



SETTING THE RECORD STRAIGHT ON THE DEFENSE OF JOHN DEMJANJUK; Points of View; Opinion and Commentary; In Rebuttal

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Body

Points of View

Opinion and Commentary

In Rebuttal

All of Monroe Freedman's statements about me in this newspaper are wrong, except two: We are--or were--old friends. And I do represent John Demjanjuk.

Until today, I thought that a responsible legal newspaper would not publish personal attacks on lawyers without making some effort to check the facts. Professor Freedman's commentary accuses me of violating legal ethics and of being faithless to my own principles by arguing that John Demjanjuk be allowed to return to this country and that the federal court decisions involving him be vacated [Must You Be the Devil's Advocate? Aug. 23, **1993**, Page 19]. The commentary is false and defamatory as to both me and Mr. Demjanjuk. A single telephone call from **Legal Times** would have established that its facts and imputations are false.

Professor Freedman is wrong about the Israeli Supreme Court decision and about the American judicial decisions that caused Demjanjuk to linger in a death cell for years, for a crime he did not commit.

John Demjanjuk was extradited to Israel to stand trial as Ivan the Terrible of Treblinka, one of the worst mass murderers of the Holocaust. It turned out that crucial exculpatory evidence--that someone named Ivan Marchenko, not Demjanjuk, was Ivan the Terrible--was withheld from the defense. That evidence was not an alibi; it had to do with tragically mistaken identification and the U.S. government's failure to live up to its obligations of candor to its adversary and to the courts.

Freedman is wrong about what the Israeli Supreme Court did once it found doubt that Demjanjuk was Ivan. That court did not, as Freedman asserts, hold that Demjanjuk was guilty of other crimes. The Israeli court did consider whether Demjanjuk should be convicted as having served at other Nazi death camps, but found that Demjanjuk never had a fair opportunity to rebut evidence of service at other camps.

In 1981, a U.S. district judge found that Demjanjuk should be denaturalized. The judge found that Demjanjuk was Ivan the Terrible, a decision that is now universally conceded to have been wrong. There is powerful evidence that government lawyers suppressed evidence that would have shown that decision to have been wrong when made.

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The U.S. judge also considered the question of whether Demjanjuk served at other camps. The judge found that, since Demjanjuk was Ivan and denied being Ivan, he probably should not be believed when he denied other culpable conduct at other camps. Thus, the judge's decision, now argued by the government as barring judicial review of Demjanjuk's right to enter the United States, was taken in the shadow of these now-discredited allegations.

Those are the facts. I represent Mr. Demjanjuk **pro bono**, along with the federal public defender, in an American judicial proceeding. The proceeding will, we hope, vacate earlier judgments against Demjanjuk and leave the government free--if it wishes--to bring and try fairly its allegations that John Demjanjuk served at death camps. If, as Professor Freedman says, there is evidence of such service, which Mr. Demjanjuk has denied, my client is entitled to a fair trial where that evidence can be tested.

I am mindful of the limitations on my rights, as counsel, to use public media to air my views. Here is some of what the record shows:

John Demjanjuk has lived for more than 16 years under the cloud of government allegations that he was Ivan the Terrible. Since at least 1978, the government has had solid evidence that these charges were false. In 1980, a government lawyer on the case wrote a memo saying that the case should not be pursued. The government failed to turn over the exculpatory material. Its lawyers violated their obligations to their adversary and to the judicial system. As a result, Demjanjuk was sentenced to death for a crime he did not commit. Whether the government's lawyers fraudulently committed misconduct was argued to the U.S. Court of Appeals for the 6th Circuit on Sept. 3. The briefs and record are there for anyone to read. My argument on that score is being made in court, not in the media.

As I write, the Israeli Supreme Court is considering its next step. Under international law, its duty to release Mr. Demjanjuk is clear.

We must remember the Holocaust, and we should pursue and punish its perpetrators. We dishonor that memory and besmirch the pursuit if we fail to accord those accused of Holocaust crimes the same measure of legality and due process that we would give to anyone accused of wrongdoing. Precisely because a charge of culpable participation in the Holocaust is so damning, the method of judging whether such a charge is true should be above reproach.

Standing Up

So much for the factual difficulties in which Professor Freedman finds himself. Let us turn to his analysis of the ethical issues.

Professor Freedman begins by lauding a major law firm for refusing a court appointment to represent an unpopular indigent defendant. The firm doesn't like the client, doesn't like the fact that he is accused of a heinous crime, and is afraid that its other clients will object. OK, says Freedman, those are good reasons for the law firm to refuse.

Let us all hurry to the library, and rewrite **To Kill a Mockingbird**. Atticus Finch is not a hero after all. He should have thought more of maintaining his law practice and refused to represent someone charged with a heinous--and possibly racially motivated--crime. Clarence Darrow should have stayed with the railroad, instead of taking on those Commie unionists as clients. The lawyers who lost their licenses for daring to represent the colonial newspaper editor John Peter Zenger for the heinous crime of seditious libel were chumps. And John Hancock, that notorious tax evader, had no right to have John Adams as his counsel.

Maybe Sullivan & Cromwell has the right to refuse a court appointment, and maybe it should have that right. I have represented plenty of unpopular folks in my 25 years at the bar and have always stood up to the task of telling my paying clients that they just have to understand a lawyer's responsibility in such matters, or they should take their business elsewhere.

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One Man's Conscience

From praise of Sullivan & Cromwell, Professor Freedman then makes a giant leap. He invents a new rule of legal ethics. Based on the supposed right to refuse a court appointment, we are told that every lawyer must bear a burden of public justification for representing someone accused of odious crimes. There is no rule of professional responsibility that so provides, and several rules cut directly against his assertions.

If Atticus Finch decides to represent an indigent defendant, Freedman will require him not only to incur the obloquy of his friends and clients, but to undertake a public defense of his ethical right to accept the case.

To put lawyers under such a burden of public justification undermines the right to representation of unpopular defendants. It invites the kind of demagoguery that we are now seeing in the attacks on lawyers for defendants in capital cases. It even invites the kinds of unwarranted attacks on zealous advocacy that have often been directed--and quite unjustly--at Professor Freedman.

I undertook the **pro bono** representation of John Demjanjuk in the 6th Circuit after a thorough review of the facts and law. I can no more be under a duty to make a public accounting of why I took this case than I can be under a duty to open up the files of all my cases to public view.

An Insulting Question

Professor Freedman does not end matters by inventing a pernicious rule. He also claims to remember what he calls a debate of 25 years ago. We did, in fact, meet on a stage at the George Washington University law school some 23 years ago. I did not make the statement he attributes to me.

I did say then, and still believe, that lawyers have a responsibility to their own conscience for the kinds of clients they choose to represent and the positions they choose to advance. The lawyers who have upheld that principle, from Sir Thomas More to Lord Brougham to Clarence Darrow, are rightly celebrated.

Having misquoted me, Freedman (who is still at this point in his diatribe calling me his friend) wonders why I would choose to use my talent for John Demjanjuk, instead of letting some other lawyer do it. I am not sure what alternative scenario he sees being played out here. Maybe he thinks I should represent some of Sullivan & Cromwell's clients instead.

I have answered that question for myself, and it is insulting for Professor Freedman to suggest that I am faithless to my principles. When the most powerful country on earth gangs up on an individual citizen, falsely accuses him of being the most heinous mass murderer of the Holocaust, and systematically withholds evidence that would prove him guiltless of that charge, there is something dramatically wrong. When that man is held in the most degrading conditions in a death cell based on those false accusations, the wrong is intensified. When the government that did wrong denies all accountability, the judicial branch should provide a remedy. I have spent a good many years of my professional life litigating such issues. I am proud to be doing so again.

See Correction, Page 2. Monroe Freedman will elaborate on the issues in his Cases and Controversies column of Sept. 20.

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