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HOISTED BY HIS OWN PETARD

Pornography, a Federal judge discovers, is in the eye of the beholder

By Julius (Jay) Wachtel. Once upon a time (actually, May 2001) Judge Alex Kozinski of the U.S. Ninth Circuit Court of Appeals was terribly angry. Federal court employees around the country had been downloading large, naughty files from porn sites, so to stop them the pinheads in Washington installed filters and remote monitoring devices.

This enraged the good judge, who insisted that his staff -- naturally, including himself -- be able to cruise the Internet unmolested.

Judge Kozinski again made news in 2003. This time it was because of his unusual relationship with Michael W. Hunter, a California inmate on death row for murdering his father and stepmother. Hunter read an article that Kozinski wrote about the death penalty and they started corresponding. Kozinski later visited Hunter. They discussed other death row prisoners, including James Richard Odle, for whom Kozinski had ordered a competency hearing. Hunter (he was eventually re-sentenced to life without parole) later told California State investigators that Kozinski asked him whether Odle was "really crazy." That worried then-California Attorney General Bill Lockyer enough to file a motion asking that Kozinski be barred from ruling on capital appeals in California.

This got the good judge mad. Lockyer's actions were "crazy"!

Three years later Judge Kozinski got -- you guessed it -- mad as a hornet. Mary Schroeder, then Chief Judge of the Ninth Circuit, had twice dismissed a disciplinary case against Los Angeles Federal District Court Judge Manuel Real. Judge Real, a controversial jurist, had allegedly interfered in the bankruptcy case of a "comely" female probationer whom he had been *personally* supervising. Judge Kozinski's dogged pursuit of the matter eventually got Judge Real censured (Congress even began an impeachment process against Real. It went nowhere.)

Having established his reputation as a square-shooting disciplinarian, Kozinski became Chief Judge of the Ninth Circuit Court of Appeals in November 2007. In this position he oversees the Court's business side, assigns the writing of opinions and supervises its judges. Everything was going swimmingly until that fateful day when he took a swing at being a trial judge.

According to the [L.A. Times](#) Appeals Court Judges fill extra time on their hands hearing regular cases. That's how Judge Kozinski recently wound up presiding over the trial of Ira Isaacs, an accused pornographer whose product is supposedly so vile that it even offends the citizens of SoCal. (Isaacs insists that the videos he makes and markets are "art," thus exempt from regulation. Even so he's been quoted as saying "I think I'd freak out if I had to watch six hours of the stuff." He's referring to the rancid displays of bestiality and defecation that twelve lucky jurors will get to see.)

On June 11, 2008, only a couple of days into the trial, Judge Kozinski called a halt to the proceedings. He had learned that the *L.A. Times* was about to publish an article suggesting that he had more than a professional interest in sexually titillating materials. [Marcy Tiffany](#), the judge's wife for more than thirty years and a respected attorney in her own right, jumped to her husband's defense. In a long letter to a popular blog she called the *Times* article "riddled with half-truths, gross mischaracterizations and outright lies." So what really happened? Well, like other tech-savvy families the Kozinskis have their own web-enabled storage device, allowing them to view and upload data from wherever they are. (Judge Kozinski told the *Times* that he occasionally shared files with others.) Among the materials were stills and videos depicting sexual, um, *stuff*, some of which the judge suggested might have been posted by an adult son.

If you believe the *Times*, the materials were offensive and pornographic (one, a step-by-step "instructional video" shows a woman shaving her public hair.) If you believe Judge Kozinski, some were offensive but "funny." If you believe Mrs. Kozinski, what little there was, was "comic-sexual":

"The fact is, Alex [her husband, not the son] is not into porn -- he is into funny -- and sometimes funny has a sexual character. The tiny percentage of the material that was sexual in nature was all of a humorous character. For example, the "women's crotches" [referring to what the *Times* described as bared pubic hair and genitalia] was one of the "camel toe" series that is widely available on the net."

Whatever their educational value, how did the files get out? The villain, according to Mrs. Kozinski, is [Cyrus Sanai](#), a Beverly Hills lawyer whose bitter dispute with the Ninth Circuit supposedly led him to target her husband for retaliation. Whether he gained access through reverse engineering (as Mrs. Kozinski wrote) or, as seems more likely, because the directories weren't password-protected, Sanai did the natural thing: he called the *Times*. Their article stunned prosecutors, who immediately filed a motion asking Judge Kozinski to recuse himself.

Against the defendant's wishes (Isaacs praised the judge during a radio interview) Kozinski not only called a mistrial but referred the whole mess to, yes, those pinheads in Washington. They in turn dumped it on a [panel](#) of Federal judges in Philadelphia's Third Circuit. As such things are handled confidentially, unless Kozinski is prosecuted or impeached we may never know what they decide. Did he violate Federal law or the canons of his office? Did his acts discredit the judiciary? Taking at face value Judge Kozinski's statements that he wound up on the porn case strictly by chance, one would think that given his personal interest in salacious material he would have declined the assignment. It's not only defendants who are entitled to a fair trial. Had Mr. Sanai *not* come forward, would the People have gotten a fair shake in court?

Judge Kozinski is not your average jurist. After graduating with honors from UCLA Law School he clerked at the Supreme Court, then served in the Reagan White House and at the Federal Claims Court before being appointed to the Ninth Circuit at the ripe old age of 35. A [prolific writer](#) with an eclectic taste, he's published in everything from staid law reviews to *Forbes* (on building computers) and the *New Yorker* (on the death penalty).

During his distinguished career Judge Kozinski has developed something most jurists decidedly lack: a fascinating public persona. We'll have to see how well it serves him in this latest challenge.