

Special Master finds Demjanjuk was not 'Ivan the Terrible'

by Jeffrey Steinberg

At the beginning of July, U.S. District Court Judge Thomas A. Wiseman, Jr. issued his long-awaited Special Master report in the case of John Demjanjuk.

Demjanjuk, a retired Cleveland auto worker, is in prison in Israel awaiting that country's Supreme Court decision on his appeal of a death sentence for his alleged mass extermination of Jews at the Treblinka, Poland Nazi concentration camp in 1942-43. During a 10-year period beginning in 1976, Demjanjuk, who was born in Ukraine, was accused by the U.S. Justice Department Office of Special Investigations (OSI) of being the Treblinka gas chamber operator known as "Ivan the Terrible." He was stripped of his American citizenship, ordered deported, and extradited to Israel to stand trial for war crimes.

In 1988, Demjanjuk was sentenced to death by an Israeli court after being convicted in a jury trial that was televised all over Israel and built up as the biggest war crimes prosecution since that of Adolf Eichmann in the early 1960s.

Demjanjuk has steadfastly maintained his innocence, and family and friends, including Rep. James Traficant (D-Ohio), fought to obtain Department of Justice (DOJ) documents which they believed would prove he was not "Ivan the Terrible." Early last year, under the Freedom of Information Act (FOIA) and through other investigative efforts, Demjanjuk's attorneys began to receive volumes of evidence proving that the DOJ had possessed proof all along that John Demjanjuk was not "Ivan."

In June 1992, the Sixth Circuit Court of Appeals in Cincinnati, Ohio, which had upheld the lower court's denaturalization and extradition orders, initiated a review of the Demjanjuk case on the basis of the appellate court's authority to overturn rulings in cases where evidence emerged of "fraud upon the court."

In August, the appeals court appointed Wiseman, a federal judge in Nashville, Tennessee as the Special Master, responsible for gathering evidence to determine whether or not DOJ prosecutors had committed fraud.

Wiseman findings released

For eight months, Judge Wiseman, on behalf of the Sixth Circuit, presided over a series of evidentiary hearings and depositions, in which current and former DOJ officials were

called to testify about their roles in the Demjanjuk case. Wiseman's mandate was to gather evidence for the appellate panel to determine whether OSI had indeed defrauded the court. On Aug. 4, in Cincinnati, the appeals panel will hear arguments from attorneys for Demjanjuk and the DOJ on the implications of the Wiseman findings.

Judge Wiseman's 210-page report for the first time officially acknowledges that there is "substantial doubt" that John Demjanjuk was "Ivan of Treblinka."

The implications of that finding are profound. For the past six years, the Israeli Supreme Court has been stalling on deciding Demjanjuk's appeal of his death sentence. In recent years, it has been presented with the same evidence now before Wiseman and the Sixth Circuit, but has so far failed to issue any decision. The Israeli court has stipulated that if it determines that Demjanjuk was not "Ivan," he will be freed, regardless of contentions by the OSI and Israeli prosecutors that if Demjanjuk was not at Treblinka, he was probably a guard at another Nazi concentration camp at Sobibor, Poland, and should, therefore, still be kept in Israeli prison.

Because the Wiseman report strongly suggests that Demjanjuk was not "Ivan," and therefore should be freed from the death sentence in Israel, friends and relatives have hailed the report as a "victory."

At the same time, however, Judge Wiseman devoted the bulk of his report to a review of the evidence of willful fraud by federal prosecutors, and concluded that there is no proof that their withholding of crucial evidence was intentional. Instead, Wiseman found that prosecutors were ensnared in turf battles between the OSI and local U.S. Attorneys, mishandled evidence, failed to pursue leads that tended to disprove their belief that Demjanjuk was "Ivan the Terrible," and committed a wide range of other acts of commission and omission that thoroughly sabotaged the pursuit of justice. However, at the end of the report, Wiseman stated his personal belief that the DOJ officials were at all times acting out of a misguided and bungled pursuit of the truth, rather than any conscious effort to perpetrate fraud.

As a result, Wiseman suggested that the Sixth Circuit close the case and consider other courses of action to rectify the potential injustice done to Demjanjuk.

A damning indictment of the DOJ

Despite his hesitation to find that OSI officials engaged in willful fraud, the Wiseman report is a damning indictment of a Department of Justice dominated by zealotry, incompetence, and petty rivalries.

In his "Conclusions," Wiseman observed: "Ultimately, this is a case about questions that were never asked and questions asked that went unanswered. Government attorneys failed to ask questions regarding the evidence they possessed, and this error prevented them from asking questions designed to obtain additional evidence.

"Government attorneys failed to challenge the evidence they possessed, and this led them to abandon leads which contradicted their interpretation of the evidence. . . .

"Thus the government was inadequately skeptical of its theory to begin with, and this shortcoming was compounded by the unintended silencing of the lone dissenting voice—Mr. Parker's." George Parker was an OSI attorney who worked on the Demjanjuk case through 1981. After writing a memo stating his belief that Demjanjuk was not "Ivan" and posing serious "moral" dilemmas for the DOJ case, Parker quit the government after his superiors ignored his warnings.

Judge Wiseman continued: "In scientific terms, the prosecutors never attempted to prove the null hypothesis—an alternative hypothesis which is the converse of that in which one believes. In the Demjanjuk case, attempting to prove the null hypothesis would have led the government investigators and attorneys to look for evidence that someone other than John Demjanjuk was Ivan the Terrible. . . .

"In addition, the case is about questions asked that went unanswered. As I have discussed above, a careful reading of Mr. Demjanjuk's discovery requests demonstrates that he asked for virtually every piece of evidence that is at issue in these proceedings. As demonstrated, the government did not provide the evidence because it believed that it was under no duty to do so. The heart of the discovery problems, therefore, was a tragic misunderstanding.

"I have fixed the responsibility for this on the government, but his case is more about imperfection than perfidy to justice. I trace the root of the misunderstanding to the unstable and fractious character of the prosecution team. . . . These difficulties were only compounded, however, by the attitude the trial attorneys took toward discovery; an attitude that at times bordered on gamesmanship. . . .

"[T]he OSI's cooperation with the government of Israel was characterized by an unintentional failure to completely disclose the materials they had acquired regarding Mr. Demjanjuk's case. Upon the filing of the FOIA requests, the Office, which feared that its failure to provide Israel with Soviet materials would be perceived as a lack of candor, and also feared disclosing the fact of its cooperation with that government, denied Mr. Demjanjuk's supporters access to materials that would have been helpful to his defense to the

criminal charges against him. . . .

"The Soviet evidence, viewed in its entirety, casts a substantial doubt on Mr. Demjanjuk's factual guilt of the central allegation of the denaturalization complaint—that he was Ivan the Terrible of the Treblinka gas chambers. The statements of former Treblinka guards and laborers recently obtained from the Soviet Union constitute an harmonious chorus which inculpate a man named Ivan Marchenko as the Ivan who worked at the gas chambers, and thus exculpate Mr. Demjanjuk from those specific crimes. Given the period of time over which the Soviet statements were made (many were made in the 1940s, others were made as recently as the 1970s), and given the lack of contact these individuals had with Jewish survivors of the death camp, the stories they tell are eerily similar, with one exception: the former Soviet guards identify Ivan Marchenko as one of the motorists of the gas chambers. There is also substantial evidence placing Ivan Marchenko at Treblinka continuously until its liquidation in November 1943, contradicting the entry on Mr. Demjanjuk's Trawniki identification card, which indicates that he was posted to Sobibor in March 1943. [Defense attorneys have charged that the Trawniki identification card, which was provided to OSI by the Soviet government, was a forgery and that Demjanjuk was held in a German POW camp and was never present at any concentration camp—ed.] Perhaps the most significant statement in the new Soviet evidence is that of Nikolai Shalayev, a confessed motorist of the gas chambers. Shalayev confirms that only two Ukrainians worked at the gas chambers, and identifies his partner as Ivan Marchenko."

Wiseman wrote that since no evidence had been surfaced discrediting the authenticity of the Trawniki ID card, the U.S. court was not, in his judgment, in error in stripping Demjanjuk of his citizenship.

Dismantle the OSI

If the Sixth Circuit adopts Judge Wiseman's recommendations, Demjanjuk could literally find himself a man without a country—freed from the Israeli hangman's noose, but blocked from returning to his home in America.

While the Special Master's report has for the first time officially endorsed the most fundamental arguments of the defense—that the government withheld crucial evidence proving Demjanjuk's innocence—it could leave in place an OSI apparatus which has trampled on the rights of American citizens, uncritically embraced Soviet KGB-produced "evidence," and helped fuel the efforts of groups like the Anti-Defamation League to brand the majority of World War II-era Central and East Europeans as unrepentant Nazis.

It is now up to the Sixth Circuit Court of Appeals and Attorney General Janet Reno to ponder the Wiseman findings. It is a damning indictment of DOJ behavior, which borders on totalitarianism, and it is a strong argument for the OSI to be put out of business.