IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Appeal No. 06-15838

ADAM SNYDER and JADE SANTORO
Plaintiff-Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant-Appellees.

APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR INDEPENDENT CONSIDERATION BY THE COURT OF APPELLANT'S MOTION FOR DISQUALIFICATION OF JAY S. BYBEE, AFTER DENIAL OF THE ORIGINAL MOTION BY JUDGE BYBEE ON FEBRUARY 8, 2008:
ORAL ARGUMENT IS SPECIALLY SET FOR FEBRUARY 13, 2008 AT BOALT HALL

On Appeal From The United States District Court
Northern District of California, Case No. C-03-4927-JSW
Honorable Jeffrey S. White

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CIRCUIT RULE 27-3 CERTIFICATE

1)

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The above-captioned matter is scheduled for oral argument in two days, on February 13, 2008. Judge Bybee, who counsel is seeking disqualification of, is one of three judges set to hear oral argument in two days. The undersigned learned that Judge Bybee was assigned to this matter on February 4, 2008. On February 7, counsel filed a Motion for Disqualification and Recusal. On February 8, 2008, Judge Bybee denied the motion. Plaintiff-Appellant Santoro now brings the instant motion seeking Judge Bybees' mandatory removal from hearing or deciding this case.

As recounted within and in the original Motion, the Plaintiff-Appellant will be irreparably harmed if Judge Bybee is permitted to hear and decide this matter due to his objectively patent bias and prejudice, which forms the subject of the instant Emergency Motion.

3)

Counsel for the Plaintiff were notified via telephone on February 11, 2008. Defendants were notified on February 11, 2008 via telephone and served facsimile.

Attorney for Appellant
JADE SANTORO

EMERGENCY MOTION FOR INDEPENDENT CONSIDERATION BY THE COURT OF APPELLANT'S MOTION FOR DISQUALIFICATION OF JAY S. BYBEE, AFTER DENIAL OF THE ORIGINAL MOTION BY JUDGE BYBEE ON FEBRUARY 8, 2008.[1]

INTRODUCTION

Appellant Jade Santoro, by his undersigned attorney, moves this honorable Court for independent consideration of his earlier Motion for Disqualification or Recusal of Jay S. Bybee from participation in its deliberations on the instant appeal, on grounds that, before he was a judge, he deeply committed himself to a broad position of support for uses of force against captives in the "Global War On Terror" that are flagrantly unconstitutional; so that, where the appeal is from dismissal of charges that the San Francisco Police Department maintained a policy and practice of indulgence of wrongful use of force, his impartiality is highly questionable, and his ability to judge it objectively even more so. Appellant argues that the totality of these circumstances, shown further in his earlier Motion, attached as Appendix Two, requires an independent determination of whether evident bias or the appearance of bias on the part of Judge Bybee should disqualify him in a case about the wrongful use of force.

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[1] See Order, Appendix One, attached.

Independent consideration of the merits of this claim is sought under R.27(c), FRAP, which provides for review by the Court of the action of a single judge, and as an emergency matter under Circuit Rule 27-3(a), where the appeal is set for oral argument in two days (See Certificate *ante*). If it should be deemed a request for reconsideration, within the meaning of Circuit Rule 27-10, we assert that, in ruling on whether his prior secret activities in furtherance of the purported abrogation of the rules and sacred principle against torture, and the universal application of the Geneva Conventions, by the Bush Regime, Judge Bybee "overlooked or misunderstood" the inviolability of those "non-derogable" international rules of law, and the unavoidable way in which that blindness creates and seals the existence of bias and the stark appearance of bias.[2] Additionally, there would appear to be an inherent conflict of interest arising from the fact that Judge Bybee's involvement in generating the purported rules of U.S. Immunity from rules of international and domestic law in prosecuting the "Global War on Terror" (GWOT) and the Invasion of Iraq were kept secret from the U.S. Senate when it considered his qualifications for appointment to the Bench.

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[2] A Writ of *Mandamus* would presumably provide an available alternative, but it appears there is no practical difference in the circumstances. In either case, the question is urgent with respect to the upcoming oral argument, specially set at Boalt Hall on Wednesday, February 13, 2008.

ARGUMENT

I. THE MATTER SHOULD BE INDEPENDENTLY CONSIDERED

The Precedents are clear that the judge's own decision is not the final word on the question or his or her recusal; and the Supreme Court has said,

> Although § 455 defines the circumstances that mandate disqualification of federal judges, it neither prescribes nor prohibits any particular remedy for a violation of that duty. Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation.

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 862 (1988).

It is clear that the issue is to be referred to the judge in question, in the first instance. See, e.g., *In re Bernard*, 31 F.3d 842, 843 (9th Cir. 1994); *U.S. v. Balistrieri*, 779 F.2d 1191, 1202-03 (7th Cir. 1985); but appellate review is appropriate, *Id.*; and the Court in *Balistrieri* said also that such review is *de novo, Balistrieri, supra*, at p. 1203.[3] In circumstances made urgent by a time factor, however, the appropriate remedy for wrongful denial of a well-taken motion for recusal is less clear; or, here, it is most problematic. "A judge may be especially

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[3] "We think that appellate review of a judge's decision not to disqualify himself... should not be deferential. *The motion puts into issue the integrity of the court's judgment.* The absence of the requirement that the judge take the factual averments of the moving party's affidavit as true 'gives chance for the evil against which the section is directed.' See supra note 5 and accompanying text." *U.S. v. Balistrieri, supra,* 779 F.2d at 1203. (Emphasis added)

reluctant to recuse himself when to do so requires him to admit that his actual bias or prejudice has been proved," *Id.* Moreover, the mischief to be worked if we are right about disqualification here is immediate, and likely to deepen over time if the remedy is not also immediate, and the availability of normal appellate review is much less certain when the judge sits on the Court of Appeals, so that the unlikely strait gate of certiorari must be cleared before it is available, in any case.

Therefore, Appellant suggests that, under the principle the High Court stated in *Lijleberg*, quoted above — and, particularly, the rule that "[t]he Court may review the action of a single judge", R.27(c). FRAP — independent consideration, or reconsideration, by a 'motion panel' of the Court is appropriate and should be made.

II. DISQUALIFICATION IS REQUIRED BECAUSE OF BIAS AND THE APPEARANCE OF BIAS.

We well understand that the issues raised and implicated by this challenge to Judge Bybee's fitness to sit in judgment on the issues in this case are deep and excruciating, especially viewed against the broad background of moral degeneration and disgrace to Our Country which has erupted from world-wide revelation of the vicious, anti-human practices carried on by the CIA and other U.S. "intelligence" forces at Abu Ghraib, Guantanamo, and uncountable other

secret sites around the world — to say nothing of the broader depredations against humanity and civil liberties which have spewed from the bogus GWOT and the fraudulently-enacted, criminal invasion and occupation of Iraq. Viewed in that context, the consequence of Judge Bybee's participation in helping engineer those outrages seems contained — definitely not to say trivial— and cut and dried.

In recap, the effort Judge Bybee's work was an essential part of, as shown by his memos and those of his cohorts,[4] was to establish a purported legal basis for abrogation of the Geneva Convention on Treatment of Prisoners of War, and for redefining the rule against torture — which applies to the treatment of anyone — as limited to pain so severe it causes "impairment of bodily function, organ failure or even death". The clear purpose of the memos, and the entire project, apparently ordered up by both Alberto Gonzalez, as Counsel to the President, and David Addington, then-Counsel to the Vice-president, was to establish a rule of law for application not only in any international tribunal — unlikely as that would be where the U.S. has cynically refused to join the world in establishing the International Criminal Court — but domestically also. Thus, for example, Mr.

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[4] Cohorts notably including then Deputy Assistant Attorney General John C. Yoo, who was on leave from his post as law professor at Boalt Hall, where we will be arguing the case on Wednesday, and has since returned — only after his participation in the gruesome project became publicly known in the wake of the courageous leaks in 2004.

Gonzalez himself wrote to the President that, "it is difficult to predict the motives of prosecutors and independent counsels who may in the future decide to pursue unwarranted charges" based on the War Crimes Act; and Mr. Bybee wrote to Gonzalez that "deviations(!) concerning treatment can be justified on basic grounds of legal excuse concerning self-defense and feasibility." (Emphasis added.)

That is, where U.S. laws proscribe both War Crimes (18 U.S.C. 2241) and torture (18 U.S.C. 2340 and 2340A), the memos sought to provide the basis on which the President could promulgate a wholly illicit Immunity from prosecution for all those involved in formulating, ordaining and carrying out the desired program of tyranny and oppression against anyone unfortunate enough to fall under U.S. Power. Taken as a manifestation of the megalomaniac "neocon" political proclamations in 2001 to 2003 by the Regime, and the President and the Vice-president in particular, of America's unilateral pupose and intention to dominate the world with military power in furtherance of its "interests" — and damn the United Nations and the rest of the world — the basis for a finding of bias and the appearance of bias in any case involving Constitutional limits on the use of force by U.S. public officers, on the part of one who took part in staking out those positions, and affirms them today by refusing to disqualify himself, is clear.

The fact that Judge Bybee's involvement in this enterprise was secret from the Senate (and the U.S, Public) during his confirmation, only underscores the premises — as well as raising the further issue of his fitness for this high position on any terms.

WHEREFORE, Appellant by the undersigned asks that his claim for disqualification be taken beyond Judge Bybee's predictable and obvious cut-and-dried judgment of his own case, and taken up by the motions panel, on an urgent basis, before the argument on Wednesday; that the Panel order that he be disqualified in this case, and that it grant such other and further relief as may be just and appropriate.

DATED: February 11, 2008

Respectfully submitted,

Dennis Cunningham
Attorney for Appellant Jade Santoro

CERTIFICATE OF SERVICE

I certify that I served the within Motion for Disqualification, etc. on Appellees by fax and mailing a copy to Sean Connolly and David Newdorf, DCAs, at the City Attorney's Office in San Francisco, on February 7, 2008.

Dennis Cunningham