

# Sixth Circuit assails OSI and ADL at Demjanjuk hearing

by Jeffrey Steinberg

After months of being slandered by such groups as the Anti-Defamation League of B'nai B'rith (ADL) and the Los Angeles office of the Simon Wiesenthal Center as a Nazi sympathizer out to "get" the Justice Department Office of Special Investigations (OSI), the chief judge of the U.S. Sixth Circuit Court of Appeals, Gilbert Merritt, issued an impassioned public response on Sept. 3.

The occasion was an important hearing in the court's review of the case of John Demjanjuk, at which attorneys for Demjanjuk and the Justice Department argued the recently issued Special Master's report, which reviewed evidence of government "fraud upon the court" in the prosecution of Demjanjuk as the alleged Nazi war criminal "Ivan the Terrible" of the Treblinka death camp in Poland during World War II. On July 29, an Israeli Supreme Court panel overturned Demjanjuk's conviction as "Ivan" on the grounds that massive evidence, including material that had been in the Justice Department's files since 1978, identified another man, Ivan Marchenko, as the real concentration camp mass-murderer.

When the Sixth Circuit, in June 1992, decided to reopen the Demjanjuk case on the basis of media reports that crucial evidence had been withheld from defense attorneys, the justices immediately came under attack from ADL circles. Former Rep. Elizabeth Holtzman (D-N.Y.), who was instrumental in the creation of the OSI Nazi-hunting unit in 1979, warned that a reversal of the Demjanjuk conviction could spell the beginning of the end for the OSI. Chief Judge Merritt was widely slandered in ADL circles as "John Demjanjuk's best defense lawyer."

Security was unusually tight at the hearing. Spokesmen for the Kach Movement, an Israeli affiliate of the U.S.-based Jewish Defense League, threatened to assassinate Demjanjuk, and, according to sources close to the clerk of the court, there was also concern about possible attacks against the judges. According to investigative journalist Robert Friedman, JDL terror targets in the United States are selected by a team of Mossad officers who in the past included a top official of the Brooklyn, New York office of the ADL.

## Means must be just

Presiding over a large audience in the courtroom, Chief Judge Merritt read from a prepared text: "Let me say at the outset that what the court is dealing with here — what we are

deliberating about in this case — is *means*, not ends. We are deliberating, for example, about whether the withholding of the Leleko and Malagon statements or the Polish Main list from the defense was a proper means in the original prosecution of this case.

"We have never doubted that the *end* was reasonable — bringing to the bar of justice and prosecuting those responsible for Treblinka and other death camps. But because the court has questioned the *means* used by the prosecution, some have said that the court also questions the *end*. That is wrong.

"We have read and reread the various statements of Leleko and Malagon who were guards at Treblinka. They describe in the most minute detail the almost unimaginable crimes committed — the smell of burning flesh day after day for a radius of 10 kilometers; the mutilation of children, crimes the details of which make other murders pale by comparison. The end sought by OSI — to bring those responsible to justice — is a worthy end. Neither do we disagree with the principle of justice and human rights established at Nuremberg. We do not doubt that there is a higher law that overrides the positive directions of the state in some situations — the Holocaust prosecutions themselves being the best example.

"But in a just society we cannot allow evil or unjust *means* to defeat noble ends. In our law each *step* must itself be just.

"So at the outset, please understand that we are deliberating about *means*, the propriety of the steps used to achieve the worthy goal of punishing those responsible for the most unspeakable, the most evil of all mass murders in human history."

## De novo review demanded

Following Merritt's statement, defense attorney Michael Tigar addressed the court on behalf of Demjanjuk. Tigar argued that, while the bulk of the Special Master's final report, submitted by Judge Thomas Wiseman in June 1993, consisted of facts that catalogued a pattern of OSI failure to disclose crucial exculpatory evidence, Wiseman's conclusion that the government had not committed willful fraud upon the court was wrong. He reviewed the behavior of several OSI attorneys who oversaw the Demjanjuk investigation and prosecution, and detailed their failure to provide critical data after informing the court and the defense that

there was no more information to be turned over. In particular, Tigar highlighted the failure of Norman Moscowitz to turn over a series of interrogations of Treblinka guards known as the "Fedorenko Protocols," and the report provided to OSI by the Polish Main Commission, a government agency in charge of pursuing Nazi war criminals.

The Fedorenko Protocols included interrogations of two crucial eyewitnesses, Leleko and Malagon, both of whom described in detail the inner workings of the Treblinka camp. Leleko was first interrogated on Feb. 21, 1945, and he provided detailed descriptions of the two men who manned the motors of the gas chambers, identifying them as "Nicholas and Marchenko." Leleko would be re-interviewed in the early 1980s and would be shown photographs of John Demjanjuk. He failed to identify Demjanjuk's pictures as those of anyone he knew at Treblinka. Despite the clearly exculpatory nature of this information, OSI attorneys never provided the Fedorenko Protocols to Demjanjuk's attorneys or to the court.

When Justice Department Appellate Division attorney Patty Stemler began to address the court on behalf of the OSI, she was immediately grilled by Chief Judge Merritt about the Fedorenko Protocols and the failure of Moscowitz and other OSI attorneys to provide copies to the defense.

Stemler attempted to defend the OSI failure to disclose the documents by claiming that the material had been "lost" between the Fedorenko and Demjanjuk case files (Fedorenko was a Treblinka guard who was also prosecuted by the OSI during the late 1970s). At that point, Judge Pierce Lively pointed out that if the Israeli prosecutors had been provided with the Fedorenko materials, they might have decided not to seek Demjanjuk's extradition. The Fedorenko material, which was lost during 1981-91 (the time of Demjanjuk's denaturalization, extradition, and trial in Israel), was only rediscovered as the result of a Freedom of Information Act lawsuit by Rep. James Traficant (D-Ohio). Lively asked Stemler, "How sloppy can you get? The Fedorenko and Demjanjuk cases were so close and were handled by a relatively small office." The OSI handling of these crucial documents, he charged, was "highly neglectful."

Toward the closing moments of the hearing, Judge Damon Keith, the third member of the panel, asked Tigar what kind of specific relief he was seeking from the final recommendations of Wiseman to suspend any further action against the OSI. Tigar argued that, while Wiseman had amassed a detailed evidentiary report, he had failed to apply the proper standards in judging the OSI's conduct. He called upon the judges to undertake a *de novo* review of the underlying legal issues and rule that the government did, indeed, commit fraud upon the court. He argued that the government has an affirmative obligation to the truth, and ended by stating that "while justice may be blind, the Department of Justice should not be blind" to the truth. Such behavior, he said, constitutes "reckless" disregard and is the basis for overturning Demjanjuk's denaturalization.

At the conclusion of the hearing, John Demjanjuk, Jr. and Edward Nishnic, Demjanjuk's son-in-law, stated at a press conference on the courthouse steps that they were optimistic that Demjanjuk would soon return to the United States, despite the fact that the Israeli Supreme Court is still reviewing a series of petitions from the Kach Movement and a group of Nazi concentration camp survivors who are demanding his re-trial on other war crimes charges.

John Demjanjuk, Jr. noted that his father would be "always stigmatized" by the false war crimes charges, that he had already suffered eight years in solitary confinement in an Israeli prison, and that his experience with the OSI had convinced him that there was "no integrity in the Department of Justice."

Nishnic chastised the Israeli National Police for doing everything they could to strip Demjanjuk of security. On two separate occasions, when it had been anticipated that Demjanjuk would be allowed to leave Israel, the deputy chief of the Israeli National Police had announced his travel itinerary. At the same time, the police have informed Demjanjuk's family that they will provide no security once Demjanjuk is released from prison.

Nishnic praised the Clinton administration, and especially Attorney General Janet Reno, for her decision not to challenge the Sixth Circuit's decision to allow Demjanjuk to temporarily return to the United States once he is released from Israeli custody. "The new DOJ image is that of the moral high ground," he said. Even if Reno decides to seek Demjanjuk's deportation, he added, at least we will be fighting on a level playing field with all of the evidence now out in the open.

## Two rulings awaited

The Sixth Circuit is expected to issue a written ruling shortly on the Wiseman Report and the underlying question of whether OSI conduct amounted to fraud. And in Israel, the Supreme Court president is also reviewing the demands by 12 petitioners for a new trial for Demjanjuk. Eight Supreme Court justices and Israel's prosecutor are opposed to new charges, citing the extradition treaty with the United States and international law as forbidding new indictments on charges other than those for which an individual was originally extradited.

At the OSI office in Washington, and at ADL headquarters in New York City, there is growing fear that the Sixth Circuit and the Israeli Supreme Court will soon rule that Demjanjuk was a victim of a frameup. The ADL is also awaiting a decision from the San Francisco district attorney, who is reviewing evidence that the ADL ran a nationwide illegal spy ring that obtained classified data on tens of thousands of American citizens. The same kind of arrogant disregard for the law which has been identified in the OSI-ADL handling of the Demjanjuk case is being unearthed in the ADL spy case as well.