UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, vs. IRA ISAACS, Defendant-Appellant	No. 08-50423 Central District of California No. CR 07-732 GHK

OPPOSITION TO CIRCUIT WIDE RECUSAL NOTICE

Defendant and Appellant Ira Isaacs is being prosecuted by a unit of the United States Department of Justice known as the "Obscenity Prosecution Task Force." This name, "Obscenity Prosecution Task Force," appears on all of the captions of documents filed with the U.S. District Court as does the name of its Director, Brent D. Ward. It was the Washington based Obscenity Prosecution Task Force which presented the case to the United States Grand Jury in Los Angeles. The United States Attorney for the Central District of California is not involved in the prosecution of this case. Indeed, neither the local United States Attorney nor any of his assistants were involved with the trial, nor are they involved now. Earlier captions did include the name of the local U.S. Attorney and his assistant, but the more recent captions omit their names. All of the trial proceedings were conducted by the attorneys from the United States Department of Justice in Washington, D.C..

For background regarding White House screening of attorneys hired by the Department of Justice see "Investigation of Allegation of Politicized Hiring by Monica

Goodling and Other Staff of Office of Attorney General 'Dated July 28, 2008'"

http://www.usdoj.gov/oig/special/s0807/final.pdf.

With respect to the Department of Justice and relations with local U.S. Attorneys please see "An Investigation Into the Removal Of Nine U.S. Attorneys in 2006," reported by the Attorney General at **http://www.usdoj/opr/us-att-firings-rept092308.pdf.**

The instant case involves the alleged distribution of adult obscene films to adults. There is no issue of child pornography. This is strictly an adult obscenity case, a rarity during the Clinton administration.

After the commencement of the jury trial on June 9, 2008 (opening statements were made and two witnesses testified for the government, and the jury saw one and a half of the three allegedly obscene movies), the Department of Justice threatened Chief Judge Alex Kozinski with a recusal motion which the Department of Justice insisted not be filed under seal. The Director of the Obscenity Prosecution Task Force, Brent D. Ward, was in the trial court when the Department of Justice requested that the trial, which recessed on Wednesday June 11, 2008, be postponed until Monday June 16, 2008.

On Friday, June 13, 2008 (Friday the 13th for those of you who are superstitious), Chief Judge Alex Kozinski recused himself and declared a mistrial, over the objections of Defendant Ira Isaacs made on Wednesday June 11, 2008 during the end of the day.

When the article from the Los Angeles Times was published all the Department had to do was advise Judge Kozinski that the Department of Justice had confidence in him and would not seek his recusal. The Department of Justice also could have made a brief statement to the Los Angeles Times that it was confident that Judge Kozinski could remain on the case. That would have ended the controversy.

For a more complete description of what happened please see Defendant and Appellant Isaacs Opposition to the Government's Motion to Vacate Existing Briefing Schedule filed on October 21, 2008.

Just as the Department of Justice very cleverly obtained the recusal of Judge Kozinski the Government is now seeking recusal of the entire Ninth Circuit Court of Appeals. The Government is also seeking expedited appellate review of the underlying appeal. The obvious reason is to try to get this case reset for trial before United States Senator Barack Obama is sworn in as President of the United States on January 20, 2009. The Government does not actually explain its motivation for trying to get the case heard as quickly as possible but that is the only explanation.

With respect to the current suggestion by the Government that the entire Ninth Circuit recuse itself it is obvious that the Government wants to embarrass the Ninth Circuit by obtaining its recusal in this case.

Defendant Isaacs opposes the recusal of the entire Ninth Circuit. If the Ninth Circuit were to do so, politics would enter into the selection of the replacement circuit judges. Not only would the selection of the replacement circuit judges be political, Defendant and Appellant Isaacs would be precluded from seeking a rehearing en banc because there apparently would be no mechanism for a full circuit court to entertain any such petition.

In response to the Government's motion to expedite the appeal, Defendant Isaacs suggested that the Government seek certiorari before judgment pursuant to 28 United States Code Section 2102(e) and U.S. Supreme Court Rule 11. See United States v. Nixon, 418 U.S. 683, 686, 41 L.Ed.2d 1039, 94 S.Ct. 3090, 3097 (1974). Before the Government takes the drastic step of seeing recusal and before the Circuit Judges of this Court recuse

themselves the better practice would be for the Government to seek certiorari before judgment. It would obviate the need for recusal or even for considering recusal and it would speed up the process. Defendant and Appellant Isaacs has already agreed in writing to cooperate with such a procedure and would join in any request for a Supreme Court review of the underlying order denying the motion to dismiss on double jeopardy grounds.

The Government obviously would not want the U.S. Supreme Court to review the recusal issue. In Cheney v. United States District Court for the District of Columbia, 541 U.S. 913, 158 L.Ed.2d 225, 124 S.Ct. 1391 (2004) Justice Scalia denied a motion to recuse him from considering the underlying case. It is obvious from Justice Scalia's opinion he does not cave in to pressure and threats. Moreover, it is clear that Justice Scalia did not think much of the Los Angeles Times, which apparently criticized Justice Scalia a number of times for not disqualifying himself on certain cases. It is also important to note from the Cheney decision that Justice Scalia did not have confidence in the accuracy of reporting by newspapers including the Los Angeles Times. See footnote 5 of the Cheney decision.

It is obvious that what is motivating the Obscenity Prosecution Task Force is its desire to embarrass the Ninth Circuit. It is a matter of common knowledge that political conservatives in Washington, D.C. have been trying to split the Ninth Circuit for years. If the Department of Justice were truly interested in a speedy resolution of this case they would seek certiorari before judgment and would try to avoid seeking recusal of the Ninth Circuit. The Obscenity Prosecution Task Force knows that it is extremely likely that the U.S. Supreme Court would rule that Chief Judge Alex Kozinski should not have recused himself because he had done nothing wrong. Moreover, his recusal was the result of Government pressure and intimidation and was unnecessary given the posture of the case - that jeopardy

had already attached. Perhaps if jeopardy had not attached and this issue arose during pretrial proceedings Judge Kozinski could have quietly bowed out of the case. Unfortunately, the Los Angeles Times had already run a front page story when the trial began on Monday June 9, 2008. It appears in retrospect that the Los Angeles Times was setting up Judge Kozinski because the Times already planned to run the second story on Wednesday June 11 and Thursday June 12, 2008. The original set up story for Monday June 9, 2008 obviously was published with the knowledge of the Times that the follow-up stories were going to be published. The Obscenity Prosecution Task Force took unfair advantage of the Los Angeles Times articles. As stated earlier, all the Government had to do was refrain from seeking Kozinski's removal and advise the Los Angeles Times that there was no problem with Judge Kozinski remaining on the case.

If Judge Kozinski's recusal stands he would never be able to sit on a Ninth Circuit Panel dealing with an obscenity case or, indeed, perhaps any case involving the First Amendment. Moreover, he could not participate in rehearings as the Chief Judge if the decision of the District Court stands in this case.

The Government apparently wants three out of circuit judges, politically hand picked, to decide the appeal and Judge Kozinski's future. The United States Supreme Court should decide this case, not three out of circuit judges.

Defendant Ira Isaacs respectfully asks this Honorable Court not to recuse itself. The entire Circuit Court is addressed here because it would probably not be appropriate for some judges to disqualify themselves and for others not to do so. Therefore, this issue uniformally impacts the entire Circuit. This decision should be made by the entire Circuit, and not by individual judges.

Circuit wide recusal is not appropriate. See Ignacio v. Judges of U.S. Court of Appeals, 453 F.3d 1160 (9th Cir. 2006).

For the foregoing reasons Defendant and Appellant Isaacs respectfully asks this Honorable Court and its individual judges not to recuse itself or themselves. For additional information Defendant and Appellant Isaacs respectfully refers this Honorable Court to the Opposition to the Motion to Vacate the Existing Briefing Schedule which includes as an attachment the Decision of the District Court which is under review.

Respectfully submitted,

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Attorney for Defendant/Appellant