No._____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

JOHN DEMJANJUK,

v.

ERIC H. HOLDER, JR., Attorney General

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APPLICATION OF JOHN DEMJANJUK TO JUSTICE JOHN PAUL STEVENS FOR A STAY

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Dated: May 5, 2009

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APPLICATION OF JOHN DEMJANJUK TO JUSTICE JOHN PAUL STEVENS FOR A STAY

John Demjanjuk, by his undersigned attorneys, hereby applies to the Circuit Justice for the Sixth Circuit for a stay of the removal of John Demjanjuk to Germany pending the filing and disposition of:

> A Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit to review its denial of a stay pending review;
>
> A Petition for an original Writ of Mandamus to the Court of Appeals for the Sixth directing it to enter an order staying Mr. Demjanjuk's removal pending final disposition of his Petition for Review; and
>
> An Petition for an original Writ of Habeas Corpus.

The Sixth Circuit denied Mr. Demjanjuk's Motion for Stay Pending Review on May 1, 2009. A copy of the Sixth Circuit's decision is attached hereto at Tab 1. A stay of removal from this Court is necessary to afford counsel adequate time to prepare and file alternative writs as outlined above, and for the Court to deal with the issues to be raised therein.

PROCEEDINGS BELOW

This case is the follow-on to *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), *cert. denied*, *Rison v. Demjanjuk*, 513 U.S. 514, 115 S. Ct. 295, 130 L.Ed.2d 205 (1994). In proceedings leading to that decision, Mr. Demjanjuk had been denaturalized, extradited to Israel, tried and convicted of being "Ivan the Terrible" of Treblinka for multiple murders in the Treblinka and Sobibor death camps, sentenced to death. After spending five years on death row Mr. Demjanjuk was acquitted by the Israeli Supreme Court when evidence came to light that "Ivan the Terrible" of Treblinka was another person, one Ivan Marchenko.

In its *Demjanjuk v. Petrovsky* decision in 1993 the Sixth Circuit vacated its prior order permitting the extradition of Mr. Demjanjuk to Israel on the grounds that it (and the denaturalization order that preceded it) had been procured by a fraud on the court committed by the Office of Special Investigations of the Department of Justice ("OSI"). Subsequently, the United States District Court for the Northern District of Ohio vacated its 1981 denaturalization order on largely the same grounds. *United States v. Demjanjuk*, C77-923, 1998 U.S. Dist. Lexis 4047 (N.D. Ohio 1998). In 1999 OSI filed another denaturalization case against Mr. Demjanjuk alleging this time that he had been a guard at the Maidanek and Sobibor death camps in Poland and at the Flossenbürg concentration camp in Germany. It is this second denaturalization case that has led to the matter now before the Court.

In 2002 the United States District Court for the Northern District of Ohio again denaturalized Mr. Demjanjuk. That decision was upheld by the Sixth Circuit Court of Appeals, *United States v. Demjanjuk*, 367 F.3d 623 (6th Cir.), *cert. denied* 543 U.S. 970 (2004). The government began removal proceedings against Mr. Demjanjuk in December 2004 and a final order of removal was entered by the Immigration Court in December 2005. The decision was

affirmed by the Board of Immigration Appeals ("BIA") in December 2006 and by the Sixth Circuit in February 2008. *Demjanjuk v. Mukasey*, 514 F.3d 616 (6th Cir.), *cert. denied* 128 S.Ct. 2491 (Mem.), 171 L.Ed.2d 780 (2008). Ukraine, Poland and Germany would not accept Mr. Demjanjuk's deportation.

On March 10, 2009 the German authorities issued an arrest warrant for Mr. Demjanjuk on charges of aiding and abetting multiple murders at the Sobibor death camp. No extradition proceedings were commenced in either Germany or the United States. On April 2, 2009 the German Ministry of Justice announced that Germany would accept Mr. Demjanjuk's deportation. Rumors to this effect had been appearing in the German press for several days before that.

On April 2, 2009 Mr. Demjanjuk filed with the Immigration Court a Motion to Reopen the removal order against him to assert a claim under the Convention Against Torture based on his likely removal to Germany, where he would be arrested, incarcerated and tried. In view of his advanced age and seriously deteriorated health this would cause severe pain and suffering amounting to torture within the meaning of the regulations (8 CFR 1208.18).[3] The Immigration Court issued a stay of removal on April 3, 2009 but on April 6, 2009 returned the motion on the grounds that it should have been filed with the BIA. The Immigration Court continued the stay until April 8. On April 7, 2009 Mr. Demjanjuk re-filed his Motion to Reopen the removal order with the BIA along with an Emergency Motion for a Stay. On April 10, 2009 the BIA denied the Emergency Motion for a Stay but did not rule on the Motion to Reopen. On April 14, 2009 Mr. Demjanjuk filed a Petition for Review with the Sixth Circuit (this is Sixth Circuit Case No.

[3] Mr. Demjanjuk is 89 years old and suffers from numerous health problems including Myelodysplastic Syndrome (MDS), a pre-leukemic condition of the bone marrow, Arthritis and Severe Spinal Stenosis.

09-3416) and a Motion for a Stay Pending Review. The Sixth Circuit entered a stay several hours after the Petition for Review and Stay Motion had been filed.

Approximately an hour before the Sixth Circuit entered the Stay Order on April 14, 2009, the Immigration and Customs Enforcement Division of the Department of Homeland Security ("ICE") removed Mr. Demjanjuk from his house and carried him to the Federal Building in Cleveland. The events that occurred during that removal, including the ICE agents negligently dropping Mr. Demjanjuk to the floor while attempting to put him into a wheelchair, are shown in Video No. 2 filed with this Stay Motion.

On April 15, 2009 the BIA denied Mr. Demjanjuk's Motion to Reopen and on April 23, 2009 Mr. Demjanjuk filed a new Petition for Review with the Sixth Circuit (this is Sixth Circuit Case No. 09-3469) and a new Motion for Stay Pending Review. On May 1, 2009 the Sixth Circuit entered a decision and order which dismissed Case No. 09-3416 as moot, and denied Mr. Demjanjuk's Motion for Stay Pending Review in Case No. 09-3469. This is the decision which brings him to this Court. A copy of the Sixth Circuit's May 1, 2009 decision and order is attached hereto as Tab 1.

JURISDICTION

The Sixth Circuit's order denying a Stay Pending Review was entered on May 1, 2009. The Court has jurisdiction to entertain a Petition for a Writ of Certiorari in this matter pursuant to 28 U.S.C. 1254. The Court has jurisdiction to issue an Original Writ of Mandamus pursuant to 28 U.S.C. 1651(a). The Court has jurisdiction to issue an Original Writ of Habeas Corpus pursuant to 28 U.S.C. 2241. The Court or a single justice thereof has jurisdiction pursuant to 28 U.S.C. 2101(f) to issue a stay to permit a party aggrieved by a judgment to obtain a Writ of Certiorari.

A STAY IS WARRANTED IN THIS CASE

This Court recently discussed the criteria to be applied in granting a stay of removal pending judicial review in immigration cases. *Nken v. Holder*, ___S.Ct. ___, 2009 W.L. 1065976 (U.S. Apr. 22), 2009). The Court held that the traditional four-part test for grant of a stay applies in immigration cases, "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at *11 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L.Ed.2d 724 (1987)).

The Court in *Nken* held that the first two factors are the most critical, that it is not enough that the chance of success on the merits be "better than negligible" and that "more than a mere possibility of relief is required." Similarly, it is not enough to show "some possibility of irreparable injury." *Nken* at *11.

Mr. Demjanjuk has attached to this Application for Stay at Tab 2 the Motion for Stay Pending Review that he filed in the Sixth Circuit in No. 09-3469, and at Tab 3 the Reply he filed in the same proceeding in support of that motion. Tab 4 is a medical report dated April 3, 2009 by the ICE doctor who examined Mr. Demjanjuk on April 2, 2009. Tab 5 is a collection communications between the OSI and the German authorities prior to the German authorities' issuance of an arrest order for Mr. Demjanjuk

1. Irreparable Injury

The Sixth Circuit correctly recited this Court's articulation of the irreparable injury standard to be applied in considering whether a stay pending review should be granted in a removal case. Notwithstanding its articulation of this Court's standard, the Sixth Circuit applied

a standard more akin to that of 8 U.S.C. 1252(f)(2) rejected by this Court in *Nken.*[4] In effect, the Sixth Circuit applied the standard of 8 U.S.C. 1252(f)(2) instead of the traditional standard for stays articulated by this Court in *Nken.* The Sixth Circuit's clear misapplication of *Nken* is most obvious in its treatment of the issue of irreparable injury.

Mr. Demjanjuk is not young; he is 89 years old. He is not in good health; he suffers from a number of physical ailments that present real and immediate risks to his life. It is difficult to conceive of injury more irreparable than that inflicted when a sick, 89 year old man, is sent away from his family to a foreign country where he does not speak the language, where he will be arrested, incarcerated and probably put on trial, and where, given his age and serious illnesses, he may well die before a final Sixth Circuit ruling on the Petition for Review. By denying a stay, the Sixth Circuit has likely ensured that Mr. Demjanjuk will die separated from his family, among strangers with whom he cannot even communicate, *even if he ultimately prevails in the Sixth Circuit*. Almost no injury is more "irreparable" than this. If the Sixth Circuit cannot find irreparable injury in these circumstances (which are largely undisputed), it clearly is applying a standard that is far more rigid even than the one Congress established in 8 U.S.C. 1252(f)(2) for injunctions and which this Court rejected as being applicable to stay motions. *See Nken.*

The medical evidence before the BIA and the Sixth Circuit was compelling that transporting Mr. Demjanjuk to Germany will expose him to serious risks and severe pain, and that using an ambulance aircraft mitigates, but does not eliminate, those risks and pain. Moreover, because of his advanced age and serious illnesses, the treatment that Mr. Demjanjuk

[4] A number of facts Mr. Demjanjuk brought to the Court of Appeals' attention in support of the stay could not have been submitted to the BIA as they occurred after the BIA entered its decision or sufficiently close to the time that the BIA entered its decision that there was no opportunity to present them to the BIA. Because of the position the BIA took with respect to its own jurisdiction, it would have been futile to seek remand to the BIA.

will receive in Germany will itself cause him severe pain and suffering. These facts backstop the common sense recognition that removing a person in Mr. Demjanjuk's circumstances from his family and committing him to the care (or lack of care) of strangers whose language he does not speak where he is likely to die is the essence of injury that is irreparable.

A. Transporting Mr. Demjanjuk to Germany presents a serious risk of causing him irreparable injury.

The evidence before the BIA and the Sixth Circuit showed that Mr. Demjanjuk suffers from:

Myelodysplastic Syndrome (MDS), a pre-leukemic condition of the bone marrow
Chronic Kidney Disease (CKD Stage 3)
Hyperoxaluria
Kidney Stones
Anemia (Secondary to MDS)
Leucopenia (Secondary to MDS)
Arthritis
Severe Spinal Stenosis

One consequence of Myelodysplastic Syndrome is anemia, a deficiency of hemoglobin in the red blood cells. The medical evidence also showed that Mr. Demjanjuk suffers from a deficiency of red blood cells. A deficiency of hemoglobin inhibits the body's ability to move oxygen to the various organs. The evidence before BIA and the Sixth Circuit showed that a normal hemoglobin range is 13.2 - 17.1. The evidence before the BIA and the Sixth Circuit showed that Mr. Demjanjuk's hemoglobin count was:

7/15/08 Hemoglobin 9.5 (Cleveland Clinic Cancer Center) Medical Report Attached to Motion for Stay to BIA

1/19/08 Hemoglobin 9.8 (Dr. Bidari) Medical Report Attached to Motion for Stay to BIA

4/2/08 Hemoglobin 11.7 (ICE Medical Report submitted to 6th Circuit)[5]

[5] The government submitted the report of the ICE doctor who examined Mr. Demjanjuk to the Sixth Circuit in response to that court's order. It did not submit the laboratory test results on which the medical report was based.

4/18/09 Hemoglobin 11.1 Dr. Steven Goliat, Quest Diagnostics Lab Report)

The government's own doctor recommended that during air transportation Mr. Demjanjuk be administered oxygen. *See* Tab 4, Medical Report of Dr. Quinones (submitted to the Sixth Circuit by the government pursuant to order of the Sixth Circuit).

A consequence of "Severe Spinal Stenosis" in the lumbar region is severe lower back pain and pain and weakness in the legs. The medical reports Mr. Demjanjuk submitted to the BIA and the Sixth Circuit contained this diagnosis and clearly indicated Mr. Demjanjuk we being treated for severe pain. The government's own medical examination showed that Mr. Demjanjuk was suffering from severe pain in the lower back. *See* Tab 4.

When the government's Opposition to Mr. Demjanjuk's Motion for Stay Pending Review in the Sixth Circuit called into question whether he was suffering severe pain, Mr. Demjanjuk presented with his Reply Brief the statement of Dr. Steven Goliat dated April 27, 2009. Dr. Goliat stated:

> John Demjanjuk Sr. suffers from severe lumbar spinal stenosis as evidenced on the recent MRI. This is a narrowing of the spinal canal with compression of the exiting nerves.
>
> He experiences low back pain with Right Lumbar Radiculopathy. His pain varies on a daily basis. He was prior on Ultram which was of no benefit. He recently was prescribed Percocet. In a younger person, we may try a nerve block, but due to his age it would not be recommended.

In addition, Mr. Demjanjuk submitted to the Sixth Circuit MRI images which showed the displacement of his vertebra which contributed to his "Severe Spinal Stenosis." *See* Tab 3, 6th Circuit Reply, Attachment E. By the time the Reply was filed, Mr. Demjanjuk also had the report of the government's own doctor who recommended that Mr. Demjanjuk be transported to an aircraft in an ambulance and that he travel in the aircraft with his seat reclined avoiding prolonged pressure on his right sacroiliac joint.

The medical evidence before the Sixth Circuit was conclusive that because of his Myelodysplastic Syndrome and resulting low red cell count and low hemoglobin count Mr. Demjanjuk is at risk of hypoxia when flying, and that as a result of his severe spinal stenosis he is in sufficient pain that he should be transported by ambulance and that he travel by air in a reclined state. The government's Medical Report (Tab 4) also expresses concern about blood clots forming during transportation and recommends continuation of pain management with Ultram during transportation. Moreover, the air transportation involved is not a short trip necessary to bring the patient to a medical facility for treatment, but a flight of approximately 10 hours on a Gulfstream 4 aircraft from Cleveland to Munich, Germany, a destination where he will be arrested and jailed. There is no way that the unnecessary pain experience can be undone or compensated if Mr. Demjanjuk ultimately prevails in his Petition for Review, and there is no way that the very real risk to his life can be undone or compensated. These considerations would provide solid grounds for a finding of irreparable injury under *Nken* even if Mr. Demjanjuk were younger and otherwise in good health. Where Mr. Demjanjuk is 89 years old and in poor health, failure to find irreparable injury is incomprehensible.

The Sixth Circuit stated that the government had represented that Mr. Demjanjuk will be transported on an aircraft equipped as a medical air ambulance and attended by medical personnel. The Sixth Circuit then held that it "cannot find that the petitioner's removal to Germany is likely to cause irreparable harm sufficient to warrant a stay of removal." Tab 1, Stay Denial at p. 3. With all respect, removing Mr. Demjanjuk by air ambulance may *mitigate* some of the immediate pain and risk involved in removal to Germany. It does not mitigate the totality of the irreparable injury that Mr. Demjanjuk will suffer from this action if he ultimately prevails in his Petition for Review.

B. Mr. Demjanjuk's medical condition ensures that he will experience severe pain and suffering in Germany.

Both the government and the Sixth Circuit seem to agree that Mr. Demjanjuk's medical condition is serious; it is sufficiently serious for the government to go to the expense and trouble of leasing an air ambulance to fly him from Cleveland to Munich, Germany, and for the Sixth Circuit to require this mode of transport to be used.

It is clear that Mr. Demjanjuk will be arrested by the German authorities when he arrives in Munich, incarcerated and likely will be put on trial.[6] This presents a second element pain and suffering that is irreparable. It is also the basis for the torture case that is argued in the next section of this Application. The Sixth Circuit stated that (Tab 1, Stay Decision at 3):

> The BIA found that the petitioner failed to submit sufficient evidence demonstrating that he will be subjected to torture in Germany. Before this court, the petitioner has not shown a strong or substantial likelihood of success on the merits of his challenge to this finding by the BIA or to the denial of his motion to reopen. At most he has offered speculation that the German authorities may not adequately attend to his medical needs while he is in that country's custody.

[6] Mr. Demjanjuk has only recently obtained documents showing the deep involvement of OSI in inducing the German authorities to issue the March 10, 2009 arrest order and their decision to accept his deportation. The dozens of pages of documents Mr. Demjanjuk has obtained are perhaps best summarized by a saccharine e-mail from Eli Rosenbaum, Director of the Office of Special Investigations, dated March 12, 2009, two days after the issuance of the arrest order, to Dr. Lutz, the Munich prosecutor in charge of the Demjanjuk case:

> All of us at the Office of Special Investigations send our congratulations, best wishes, and expressions of gratitude *(sic)* and admiration for your enormously important actions of this week in the Demjanjuk case.
>
> We stand ready to assist you, and we greatly look forward to the visit to Washington beginning on April 1.
>
> Sincerely,
>
> Eli Rosenbaum

This is eerily reminiscent of the early 1980's efforts of OSI that ultimately persuaded the Israeli authorities to seek Mr. Demjanjuk's extradition and trial as Ivan the Terrible of Treblinka.

Torture under the regulations (8 CFR 1208.18) consists of intentionally subjecting a person to severe pain and suffering for the purpose, *inter alia*, of punishing him for crimes of which he is convicted or suspected, and doing so with official approval or acquiescence. The pieces of the definition have to be parsed and the facts examined against the specific requirements. In this section, we will look only at the "severe pain and suffering" issue. Did John Demjanjuk establish to the requisite degree of certainty that he will be subjected to severe pain and suffering in Germany? If he did, it is relevant both to his irreparable injury claim and to his claim that he is likely to succeed on the merits.

First, we need to clear away any notion that, as far as severe pain and suffering is concerned, all men are equal. They plainly are not. The treatment afforded to members of any NFL backfield on a Sunday afternoon in October would plainly inflict very severe pain and suffering on most other men in the society. The torturer, like the tortfeasor, takes his victim as he finds him.[7] 89 year old men, especially when they have medical problems such as Severe Spinal Stenosis, are particularly vulnerable. Treatment that might not cause much pain at all to younger men or to older men not suffering from their medical problems can cause severe pain and suffering.

Second, we need to clear away the government's (and ultimately the Sixth Circuit's) naïve reliance on the proposition that the German authorities will comply with their laws and not subject someone to incarceration and trial if he is unable to withstand the ordeal or to assist in his own defense. As Mr. Demjanjuk pointed out to the BIA and the Sixth Circuit, our best measure of how the <u>German authorities</u> will treat Mr. Demjanjuk is to look at how the <u>United States</u>

[7] An excellent illustration of this point in a "torture" context occurred in the 1961 film "The Guns of Navarone" when the German SS officer simply lays his pistol on Major Franklin's (Anthony Quayle) shattered knee causing excruciating pain with the object of making the major talk.

authorities have treated him.[8] By that measure, Mr. Demjanjuk's concerns are not "speculation" but are rational fears based on hard experience.

(i) ICE did not conduct a physical examination of Mr. Demjanjuk to determine his fitness to travel to Munich until Mr. Demjanjuk's April 1, 2009 request for an administrative stay on medical grounds.[9]

(ii) ICE intended to use a Gulfstream IV owned by the Federal Aviation Administration to transport Mr. Demjanjuk to Munich on April 5, notwithstanding the clear statement in the medical report of its own doctor that Mr. Demjanjuk would need supportive oxygen and other palliative treatment during transportation not available on such an aircraft.

(iii) ICE ignored the April 3 advice of its own doctor who examined Mr. Demjanjuk that he be transported in an ambulance, presumably manned by trained emergency medical technicians experienced in moving sick and injured patients. Instead, on April 14 ICE attempted to move him in a wheel chair, *dropping him in the process* when they failed to secure the wheelchair. *See* Tab 3, Demjanjuk Reply, Attachment F, Nishnic Declaration, and Video No. 2.

Notwithstanding the government's own callous and uncaring treatment of Mr. Demjanjuk, it went on to assure the Sixth Circuit that the German authorities will provide "appropriate medical care." The issue is not what is supposed to happen, but what practical real world experience tells us does happen. The same government that assured the Sixth Circuit that Mr. Demjanjuk would receive "appropriate medical care" in Germany, notwithstanding his age, his serious medical conditions, his need for pain killers and his need for weekly shots of Procrit to control the Myelodysplastic Syndrom, ***terminated*** Mr. Demjanjuk's Medicare coverage several months ago. Neither the government nor the Sixth Circuit explained why the German government would provide to Mr. Demjanjuk the "appropriate medical care" that the United States government itself specifically and intentionally withdrew from him.

[8] To date in this proceeding, the government has not contended that the German authorities are more likely to comply with their rules and to act compassionately than the United States authorities.

[9] The government can hardly contend that it was unaware of the medical issues involved in transporting Mr. Demjanjuk. A simple reference to his age would have been enough. In fact, ICE agents attached a GPS ankle bracelet to Mr. Demjanjuk in early March and could clearly see his condition.

There is no evidence that the German authorities are any more competent or compassionate than the equivalent United States authorities and, other than the government's assurance that the German authorities would provide Mr. Demjanjuk the "appropriate medical care" it sought to deprive him of, the government has made no contention that such is the case. Thus, Mr. Demjanjuk contends that the treatment afforded him by the United States authorities is a reasonable proxy for the treatment he can expect to receive in Germany. The treatment he has received from ICE has caused him extreme pain and suffering and ICE has exhibited a calculated indifference to the needs of a person in Mr. Demjanjuk's condition--taking necessary and appropriate measures to address his unique situation only when its failure to do so has been exposed in litigation.

The Sixth Circuit concluded that, "At most, he has offered speculation that German authorities may not adequately attend to his medical needs while he is in that country's custody." The Sixth Circuit's standard is impossibly high and reflects the requirements of 8 U.S.C. 1252(f)(2), not the traditional stay requirements called for by this Court in *Nkem.* Mr. Demjanjuk presented evidence to the BIA and the Sixth Circuit clearly showing that the treatment afforded him by the United States authorities caused him severe pain and suffering, and contended that the German authorities would treat him in a similar manner. It is the government and the Sixth Circuit that base their conclusions on a naïve and speculative view that what is *supposed* to happen in Germany will in fact happen, notwithstanding the hard contrary evidence of the actual conduct of the United States authorities.

The Sixth Circuit applied in fact an incorrect standard in assessing the risk of irreparable injury to Mr. Demjanjuk, a standard inconsistent with this Court's requirements in *Nken.*

2. Probability of success on the merits

This Court has held that in a removal case a person seeking a stay of removal has to make a showing of probability of success on the merits. That showing must be more than a showing that probability of success is "better than negligible" and "more than a mere possibility of relief" must be shown. *Nken* at *11. Once again, the Sixth Circuit articulated the *Nken* standard, but for the purposes of a stay, in fact required a showing more consistent with 8 U.S.C. 1252(f)(2).

The evidence presented to the BIA and to the Sixth Circuit showed with little doubt that Mr. Demjanjuk was likely to undergo severe pain and suffering in Germany. *See* discussion in the "irreparable injury" section above. Mr. Demjanjuk's fear is not "speculative" as the Sixth Circuit suggested, but is based solidly on the treatment afforded to him by the ICE authorities.[10] In the absence of solid evidence (or even a government contention) that the German authorities are likely to be more competent and compassionate in handling a person in Mr. Demjanjuk's condition than the United States authorities, the treatment afforded him by the ICE agents and the United States government is a good proxy for the type of treatment he will *in fact* be afforded in Germany. That treatment will inevitably cause him severe pain and suffering, just as it has in the United States. It is the BIA and the Sixth Circuit that engage in "speculation" when they dismiss Mr. Demjanjuk's argument based solidly on actual administrative conduct in the United States and rely on the German authorities complying with unproven German rules.[11]

[10] Video No. 2 filed with the Sixth Circuit and with this Application clearly demonstrates the insensitivity of the authorities. Contrary to the recommendations of their own doctor who had examined Mr. Demjanjuk they refused to use an ambulance to move Mr. Demjanjuk, instead they used a van and wheel chair and in the process dropped Mr. Demjanjuk to the floor (*see* Video No. 2 and the Declaration of Edward Nishnic, Tab 3, Reply at Attachment F). They have provided proper treatment only when compelled to do so by litigation or the threat of litigation.

[11] As Mr. Demjanjuk argued to the BIA, (Tab 2 Attachment A,

There is also a "purpose" and an "intent" requirement in the regulations defining torture. The purpose and intent of the German authorities obviously must be inferred by the BIA from the surrounding circumstances. The German authorities are scarcely going to announce to the press that they have decided to arrest Mr. Demjanjuk, throw him in jail and force him to stand trial in order to subject him to severe pain and suffering, and that, by the way, they are doing this in order to be seen to be punishing him because they think he worked for the German authorities in 1942 and 1943 at a German death camp. The BIA could and should have drawn reasonable inferences regarding German intentions from several facts. In fact, the BIA never addressed Mr. Demjanjuk's argument regarding the purpose and intent of the German authorities.

In its Opposition filed in the Immigration Court on April 3, the government argued (Government Opposition p.10) (emphasis added):

> Any argument that Demjanjuk wishes to make about capacity to stand trial is properly made to the German authorities after arrival in Germany. German courts have the authority to dismiss prosecutions on health grounds. Indeed, in Nazi cases, such outcomes have been commonplace in Germany for many decades. [citation omitted]

Accepting the truth of the government's contention in the underscored language, the BIA should have asked itself why the German authorities are now seeking to accept *deportation* of Mr. Demjanjuk, an 89 year old man who is obviously in poor health. Even a casual review of Video No. 1 (which was before the BIA) must raise serious doubts about Mr. Demjanjuk's ability to withstand a trial. If Mr. Demjanjuk cannot withstand the rigors of a trial (and the *innuendo* in the Government's statement above is that a generous standard has historically been applied in Germany to so-called "Nazi cases"), why does the German government now want to bring him to Germany where he is likely ultimately to be found unable to stand trial and then to become a ward of the German taxpayer? Why has the German government not availed itself of

the opportunity to have a German official doctor conduct a medical examination to determine whether Mr. Demjanjuk is capable of standing trial in Germany *before* it accepts his deportation.[12] Because the motives of the German authorities are at issue in deciding whether their actions will amount to torture, the BIA's failure to address those motives is a major error in its decision. The Sixth Circuit similarly failed to address the issue.

There were two possible logical conclusions that the BIA could have drawn from these facts. The first is that the German government simply wants to relieve the United States of the burden of supporting a sick, 89 year old man who has no connection with Germany other than that he was seriously injured fighting the Germans in 1941, taken prisoner by them in 1942, and is alleged to have worked for the German authorities in 1942 - 1945. Under this analysis, the German authorities will: (i) apply what the government views as their generous standard to determine whether Mr. Demjanjuk is capable of standing trial, (ii) find him incapable of doing so, and (iii) turn the burden of supporting Mr. Demjanjuk for the rest of his life over to the German taxpayer. Mr. Demjanjuk suggested to the BIA that such an analysis, while consistent with the facts established before the BIA, would be fanciful. The BIA did not address the issue.

The other conclusion that the BIA could have drawn from the facts is that the German authorities do not care whether Mr. Demjanjuk is ultimately convicted or acquitted or even whether he is actually brought to trial. The German authorities want to bring him to Germany, arrest him, incarcerate him and, if possible, bring him to trial in order to be seen to be *punishing* Mr. Demjanjuk, at least to the extent of subjecting him to the severe physical and mental pain that pre-trial incarceration and a trial and separation from his family will cause. While a medical

[12] Both Mr. Demjanjuk's German counsel and his United States counsel have made it clear to the German authorities that Mr. Demjanjuk is available for a medical exam by the German authorities at any time, either at his home or at a suitable Cleveland hospital. The German authorities have not responded to the offer.

exam at some point before trial may well result in the dismissal of the case (at least if the *innuendo* in the government's statement about prior German practice in this respect is correct and holds true in this case), for many months and perhaps years Mr. Demjanjuk would be subjected to the severe physical and mental pain of incarceration and the German authorities would be viewed favorably in some quarters for "punishing" him for his alleged crimes. The BIA could fairly have concluded from the facts that the German authorities have both the purpose (punishment) and the specific intent to inflict severe physical and mental pain on Mr. Demjanjuk for that purpose. The BIA did not address the issue.

Mr. Demjanjuk argued to the Sixth Circuit (Tab 2, Motion for Stay Pending Review at 22-26) that in light of the unsavory political history of this case (which the Sixth Circuit explored in part in *Demjanjuk v. Petrovsky*, 10 F.3d 338, 354 (6th Cir. 1993)) both the BIA and the Sixth Circuit should be alert to the plain political motivations of the various actors. The same actors who brought political pressure on the Israeli government to extradite Mr. Demjanjuk and try him for murder, are now at work to bring political pressure on the German government to do likewise. *See* Tab 2, Motion for Stay Pending Review, at p.25 n.13.

On April 30, 2009, the day before the Sixth Circuit denied Mr. Demjanjuk's Motion for Stay Pending Review, Mr. Demjanjuk obtained a number of documents which illustrated the deep involvement of the OSI in procuring the German arrest order. Mr. Demjanjuk has not yet had the opportunity to analyze them (many of them are in German and require translation for careful analysis) but it is clear that OSI and its Director Eli Rosenbaum were deeply and actively involved in pressing the German authorities to begin a prosecution of Mr. Demjanjuk and to accept his deportation. Those documents, which were obtained from the German prosecutor's files, are attached hereto at Tab 5.

The evidence that the actions of the German authorities are politically motivated and not driven by ordinary prosecutorial considerations (including the health and age of the defendant) is substantial and was entirely ignored by the Sixth Circuit in its finding regarding probability of success on the merits.[13]

3. Harm to other parties and the public interest

The Sixth Circuit did not address the two factors of harm to other parties and the public interest. Mr. Demjanjuk assumes that the Sixth Circuit agreed with his contention that he presents no threat to the United States and that there is a public interest in not subjecting people to torture that counsels an orderly review of claims such as that of Mr. Demjanjuk.

CONCLUSION

For the reasons set forth above, Mr. Demjanjuk respectfully requests that the Court enter a stay of Mr. Demjanjuk's removal to permit him adequate time to prepare and file appropriate petitions for a writ of certiorari, for an original writ of mandamus, and/or a petition for and original writ of habeas corpus, not less than the 90 days permitted by 28 USC 2101(c) for filing a petition for a writ of certiorari.[14]

Alternatively, the Court should enter an order directing the Sixth Circuit to stay Mr. Demjanjuk's removal pending its decision on the petition for review now pending before the Sixth Circuit in Sixth Circuit Case No. 09-3469.

Respectfully submitted,

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[13] Mr. Demjanjuk does not fault the Sixth Circuit for not taking into consideration documents that were not placed before it. Similarly, Mr. Demjanjuk cannot be faulted for not presenting to the Sixth Circuit documents that he did not obtain until the day before the Sixth Circuit denied his Motion for Stay Pending Review.

[14] Counsel for Mr. Demjanjuk is a sole practitioner with other clients. The month of April has been almost entirely consumed with work on this *pro bono* case. The full 90 days for preparation of a petition for writ of certiorari is essential in light of the counsel's other commitments.

JOHN DEMJANJUK

By:_____
One of his attorneys

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