maintained by the Polish Main Commission, the equivalent to the OSI in the United States, revealed that an Ivan Marchenko had been on the list of guards at Treblinka at the time. The list contained no mention of a John Demjanjuk or any name even similar to that.

Wartime photographs of Demjanjuk and Marchenko, however, were similar enough that photographic identification of Demjanjuk would be totally unreliable, especially 30 years after the fact. George Parker, an OSI attorney who worked on the early Demjanjuk case investigation, noted in memos to his superiors that there was a serious problem in the use of photo identification.

According to the Demjanjuk brief, there were six major bodies of evidence that were in the possession of the OSI prior to the first action against Demjanjuk. In some cases, the evidence was never supplied to either the defense or to the court in any of the court actions in the United States. The six packages of evidence cited in the Demjanjuk brief were:

1) The 1978 Fedorenko Protocols, a series of documents provided to the OSI by the Soviet government. Among the material in the protocols were statements by two Treblinka witnesses, Lelko and Malagon, identifying another man as "Ivan the Terrible of Treblinka."

2) The Polish Main Commission report, which contained the most complete list of guards at Treblinka. While Demjanjuk's name appeared nowhere on the list, Ivan Marchenko's name did appear.

3) The 1979 protocols which included details of interviews with one Danilchenko and a second interview with Malagon in which further evidence pointed to Demjanjuk's innocence. It was the 1979 protocols that prompted Parker to conclude that Demjanjuk was not "Ivan" and to write a memorandum to his superiors on Feb. 28, 1980 urging them not to proceed with the Demjanjuk case.

4) November 1979 memos from OSI staffers Garand and Dougherty describing manipulative techniques used by OSI attorney Norman Moscowitz in a crucial interrogation of former Treblinka guard Otto Horn. Garand and Dougherty accompanied Moscowitz to West Germany to interrogate and eventually videotape testimony from Horn. Moscowitz

discussed the OSI's case against Demjanjuk with Horn prior to the photo-identification session and the videotaped interrogation, thus leading Horn to make false statements, according to the judgment of the two OSI staffers present. The Garand and Dougherty memos were never provided to the defense or the court but were fished out of the garbage cans of the OSI office at Department of Justice headquarters.

5) Sol Lackman interviews conducted by the OSI in 1976 and 1980. Lackman was a survivor of the Treblinka concentration camp who worked nearby the gas chambers and had the opportunity to see the two diesel engine operators on a daily basis over a long period of time. On the two occasions when he was queried by the OSI, Lackman failed to identify the photos of Demjanjuk. OSI acknowledged that Lackman, of all of the victim-witnesses, had the closest view of "Ivan" of any of the Treblinka survivors. Yet, Demjanjuk's attorneys and the court were never informed of Lackman's existence throughout the judicial proceedings in the United States.

6) OSI interrogations of Franz Suchomel. Another important eyewitness to the gas chamber at Treblinka, Suchomel was interviewed by the OSI in September 1979, and he, too, failed to identify photographs of Demjanjuk as being that of "Ivan." According to the Parker memo of February 1980, the Suchomel deposition included "highly exculpatory evidence." The Suchomel material was never provided to the Demjanjuk defense.

In addition to these six packets of highly exculpatory evidence withheld from the defense and the court, the Tigar-Marek brief also revealed that another half-dozen critical OSI documents proving Demjanjuk's innocence were missing from the Department of Justice files altogether. The only record of these documents was citations in other OSI material, some of which was only obtained by the defense under the Freedom of Information Act or by rummaging through the Department of Justice trash.

Court will decide

After oral arguments later this month, in which both the OSI and Demjanjuk's lawyers will have the opportunity to present their version of the key facts before the Special Master, Judge Wiseman will prepare a fact-finding report for the Sixth Circuit.

Once the Sixth Circuit has had the opportunity to review those findings of fact, they will rule on whether or not the government did commit fraud upon the court. If they rule in favor of Demjanjuk, the court could declare the entire denaturalization and extradition process null and void. At that point, the U.S. State Department could be pressed to ask Israel to free Demjanjuk and allow him to return to America.

At stake is John Demjanjuk's life. The case may also determine the continued existence of the Justice Department's Office of Special Investigations, a unit that has made a mockery of justice and due process.