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October 29, 2008

VIA FEDERAL EXPRESS

The Honorable Molly A. Dwyer
Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *United States v. Isaacs*, No. 08-50423 (9th Cir.)

Dear Ms. Dwyer:

Enclosed please find the original and fifty (50) copies of the Notice of Potential Need for Circuit-Wide Recusal in connection with the above-captioned case. Per our discussions, the United States respectfully requests that a copy of this notice be distributed to all active and senior-status judges for their review.

Thank you in advance for your cooperation. Please do not hesitate to call me if I can be of any further assistance.

Respectfully submitted,

Michael A. Rotker

MICHAEL A. ROTKER
Attorney, U.S. Department of Justice

In the
United States Court of Appeals
for the Ninth Circuit

No. 08-50423

UNITED STATES OF AMERICA,

Appellee,

v.

IRA ISAACS,

Defendant-Appellant.

NOTICE OF POTENTIAL NEED FOR RECUSAL OF THE NINTH CIRCUIT COURT OF APPEALS

PRELIMINARY STATEMENT

The United States of America, by and through undersigned counsel, respectfully submits this notice in order to alert the judges of this Court (active and senior-status alike) that they may wish to consider whether their participation in this appeal would be consistent with their obligation to recuse themselves from participating "in any proceeding in which

[their] impartiality might reasonably be questioned." 28 U.S.C. 455(a). The primary basis for the possible need for the entire Circuit to recuse itself is that certain actions of the district court judge (Kozinski, C.J. 9th Cir., sitting by designation) – actions that were directly challenged in the proceedings below and will likely be challenged in this appeal – are the subject of an ongoing Judicial Council investigation which, at the request of this Circuit's Judicial Council and at the direction of Chief Justice John R. Roberts, Jr., is being conducted by the Third Circuit Judicial Council.

The United States was uncertain whether the judges of the Court were aware of these facts and their relationship to this appeal. To ensure that there was no ambiguity, we concluded that it was appropriate to notify the Court of these circumstances so that its members could make an informed decision at an early stage of this proceeding whether their participation in this appeal would lead a "reasonable person [to] perceive[] a significant risk" that the appeal will be "resolve[d] * * * on a basis other than the merits." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (so interpreting Section 455(a)).[1]

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[1] The United States takes no position on whether the members of this Court are required to recuse, but instead defers to the Court.

BACKGROUND

1. On July 24, 2007, after an extensive federal investigation into the use of the Internet to distribute allegedly obscene movies, a federal grand jury in the Central District of California returned an eight-count indictment charging defendant Ira Isaacs with importing or transporting obscene material for sale or distribution, in violation of 18 U.S.C. 1465 (Counts 1-4); importing or transporting obscene material, in violation of 18 U.S.C. 1462(a) (Count 5-6); and improper recordkeeping for material depicting sexual activity, in violation of 18 U.S.C. 2257(f)(4) (Counts 7-8). The indictment also included a forfeiture count pursuant to 18 U.S.C. 1467. Dkt. 1. The case was randomly assigned to Judge George H. King, who, several months later, transferred the case to the calendar of Judge Alex Kozinski, Chief Judge of the United States Court of Appeals for the Ninth Circuit. Dkt. 51; see 28 U.S.C. 291(b) (allowing circuit court judges to serve temporarily as district court judges).

Prior to trial, the government voluntarily dismissed Counts 4, 6, 7, and 8 of the indictment. Dkt. 44, 64. On Monday, June 9, 2008, trial on the four remaining counts began with Chief Judge Kozinski presiding. A

jury was empaneled and sworn on Tuesday, June 10, 2008.

2. On Wednesday, June 11, 2008, during the morning session of the trial, the Los Angeles Times published an article on its website, latimes.com, reporting that Chief Judge Kozinski's now-defunct personal website (alex.kozinski.com) contained materials of a sexually explicit nature, some of which, the article reported, were at least thematically similar to some of the materials in the videos that were the subject of the criminal charges against Isaacs. See Scott Glover, *Judge In Obscenity Case Put Explicit Photos On Web, L.A. Times* (June 11, 2008).

At 2:15 p.m. that afternoon, Chief Judge Kozinski met with counsel, outside the jury's presence, to address "the story in the LA Times this morning." Tr. (6/10/08) 86. Chief Judge Kozinski declined to "comment on the story," but advised counsel that he "did not know about [the story] before the jury was sworn and jeopardy attached." *Id.* Chief Judge Kozinski further stated that he "found out about [the story] yesterday after court," *id.*, and that, in view of the "very serious" nature of the issues it raised – issues which, in his view, implicated the public's "confidence in judicial qualifications," *id.* at 87 – he wanted to provide "the parties an

opportunity to think about whether they wish to move to disqualify me," *id.* To that end, Chief Judge Kozinski granted the government's request to stay the trial until Monday, June 16, 2008 in order to reflect on the court's invitation as well as the legal consequences of terminating the trial after jeopardy had attached but prior to a verdict. *Id.* at 100-105.

3. The next day, Thursday, June 12, 2008, the LA Times issued a follow-up article reporting Chief Judge Kozinski's "acknowledge[ment]" that he "maintain[ed] his own publicly accessible Web site featuring sexually explicit photos and videos." Scott Glover, *Judge Maintained Web Site With Explicit Photos*, L.A. Times (June 12, 2008). According to the article, Chief Judge Kozinski "defended some of the adult content as 'funny' but conceded that other postings were inappropriate." *Id.* The article also pointed out that the material depicted in the videos at issue in Isaacs' case was "considerably more vulgar" than the material found on Chief Judge Kozinski's website. *Id.*

That afternoon, Chief Judge Kozinski issued an official statement asking the Judicial Council of the Ninth Circuit "to initiate proceedings concerning the article that appeared in yesterday's Los Angeles Times,"

see http://www.ce9.uscourts.gov/misconduct/orders/CJA_6-12-08.pdf, and indicating that he would "cooperate fully in any investigation." *Id.*

4. The following day, Friday, June 13, 2008, Chief Judge Kozinski entered an order (i) recusing himself from further participation in Isaacs' case, (ii) concluding that there was manifest necessity to declare a mistrial, and (iii) transferring the case to Chief United States District Judge Alicemarie Stotler for reassignment. Dkt. 66. Chief Judge Stotler promptly reassigned the matter to Judge King who, after a status conference with counsel the following week, agreed to receive briefs and hear argument on Isaacs' claim that the Double Jeopardy Clause barred his reprosecution and required dismissal of the indictment.

5. On September 19, 2008, after full briefing and argument, Judge King denied Isaacs' motion to dismiss, holding that Chief Judge Kozinski acted properly in recusing himself under Section 455(a) in order to preserve the appearance of impartiality and exercised sound discretion in determining that manifest necessity justified the declaration of a mistrial. Dkt. 89. The present appeal was initiated when Isaacs filed a notice of appeal from Judge King's ruling. See *Abney v. United States*, 431 U.S.

651, 662 (1977); *United States v. Elliot*, 463 F.3d 858, 863-864 (9th Cir. 2006) ("Denial of a defendant's pretrial motion to dismiss an indictment on double jeopardy grounds is immediately appealable as a collateral order under 28 U.S.C. 1291.").[2/]

6. On Monday, June 16, 2008, the Judicial Council of the Ninth Circuit (Thompson, Thomas, Graber, McKeown, and Berzon, Circuit Judges; and Gonzalez, Hatter, Lasnik, Molloy and Stotler, District Judges) issued an order responding to Chief Judge Kozinski's June 12, 2008 statement (which it construed as a complaint of possible judicial misconduct). The order found that this complaint presented "[e]xceptional circumstances" within the meaning of Rule 26 of the Rules Governing Judicial-Misconduct and Judicial-Disability Proceedings so as to warrant a request that Chief Justice John R. Roberts, Jr. transfer it to the judicial council of another circuit for its review and disposition. *In re Complaint of Judicial Misconduct*, No. 08-90085, at 1 (Jud. Council), available at

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[2/] The appeal was docketed on September 24, 2008. The United States thereafter filed a motion to expedite the appeal, which Isaacs opposed, and the United States then filed a reply. That motion remains pending. No other filings have been made in this appeal.

http://www.ce9.uscourts.gov/misconduct/orders/08_90035.pdf.[3/]

Chief Justice Roberts accepted the request that day and directed that the complaint be transferred to the Third Circuit Judicial Council. http://www.uscourts.gov/library/Rule_26_Transfer_letter.pdf; Scott Glover, *Panel To Investigate Federal Judge In Porn Postings*, L.A. Times (June 17, 2008). Chief Third Circuit Judge Anthony Scirica promptly formed a five-member special committee (consisting of himself, Third Circuit Judges Marjorie Rendell and Walter Stapleton, and Chief District Judges Harvey Bartle III (E.D. Pa.) and Garrett Brown Jr. (D.N.J.)) to conduct the inquiry. The committee's investigation is, to the best of our knowledge, still ongoing.[4/]

[3/] Rule 26 provides that, "[i]n exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice to transfer a proceeding based on a complaint identified under Rule 5 or filed under Rule 6 to the judicial council of another circuit. * * * Upon receiving such request, the Chief Justice may refuse the request or select the transferee judicial council, which may then exercise the powers of a judicial council under these Rules."

[4/] Published news reports have indicated that Chief Judge Kozinski has retained counsel, and that the Special Committee has hired a law firm to assist it with its investigation.

DISCUSSION

1. The federal judicial disqualification statute provides, in pertinent part, that "[a]ny * * * judge * * * of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. 455(a). The avowed "goal of section 455(a) is to avoid even the appearance of partiality," *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988), and thereby "to promote[] public confidence in the integrity and impartiality of the judiciary." Code of Judicial Conduct for United States Judges, Canon 2(A). The House Report accompanying the statute's 1974 overhaul emphasizes the statute's prophylactic nature by stating that "if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case." H.R. Rep. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6354-6355.

To these ends, this Court has held that Section 455(a) requires a judge to ask whether a reasonable third-party observer "with knowledge of all the facts * * * would perceive a 'significant risk' that [the judges] will be influenced by [the external facts] and solve the case on a basis other

than the merits." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008); accord *Clemens v. United States District Court*, 428 F.3d 1175, 1178 (9th Cir. 2005). Consistent with Section 455(a)'s salutary objectives, this Court also has recognized that "[i]f it is a close case, the balance tips in favor of recusal." *Holland*, 519 F.3d at 912 (citing *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993)); accord *In re United States*, 158 F.3d 26, 36-37 (1st Cir. 1998). In addition, the statutory obligation to recuse is a self-enforcing one in that it is not contingent on the filing of a motion to recuse. See, *e.g.*, *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 162 (3d Cir. 1993) ("Whenever a judge's impartiality 'might reasonably be questioned' in a proceeding, 28 U.S.C. § 455(a) commands the judge to disqualify himself sua sponte in that proceeding."); *Youn v. Track, Inc.*, 324 F.3d 409, 422-423 (6th Cir. 2003) (Under § 455[(a)], a judge must sua sponte recuse himself if he knows of facts that would undermine the appearance of impartiality."); cf. *King v. United States District Court*, 16 F.3d 922, 993 n.2 (9th Cir. 1994) (Reinhardt, J., concurring) ("[A] district judge has a statutory obligation to [recuse himself] sua sponte in the circumstances described in 28 U.S.C. 455(a).").

And, while the recusal of an entire circuit is certainly a rare and extraordinary occurrence, it is not without precedent. See, *e.g.*, *United States v. Claiborne*, 870 F.2d 1463, 1464 (9th Cir. 1989) (noting that two separate pretrial appeals in this case, which involved the criminal prosecution of a former federal district judge, were handled by two separate panels of out-of-circuit judges); *United States v. Moody*, 977 F.2d 1420, 1422-1423 (11th Cir. 1992) (noting that the Eleventh Circuit sua sponte recused itself from participating in any appeals involving the defendant, who was charged with murdering Eleventh Circuit Judge Robert S. Vance).[5/]

[5/] See also *Gay v. Petsock*, 917 F.2d 768, 770-771 (3d Cir. 1990) (three Second Circuit judges presided over an appeal in the Third Circuit after the plaintiff moved to disqualify the judges of the Third Circuit); *Stern v. Nix*, 840 F.2d 208, 209 n.* (3d Cir. 1988) (three Second Circuit judges presided over an appeal in the Third Circuit after "all the judges of the Third Circuit * * * recused themselves"); *United States v. Isaacs*, 493 F.2d 1124, 1131 n.*, 1168 (7th Cir. 1974) (after Seventh Circuit recused itself, three out-of-circuit judges presided over an appeal brought by, among others, Otto Kerner, former Illinois governor who then resigned to become a Seventh Circuit judge); *United States v. Manton*, 107 F.2d 834, 836 (2d Cir. 1938) (three judge panel of two Supreme Court Justices and one out-of-circuit judge presiding over appeal of former Senior Circuit Judge for the Second Circuit).

The peculiar facts and circumstances of this case raise the possibility that the members of this Circuit may wish to consider whether their participation in this appeal would lead a reasonable observer to question the appearance of impartiality, in view of (but not limited to) the pendency of a Judicial Council investigation of this Circuit's Chief Judge (commenced at his request), and this Circuit's Judicial Council's finding that this investigation presented "exceptional circumstances" to warrant a request for a transfer to another circuit's judicial council.[8/]

2. If the judges of this Circuit conclude that Section 455(a) mandates their recusal, then we respectfully submit that the procedures for handling this appeal are delineated in 28 U.S.C. 291(a), which provides that "[t]he Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request by the chief judge or circuit justice of such

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[8/] Recusal under Section 455(a) is also limited by the extrajudicial source doctrine, see *Liteky v. United States*, 510 U.S. 540 (1994), "which generally requires as the basis for recusal something other than rulings, opinions formed or statements made by the judge during the course of trial." *Holland*, 519 F.3d at 913-914. This limitation does not appear to pose any impediment to recusal in this case, though we again defer to this Court's judgment in this regard.

circuit." As its text indicates, this provision authorizes the Chief Justice to designate out-of-circuit judges to serve temporarily as circuit judges in another circuit when it is "in the public interest" to do so – a broad grant of authority which, it has been noted, applies "where an entire court of appeals has disqualified itself from hearing a case." *Meeropol v. Nizer*, 429 U.S. 1337, 1339 (1977) (in-chambers statement of Marshall, J., as Circuit Justice).

As Section 291(a) also indicates, the Chief Justice's authority under this statute may be invoked by a "request by the chief judge * * * of [the] circuit." Three aspects of this statutory language bear brief mention. *First*, this Court must initially decide which judge, within this Circuit, serves as "the chief judge," within the meaning of Section 291(a), for purposes of this appeal. The Chief Judge himself would seem to be recused as a *judicial* matter by virtue of having served as the district court judge, but that would not necessarily mean that the Chief Judge is also recused as an *administrative* matter. Cf. *United States v. Nixon*, 827 F.2d 1019, 1021 n.3 (5th Cir. 1987) (noting that the Chief Circuit Judge "recused himself in this matter administratively as well as judicially"). If

the Chief Judge is administratively recused, the Court, it would seem, would need to identify an acting Chief Judge who would be empowered to carry out this administrative function. See *id.* (citing 28 U.S.C. 45(d) ("If a chief judge is temporarily unable to perform his duties as such, they shall be performed by the circuit judge in active service, present in the circuit and able and qualified to act, who is next in precedence.")).[7]

Second, in *Claiborne*, this Court construed Section 291(a) to bestow on the chief judge "a great deal of discretion" to decide "when out-of-circuit judges are needed," and explicitly "decline[d] to cabin this discretion" by "imposing upon a chief judge of a circuit a duty to poll all in-circuit judges before seeking out-of-circuit judges." 870 F.2d at 1466 (upholding then-Chief Judge Browning's decision to request that then-Chief Justice Burger appoint out-of-circuit judges to handle the defendant's appeal without first

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[7] The fact that the Chief Judge or the acting Chief Judge would be recused from hearing the merits of this appeal would not preclude that judge from addressing this "administrative problem" by undertaking the "purely * * * ministerial act" required by Section 291(a) of requesting that the Chief Justice designate out-of-circuit judges. *Meeropol*, 429 U.S. at 1339; cf. *Moody*, 977 F.2d at 1423 ("There is no question that a federal judge may perform ministerial acts even after he has disqualified himself from a particular case"; holding that, despite his recusal, Chief Circuit Judge Tjoflat was permitted to designate a district court judge to preside over the trial after the first judge recused himself).

polling all circuit judges).

Third, the "request" to be made of the Chief Justice (sometimes referred to as a "certificate of necessity," *Meeropol*, 429 U.S. at 1339) may take the form of a written notification. See, *e.g.*, *Isaacs*, 493 F.2d at 1168 (per curiam; order denying rehearing) (explaining that the Chief Circuit Judge communicated the fact that the entire Seventh Circuit had recused itself to the Chief Justice "in a letter").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing notice to be served this 29th day of October 2008, by first class mail, postage prepaid, and by facsimile, on:

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