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The Sixth Circuit's Unprecedented Reopening of Demjanjuk v. Petrovsky

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THE SIXTH CIRCUIT'S UNPRECEDENTED REOPENING OF
DEMJANJUK v. PETROVSKY

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I. INTRODUCTION

The legal odyssey of John Demjanjuk began in 1977 when the Department
of Justice initiated denaturalization proceedings based on allegations that
Demjanjuk had illegally secured United States citizenship by concealing his
service with the German S.S.1 Following entry of denaturalization and
extradition orders in the United States District Court for the Northern District
of Ohio, Demjanjuk was extradited to Israel where he was convicted of war
crimes that occurred at Nazi death camps.2 In 1992, while Demjanjuk was in
Israel awaiting the appeal of his conviction, the United States Court of Appeals
for the Sixth Circuit took the unprecedented step of re-opening a prior habeas


proceeding.3 Six years earlier the Sixth Circuit had affirmed the district court's denial of Demjanjuk's petition for habeas relief from the extradition order.4

Reopening the case has been described as an "extraordinary step"5 and an "unprecedented move that raised eyebrows in the legal community."6 A commentary published in the Wall Street Journal, described the court's action as "lawless", "unprecedented and overreaching."

The United States Department of Justice maintained that the Sixth Circuit lacked jurisdiction to reopen the habeas corpus proceeding.8 Petitions were filed by two Justice Department attorneys requesting the United States Supreme Court to issue a writ of mandamus directing the Sixth Circuit to cease proceedings9 or to take a more appropriate course of action.10 In light of the criticism that the Sixth Circuit has received, this note will examine the authority of the court to reopen the Demjanjuk case in June, 1992.

The note will begin by outlining the legal history of the Demjanjuk case, culminating in the decision of the Sixth Circuit to reopen the habeas corpus action in response to the court's concern that Justice Department attorneys

6Myers, supra note 2, at 31.
9Moscowitz v. Merritt, No. 92-1447 (U.S. Mar. 2, 1993)(petition for a writ of prohibition or mandamus). Norman A. Moscowitz was an attorney in the Office of Special Investigations, a unit within the Department of Justice, and represented the government in Demjanjuk's denaturalization proceedings. The questions presented in the petition for the writ of mandamus included: whether the Sixth Circuit had jurisdiction to reopen the extradition after Demjanjuk had been extradited to Israel, whether the Sixth Circuit abused its judicial power by failing to remand the proceeding to the district court, whether the Sixth Circuit improperly delegated the proceedings to a Special Master and whether the allegations of non-disclosure met the legal standard for fraud upon the court. On May 25, 1993, the Supreme Court denied review without comment.
10Parker v. Merritt, No. 92-1350 (U.S. Feb. 1, 1993)(petition for a writ of prohibition or mandamus). George L. Parker was an attorney in the Office of Special Investigations and worked on the Demjanjuk case prior to the denaturalization trial. The questions presented in Parker's petition for writ of mandamus were whether the appointment of a Special Master in the reopening of Demjanjuk v. Petrovsky was an inappropriate exercise of the inherent power of the Sixth Circuit and whether the Sixth Circuit should have remanded the case to the United States District Court for the Northern District of Ohio where the underlying proceedings had been heard. The Supreme Court denied review on May 25, 1993.
failed to disclose relevant information during earlier proceedings. Parts III and IV of the note discuss why the authorities cited by the Sixth Circuit, Federal Rule of Appellate Procedure 40 and Federal Rule of Civil Procedure 60(b)(6), did not give the appellate court authority to reopen the Demjanjuk habeas corpus proceeding in 1992. Part V addresses the scope of a federal court’s inherent power, and this note concludes that the acts of the Justice Department attorneys did not warrant the court’s reopening of the case under its inherent power to protect the court from fraud.

II. LEGAL HISTORY OF THE DEMJANJUK CASE

John Demjanjuk, a native of the Ukraine, entered the United States in 1952 under the Displaced Persons Act of 1948 and became a United States citizen in 1958. In 1977, the Department of Justice filed a complaint in the United States District Court for the Northern District of Ohio seeking to revoke Demjanjuk’s certificate of naturalization. After entering extensive findings of fact, the district court revoked Demjanjuk’s naturalization in 1981 and vacated the order admitting him to United States citizenship. On October 31, 1983, Israel filed a request with the U.S. State Department for Demjanjuk’s extradition to face charges of murder at Nazi death camps. Following an evidentiary hearing, the District Court for the Northern District of Ohio entered an order in 1985 certifying that Demjanjuk was subject to extradition.

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13 Demjanjuk, 518 F. Supp. at 1386. The court found that Demjanjuk made material misrepresentations on his visa application by failing to disclose that he served in the German SS at Trawniki, a camp run by the German SS in order to train guards for work at concentration camps, and at Treblinka, an extermination camp. Id. at 1381-82. A person who had served as a concentration camp guard could not obtain a U.S. visa, even if the service was involuntary. Id. at 1381. Demjanjuk, a Ukrainian, was conscripted into the Russian army in 1940; he was subsequently captured by the Germans. Id. at 1363-64. Russian P.O.W.s were used by the Germans to staff concentration camps. Id. at 1365.


15 In re Extradition of Demjanjuk, 612 F. Supp. at 571. The extradition warrant from the State of Israel charged Demjanjuk with the crime of murdering Jews under the Nazis and Nazis Collaborators Law of Israel. Id. at 546. The district court examined eyewitness affidavits of Treblinka concentration camp survivors who identified John Demjanjuk from photographs as a guard at the camp. The court found that the eyewitness testimony of the survivors was sufficient to establish probable cause that John Demjanjuk was the man sought by Israel in its extradition warrant. Id. at 552.
There is no direct appeal from an order certifying extradition; the only means to obtain a review is through a collateral habeas corpus proceeding. Demjanjuk filed a petition for a writ of habeas corpus in the district court seeking to block his extradition. The district court denied the writ. In 1985, the U.S. Court of Appeals for the Sixth Circuit (panel consisting of Judges Pierce Lively, Damon J. Keith and Gilbert S. Merritt), in Demjanjuk v. Petrovsky, affirmed denial of the writ of habeas corpus, holding that the district court properly certified to the Secretary of State that Demjanjuk was subject to extradition to Israel. The Supreme Court denied certiorari.

The United States extradited John Demjanjuk to Israel in February, 1986. In April 1988, an Israeli Court found Demjanjuk guilty of war crimes, concluding that Demjanjuk was the Nazi gas chamber operator, Ivan the Terrible. Demjanjuk appealed this conviction, which carried a death sentence, to the Supreme Court of Israel. On April 8, 1988, Demjanjuk filed an action in the U.S. District Court for the Northern District of Ohio requesting relief from previous judgments on the basis that the United States had fraudulently withheld evidence during the previous proceedings.

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18 Demjanjuk, 776 F.2d at 584.


21 Demjanjuk v. United States, No. 88-0864 (N.D. Ohio Apr. 8, 1988)(complaint for declaratory judgment and injunctive relief). Cases are assigned randomly in this district court and the case was not assigned to the Judge who had heard the denaturalization and extradition cases. The complaint filed by Demjanjuk alleged that the United States had evidence indicating that Demjanjuk was not Ivan the Terrible prior to 1981 and that the United States withheld this evidence with the intent of preventing Demjanjuk from formulating a defense. Id. at 7, 8. The complaint states that these acts and others denied Demjanjuk his right to due process under the U.S. Constitution. Id. at 29.

The Justice Department filed a motion to dismiss and no action was taken by the court until January 28, 1992 when the case was referred to a magistrate judge for recommendation for disposition. A pre-trial conference was held on March 24, 1992. On June 24, 1992 Demjanjuk filed a motion to stay proceedings in the case pending the appellate decision in Demjanjuk v. Petrovsky which had been reopened by the Sixth Circuit on June 5, 1992. See Civil Docket for Case #88-CV-864, United States District Court for the Northern District of Ohio (Filed April 8, 1988). Following a joint motion
While Mr. Demjanjuk was in Israel awaiting the Israeli Supreme Court's review of his conviction, new evidence from the rapidly disintegrating Soviet Union began to surface that suggested that another Ukrainian, Ivan Marchenko, may have been the notorious Ivan at the Treblinka death camp. With Mr. Demjanjuk extradited to Israel and his appeal being considered by the Supreme Court of Israel, the United States Court of Appeals for the Sixth Circuit issued its order of June 5, 1992, reopening, sua sponte, the case of Demjanjuk v. Petrovsky. The order was issued by the same panel of judges that heard the case in 1985. The order states:

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.

The Sixth Circuit ordered the United States to file a brief describing any evidence within its possession that would tend to show that John Demjanjuk was not "Ivan the Terrible" and to include a statement indicating when agents of the United States first learned of this evidence.

As authority for reopening the case, the Sixth Circuit cited Rule 40 of the Federal Rules of Appellate Procedure, which pertains to the rehearing of causes previously heard, and Rule 60(b)(6) of the Federal Rules of Civil Procedure, which pertains to relief from judgments previously entered. In a subsequent order entered on August 17, 1992, the court, responding to the Justice Department's assertion that the court lacked jurisdiction to reopen the case, stated it was proceeding under "its inherent power to grant relief, for 'after-discovered fraud' from an earlier judgment 'regardless of the term of [its] entry'."
III. AUTHORITY TO REOPEN AN APPELLATE MANDATE

A. Federal Rule of Appellate Procedure 40

The Sixth Circuit reopened the Demjanjuk habeas corpus proceeding on its own motion citing authority pursuant to Federal Rule of Appellate Procedure 40. Rule 40 states:

A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present.

The local rule of the Sixth Circuit does not modify the fourteen day time period.

The action taken by the Sixth Circuit does not fall within the parameters of Federal Rule of Appellate Procedure 40. A petition was not filed by a party; the court reopened the case on its own motion. Rather than fourteen days after entry of judgment, the Sixth Circuit acted six years after it had entered its judgment. The impetus for the Sixth Circuit’s reopening of the case was not that the court had overlooked or misapprehended law or fact, but that the court


Federal Rule of Appellate Procedure 21(c) provides for the use of extraordinary writs by the appellate courts. The notes of the advisory committee state that subdivision (c) authorizes the use of the writs "which may be issued under the authority of 28 U.S.C. § 1651." "The All Writs Act is a residual source of authority to issue writs which are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling". Pennsylvania Bureau of Correction v. United States Marshall Serv., 474 U.S. 34, 43 (1985).

Federal Rule of Civil Procedure 60 abolishes the writs pertaining to relief from a final judgment. The advisory notes to Rule 60 state that "It is obvious that the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments." Thus the writs pertaining to relief from final judgment have been abolished by the civil rules, specifically Rule 60, and relief from a final judgment would not be available under authority of the All Writs Act, 28 U.S.C. § 1651. Although the All Writs Act "empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." Pennsylvania Bureau of Correction, 474 U.S. at 43.


30 "A petition must be filed within (14) days of the date of the opinion." Internal Operating Procedures of the United States Court of Appeals for the Sixth Circuit, Chapter 20.1 (1991).
was concerned that a party had withheld evidence.³¹ Further, the mandate of the court in Demjanjuk v. Petrovsky issued in 1985.³² The issuance of the mandate formally ended the jurisdiction of the appellate court.³³

In considering a petition for rehearing submitted by a party, the Sixth Circuit required compliance with the fourteen day time period. In Libbey-Owens-Ford Co. v. Blue Cross, the court refused to consider a petition filed twelve days late, holding that failure to file within fourteen days makes a rehearing "impossible".³⁴ The court further stated that "[b]ecause the motion was filed in this case after the fourteen-day period, this court is divested of further appellate jurisdiction."³⁵ It is incongruous that the court would allow its own motion to rehear a case made six years after judgment had been entered, while invoking the fourteen day rule to prohibit rehearing a case where a party had filed its petition only twelve days late.

To be granted a rehearing, the petitioner must convince the court that it overlooked or misapprehended a point of law or fact.³⁶ The point overlooked must be one that is in the record; facts beyond the record cannot be introduced.³⁷ The Sixth Circuit has denied a petition for rehearing where the


³²A certified copy of the judgment and a copy of the opinion of the court constitute an appellate mandate. The mandate of the court is issued twenty-one days after the entry of judgment. A timely petition for rehearing will stay the mandate until decision on the petition is reached. If the petition is denied, the mandate will issue seven days after entry of the order denying the petition. The time for issuance of the mandate can be enlarged or shortened by order. FED. R. App. P. 41. Since a petition for rehearing was not granted and the time for filing was not extended, the appellate mandate in Demjanjuk v. Petrovsky issued within twenty-one days of the judgment in 1985.

³³See Johnson v. Bechtel Assocs. Professional Corp., 801 F.2d 412, 415 (D.C. Cir. 1986). Following issuance of the mandate, jurisdiction returns to the court to which the mandate is directed. Id. In Demjanjuk, jurisdiction returned to the District Court for the Northern District of Ohio.

³⁴Libbey-Owens-Ford Co. v. Blue Cross & Blue Shield Mut. of Ohio, 982 F.2d 1031, 1036 (6th Cir. 1993)(stating that failure to file a request for a rehearing within the fourteen day period makes "review of the decision impossible without prior leave of court"), cert. denied, 114 S. Ct. 72 (1993).

³⁵Id.

³⁶FED. R. App. P. 40. The operating rules of the Sixth Circuit state "[a] petition for rehearing is intended to bring to the attention of the panel claimed error of fact or law in the opinion." Internal Operating Procedures of the United States Court of Appeals for the Sixth Circuit, Chapter 20.2 (1991).

³⁷United States v. Vasquez, 985 F.2d 491, 497 (10th Cir. 1993); see also Foster v. MCI Telecommunications Corp., 773 F.2d 1116 (10th Cir. 1985)(rehearing is allowed where court finds petitioner properly pointed out that the court failed to address an issue legitimately raised in the briefs). But see Ruiz v. INS, 813 F.2d 283 (9th Cir. 1987)(holding that a new argument presented by the government fell within the exception to the rule prohibiting the hearing of new arguments on a petition for rehearing); United States v. Byers, 740 F.2d 1104 (D.C. 1984)(holding that a new issue can be considered on rehearing.
court found that the issues raised in the petition for rehearing had been fully considered, but granting rehearing where the petitioner convinced the court that it may have ignored relevant issues brought up during the trial. In reopening Demjanjuk, the Sixth Circuit did not consider whether it misapprehended a point of law or fact raised in the record. Instead, the court's decision to reopen the case resulted from the court's consideration of information outside the record that came to its attention six years after it had issued its mandate. The Sixth Circuit cited to authority for reopening Demjanjuk under Rule 40; however, this rule does not apply in the circumstances surrounding Demjanjuk because the requirements of filing a petition within fourteen days and the misapprehension by the court of law or facts in the record were not satisfied.

B. Recall of an Appellate Mandate

Although Federal Rule of Appellate Procedure 40 does not apply to the circumstances of Demjanjuk, the court may have relied on the rule because it is the only appellate rule that pertains to the reconsideration of a case. Expanding their authority beyond the appellate rules, circuit courts have developed a common law doctrine allowing for the recall of an appellate mandate. "[C]ourts of appeals have asserted the power (analogous to that conferred on the district courts by Fed. R. Civ. P. 60(b)) to recall a mandate, in effect reopening the case, without limit of time, although only in exceptional circumstances." The appellate courts have asserted the power to recall an appellate mandate in order to fill in a perceived gap in the federal rules. The exercise of the power to recall an appellate mandate is at the discretion of the court.

where an intervening Supreme Court decision makes the previously untenable issue a plausible one.

38Plaut v. Spendthrift Farm, 11 F.3d 572 (6th Cir. 1993).

39Coal Resources, Inc. v. Gulf & Western Indus., Inc., 756 F.2d 443, 445 (6th Cir. 1985). In a breach of contract case, the court granted a petition for rehearing where the party argued that the panel ignored a stipulation at trial regarding the burden of proof.

40Demjanjuk v. Petrovsky, No. 85-3435 (6th Cir. June 5, 1992)(reopening case on motion of the court), reprinted in 10 F.3d 338, 356 app. (6th Cir. 1993). The court refers to "numerous recent press reports and articles in the United States" that indicate that the extradition warrant for Demjanjuk was "improvidently issued because it was based on erroneous information." Id. at 357.

41Patterson v. Crabb, 904 F.2d 1179, 1180 (7th Cir. 1990)(citing Johnson v. Bechtel Assocs. Professional Corp., 801 F.2d 412, 446 (D.C. Cir. 1986)(per curiam); see also Zipfel v. Halliburton Co., 861 F.2d 565, 567 (9th Cir. 1988), vacating 832 F.2d 1477 (9th Cir. 1987) (vacating the decision after a recall of the first appellate mandate); American Iron & Steel Inst. v. EPA, 560 F.2d 589, 593-595 (3d Cir. 1977)(holding that appellate mandate could be recalled where there were differences between the court's decision and a recent opinion of the Supreme Court), cert. denied, 435 U.S. 914 (1978).

42Patterson, 904 F.2d at 1180 (citing to United States v. Torres, 751 F.2d 875, 878 (7th Cir. 1984)). In Patterson, the appellant never obtained a hearing on his appeal due to
Two circumstances in which appellate mandates have been recalled are when a Supreme Court decision has changed the controlling law or when the appellate court has made a clerical or procedural error. The Ninth Circuit in *Zipfel v. Halliburton* recalled its appellate mandate when a subsequent Supreme Court decision had significantly differed from the holding of the appellate court so that adherence to the appellate decision would be unjust and create diverse results between litigants. The Seventh Circuit has recalled a mandate in a case of judicial error because the court denied an appeal on the mistaken belief that the lower court had not entered a final judgment. The Sixth Circuit recalled a mandate when the court erred in enforcing a bargaining order on the basis that an employee engaged in labor organizing had been wrongfully discharged, when, however, the appellate court had actually overturned the finding of wrongful discharge.

The District of Columbia Circuit in *Greater Boston Television Corp. v. FCC* analyzed the power to recall an appellate mandate, stating that the clearest reason to recall an appellate mandate is to correct clerical mistakes. Of relevance to the Demjanjuk case, the court in *Greater Boston* cited the "firmly established" doctrine that gives a court the power to set aside an appellate mandate for fraud on the court. Although an appellate court can reopen a case for fraud on the court, this occurs only in the limited circumstances in which the court itself has been defrauded, which will be discussed in Section V.

Federal appellate courts have recognized that the recall of an appellate mandate is an exceptional remedy that should be limited. "If justice is to be served, there must at some point be an end to litigation; on that account, the power to recall mandates should be exercised sparingly." The court in *Greater Boston* states:

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43 *Zipfel*, 861 F.2d at 567.
44 *Zipfel*, 861 F.2d 565 (9th Cir. 1988).
45 *Zipfel*, 861 F.2d at 567.
46 *Patterson v. Crabb*, 904 F.2d 1179 (7th Cir. 1990).
47 *A to Z Portion Meats v. NLRB*, 643 F.2d 390, 391 (6th Cir. 1980).
48 *463 F.2d 268, 277-78 (D.C. Cir. 1971), cert. denied, 406 U.S. 950 (1972)*. The court stated that since the Federal Rules of Appellate Procedure do not include a provision pertaining to the recall of an appellate mandate, the court would have to look to general doctrine. *Id.* The court then surveyed cases that have recalled an appellate mandate. In addition to the reasons cited in the text, appellate mandates have been recalled to avoid differences in results of cases pending at the same time and to revise an unintended instruction to the trial court that would result in injustice. *Id.* at 278, 279.
49 *Id.* at 277.
While there is a doctrine for recall of mandate broadly rooted in a showing of "good cause" and the need to "prevent injustice", the "power to recall mandates should be exercised sparingly" and is not to be availed of freely as a basis for granting rehearings out of time for the purpose of changing decisions even assuming the court becomes doubtful of the wisdom of the decision that has been entered and become final.51

Courts are reluctant to use the extraordinary procedure of recalling a mandate when a "normal process" is available.52

While precedent exists for recalling an appellate mandate, the wisdom of such a rule has been questioned. The First Circuit in Boston and Maine Corp. v. Town of Hampton53 was "troubled" by the implications of asserting an inherent authority to recall a mandate. The court questioned:

What, for example, would be the effect on jurisdiction in the district court, after a mandate is recalled and then reissued? And what reasoned explanation would justify the divergence between fixed time limits on the district court's ability to amend a judgment under Fed. R. Civ. P. 60 and the absence of like time limits on the suggested inherent authority of the appellate courts to recall a mandate, even if acting on precisely the same grounds? Would vesting such exceptional power solely in courts of appeal create an area of essentially original, rather than appellate jurisdiction in courts of appeal over closed cases?54

The First Circuit was further concerned that continuing the practice of recalling an appellate mandate "risks extending indefinitely the authority of the court over closed cases."55

The Federal Rules of Appellate Procedure do not include a rule authorizing the reopening of judgments other than Rule 40, with its narrow fourteen day time period. The absence of a rule similar to Federal Rule of Civil Procedure 60 suggests that the drafters of the rules did not intend that appellate courts reopen judgments. After the issuance of the appellate mandate, jurisdiction returns to the district court. Circumstances such as fraud, newly discovered evidence or mistake, as specified in Federal Rule of Civil Procedure 60(b), should be considered by the district court.

where in the unusual procedural posture of the case, the normal process of appeal was available, the court would not resort to recalling the mandate).

51 Greater Boston, 463 F.2d at 277 (quoting Estate of Iverson v. Commissioner, 257 F.2d 408, 409 (8th Cir. 1958).

52 Johnson, 801 F.2d at 416.

53 7 F.3d 281, 282 (1st Cir. 1993).

54 Id.

55 Id. at 283.
In the circumstances of Demjanjuk, extending appellate jurisdiction over a case for six years after entry of judgment stretches the limited concept, not recognized in the appellate rules, that a mandate can be recalled. Further, the circumstances of Demjanjuk do not involve the limited situations under which an appellate mandate has been recalled such as procedural or clerical error, or a change in the controlling law.

IV. AUTHORITY TO REOPEN UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)(6)

The Sixth Circuit cited Federal Rule of Civil Procedure 60(b)(6) as authority to reopen Demjanjuk v. Petrovsky. The Federal Rules of Civil Procedure, by their own terms, are intended to apply only to the district courts. Appellate courts, however, have applied the policies underlying the Rules to resolve procedural issues. Rule 60 pertains to the relief that a party may obtain from a judgment. The drafters of Rule 60 attempted to balance the interest in the finality of judgments against the competing interest in assuring justice. As will be discussed below, the policy behind Federal Rule of Civil Procedure 60(b)(6) precludes its use in the circumstances of Demjanjuk and therefore the rule was improperly relied upon by the Sixth Circuit.

Rule 60(b) specifies several circumstances in which relief from a judgment is appropriate. The first five clauses provide relief from a final judgment on motion for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud,
misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged. 60

Clause six is a residual clause that includes "any other reason justifying relief from the operation of the judgment." 61 Rule 60(b) also includes two savings clauses. The first provides for relief by an independent action, and the second allows a judgment to be set aside for fraud upon the court. 62

Rule 60 provides that a motion for relief from a judgment shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered. 63 In reopening Demjanjuk, the Sixth Circuit acted in response to newly discovered evidence and concern that fraud had occurred during the earlier proceedings. 64 Although these circumstances are covered by 60(b)(2) and 60(b)(3), those rules could not be used by the court because they must be initiated by motion within one year of entry of the judgment. Since the Sixth Circuit was initiating its proceeding in 1992, six years after entering its judgment denying habeas relief in 1985, the court looked to the residual clause, 60(b)(6), which is not subject to the one year time limit.

Although a residual clause, 60(b)(6) has a significant limitation to its use; the motion must be based on "any other reason" than those listed in clauses (1) through (5). 65 The Supreme Court in Liljeberg v. Health Services Acquisition Corp. 66 stated that a Rule 60(b)(6) motion may be granted "provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." 67 This limitation

60 FED. R. CIV. P. 60(b).
61 Id.
62 Id.
63 Id.
64 Demjanjuk v. Petrovsky, No. 85-3435 (6th Cir. June 5, 1992)(reopening case on motion of the court), reprinted in 10 F.3d 338, 357 app. (6th Cir. 1993). In the June 5th order the court stated that recent press reports (The press was reporting new information obtained from the Soviet Union concerning the identity of Ivan the Terrible. See supra note 2.) indicated to the court that the extradition warrant executed by the Executive Branch may have been "improvidently" issued. A subsequent order, August 17, 1992, stated that the question for the court was whether fraud upon the court had misled the court into allowing Demjanjuk to be extradited. Demjanjuk v. Petrovsky, No. 85-3435, at 1 (6th Cir. August 17, 1992)(order appointing a Special Master), reprinted in 10 F.3d 338, 357 app. (6th Cir. 1993).
65 FED. R. CIV. P. 60(b); 7JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 60.27[1] (2d ed. 1993).
67 Id. at 863; see also Wilson v. Johns Manville Sales Corp., 873 F.2d 869, 871 (5th Cir.)(stating that relief cannot be granted under 60(b)(6) where, but for the rule's time limit, relief could have been granted under another subsection of rule 60(b)), cert. denied, 493 U.S. 977 (1989); Solaroll Shade & Shutter Corp. v. Bio-Energy Systems, Inc., 803 F.2d
prevents the use of clause (6), which only requires filing within a reasonable time, to circumvent the one year limitation imposed by the first three clauses.\(^{68}\)

The Sixth Circuit has held that Rule 60(b)(6) can be applied only where there is a ground for relief from a judgment that goes beyond those listed in clauses (1) through (5).\(^{69}\) In *Olle v. Henry & Wright Corporation*,\(^{70}\) the Sixth Circuit stated, "The difficulty in interpreting subsection (b)(6), and perhaps the reason for the paucity of decisions in this area, arises from the fact that almost every conceivable ground for relief is covered under the first three subsections of Rule 60(b)."\(^{71}\)

The grounds for reopening *Demjanjuk* relied on by the Sixth Circuit, the availability of new evidence and fraud by an adverse party, are included in 60(b)(2) and 60(b)(3). Motions for relief due to fraud and newly discovered evidence, when brought more than one year after the entry of judgment, have been denied as time-barred under 60(b)(2) or 60(b)(3) and unavailable under 60(b)(6), because the ground for the motion was stated in the other two subsections of the rule.\(^{72}\)

The purpose of incorporating a residual clause, such as 60(b)(6), in a rule is to provide for unusual and exceptional circumstances that the drafters of the

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\(^{68}\) Olle v. Henry & Wright Corp., 910 F.2d 357, 366 (6th Cir. 1990) (stating that there must be extraordinary circumstances to bring a motion under Rule 60(b)(6) to "prevent clause (6) from being used to circumvent the one-year limitations period that applies to clause (1)"). Litigants may not invoke Rule (60)(b)(6) to avoid the time limits that are imposed by the other sections of Rule 60(b). See *Home Port Rentals, Inc. v. Ruben*, 957 F.2d 126, 133 (4th Cir.), cert. denied, 113 S. Ct. 70 (1992).

\(^{69}\) Lewis v. Alexander, 987 F.2d 392 (6th Cir. 1993); Mcdowell v. Dynamics Corp. of Am., 931 F.2d 380 (6th Cir. 1991); Olle v. Henry & Wright Corp., 910 F.2d 357 (6th Cir. 1990).

\(^{70}\) 910 F.2d 357 (6th Cir. 1990).

\(^{71}\) *Id.* at 365.

\(^{72}\) Wilson v. Johns-Manville Sales Corp., 873 F.2d 869 (5th Cir.), cert. denied, 493 U.S. 977 (1989). In a products liability action, the plaintiff requested that the court set aside a judgment because the defendant had fraudulently concealed the time that he knew of an asbestos hazard. The plaintiff's attempt to set aside the judgment under 60(b)(6) was denied because the ground for relief, fraud, was covered by Rule 60(b)(3). Under Rule 60(b)(3), the motion was required to be brought within one year; *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 878 F.2d 182 (7th Cir. 1989) (motion for relief from a judgment alleging fraudulent concealment and misrepresentation in a Federal Employees Liability Claim filed more than one year after judgment was time-barred by Rule 60(b)(3) and unavailable under Rule 60(b)(6) because the ground for relief is found in Rule 60(b)(3)); *In re Met-L-Wood Corp.*, 861 F.2d 1012 (7th Cir. 1988), cert. denied, 490 U.S. 1006 (1989) (motion to set aside judgment for fraud filed one year after entry of judgment is time-barred, and the court would not apply 60(b)(6) because it would negate the purpose of 60(b)(3)'s time limit).
rule did not anticipate. Federal Rule of Civil Procedure 60(b)(6), has been applied to relieve a party of a judgment when the party’s own attorney has been guilty of misconduct in failing to appear at docket call resulting in dismissal of the case.\textsuperscript{73} The rule has also been used to vacate an order dismissing a case where a party repudiated the settlement agreement.\textsuperscript{74} These are the types of unexpected situations which the residual clause is intended to cover. Newly discovered evidence and fraud are anticipated occurrences which were specifically included in Rule 60(b)(2) and 60(b)(3).

Further, Rule 60 states that relief under the rule is provided "on motion."\textsuperscript{75} The Sixth Circuit, in considering a 60(b) motion, has stated, "[i]n no event may the district court act sua sponte to grant relief from judgment. Rather, the affected party must first make a motion for such relief."\textsuperscript{76} The Sixth Circuit reopened Demjanjuk on its own motion.\textsuperscript{77} Reopening the case on motion of the court is contrary to both the rule and the Sixth Circuit’s interpretation of the rule.

The Sixth Circuit’s reliance on authority under Rule 60(b)(6) for reopening Demjanjuk appears inappropriate. Applying the rule at a minimum deviates from normal procedure in several ways. First, although there is precedent, use of a Federal Rule of Civil Procedure by an appellate court is unusual. Second, if the rule is applied by the appellate court, it should adhere to the policy established in the district courts for applying the rule. Clearly 60(b)(6) is to be reserved for circumstances that are not covered by sections (1) through (5). Finally, the Sixth Circuit disregarded its own construction of the rule that allows an action to be initiated only on a party’s motion.

\textsuperscript{73} Fuller v. Quire, 916 F.2d 358 (6th Cir. 1990). In Fuller, the court used Rule 60(b)(6) to reinstate a case after an order dismissing the case had been entered. The court found that the attorney’s failure to arrive at court for the docket call should not relieve the plaintiff of a cause of action where the plaintiff had been diligent in attempting to discover the status of the case and the plaintiff lived at some distance from the court. \textit{Id}. 74 Keeling v. Sheet Metal Workers Int’l Ass’n, Local Union 162, 927 F.2d 609 (9th Cir. 1991). The court found the circumstances of repudiation of a settlement agreement sufficiently extraordinary to vacate the previous judgment under Rule 60(b)(6).

75 "On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding . . . .” \textit{FED. R. CIV. P. 60(b)}. 76 Lewis v. Alexander, 987 F.2d 392, 395 (6th Cir. 1993)(citing Eaton v. Jamrog, 984 F.2d 760, 762 (6th Cir. 1993)). The Sixth Circuit in Eaton, stated "Rule 60(b), \textit{FED. R. CIV. P. provides several specific situations in which a district court, ‘on motion’, may relieve a party of a final judgment...[r]ule 60(b) explicitly requires a motion from the affected party, and in this case the district court acted sua sponte.” \textit{Id}. at 762. The Sixth Circuit found that the district court erred in acting sua sponte and dismissed the appeal. \textit{Id}. 77 Demjanjuk v. Petrovsky, No. 85-3435, at 1 (6th Cir. June 5, 1992)(reopening case on motion of the court), \textit{reprinted in} 10 P.3d 338, 356 app. (6th Cir. 1993).
V. Authority to Reopen Under the Inherent Power to Set Aside a Judgment for Fraud on the Court

A. The Court's Inherent Power

The Sixth Circuit rejected the Justice Department's contention that it did not have authority to reopen its 1985 judgment denying habeas relief to Demjanjuk by citing its "inherent power to grant relief for 'after-discovered fraud', from an earlier judgment 'regardless of the term of [its] entry'". The concept of inherent power is based on the principle of separation of powers. Courts exist as independent entities and have an obligation to maintain themselves to ensure that the judicial functions are carried out. Thus, they have an independent, inherent power to assure that all expenses are paid and that sufficient employees are hired.

The Supreme Court in Chambers v. Nasco, discussed the scope of the inherent power of federal courts. Chambers cited the inherent power of a federal court to control admission to its bar and discipline attorneys, to punish for contempt of court, to bar a disruptive criminal defendant from the courtroom, to dismiss an action on grounds of forum non conveniens and to dismiss a suit for failure to prosecute. These are the basic powers that enable a court to function. The Supreme Court in Link v. Wabash R.R., described the inherent powers as those "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."

Chambers recognized that "the inherent power also allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court", citing Universal Oil Products Co. v. Root Refining Co., which involved bribery of a judge. The fraud on the court doctrine derives from the

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81 Id. In Chambers the Supreme Court held that a federal court could use its inherent power to impose sanctions for the bad faith conduct of a party. The district court had imposed sanctions against Chambers requiring him to pay the entire amount of the opposing party's litigation fees where Chambers had tried to deprive the court of jurisdiction and obstructed, delayed and harassed his opponent. Id. at 2130, 2131. The district court could sanction the behavior even if it was not covered by the rules on sanctions as long as the inherent power was not used to circumvent the clear mandate of the rule. Id. at 2136.

82 370 U.S. 626 (1962).

83 Id. at 630-31.

84 Chambers, 111 S. Ct. at 2132.

85 328 U.S. 575 (1946).
court's inherent power because a court is unable to carry on its basic function of adjudicating cases when a fraud, such as bribery of the judge, is perpetrated on the court itself.

In its order of August 17, 1992, following reopening the Demjanjuk habeas proceeding in June 1992, the Sixth Circuit stated that the "bedrock question" for the court was whether the failure of Justice Department attorneys to disclose exculpatory information indicating that Demjanjuk was not Ivan the Terrible constituted fraud upon the court. The court appointed a Special Master to investigate the fraud issue and to file a report with the court.86

B. Federal Rule of Civil Procedure 60(b) Savings Clause

The inherent power of a court to grant relief from a judgment for fraud on the court is recognized by the second savings clause of Federal Rule of Civil Procedure 60(b). Rule 60(b) includes two savings clauses in the phrase: "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."87 The two actions are distinct and should not be considered as one procedure to entertain an independent action for fraud upon the court.88 Fraud upon the court is a distinct ground that is distinguishable from fraud between the parties entitling relief under Rule (60)(b)(3).90 Fraud on the court goes beyond fraud between the parties and involves a "direct assault on the integrity of the judicial process."91 While an independent action can be based on fraud, it can also be based on accident, mistake or any other equitable ground.92

The independent action refers to a proceeding for relief from a judgment filed in a new or separate action, which may or may not be initiated in the court that


87 Id. at 2, reprinted in 10 F.3d at 359.

88 FED. R. CIV. P. 60(b).

89 Both treatises, WRIGHT & MILLER and MOORE'S FEDERAL PRACTICE, separate the clause into two distinct grounds for granting relief from a judgment. 7 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.36 (Independent Action in Equity); ¶ 60.33 (Power to Set Aside a Judgment for Fraud Upon the Court) (2d ed. 1993); 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2868 (Independent Action for Relief); § 2870 (Fraud on the Court)(1973); see also S.E.C. v. E.S.M. Group, Inc., 835 F.2d 270, 273 (11th Cir.), cert. denied, 486 U.S. 1055 (1988); Averbach v. Rival Mfg. Co., 809 F.2d 1016, 1021 (3d Cir.), cert. denied, 482 U.S. 915 (1987); Kupferman v. Consolidated Research & Mfg., 459 F.2d 1072 (2d Cir. 1972).


91 Id.

92 7 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.36 (2d ed. 1993).
rendered the judgment.93 In reopening Demjanjuk, the Sixth Circuit did not initiate a new action; the court reopened the 1985 habeas corpus proceeding, sua sponte.94 Proceeding under the first savings clause of 60(b) is inappropriate for a court since it would be beyond a court's authority to file its own independent action. It appears, however, that this was the basis under which Demjanjuk filed for relief from previous judgments in the district court in April 1988.95

The Sixth Circuit's order of November 19, 1993, which vacated the judgment in the extradition proceeding, referred to the savings clause of 60(b) as authority for the court's action.96 While the Sixth Circuit did not distinguish the two 60(b) savings clauses, it would seem from the court's references to fraud on the court that it was referring to the second savings clause, which pertains to the court's inherent power to set aside a judgment for fraud on the court. The clause was added to the Federal Rules of Civil Procedure in 1948. The advisory committee note cited the Supreme Court decision in Hazel-Atlas97 as an illustration of the relief to be granted by the 60(b)(6) second savings clause.98


The Sixth Circuit and Rule 60(b) (Notes of Advisory Committee) both cite Hazel-Atlas as a case in which the power to grant relief for fraud upon the court

93 FED. R. CIV. P. 60(b). Notes of the Advisory Committee, 1946 amendment.


95 Relief could be granted to Demjanjuk if he demonstrated that the elements of an independent action applied to his case. The essential elements of an independent action are:

(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.

Barrett v. Secretary of Health and Human Services, 840 F.2d 1259, 1263 (6th Cir. 1987) (quoting National Surety Co. of New York v. State Bank of Humboldt, 120 F. 593, 599 (8th Cir. 1903)). While not available to the appellate court, the independent action did exist as a potential remedy for Demjanjuk. Thus, an alternative to the Sixth Circuit reopening the case existed. Demjanjuk had a proceeding alleging fraud by the Justice Department pending in the District Court at the time that the Sixth Circuit reopened the habeas proceeding. See supra note 21.


97 322 U.S. 238 (1944).

is exercised. Hazel-Atlas had its origins in 1926 when the Hartford-Empire Co. applied for a patent on a machine that poured glass into molds. After the company experienced difficulty obtaining the patent, certain officials and attorneys of Hartford-Empire conspired to write an article praising the machine, persuaded the president of a glass workers' union to falsely sign it as its author and had it published. The published article was then submitted to the patent office, which subsequently granted the patent.

In 1928, Hartford brought suit in the district court alleging that the Hazel-Atlas Co. had infringed on its patent. The district court dismissed the suit. Although the forged article was part of the material submitted to the district court, it was not emphasized by counsel, and the court did not refer to it. However, on appeal, Hartford's attorney directed the attention of the circuit court to the article. The court, quoting from the article, reversed the district court decision and held that the patent had been infringed.

From documents produced at a separate antitrust lawsuit against Hartford, Hazel-Atlas learned that the article relied on by the circuit court was fraudulent. Hazel-Atlas filed a petition in that court for leave to file a bill-of-review in the district court to set aside the judgment in the patent infringement case on the basis of fraud. The circuit court decided "that since the alleged fraud had been practiced on it rather than the district court it would pass on the issues of fraud itself instead of sending the case to the district court."

The court of appeals denied relief, holding that the fraud was not newly discovered and the decision was not based primarily on the article. The court also stated that it did not have power to set aside the judgment because the term in which it was entered had expired. The Supreme Court reviewed and reversed the appellate court. The Supreme Court recognized the historic equity power to grant relief from judgments in cases of after-discovered fraud. The Court further stated, "Out of deference to the deep-rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious in exercising their power over such judgments."

The Supreme Court, however, found the equity power to set aside a judgment for fraud to be fully applicable to the circumstances of Hazel-Atlas. The Court noted that there was "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of

99 "Almost all of the principles that govern a claim of fraud on the court are derivable from the Hazel-Atlas case." Id. at 249.


101 Id. at 241.

102 Id. at 243.

103 Id. at 239-40.

104 Id. at 243-44.

Appeals." Also of significance to the Court was the fact that the patent suit did not concern only private parties but that it affected the public.

[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

The Court also agreed with the circuit court that the case did not have to be sent back to the district court for a decision on the issue of fraud. The principles of fraud on the court contained in *Hazel-Atlas* are 1) a deliberate scheme, 2) perpetrated by an officer of the court, 3) directed at the judicial machinery, and 4) involving more than an injury to a single litigant. Here the injury went beyond the plaintiff because the assignment of patents affects the public interest.

**D. Defining Fraud on the Court**

The authority of a court to reopen a case when there has been a fraud perpetrated on the court, as set forth in *Hazel-Atlas*, is well-established law. The doctrine is codified in Federal Rule of Civil Procedure 60(b)’s second savings clause. If the court determines that a fraud has been perpetrated on it, the court can vacate its previous judgment. The court has broad power to consider whether it has been victimized by a fraud. A court may bring its own motion to set aside a judgment, and there is no time limit for bringing the motion, even the doctrine of laches will not prevent a hearing on the matter.

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106Id. at 245-46.

107Id. at 246.

108Id. at 249.


110"Although a party may bring the matter to the attention of the court, this is not essential, and the court may proceed on its own motion." 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2870 at 250 (1973); see also 7 JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 60.33. (2d ed. 1993).

111See Root Refining Co. v. Universal Oil Prods. Co., 169 F.2d 514 (3rd Cir. 1948), cert. denied, 335 U.S. 912 (1949). The court asserted that "when the controversy has been terminated by a judgment, its freedom from fraud may always be the subject of further judicial inquiry; and the general rule that courts do not set aside their judgments after the term at which they rendered has no application." Id. at 522. In *Root Refining*, a Circuit Court Judge had accepted a bribe related to a judgment in a patent infringement case. In order to preserve the integrity of the judicial process, the court held that it had the duty and the power to vacate its own judgment. Id.; see also Bulloch v. United States, 763 F.2d 1115 (10th Cir. 1985), cert. denied, 474 U.S. 1086 (1986). In *Bulloch*, a motion to set aside a judgment asserting fraud on the court was brought twenty-five years after the original judgment denying liability under the Federal Tort Claims Act. The Tenth Circuit
A motion to set aside a judgment for fraud on the court should be made in the court in which the fraud was allegedly practiced. The power to reopen a judgment for fraud on the court can be exercised by an appellate court if the fraud was perpetrated on that court rather than on the trial court. The appropriateness of the appellate court considering the fraud issue, rather than the trial court, was raised during the Demjanjuk proceedings. One of the briefs submitted to the U.S. Supreme Court, on behalf of attorney Norman Moscowitz, noted that "the District Court for the Northern District of Ohio conducted both the denaturalization and extradition proceedings. All evidentiary and discovery matters took place before that court." Since the disputed discovery process did not occur at the appellate level, the district court, rather than the appellate court, would seem to have been the defrauded court.

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1127 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.33 (2d ed. 1993).

1131 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2870 (1973); 7 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.23 (2d ed. 1993).

114 Moscowitz v. Merritt, No. 92-1447 (U.S. Mar. 2, 1993)(petition for a writ of prohibition or mandamus). Moscowitz maintained that the Sixth Circuit was required to remand the proceeding to the district court for determination of the fraud issue. Id. at 13. The brief cited cases in the circuit courts that have held that an investigation of fraud on the court should be conducted by the trial court, rather than the appellate court. Id. at 14. Moscowitz further points out that the district court was the proper forum for determining the fraud issue because the court was familiar with the evidence and discovery issues involved in the lengthy proceeding. The Special Master who was appointed to consider the fraud allegations had no familiarity with the fifteen years of proceedings. Id. at 16; see also Motion to Rescind Order of August 17, 1992 Appointing a Special Master, Demjanjuk v. Petrovsky, No. 85-3435 at 12 (6th Cir. Oct. 28, 1992). This motion made on behalf of George Parker, a Justice Department attorney, asserted that referring the fraud investigation to the Special Master ignored the district court where the alleged fraud took place. Id. at 10. "If fraud was practiced, it was in the proceedings before the district court; nothing additional happened before the Sixth Circuit." Id. at 12.


116 Although it could be argued that the alleged fraud in Demjanjuk extended to the appellate level because the attorneys did not submit the disputed documents to the appellate court, the crux of the alleged fraud occurred during proceedings before the district court. This is distinguishable from the facts of Hazel-Atlas where, although the forged document was part of the record in the district court, the attorneys specifically drew the attention of the court to the forged document in their appellate argument. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 247 (1944). Hazel-Atlas involved a situation in which the existence of fraud was not in dispute, "relevant facts as to the fraud were agreed upon by the litigants." Id. at 249. In Hazel-Atlas, the Supreme Court did not decide whether, if the facts relating to the fraud were in dispute, the case should be remanded to the district court. 322 U.S. at 249, 250 n.5. In Standard Oil Co., which established that a district court could reopen on a 60(b) motion without leave of the appellate court, the Supreme Court stated "the trial court is in a much better position
In its discussion of fraud on the court, one treatise notes, "[s]ince the power to vacate a judgment for fraud on the court is so great, and so free from procedural limitations, it is important to know what kind of conduct falls into this category." Courts have described fraud on the court as a nebulous and elusive concept which should be interpreted narrowly. Professor Moore's often cited definition is that fraud upon the court should:

[E]mbrace 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.

Professor Moore's definition puts emphasis on the subversion of the court itself, resulting in the court being unable to carry out its basic function of adjudicating cases. To constitute a fraud on the court there must be an attack on the judicial process itself. It is limited to the most egregious conduct that cannot be exposed by the normal adversarial process during the proceeding.

Courts have held that to find a fraud on the court, there must be evidence of a deliberate "unconscionable scheme." This scheme would encompass an

to pass upon the issues presented in a motion pursuant to Rule 60(b)". Standard Oil Co. v. United States, 429 U.S. 17, 19 (1976).

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119 Great Coastal Express v. International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 675 F.2d 1349 (4th Cir. 1982). "The federal courts that have struggled with the definition of 'fraud on the court' in the context of Rule 60(b) have found such a definition elusive, see, e.g., Toscano v. Commissioner, 441 F.2d 930, 933-34 (9th Cir. 1971), but have generally agreed that the concept should be construed very narrowly." 675 F.2d at 1356.

120 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.33, at 360 (2d ed. 1993); see also Sheldon R. Shapiro, Annotation, Construction and Application of Provision of Rule 60(b) of Federal Rules of Civil Procedure that Rule does not limit power of Federal District Court to set aside judgment for "Fraud Upon the Court", 19 A.L.R. FED. 761 (1974).

121 Great Coastal, 675 F.2d at 1357.

122 United States v. Parcel of Land and Residence at 18 Oakwood Street, Dorchester, Mass., 958 F.2d 1, 5 (1st Cir. 1992)(finding that relief from a judgment for fraud on the court cannot be granted unless the movant demonstrates an unconscionable scheme to interfere with the judicial process); Aoude v. Mobil Corp., 892 F.2d 1115, 1116 (1st Cir. 1989)(fraud on the court occurs where a party has sentimentally set in motion some unconscionable scheme calculated to prevent the court from impartially adjudicating a matter). In Aoude, the plaintiff filed a complaint relying on a deliberately fabricated purchase agreement. The court found a fraud on the court in such "brazen conduct". Id. at 1122. Fraud on the court may also be found where attorneys are in collusion with a judge to reach a certain disposition in a case. See Browning v. Navarro, 826 F.2d 335, 345-46 (5th Cir. 1987) in which allegations that attorneys and judge colluded to give favorable jury instructions and to discharge opposing counsel in mid-trial, if proved,
egregious, deliberate act such as bribery of a judge or jury. Hazel-Atlas involved the deliberate fabrication of evidence by an attorney, which was presented directly to the appellate court.

Lesser improprieties have not risen to the level of fraud on the court. Perjury is not a sufficient ground to relieve a party from a judgment alleging fraud on the court. Of relevance to the Demjanjuk case, the nondisclosure of material would establish fraud on the court. Intentional false declarations made to a court by an attorney may also be fraud on the court. See In re Intermagnetics Am., Inc., 926 F.2d 912 (9th Cir. 1991); Virgin Islands Housing v. David, 823 F.2d 764 (3d Cir. 1987).

"Thus 'fraud on the court' is typically confined to the most egregious cases, such as bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged." Great Coastal, 675 F.2d at 1356; see Root Refining Co. v. Universal Oil Prods. Co., 169 F.2d 514 (3d Cir. 1948), cert. denied, 335 U.S. 912 (1949). In Root Refining, the Third Circuit vacated a judgment in a patent infringement case where the judge in the proceeding was implicated in bribery related to his decision in the case before him. The court found this to be a clear circumstance of a fraud being perpetrated on the court.

Not all courts consider the submission of fraudulent documents to warrant relief under the fraud on the court doctrine, which applies to actions that are directed to the judicial machinery rather than to another party. The court in Bulloch states, "Fraud on the court (other than fraud as to jurisdiction) is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents." Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985), cert. denied, 474 U.S. 1086 (1986).

"Courts confronting the issue have consistently held that perjury or fabricated evidence are not grounds for relief as 'fraud on the court'." Great Coastal Express v. International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 675 F.2d 1349, 1357 (4th Cir. 1982). Hazel-Atlas did find fraud on the court where a document had been forged. However, the factor that elevated the forgery to fraud on the court may have been that the forgery was perpetrated by an attorney, an officer of the court. 11 CHARLES A. WRIGHT & ARTHUR A. MILLER, FEDERAL PRACTICE AND PROCEDURE ¶ 2870, at 255 (1973).

Hazel-Atlas seems to require something more than perjury to constitute fraud on the court stating that the case was "not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury." Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245 (1944); see also Quality Technology Co. v. Stone & Webster Eng’g Co., 7 F.3d 234 (6th Cir. 1993)(stating that perjured testimony alone is not sufficient to be fraud upon the court); Gleason v. Jandrucko, 860 F.2d 556 (2d Cir. 1988)(finding that subsequently discovered evidence of perjury by witnesses did not constitute fraud on the court); Great Coastal Express v. International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 675 F.2d 1349, 1357 (4th Cir. 1982), cert. denied, 459 U.S. 1128 (1983)(holding perjured testimony is not a fraud on the court where company witnesses in trial concerning labor dispute admitted perjury).

Perjury, however, might be a fraud on the court if the attorneys planned the perjury. During the proceedings before the district court, Demjanjuk alleged that government witnesses had committed perjury in the denaturalization proceeding. United States v. Demjanjuk, 103 F.R.D. 1 (N.D. Ohio 1983). The district court found insufficient evidence of perjury and further stated that to find fraud on the court would require evidence that officers of the court engineered the perjury. ld. at 6.
facts has not been found to constitute fraud upon the court.\textsuperscript{126} The Sixth Circuit has noted the "well-settled rule that the mere nondisclosure to an adverse party and to the court of facts pertinent to a controversy before the court does not add up to 'fraud upon the court' for purposes of vacating a judgment under Rule 60(b)."\textsuperscript{127}

\textbf{E. Fraud on the Court in Demjanjuk}

The fraud alleged in reopening \textit{Demjanjuk} was that Justice Department attorneys, during the denaturalization and extradition proceedings, failed to disclose information that suggested that a guard other than Demjanjuk may have been Ivan the Terrible of Treblinka.\textsuperscript{128} This information included statements of two former Treblinka guards who referred to a man named Marchenko as a guard who operated the Treblinka gas chambers and a partial list of guards at Treblinka that included the name Marchenko but not Demjanjuk.\textsuperscript{129} The allegation was not that any of the evidence submitted was

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\item \textsuperscript{126}Wilson v. Johns-Manville Sales, 873 F.2d 869 (5th Cir.), \textit{cert. denied}, 493 U.S. 977 (1989)(denying motion to set aside judgment for fraud on the court where asbestos manufacturer's concealment of time it knew about asbestos hazards was a mere non-disclosure and not a fraud on the court); Gleason v. Jandrucko, 860 F.2d 556 (2d Cir. 1988)(failure to turn over evidence pertaining to the unreliability of identification of plaintiff in civil rights action for wrongful arrest was held not to be sufficient to be fraud on the court); S.E.C. v. ESM Group, 835 F.2d 270, 273-274 (11th Cir.), \textit{cert. denied}, 486 U.S. 1055 (1988)(holding that attorney's failure to alert other side of possible defenses is not a fraud on the court); Kerwit Medical Prods. v. N. & H. Instruments, 616 F.2d 833 (5th Cir. 1980) (holding that corporation's failure to advise district court of facts in the corporation's possession that the opposing party could use to form a defense was not fraud upon the court); Pfizer, Inc. v. International Rectifier Corp. (\textit{In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions}), 538 F.2d 180, 195-96 (8th Cir. 1976), \textit{cert. denied}, 429 U.S. 1040 (1977)(holding that defendant did not perpetrate a fraud on the court by failing to turn over documents which defendant erroneously believed were covered by the work product rule and finding that there was no evidence of a scheme to conceal material facts).
\item \textsuperscript{127}Brown v. County of Genesee, 872 F.2d 169, 175 (6th Cir. 1989)(citing Kerwit Medical Prods. v. N. & H. Instruments, Inc., 616 F.2d 833, 937 (5th Cir. 1980)). In \textit{Brown} the court held that a party to a settlement in an employment discrimination suit did not have to tell the opposing party, an employee, that she was mistaken as to the highest level of pay that she could have received in the settlement. The court pointed out, however, that the information was in public records accessible to the employee if she had exercised due diligence. \textit{Id.} at 175.
\item \textsuperscript{128}Demjanjuk v. Petrovsky, 10 F.3d 338, 340 (6th Cir. 1993), \textit{cert. denied}, 115 S. Ct. 295 (1994).
\item \textsuperscript{129}\textit{Id.} at 342. The Sixth Circuit listed five protocols which it said contained evidence that the Justice Department attorneys had negligently failed to turn over to Demjanjuk. The Fedorenko Protocols (1978) contained statements from the Soviet Union by two former Treblinka guards who referred to a man named Marchenko as the notoriously cruel guard who operated the gas chamber. The Danilchenko Protocols (1979) which included a statement that a "Ivan Demedyuk or Ivan Dem'yanyuk" was a cook at Treblinka and Marchenko operated the gas chambers. Also, Danilchenko, a guard at Sobibor, stated that Demjanjuk was a fellow guard at Sobibor. The court noted that
fraudulently drafted by the Justice Department attorneys in an attempt to subvert the court, but rather that relevant, possibly exculpatory, information was not turned over to Demjanjuk.

Under prior case law, the failure to disclose relevant information in a civil case has not been held to constitute a fraud upon the court. Something more egregious is required such as the deliberate forging of documents by attorneys in *Hazel-Atlas* or bribery of a judge. The Special Master, who was appointed by the Sixth Circuit to conduct the hearings on fraud in *Demjanjuk*, expanded the concept of fraud on the court to include nondisclosure during discovery. He did require that the nondisclosure be done with actual intent to defraud, willful blindness to the truth or a reckless disregard of the truth. After expanding fraud on the court to include the failure to disclose information, the Special Master concluded that in *Demjanjuk*, the Justice Department attorneys did not commit a fraud upon the court. In his report submitted to the Sixth Circuit, the Special Master concluded that only culpable individuals could commit fraud on the court and the "individuals who composed the team which prosecuted Mr. Demjanjuk acted in good faith. They did not intend to violate the Rules or their ethical obligations. They were not reckless." 

although this statement was inculpatory as to Demjanjuk's presence at Sobibor, it was exculpatory as to his presence at Treblinka. The Dorofeev Protocols (1980) contained statements from five Soviets who served at Trawniki, a German training camp for Nazi guards. One tentatively identified Demjanjuk's photo. Four of the former guards were unable to identify him. The Dorofeev information was available to Demjanjuk in 1981. *United States v. Demjanjuk*, 518 F. Supp. 1362, 1384-85 (N.D. Ohio 1981). The Polish Main Commission List (1979) listed names of known guards at Treblinka; Ivan Marchenko appears on the list but Demjanjuk does not. *Demjanjuk* learned of the existence of this list from private sources in 1982. *Demjanjuk*, 10 F.3d. at 349. The Otto Horn Interview Memoranda (1979) in which an investigator and a historian noted that when a former guard at Treblinka identified Demjanjuk's picture as a Treblinka guard from a photospread, he had previously seen Demjanjuk's picture in an earlier photospread. *Id.* at 342-44.

130 *Id.* at 348.
131 *Id.*
132 *Id.* at 349. The Special Master, United States District Judge Thomas A. Wiseman, Jr., of the Middle District of Tennessee, had conducted hearings over a six month period that included testimony from Justice Department attorneys. He filed his report with the Sixth Circuit on June 30, 1993. *Id.* at 339.

133 Report of the Special Master, Demjanjuk v. Petrovsky, No. 85-3435, at 206 (6th Cir. June 30, 1993). The report continued stating that the Justice Department attorneys "did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance. Although they were blinded to what we may now perceive to be the truth, they were not willfully blind." *Id.* at 206. The Special Master noted that the Justice Department attorneys fully cooperated with his investigation although some attorneys believed the proceedings were "without foundation or jurisdiction." *Id.* at 206, 207. The recommendation of the Special Master was that the case of Demjanjuk v. Petrovsky be closed and that no action be taken against the attorneys who prosecuted Mr. Demjanjuk. *Id.* at 210.
The Sixth Circuit was required to accept the findings of fact submitted by the Special Master unless they were clearly erroneous. The court did accept the Special Master's finding that the Justice Department lawyers did not deliberately withhold information, which they had a duty to disclose, from Demjanjuk or the court. The court did not, however, accept the Special Master's finding that the attorneys were not reckless in regard to their duty to the court. The Sixth Circuit held that the attorneys "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." Based on this determination, the Sixth Circuit, in its order of November, 1993, vacated the judgment in Demjanjuk's extradition proceedings on the "ground that the judgments were wrongly procured as a result of prosecutorial misconduct that constituted fraud on the court".

The Sixth Circuit's finding of reckless misconduct by the Justice Department attorneys, who failed to turn documents over to Demjanjuk, was both in conflict with the conclusion of the Special Master and a new ground for finding fraud on the court. Fraud on the court has been reserved for circumstances in which there is a deliberate, intentional scheme to defraud the court. Failure to disclose information, that is not part of a deliberate scheme, is not the egregious

134 Demjanjuk v. Petrovsky, 10 F.3d 338, 340 (6th Cir. 1993), cert. denied, 115 S. Ct. 295 (1994). The court cites Federal Rule of Civil Procedure 53(e)(2) which states that "[i]n an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." The Special Master conducted "extensive" hearings into the fraud allegations over a period of six months. Id. at 339.

135 Demjanjuk, 10 F.3d at 349.

136 Id. at 354. The Sixth Circuit refers to the Restatement (Second) of Torts for the definition of recklessness. "[T]he actor has... knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so." Id. at 349. The Sixth Circuit applied this definition to the question of the Justice Department attorneys' conduct during the Demjanjuk proceedings, finding that they recklessly disregarded the importance of information in their possession to Demjanjuk's defense. Id. at 354.

137 Demjanjuk, 10 F.3d at 356. The Justice Department filed a petition for Rehearing and Suggestion for Rehearing En Banc. Demjanjuk v. Petrovsky, No. 85-3435 (6th Cir. Dec. 30, 1993). The Justice Department's petition posed two issues: 1) Whether attorneys who acted in good faith and without a subjective intent to defraud nevertheless committed fraud on the court by failing to disclose information that they did not consider exculpatory, and 2) Whether the panel violated Fed. R. Civ. P. 53(e)(2) in disregarding the Special Master's findings of fact and in resting its determination that the government attorneys committed fraud on critical factual errors. The Sixth Circuit denied the petition for rehearing on February 2, 1994. The Justice Department subsequently filed a petition for certiori to the Supreme Court. The question presented was whether attorneys for the government who acted in good faith and without a subjective intent to defraud nevertheless committed fraud upon the court by failing to disclose during respondent's denaturalization and extradition proceedings information that they did not consider exculpatory. Petition for a Writ of Certiori, Rison v. Demjanjuk, No. 93-1875 (U.S. May, 1994). The petition was denied by the Supreme Court. 115 S. Ct. 295 (1995).
conduct that rises to the level of a fraud on the court, allowing a court to have the broad power to overturn judgments at any time after their entry.

The reluctance of courts to find failure to disclose information to an opposing party to be an egregious act stems from the adversarial nature of the United States justice system. The judicial process is "a vigorously competitive contest between opposing counsel". Construing discovery requests broadly "goes against the trial lawyers grain".

In contrast, nondisclosure of material information is viewed differently in a criminal context. The Second Circuit, considering a motion to set aside a judgment for fraud on the court based on allegations of nondisclosure, noted that if the case had been a criminal case, the same nondisclosure done by a prosecutor would be a ground for attacking the judgment. The higher standard for disclosure of evidence in a criminal proceeding than in a civil proceeding derives from the Supreme Court holding in *Brady v. Maryland*. *Brady* held that the failure of prosecutors to turn-over exculpatory evidence in a criminal proceeding violates due process, "irrespective of the good faith or the bad faith of the prosecution."

All proceedings involving Demjanjuk, including the habeas proceeding reopened by the Sixth Circuit, have been civil proceedings. The fraud on the court doctrine, contained in Federal Rule of Civil Procedure 60(b)’s second savings clause, has developed in the context of civil proceedings. The Sixth Circuit noted that the Special Master analyzed fraud on the court in *Demjanjuk* in its civil context, without considering *Brady*, because the Supreme Court has never extended the holding in *Brady* to civil actions.

The Sixth Circuit based its finding of fraud on the court in *Demjanjuk* on the belief that the *Brady* rule should be extended to denaturalization and extradition actions that are based on proof of criminal activity. As applied to Demjanjuk, the extension of the *Brady* rule is reasonable. Demjanjuk’s

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138*USM Corp. v. SPS Technologies Inc.*, 694 F.2d 505, 509 (7th Cir. 1982), *cert. denied*, 462 U.S. 1107 (1983) ("The American system of justice has been built on the premise that truth, at least the sort of truth that is relevant to legal rights and remedies, is likeliest to emerge from a vigorously competitive contest between opposing counsel.").

139*Id.*


142*Id.* at 86.


144*Id.*

145*Id.; see also,* Michael Gaugh, *The Strange Case of John Demjanjuk: An argument for a higher ethical standard in immigration proceedings based on criminal conduct*, 7 GEO. J. LEGAL ETHICS 783 (1994).
extradition was based on allegations that he committed mass murders. Once extradited to Israel he faced a trial for those crimes which could and did result in a death sentence. If the United States Justice Department had exculpatory information, justice would require that the attorneys disclose that information.

It is uncertain, however, whether the nondisclosed material was exculpatory or would have changed the result of the extradition hearing, which merely requires probable cause.146 The Supreme Court held in United States v. Bagley,147 that a conviction will be reversed under the Brady rule only where there is a reasonable probability that the outcome of the trial would have been different if the nondisclosed information had been available to the defense.148 The evidence considered by the district court in the Demjanjuk extradition hearing included identifications of Demjanjuk as Ivan the Terrible made by Treblinka survivors.149 The Sixth Circuit, reviewing the extradition proceedings in 1985, referred to the witness statements and, quoting from Justice Oliver Wendell Holmes, stated that the court’s task in reviewing an extradition proceeding was "to determine 'whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.'"150 The Sixth Circuit continued stating "surely the evidence in this case satisfied this lenient standard".151 Thus disclosure of the disputed information by the Justice Department at the time of the extradition hearing may not have had a reasonable probability of changing the court’s determination that there was probable cause to extradite Demjanjuk to Israel.

If the Brady rule were extended to extradition proceedings, failure to disclose exculpatory information would be a due process violation, not a fraud on the court. The Brady rule protects against violations of the due process rights of individuals. The fraud on the court doctrine protects the functioning and the integrity of the court. The doctrine requires an attack on the judicial process itself, not merely a fraud between the parties.

146See In re Extradition of Demjanjuk, 612 F. Supp. 544 (N.D. Ohio 1985), the court states "the Government and the requesting country are not required to show actual guilt, that the person sought committed the crime. The only requirement is that there be probable cause to believe the fugitive is guilty" Id. at 563.


148Id. at 682.

149612 F. Supp. at 564.


151Id. The evidence relied on by the Israeli Supreme Court when it overturned Demjanjuk’s conviction included information that was never in the possession of the United States Justice Department during the proceedings that occurred between 1981 and 1985. This information concerning the identity of Ivan Marchenko as Ivan the Terrible of Treblinka came out of the Soviet Union in the 1990’s. Demjanjuk, 10 F.3d at 342.
In the circumstances of Demjanjuk, the appropriate procedure would have been to assert a due process violation based on the rationale of the *Brady* rule, rather than a fraud on the court. Assertion of a *Brady* violation is most frequently done by appeal or filing of a habeas petition. In the extraordinary circumstances of the *Demjanjuk* case, where the time for appeal had passed and Demjanjuk was no longer in the custody of the United States, which would preclude a habeas filing, Demjanjuk could have attacked the extradition judgment in an independent action as authorized by the first savings clause of Federal Rule of Civil Procedure 60(b). At the time that the Sixth Circuit reopened the 1985 habeas proceeding, an action brought by Demjanjuk, asserting violation of his due process rights, was pending in the district court. The proceeding in the district court was stayed after the Sixth Circuit appointed the Special Master to conduct hearings for the appellate court on the fraud issue.\(^{152}\)

Fraud on the court is a narrow doctrine that includes only egregious, intentional behavior that strikes at the basic functioning of the judicial process. Expanding the concept to include an attorney’s unintentional failure to disclose material information is a significant departure from the existing case law with implications extending to all civil litigation. In the circumstances of Demjanjuk, rather than expanding the fraud on the court doctrine to include *Brady* violations, relief, if appropriate, was available to Demjanjuk by means of an independent action asserting a due process violation.

**VI. CONCLUSION**

The Sixth Circuit denied John Demjanjuk’s petition for habeas corpus relief from an extradition order in 1985. Six years later, on its own motion, the court reopened the habeas case based on information in news reports. Demjanjuk had been extradited to Israel and was no longer in the custody of the United States.

In June 1992 when the Sixth Circuit, sua sponte, reopened the *Demjanjuk* case, a proceeding was open in the District Court for the Northern District of Ohio based on Demjanjuk’s claims that fraud and misconduct by the Justice Department had deprived him of his constitutional right to due process. Further, the exculpatory information newly released from the Soviet Union was being considered by the Supreme Court of Israel, which did acquit Mr. Demjanjuk. In the circumstances of June 1992, when Mr. Demjanjuk’s concerns were being raised in two other judicial forums, the Sixth Circuit initiated its own proceeding.

The Sixth Circuit cited authority to reopen *Demjanjuk* under Federal Rule of Appellate Procedure 40 and Federal Rule of Civil Procedure 60(b)(6). An analysis of each indicates that neither of these cited sources gives an appellate court authority to reopen a case in the circumstances of *Demjanjuk*. The Sixth

Circuit could, however, reopen the case to determine whether a fraud had been perpetrated on the court.

In reaching its conclusion that a fraud had been perpetrated on the appellate court during the Demjanjuk proceedings, the Sixth Circuit expanded the concept of fraud on the court to include circumstances in which a party has unintentionally failed to disclose material information during prior proceedings. If the court's holding is followed in future cases, appellate courts would have the authority to reopen cases, sua sponte, without regard to time, in a circumstance where there is an allegation that information has not been disclosed in a prior civil proceeding. This would be a significant expansion of the court's authority to reopen closed cases based on fraud on the court.

The Sixth Circuit's concern that exculpatory information is disclosed in the context of extradition proceedings based on proof of crimes has merit. Clearly, in the Demjanjuk case, a failure of the Justice Department to turn over documents that were exculpatory, and which would have changed the result of the extradition hearing, is an extremely serious injustice to Demjanjuk that would fall within the rationale of the Brady rule. The remedy, however, would be to assert a Brady violation on appeal, in a habeas proceeding or in an independent action to attack the judgment on due process grounds, not by asserting that there is a fraud on the court.

The jurisdiction of an appellate court generally extends to hearing cases on review brought before it by interested parties. Once the appellate mandate issues, the jurisdiction of the court ends. The narrow exception for reopening an appellate mandate where the court has made a procedural or clerical error is not applicable to the circumstances of Demjanjuk.

The Sixth Circuit's reopening of Demjanjuk v. Petrovsky represents a significant expansion of an appellate court's authority to reopen a case. The power of a court to reopen a judgment based on fraud on the court is unfettered by procedural constraints, it can be done on motion of the court at any time after issuing the judgment. This power should remain limited to those circumstances where there is evidence of a deliberate scheme to attack the judicial process itself, such as bribery of a judge or jury or the intentional submission of fraudulent documents.

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