

**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-	:	
	:	
JOHN DEMJANJUK,	:	
	:	
Defendant.	:	

**MEMORANDUM OF JOHN DEMJANJUK IN SUPPORT
OF MOTION PURSUANT TO FED. R. CIV. P. 60**

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

Introduction

John Demjanjuk, by his undersigned counsel, files this memorandum in support of his motion pursuant to Fed. R. Civ. P. 60(b)(6) and 60(d)(1) and (3) for relief from the final judgment and order, and to set aside that final judgment that led to his denaturalization and deportation to the Federal Republic of Germany where he now resides. The Supreme Court has given us clear guidance for this review.

Before sustaining any decision to impose the grave consequences of denaturalization, the Court has regarded it as its duty “to scrutinize the record with the utmost care” construing “the facts and the law . . . as far as is reasonably possible in favor of the citizen.”

Fedorenko v. United States, 449 U.S. 490, 522-23 (1981) (Burger, C.J., Blackmun, J. concurring in judgment). The law must protect United States citizens from political pressures, both foreign and domestic.

Were the law otherwise, valuable rights would rest upon a slender reed, and the security of the status of our naturalized citizens might depend in considerable degree upon the political temper of majority thought and the stresses of the times. Those are consequences foreign to the best traditions of this nation, and the characteristics of our institutions.

Schneiderman v. United States, 320 U.S. 118, 158-59 (1943). The government's actions towards Mr. Demjanjuk prevented that close scrutiny as required by law.

Procedural History

The lengthy procedural history of this case can be found in *United States v. Demjanjuk*, 367 F.3d 623, 627 (6th Cir. 2005), *cert denied*, 543 U.S. 970 (2005); *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), *cert. denied sub nom. Rison v. Demjanjuk*, 513 U.S. 914 (1994). The following summary provides salient facts up to the present. A more thorough summary can be found through the attached timeline. Exh. A.¹

In 1981, this Court revoked Mr. Demjanjuk's certificate of naturalization, and vacated the order admitting him to United States citizenship. *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd per curiam*, 680 F.2d 32 (1982), *cert. denied*, 459 U.S. 1036 (1982). The proceedings were conducted by the Department of Justice's Office of Special Investigations. In 1985, the Court of Appeals upheld an order extraditing Mr. Demjanjuk to Israel. *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). Mr. Demjanjuk was

¹ Exh. A is an interactive timeline reflecting the majority of key events in these legal proceedings spanning over three decades. To minimize the volume of paper in this filing and to maximize the value of this timeline as a reference tool, defense counsel submit this particular exhibit in an electronic format only. Some of the events reflected in the timeline have documents associated with them that we could not obtain in time for this filing. Some of the documents obtained from the Court Clerk's office are not complete. To the extent we are able to expand the timeline to make it more comprehensive, we will seek leave to file amended versions of it.

indicted and convicted before an Israeli court in 1988 for being trained in Trawniki, for being an SS guard at Sobibor, and for being “Ivan the Terrible” of Treblinka, for which he was sentenced to death by hanging. He appealed his conviction and sentence.

While Mr. Demjanjuk’s appeal to the Supreme Court of Israel was pending, newspaper articles appeared saying that the evidence against him was deeply flawed, and that this Court (the late former Chief Judge Frank J. Battisti) and the Court of Appeals had relied on that flawed evidence. The allegations were essentially that the government withheld information from the defense and from the Courts indicating Mr. Demjanjuk was not “Ivan the Terrible” of Treblinka.

On June 5, 1992, the Court of Appeals issued an order setting a briefing schedule with an eye to reopening the extradition case. That order read in pertinent part:

The petitioner-appellant, John Demjanjuk, was extradited to the State of Israel for trial of a capital offense, the commission of war crimes during World War II. In a previous decision of this court in this case, 776 F.2d 571 (6th Cir.1985), we declined to stop the extradition by issuing a writ of habeas corpus. Our previous study of the record and numerous recent press reports and articles in the United States indicate that the extradition warrant by the Executive Branch may have been improvidently issued because it was based on erroneous information. Consideration should be given to its validity and to whether this court’s refusal to grant the petition for writ of habeas corpus was erroneous. . . . Pursuant to the authority stated in rule 40, Fed.R.App.Proc., pertaining to the rehearing of causes previously heard and Rule 60(b)(6), Fed.R.Civ.P., pertaining to relief from judgments previously entered, the Court, upon its own motion, makes the following orders

Demjanjuk v. Petrovsky, supra, Appendix 1, 10 F.3d at 356-57.

On August 11, 1992, the Court of Appeals heard oral argument, and six days later ordered hearings to be conducted by a Special Master on possible fraud on the court. A year later, the Supreme Court of Israel reversed the conviction of Mr. Demjanjuk. The Court of Appeals then

issued an order requiring his return to the United States while it reviewed the Special Master's findings. *See* Bench Ruling of Aug. 3, 1993, 1993 WL 394773 (6th Cir. 1993). Later that year, the Court of Appeals found the government had committed fraud on the court. The fraud was specifically the failure to turn over to the defense three protocols or interviews of individuals whose statements constituted exculpatory evidence, a list of known guards at Treblinka that did not contain Mr. Demjanjuk's name, and an interview memorandum made following the interview of former SS guard Otto Horn who served at Treblinka. "[W]e conclude that OSI did so engage in prosecutorial misconduct that seriously misled the court." *Demjanjuk v. Petrovsky*, 10 F.3d at 339. The Court of Appeals 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.

* * * * *

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.

With the extradition judgment and mandate recalled and set aside, this Court (former Judge Paul R. Matia) then reconsidered the first denaturalization judgment. The Court reviewed the relevant evidence, and found the fraud had infected the first denaturalization against Mr. Demjanjuk in this Court (the late former Chief Judge Frank J. Battisti). *United States v. Demjanjuk*, C77-923, 1998 U.S. Dist. LEXIS 4047 (N.D. Ohio Feb. 20, 1998). In fact, the Court found the government

had perpetrated *additional* fraud on the court by failing to share with defense counsel the identity of Jacob Reimer who served as a clerical official at the Trawniki training camp. OSI had interviewed Mr. Reimer, and determined he “had no useful information.” *Id.* at * 12. OSI decided not to reveal the existence of Mr. Reimer to defense counsel. *Id.* at *11-12.

The Court believes that simply vacating the judgment is not a sufficient sanction in light of the magnitude of the offense. Doubt cast upon the fairness of one judicial proceeding infects the whole justice system. ***Such behavior whether or not intentional must not be tolerated.*** The sanction for it must be appropriately severe. Yet, in fashioning a response, a court must be vigilant that it not allow unspeakable horrors to go unpunished in the name of preserving the abstract principle of justice. Just as the government should not be able to profit from its misbehavior, neither should a defendant be insulated from the consequences of his alleged moral turpitude because he becomes the inadvertent beneficiary of sanctions against the government.

Accordingly, it is the judgment of the Court that this case be dismissed without prejudice. Upon review of its evidence, if the government still believes it has a credible case against the defendant, it may refile an appropriate complaint seeking to revoke and set aside the order admitting the defendant to citizenship and canceling his certificate of naturalization, and ***attempt to prove its allegations on a level playing field.*** Our system of justice requires no less of the government and demands no more of the defendant.

Id. at *18-20 (emphasis added, footnote omitted).

About a year and a half later, the government filed a new denaturalization complaint — the same case in which Mr. Demjanjuk now files the instant motion. The case was tried to this Court (former Chief Judge Paul R. Matia) which entered judgment against Mr. Demjanjuk, and the Court of Appeals affirmed the judgment. Mr. Demjanjuk was then deported to Germany where he stood trial in Munich’s Landgericht for being an accessory to murder as a guard during World War II at

the Sobibor camp in what was then occupied Poland.² A panel consisting of three judges trained in the law and two lay judges convicted Mr. Demjanjuk on May 12, 2011, and sentenced him to five years imprisonment with credit for time served (approximately two years).³ Both sides have appealed to the Bundesgerichtshof in Karlsruhe.⁴ Mr. Demjanjuk was released pending further proceedings, and is presently living in a nursing home in Bavaria due to his frail health.

Standards for Review and Relief Pursuant to Fed. R. Civ. P. 60

The exceptional and extraordinary circumstances described in this motion meet the standards in *Demjanjuk v. Petrovsky* and in this Court's 1998 order for the remedy we seek. Fed. R. Civ. P. 60(b)(6) provides: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief." This rule gives the Court broad authority to set aside a final judgment on a case-by-case basis "when the movant shows 'any . . . reason justifying relief from the operation of the judgment' other than the more specific circumstances set out in Rules 60(b)(1)-(5)." *Gonzalez v. Crosby*, 545

² In the German legal system, the Landgericht is the trial level for a wide variety of criminal charges. In this instance pursuant to German law and procedure, a specially constituted criminal court known as the Schwurgericht heard Mr. Demjanjuk's case.

³ Having both legally trained judges and lay judges sit together is a standard practice in Germany's justice system.

⁴ The prosecution initially appealed the decision by the Landgericht not to detain Mr. Demjanjuk and the sentence of five years in custody. The prosecution had requested a sentence of six years with immediate remand into detention. The defense has appealed the conviction. The Bundesgerichtshof in Karlsruhe (the Supreme Court of Germany, but distinct from the Bundesverfassungsgericht also in Karlsruhe which is the Constitutional Supreme Court of Germany) will ultimately decide the appeals. Under German law, the Landgericht will issue in several months' time a written opinion (equivalent to a judgment and commitment order in narrative form) regarding Mr. Demjanjuk's conviction. Not until the appeal has been decided does German law give legally binding effect to the conviction against Mr. Demjanjuk. The prosecution just recently withdrew its complaint against the release of Mr. Demjanjuk which was pending since May 12, 2011 before the Oberlandesgericht in Munich (one level above the Landgericht which released Mr. Demjanjuk).

U.S. 524, 529 (2005) (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863, n.11 (1988)); *Klapprott v. United States*, 335 U.S. 601, 613 (1949) (opinion by Black, J.); *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990) (internal citations omitted).

A movant satisfies the burden under Rule 60(b)(6) upon a timely showing of “exceptional or extraordinary circumstances.” *Olle v. Henry & Wright Corp.*, *supra*; *Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001); *see also Gonzalez v. Crosby*, 545 U.S. 524, 535-36 (2005); *Ackermann v. United States*, 340 U.S. 193, 199 (1950); *Gerber v. Riordan*, 2010 WL 906434, *1 (N.D. Ohio Mar. 12, 2010) (“[r]elief under Rule 60(b)(6) requires a showing of extraordinary circumstances”) (internal citations omitted). *Cf. Leverton v. Pope*, 100 F. App’x 263 (5th Cir. 2004) (upholding lower court’s denial of Rule 60(b)(6) motion citing to lack of “extraordinary circumstances”).

A finding of exceptional or extraordinary circumstances requires a balancing of numerous factors, “including the competing policies of the finality of judgments and the ‘incessant command of the court’s conscience that justice be done in light of all the facts.’ ” *Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund*, *supra*, 249 F.3d at 529 (quoting *Griffin v. Swim-Tech Corp.*, 722 F.2d 667, 680 (11th Cir. 1984)). When such extraordinary circumstances are present, courts have significant equitable powers under Rule 60(b)(6). *See Thompson v. Bell*, 580 F.3d 423, 444 (6th Cir. 2009).

To be timely, the movant must file a Rule 60(b)(6) motion within a reasonable amount of time. *See Conner v. Attorney General*, 96 F. App’x 990, 992 (6th Cir. 2004). It is at the discretion of the Court to determine a “reasonable amount of time,” *see Waiferson, Ltd. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992), considering such factors as “the facts of the given case

including the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstance compelling equitable relief.” *Olle v. Henry & Wright Corp.*, *supra*, 910 F.2d at 365.

In *D’Ambrosio v. Bagley*, 688 F. Supp. 2d 709 (N.D. Ohio Mar. 3, 2010), *appeal pending*, Case No. 10-3247 (6th Cir.), this Court (former Judge Kathleen M. O’Malley) last year made a finding of “extraordinary circumstances” where it was discovered that, although the State had been previously ordered to reveal exculpatory evidence to Mr. D’Ambrosio’s lawyers, “[t]he State engaged in substantial inequitable conduct, wrongfully retaining and delaying the production of yet more potentially exculpatory evidence.” 688 F. Supp. 2d at 728. The inequity of the State’s actions stemmed from the fact that the evidence “would have substantially increased a reasonable juror’s doubt of . . . guilt.” *Id.* As such, the Court vacated the prior judgment pursuant to Rule 60(b)(6), and ordered the State was barred from re-prosecuting Mr. D’Ambrosio as a sanction for its continued misconduct. 688 F. Supp. 2d at 735.

Fed. R. Civ. P. 60(d)(1) provides in relevant part: “[Rule 60] does not limit a court’s power to entertain an independent action to relieve a party from a judgment, order, or proceeding.” An independent cause of action under Rule 60(d)(1) is to be applied in “those cases of ‘injustice which, in certain instances, are deemed sufficiently gross to demand a departure’ from rigid adherence to the doctrine of res judicata.” *United States v. Beggerly*, 524 U.S. 38, 46 (1998) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)). Thus, a movant must show “unusual or exceptional circumstances” to gain relief through an independent cause of action under Rule 60(d)(1). *Rader v. Cliburn*, 476 F.2d 182, 184 (6th Cir. 1973).

In *Barrett v. Sec’y of Health & Human Servs.*, 840 F.2d 1259 (6th Cir. 1987), the Court of

Appeals elaborated, outlining the elements necessary for a Rule 60(d)(1) independent cause of action: “(1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.” 840 F.2d at 1263. The Court of Appeals most recently reaffirmed these standards in *Mitchell v. Rees*, No. 09-5570, 2011 WL 2566940 (6th Cir. June 30, 2011).

Fed. R. Civ. P. 60(d)(3) “ does not limit a court’s power to set aside a judgment for fraud on the court.” To establish fraud upon the court under this rule, a movant must show that the alleged conduct was all of the following: (1) committed on the part of an officer of the court; (2) directed to the judicial machinery itself; (3) intentionally false, willfully blind to the truth, or is in reckless disregard for the truth; (4) a positive averment or a concealment when one is under a duty to disclose; and (5) deceptive of the court. *Workman v. Bell*, 227 F.3d 331, 336 (6th Cir. 2000).

As the Court of Appeals held in the first finding of fraud on the court in Mr. Demjanjuk’s proceedings:

“Fraud upon the court should . . . embrace only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and relief should be denied in the absence of such conduct.”

Demjanjuk v. Petrovsky, *supra*, 10 F.3d at 353 (quoting 7 MOORE’S FED. PRAC. AND PROCEDURE ¶ 60.33).

Like the other claims asserted by this motion, a claim under Rule 60(d)(3) for fraud on the court is not subject to any statute of limitations. *See Computer Leasco, Inc. v. NTP, Inc.*, 194 F.

App’x 328, 334 (6th Cir. 2006) (“[Rule 60(d)] provides a savings clause . . . that allows judgments to be attacked without regard to the passage of time”). Rule 60(d)(3) also authorizes extraordinary relief upon the proper finding. It expressly provides: “This 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.” Fed. R. Civ. P. 60(d)(3). Again as illustrated in this very case, a “federal court has the inherent power to vacate its own judgment upon proof that a fraud has been perpetrated upon the court.” *Demjanjuk, supra*, 10 F.3d at 358 (internal citations omitted). Given the potency of this power, however, it must be exercised with restraint and discretion. *Id.*

A court has inherent authority to grant relief for “after-discovered fraud” regardless when the judgment has been entered. *Demjanjuk, supra*, 10 F.3d at 356. *See also Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 244 (1944). This equity rule is appropriate where the court deems circumstances “sufficiently gross to demand a departure from rigid adherence to the term rule.” 322 U.S. at 244. Courts have used this power without hesitation where enforcement of its earlier judgment is “manifestly unconscionable.” *Id.*

The Government’s Unambiguous Discovery Obligations

To say that the parties have fought tooth and nail over discovery issues is an understatement. Yet it is on this very issue of discovery that this Court and the Court of Appeals found the government to have committed fraud on the court multiple times — fraud that arose because the government failed to produce exculpatory materials it possessed to demonstrate Mr. Demjanjuk was not “Ivan the Terrible” of Treblinka even though it had claimed otherwise for years and years. The government knew better. Its discovery obligations were broad and unambiguous.

They begin with the federal rules themselves. A denaturalization proceeding is a civil

proceeding, thus subject to the Federal Rules of Civil Procedure. *United States v. Mandycz*, 447 F.3d 951, 962 (6th Cir. 2006); *Addington v. Texas*, 441 U.S. 418, 424 (1979). Two rules in particular, Fed. R. Civ. P. 26 and 34, obligated the government to disclose materials in its possession, custody, or control relevant to the government's claim and Mr. Demjanjuk's defense.

“Parties may obtain discovery regarding any matter . . . which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery . . . including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things.” Fed. R. Civ. P. 26(b)(1). These materials are subject to discovery “upon a showing that the party seeking discovery has substantial need of the materials in preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Fed. R. Civ. P. 26(b)(3). The government's discovery obligations covered more and more materials as the Iron Curtain fell giving the government new access to foreign archives from which it obtained information and materials. “A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.” Fed. R. Civ. P. 26(e)(1).⁵

The government had innumerable opportunities to comply with these obligations while Mr. Demjanjuk was in this country, whether it be in the first denaturalization proceeding, the second denaturalization proceeding, the extradition or deportation proceedings, or appeals. By no means

⁵ These rule quotations are from the 1999 version of the Federal Rules of Civil Procedure as they were in effect when the government initiated this case.

an exhaustive list, the instances detailed below provide a snapshot of the many times the government's discovery obligations were made clear — and why little patience should be shown now for its disregard of those obligations.

***United States v. Demjanjuk*, Case No. C77-923 (first denaturalization proceeding)**

Party	Date	Document
Demjanjuk	11/18/1977	Demjanjuk's first discovery motion: requesting government produce documents and other material for defense inspection and copying.
Government	12/19/1977	Government's motion for extension of time to produce documents and other material for defense inspection and copying (11/18/1977).
Government	1/24/1978	Government's answers to Demjanjuk's interrogatories.
Government	1/25/1978	Government's motion to overrule Demjanjuk's discovery request for production of documents and other materials (11/18/1977).
Government	5/8/1978	Government's answers to Demjanjuk's second set of interrogatories.
Demjanjuk	6/4/1979	Demjanjuk's motion to compel discovery.
Demjanjuk	6/13/1979	Copy of letter from John Martin (defense) to John Horrigan (prosecution) regarding discovery.
Government	6/18/1979	Government's interrogatories for Demjanjuk filed.
Government	9/21/1979	Copy of letter from Horrigan to Martin regarding answers to interrogatories.
Demjanjuk	10/1/1979	Copy of letter from Martin to Horrigan regarding interrogatories.
Government	11/8/1979	Government's response to Demjanjuk's request for production and copying of documents.

Government	11/26/1979	Government's supplemental answers to Demjanjuk's interrogatories.
Government	12/3/1979	Government's motion for extension to conduct discovery.
Government	12/4/1979	Government's second supplemental answers to Demjanjuk's interrogatories.
Government	12/4/1979	Government's motion for protective order to shield from public disclosure the names of certain individuals contained in affidavit.
Court	12/19/1979	Order: (1) extending discovery until 2/1/1980; (2) Government's motion for a protective order is granted (12/4/1979).
Government	12/21/1979	Government's third supplemental answers to Demjanjuk's interrogatories.
Government	12/27/1979	Government's fourth supplemental answers to Demjanjuk's interrogatories.
Court	1/14/1980	Memorandum and order: (1) denying Demjanjuk's motion to prohibit use of deposition; (2) Government pay expenses of defense counsel to attend depositions in Germany; (3) denying Demjanjuk's motion for reasonable attorney's fees.
Court	1/16/1980	Order extending deadline for all discovery up to and including 2/29/1980. Berlin, Germany deposition to take place on 2/22/1980.
Demjanjuk	2/11/1980	Demjanjuk's motion to compel.
Government	2/19/1980	Government's response to Demjanjuk's motion to compel (2/11/1980).
Government	2/21/1980	Government's sixth supplemental answers to Demjanjuk's interrogatories.

Court	2/22/1980	Order: Demjanjuk's motion to compel answers to first set of interrogatories is granted; Order: Demjanjuk's oral motion that deposition of Heinrich Schaefer be delayed or not had.
Government	2/27/1980	Government's motion for protective order regarding answers to Demjanjuk's third set of interrogatories.
Government	2/29/1980	Government's answers to Demjanjuk's third set of interrogatories.
Government	3/14/1980	Government's motion for protective order regarding seventh supplemental answers to Demjanjuk's interrogatories.
Demjanjuk	3/21/1980	Demjanjuk's motion to compel answers to interrogatories.
Government	3/21/1980	Government's supplemental brief in support of motion that facts and authenticity of documentary evidence be admitted and established.
Government	3/21/1980	Government's motion for extension of discovery.
Government	3/26/1980	Government's amended motion for extension of discovery.
Government	4/1/1980	Government's answer to Demjanjuk's motion to compel answers to interrogatories (3/21/1980).
Court	4/3/1980	Memorandum and order extending discovery until 5/15/1980 with the exception that Government shall not depose Demjanjuk's wife.
Court	4/4/1980	Memorandum and order providing certain documentary evidence requested for admission be taken to establish facts and authenticity (3/21/1980).
Court	4/8/1980	Memorandum and order regarding government's answers to Demjanjuk's interrogatories.
Government	4/21/1980	Government's eighth supplemental answers to Demjanjuk's interrogatories.
Government	5/13/1980	Government's answers to Demjanjuk's fourth set of interrogatories.

Demjanjuk	5/15/1980	Demjanjuk's motion to extend discovery.
Demjanjuk	5/21/1980	Demjanjuk's motion to compel.
Demjanjuk	5/30/1980	Government's motion for time extension until 6/4/1980 to respond to Demjanjuk's motion to compel.
Court	6/3/1980	Order granting government leave to respond to interrogatories on or before 6/15/1980; granting Demjanjuk's motion to extend discovery for limited purpose of filing fifth set of interrogatories
Court	6/6/1980	Order denying Demjanjuk's motion to compel answers to interrogatories 5, 6, and 8; further granting motion as to interrogatory 10; and further denying motion as to interrogatory 13.
Government	6/16/1980	Government's answers to Demjanjuk's fifth set of interrogatories.
Government	6/24/1980	Government's answers to Demjanjuk's fourth set of interrogatories.
Demjanjuk	6/26/1980	Demjanjuk's motion to compel.
Demjanjuk	7/2/1980	Demjanjuk's motion to compel government to answer interrogatories 10 and 15 of the fourth set of interrogatories.
Court	7/18/1980	Memorandum and order denying Demjanjuk's motion to compel (6/26/1980).
Government	9/3/1980	Government's supplemental answers to Demjanjuk's fourth set of interrogatories.
Government	9/8/1980	Government's second supplemental answers to Demjanjuk's fourth set of interrogatories.
Government	10/24/1980	Government's supplemental answers to Demjanjuk's interrogatories.
Government	11/20/1980	Government produces documents to Demjanjuk.
Government	12/30/1980	Government's supplemental answers to Demjanjuk's interrogatories.

<i>United States v. Demjanjuk</i> , Case No. 99-CV-1193 (second denaturalization proceeding)
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Party	Date	Document
Court	7/16/1999	Case management conference ordering completion of discovery by 7/31/2000.
Court	1/26/2000	(1) Order extending discovery deadline to 8/31/2000. (2) Motion deadline set, 10/2/2000. (3) Expert witnesses to be identified and reports given by 8/14/2000.
Demjanjuk	2/7/2001	Demjanjuk files conditional motion to compel against government.
Government	4/5/2001	Government files motion to strike Demjanjuk's conditional motion to compel (2/7/2001).
Court	4/27/2001	Marginal entry order denying Demjanjuk's conditional motion to compel (2/7/2001).
Demjanjuk	5/14/2001	Emergency motion for continuance based on government's discovery abuses.
Demjanjuk	5/16/2001	Supplemental filing in support of motion for continuance (5/14/2001).
Government	5/16/2001	Government's response to Demjanjuk's emergency motion for continuance (5/14/2001).
Demjanjuk	5/21/2001	Demjanjuk's motion to take discovery concerning Ukrainian documents obtained during government's investigation in March & April, 2001 and not produced to Demjanjuk until 5/12/2001.
Demjanjuk	5/21/2001	Letter to court from Michael Tigar regarding discovery and log of Tigar's progress on the case.

Court	5/22/2001	Memorandum opinion and order: (1) denying Demjanjuk's emergency motion for continuance (5/14/2001); (2) Demjanjuk's motion for discovery from 5/21/2001 is granted as to requests 2, 3, & 4 and denied as to request 1.
Demjanjuk	5/23/2001	Demjanjuk's memorandum reporting on status of authorized discovery.

The case law adds further clarity to the government's discovery obligations. Supreme Court jurisprudence establishes that the government has an affirmative and ongoing obligation to disclose exculpatory evidence to the defense, and failure to do so is a constitutional violation. These due process principles were firmly established well before Mr. Demjanjuk's first denaturalization hearing, thereby placing upon the government the affirmative duty to disclose exculpatory evidence. The fact the proceedings against him were not directly criminal in nature does not relieve the government of these clear mandates and obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), as the Sixth Circuit stated in *Demjanjuk v. Petrovsky*:

We believe *Brady* should be extended to cover denaturalization and extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities of the party proceeded against. If the government had sought to denaturalize Demjanjuk only on the basis of his misrepresentations at the time he sought admission to the United States and subsequently when he applied for citizenship, it would have been only a civil action. The government did not rest on those misrepresentations, however. Instead, the respondents presented their case as showing that Demjanjuk was guilty of mass murder.

10 F.3d at 353.

In *Brady*, the Supreme Court ruled that "suppression by the [government] of evidence favorable to an accused upon request violates due process where the evidence is material either to

guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87. The deliberate deception by the government in the presentation of known false evidence is incompatible with the “rudimentary demands of justice.” *Giglio v. United States*, 405 U.S. 150, 153 (1972) (internal citations omitted). “[T]he same result obtains when the [the government], although not soliciting false evidence, allows it to go uncorrected when it appears,” *Napue v. Illinois*, 360 U.S. 264, 269 (1959), for a new trial is required if “the false testimony could . . . in all reasonable likelihood have affected the judgment of the [fact finder].” 360 U.S. at 271. The government’s failure to disclose requested impeachment evidence that the defense could have used to conduct an effective cross-examination of important prosecution witnesses constitutes “ ‘constitutional error of the first magnitude and no amount of showing of want of prejudice [can] cure it.’ ” *Davis v. Alaska*, 415 U.S. 308, 318 (1974) (quoting *Brookhart v. Janis*, 384 U.S. 1, 3 (1966)).

Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of suppressed evidence would have resulted ultimately in the defendant’s acquittal whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculcate the defendant.

Kyles v. Whitley, 514 U.S. 419, 434 (1985). The second aspect requires that “[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.” 514 U.S. at 434-35. The third aspect identified is “once a reviewing court . . . has found constitutional error there is no need for further harmless-error review.” 514 U.S. at 435. “The fourth and final aspect of . . . materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item.” 514 U.S. at 436. Defendants are also not required to “scavenge for hints of undisclosed *Brady* material

when the prosecution represents that all such material [had] been disclosed.” *Banks v. Dretke*, 540 U.S. 668, 695 (2004).

“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935). In Mr. Demjanjuk’s case, the government attorneys appear to have forgotten this bedrock command.

Continuation of the Withholding of Relevant and Exculpatory Materials

Three decades of litigation have produced large quantities of documents from the government. The defense has also obtained large quantities of documents through its own investigation. No part of that history, however, absolves the government of its most recent discovery lapses that severely prejudiced Mr. Demjanjuk’s interests, impugned the fairness of these proceedings, and undermined the integrity of the result in this case.

The most publicized of these lapses occurred this spring. On April 12, 2011, Associated Press reporters David Rising and Randy Herschaft published an article revealing that they had found recently declassified FBI documents dated March 4, 1985 in the National Archives and Records Administration facility in College Park, Maryland. The FBI documents assert that the key evidence against Mr. Demjanjuk was “quite likely fabricated” by the KGB. Exh. C. The most widely reported document is Exh. D. There is also an accompanying transmittal document that, while not the subject of news reporting, possibly presents the more serious discovery violation. Exh. E. On May 27, 2011, the government produced to the undersigned counsel slightly different copies of these same documents. Exhs. F and G. The FBI wrote both documents when Mr. Demjanjuk was in

custody on a warrant that ultimately resulted in his extradition to Israel in 1986.

German prosecutor Dr. Hans-Joachim Lutz initially said he was unaware of the FBI report. Exh. C, p.4. He later told the German court that following the AP story, the United States Department of Justice contacted him and told him that he had indeed seen the FBI report because it had been shown to him at the U.S. consulate in Munich. He told the judges, though, that he did not recall ever having seen the FBI report. Exh. H, p.2. While there is no reason to doubt the DOJ showed Dr. Lutz the March 1985 Cleveland FBI documents, the DOJ apparently never gave him an electronic or paper copy. German law requires Dr. Lutz to give the defense any electronic or written material relevant to the case. Assuming Dr. Lutz complied with his discovery obligations under German law, Mr. Demjanjuk's defense team never received a copy of the March 1985 Cleveland FBI documents until *after* the AP article had appeared — near the close of the proceedings in Germany after all relevant witness testimony had been concluded. Exh. C, p.4. In other words, this discovery was revealed too late to have any meaningful impact on the proceedings in Germany.

The March 1985 Cleveland FBI documents were initially classified “secret.” During the 1980s when Cleveland FBI was evidently reaching its conclusions about the evidence against Mr. Demjanjuk, OSI was actively seeking to prevent Mr. Demjanjuk's defense team from having access to government materials that might relate to the ongoing prosecution in Israel. In mid-1986, OSI attorney Bruce J. Einhorn wrote to fellow OSI attorney Martin H. Sachs, arguing that OSI should resist a FOIA application by the Demjanjuk family and others. Among the purposes of such resistance was “[c]oncern over the integrity of the Israeli prosecution and the fairness to the defendant -- release of our material now would, in all probability, reveal (and could easily undermine and prejudice) the Israeli prosecution strategy.” Exh. I, p.1. This same sentiment and

suggestions as to how to keep the materials from being disclosed to the public were passed along to OSI director at the time, Neal M. Sher. Exh. I, p.2. This sentiment seemed to have been widely shared in the ranks of OSI. Exh. I, pp. 3-4.⁶

This sentiment is remarkable in and of itself, since the decision was made to withhold the materials. It is made all the more remarkable when one understands that the Demjanjuk family was one of those public petitioners seeking the information through a Freedom of Information Act request. Ultimately, two federal courts in Washington, D.C. decided in favor of the family with regard to the key materials sought. A government motion for reconsideration and a motion for a stay were then denied. *See Nishnic v. U.S. Dept. of Justice*, 671 F. Supp. 771 (D.D.C.), *aff'd*, 828 F.2d 844 (D.C. Cir. 1987), *recon. denied*, 1987 WL 19434 (D.D.C. Oct. 20, 1987), *stay denied*, 1987 WL 28478 (D.D.C. Dec. 16, 1987).

The March 1985 Cleveland FBI documents unquestionably fall within the broad parameters of Fed. R. Civ. P. 34(a): “any designated documents . . . which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.”⁷ Yet the government never produced these documents to the lawyers who earlier represented Mr. Demjanjuk in this case. *See* Declaration of Michael E. Tigar, ¶¶ 9-10 (Exh. J); Declaration of John Broadley, ¶¶ 10-11 (Exh. K).

Beyond simply Fed. R. Civ. P. 34, the March 1985 Cleveland FBI documents are relevant and responsive to any number of discovery requests and disclosure requirements in (a) the

⁶ Exh. I illustrates another discovery problem the defense experienced earlier in this case. The documents brought together in this particular exhibit were not obtained via government responses to discovery requests, but rather by doing a trash pull.

⁷ As before with Fed. R. Civ. P. 26, the language quoted from Fed. R. Civ. P. 34 is from the 1999 version of the rule when the government began this case.

denaturalization case (before the late former Chief Judge Battisti), (b) the extradition case before the same judge, (c) the fraud on the court proceedings in the Court of Appeals, (d) the fraud on the court proceedings before the Special Master, (e) the litigation on whether to set aside the first denaturalization judgment in which litigation the Court (former Judge Matia) focused on the extent and nature of government failure to disclose, (f) the affidavit of good cause attached to the renewed denaturalization complaint in 1999, (g) the second denaturalization trial in this Court (former Chief Judge Matia), (h) the subsequent proceedings in the Court of Appeals where the reliability of the Trawniki card and other material that came with Note 100 was in issue, (i) the Freedom of Information Act suits the defense initiated in this case, (j) all the deportation, removal and extradition proceedings that first removed Mr. Demjanjuk to Israel and then to Germany, (k) the trials in both of those countries, and (l) the appeal to the Supreme Court of Israel that reversed Mr. Demjanjuk's first convictions.

The government's decision not to disclose this discovery during these decades-long proceedings prevented Mr. Demjanjuk from asserting a complete defense *and* the courts from rendering a just decision. The March 1985 Cleveland FBI documents consist of key exculpatory memoranda authored by the government's main investigatory agency in a branch office situated in the very town where the proceedings against Mr. Demjanjuk unfolded. One of the documents states:

Cleveland opines that the caption matter, like other similar matters, could easily have been initiated and controlled by the Soviet Intelligence Service KGB as a means of intimidating Soviet emigres by effectively silencing Soviet emigre dissidents who speak out against the Soviet regime, and to demonstrate to those emigres, what many of them are told upon exiting the USSR that the KGB is in close cooperation with the intelligence services of all countries, including the FBI in the U.S. and that any sign of dissident activity will result in harsh measures being brought to bear against them, even though they are in the U.S.

Exh. E, p.1. The memorandum goes on to list steps the government should take “in an attempt to prevent the USDJ from becoming a tool of the KGB.” *Id.*, p.2.

Significant portions of the much publicized report, as well as the name of the author, are still redacted because they are classified as “secret.” One of the still classified paragraphs is the last one which presumably includes some type of conclusion. Exh. D, p.3. Consequently, defense counsel can only guess as to the complete contents of this particular document. But what is revealed would have been of tremendous value to the defense of Mr. Demjanjuk in this case.

Unless we conclude the government failed to involve the FBI or its Cleveland field office in these proceedings (a supposition belied by other materials and common sense) or that it simply overlooked this field office when addressing its obligations to produce full and complete discovery (a supposition the runs up against common sense), we are left with the one plausible conclusion that the government intentionally withheld these materials. And regrettably, that is the one supposition in fact supported by the history of and other discovery produced (or not produced) in this case. What other materials are still undisclosed due to a “secret” or “top secret” stamp or a “withdrawal notice” placed in a publicly available file where a document would otherwise be?

We now know that, notwithstanding earlier findings by both this Court and the Court of Appeals that the government had committed fraud on the court, and notwithstanding the grave consequences that resulted from those findings, the government continued to withhold materials relevant to the defense. OSI in charge of the denaturalization proceedings knew its case had been judged not “credible” by FBI agents as far back as March 1985. Yet the government never mentioned these exculpatory materials until after Mr. Demjanjuk had already been stripped of his citizenship in this Court and deported to Germany. Why certain documents identified by their

National Archive number have been in part recently declassified and then ultimately “withdrawn” from access is still unclear. This silence was throughout the second denaturalization proceeding that led to Mr. Demjanjuk’s deportation to Germany. Even when trial counsel cross-examined the government’s experts in ways that made the conclusions in these documents plainly relevant, the government failed to disclose. The playing field this Court and the Court of Appeals attempted to make fair is still not level.

The affidavit of good cause attached to the renewed denaturalization complaint filed in this case in 1999 contained this introductory paragraph from Dr. Elizabeth B. White:

I am the Chief Historian in the Office of Special Investigations, Criminal Division, United States Department of Justice. As such, I have access to records and information of the United States Immigration and Naturalization Service (“INS”) as well as other agencies and organizations, regarding the wartime activities, immigration, and naturalization of John Demjanjuk (“Defendant”). These records and this information form the basis for this affidavit.

United States v. Demjanjuk, Case No. 99-CV-1193, Doc. 1, Exh. A, ¶ 1.

Despite this expansive reference to a universe of relevant records, the affidavit does not contain any information about the March 1985 Cleveland FBI documents. The defense team had to wait about a quarter of a century to see these documents, and even then only with key paragraphs and authorship redacted. Put another way, the government failed to provide these documents in the extradition and deportation proceedings in this Court, in the appeal of those proceedings to the Board of Immigration Appeals and the Court of Appeals, in the proceedings at the trial court level in Israel and in the proceedings before the Supreme Court of Israel, in the later fraud on the court proceedings before this Court and the Court of Appeals, in the Special Master proceedings leading up to the fraud on the court finding, or in any of the later litigation that led to denaturalization and

the eventual second prosecution of Mr. Demjanjuk in Germany. All this despite clear orders to the contrary to produce such materials.

The past history of fraud on the court, the withholding of evidence, and the possible forgery of key evidence have plagued this case from the outset — which makes the substance of the March 1985 Cleveland FBI documents all the more troubling. After the motion for appointment of counsel was filed on April 29, 2011, a Cleveland reporter interviewed Jonathan Drimmer, one of the government lawyers in this case. Mr. Drimmer said that he had never seen or heard of the FBI report. Yet he is quoted as saying that the Trawniki card is authentic. Exh. L, p.2.

Mr. Drimmer's remarks reflect two considerable concerns that undermine the integrity and fairness of the judgment resulting from the proceedings in this case. First, if a senior DOJ lawyer has been kept ignorant of this report by the DOJ's own FBI, we have yet another troubling example of the compartmentalization that Circuit Judge Lively condemned.

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.

Demjanjuk v. Petrovsky, 10 F.3d at 342.

The government appears to be taking the position that because it was not aware of the report, it had no duty to disclose it. The government and more specifically OSI were, however, aware of the report. The transmittal memorandum begins:

Pursuant to instructions of FBIHQ in referenced airtel, Cleveland is enclosing five (5) copies of an LHM captioned as above, to be discussed with USDJ, Office of Special Investigations, in coordination with INTD/CI-1A, and Executive Agencies Unit (EAU).

Exh. E. The Special Agent in Charge of the Cleveland FBI Office authored the memorandum, and it was addressed to the Director of the FBI.

The government will presumably argue that the information is not material, and would not have made a difference.⁸ Even if that were so, that would not, of course, relieve the government of its discovery obligations under the law. More importantly, the questioned material is far from being merely cumulative of other evidence.

One of the government's own experts in this case, Dr. Charles Sydnor, who testified at times as if his opinions were apodictic, was cross-examined at length about the content and reliability of the key archival evidence, otherwise known as Note 100 material, which includes the World War II-era photo identification military service pass the government used to denaturalize, extradite, remove, and now most recently to convict Mr. Demjanjuk in Germany. He admitted that if the person identified on the pass as No. 1393 is not Mr. Demjanjuk, then none of the other documents refer to Mr. Demjanjuk. Denat. 2 Tr. 673-74.⁹ The government's evidence is a chain of which the key link is the Trawniki card. Yet this is the very link the Cleveland FBI opined in March 1985 was "likely fabricated." *Any and all* government documents casting doubt on that link are relevant, and

⁸ The government is behaving like social scientists might predict when cherished opinions are thrown into doubt by new evidence. Two social scientists, Brendan Nyhan and Jason Reifler, have demonstrated that when people who hold a mistaken belief are given truthful information challenging their wrong views, they have difficulty accepting the truth, and hold even more strongly to their errors. The latter phenomenon is known in social science research as the "backfire effect." As anticipated then, government lawyers show no interest whatever in exploring the significance of the March 1985 Cleveland FBI documents, and indeed dismiss their importance. Mark Twain's wisdom sheds light here: "It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so."

⁹ These transcript references are to the second denaturalization proceeding, May 29 through June 7, 2001, against Mr. Demjanjuk, *i.e.*, the instant case. For the Court's convenience, these transcripts are made a part of this motion as Exh. B, and are filed with this motion in an electronic format for the ease of use.

should have been produced to defense counsel.

Although Dr. Sydnor signed his expert report in this case as sole author, in fact it was the product of five or six OSI employees and himself. He did not identify those employees in the report. Denat. 2 Tr. 350. But the agents who assisted with the report clearly did not do their job. There is no credible excuse for six OSI historians funneling documents to Dr. Sydnor and not bothering to provide him or this Court with a set of documents that contain an FBI conclusion about forgery. Even if the government were to argue that the FBI's conclusion had been later debunked, that conclusion is still relevant in assessing weight to the strength of the evidence that led to Mr. Demjanjuk's loss of citizenship and the need to stand trial a second time in a foreign country based on the same evidence that led to his earlier acquittal by the Supreme Court of Israel.

Dr. Sydnor admits that the records kept by the KGB were sloppily kept, written on, and generally treated in what he said was a "vandalous" way. They had been used in prosecutions, and treated sloppily. Denat. 2 Tr. 437, 572. Thus, even he was aware of circumstances that increase the risk of error and forgery. Dr. Sydnor also admitted there is no historical evidence indicating when the alleged John Demjanjuk left Sobibor. Denat. 2 Tr. 543. The most important key document came from KGB archives, and the control of it by that service created the risks the FBI conclusion recognized.

This is also not a situation where one can comfortably sit back and simply trust the government. Neither its own track record in this case nor that of its witnesses is particularly stellar in light of the previous findings of fraud on the court. According to his testimony, Dr. Sydnor was an OSI witness 17 times as of the Demjanjuk trial, yet in the first denaturalization proceeding, he was certain that Mr. Demjanjuk was "Ivan the Terrible" of Treblinka, a "monster" and should be

hanged. Denat. 2 Tr. 320-24. That view, of course, was rejected by this Court, the Court of Appeals, and the Supreme Court of Israel. In addition, Dr. Sydnor's testimony was rejected in Germany due to bias. Larry Stewart, a Treasury Department expert on ink, testified in this case and in Germany for the government. Yet reliance on Mr. Stewart's testing procedures becomes problematic when one recalls that the same government that called him as a witness in this case charged him with perjury in connection with testimony given in *United States v. Martha Stewart*.¹⁰ He was acquitted, but the United States officially stated that he had lied and breached their trust.

There is another troubling non-disclosure issue in this case. Dr. Sydnor testified that there is a Soviet-era investigation file card for an Ivan Andreevich Demjanjuk for service at Trawniki, and this is not the John Demjanjuk in this case. This Ivan was born one year later in the same village as Mr. Demjanjuk, and people remember him. Denat. 2 Tr. 707-10. This evidence makes the forgery revelation more relevant, and provides yet more proof that the wrong man has been accused here. The defense learned of Ivan Andreevich's existence from an investigation card released by OSI. This card reflects the conclusions and actions of Soviet prosecutors. OSI has purportedly never obtained from the USSR or Russia any additional evidence on this "other Ivan." There is apparently a Soviet investigative file, known as 1627, of at least 1400 pages, that deals with the Soviet investigation relating to this matter, including material on the Trawniki card. That file was originally in the Ukraine (Mr. Demjanjuk's birthplace region), but the KGB apparently moved it to Moscow. It remains unclear whether all the material in this file has been disclosed either

¹⁰ "Several months after the jury returned its verdict, the Government announced that an investigation had revealed that Lawrence [Stewart] had made false material statements in the testimony he gave in Stewart's and Bacanovic's trial. He was indicted on June 9, 2004 on two counts of perjury in violation of 18 U.S.C. § 1623 relating to his testimony that he had personally participated in the forensic tests about which he testified and that he was familiar with a book proposal drafted by his colleagues, and he knew that it included a chapter on densitometry." *United States v. Stewart*, 433 F.3d 273, 296 (2nd Cir. 2006).

previously by Soviet or subsequently by Russia authorities.

The defense is mindful that discovery can become difficult when materials cross countries' borders. But one could safely assume the government would have more than a few sheets of paper on the other "Ivan Demjanjuk" if it were carefully preparing its case, as we can presume it did. How is it, then, that the government for all of its careful preparations produces only a handful of pages on the other "Ivan Demjanjuk"? Exh. M. Or that the other "Ivan Demjanjuk" identified by one witness as a guard had a false silver tooth and the defendant does not? Exh. N, p.2. Exhibit N says "white metal teeth"; Exhibit O says "silver teeth." Either way, there was testimony that the defendant in this case had neither.

A further disturbing aspect of the March 1985 Cleveland FBI documents surfaces when they are put into context with other previously classified documents obtained at the National Archives. In March 1981, the Special Agent in Charge of the Cleveland FBI office wrote the Director of the FBI another memorandum referring to "possible KGB utilization of misinformation in U.S. judicial process — trial of John Demjanjuk, Cleveland, Ohio, 1981." Exh. P While portions of this memorandum similarly remain classified and therefore have never been seen by any defense lawyer in any proceeding involving Mr. Demjanjuk, disclosed portions suggest a Cleveland FBI office that was truly concerned that the evidence against Mr. Demjanjuk was forged — so concerned that the office planned to take action.

The Cleveland Ukrainian community has made numerous allegations of Soviet, even KGB interference in its affairs. These and similar allegations, have become more strident during the course of the Demjanjuk trial.

Cleveland feels now would be a propitious time to put forth a significant effort to initiate as many contacts as possible among the Cleveland area Ukrainians. The most beneficial results of such

efforts would be to determine if there is any genuine substance to the aforementioned Ukrainian allegations. [REMAINING PORTION OF PARAGRAPH REDACTED]

Cleveland plans to take the following steps: A thorough review of press coverage of the Demjanjuk trial in order to obtain, first an over-all and then a detailed picture of precisely what the Ukrainians are claiming not only in relation to Demjanjuk and his denaturalization trial, but also the alleged nature and extent of Soviet (KGB) penetration of local and national Ukrainian affairs. Names of spokesmen for the Ukrainian community who have been quoted in newspaper articles will be further considered for specific interviews, UACB.

Exh. P, pp. 2-3.

Less than two weeks later, the Director of the FBI responded with a five-page memorandum portions of which remain classified and thus redacted. Exh. Q. One salient conclusion of the memorandum:

Because of an absence of probable cause to believe that the documentary evidence furnished by the Soviet government in the Demjanjuk matter has been falsified, Cleveland is directed to close captioned investigation.

Exh. Q, p.3. The memorandum goes on to state that “INS has jurisdiction in the Demjanjuk matter.”

Id., p.5. The Director’s memorandum concludes:

Because a verdict in the Demjanjuk trial has not been rendered and for other reasons set-forth above this directs Cleveland to cease its investigation.

Id.

The Cleveland FBI office did not follow that directive. It did not back down regardless of which agency has jurisdiction. We now know from the recently declassified documents uncovered by the AP reporters that four years later the Cleveland FBI office was still investigating this matter.

From the March 4, 1985 memorandum we learn:

Investigation at Cleveland, **including interviews of various Soviet emigres, coupled with past history of Soviet Intelligence Service (KGB) techniques,**¹¹ has strongly indicated that the following scenario, involving Soviet utilization of the USDJ Office of Special Investigation (OSI) to effect Soviet purposes:

1. Through its spotter service within the Soviet emigre community in the United States, the KGB learns of prominent emigre dissidents speaking out publicly and/or leading emigre groups in opposition to the Soviet leadership in the USSR.
2. The KGB, in continuation of internal security measures extended into the United States, initiates an anonymous letter to USDJ/OSI, accusing the emigre dissident of being a former war criminal guilty of atrocities during World War II.
3. USDJ/OSI initiates an investigation into background of the accused emigre. Lacking evidence of the allegation's veracity, USDJ/OSI, thereupon sends results of their investigation to KGB/Moscow, requesting review of records seized from Nazi Prison Camps in the aftermath of World War II for evidence which might substantiate the accusation.
4. The KGB then produces a record purporting to tie the accused with the commission of Nazi atrocities, which record may be falsified for the express purpose of discrediting the accused.
5. The KGB then makes the questioned records "available" to USDJ for action against the accused in immigration court. A KGB officer is dispatched from a Soviet embassy or

¹¹ This bolded language is redacted on the copy at NARA and the one the AP obtained.

consulate in the United States, to “present” the questioned records in court, but not to permit its examination by document experts.

6. In court, the KGB officer thereupon “shows” the documents to the judge, but does not permit the documents to be presented in evidence or to be otherwise copied; thus barring United states authorities or the court from examining the the [sic] authenticity of the records.
7. The end result is that justice is ill-served in the prosecution of an American citizen on evidence which is not only normally inadmissable [sic], in a court of law, but based on evidence and allegations quite likely fabricated by the KGB.

[REMAINING PORTION OF PAGE REDACTED]

Exh. F, pp.2-3.

Had the defense been able to see this memorandum at the beginning of this case, we would have been able to seek further discovery on the “various Soviet emigres” interviewed, on the past history of the KGB techniques the Cleveland FBI office studied, or on the four years of work the Cleveland FBI office undertook on this case *despite* the Director’s instructions to the contrary.¹² It is safe to say that Mr. Demjanjuk could well have called multiple FBI agents and FBI interviewees and FBI informants as witnesses in support of his defense. It is safe to say his defense would have been very different in this case. The result could have been different, too. *See* Exh. J, ¶ 12; Exh.

¹² KGB techniques for forgeries or “disinformation” — to use the English translation of a word coined by the KGB itself — were often employed for political purposes. Senate Report 99-522, Oct. 3, 1986, available at intelligence.senate.gov/pdfs99th/99522.pdf, documents Soviet forgery efforts. For example, in 1986, Soviet agents sought to implicate the Chairman of the Senate Select Committee on Intelligence with a forged letter. *See id.* at pp. 31-32 and Appendix F. In the context of this history from the mid-1980s, the Cleveland FBI office memorandum dated March 4, 1985 discussing KGB techniques takes on additional significance.

K, ¶ 13.

There is another troubling, ongoing discovery problem in this case. As demonstrated even in the few short quotations above, some of the material in key documents remains classified. When a memorandum dealing exclusively with Mr. Demjanjuk and the proceedings against him have entire portions and seemingly key paragraphs redacted because those portions are still classified, *see, e.g.*, Exh. Q, p.4; Exh. D, it seems impossible that the government meets the full scope of its discovery obligations by turning over such redacted materials. Litigants routinely handle 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 the government can meet its discovery obligations. Yet nothing similar appears to have been done in this case. *See* Exh. J, ¶ 13; Exh. K, ¶ 14.

The defense seeks extraordinary relief due to the extraordinary circumstances presented here. Less than two months ago, government counsel provided copies of documents from the Cleveland FBI office. It was represented at that time that those documents had never before been reviewed by OSI counsel. That is an extraordinary admission given the fact that the Cleveland FBI office was situated in the very city — indeed just a few blocks away from — where the government took its first steps against Mr. Demjanjuk. OSI knew the FBI and the Cleveland FBI office were involved in the investigation of this case because they were told that according to the few documents we have seen. After so many years of investigation into this matter by the Cleveland FBI office, there must be many more relevant and responsive documents the defense has never seen.

Were we to accept an explanation that OSI never knew the FBI was investigating this matter, whether from the Washington headquarters, the Cleveland field office, or both, that would bend

credulity far beyond the breaking point. More significantly for present purposes, that explanation also bends the law far beyond its breaking point. For the extraordinary relief requested here, there was a very ordinary solution possible years ago. The present situation would never have arisen had the government simply stuck to earlier representations it had made to the Court regarding the fulfillment of its discovery obligations. Asking all agencies possibly involved with the investigation of Mr. Demjanjuk for their file materials in order to fulfill the government's discovery obligations would have in the end been far easier than defending against motions that challenge all that preceded this filing.

This motion was prompted by good investigative work by two journalists. One might respond to this motion by challenging the defense to go out and do its own file search at NARA's facilities in College Park, Maryland. We did that, and made little progress not because of our own deficiencies but because of the way the government maintains materials at NARA. There are several problems that seem to have gone unaddressed in this litigation. First, searching NARA files with the subject line "John Demjanjuk" or something similar often produces only "withdrawal notices" like those attached. Exh. R. Too little information is given on the notice to determine whether the withdrawn materials are even relevant and worth pursuing. Some "withdrawal notices" have broad subject lines that, experience tells us, encompass materials that are relevant to this case. Exh. S. But when hundreds of such "withdrawal notices" are substituted for the actual documents, it is then impossible for defense counsel to determine which materials are worth pursuing via a FOIA request. Some subject lines are too vague or incomplete even to guess whether the materials that have been withdrawn are worth pursuing. Exh. T. Nevertheless, experience again tells us that some of these files also contain relevant materials. In the end, no defense lawyer should have to go on a fishing

expedition to find materials already in the government's possession, custody or control and subject to discovery. One of the undersigned attorneys (Werneke) submitted FOIA requests with NARA on May 20, 2011, concerning several of these "withdrawal notices." Neither NARA nor any other agency has responded to date. Exhs. U, V.

On November 22, 1994, the government made a number of representations to the Court regarding how OSI was going to redouble its efforts to ensure it met its discovery obligations.

Among those representations was the following:

In response to the Sixth Circuit's 1992 reopening of the extradition proceeding, the Office of Special Investigations has taken steps to ensure that its attorneys exceed even the expansive discovery obligations codified in the December 1993 amendments to the Federal Rules of Civil Procedure.

United States' Opposition to Defendant's Motions to Reopen, to Set Aside Judgment, and to Dismiss with Prejudice, filed Nov. 22, 1994 in Case No. C77-923, at fn.5. The government broke that promise by revealing plainly relevant, exculpatory materials over two-and-a-half decades late. And it knew it had those materials all along.

Redress for Fraud on the Court

As this Court has held in *D'Ambrosio v. Bagley*, *supra*, 688 F. Supp. 2d 709, failure to produce potentially exculpatory evidence creates the requisite "extraordinary circumstances" to set aside a final judgment — even so far as to restore a person to freedom who was previously on Ohio's death row. A similar, indeed a more extensive failure to produce documents during discovery in a denaturalization proceeding should be addressed in the same manner as the failure to produce exculpatory evidence in a criminal case.

When granting the extraordinary relief provided under Rule 60(b) "a court only has the

power to vacate a prior judgment: a court may not avail itself of Rule 60(b) to grant ‘affirmative relief in addition to the relief contained in the prior order or judgment.’ ” 688 F. Supp. 2d at 731 (internal citations omitted). This is not to say that Rule 60(b) allows a court to vacate a judgment and nothing more. *Id.* Because the practical effect of Rule 60(b) relief is to return the case to its procedural posture prior to the judgment, the Court may enter a new, corrected judgment in the same order vacating the prior judgment. *Id.*

The facts of *D’Ambrosio v. Bagley* are instructive here. A three-judge panel of an Ohio trial court had convicted the defendant of aggravated capital murder and sentenced him to death. In his post-conviction petition in this Court, the defendant claimed that the State had improperly withheld potentially exculpatory evidence. Pursuant to this claim, the defendant was granted further discovery, which the defense and the Court believed had been successfully completed. The Court subsequently issued an order instructing the State either to set aside the conviction and sentence or to conduct a new trial. If electing a new trial, the State had 180 days to do so.

Several months later, the State produced new, previously undisclosed exculpatory evidence. A new trial was not permitted to move forward until the defendant was able to examine the new evidence. In response, the State asked the Court to extend the deadline to re prosecute. The defense opposed this motion, and asked the Court to bar re prosecution. The Court denied the State’s motion, and set aside the conviction and sentence on the grounds that the State had not engaged in a good faith effort in discovery and had withheld material evidence until the eve of trial. The Court, however, refused to bar re prosecution, stating that Mr. D’Ambrosio had not been materially prejudiced by the delay resulting from the State’s discovery violations. The defendant then filed a Rule 60(b) motion asking the Court to vacate its decision to not bar re prosecution.

In considering the defendant's Rule 60(b) motion, the Court found that the State had in fact withheld evidence from the defense that "would have substantially increased a reasonable juror's doubt . . . of guilt." 688 F. Supp. 2d at 728. Such untenable conduct by the State "led to material prejudice against D'Ambrosio's ability to defend himself at a new trial." 688 F. Supp. 2d at 731. "Had this court known of that prejudice . . . it would not have permitted reprosecution to proceed." *Id.* The Court emphasized that it was not barring reprosecution through the operation of Rule 60(b) itself; rather, the Court was vacating the prior judgment declining to bar retrial, and entering "a new judgment [reaching] the opposite conclusion." 688 F. Supp. 2d at 732.

Although the instant case is a denaturalization proceeding and not a criminal case, the legal issues and context are strikingly similar to those in *D'Ambrosio v. Bagley* to warrant a similar outcome. Like Mr. D'Ambrosio, Mr. Demjanjuk's defense has been hindered by the government's failure to meet its obligations in discovery. The importance to the defense team of the March 1985 Cleveland FBI documents in all of Mr. Demjanjuk's legal proceedings since FBI agents drafted those documents is incalculable. These documents contain conclusions of experienced law enforcement personnel employed by an agency with expertise about the KGB's tactics. The document itself would have been admissible under Fed. R. Evid. 803(8) if offered by Mr. Demjanjuk. If the documents had been previously produced, counsel could have deposed the documents' authors who to this date remain unidentified. This would have been particularly important in light of what appears to be a significant and developing rift between the views of OSI and special agents in Washington, D.C. and the Cleveland FBI office. The documents would have been key in cross-examining various expert witnesses the government offered at the second denaturalization trial. Moreover, had the government shared them with the defense and then brought

them to the attention of the Israeli prosecutors, the entire drama of Mr. Demjanjuk's trial, conviction, imposition of the death sentence, reversal by the Israel Supreme Court, and the ultimate return of Mr. Demjanjuk to the United States might have been avoided. So, too, would the monumental stigma that Mr. Demjanjuk and his family have suffered through three decades of legal proceedings.

One thing is for certain: Mr. Demjanjuk's defense would have been more persuasive, more powerful, and more pointed than the one he was able to put on. But because the government chose to withhold those documents and others, Mr. Demjanjuk was deprived of his lawful right to put on the defense he sought, and was prevented from obtaining the benefit of that defense. *See California v. Trombetta*, 467 U.S. 479, 485 (1984); *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (constitutional guarantee under the due process clause that the defense be able to present a complete defense as a notion of fundamental fairness).

There is also another striking similarity between this case and *D'Ambrosio v. Bagley*. The government's withholding of discovery the first time around resulted in the Court's decision to vacate Mr. Demjanjuk's first denaturalization order without prejudice. *See United States v. Demjanjuk*, C77-923, 1998 U.S. Dist. LEXIS 4047, * 11 (N.D. Ohio Feb. 20, 1998) ("Such behavior whether or not intentional must not be tolerated."); *see also Demjanjuk v. Petrovsky, supra*, 10 F.3d at 350 ("[t]he 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"). Similar to the discovery violations that were first presented to the Court in Mr. D'Ambrosio's case, OSI's violations in the late 1970s, the 1980s and early 1990s did not warrant in the Court's view a prohibition against future

denaturalization proceedings. As in *D'Ambrosio v. Bagley*, ongoing discovery violations now warrant a prohibition.

The Supreme Court has recognized a court's inherent authority to grant relief from an earlier judgment for after-discovered fraud "regardless of the term of [its] entry." *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 244 (1944). This authority has been codified in Fed. R. Civ. P. 60(d)(3) which states, "[Rule 60] does not limit a court's power to set aside a judgment for fraud on the court."

The Court of Appeals, echoing the Supreme Court, has made clear that depriving a litigant of a day in court can be a valid sanction for egregious discovery and disclosure failures. See *Harmon v. CBX Transp. Inc.*, 110 F.3d 364 (6th Cir. 1997). In this instance for the government as litigant, there were both ample warnings and ample notices of consequences. In *Nat'l Hockey League v. Metro. Hockey Club*, 427 U.S. 639 (1976), the Supreme Court upheld a dismissal sanction without even waiting for full briefing and argument. The Court apparently recognized that celerity and severity go together to deter misconduct. 427 U.S. at 643 (stating that severe sanctions must be available for misconduct in order to penalize the wrongdoer and deter others).

In *Demjanjuk v. Petrovsky*, *supra*, the Court of Appeals vacated the order as to Mr. Demjanjuk's extradition, finding that "the judgments were wrongly procured as a result of prosecutorial misconduct that constituted fraud on the court." 10 F.3d at 356. The prosecutors had "[failed] to disclose at least three sets of documents in their possession before the proceedings against Demjanjuk ever reached trial." 10 F.3d at 350. Withholding this evidence "almost certainly misled [Demjanjuk's] counsel and endangered his ability to mount a defense." *Id.* Moreover, the Government had "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,” and thus had committed fraud on the court. *Id.* As a result, the extradition order was vacated, the District Court in turn vacated the denaturalization order, and Mr. Demjanjuk’s citizenship was restored.

The denaturalization order currently in place against Mr. Demjanjuk should be vacated, too. The current claims concern the same kind of misconduct having the same kind of detrimental impact on Mr. Demjanjuk’s ability to present a defense.

The list of opportunities to make full disclosure and to tell the entire truth is longer now than in the earlier litigation. The government, warned by the Court of Appeals and by this Court, has persisted in its misconduct. It is impossible to view the chart beginning on page 12 of this memorandum or the timeline submitted as Exh. A and not conclude that the government had ample opportunity to produce full discovery in this case as it was obligated to do. Yet the government still failed to turn over to the defense the March 1985 Cleveland FBI documents that concern undisputably the most crucial bit of evidence in this case; even when the documents were disclosed, it still redacted key parts from those documents; still withholds classified materials; still is tardy in producing files from the Cleveland FBI office it claimed it had never reviewed before this spring; still withholds voluminous materials as being “withdrawn” from the searchable records at NARA’s facilities in College Park, Maryland; still withholds materials on 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; and still was late in the production of interview transcripts (protocols) involving other camp guards who were tortured and interrogated in the former Soviet Union as early as 1960 yet whose translated

interviews were made available to the defense only after Mr. Demjanjuk had been stripped of his citizenship for a second time.

The government's conduct has left an indelible mark upon the lives of Mr. Demjanjuk and his family. It has eroded the public trust in these proceedings. It has undermined our confidence in one of the most powerful sanctions a federal court can impose on an American citizen — to strip that individual of his citizenship and to leave him stateless. It bears repeating lest there be any doubt: the defense does not bring this motion hastily or without lengthy consideration of its consequences. Serious questions remain, however, about the integrity of the judicial process that most recently resulted in Mr. Demjanjuk's being stripped for a second time of his United States citizenship and being shipped to Germany to stand trial there.

Sloppiness or inadvertence arises to some degree in every litigation in every court in this country and elsewhere. Judicial systems are after all institutions created and run by fallible human beings. But context is everything in this proceeding — a rare proceeding indeed that found a man accused and convicted of being someone he was not, sentenced to die for it, and then acquitted and set free by the Supreme Court of a country that had the most to lose by letting a man accused of Nazi war atrocities go free. And all of that was triggered by the fact that the government had the wrong person — but insisted all along and under oath that it was right even though its representatives knew better. The lesson should have been learned and the playing field leveled. If nothing else, the files in the FBI's Cleveland office should have been gone over with a fine-tooth comb. Perhaps they were — and that's just part of the problem presented in this motion.

For the reasons summarized in his motion and in this supporting memorandum, Mr. Demjanjuk requests that:

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. 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 Mr. Demjanjuk's denaturalization with prejudice.

Respectfully submitted,

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