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Judging and Administration for Far-Off Places: Trial, Appellate, and Committee Work in the South Pacific

Stephen L. Wasby
University at Albany - SUNY

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ARTICLE

JUDGING AND ADMINISTRATION FOR
FAR-OFF PLACES: TRIAL, APPELLATE,
AND COMMITTEE WORK IN THE
SOUTH PACIFIC

STEPHEN L. WASBY*

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* Professor of Political Science Emeritus, University at Albany - SUNY, residing in Eastham, Mass. Contact: wasb@albany.edu. The author wishes to express his appreciation to Judge Alfred T. Goodwin, Senior Judge, U.S. Court of Appeals for the Ninth Circuit, for access to his papers. In a way, this Article extends the judge's writing in Alfred T. Goodwin, *United States Law in the Pacific Islands*, 22 W. LEGAL HIST. 103 (2009). The reader should note that the author reviewed the Goodwin Papers while conducting research for this Article. The unpublished documents cited here, including unpublished case dispositions, are available in the Goodwin Papers, which are held at the Oregon Historical Society, Portland, Oregon, except that the interview of Judge Goodwin and correspondence between Judge Goodwin and the author are on file with the author.

The author has made every effort to ensure the accuracy of citations to, and quotations from, those documents, but the author notes that the editors of the *Golden Gate University Law Review* have not had the opportunity to review the documents from the Goodwin Papers cited or referred to here.

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I. INTRODUCTION

Little attention is paid to the far reaches of the federal judicial system, which extends beyond the boundaries of the continental United States and even beyond the outermost states of Alaska and Hawaii; Puerto Rico is part of the First Circuit,¹ and the Virgin Islands are part of the Third Circuit.² Most particularly, the Ninth Circuit encompasses not only Hawai’i but also the territories of Guam and the Northern Mariana Islands (NMI). Not only has the Ninth Circuit provided judges to hear cases in the district courts in Guam and the NMI as needed and reviewed cases appealed from those districts, but, through the circuit’s Pacific Islands Committee—formerly the Pacific Territories Committee of the Judicial Conference of the United States—it has also developed and helped implement policy for those courts, including their relation to the Ninth Circuit.

One judge who has played an especially prominent role in this activity, as a judge sitting in the far Pacific and as a member and chair of the committee, is Alfred T. Goodwin. From the beginning of his Ninth Circuit service, he heard cases appealed from Guam and the Northern Marianas. Starting when he was the circuit’s chief judge and continuing as chairman of the Pacific Islands Committee, he went out to the islands regularly; on one of his trips as chief judge, he helped dedicate the courthouse in Saipan. As chief judge, he “had to cajole district judges” to go

¹ See Stephen L. Wasby, *A Look at the Smallest Circuit*, 43 SUFFOLK U. L. REV. 417 (2010).

² Before the change in the relationship between the United States and Panama, the District of the Canal Zone was part of the Fifth Circuit.

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there and sent many judges from the Central District of California, “but no one would go back,” so he assigned himself to go.³ After Judge Goodwin assumed senior status, he continued his committee responsibility and often flew across the Pacific to sit in the courts of Guam and other island locations. In addition to sitting in those far-off courts, in March 2004 he was in Guam with Ninth Circuit Chief Judge Mary Schroeder and Justice Sandra Day O’Connor for a ceremony to mark fifteen years of the Ninth Circuit’s certiorari jurisdiction over cases from Guam and the change to Supreme Court certiorari jurisdiction over those cases. His work in Guam and other south Pacific locations meant that he continued to pack his large frame into an airplane when he was in his 80s, and he has observed, “It’s a grueling trip—11 hours by air—for someone my age; I won’t sit in a fetal position for 11 hours, so I fly business class.”⁴

Judge Goodwin sat in Guam as a trial judge,⁵ and, with U.S. district judges from Guam and the NMI, as a member of the Appellate Division of the District of Guam; some of the Ninth Circuit panels on which he sat heard cases while in Saipan in the NMI. He also came to sit by invitation in other courts in the south Pacific—American Samoa, the Marshall Islands, and the Federated States of Micronesia—where, as he put it, he “wrote opinions for foreign nations,” or, as he put it more jocularly, “I’m running my far-flung trap line.”⁶ Someone jokingly suggested the possibility that he “went (somewhat) native,” fitting in well with the “locals,” as when it was reported, “He was offered a bat for dinner, and he didn’t even flinch; he ate the whole thing.”⁷ One cannot talk of federal judges in the south Pacific without touching on the Pacific Islands Committee, but the primary purpose of this Article is to provide a picture, using the cases in which Judge Goodwin participated,⁸ of the types of legal matters heard by the federal judiciary in Guam and in the cases the Ninth Circuit

³ Because he had sent others out there, he “thought I should go and see what was happening.” Interview with Alfred T. Goodwin (Jan. 10, 1994).

⁴ *Id.*

⁵ *See, e.g.*, Order by Chief Judge Procter Hug, Jr., *Assignment of a Judge to the District Court of Guam*, for April 11, 1996–April 10, 1997.

⁶ Conversation with Alfred T. Goodwin, (Jan. 6, 1994).

⁷ Memorandum from Judge William Canby to Associates [all other judges of the Ninth Circuit Court of Appeals], forwarding an article, *Islanders eating Pacific bats to extinction*, ARIZ. REPUBLIC, Sept. 2, 1993, and joking that Judge Goodwin was exacerbating this environmental problem. He added, “It is my understanding that one eats these bats with the hair on, but our nameless miscreant informed me that ‘it’s not really hair; it is more like fur.’” (n.d.).

⁸ The Article is based on case dispositions, both published opinions and “unpublished” non-precedential memorandum dispositions, along with Judge Goodwin’s correspondence about Pacific Islands Committee work and related matters. Unfortunately, the author was not able to undertake any fieldwork in the locales in which Judge Goodwin sat, although he can claim to have watched Ninth Circuit oral argument in Hawai’i.

reviewed from Guam and the NMI, as well as to indicate the types of appellate cases heard in several other island venues. To be sure, many of the cases that came before the judges visiting these far outposts were like any others they encountered on the mainland—for example, routine appeals from criminal convictions and sentences—but some of the cases, whether heard out in the islands or on Ninth Circuit review, touched on institutional or structural matters with which the committee was concerned. In particular, there were prominent cases concerning appellate jurisdiction in cases from Guam and from the NMI, and some touched on the basic relations between the United States and the territories as well as on island politics, of which the mainland judges were appropriately wary. With Ninth Circuit decisions part of this Article, there will be some depiction of the interactions of judges on that court's panels as they decided cases.

Once past an introductory description, the work of the Pacific Islands Committee will not be discussed in detail but the committee appears with some frequency in this account because the judge's service on it is meshed with his sitting as a judge in Guam and NMI. Membership on the committee not only meant greater likelihood of sitting in those far-off locations, particularly in the Appellate Division of the District Court in Guam, but Ninth Circuit judges' involvement in the courts of the south Pacific has also been both judicial, as they sat as trial and appellate judges there, and policy-making (if not legislative in the strict sense). When in Guam or the NMI, the judges who were committee members were not just "dropping in" to hear arguments and then go home, they were also paying attention to the functioning of the local courts and the views of members of the local bar with whom they would meet and dine. Thus a recurring theme is that there was a crossover between, or mixing of, judicial and policy-making roles.

A. HOW THE ARTICLE PROCEEDS

After a relatively brief look at the Pacific Islands Committee, the focus of the Article turns to Judge Goodwin in Guam. Particular attention is given to several years of the judge's sittings there both as a trial judge in the U. S. District Court and as a judge in its Appellate Division; Ninth Circuit rulings on appeals from his decisions in Guam are included. This description, like the treatment of his sittings in other south Pacific venues, is rather detailed to allow the reader to see the full range of civil and criminal matters, including domestic issues, in which the judge was involved. These matters were not unlike ones Judge Goodwin had seen as a state and federal trial judge or those he faced during his nearly ten-

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year tenure on the Oregon Supreme Court, which like the Appellate Division of the District of Guam was not a discretionary jurisdiction court at the time.⁹ Following this description is treatment of cases from Guam in which Judge Goodwin was a member of the Ninth Circuit panel; some of those cases implicated important questions of jurisdiction. Attention then moves to Ninth Circuit cases from the Northern Marianas, especially those in which Judge Goodwin wrote opinions. The judge's involvement in cases in other island republics ends this Article.

B. THE PACIFIC ISLANDS COMMITTEE

The Pacific Islands Committee, formerly the Pacific Territories Committee, had its origins in 1975 in the work of the Ninth Circuit's then-Chief Judge Richard Chambers as he developed the Second South Pacific Judicial Conference for the judges of the Pacific Trust Territories.¹⁰ After the conference, in 1976 Judge Chambers recommended to Chief Justice Warren Burger that a committee be created to work with the courts of the south Pacific, not limited to those venues with U.S. territorial status. The Chief Justice agreed with the recommendation and appointed Judge Chambers to chair the Pacific Territories Committee of the Judicial Conference of the United States (JCUS).¹¹ The committee's purpose, as later stated, was "to act as a resource to the United States territories and former Trust Territory of Pacific Islands in their endeavor to make their judicial systems more effective and advance the rule of law."¹² The committee's work has been part of the "informal relations between the now independent courts of Micronesia and the judiciary of the Ninth Circuit," continuing through today.¹³ Ever since Judge Chambers, all the Ninth Circuit's chief judges "have cooperated with the free association states in furnishing judges as visitors to assist with appeals."¹⁴

Judge Chambers' first committee report to the JCUS was submitted on September 1, 1976, with a second report following in February 1977. For the remainder of the decade, the committee, which met at the Ninth Circuit's Judicial Conference and sometimes at the judges' mid-winter

⁹ Judge Goodwin has likened sitting on the Appellate Division of the District of Guam to "being on the Oregon Court of Appeals," with a "wide range of cases, including street crimes." Like the Appellate Division of the District of Guam, the Oregon Supreme Court was not a discretionary jurisdiction court when Judge Goodwin sat on it. Interview with Alfred T. Goodwin, *supra* note 4.

¹⁰ The first such conference had been held in American Samoa in 1973.

¹¹ Letter from Chief Justice Warren Burger to Richard Chambers (June 9, 1976).

¹² Goodwin, *supra* note 1, at 125.

¹³ *Id.* at 113.

¹⁴ *Id.* at 114.

meetings, “focused on reviewing and commenting on proposed legislation affecting the judicial structure of various island courts.”¹⁵ Among the matters considered was an earlier idea to place the appellate jurisdiction for all the Pacific territories in the District Court for Hawai’i, but Judge Chambers, in a statement indicating the ethnic and cultural matters to which the committee would regularly have to be sensitive, reported that the idea was “strongly opposed” by those in the territories. “Some believe this is traceable,” he said, “to the unhappy relationships between many American Samoan immigrants to Hawaii and many citizens of the state of Hawaii.”¹⁶ Among the wide range of matters that the committee was to consider over time was the possible creation of a Pacific Legal Institute, continuing legal education in Guam, and assisting law libraries, as well as a number of specific issues relating to Guam, and questions of diversity-of-citizenship jurisdiction for the territorial courts.

In addition to Judge Chambers, the committee’s initial members were Ninth Circuit Judges Walter Ely of Los Angeles and Herbert Choy of Hawaii, retired District of Guam judge Paul D. Schriver of Denver, and former attorney general of American Samoa Charles H. Habernigg of Portland, Oregon. The committee’s composition changed in the 1980s with Judge Chambers’ resignation from the committee in 1982 and Judge Choy’s departure. To replace Chambers as committee chair, Chief Justice Burger appointed then Judge Anthony Kennedy, perhaps as a “reward” for getting his congressman, Rep. Harold “Bizz” Johnson, to obtain funding for the new Ninth Circuit appellate courthouse in Pasadena.¹⁷ In his 1985 report, Judge Kennedy suggested that with Congress having approved basic structural matters concerning Guam and NMI, the committee could shift more of its attention to American Samoa. He also recommended against having attorneys as committee members¹⁸ and said that it sufficed to have three or four judges as the committee, and the committee then became Ninth Circuit Judges Jerome Farris and William Canby and District Judge Samuel King (D. Hawai’i). In 1990, now-Justice Kennedy reported to Chief Justice Rehnquist that the committee had completed its agenda and suggested discharging the committee. The Chief Justice did so, but he turned over the committee’s work to

¹⁵ Alfred T. Goodwin, *A History of the Pacific Islands Committee of the Judicial Council of the Ninth Circuit 5* (unpublished manuscript) (n.d.). The account here draws on that source as well as the other material cited.

¹⁶ Memorandum from Richard Chambers to Associates re: *People of Territory of Guam v. Olsen*, 540 F.2d 1011 (9th Cir. 1976) (en banc) (June 8, 1976).

¹⁷ Email from Alfred T. Goodwin to Stephen L. Wasby (Feb. 6, 2014, 1:42PM ET) (on file with author).

¹⁸ Mr. Habernigg had initially served with Judge Kennedy, along with Judge Ely and Judge Leland Nielsen (S.D. Cal.).

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the Ninth Circuit's Judicial Council. On April 19, 1991, that body issued the charter of the Council's Pacific Territories Committee and shortly thereafter, on August 4, 1991, changed its name to the Pacific Islands Committee, a reflection of the changed status of some former Trust Territories to independent republics.

Chief Judge Browning, who succeeded Chief Judge Chambers, had not been interested in travel to the court's far-flung outposts. Judge Goodwin became involved in the committee's work after he became Chief Judge and its work was, as just noted, transferred to the Ninth Circuit.¹⁹ Judge Goodwin's major involvement extended from the latter part of his tenure as chief judge for quite some time thereafter, as both committee chair and member. Judge J. Clifford Wallace, upon becoming chief judge, appointed Goodwin as committee chair for October 1, 1991, through September 30, 1995, which he extended by a year.²⁰ When Goodwin joined the committee, in addition to Judges Canby and King, its members were the district judges from Guam and the NMI, John Unpingco and Alex Munson.²¹ Ninth Circuit judges who served on the committee included Cynthia Holcomb Hall and Melvin Brunetti, the committee's chair in 1999, and the committee received assistance from Ninth Circuit staff, particularly assistant circuit executive David Pimentel.

Just before stepping down as chief judge, Judge Wallace became chair of the committee; the new chief judge, Procter Hug, Jr., had not wished to undertake the travel associated with the position. Hug then extended Goodwin's membership on the committee a year at a time through September 30, 1999,²² at which time Goodwin left the committee, but his absence was brief, as Chief Judge Mary Schroeder placed him back on the committee when Judge Hall resigned, and then reappointed him, at first for two years and then for an additional year.²³

¹⁹ Judge Goodwin has suggested that his involvement came at the recommendation of former Chief Judge Chambers, perhaps for Goodwin's having moved to Pasadena as part of the court's obtaining the new courthouse there, *see* email from Alfred T. Goodwin to Stephen L. Wasby, (Feb. 6, 2014, 1:42PM ET) (on file with author), but the Ninth Circuit did not assume responsibility for the committee until after Goodwin became chief judge.

²⁰ Letters from J. Clifford Wallace to Alfred T. Goodwin (July 15, 1991 & Oct. 31, 1995). Prior to appointing Goodwin as chair, Chief Judge Wallace, known for attention to administrative detail, wrote to Goodwin about what he wished the committee to do and suggested an agenda. Letter from J. Clifford Wallace to Alfred T. Goodwin (June 25, 1991).

²¹ Judge King was replaced, in turn, by fellow District of Hawai'i Judges Alan Kay, David Ezra, and Susan Oki Mollway.

²² *See, e.g.*, Letters from Procter Hug, Jr., to Alfred T. Goodwin (July 26, 1996 & May 11, 1998).

²³ Letters from Mary Schroeder to Alfred T. Goodwin (Dec. 8, 2000, June 25, 2002 & Sept. 27, 2005).

With Judge Wallace as its chair, the committee undertook a needs assessment for judicial training, including a National Judicial College study of whether the Supreme Court of Guam was sufficiently developed to allow direct review of its rulings by the U.S. Supreme Court. However, that was only a small part of the wide range of matters in which the committee was involved. As to Guam and the NMI, issues considered subsumed legislation, including changes in the Guam court structure such as:

- The route for appeals from Guam and NMI to the Ninth Circuit—whether by appeal as of right or certiorari—and to the Supreme Court, Article III status for Guam and NMI district judges,
- The possibility of combining the Districts of Guam and NMI, a continuing judicial vacancy (in Guam), the creation of a Commonwealth-Federal Council in NMI, possible interference with investigations by a U.S. Attorney’s office, and
- Possible discipline for a judge who appeared to have encouraged lawyers to contribute to a sports charity in which he was involved.

While Guam and the NMI may have dominated the committee’s work, also receiving attention were matters of wider coverage, which included the Republic of the Marshall Islands, the Federated States of Micronesia, Palau, and American Samoa. Some topics were “one-off.” However, many topics recurred against the background of namely the need to avoid involvement in local conflicts, particularly those between judges and attorneys, to heed local preferences, and to be aware of the tension between local self-determination and involvement by the federal government, including the judiciary. The topics the committee considered included the South Pacific Judicial Conference, including Ninth Circuit judges’ attendance, island judge attendance at Ninth Circuit judge meetings, judicial education and training; potentially competing judicial foundations or institutes,²⁴ library facilities and holdings; law clerks’ travel expenses, court facilities in American Samoa, and assigning judges to sit in the Federated States of Micronesia.

II. GUAM: COURT STRUCTURE AND APPELLATE JURISDICTION²⁵

Some words are in order about the court structure in Guam and about appellate jurisdiction over rulings in the island courts before Judge Goodwin’s judicial service in Guam is examined.

²⁴ The Pacific Legal Institute and Pacific Institute of Judicial Administration.

²⁵ The sources referred to in note 1, *supra*, were the basis for this Part.

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The structure of the judiciary in Guam had been through a number of transformations, some resulting from U.S. acquisition of Guam in the Spanish-American War at the same time the U.S. acquired Puerto Rico, and continuing throughout the century. At first, the court structure that had been established for Spain's colonies was retained on an interim basis, but the Governor under the U.S. regime set up a Supreme Court of four of his appointees. In 1905, Congress converted this court to a Court of Appeals of three judges (five for capital cases), and the Spanish Court of First Instance became the Island Court.²⁶ The Guam courts, which used California law, were further reorganized in 1933, with the Court of Appeals now having five judges appointed by the governor: a presiding judge, two Navy personnel, and two Guamanians. At the time of the Organic Act of 1950, the Department of the Interior replaced the Navy as the controlling U.S. agency. In 1951 the U.S. District Court was created alongside the Island Court, and it was granted civil jurisdiction over cases involving at least \$2,000. In 1974 the Island Court became the Superior Court, with jurisdiction over all cases under Guam law. Appeals from the Island Court (and Superior Court) went to the Appellate Division of the U.S. District Court, a district judge and two district judges from other districts (a court of appeals judge could so sit), with further appeal to the Ninth Circuit under a 1963 ruling.

A Supreme Court was also established in 1974. However, as discussed below, invalidation of transfer of appellate jurisdiction to that court meant that there was no Supreme Court of Guam until one was created in 1993 after Congress authorized it in the Omnibus Territories Act in 1984; the judges were not sworn in until 1996. The Supreme Court consists of a Chief Judge and two full-time associate justices, with up to four part-time associate justices; a Superior Court judge can be an acting associate justice, as can a federal judge. It has appellate jurisdiction of cases under Guam law, including declaratory judgment requests by the executive and legislature as to their powers. Further appeal of these Guam law cases was to be to the Ninth Circuit Court of Appeals by writ of certiorari,²⁷ and then by certiorari to the U.S. Supreme Court. Thus the Ninth Circuit retained judicial oversight of the Guam Supreme Court's actions; that lasted for 15 years, a span covering Judge Goodwin's service on the Pacific Islands Committee, after which review of decisions of the Guam Supreme Court would be by certiorari to the U.S.

²⁶ This paragraph and that following are drawn from an unsigned, undated manuscript, "Guam," found in Judge Goodwin's Pacific Territories Committee files. One might assume that Judge Goodwin was its author.

²⁷ Similarly, cases from the Virgin Islands Supreme Court go to the U.S. Court of Appeals for the Third Circuit on certiorari. See *In re Kendall*, 712 F.3d 814, 821 n.3 (3rd Cir. 2013).

Supreme Court. After all appeals filed prior to the establishment of the Guam Supreme Court were heard, the District of Guam stopped hearing appeals.²⁸

A. GUAM APPELLATE JURISDICTION CHALLENGED

Early in Judge Goodwin's tenure in the Ninth Circuit, he was involved in that court's grappling with the relation of Guam's island courts to the federal court system, a matter in which he was later to participate while helping develop policy. The initial effort to vest appellate jurisdiction in a Supreme Court of Guam was challenged. A case was appealed from the newly created (or named) Superior Court to the Guam Supreme Court, in which the Guam Territorial Legislature had vested appeals that would have gone to the U.S. District Court's Appellate Division as to local non-federal matters.²⁹ The respondent then asked the District Court for a writ of prohibition precluding the Supreme Court of Guam from acting on the appeal. The Ninth Circuit thus faced the question of the territorial legislature's authority to shift this appellate jurisdiction and the task of interpreting a sentence Judge James Carter, who wrote for himself and Judge Goodwin, called "overstuffed" and Judge Anthony Kennedy called "convoluted."³⁰ The Carter-Goodwin majority found that this elimination of the District Court's appellate jurisdiction had been authorized by Congress, and that the Guam legislature's earlier and long-standing grant of appellate jurisdiction to the District of Guam was "not compelled by the statute."³¹ Judge Kennedy, in dissent, found no authorization in the Guam Organic Act to transfer the District of Guam's appellate jurisdiction and disagreed that the legislature's power to "determine" appellate jurisdiction allowed legislative extinction. He thought, "Congress would have spoken more directly had it intended to enable the territorial legislature to substitute a local appellate court for the appellate division of the district court."³²

It was to be only somewhat over two years before this ruling was supplanted. A defendant convicted in the Guam Superior Court tried to appeal to the District of Guam, which dismissed the appeal. The Ninth Circuit took the case en banc before it was decided by a three-judge

²⁸ See Goodwin, *supra* note 1, at 122–24.

²⁹ *Agana Bay Dev. Co. (H.K.) Ltd. v. Supreme Court of Guam (Dillingham Corp. of the Pacific, Real Party in Interest)*, 529 F.2d 952, 956 (9th Cir. 1976) (Carter, J., for the majority), *overruled by* *Territory of Guam v. Olsen*, 540 F.2d 1011 (9th Cir. 9176) (en banc) (per curiam), *aff'd*, 431 U.S. 195 (1977); *id.* at 959 (Kennedy, J., dissenting).

³⁰ *Id.* at 956 (Carter, J., for the majority).

³¹ *Id.* at 958.

³² *Id.* at 959 (Kennedy, J., dissenting).

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panel; this use of an en banc court before panel resolution of a case was infrequently used but it was urged in this instance by several judges because of the number of people affected and, as Judge Richard Chambers put it, “anarchy has been going on in the Guam court system.”³³ In a very brief per curiam opinion, the seven-judge majority adopted Judge Kennedy’s earlier dissenting opinion: “We now hold that the provisions of Guam’s Court Reorganization Act transferring the appellate jurisdiction of the district court to a territorial court are not authorized by the Organic Act.”³⁴ Judge Goodwin, for himself and three other judges, dissented on the basis of Judge Carter’s earlier opinion he had joined. In the course of voting on which of the prior opinions (Judge Carter’s or Judge Kennedy’s) to adopt, Judge Shirley Hufstedler said she “would like to keep the Supreme Court of Guam alive and fully stocked with entirely local questions, excluding substantial federal questions,” but she thought that would require rewriting either Guam’s Court Reorganization Act or a portion of the Organic Act.³⁵

Judge Chambers’ separate comments accompanying the en banc ruling point to the mixed judicial-policy-administrative tasks of a Ninth Circuit judge who not only hears appeals from Guam and the NMI but who also serves on the Pacific Islands Committee. Chambers took no position in the case because he had just been appointed by Chief Justice Burger to chair the JCUS Committee on the Pacific Territories and he thought “I should not wear a judicial hat and a semi-legislative or policy hat at the same time, although I do not consider myself disqualified.”³⁶ Other Ninth Circuit judges, including Goodwin, were not to adopt that non-participatory stance.

Before the Ninth Circuit had ruled on his appeal, the appellant tried to obtain certiorari before judgment from the U.S. Supreme Court, which denied the petition.³⁷ However, on receiving the en banc decision, the Justices affirmed but by only a 5-4 vote.³⁸ For the Court, Justice Brennan said that the 1950 Organic Act did not authorize divesting the District Court’s jurisdiction to hear appeals from Guam courts; there had been no clear signal from Congress giving such authority to the territorial legislature, which could “determine” jurisdiction only in selecting what cases were appealable. Dissenting, Justice Marshall thought the legisla-

³³ Memorandum from Judge Richard Chambers to Associates re: People of the Territory of Guam v. Olsen, 540 F.2d 1011 (9th Cir. 1976) (en banc) (May 27, 1976).

³⁴ Territory of Guam v. Olsen, 540 F.2d 1011, 1012 (9th Cir. 1976) (en banc) (per curiam), *aff’d*, 431 U.S. 195 (1977).

³⁵ Judge Shirley Hufstedler, vote memo, People of Guam v. Olsen (June 20, 1976).

³⁶ Memorandum from Judge Richard Chambers, *supra* note 34, at 1013.

³⁷ Olsen v. Territory of Guam, 425 U.S. 960 (1976).

³⁸ Territory of Guam v. Olsen, 431 U.S. 195 (1977).

ture's action was plainly authorized and called the abolition of the Guam Supreme Court "unprecedented."³⁹

Some of Judge Goodwin's judicial service in Guam while on the Ninth Circuit was a result of a long-standing district court vacancy there after Judge Cristobal Duenas retired. The position was not filled during the Reagan administration, with financial reasons contributing to the lack of action. Judge Goodwin remarked to Guam's Delegate to Congress about the "difficulty in finding qualified experienced lawyers who can afford to take the job," as the lawyers who were "most experienced and most qualified" were "earning incomes well beyond the government salary"; that led him to suggest looking among younger lawyers for possible appointees.⁴⁰

Judge Goodwin's early trips to sit in Guam let him see directly "how important it is to have a judge who understands Guam, the people, their language and customs,"⁴¹ and this led him to assist in recruitment. Goodwin visited with a prospective nominee, John Unpingco, a native Guamanian, at China Lake, California, where Unpingco was serving as an Army JAG officer, and recommended him to the Ninth Circuit representative on the ABA Standing Committee on the Judiciary.⁴² Yet once Judge Unpingco was ultimately appointed, according to Judge Goodwin, sometimes it was difficult to get judges to go to Guam to sit. When there were enough judges within the circuit who sought to go, determining which judges should go was not always easy. When the name of a district judge from outside the circuit was suggested, there was negative reaction, with a Ninth Circuit judge who was a member of the Pacific Islands Committee stating that he "adamantly oppose[d] accommodating requests like this from out-of-circuit judges. There are many district judges in our own circuit who would love to have an assignment in Guam," and arguing that they should be used first; he even suggested that some would prefer the Guam assignment to attendance at the circuit's judicial conference.⁴³

³⁹ *Id.* at 205 (Marshall, J., dissenting).

⁴⁰ Letter from Alfred T. Goodwin to Ben Garrido Blaz (Nov. 21, 1991).

⁴¹ *Id.* While indicating his willingness to sit in Guam "any time my schedule permits," he said "I believe Guam needs a full-time resident judge as soon as possible," with "the condition . . . urgent."

⁴² Judge Goodwin says that the Guamanians "give him more credit than he deserves" for the appointment, but he has been taken deep-sea fishing by Judge Unpingco's brother (and not fed to the fishes). Interview of Alfred T. Goodwin (Jan. 6, 1994).

⁴³ Memorandum from A. Wallace Tashima to Mary Schroeder, John Unpingco, Alfred T. Goodwin, J. Clifford Wallace, and staff (June 11, 2003); Memorandum from A. Wallace Tashima to Alfred T. Goodwin & Mary Schroeder (Jan. 23, 2003).

III. JUDGE GOODWIN IN GUAM

A. GOODWIN IN GUAM, 1994

The first years of Judge Goodwin's service as a judge in Guam were during the time when appeals from the Superior Court of Guam went to the District of Guam's Appellate Division. What types of cases occupied Judge Goodwin in Guam in his role as both a federal district judge and as an appellate judge? Although shortly after he took senior status in 1991, he spent three weeks in Guam presiding over trials and serving on the Appellate Division, two weeks in March 1994 are illustrative of the range of cases that were typical of what he would see in his service there. The first week was taken up with appellate work. Prior to Judge Goodwin's arrival, not only had a law clerk there provided a listing of the appeals ready for that appellate session—not all of which appear to have reached the final calendar—but Judge Unpingco had also proposed the cases in which Goodwin would write the opinions.⁴⁴

On the morning of March 8, Judge Goodwin sat with Judges Alex Munson (D. NMI) and John Unpingco (D. Guam) to hear the appeals in four criminal cases. In one case, the issues included claims of outrageous government conduct violating due process, denial of effective assistance of counsel (present in the other cases), and an error in sentencing.⁴⁵ Another case was a conviction for criminal sexual conduct.⁴⁶ The third case, a conviction for burglary, robbery, and possession/use of a deadly weapon in a felony, posed not only an ineffective assistance of counsel issue but also issues on jury instructions (on "reasonable doubt"), and a claim that the sentence constituted cruel and unusual punishment.⁴⁷ The last of the four cases involved official misconduct and harassment issues as to whether the Guam statute on official misconduct fit the charged conduct and on admission of testimony on prior bad acts.⁴⁸ Another case that did not make it to the calendar was a drug conviction that would have required examination of the exercise of peremptory challenges of jurors in a manner not conforming to the territorial statute, as well as the prosecutor's including in closing argument factual matters not in evidence.⁴⁹

⁴⁴ Letter from Jane Fearn-Zimmer (law clerk to Judge John Unpingco) to Alfred T. Goodwin (Jan. 26, 1994).

⁴⁵ *Territory of Guam v. Ulloa*, CR-91-00071A.

⁴⁶ *People v. Pitts*, CR-91-00096A; *People v. Scott*, 91-00145A.

⁴⁷ *People v. Taimanglo*, CR-93-00007A.

⁴⁸ *People v. Camacho*, CR-93-00073A.

⁴⁹ *People v. Muna*, CR-93-00034A; *see* letter from Jane Fearn-Zimmer to Alfred T. Goodwin (Jan. 26, 1994), indicating "appeals ready for the March 1994 Appellate Session."

Five more appeals, four criminal and one civil, were scheduled for the next morning before the same panel. An appeal from a conviction for burglary and first-degree criminal sexual conduct involved sufficiency of the evidence,⁵⁰ and again denial of effective assistance of counsel was an issue in two others.⁵¹ For a defendant convicted of multiple offenses, including robbery, kidnapping, burglary, terrorizing, and using a deadly weapon in a felony, sentencing issues were central—multiple sentences for a single course of conduct and admissibility of prior bad acts.⁵² The civil case involved the Superior Court’s *sua sponte* grant of summary judgment and decree of specific performance, as well as a denial of a motion to file an amended complaint.⁵³

The next morning, the panel heard an appeal in a case involving divorce and a property settlement agreement, where there were claims of trial court error in defining “net profits” in a settlement agreement and in the order for payment of a share of children’s college expenses even after they were emancipated and did not begin college after high school.⁵⁴ Then, when Judge Unpingco had to recuse himself, Judges Goodwin and Munson were joined by Judge Lamorena from the Guam courts to hear the inaptly captioned *Darling v. Darling* divorce and property settlement appeal, with an issue of the payment of child support when the children were in the custody of the party ordered to pay.⁵⁵

On Friday, March 11, Judge Goodwin, as a trial judge, held a status conference on a possible settlement of a suit for breach of an insurance contract and lack of fair dealing with respect to the insurance,⁵⁶ and he also conducted a resentencing proceeding that resulted from an appellate reversal of a sentence he had earlier imposed. In 1992, on a conviction for the defendant’s filling in federally protected wetlands on his own property, the judge, who said during the sentencing that defendant “grew up in a rice paddy in a place where the normal way of dealing with politicians was giving them gifts,” sentenced the defendant to two months of home detention, a \$25,000 fine, and three years of probation, reflecting a decrease in the Sentencing Guidelines level for acceptance of responsibility, and declined to increase the Guidelines level for a re-

⁵⁰ People v. Quezada, CR-93-00019A.

⁵¹ People v. Pitts, CR-91-00096A; People v. Carbullido, CR-93-00078A.

⁵² People v. Tedtaotao, CR-93-00001A.

⁵³ Executive View Estate, Inc. v. Look, CV-93-00062A.

⁵⁴ Johns v. Johns, CV-93-00060A.

⁵⁵ Darling v. Darling, CV-93-00077A.

⁵⁶ Cooney v. Continental Insurance Co., CV-93-00014. Judge Goodwin took notes on legal-sized lined pages, listing the claims of Plaintiff and Defendant and making some notes about “Law,” but his records do not indicate a settlement.

peated and continuous violation.⁵⁷ That brought a negative response from the Assistant United States Attorney, who claimed that defendant's not removing the fill despite repeated demands should be taken into account,⁵⁸ and on the government's appeal,⁵⁹ the Ninth Circuit vacated the sentence. With no question that there had been a discharge of a pollutant, Judges Otto Skopil and David Thompson said the Guidelines called for a four-level increase if there were only a single discharge but a six-level increase for a continuous and repeated violation, and they remanded for the sentencing judge to choose one or the other or to vary from the Guidelines,⁶⁰ while Judge Pamela Ann Rymer, concurring in the judgment, thought the six-level increase was required.⁶¹

Judge Goodwin's second week was spent serving as a trial judge. On March 15, he held a status conference on a set of 35 land cases, while the next day he had six matters, including a status conference in chambers, a settlement conference, a motion for a preliminary injunction and temporary restraining order, and, on the criminal docket, a change of plea and sentencing, a detention hearing (sealed), and an arraignment (also sealed). An arraignment (also sealed) took place the following day. On Friday, March 18, the judge, after beginning his day by conducting a naturalization proceeding, continued with several criminal matters—a change of plea, an initial appearance concerning a complaint, a sentencing, and a continued order to show cause—before dealing with a motion for an interlocutory sale of a boat and a summary judgment motion involving another vessel; he ended the day with a scheduling conference in a civil case. March 21 saw yet another settlement conference, a detention hearing, and a preliminary hearing.

1. *Law Clerk Assistance*⁶²

In carrying out his work in Guam, what assistance did Judge Goodwin have? His notes indicate that his own elbow clerks were involved in work on some Guam cases, and he also received assistance from a law clerk to Judge Unpingco, with cases moved along through cross-oceanic communication. He preferred not to bring a clerk from the mainland, because “[i]f I have a lottery to take a clerk, the others will be unhappy,”

⁵⁷ United States v. Suarez, CR-92-00036.

⁵⁸ Tandra A. Bryant, *U.S. Attorney Upset with Sentence*, PAC. DAILY NEWS, Oct. 30, 1992, at 3.

⁵⁹ In post-conviction proceedings, Judge A. Wallace Tashima (C.D. Cal.) denied relief on defendant's claims relating to the trial. United States v. Suarez, 846 F. Supp. 892 (D. Guam 1994).

⁶⁰ United States v. Suarez, 15 F.3d 1094 (9th Cir. 1994) (unpublished table ruling).

⁶¹ Judge Goodwin's files contain no indication of his action on resentencing.

⁶² The communications cited in this section are on file with the author. See *supra* note 1.

and he thought it better to take his secretary, “to help with getting cases ready,” or a staff attorney “who has been a ‘nanny’” to the lawyers in Guam.⁶³

An example of assistance from a law clerk in Guam is a case that was part of a situation in which three professors who stole personnel files were fired and then reinstated by the Guam Civil Service Commission (CSC) and the Superior Court dismissed the university’s appeal. In the process leading up to the Appellate Division’s affirmance of the dismissal,⁶⁴ the law clerk analyzed one of the matters at issue, the timeliness of the filing of the appeal from the CSC.⁶⁵ Responding to the law clerk, Judge Goodwin dealt with the argument that the trial judge’s ruling was a nullity because it was filed in the wrong court, which he thought an error “in light of the liberal policy of Federal Rule Civ. P. 1” and an earlier Appellate Division decision.⁶⁶ He suggested matters on which he would like to hear oral argument and indicated how he would decide the case “[i]f we are free do so.” Judge Goodwin admitted that the rule he proposed was “all more or less legislative, but if Guam doesn’t want to take care of business . . .” He added, “Guam has never bothered to enact any procedure for judicial review” . . . “somebody has to. It is time to eliminate this wasteful litigation over filing deadlines on petitions for judicial review of administrative orders.”⁶⁷

The law clerk in Guam continued to provide assistance when professors sued for civil rights violations on the claimed basis of discrimination because of their origin as non-Pacific Islanders.⁶⁸ After orders regarding the scheduling of a hearing on a Motion to Quash Service and on other procedural matters, the law clerk sent a bench memo recommending that a Motion to Dismiss be granted as to some claims but not others, followed by notifying the judge of the extensive Opposition filed by plaintiffs.⁶⁹ The law clerk’s assistance extended to preparation of a draft disposition, which she then “substantially modified” because of her rethinking of an immunity issue, where she found that qualified immunity for individuals (to which she thought defendants were probably entitled)

⁶³ Interview of Alfred T. Goodwin (Jan. 6, 1994).

⁶⁴ *University of Guam v. Guam Civil Service Commission* (Matheny, real party in interest), Civil No. 94-00018A (order filed Feb. 10, 1995). Judge Canby and Judge H. Russell Holland of the District of Alaska served with Judge Goodwin on the Appellate Division in this case.

⁶⁵ See Memorandum from Ann Keith to Alfred T. Goodwin (Jan. 4 1995).

⁶⁶ The panel in that case was three district judges: Samuel King (D. Hawai’i), Alfredo Laureta (D. N. Mar. I.), and Cristobal Duenas (D. Guam). A 1992 case implicated here was decided in 1992 by Judge Bailey Brown of the Sixth Circuit, Judge Terry Hatter (C.D. Cal.), and Judge Munson (D. N. Mar. I.).

⁶⁷ Memorandum from Alfred T. Goodwin to Ann Keith (n.d.).

⁶⁸ *Matheny v. Torries*, Civil No. 93-00074 (D. Guam).

⁶⁹ Email from Ann Keith to Alfred T. Goodwin (May 11, 1974 & May 13, 1994).

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had not yet been put to the court.⁷⁰ Judge Goodwin heavily edited the draft order, particularly on the immunity matter, indicating that plaintiffs' claims against defendants in their individual capacity could not be examined prior to discovery and dismissing claims as to four defendants unless, in his language, plaintiffs could "alleg[e] specific acts of discriminatory behavior on the part of each named defendant as distinguished from such generic vicarious fault as 'failure to supervise' other named defendants," and he ended by writing, "This is not a negligence case."⁷¹

The effectiveness of the communication between Judge Goodwin in Pasadena and the law clerk in Guam could also be seen in the judge's comment in a later case, "Keep me posted and I will keep you posted."⁷² The judge first asked the law clerk to speak to the U.S. Attorney and the Probation Department concerning a defendant's request for *in forma pauperis* status, and she reported that neither opposed the request while also reporting the defendant's motion for release pending appeal.⁷³ Judge Goodwin then granted IFP status but denied bail, finding "no likelihood, even after an appeal, that Brooks [the defendant] would receive a sentence of less than time served, including the normal time of an appeal."⁷⁴

That case also serves to illustrate that Judge Goodwin's membership on the Ninth Circuit while handling cases in the islands could facilitate resolution of problems. When appellant Brooks wrote to the Ninth Circuit, declaring that he did not wish to have counsel on appeal, a motions panel of Judges O'Scannlain, Leavy, and Kleinfeld, "pursuant to circuit court policy, remand[ed] this matter to the district court for the limited purpose of enabling that court to conduct a hearing pursuant to *Faretta*."⁷⁵ The district court was to "engage in a colloquy with appellant regarding the dangers and disadvantages of self representation on appeal" and to make written findings.⁷⁶ Receiving that Order, the Guam law clerk wrote to Judge Goodwin to express concern about how to meet the court's requirement that the defendant "must personally appear to waive his right to counsel," given that Brooks was in prison in Lompoc, California.⁷⁷ At this point, Judge Goodwin, taking responsibility for the

⁷⁰ Email from Ann Keith to Alfred T. Goodwin (May 24, 1974).

⁷¹ The revised order was signed May 24, 1994.

⁷² Memorandum from ATG to Ann Keith re: United States v. Brooks, CR-98-00046 (Jan. 23, 1997).

⁷³ Memorandum from Alfred T. Goodwin to Ann Keith (Oct. 25, 1996); Memorandum from Ann Keith to Alfred T. Goodwin (Oct. 28, 1996).

⁷⁴ Memorandum from Alfred T. Goodwin to Ann Keith (Oct. 28, 1996).

⁷⁵ *Faretta v. California*, 422 U.S. 806 (1975).

⁷⁶ United States v. Brooks, No. 96-10478 (9th Cir. Filed Jan. 16, 1997).

⁷⁷ Memorandum from Ann Keith to Alfred T. Goodwin (Jan. 24, 1997).

sentencing “since Judge Unpingco did not feel comfortable sentencing a local lawyer with whose family he is acquainted,”⁷⁸ communicated within his own court. He wrote to the Clerk of Court that the motions panel “may not have been aware that Mr. Brooks is currently serving his sentence at Lompoc” and suggested that “it would be enormously time-consuming as well as costly to the taxpayers to fly him to Guam so he can tell the district court in Guam that he really understands the *Faretta* case and wishes to be his own attorney,” particularly as Brooks had long been a lawyer “and is well aware of his right to have an attorney.” Goodwin suggested that federal marshals could bring Brooks from Lompoc to Pasadena (where Goodwin had his chambers) for the *Faretta* hearing, or to San Francisco, so Goodwin could conduct it and make the necessary findings.⁷⁹ Judge Leavy, as a panel member, suggested vacating the panel’s order and leaving the matter to Judge Goodwin, “in his capacity as a judge of this court, for the purpose of reviewing by any means he sees fit the question of whether Brooks is making a knowing, intelligent, and unequivocal waiver of his right to counsel on appeal.”⁸⁰ The other judges agreed and Judge Goodwin contacted a U.S. Marshal at Lompoc to initiate a telephone call between the judge and Brooks;⁸¹ the telephone call took place; and Judge Goodwin issued the necessary order memorializing the phone call and concluding that Brooks had made “a knowing, intelligent and unequivocal waiver of his right to counsel on appeal.”⁸²

B. GUAM, 1995

Judge Goodwin’s work in Guam is further illustrated by his week there in January 1995 serving as a district judge. On January 25, he held settlement conferences in two cases and tried three cases concerning land. The Guam law clerk had indicated that several litigants had “requested the opportunity to participate in a settlement conference before a judge other than the trial judge,”⁸³ so Goodwin held two more settlement

⁷⁸ Memorandum from Alfred T. Goodwin to Ann Keith (Jan. 23, 1997).

⁷⁹ Memorandum from Alfred T. Goodwin to Cathy Catterson (Clerk of Court, Ninth Circuit) (Jan. 23, 1997).

⁸⁰ Judge Edward Leavy to Judges Diarmuid O’Scannlain & Andrew Kleinfeld (Jan. 29, 1997).

⁸¹ Letter from Alfred T. Goodwin to Michael Southern (U.S. Marshal Service, Lompoc CA) (Feb. 4 1997).

⁸² Order, February 6, 1997.

⁸³ Memorandum from Jane Fearn-Zimmer to Alfred T. Goodwin (Jan. 4, 1995); ATG’s notes on the face of the memorandum.

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conferences and accepted a change of plea.⁸⁴ There was another settlement conference on January 27, but two status hearings were struck from the calendar and their place on the docket was taken by a guilty plea.

This service as a trial judge was followed by service on the Appellate Division with Judges Unpingco and Munson. They decided four cases on February 16, with Judge Goodwin writing the opinions in two. While doing that work, he conducted additional settlement hearings, one telephonically,⁸⁵ and two others, one of which was continued from earlier.⁸⁶ Reviewing a Superior Court award of a default judgment and punitive damages in a purchaser's suit for fraud and breach of contract, Judge Goodwin wrote for the court to vacate the default judgment. He found an abuse of discretion in granting it without explanation after the vendor showed a valid defense and he also ruled that the vendor's allegedly hiding to avoid service of process did not warrant punitive damages. Not only had the court "been unable to locate anything in the record to justify punitive damages," but "[t]he defendant had no duty to run down to the office of the plaintiff's attorney to accept service of summons. If she was, in fact, hiding out to avoid service, the consequences of that behavior are, *inter alia*, service by publication, not punitive damages."⁸⁷

Judge Goodwin also wrote to vacate a ruling by the same Superior Court judge in a case an intoxicated pedestrian brought for injuries when he was struck by a police officer's (official) motorcycle. The hapless plaintiff, who had consumed beer, had been detained for reckless driving but chose not to wait for a police ride home and instead started walking.⁸⁸ The trial judge had found the police department 90 percent at fault and awarded a judgment of \$270,000 (after reduction for plaintiff's 10 percent liability). That award was excessive, Goodwin said, and while there was "abundant evidence" of the officer's negligence and of plaintiff's contributory negligence, he found a lack of support for the 90 percent ruling, referring to it as "the trial court's curious decision that the government of Guam was 90 per cent responsible for Lampley's difficulties," as plaintiff "voluntarily placed himself in harm's way" and "chose the time and manner in which he slipped away from the police station to wander about in the early morning darkness and traffic. . . . No police

⁸⁴ *Matos v. M/V Chloe Z.*, CV-94-00013; *Pranjic v. M/V Chloe Z.*, CV-94-00014; *United States v. Sy*, CR-94-00147. District Court of Guam, Calendar for the District Court of Guam for January 26, 1995.

⁸⁵ *Howard v. Ambros*, CV-94-00061.

⁸⁶ The continued conference was in *Lightning Development v. Consolidated Transportation Services*, CV-94-00066; the other case was *Kallingal v. Director of Revenue and Taxation*, CV-94-00036.

⁸⁷ *Tokuda v. Huang*, 882 F. Supp. 154, 156 (D. Guam App. Div. 1995).

⁸⁸ *Lampley v. Gov't of Guam*, 882 F. Supp. 957 (D. Guam App. Div. 1995).

officer encouraged Lampley to jaywalk or linger in the street despite the approach of an oncoming vehicle.”⁸⁹ Nor could the panel find support for future lost wages and the like but only “for such minor pain, cost, and inconvenience as would be associated with removing metal pins and appliances that had been placed in his leg to assist healing.”⁹⁰

Judge Goodwin also joined in his colleagues’ opinions. In one case, in which Judge Unpingco wrote the opinion, convictions for a string of offenses (firearms, DUI, use of dangerous weapon in a felony) were affirmed.⁹¹ The defendant’s failure to raise the issue in a pre-trial motion had waived objection to admission of a rifle found in his truck and the defendant also failed to establish that counsel’s not moving to suppress constituted ineffective assistance of counsel.⁹² Per Judge Munson, the court also affirmed the Guam Worker’s Compensation Commission’s denial of benefits to a former country club employee, affirmed by the Superior Court, as supported by substantial evidence,⁹³ and dismissed, for lack of prosecution, both a complaint and cross-claim in a case on tenants in common of real property.⁹⁴ Also dismissed was an appeal from a conviction for attempted theft and committing a felony while on felony release after the defense attorney filed an *Anders* brief identifying speedy trial as the only the possible issue.⁹⁵ The court also, in a per curiam disposition, found no error and affirmed in a suit to recover an unpaid balance for the purchase of electrical supplies in which the trial court had used one party’s findings.⁹⁶

C. GUAM, 1996

Judge Goodwin’s service in Guam continued in 1996. This time he sat on the district court’s Appellate Division. Again the judges heard a series of typical cases. For the appellate hearings on February 28 and 29, they divided the opinions among themselves and filed them on March 5 and 6. There were eight cases in addition to those in which Judge Goodwin wrote opinions. One criminal appeal was from a conviction of a man for sexual contact with his 14-year-old niece, in which the Appellate Division ruled that the trial court had not abused its discretion in refusing

⁸⁹ *Id.* at 958–59.

⁹⁰ *Id.* at 958.

⁹¹ *People v. Garrido*, 882 F. Supp. 152 (D. Guam App. Div. 1995).

⁹² *Id.*

⁹³ *Lopez v. Guerrero*, 882 F. Supp. 952 (D. Guam App. Div. 1995).

⁹⁴ *Corbilla v. Villalada*, DCA CV 94-00045A, Order (D. Guam App. Div. Feb. 16, 1995).

⁹⁵ *People v. Botelho*, CR 95-0037A (D. Guam App. Div. 1995); *see Anders v. California*, 386 U.S. 738 (1967).

⁹⁶ *Phoenix Eng’g & Supply, Inc. v. Universal Elec., Inc.*, 882 F. Supp. 956 (D. Guam App. Div. 1995).

an offer to demonstrate that the claimed act was impossible, that the indictment was specific, and that the evidence was sufficient. In the other appeal, from a conviction for murder and use of deadly weapon during a felony, jury instruction and ineffective assistance of counsel claims were rejected.⁹⁷

Another case concerned an altercation in which defendant's supporters pushed people working for Guam Cable News; those who had been pushed sued and received summary judgment on First Amendment and emotional distress claims.⁹⁸ Without all present, the trial court had adopted a judgment on other matters except for costs and fees, said the omission was intentional, and refused to amend. The appellate panel vacated that ruling as an abuse of discretion for not providing the appellants the option of accepting the court's conditions or otherwise proceeding.⁹⁹

In a civil appeal with a question of timely filing, the appellate panel affirmed dismissal for failure to prosecute the case and rejected as moot the denial of an attorney's withdrawal.¹⁰⁰ The panel also cleaned up aspects of an employment dispute with claims and counterclaims of defamation and interference with prospective business advantage. The defendant had been represented by the Public Defender before becoming ineligible for those services, but the trial judge had ordered the Public Defender to continue. The Appellate Division dismissed the request for attorney fees and agreed Rule 11 sanctions were not warranted.¹⁰¹

In a land dispute over the width of an easement on which a project was constructed, in which the trial court had determined the easement's width, granted defendants summary judgment, and denied reconsideration, the panel affirmed the trial court.¹⁰² In a case over an insurance policy's family-member exclusion resulting from a fatal automobile accident, the Appellate Division reversed the trial court's grant of summary judgment to the insurance company and held that Guam law did not make the driver, who had been adopted, part of the family.¹⁰³ When a

⁹⁷ *People v. Muna*, CR 94-00075A (D. Guam App Div., Mar. 6, 1996); *People v. Sakura*, CR 94-00131A (D. Guam App. Div., Mar. 6, 1996).

⁹⁸ *Kerrigan v. Gill*, No. CV 95-00072A, 1996 WL 104517, at *5 (D. Guam App. Div. Mar. 6, 1996).

⁹⁹ *Id.*

¹⁰⁰ *Farmer v. Slotnick*, No. CV 95-00056A, CV 95-00073A, 1996 WL 104527, at *3 (D. Guam App. Div., Mar. 5, 1996).

¹⁰¹ *Moore v. Hoffman*, No. CV 95-00033A, 1996 WL 104534, at *3 (D. Guam App. Div., Mar. 6, 1996).

¹⁰² *Universe Resort Guam v. Sandcastle, Inc.*, No. CV95-00029A, 1996 WL 104525 (D. Guam App. Div. Mar. 5, 1996), *rev'd*, 116 F.3d 488 (9th Cir. 1997) (unpublished memorandum disposition).

¹⁰³ *Costa v. Quidachay*, No. CIV. 95-00108A, 1996 WL 104520, at *2 (D. Guam App. Div. Mar. 6, 1996).

person was injured in a building's common space by a gun fired from leased space used as a shooting gallery, the court considered the lessor's duty over the common space and affirmed summary judgment for the lessors and others;¹⁰⁴ the Ninth Circuit affirmed in turn, holding that the owner had met its duty to inspect the premises.¹⁰⁵

Prior to coming to Guam, Judge Goodwin had prepared an opinion that was not used (he brought on disk proposed opinions in lieu of bench memorandums). As part of a larger dispute between Guam's governor and legislature as to who had the power over Guam's Department of Education, the Superior Court had issued mandamus to process employment papers. The judges dismissed the appeal as not presenting a case or controversy, although an appeal from a subsequent Guam Superior Court ruling could produce an appeal on which there could be a ruling.¹⁰⁶

In writing for the appellate panel, Judge Goodwin, in a straightforward ruling, affirmed a conviction for multiple criminal sexual contacts involving the defendant's eight-year-old stepdaughter.¹⁰⁷ However, he faced a somewhat more complex criminal appeal, this time from a conviction in a third trial for robbery and murder.¹⁰⁸ The first trial had resulted in a hung jury, the Ninth Circuit had reversed the second conviction for improper jury instructions, and there had been a third conviction. There was an apparent *Brady* violation relating to whether the prosecutor should have produced a plea agreement with another individual,¹⁰⁹ but Judge Goodwin found that the panel "need not decide that issue" because, even were there a violation, reversal would not be required as there was no probability that, without it, the proceedings would have produced a different result. He also rejected the defendant's claim that speedy trial rights were violated by the extent of time from the Ninth Circuit reversal to the reinstatement of proceedings. Looking at the factors dictated by *Barker v. Wingo*,¹¹⁰ he found no error nor was there any error as to jury instructions.¹¹¹

One contract case related to a real estate lease agreement and option to purchase, in which the Superior Court had given summary judgment,

¹⁰⁴ *Camacho v. Du Sung Corp.*, No. CV 95-00126A, 1996 WL 104528, at *3 (D. Guam App. Div. Mar. 5, 1996), *aff'd*, 121 F.3d 1315 (9th Cir. 1997).

¹⁰⁵ *Camacho v. Du Sung Corp.*, 121 F.3d 1315 (9th Cir. 1997).

¹⁰⁶ See Memorandum from Alfred T. Goodwin to Judge John Unpingco re: Territorial Board of Education v. Rivera, Special Proceedings Case SP 0024-96 (Oct. 10, 1996).

¹⁰⁷ *People v. Jonas*, No. CR No. 94-00091A, 1996 WL 104530 (D. Guam App. Div. Mar. 6, 1996).

¹⁰⁸ *People v. Vilorio*, No. CRIM. 94-00132a, 1996 WL 104529 (D. Guam App. Div. Mar. 6, 1996).

¹⁰⁹ See *Brady v. Maryland*, 373 U.S. 83 (1963).

¹¹⁰ See *Barker v. Wingo*, 407 U.S. 514 (1972).

¹¹¹ *Vilorio*, 1996 WL 104529.

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ordering specific performance.¹¹² Judge Goodwin wrote to vacate that requirement, affirm the trial court's denial of motion to amend the complaint, and remand "to 1) dismiss without prejudice the claim for damages and 2) direct that each party bear its own attorney fees and costs."¹¹³ Another contract case stemmed from disputes among companies involved in the construction of a large high-rise condo. The general contractor, to supply "architectural, engineering, financing and construction services," was to be paid from the condos' sale. One dispute was over a provision, "[p]urportedly in the agreement," allowing the general contractor to "keep ownership" until its share of the costs was paid and over the second company's refusal "to issue any recordable document" that would allow the general contractor "to perfect its security interest."¹¹⁴ On a claim for payment for labor and materials furnished for the project by another construction company, the trial court had claimed lack of jurisdiction to decide summary judgment; to obtain an appeal, the parties stipulated that partial summary judgment was final. Judge Goodwin's opinion affirming in part and reversing in part found some grounds for affirming summary judgment. Although he said, "Ordinarily we would not reach the trial court's alternative statement of grounds for granting summary judgment on the theory that it had no jurisdiction," he went on to discuss an unused mechanics lien remedy and counsel's arguments the trial court had apparently accepted, before ruling that "[n]either assertion has any merit on the record in this case." Finding that the plaintiff lacked any lien right when the present case was filed, he made the side-comment that "any talk of a plain, speedy, and adequate remedy at law was mere cultural background in this case." He then upheld summary judgment on some of plaintiff's claims, with another claim noted as still pending in the trial court.¹¹⁵

Judge Goodwin's other opinion in this set of appeals involved an effort to recover land allegedly lost through improper foreclosure (though not a precursor of the U.S. housing debacle fifteen years later); a Superior Court judge had dismissed the suit for relief. In reversing and remanding,¹¹⁶ Goodwin roundly criticized the plaintiff's initial counsel.

¹¹² Exec. View Estate, Inc. v. Kamminga, Civil No. 95-00125A, 1996 WL 104469 (D. Guam App. Div. Mar. 6, 1996).

¹¹³ *Id.*

¹¹⁴ This characterization of the case is drawn from Ann Keith, memorandum to ATG, Jan. 27, 1995, re: Brigham Construction and Development v. Lucky Development Co., T&K Development, Civil No. 95-00051A, CV0078-92.

¹¹⁵ Brigham Constr. & Dev., Inc. v. Lucky Dev. Co., No. CIV. 95-00051A, CV0078-92, 1996 WL 104531 (D. Guam App. Div. Mar. 6, 1996).

¹¹⁶ And also finding certain other claims "premature on the record then before the court." Boggs v. C.Y. Development, Civil No. 95-00084A (D. Guam App. Div., Mar. 5, 1996).

Plaintiff's initial pleading indicated a lack of interest in the property but Goodwin ruled that, "[i]n view of the incompetence of plaintiffs' original counsel," there was no such admission; instead it was clear from other language in the complaint that plaintiffs "were trying to assert a right to set aside a void lien foreclosure and reclaim their land." Thus the court "will not hold that they lost all legal and equitable rights to seek restitution or damages for the loss of the property, even though their lawyer blundered."¹¹⁷ In further criticism,¹¹⁸ he observed, "Much of the delay, expense, and confusion in this case could have been spared if Boggs had obtained competent legal counsel in the trial court [and] proceeded on an intelligible legal theory . . ." He then spoke to the trial court: "Reasons of judicial economy as well as of fairness to litigants commend very cautious use of Rule 12 dismissals in cases in which it can be understood, despite inept pleading, that a non-frivolous claim is being made, and . . . some kind of relief possibly can be obtained."

1. *A Sidebar: Local Lawyering*

Judge Goodwin's criticism raised the matter of the competence of lawyers in Guam, which was an issue across a number of cases. Commenting on the lawyering he had encountered, Judge Goodwin said that it was certainly "not all bad." While there were "refugees from discipline committees in the States," he found that some "seriously committed and good lawyers" originally came to Guam in the Peace Corp or married persons from Guam. His view of the indigenous lawyers, however, was that they were products of night law schools and not well prepared; most were "nice people" but a couple were "more trouble than they are worth."¹¹⁹ He has also spoken of the number of Pacific Islanders who had received their legal education at Santa Clara University in California. One was Guam's attorney general in the early 1990s, who told Goodwin "that several Chamoro students went to Santa Clara and came back to practice in Guam, where they are doing very well." Goodwin also noted that the local population preferred local lawyers, because "[m]ainlanders who go out there to live the good life and make a few bucks sometimes aggravate latent unrest about colonialism."¹²⁰

Convicted defendants' claims of ineffective assistance of counsel are certainly not uncommon but the lawyering in some cases did cause

¹¹⁷ *Id.*

¹¹⁸ Judge Goodwin was careful to exonerate plaintiffs' present counsel: "We recognize that Boggs' present counsel did not represent Boggs when the Superior Court was dealing with the complaint and the motions to dismiss." *Id.*

¹¹⁹ Goodwin, *supra* note 4.

¹²⁰ Letter from Alfred T. Goodwin to Jeanne E. Greenawalt (Dec. 20, 1991).

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problems. One could see this most obviously in the show cause order Judges Goodwin, Unpingco, and Munson issued in April 1993 to James M. Maher relating to “the content and tone” of briefs “and for his comments at oral argument.”¹²¹ The court referenced, among other matters, Maher’s “repeated misrepresentations of the record” and “use of exaggeration and hyperbole to distort the record,” his “repeated use of inflammatory, derogatory, and snide remarks” and “his calling into question the integrity of the trial court” and the Appellate Division. Evaluating Maher’s 72-page response, the law clerk assisting him said the lawyer “seems to intentionally miss the point of the panel’s concerns and spends most of his time re-trying his appeal and maintaining that anything is permissible in the defense of a criminal client.”¹²² The response’s tone led the panel to conclude that a further hearing would be “neither necessary nor appropriate,” and, treating its order as a public reprimand, barred him from representing clients before the Appellate Division for six months and ordered forfeiture of any Criminal Justice Act attorney fees in the case. The judges went further, chastising him by saying that he “either does not recognize or chooses not to recognize the difference between proper appellate argument and self-indulgent personal attacks on his opponents” and pointing out that he “appeared to be at least as interested in extended bouts of name-calling as he did in addressing the legal issues he urged for his client.”¹²³

In the south Pacific, substandard lawyering was not limited to Guam, just as it is not limited to the Pacific islands.¹²⁴ For example, Judge Goodwin noted poor lawyering in a sodomy case he heard on the High Court of Samoa; he said it had poor lawyers all over it. When asked if the quality was the same as it formerly was with Guam cases (and about which he had earlier complained), the judge called the lawyer community “the poor farm,” with a number of the lawyers there “a jump ahead of the Grievance Committee”—an indication of why they had relocated from the mainland.

Sitting in place of the recused Judge Munson, Judge Goodwin found himself presiding over a judicial discipline panel in the Northern Marianas with Judge Unpingco from Guam and Judge Sablan-Onerheim of the NMI Superior Court. An attorney—apparently well-known in the local bar—was accused of a number of ethics violations based on his

¹²¹ *People of the Territory of Guam v. Palomo*, DCA No. 91-00061A; *People of the Territory of Guam v. Albertson*, DCA No. 91-00062A (D. Guam App. Div., Apr. 8, 1993).

¹²² Memorandum from unnamed law clerk (but probably Ann Keith) to Alfred T. Goodwin (May 12, 1993).

¹²³ Order Imposing Sanctions (n.d.).

¹²⁴ See Stephen L. Wasby, *As Seen from Behind the Bench: Judges’ Comments on Lawyer Competence*, 38 J. LEGAL PROFESSION 47 (2014).

having engineered a settlement in a Fair Labor Standards Act (FLSA) case¹²⁵ by having contacted plaintiffs without contacting their lawyer, who filed a complaint and the CNMI bar took the matter further. With Judge Goodwin having worked with a local law clerk in preparing the panel's findings and orders, the judges agreed with the charges and ordered the attorney suspended for several months.¹²⁶ He was also in contact with Ninth Circuit colleagues on a panel handling an appeal in which the attorney was to appear, to apprise them of the status of the disciplinary action,¹²⁷ as there had been some concern in the disciplinary panel that the lawyer would not reveal, as required, that he had been sanctioned. This was a further instance of what was seen in the *Brooks* case that the judge's Ninth Circuit service could assist in resolving matters in the islands.

D. REVIEW BY THE NINTH CIRCUIT

Judge Goodwin's Ninth Circuit colleagues were to review some of his rulings in Guam, both from his sitting on the Appellate Division of the District Court and as a trial judge. As to the former, one case in which he was affirmed concerned the Guam government's rejection of an individual's attempt to register land, which the trial court found belonged to Guam. Writing for District Judge Munson and Superior Court Judge Diaz, Judge Goodwin had cast the basic issue as whether the lot in question "is in fact private land or whether . . . it is government land . . . successively owned by Spain, the United States, and now the government of Guam."¹²⁸ Recording land doesn't entail ownership, he said, and antiquity, use, and payment of taxes did not assist the claimant, as the government was not estopped from its land claim by having accepted his taxes.¹²⁹ The Ninth Circuit, while noting that both sides had colorable claims of title, agreed as to estoppel and found that the claimant could not establish adverse possession and had not proved good record title for lack of documentary evidence as to the earliest grantor in the chain of title.¹³⁰

The Ninth Circuit also affirmed one of rulings where Goodwin had sat as a district judge to accept a guilty plea and had sentenced defendant

¹²⁵ *Budanio v. Saipan Marine Tours* (Civil No. 98-0062) (NMI).

¹²⁶ Disciplinary Complaint Against Theodore R. Mitchell (Order filed May 4, 2001).

¹²⁷ See, e.g., Memorandum from Alfred T. Goodwin to Judges Betty Fletcher, William Canby & Richard Paez re: *Budanio v. Saipan Marine*, 99-16964 (Mar. 22, 2001).

¹²⁸ *In re Estate of Yamashita*, Civ. No. CIV91-00081A, 1993 WL 128216, at *1 (D. Guam App. Div. Apr. 8, 1993), *aff'd*, *Yamashita v. Territory of Guam*, 59 F.3d 114 (9th Cir. 1995).

¹²⁹ *Id.* at *1-2.

¹³⁰ *Yamashita v. Territory of Guam*, 59 F.3d 114, 116 (9th Cir. 1995).

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to 235 months for conspiracy to import methamphetamine and heroin and for attempted possession of those drugs.¹³¹ The ruling challenged on appeal was his rejection of defendant's motion to withdraw his guilty plea. In a non-precedential disposition, Judges Cynthia Hall, Melvin Brunetti, and Sidney Thomas affirmed, saying, "The record belies [the] assertion" that defendant believed he had an absolute right to withdraw his plea, and Judge Goodwin had not abused his discretion in denying the motion.¹³²

While affirming in some instances, the court of appeals also reversed the Appellate Division on which Judge Goodwin had sat. In one example, Judges Goodwin, Duenas, and Munson affirmed a conviction for aggravated assault and possession/use of a deadly weapon during a felony. Making no mention of the ruling below, a Ninth Circuit panel held that all jury instructions must be read aloud to the jury with counsel and defendant present, so the trial judge's refusal to instruct orally on elements of the charged offense required automatic reversal.¹³³ A different Ninth Circuit panel (Judges Reinhardt, Norris, and James Browning) also reversed a conviction for conspiracy to distribute marijuana.¹³⁴ Agreeing that a customs agent who allowed a marijuana shipment through for a \$20,000 payment could be found responsible for the whole smuggling operation entailing several distributions, the panel nevertheless reversed as to a rental car agent who, for one ounce of marijuana, provided a car used to move a shipment.¹³⁵ Several years later, Judges Reinhardt, Edward Leavy and Sidney Thomas reversed the Appellate Division as to a conviction on several counts of criminal sexual conduct involving children, assault, and child abuse, because testimony concerning the contents of sexually explicit adult gay magazines were irrelevant to the charges and its admission was reversible error.¹³⁶

E. GUAM, 1998

Further evidence of the work of a mainland judge deciding cases in Guam came when Judge Goodwin returned for the week of April 20-24, 1998, to perform service both as a district judge and on an appellate panel. On the first day, he dealt with three ex parte applications to order the transfer of funds and to accept a stipulation for extension of time to

¹³¹ *United States v. Ascura*, 134 F.3d 379 (9th Cir. 1998) (unpublished table disposition) (superseding 124 F.3d 213 (9th Cir. 1987)).

¹³² *Id.*

¹³³ *Territory of Guam v. Marquez*, 963 F.2d 1311, 1316 (9th Cir. 1992).

¹³⁴ *United States v. Umagat*, 998 F.2d 770 (9th Cir. 1993).

¹³⁵ *Id.*

¹³⁶ *People of the Territory of Guam v. Shymanovitz*, 157 F.3d 1154 (9th Cir. 1998).

complete a land transfer.¹³⁷ The next day began with a status conference¹³⁸ and two settlement conferences, at least one of which was successful, reflected in a letter from an assistant attorney general indicating acceptance of the taxpayer's settlement offer, which needed to be reflected in a judgment.¹³⁹ Then came various criminal matters: an initial appearance combined with a show cause order about revocation of pre-trial release conditions;¹⁴⁰ two initial appearances with waiver of indictment, filing of information, and taking of a plea;¹⁴¹ and an appearance concerning an indictment.¹⁴² There was also a sentencing, ten months for distributing methamphetamine, in which the judge recommended that defendant serve his sentence at the Federal Correction Institution at Dublin, California.¹⁴³ However, the Bureau of Prisons, reporting that FCI Dublin "house[d] only sentenced female offenders," found that "it has been necessary to designate Mr. Yamanaka to the Federal Prison Camp (FPC), Nellis Air Force Base, Las Vegas, Nevada, which is commensurate with his security needs."¹⁴⁴

A party was a "no show" for an April 21 hearing on a default judgment,¹⁴⁵ one of three settlement conferences scheduled for April 22 was cancelled, and another went "off" the calendar.¹⁴⁶ The next day, after the judge held a scheduling conference,¹⁴⁷ the appellate panel heard a motion to dismiss and suppress evidence and a *Brady* motion in a case for tax evasion because of unreported miscellaneous income, discussed further immediately below.¹⁴⁸ Judge Goodwin ended his day with "two more

¹³⁷ Government of Guam v. 6,390.56 Sq. Meters of Land and Amistad, CV-66-0038; Government of Guam v. 4,225.81 Sq. Meters of Land, in Municipality of Agama, and Guzman, CV-69-00130 and Government of Guam v. 4,966.20 Sq. Meters of Land, in Municipality of Agana, and Tanaka .

¹³⁸ United States v. Guam Power Authority, CV-97-00030.

¹³⁹ Letter from Stephen A. Cohen (Assistant Attorney General, General Counsel, Department of Revenue and Taxation) to Alfred T. Goodwin (as Settlement Conference Judge) Leong v. Director, Department of Revenue and Taxation, CV No. 96-00092 (Apr. 21, 1998). The other settlement conference was in Ranon v. Micronesia Assistance, Inc., CV-97-00078.

¹⁴⁰ United States v. Woods, CR-98-00034.

¹⁴¹ United States v. Crisostomo; United States v. Sablan.

¹⁴² United States v. Sealed, CR-98-00062.

¹⁴³ United States v. Yamanaka, CR-98-00006 (D. Guam, 1998).

¹⁴⁴ United States v. Yamanaka, CR-98-00006 (D. Guam, 1998); Letter from Peter M. Carlson (Regional Director, Federal Bureau of Prisons) to Alfred T. Goodwin (June 18 1998).

¹⁴⁵ Fajardo v. Korean Development Corp. (Seoul Regency Hotel), CV-98-00002.

¹⁴⁶ Respectively, Caterpillar Financial Service Corp. v. Mariza Z/Laura Z/Margaret Z, CV-95-00063/ CV-95-00064/CV 95-00106; Grzuno v. Don Juan Fishing Co., CV-97-00056. The case in which the settlement conference was held was United States for Catalasan v. Somera Construction Co., CV-97-00016.

¹⁴⁷ Fargo Pacific Inc. v. P.W.S. International, CV-98-00005.

¹⁴⁸ Government of Guam v. Taitano, CR-98-00010.

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arraignments.”¹⁴⁹ On April 24, the judge handed down two sentences, held a final pretrial conference, and, in a bankruptcy case, dealt with an application for an order to authorize a trustee to sell property and pay advertising costs.¹⁵⁰

Less than two weeks after Judge Goodwin presided over the tax evasion case, Judge Unpingco’s law clerk sent a proposed order denying the Motion to Dismiss or Suppress Evidence,¹⁵¹ which Goodwin signed the same day. The defendant had argued that a government agency’s release of Form 1099s, which led to the prosecution, was improper, but the Order found no violation of the Internal Revenue Code and Goodwin said that, in any event, the proper remedy would not be to suppress evidence or dismiss an indictment.¹⁵² He found that the Department of Revenue and Taxation was “permitted to turn over taxpayer return information to its prosecutorial arm” (a division in the Attorney General’s Office), and how the tax officials received the information about the failure to report was “not material.” He dismissed “defendant’s expressed outrage” because the Department of Education had to file the Form 1099s and he would not hold a Form 1099 to be “return information” not supposed to be released to others, “because to do so would be to reward the . . . Department of Education for failing to comply with its legal duty to file the 1099 with Revenue and Taxation.”¹⁵³

At its April 23 session, the Appellate Division (Goodwin-Unpingco-Munson) dealt with two cases, in one affirming a trial court default judgment entered for noncompliance with discovery where the party had been warned,¹⁵⁴ and in the other affirming in a Munson opinion a conviction for aggravated murder and conspiracy to commit it, with special allegations. Judge Goodwin had raised a question about prosecutorial misconduct, which had taken the form of calling an attorney representing a cooperating witness to get him to vouch for “state of mind,” the sort of behavior Goodwin wanted stopped in the Guam courts: “[W]ith the bench and bar in the shape they are in at this time it is a wrong message to send to the judges of the Supreme Court that vouching in this form is acceptable, even though it was not objected to at trial.” He therefore

¹⁴⁹ Alfred T. Goodwin notation on calendar.

¹⁵⁰ Respectively, *United States v. Bamba*, CR-97-00173; *United States v. Lam*, CR-97-00185, *Lingao-Lingao v. Bitanga*, CV-96-00080; *In re Walkinshaw*, BC-97-00096.

¹⁵¹ Memorandum from Ann Keith to Alfred T. Goodwin re: *People v. Taitano*, CR-98-00010 (May 4, 1998).

¹⁵² Finding that “no authority has been cited for holding that suppression or dismissal is an appropriate remedy for the violation,” he added, “Defendant has presented no valid reason for punishing the government by suppressing evidence in a criminal case.” *People v. Taitano*, CR-98-00010, Order (D. Guam, May 4, 1998).

¹⁵³ *Id.*

¹⁵⁴ *Lee v. Cha*, CV-96-0030A (D. Guam App. Div. 1998).

urged modifying the opinion so that instead of saying vouching had not occurred, it would say that vouching had occurred but was harmless error. He made clear that if his two colleagues did not agree, “I will simply convert my suggestion into a specially concurring opinion on the ground that the error was harmless,”¹⁵⁵ but Judge Munson agreed,¹⁵⁶ obviating the separate concurrence.

IV. NINTH CIRCUIT REVIEW OF GUAM CASES

Beyond appeals from Judge Goodwin’s Guam district court rulings, there were many other cases from Guam the Ninth Circuit reviewed, and throughout the judge’s long Ninth Circuit tenure, he participated in many appeals brought from there and from the Northern Marianas. Some, but relatively few, of those appeals were actually heard in Hagatna, Guam, and in Saipan, Northern Marianas. Ninth Circuit panels sitting in the islands most often were composed of three circuit judges, although at times two circuit judges were joined by a mainland district judge. As a convenience to island lawyers by reducing their travel time, most appeals were heard on the court’s annual Honolulu calendar instead of at San Francisco, where the remainder were heard.

A. A DEFECTIVE PANEL

Before examining Ninth Circuit cases in which Judge Goodwin participated that resulted in published opinions, which are circuit precedent, and those with unpublished non-precedential dispositions, requiring attention are cases in which the court’s authority was questioned because of the panel’s composition. A panel that was fatal to the court’s authority was composed of two Ninth Circuit judges—Goodwin and Mary Schroeder—and a district judge, but not one from the mainland or Hawai’i. The problem was that the district judge was a territorial, non-lifetime judge—interesting in that the Pacific Islands Committee had considered a proposal to shift the judges from Guam and the Northern Marianas to Article III (lifetime) status.

Two cases posed the immediate problem. The first was a straightforward criminal appeal from Guam, argued there with Judge Alex Munson (D. NMI) as the third member of the panel, in which defendants appealed their methamphetamine convictions.¹⁵⁷ The panel affirmed,

¹⁵⁵ Memorandum from Alfred T. Goodwin to Judges Munson & Unpingco re: *People v. Demapan*, CR-95-00009A (May 7, 1998).

¹⁵⁶ Memorandum from Judge Alex Munson to Alfred T. Goodwin & Judge Unpingco (May 8, 1998).

¹⁵⁷ *United States v. Nguyen*, 284 F.3d 1086 (9th Cir. 2002), *vacated*, 539 U.S. 69 (2003).

finding the evidence sufficient and ruling that evidence tying defendants' brother and nephews to defendants was not irrelevant or improperly prejudicial.¹⁵⁸ Such a case would probably have been decided as a non-precedential memorandum disposition, but Judge Schroeder spoke of "the presumption in favor of publication in Guam and NMI cases"¹⁵⁹ that was probably part of the effort to build up the corpus of law in the territories. The other case, argued in the NMI two days after the first, with Judge John Unpingco (D. Guam) as the third judge,¹⁶⁰ was a Title IX sexual harassment claim against a college and its officials in which the college had won a summary judgment and a jury returned a verdict against an instructor. Speaking through Judge Goodwin, the panel affirmed, ruling that the college was not deliberately indifferent to the sexual harassment, so recovery under Title IX was precluded.¹⁶¹

However, that was far from the end of the matter. The losing parties sought Supreme Court review, and the criminal defendants, who had not raised the issue in the court of appeals, now claimed that a district judge from a territory, not being a judge appointed "during good behavior," could not properly sit on a U.S. court of appeals panel. The panel had been aware of the problem but had decided to proceed. During preparation for the sitting, Judge Goodwin had communicated with Judge Schroeder and the Clerk of Court about the district judges' eligibility to sit. He found them to be "district judges within the circuit" and suggested proceeding. However, he noted that, "under the present regime in Washington, there is a 50-50 chance that a panel with an Article I judge on it could be challenged as not properly authorized," but he would "let some busybody challenge the decisions if they want to. It would get the matter before the Supreme Court maybe,"¹⁶² which was indeed to happen. The Clerk of Court, who said she had "made the mistake of asking the AO," which did not "think Article I judges could sit on Article III courts," nonetheless said, "I say go for it."¹⁶³

The Administrative Office was to be proved correct. Speaking for the Supreme Court about what he called the "highly unusual presence" of the territorial judges, Justice Stevens, for the five-Justice majority which reversed the conviction, ruled that the statute allowing district judges to

¹⁵⁸ *Id.*

¹⁵⁹ Memorandum from Judge Mary Schroeder to panel re: *United States v. Nguyen*, 284 F.3d 1086 (9th Cir. 2002) (Feb. 22, 2002).

¹⁶⁰ *Oden v. N. Marianas Coll.*, 284 F.3d 1058 (9th Cir. 2002), *vacated*, 539 U.S. 924 (2003).

¹⁶¹ *Id.*

¹⁶² Memorandum from Alfred T. Goodwin to Mary Schroeder & Cathy Catterson (Nov. 20, 2001).

¹⁶³ Memorandum from Cathy Catterson to Mary Schroeder & Alfred T. Goodwin (Dec. 3, 2001).

sit required that they be Article III judges and that the territorial judges, Article I judges who held term, not lifetime, appointments, were not so qualified.¹⁶⁴ Nor would the majority accept the validity of the convictions on a variety of other grounds. For example, two judges of a panel were a quorum that could transact business or at least complete a panel's work, but Justice Stevens said the statute required that a panel had to be composed *ab initio* of three judges, and the panel had to be a properly constituted set of three judges, which this panel was not. The dissenters disagreed as to whether the presence of a judge not properly on the panel could be excused. Chief Justice Rehnquist wrote that the defendant had failed to object to the presence of the district judge and that presence "simply did not seriously affect the fairness, integrity, or public reputation of judicial proceedings."¹⁶⁵

Then in the case from NMI, the Court granted certiorari, vacated the judgment, and remanded (GVR'd) for reconsideration in light of its primary ruling.¹⁶⁶ On remand, a completely different panel—Judges Susan Graber, Melvin Brunetti, and Jay Bybee—again found no deliberate indifference and thus no Title IX violation. However, as to a consolidated appeal from the plaintiff's separate territorial case, the panel said that the court of appeals lacked jurisdiction over an appeal from the Supreme Court of the Commonwealth of the Northern Mariana Islands in cases that, like this one, were not completed before a statute providing for a limited period of court of appeals review expired.¹⁶⁷

The criminal case's subsequent history was somewhat different and indicates that a different panel can produce a different outcome. Here the new panel—Judges Jerome Farris, John Noonan, and Johnnie Rawlinson—affirmed in part, reversed in part and remanded in a non-precedential memorandum disposition. They again found that introduction of evidence on familial relations was proper and that evidence was sufficient to support the convictions, but they ruled that drugs passing through international airspace from California to Guam did not constitute "importation" and thus convictions for conspiracy to import and for aiding and abetting had to be reversed, with the case remanded for resentencing on the remaining count of attempting to possess.¹⁶⁸ In a superseding disposition, the panel also found that in sentencing, the district court had improperly adopted the pre-sentence report's statement of the quantity of

¹⁶⁴ *Nguyen v. United States*, 539 U.S. 69, 73 (2003).

¹⁶⁵ *Id.* at 84 (Rehnquist, J., dissenting).

¹⁶⁶ *Oden v. N. Marianas Coll.*, 539 U.S. 924 (2003).

¹⁶⁷ *Oden v. N. Marianas Coll.*, 440 F.3d 1085 (9th Cir. 2006).

¹⁶⁸ *United States v. Nguyen*, 103 F. App'x 635 (9th Cir. 2004), *withdrawn*, 113 F. App'x 252 (9th Cir. 2004).

drugs, which was error under the Supreme Court's cases requiring jury, not judge, findings of facts.¹⁶⁹

The panels the Supreme Court found defective had heard several other cases, but those judgments apparently remained undisturbed as the losing parties did not seek certiorari. On February 14, 2002, the Goodwin-Schroeder-Unpingco panel had heard three other civil appeals at Saipan. One involved a preliminary injunction sought to bar the transfer of assets outside the Northern Marianas, to protect rights under a settlement agreement related to a debt for commercial goods, which the district court had denied for lack of a showing of irreparable harm. The Ninth Circuit panel affirmed on ruling that the district court could not grant such an injunction to an unsecured creditor.¹⁷⁰ Another appeal, which raised questions as to a defendant's failure to object to the form of a verdict, arose when a developmentally handicapped person, from whom a police officer had illegally obtained a confession (and the prosecution had then dismissed the case), sued the officer and had received only \$1 in general damages but \$10,000 in punitive damages. As Judge Goodwin's opinion explained, the verdict form given the jury—with no objections to it or the instructions at any one of several points, thus waiving challenges—"produced a confusing array of answers to a list of incomprehensible interrogatories," and "True to the reputation of special interrogatories in tort cases as the darling of the insurance industry, the verdict form created more legal questions than the pleadings and evidence had presented."¹⁷¹ As to "the only issue," "whether the evidence supports the verdict,"¹⁷² Goodwin found that "[t]he jury obviously believed the evidence that the defendant had used improper means in obtaining the confession, and believed that the plaintiff had been denied advice that he could have a lawyer if he asked for one."¹⁷³ In the third case, the panel, in a brief non-precedential disposition, found no disputed questions of material fact and thus upheld a summary judgment granted defendants in a suit by a former corrections department director for employment discrimination involving pay differentials and retaliation.¹⁷⁴

¹⁶⁹ *United States v. Nguyen*, 113 F. App'x 252 (9th Cir. 2004). The applicable cases were *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004).

¹⁷⁰ *Dateline Exps. v. Basic Constr.*, 306 F.3d 912 (2002) (per curiam). Judge Schroeder was the author of the per curiam opinion.

¹⁷¹ *Ayuyu v. Tagabuel*, 284 F.3d 1023, 1025 (9th Cir. 2002).

¹⁷² *Id.*

¹⁷³ *Id.* at 1027.

¹⁷⁴ *San Nicolas v. Dep't of Pub. Safety, N. Mariana Islands*, 31 F. App'x 496 (9th Cir. 2002).

B. PUBLISHED OPINIONS

In appeals from Guam, among the Ninth Circuit's published opinions, which create circuit precedent, the politically most sensitive were an inter-branch dispute, an elections case, and two cases on courts' jurisdiction—an aggravated murder case which turned on whether the panel still had jurisdiction to decide the case, sensitive because of the implications for local courts' authority, and one on the allocation of import quotas, where the question was whether the general federal courts had jurisdiction. These were decided along with more mundane cases involving land and construction.

The inter-branch dispute, containing some elements of intrigue, occurred when Guam's legislature passed a bill but then recessed without providing for receiving messages during the recess. The governor received the bill (from whom?)¹⁷⁵ during the recess, and he sent a message "to someone connected with the legislature"¹⁷⁶ that he couldn't return the bill. That prompted a senator to sue and District Judge Duenas upheld the governor's (non)action; however, after his ruling, the District of Columbia Circuit said the President could return a bill to Congress during an intra-session recess if a mechanism for receiving it was in place.¹⁷⁷ The Ninth Circuit distinguished the D.C. case, saying that Guam legislature failed to make that sort of provision and holding that "the district court correctly concluded that the Governor was free to take advantage of the legislative hiatus and exercise the pocket veto."¹⁷⁸

The elections case was of a type seen on the mainland when the major political parties created obstacles for third parties or independent candidates, and Judge Goodwin drew on a Supreme Court case that resulted from Ohio's efforts to block George Wallace from appearing on the ballot.¹⁷⁹ In Guam, the ballot had candidates for 21 legislative seats with one Democrat and one Republican candidate for each seat. Someone had been barred from the 1974 legislative primary ballot under a rule that those who signed petitions for independent candidates could not have signed petitions for party candidates. The district court found that the rule did not create an equal protection violation, but Judges Goodwin, Stanley Barnes, and John Kilkenny thought otherwise and vacated and remanded with instructions. While the Supreme Court had recognized a state interest in regulating the number of candidates on the ballot, Judge

¹⁷⁵ *Bordallo v. Camacho*, 520 F.2d 763, 764 (9th Cir. 1975) (per curiam) ("The record is provocatively silent on the manner of delivery and the identity of the messenger:").

¹⁷⁶ *Id.* ("again the record is tantalizingly silent").

¹⁷⁷ *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

¹⁷⁸ *Bordallo*, 520 F.2d at 765.

¹⁷⁹ *Williams v. Rhodes*, 393 U.S. 23 (1968).

Goodwin said the Guam rule had not been shown to have that purpose, which instead was “to make it more difficult for an independent candidate than for a party candidate to obtain valid signatures,” so the law’s “net effect is a severe restriction on the rights of voters and independent candidates.”¹⁸⁰

The earlier-noted ongoing changes in Guam court structure included changes in the routes for appeals, and a case illustrates a judge’s deciding the applicability of a statute with which the Pacific Islands Committee was involved. The Guam Supreme Court affirmed a Guam Superior Court conviction for aggravated murder and, as was then permissible, further appeal was by petition for certiorari to the Ninth Circuit, which granted the petition and heard argument in the case at Saipan on April 30, 2004.

The panel’s initial discussion was about a *Miranda* issue going to the validity of the conviction.¹⁸¹ Then on October 30, 2004, six months after argument, Congress struck the provision that had given the Ninth Circuit certiorari jurisdiction over Guam appeals; however, no provision was made for pending cases like the murder conviction. Faced with this situation, the panel (Judges Goodwin, Schroeder, and Wallace) sought supplementary briefing, and discussion turned to the question of the court’s jurisdiction.¹⁸² There was much shifting of position within the panel,¹⁸³ particularly as to what case controlled the opinion—the Supreme Court’s *Landgraf* decision on statutory retroactivity¹⁸⁴ or the Civil War era *McCardle* ruling on withdrawal of jurisdiction.¹⁸⁵ Also at play were the Supreme Court’s ruling in *Bruner v. United States*,¹⁸⁶ a relatively recent case involving district court appellate jurisdiction in cases from the island courts of NMI focusing on the Tucker Act in which it had been held that jurisdiction continued,¹⁸⁷ and the quite-recent Ninth Circuit *Duldulao* ruling, which barred consideration of a petition pending

¹⁸⁰ *Webster v. Mesa*, 521 F.2d 442, 444 (9th Cir. 1975).

¹⁸¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁸² Indicating the interplay of judicial Pacific Islands Committee matters, Judge Schroeder wrote, “On a related subject, is the Committee following up on why the AO did not notify us [about the statutory change]?” She also asked, “On another related subject, what is happening with the district court vacancy in Guam?” She added a concern about the viability of Guam government, saying she wanted to talk to someone “about what this means for the hoped for future of a corruption-free government in Guam.” Memorandum from Mary Schroeder to panel re: *Santos v. The People of The Territory of Guam*, 436 F.3d 1051 (9th Cir. 2006) (Dec. 24, 2004).

¹⁸³ In particular by Judge Goodwin: “To the charge of waffling, I plead guilty.” Memorandum from Alfred T. Goodwin to panel re: *Santos* (Dec. 2, 2005).

¹⁸⁴ *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

¹⁸⁵ *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

¹⁸⁶ *Bruner v. United States*, 343 U.S. 112 (1952).

¹⁸⁷ *Gioda v. Saipan Stevedoring Co.*, 855 F.2d 625 (9th Cir. 1988). Judge Goodwin criticized the basis for that ruling and saw no need to extend it.

when the statute withdrawing jurisdiction was enacted.¹⁸⁸ Ultimately, the judges, drawing primarily on *Bruner*, held that the Ninth Circuit no longer had the authority to decide the appeal. As Judge Goodwin wrote for himself and Judge Schroeder, “The withdrawal of our power to hear the case carried with it the destruction of our power to decide the case.”¹⁸⁹ Judge Wallace used a somewhat different route, focusing on *McCardle* and *Duldulao*,¹⁹⁰ to reach the same result. Apart from what the ruling said about appellate jurisdiction affecting the territories, the case illustrates both Ninth Circuit case processing and judges’ sensitivity to island issues. Before the panel’s discussion turned to jurisdiction, one of the judges called attention to the publicity the murder case had received in Guam,¹⁹¹ but, even more so when the question arose as to whether the Ninth Circuit could continue to review the Guam Supreme Court’s ruling, there was awareness of Guam lawyers’ sensitivity on the matter. In discussing hearing argument on the jurisdictional question, Judge Wallace observed, “Because of the political sensitivity of Guam to this issue, a video conference might be preferable” (to teleconference), so the attorneys could be heard;¹⁹² a month later, he added, “My main concern was with the sensitivity on this issue in Guam, and whether it might not be prudent to hear from the lawyers.”¹⁹³ Also of concern was reaction by the Guam judges, particularly if the panel were to rule on the merits and criticize the police. As Judge Goodwin put it, “The Guam Supreme Court would not appreciate our laboring over the complex twists and turns of the Miranda performance of the local police and then holding that the police and the Superior Court erred, and that the Supreme Court also erred in part, but that the errors were all harmless”;¹⁹⁴ that discussion would be obviated if the Ninth Circuit declared it lacked jurisdiction to resolve the appeal.

Another aspect of sensitivity to island issues was the way matters on Guam were treated in relation to similar matters involving the NMI. Although these territories are independent entities, each with its own enabling legislation, and each is a separate federal judicial district, the judges nonetheless are very careful in taking actions with respect to one that could seem inconsonant with those taken with respect to the other.

¹⁸⁸ *Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996).

¹⁸⁹ *Santos v. People of the Territory of Guam*, 436 F.3d 1051, 1053 (9th Cir. 2006).

¹⁹⁰ “*Duldulao* is replete with language that controls this appeal.” *Id.* at 1055 (Wallace, J., concurring separately).

¹⁹¹ Memorandum from Mary Schroeder to panel (Apr. 30, 2004) (“The case was highly publicized in Guam.”).

¹⁹² Memorandum from J. Clifford Wallace to panel (Dec. 9, 2004).

¹⁹³ Memorandum from J. Clifford Wallace to panel (Jan. 3, 2005).

¹⁹⁴ Memorandum from Alfred T. Goodwin to panel (July 7, 2005).

That arose in connection with the jurisdictional question in *Santos* because at roughly the same time, the *Oden* case (discussed above) had the same issue. The need for the *Santos* panel to keep the *Oden* case in mind can be seen from a Judge Goodwin note that it would be awkward if the cases came out differently “even though the two statutes and their legislative history vary slightly” and in what he wrote in a subsequent note, “Even though the legislative histories and the actual language of the two enactments vary to some degree, the distinction is probably too subtle to impress the lawyers of the two most interested bar associations.” He went on to say that if the panels considering the two cases “cannot be brought together on the point, the two opinions should be carefully written to explain why they differ in the result, then filed simultaneously, so our readers will know the disagreement is not an accident.”¹⁹⁵ However, the judge’s suggestion for coordination was rejected and the panel proceeded with its opinion, with *Oden* to follow. The *Santos* case also had the potential to affect cases pending before other panels, which were deferring decision in their cases until *Santos* came down.¹⁹⁶ Thus, Judge Goodwin wrote to some judges to indicate that the jurisdictional issue was still under study and there would be no decision in *Santos* by the Hawai’i calendar, which contained cases from Guam subject to the same jurisdictional problem.

Another type of jurisdictional issue arose in relation to the special economic arrangements U.S. territories had with the “mother country,” including terms under which items manufactured in those territories could be brought into the United States. A statute on the importation of watches from Guam, American Samoa, and the Virgin Islands¹⁹⁷ was intended to aid products made in the labor-intensive watch manufactory in the islands without harming the domestic watch industry, and allocation of quotas under the statute led to a suit in the District of Guam by watch manufacturers against the Secretaries of the Interior and Commerce. The district court dismissed the case on the basis that its subject matter properly placed the case in the Customs Court. Judges Goodwin, Joseph Sneed, and J. Blaine Anderson, affirming per curiam, said that “the 1979 Allocation Rules have a substantial relation to traditional customs purposes, i.e., protection of domestic industry from foreign competition and the raising of revenues, even though the rules also have the concurrent purpose of promoting insular economic development.” Fur-

¹⁹⁵ Alfred T. Goodwin, note on face of bench memo from Judge Wallace’s chambers (Dec. 29, 2004); Memorandum from Alfred T. Goodwin to panel (Dec. 30, 2004).

¹⁹⁶ See also John Noonan, memorandum to *Santos* panel, Nov. 17, 2005 (indicating that he had a case from the May 2004 Hawai’i calendar about Guam tax assessments, with the decision deferred for *Santos*).

¹⁹⁷ 19 U.S.C.A. § 1202 (Westlaw 2015).

thermore, the plaintiff watch manufacturers could obtain access to the Customs Court by choosing to import in excess of the quotas.¹⁹⁸

Among the appellate cases in which Judge Goodwin participated that resulted in published opinions was a criminal case for murder of two Navy enlisted men. One of two possible defendants could not be prosecuted under Guam criminal law and the other was convicted at a trial before Judge Duenas under the felony murder doctrine. A challenge to the use of that doctrine was rejected by the Ninth Circuit panel of Judges Goodwin, Barnes, and Kilkenny, with Judge Kilkenny concurring separately on the belief that the unqualified felony murder instruction should not have been given.¹⁹⁹

Three criminal appeals argued on February 14, 2003, at Saipan before Judges Goodwin, Mary Schroeder, and A. Wallace Tashima are indicative of Guam criminal cases without any particular “Guam flavor,” that is, issues specific to the island. The panel affirmed a conviction for perjury and making of a false statement in an asylum application, ruling that the statements were material.²⁰⁰ The judges also affirmed the district court’s refusal to allow the withdrawal of a guilty plea to narcotics trafficking. They found that the plea colloquy, with someone competent in English, was thorough and that too much time had elapsed between the plea and the motion to allow the defendant to withdraw it.²⁰¹ However, they did reverse a conviction for conspiracy to distribute meth because District Judge Unpingco had exceeded his authority in ordering immediate deportation as a condition of supervised release instead of turning the convicted defendant over to the immigration authorities for deportation proceedings; here the panel agreed with other circuits.²⁰²

Two other published opinions dealt with contract questions relating to land or building on it. Judge Duenas had denied specific performance concerning a land sale on the basis that the buyer’s option was not properly exercised. The panel (Judges Goodwin and Eugene Wright and Judge Howard Markey of the Court of Customs and Patent Appeals) instead held in a four-paragraph per curiam opinion that the option has been properly exercised when a bilateral purchase/sale contract was substituted for a unilateral option contract. It was, they said, a local law matter whether the buyer’s action complied with contractual obligations, so they vacated and remanded for a decision “free from any misconcep-

¹⁹⁸ *Jerlian Watch Co. v. U.S. Dep’t of Commerce*, 597 F.2d 687 (9th Cir. 1979) (per curiam).

¹⁹⁹ *Territory of Guam v. Root*, 524 F.2d 195 (9th Cir. 1975).

²⁰⁰ *United States v. Chen*, 324 F.3d 1103 (9th Cir. 2003).

²⁰¹ *United States v. Nostratis*, 321 F.3d 1206 (9th Cir. 2003).

²⁰² *United States v. Tinoso*, 327 F.3d 864 (9th Cir. 2003).

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tions about the validity of the exercise of the option.”²⁰³ In the other case, involving construction at Anderson AFB, the general contractor had not paid a supplier of concrete for driveways, who sued under the Miller Act. As Judge Harry Pregerson stated for the panel (also Judges Goodwin and Donald Lay of the Eighth Circuit) in affirming Judge Unpingco’s judgment for the supplier, that statute was “enacted to protect suppliers of materials and labor for federal projects.”²⁰⁴

C. “UNPUBLISHED” DISPOSITIONS

In the Ninth Circuit Court of Appeals, over 80 percent of the court’s dispositions are non-precedential memorandum dispositions, often referred to as “unpublished” dispositions because of their origin in that status.²⁰⁵ Quite a number of the Guam appeals in which Judge Goodwin participated resulted in such non-precedential rulings. Included were a number dealing with procedure, some relating to land, a divorce, and several criminal cases. In most cases, the judges were inclined to affirm the district court, an attitude perhaps best seen in a very brief 1973 disposition, which read in its entirety: “This court certainly ought not to reverse a judgment where a Guamanian statute, applied literally by the local district judge, is sensible and the material facts are not disputed.”²⁰⁶ Most cases, particularly the criminal appeals, were like cases from elsewhere, that is, they were not *sui generis* because of their Guam origin. However, one divorce case among those heard—involving an Air Force general who had been in Guam on duty but maintained a Florida domicile—did raise the question of whether U.S. military personnel could avail themselves of Guam’s “policy of opening its courts to service personnel,” with the judges (Goodwin, Koelsch, and Wallace) deciding that the “[t]raditional view of Domicile has to yield” to Guam’s policy.²⁰⁷

As was true with published opinions, some non-precedential dispositions turned on jurisdiction. When the district court had dismissed a suit to quiet title, the Ninth Circuit panel reversed and remanded, saying that prior to the Guam Court Reorganization Act of 1974 and the court’s rul-

²⁰³ *Sgambelluri v. Velarde*, 511 F.2d 61 (9th Cir. 1975) (per curiam). Internal panel communication about the case concerned citing an unpublished disposition which was then redesignated for publication.

²⁰⁴ *United States ex rel. Hawaiian Rock Prods. v. A.E. Lopez Enters.*, 74 F.3d 972 (9th Cir. 1996).

²⁰⁵ See Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67 (2004).

²⁰⁶ *Hassler & Crain v. Stanfoam*, No. 72-2774 (9th Cir. Mar. 7, 1973) (Koelsch, J., for the panel).

²⁰⁷ Alfred T. Goodwin, conference notes (Jan. 15, 1974); *Lewis v. Lewis*, 73-2474 (9th Cir. Jan. 31, 1974).

ing in *Look v. Government of Guam*,²⁰⁸ the District of Guam did have subject-matter jurisdiction over such cases.²⁰⁹ Furthermore, when the Appellate Division of the District of Guam had dismissed an appeal from the Island Probate Court, the Ninth Circuit affirmed, as the ultimate rights in the case could be resolved in the Guam courts. The statute allowed the Appellate Division's Presiding Judge, sitting as a single judge, to dismiss for lack of jurisdiction,²¹⁰ and the Ninth Circuit panel of Judge Goodwin and Judges Chambers and Wallace upheld the dismissal on the grounds that the judge had acted within his powers.²¹¹

In a case stemming from a contract and indemnity agreement, followed by an arbitration award and a payment demand, the trial judge entered a default judgment as a sanction for not appearing at a deposition, and the Appellate Division remanded on finding abuse of discretion in the entry of the default as a discovery sanction. The Ninth Circuit panel (Goodwin, Thomas Nelson, and Charles Wiggins) found the case simple,²¹² requiring only a three-line order to affirm for the district court's reason.²¹³ A Ninth Circuit panel also overturned a dismissal for want of prosecution six months and 13 days after the case was filed, as it appeared that the district judge's pique had played a part. Noting that "[t]he record reveals that the trial judge became exasperated because the conduct of an attorney for the plaintiff appeared to be wanting in candor," the panel thought the dismissal "unduly punishes the client for collateral errors of his attorney" —who, the court noted, "is no longer practicing in Guam" —and other sanctions were available.²¹⁴

With land ownership important in the islands, it is not surprising that some appeals involved land issues. One came in a landowner action for encroachment. Judges Barnes, Kilkenny, and Goodwin affirmed plaintiff's lack of standing to complain about non-continuous trespass prior to possession, but they reversed the dismissal of the case, as the record was not clear that the entire claim was covered and dismissal would have to cover its full scope.²¹⁵ The same judges also handled an appeal from a ruling that another family had land by adverse possession. Here one

²⁰⁸ *Look v. Gov't of Guam*, 497 F.2d 699 (9th Cir. 1974).

²⁰⁹ *Guam United Trading Serv. v. Bamba*, No. 74-1198 (9th Cir. June 20, 1975).

²¹⁰ 48 U.S.C.A. § 1424(a) (Westlaw 2015).

²¹¹ *In re Estate of Lujan/Smith v. Lujan*, No. 73-2695 (9th Cir. July 18, 1974).

²¹² See Alfred T. Goodwin, conference memo re: *Fargo Pacific v. Imamura*, 166 F.3d 1217 (9th Cir. 1998) (Nov. 3 1998) (table) ("The judges were in agreement this was probably a one-off case with no further cases to come.").

²¹³ A law clerk's bench memorandum raised questions of "finality" of pre-trial decisions by the Appellate Division. Memorandum from law clerk (Larry) to Alfred T. Goodwin (Oct. 27, 1998). However, the panel did not follow that route.

²¹⁴ *Gaspard v. Fritzen*, No. 74-1707 (9th Cir. n.d.).

²¹⁵ *Yu Co. v. Olsen & Olsen*, No. 74-2126 (9th Cir. July 8, 1975).

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could see that, in reviewing Guam cases, the U.S. court of appeals at times had to deal with island court proceedings that were more informal than was optimal. It could be seen that the dispute was at least in part a family matter in Judge Goodwin's conference notes, which stated that that "Kilkenny is a little doubtful that adverse possession can run against relations who in practice are using the land in common."²¹⁶ The panel was particularly frustrated by inadequate findings. The "contradictory and sketchy record on appeal" did not provide facts for a final judgment on which the judges could rely although "[t]he local judge may have had knowledge of facts that did not become part of the record." Judge Goodwin was careful to say, "We have no reason to question the trial court's resolution of credibility issues, but the case requires a proper set of findings, informed by, and relevant to, the appropriate substantive law."²¹⁷ Moreover, the trial court's finding as to who paid the taxes was contradicted by the evidence. The panel thus vacated and remanded "for such further proceedings in the appropriate court [whether the District Court or the Island Court as may be needed to establish a proper factual record."²¹⁸

The many standard criminal appeals from Guam dealt with a variety of issues; questions of searches and sentencing arose in quite a number of them. In addition, the court (here, Judges Rymer, Goodwin, and Sandra Ikuta) reversed a post-verdict judgment of acquittal after a conviction for making a false statement to immigration officials, because District Judge Tydinco-Gatewood had substituted her own judgment for that of the jury, and vacated and remanded for reinstatement of the jury verdict.²¹⁹ The same panel, finding ample evidence of participation, affirmed a conviction for conspiracy to distribute methamphetamine.²²⁰ When the district court in Guam²²¹ denied withdrawal of a plea, the Ninth Circuit panel (Judges Goodwin, Rymer, and Raymond Fisher) dismissed the appeal because of the defendant's valid waiver of appeal as part of the plea.²²² There was also a suit against prison officials for an inmate's death, dismissed by the district court on the basis of a two-year statute of limitations. The panel, for which Judge Goodwin wrote, reversed the

²¹⁶ Alfred T. Goodwin, conference notes re: *Reyes v. Taitano*, 538 F.2d 338 (9th Cir. 1976) (table) (May 23, 1975).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *United States v. Ling*, 283 F. App'x 565, 566 (9th Cir. 2008).

²²⁰ *United States v. Elm*, 283 F. App'x 554 (9th Cir. 2008). The district judge was Judge John Coughenour of the Western District of Washington, sitting by designation in Guam.

²²¹ Here, Judge Robert Jones of the District of Oregon.

²²² *United States v. Alado*, 210 F. App'x 710 (9th Cir. 2006).

dismissal²²³ after waiting for another Ninth Circuit case,²²⁴ which found a three-year limit for cases prior to the Supreme Court's ruling in *Wilson v. Garcia* that § 1983 cases were personal injury actions for limits purposes.²²⁵

Searches were under review in a drug case, with a search under exigency upheld and the district court finding of consent not clearly erroneous,²²⁶ and in a case of a drug user in possession of a gun and ammunition, affirmed on one of the bases the district court had used to sustain the search.²²⁷ There were also search issues in a standard multi-issue criminal appeal in a drug and firearms case in which the panel (Judges Schroeder, Goodwin, and Richard Clifton) found no error in the district court's admission of testimony or its refusal to suppress the results of a search of a home, found the stop of a car proper, and found the evidence sufficient to support a conspiracy, but found the record inadequate to consider a claim of ineffective assistance of counsel, which would have to await collateral attack.²²⁸ There was also a counterfeiting investigation in which evidence had been suppressed. After some internal communication about whether the U.S. Attorney had properly certified the case for interlocutory appeal, a matter resolved after learning of some problems in the office of Clerk of Court, the Wiggins-Thomas Nelson-Goodwin panel agreed that the government had failed to serve defendants with copies of the warrants.²²⁹

The sentencing appeals were varied. A standard appeal with no reference to Guam was a challenge to a sentence after a guilty plea in a methamphetamine case, in which the panel found the government had not breached the plea agreement and the district court had not erred in not giving a downward departure, nor was there error on the amount of drugs attributed to the defendant.²³⁰ When the district judge²³¹ denied continuance of sentencing to give counsel time to move to withdraw a guilty plea, the Goodwin-Rymer-Fisher panel upheld that decision, as the district court had adequately balanced Sixth Amendment rights with delay and inconvenience.²³²

²²³ *Bias v. Gov't of Guam*, 851 F.2d 360 (9th Cir. 1988) (table).

²²⁴ *Ngiraingas v. Sanchez*, 858 F.2d 1368 (9th Cir. 1988), also from Guam.

²²⁵ *Wilson v. Garcia*, 471 U.S. 261 (1985).

²²⁶ *United States v. Alaimalo*, 166 F.3d 344 (9th Cir. 1998) (table).

²²⁷ *United States v. Santos*, 63 F. App'x 343 (9th Cir. 2003); Judge Goodwin wrote for a panel including Judges Pamela Rymer and Thomas Nelson.

²²⁸ *United States v. Dela Pena*, 62 F. App'x 754 (9th Cir. 2003).

²²⁹ *United States v. Choi*, 185 F.3d 869 (9th Cir. 1999) (table).

²³⁰ *United States v. Zabala*, 165 F.3d 920 (9th Cir. 1998) (table) (Judges Wiggins, Thomas Nelson, & Goodwin).

²³¹ Judge Roger Benitez of the Western District of Washington.

²³² *United States v. Lujan*, 211 F. App'x 645 (9th Cir. 2006).

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Another appeal involved the intersection of proper sentencing and deportation. The defendant had pled guilty to possessing counterfeit and unauthorized access devices,²³³ but there was no allocution at the sentencing. Judges Goodwin, Wallace, and Stephen Trott affirmed because the defendant had been deported and thus was no longer able to be present for allocution, but their action was subject to an appearance for resentencing if defendant were to be back in the country.²³⁴ And when a district judge²³⁵ denied defendant's motion to force the government to file a motion for a downward departure for substantial assistance, a Goodwin-Reinhardt-Carlos Bea panel vacated and remanded on finding the government's refusal arbitrary.²³⁶

V. NINTH CIRCUIT REVIEW OF NMI CASES

Under the Covenant reached with the U.S. government in 1977,²³⁷ the Northern Marianas became a federal judicial district; the Islands' trustee status was terminated a decade later in 1986. Even before hearing cases from the U.S. District of the Northern Marianas, the Ninth Circuit had to deal with a question of governmental authority in the prior Trust Territory of the Pacific Islands. In the case, Micronesian citizens sued in U.S. district court in Hawai'i to block the High Commissioner's action approving lease of land for the building of a hotel. The district court dismissed the case on finding that, while U.S. environmental laws applied to federal agencies operating in the Trust Territories, the territorial government's action was not subject to Administrative Procedures Act (APA) review. The appeal turned on whether the island citizens had a remedy in the island courts, without which they would be without recourse. As Judge Goodwin's law clerk put, they would lack a remedy, if the Commissioner—appointed by the Secretary of the Interior (as were the members of the island High Court) —“can hide behind an order of the Secretary, which is not reviewable in the island court.”²³⁸

The Ninth Circuit (Judges Goodwin and Ozell Trask and Senior District Judge William East [D. Or.]) affirmed the dismissal. Goodwin, for himself and Judge East, agreed that while the Trust Territory was not a U.S. territory or possession under the APA as the United States was trus-

²³³ Before Judge James Otero of the Central District of California.

²³⁴ *United States v. Kim*, 305 F. App'x 427 (9th Cir. 2008).

²³⁵ Robert Takasugi of the Central District of California.

²³⁶ *United States v. Marquez*, 198 F. App'x 678 (9th Cir. 2006).

²³⁷ 48 U.S.C.A. § 1681 (Westlaw 2015).

²³⁸ Memorandum from Donald Friedman (law clerk to Judge Goodwin) to Alfred T. Goodwin re *People of Saipan v. U.S. Department of Interior and Continental Airlines*, 502 F.2d 90 (9th Cir. 1974) (Jan. 31, 1974).

tee for the United Nations, the Trust Territory was like the entities intended to be excluded from APA review. However, unlike the district court, Goodwin did find that the islanders had judicially enforceable substantive rights deriving from the Trusteeship Agreement. While these rights were “not initially enforceable in United States courts, [r]ather, upon principles of comity, they should be asserted before the High Court of the Trust Territory.”²³⁹ In the end, he was careful to allow re-filing in the U.S. district court if the High Court of the Trust Territory were to find itself without jurisdiction to review the High Commissioner’s action. Judge Trask reached the same result but in a somewhat different manner: the Trusteeship Agreement itself was not self-executing, but subsequent actions had made it judicially enforceable and the provisions of the Trust Territory Code led him to agree that the case should be heard first in the High Court.

A. JURISDICTIONAL DISPUTES

Before the NMI had its own appellate court, the U.S. District Court, through its Appellate Division, had appellate jurisdiction over cases from the NMI courts as the NMI government had provided, with federal questions reserved to the federal court.²⁴⁰ The Commonwealth Judicial Reorganization Act of 1989²⁴¹ gave the Supreme Court of the NMI jurisdiction over all appeals from the island’s trial court—now the Commonwealth Superior Court—and transferred pending cases to the new Supreme Court. With this change, appeals were to go to the Ninth Circuit only after a final ruling from the CNMI Supreme Court, so the U.S. District Court’s jurisdiction over appeals was eliminated. The Ninth Circuit had to deal with a controversy that arose from this alteration of appellate jurisdiction. The resulting *Wabol* and *Mafnas* cases were almost as important, if not more so, for the time necessary for the Ninth Circuit to resolve them than for their important rulings. It is clear that the court of appeals’ internal processes negatively affected its relationships with CNMI, and this NMI history was also to affect similar jurisdictional issues as to Guam. Judge Goodwin did not participate in either case but was involved tangentially as the circuit’s Chief Judge and then as chair of the Pacific Islands Committee.

Wabol v. Villacrusis began as a land claim dispute. On that point the Ninth Circuit ruled that the NMI provision restricting long-term alienation of interests in Commonwealth land was not subject to Fourteenth

²³⁹ *People of Saipan v. U.S. Dep’t of Interior*, 502 F.2d 90 (9th Cir. 1974).

²⁴⁰ 48 U.S.C. § 1694b(a) (current version at 48 U.S.C.A. § 1821 (Westlaw 2015)).

²⁴¹ P.L. 6-25, § 3106.

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Amendment equal protection limitations.²⁴² The importance of the case stems instead from whether the Ninth Circuit's jurisdiction to hear the case was removed by the Commonwealth of Northern Marianas Islands Judicial Reorganization Act of 1989. That law was enacted while the appeal was pending before the Ninth Circuit, "almost one year after this appeal had been fully briefed, argued and submitted for jurisdiction."²⁴³ That might lead one to ask why the panel had not been able to file its opinion within a year's time—instead of closer to *two years* after argument (argument May 11, 1988, opinion filed February 20, 1990). The answer may be that the author, Judge Cecil Poole, was notoriously slow in producing opinions. Whatever the reason, as Judge Goodwin was later to observe, "We had trouble with Saipan because the question [about cases in the pipeline when the new NMI Supreme Court was operating] was not resolved by statute and the panel that got the question for our court to decide lost about two years' time and substantial amount of good will for our court in failing to decide the case when the question urgently needed to be decided."²⁴⁴

The case had first been before a Ninth Circuit motions panel, which issued a show cause order as to whether the case should be dismissed for lack of a final judgment and sent the case to a merits panel for consideration of that question, which resulted from the district court's having remanded the case to the island trial court. The merits panel (Judges Charles Wiggins and Melvin Brunetti with Judge Poole) found "sufficient characteristics of finality . . . to command our immediate attention" and the proceedings pending below would not preclude resolution of the central question.²⁴⁵ The panel stated that some accounting matters might remain "should not prevent our adjudication of important and potential dispositive questions which have been fully briefed and argued," and doing otherwise would "disserve the cause of judicial economy and therefore frustrate the very purpose of the final judgment rule."²⁴⁶

The finality matter was, however, only a predicate to the more important jurisdictional issue. In the Court Reorganization Act, the Commonwealth had removed federal court jurisdiction over appeals from the local trial courts, *including those pending when the Act was passed*, and

²⁴² *Wabol v. Villacrusis*, 898 F.2d 1381 (9th Cir. 1990), *as amended*, 908 F.2d 411 (9th Cir. 1990), *as amended*, 958 F.2d 1450 (9th Cir. 1990) .

²⁴³ *Id.* at 1386.

²⁴⁴ Memorandum from Alfred T. Goodwin to J. Clifford Wallace and others (June 19, 1991). Judge Goodwin, in commenting later on the *Mafnas* case (see below) referred to the "equally infamous" *Wabol* case, "infamous for the delay and the apparent confusion." Memorandum from Alfred T. Goodwin to Pacific Islands Committee (Jan. 24, 1994).

²⁴⁵ *Wabol*, 898 F.2d at 1385.

²⁴⁶ *Id.* at 1386.

the new NMI Supreme Court had upheld that provision.²⁴⁷ However, the Ninth Circuit ruled that it *did* retain jurisdiction because the Covenant creating the NMI's governmental structure "does . . . limit NMI's authority to restrict the jurisdiction of courts empowered to hear appeals from federal courts or involving issues of federal law," and Congress, in its 1984 amendments to the Covenant, had made clear that NMI "would not have the authority to determine which courts would be empowered to hear appeals from federal courts."²⁴⁸ Thus, what NMI had done was "an exercise of precisely the kind of authority Congress has withheld from NMI." NMI officials could not "amend or circumvent the express provision that all appeals from the appellate division of the district court must be heard by [the Ninth Circuit Court of Appeals], without limitation."²⁴⁹

The *Mafnas* case was, like *Wabol*, a land dispute. It was tied to local ethnicity involving claims that a land transfer violated provisions limiting the ability of those not of NMI descent to obtain permanent or long-term interests in land, but it also became tangled in the Commonwealth Judicial Reorganization Act's withdrawal of federal appellate jurisdiction. It also seemed to go on interminably, part of the time attributable to deferral of submission in February 1989 pending the *Wabol* decision, which itself, as just seen, was not to come soon. Once *Wabol* did come down in early 1990, the first panel to consider *Mafnas* (Judges Wallace, David Thompson, and Ferdinand Fernandez) dismissed the appeal because the Judicial Reorganization Act had deprived the District Court's Appellate Division of jurisdiction over appeals in which there was no final mandate.²⁵⁰ Then the District Court's Appellate Division said that the *Mafnas I* dismissal meant that its ruling stood, but the NMI Supreme Court issued a writ of prohibition to the Superior Court to disregard the Appellate Division's mandate. The appeal of that ruling became the first case to reach the argument stage on direct appeal from the Commonwealth Supreme Court. In this second iteration of *Mafnas*, a panel of Judges Warren Ferguson (who wrote), Mary Schroeder, and Betty Fletcher first observed, "The procedural background to this case is confusing due to what appears to be a race between the parties to find a court that will hold in their favor,"²⁵¹ but the judges ruled that *Mafnas I* had removed the Appellate Division's jurisdiction. Appellate jurisdiction in the Ninth Circuit existed but the case was moot, the same result achieved by vacating the Appellate Division mandate.

²⁴⁷ *Wabol v. Villacrusis*, #89-005 (Supreme Court, Northern Mariana Islands, Dec. 11, 1989).

²⁴⁸ *Wabol*, 898 F.2d at 1387.

²⁴⁹ *Id.* at 1388.

²⁵⁰ *Mafnas v. U.S. Dist. Ct. for the N. Mariana Islands*, 919 F.2d 101 (9th Cir. 1990).

²⁵¹ *Mafnas v. Superior Ct. of N. Mariana Islands*, 936 F.2d 1068, 1069 (9th Cir. 1991).

Judge Ferguson made an accurate prediction when he observed that once the NMI Supreme Court decided matters, “any issues which remain in dispute will find their way back to this court,”²⁵² but another set of Ninth Circuit judges—William Norris, Robert Beezer, and Andrew Kleinfeld—was to decide *Mafnas III*.²⁵³ The CNMI Supreme Court had reversed the Superior Court’s ruling for the plaintiff in the land title dispute, but the Ninth Circuit now ruled the CNMI court had no authority to hear an appeal the Ninth Circuit previously dismissed; thus, the Superior Court’s judgment was reinstated. The CNMI Supreme Court was successor to the jurisdiction of the Appellate Division, with “no greater jurisdictional power over this case than the Appellate Division had after our dismissal.” That dismissal “left the Appellate Division with no jurisdiction to disturb the judgment of the CNMI Superior Court, [so] the CNMI Supreme Court had no jurisdiction to disturb that judgment.”²⁵⁴ The long history of the case prompted a further negative comment from Judge Goodwin to his Pacific Islands Committee colleagues: “The Ninth Circuit has shot itself in the foot several times in connection with the infamous *Wabol* and *Mafnas* cases.”²⁵⁵ In particular, he found *Mafnas* “a good example of what happens when a panel that is familiar with a case refuses to take it back, or the staff fails to ask them to take it back when it returns.”²⁵⁶

B. FEDERAL COURT—CNMI COURT INTERACTION

The Ninth Circuit also decided, in published opinions, cases on other aspects of appellate jurisdiction and particularly on interaction between the CNMI courts and the federal courts, and there were also cases touching on basic relations between the United States and the Commonwealth of the Northern Marianas. Touching on the jurisdictional changes was an appeal from a murder conviction in the NMI courts, affirmed by the District Court’s Appellate Division. The Ninth Circuit panel (Judges John Noonan, Goodwin and Alex Kozinski) first distinguished *Wabol* and held that the Court Reorganization Act could not withdraw appellate jurisdiction from the Ninth Circuit “where the appeal was currently pend-

²⁵² *Id.* at 1072.

²⁵³ *Aldan-Pierce v. Mafnas*, 31 F.3d 756, 758–59 (9th Cir. 1994) (superseding 11 F.3d 923 (9th Cir. 1993)).

²⁵⁴ *Id.*

²⁵⁵ Memorandum from Alfred T. Goodwin to Pacific Islands Committee (Jan. 24, 1994).

²⁵⁶ *Id.* In his memorandum, Judge Goodwin delineated the “unhappy story” of the case, which had *fifteen* entries from the plaintiff’s initial NMI Superior Court victory through the petition for rehearing in *Mafnas III* and thus did not include the revised Ninth Circuit opinion in that version of the case.

ing before our court.”²⁵⁷ *Wabol* had been before the Ninth Circuit when the Act was passed, but in this instance the appeal was filed after the new NMI court was created. The result was that, because of a failure to exhaust remedies within the NMI courts, the Appellate Division lacked jurisdiction—and thus the Ninth Circuit itself lacked jurisdiction to hear the appeal. The Ninth Circuit judges, while saying the Appellate Division’s motives were “praiseworthy,” countered that court’s view that no other court was functioning because there were no judges or rules and the CNMI Supreme Court existed only on paper; instead it was clear that the case had been transferred to a functioning court as the CNMI Supreme Court had issued its first opinion five months before the Appellate Division decided the present case. *Gioda v. Saipan Stevedoring*²⁵⁸ had used “manifest injustice” to decline to apply new law to a pending case, but here there would be no manifest injustice by dismissing the appeal.

For fifteen years after the CNMI Supreme Court was established, cases were to go from there to the Ninth Circuit and were to do so on appeal. This allowed the federal court to dismiss an appeal for want of a substantial federal question, just as the U.S. Supreme Court has done with appeal cases. Illustrative is a case that arose when parents won a jury verdict when they sued their sons for restitution and damages for fraudulent inducement to sign over real property.²⁵⁹ The trial court’s denial of a JNOV was affirmed by the CNMI Supreme Court, which, however, ordered a remittitur. That led to due process issues being brought to the Ninth Circuit, where a panel of Judges Goodwin, Harry Pregerson, and Eighth Circuit Judge Donald Lay said it lacked jurisdiction over them because the CNMI Supreme Court had not said whether its ruling was based on the U.S. or CNMI Constitution; moreover, the issue had been waived by not having been raised in the opening brief.²⁶⁰

Interaction between CNMI courts and the Ninth Circuit also arose in a dispute over the removal of the Special Assistant to the Governor for Women’s Affairs. District Judge Munson had found a property interest in the individual’s continued employment, with no removal except for cause, even during the term of a governor succeeding the one who made the initial appointment; he also ruled that plaintiff had an implied right of action for money damages. The Ninth Circuit did not initially decide the extent of the individual’s job protection but, acting as it might when faced with a state law question to which the answer was not clear, certified two questions to the CNMI Supreme Court: (1) whether the individ-

²⁵⁷ *N. Mariana Islands v. Kawano*, 917 F.2d 379, 381 (9th Cir. 1990).

²⁵⁸ *Gioda v. Saipan Stevedoring*, 855 F.2d 625 (9th Cir. 1988).

²⁵⁹ *Santos v. Nansay Micronesia, Inc.*, 76 F.3d 299 (9th Cir. 1996) (per curiam).

²⁶⁰ *Id.* Judge Goodwin was the author.

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ual could never be removed except for cause, even by a later governor, or whether the protection applied only during the appointing governor's term, and (2) if "Yes" to (1), whether there was an implied right of action against CNMI officials for a violation of Article III, Section 22, of the Covenant.²⁶¹ When the CNMI Supreme Court's answered the first question by saying that the "for cause" protection applied only during the appointing governor's term,²⁶² the Ninth Circuit, per Judge Stephen Trott (with Judges Goodwin and Mary Murguia), ruled on the basis of that answer that the termination of the individual did not violate due process: there was no protected interest in continued employment beyond the term of the appointing governor.²⁶³

The Ninth Circuit's answer to a question about applicable statutes of limitations affected which courts—NMI or federal—could entertain certain claims. A person sued the CNMI government in federal court over a rape by an employee of CNMI's Immigration Services.

Because of the need for CNMI interpretation of certain issues, Judge Munson declined to exercise supplemental jurisdiction over the CNMI claims until they had been litigated in the CNMI courts; the plaintiff then filed there but was found "out of time." When the CNMI Supreme Court affirmed that ruling, plaintiff came back to federal court to amend her complaint, but Judge Munson gave preclusive effect to the CNMI court's limitations ruling and denied the request. The Ninth Circuit panel of Judges Schroeder, Goodwin, and Murguia, after hearing the appeal at Saipan, ruled that federal court claims were not precluded by the CNMI court's ruling that claims under CNMI law were barred by the statute of limitations; it was acceptable to file in a different court with a longer limits period; and *res judicata* based on a limitations period was not applicable if unfair.²⁶⁴

C. CORE UNITED STATES—CNMI RELATIONS

The cases discussed make clear that the Ninth Circuit had to grapple with relations between the United States and CNMI courts. There were also other cases that went to the core of relations between the United States and the Commonwealth, although clearly they involved matters

²⁶¹ *Peter-Palican v. Gov't of N. Mariana Islands*, 673 F.3d 1013 (2012). There had been an earlier ruling, by a different Ninth Circuit panel (Judges Kozinski, Bybee, & Callahan) that the acting governor had qualified immunity from suit. *Peter-Palican v. Gov't of N. Mariana Islands*, 332 F. App'x 377 (9th Cir. 2009).

²⁶² *Peter-Palican v. Gov't of N. Mariana Islands*, No. 2012-SCC-0010-CQU, 2012 WL 2564359 (June 29, 2012).

²⁶³ *Peter-Palican v. Gov't of N. Mariana Islands*, 695 F.3d 918 (9th Cir. 2012).

²⁶⁴ *Zhang v. Dep't of Labor & Immigration*, 331 F.3d 1117 (9th Cir. 2003) (*per curiam*).

within the courts' ken. Perhaps most illustrative is a case which arose when the Interior Department's Inspector General (IG) sought enforcement of an administrative subpoena for tax records for a CNMI audit under the Insular Areas Act. The CNMI Supreme Court issued a temporary injunction against the release of tax information on the basis that the audit would intrude on taxpayer privacy rights. As the Governor would not comply with the subpoena, the IG sought enforcement in federal court and Judge Munson agreed.²⁶⁵

Interest in the appeal to the Ninth Circuit was high, evident from a request for video coverage of argument, which the Ninth Circuit allowed.²⁶⁶ One question was whether the Covenant restricted Congress' legislative powers, but the crucial one was the extent of local self-government. Judge Goodwin initially circulated an opinion stressing "a substantive right of local self-government free from congressional interference," with enforcement of the subpoena inconsistent with self-government,²⁶⁷ but the other panel members disagreed. Judge Ruggero Aldisert, drawing on the situation in the Virgin Islands (part of the Third Circuit, his court), agreed that the subpoena should be enforced: the federal government ought to be able to audit a territory receiving federal dollars. Judge Betty Fletcher, in persuasive views, argued that Congress "has provided adequate statutory authority for the subpoena." She thought the Covenant allowed United States legislation applicable to the NMI as long as Congress made the applicability clear. Moreover, she found the relationship between the U.S. and CNMI "unique" and not like federal-state relations, as the Covenant did not "support the equivalent of full state sovereignty for the CNMI." She also thought that the federal government's interest was also clear, as "the fiscal relationship . . . is critical," with the United States giving CNMI financial aid (direct grants and federally funded services). As she concluded:

To say that the United States can't require the CNMI to account for its management of federal funds and the funds it must collect under . . . tax provisions . . . does not seem a supportable result in light of the United States' unequivocal prerogative to intervene in at least *some* aspects of CNMI life.²⁶⁸

²⁶⁵ Of Judge Munson's view that the U.S. has the audit power despite the Covenant's self-government provision, a law clerk observed, "The locals call this colonialism." *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749 (9th Cir. 1993); Memorandum from Edith Ramirez (law clerk to Judge Goodwin) to Alfred T. Goodwin (Dec. 28, 1993).

²⁶⁶ *United States ex rel. Richards v. De Leon Guerrero*, Order (9th Cir. Jan. 12, 1993).

²⁶⁷ Alfred T. Goodwin, draft opinion circulated to panel re: *Guerrero* (June 7, 1993).

²⁶⁸ Memorandum from Betty B. Fletcher to panel re: *Guerrero* (June 25, 1993) (emphasis in original).

That argument led Judge Goodwin to change his position and circulate a new opinion, adopted by the panel, which stated, “The Insular Areas Act unambiguously provides the authority for the Inspector General to conduct an audit of the CNMI”²⁶⁹ although the Act was silent concerning subpoenas, but authority for the latter could be found in the Inspector General Act. As to the central question “whether the Insular Areas Act conflicts with the self-governance provisions of the Covenant,”²⁷⁰ Goodwin drew on Judge Fletcher’s argument to say, “The Covenant has created a ‘unique’ relationship between the United States and the CNMI, and its provisions alone define the boundaries of those relations.”²⁷¹ He would not accept a reading of Section 105 of the Covenant “carving out an area of ‘local affairs’ immune from federal legislation.” Congress could not override the Covenant’s “fundamental provisions,” but “[t]his does not mean that Congress may not pass any legislation ‘affecting’ the internal affairs of the CNMI.”²⁷² Asserting the United States’ “substantial federal interest in monitoring the CNMI’s collection of taxes,” with federal aid that “inextricably links federal and CNMI interests,” he found the subpoena was not “unwarranted federal interference with the CNMI’s internal fiscal affairs.”²⁷³

Also going to the United States-CNMI relationship, because of the question whether CNMI had certain protections from suit available to United States states, was a case brought under the Fair Labor Standards Act (FLSA) by CNMI middle-management administrators seeking overtime pay. Judge Munson had given the government summary judgment. The Goodwin-Schroeder-Tashima panel, hearing argument at Saipan, faced a threshold question of whether the CNMI government was entitled to sovereign immunity. To reach that question, the panel had to decide whether to dispose of the case on the merits—the plaintiffs would lose as not entitled to FLSA protection—or to reach the sovereign immunity question first; they decided on the latter sequence. The judges looked at recent Supreme Court cases, at Puerto Rico’s relation to the United States, and at an earlier case that held there was no Eleventh Amendment immunity in a § 1983 case,²⁷⁴ and held that CNMI was not entitled to Eleventh Amendment immunity: the Covenant did not incorporate the Eleventh Amendment, there was no reason to question the circuit’s ear-

²⁶⁹ *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 753 (9th Cir. 1993).

²⁷⁰ *Id.*

²⁷¹ *Id.* at 754.

²⁷² *Id.* at 755.

²⁷³ *Id.*

²⁷⁴ *Fleming v. Dep’t of Pub. Safety*, 837 F.2d 401 (9th Cir. 1988).

lier ruling, and the CNMI had waived its common law sovereign immunity.²⁷⁵

Also before the Ninth Circuit was a matter of governmental powers within CNMI, a challenge to the governor's vetoes of line-item appropriations. District Judge Alfredo Laureta had given summary judgment to the Governor. The Ninth Circuit, for whom Third Circuit Judge Arlin Adams wrote,²⁷⁶ found a federal question was presented so the appeal was properly before that court but then found a lack of standing as the individual had not shown harm to himself rather than only to all Island of Rota residents.²⁷⁷

The Ninth Circuit also decided another aspect of the CNMI government's basic authority—its control of immigration to the islands through the NMI Nonresident Workers Act (NWA). In a suit brought in the CNMI courts but removed to federal court, Judge Munson gave the CNMI government partial summary judgment, a settlement was reached on most matters, and the judge then dismissed plaintiff's § 1981 claim, and a Ninth Circuit panel of Judges Goodwin, Schroeder, and Wallace affirmed. However, on the panel's way to that result, there was some back-and-forth about whether to apply a rational basis level of scrutiny to the restrictions on migration or something more; agreeing not to address that matter, the judges ruled under both rational basis and intermediate scrutiny. The panel initially agreed to reverse and remand for the district court to consider the relation between § 1982 and the Covenant as to immigration authority. However, after prodding by Judge Wallace, the judges agreed to uphold CNMI's authority coming from Congress through the Covenant. Judge Goodwin's opinion stated that plaintiffs had adequately pled a claim under § 1981, which "prohibits governmental discrimination on the basis of alienage."²⁷⁸ While rejecting the argument that the Covenant gave CNMI plenary power over regulation of aliens, he held that the NWA did not violate either non-resident workers' equal protection rights or their substantive due process rights and on that

²⁷⁵ *Norita v. N. Mariana Islands*, 331 F.3d 690, 695 (9th Cir. 2003). As Judge Goodwin developed his opinion, he was urged to strengthen it by Judge Schroeder. See Memorandum from Mary Schroeder to panel re: *Norita* (April 22, 2003). Taking a shot, she asked, "Why should we be suggesting that sovereign immunity for the corrupt and inexperienced government of CNMI should be recognized when our cases are clear?"

²⁷⁶ Initially, the panel's opinion was by Judge Goodwin, with Judge Adams dissenting, but Judges Goodwin and Farris found that dissent persuasive, and Judge Adams thus wrote for the panel.

²⁷⁷ Judge Goodwin's law clerk argued to him that there was injury (a loss of things that could have been obtained if the money had been appropriated). Memorandum from Laurel Terry to Alfred T. Goodwin (Aug. 7, 1981). *Taisacan v. Camacho*, 660 F.2d 411, 411 (9th Cir. 1981).

²⁷⁸ *Sagana v. Tenorio*, 384 F.3d 731, 740 (9th Cir. 2004).

basis affirmed Judge Munson's dismissal of the § 1981 claim.²⁷⁹ Making clear the judges' difficulty in dealing with the claims before them,²⁸⁰ Judge Goodwin said that "the NWA withstands challenge" only at a certain "level of abstraction" and left open the possibility that individual NWA provisions might fail to "satisfy a more focused Equal Protection challenge."²⁸¹

D. OTHER CASES

Not all NMI cases before the Ninth Circuit raised questions of court jurisdiction or governmental structure, as some raised standard questions found in cases before a U.S. court of appeals. In an appeal of a conviction under the Hobbs Act (interference with commerce by extortion), a panel of Judges Beezer, Goodwin, and Thomas Nelson initially issued an unpublished memorandum to affirm the conviction on the basis of harmless error. Then, after a petition for rehearing, the panel issued a published opinion authored by Judge Beezer reversing the district court on the ground that the indictment failed to state an essential element, which defendant had claimed prior to trial.²⁸² Judge Goodwin also participated in a case in which the claim was lack of notice of a Land Commission hearing so that land was obtained by treachery. The courts below had been divided: the CNMI trial court set aside Commission determinations but the District Court's Appellate Division (Judges Alfred Lauretta, William Enright [S.D. Cal.], and Robert E. Moore [Commonwealth trial judge]) had reinstated the Commission ruling. The Ninth Circuit (Judges Choy, Goodwin, and Kennedy) affirmed in a per curiam opinion, saying notice need not be given to a landowner's land trustee where the landowner himself had notice, nor was there abuse in not looking to the landowner's competence.²⁸³

Other cases from NMI that were disposed of by non-precedential "unpublished" memorandum dispositions included a brief dismissal for "lack of a genuine federal issue," with a citation to an earlier Ninth Circuit case,²⁸⁴ and fisheries, employment, and criminal cases. Both a fisheries case and a personnel matter, like one of the published opinions,

²⁷⁹ "Although we reject the district court's conclusion that Sagana did not properly plead his §1981 claim, we affirm the district court's dismissal on its merits, consistent with our holding on the equal protection claim." *Id.* at 743.

²⁸⁰ "Upon review, our efforts are somewhat encumbered by the bulk and vague contours of Sagana's claim." *Id.* at 736.

²⁸¹ *Id.* at 741, 743.

²⁸² *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999).

²⁸³ *Pangelinan v. Tudela*, 733 F.2d 1341 (9th Cir. 1984) (per curiam).

²⁸⁴ *Dela Cruz & Cheng v. Hotel Nikko Saipan*, No. 98-15117 (9th Cir. Mar. 4, 1999).

posed a question of the applicability of federal law in CNMI. When a company sought a declaration that the Magnuson Fisheries Conservation and Management Act²⁸⁵ and regulations were not applicable there, District Judge Laureta issued a preliminary injunction, but with Presidential Proclamation 4726 having suspended operation of U.S. vessel documentation laws in NMI, then found the case moot. The Ninth Circuit (Judges Goodwin, Charles Merrill, and J. Blaine Anderson) affirmed, as nothing remained to be decided because the Proclamation gave plaintiffs the right to fish with their vessel.²⁸⁶ The personnel case was a suit under FLSA against an employer by former contract employees; there the court held that, under the Covenant, FLSA's minimum wage provisions were not applicable in CNMI although the Act's overtime provisions were and that as the latter did not apply in this case, Judge Munson had properly dismissed the FLSA claims. However, it was error to have dismissed the CNMI and common law claims for lack of jurisdiction: as diversity-of-citizenship jurisdiction was satisfied, the case was remanded for consideration of those claims.²⁸⁷ There was also a fairly standard employment discrimination case with claims against the school system for non-appointment to various positions and retaliation, where the Ninth Circuit panel²⁸⁸ affirmed summary judgment for the government. There were no protected property and liberty interests here, and there had been no constitutional violation as to claims of failure to respond to inquiries made as part of the individual's job.²⁸⁹

The most involved criminal appeal was from convictions for kidnapping, assault and battery, and attempted rape, which the District Court's Appellate Division had affirmed; at issue in the Ninth Circuit appeal were admission of and sufficiency of the evidence. Affirming in a memorandum disposition (by Judge Goodwin), the panel found the evidence more than sufficient to support the conviction; inconsistencies in testimony "were vigorously pointed out to the jury by defense counsel," and it was the jury's duty to weigh what it had heard.²⁹⁰ Nor were there grounds to complain about what the defendant's witness (the CNMI Attorney General, who handled the preliminary investigation) said about the rape victim's emotional state. Language problems of a multi-lingual so-

²⁸⁵ 16 U.S.C.A. § 1801 (Westlaw 2015).

²⁸⁶ *Marianas Fisheries, Inc. v. Kreps*, 676 F.2d 711 (9th Cir. 1982) (table).

²⁸⁷ *Abellanosa v. L&T Int'l Corp.*, 283 F. App'x 572 (9th Cir. 2008). The panel was Judge Pamela Ann Rymer, who wrote the disposition; Judge Goodwin; and Judge Sandra Ikuta.

²⁸⁸ Judges Thomas Nelson, author of the disposition; Charles Wiggins; and Goodwin.

²⁸⁹ *Angello v. CNMI Pub. Sch. Sys.*, 166 F.3d 342 (9th Cir. 1998) (table). The unsigned disposition was written by Judge Nelson.

²⁹⁰ *N. Mariana Islands v. Wabol*, 734 F.2d 20 (9th Cir. 1984) (table).

ciety had been present in the courtroom, although the judges found no prejudice to defendant from them:

The victim's first language is Carolinian, second is Chamorran, and she apparently speaks only halting English. The trial was conducted in English, with translation when necessary. The physician was a mainlander who does not speak the native tongues. The chief prosecutor also had to communicate with the victim through interpreters. Review of the transcript indicates that communication with the victim was at times difficult, apparently because of the language problems.²⁹¹

Less difficult was an appeal from a conviction for conspiracy and alien smuggling, in which defendant claimed the government had repatriated potentially exculpatory witnesses before a defense attorney was appointed. The panel (Paez, Graber, Goodwin) said appellant failed to show that the government acted in bad faith and that the repatriation was "not the result of a scheme to obtain a tactical advantage over Defendant."²⁹² Likewise, in an appeal from another conviction for smuggling undocumented aliens, a panel of Judges Schroeder, Goodwin, and District Judge Lloyd George (D. Nev.) found "overwhelming" evidence of the smuggling, with the evidence of defendant's intent to enter a non-designated port "easily sufficient, if not overwhelming."²⁹³ And the same panel, in a disposition Judge Goodwin prepared, affirmed a conviction for conspiracy to collect extension of credit by extortion, which had been followed by denial of a motion to acquit. A rational trier of fact, said the panel, could reasonably infer that the defendant did the act despite his changed appearance.²⁹⁴

VI. BEYOND GUAM AND THE NORTHERN MARIANAS

While most of Judge Goodwin's judicial involvement in the south Pacific concerned Guam and the Northern Marianas, his contacts through the Pacific Islands Committee led to invitations to sit in other venues. One was American Samoa, where his appointment came from the U.S. Secretary of the Interior, and he also was invited to sit in the Marshall Islands and in the Federation of Micronesia.

²⁹¹ *Id.*

²⁹² *United States v. Peng*, 2 F. App'x 735, 736 (9th Cir. 2001).

²⁹³ *United States v. Fleming*, 146 F. App'x 232, 232 (9th Cir. 2005).

²⁹⁴ *United States v. Yan*, 146 F. App'x 906, 907 (9th Cir. 2006).

A. AMERICAN SAMOA

On the request of Chief Judge Michael Kruse of the High Court of American Samoa, Ninth Circuit Chief Justice J. Clifford Wallace agreed that two judges would assist with the appellate calendar there in March or April 1992, and Judge Goodwin was appointed to serve as an Acting Associate Justice of the High Court by Secretary of the Interior Manuel Lujan, with the Interior Department paying travel funds from California to Samoa. As Justice Kruse told Goodwin, the cases to be heard were a “varied mix” and “a few of the cases are peculiarly local in flavor.”²⁹⁵

That mix was also true of later court calendars, such as the one in 1997. In 1996, Judge Goodwin, as chair of the Pacific Islands Committee, worked with Chief Judge Procter Hug, Jr., to find two judges to go to American Samoa for a session the local court had moved from February to April 1997 to accommodate judges going on to attend the Pacific Islands Judicial Conference in Sydney, Australia. As a result of an understanding between the High Court and the Ninth Circuit that produced some control over who sat in Samoa, the judges were to be drawn from the Pacific Islands Committee. As Judge Goodwin explained: “This arrangement was worked out some years ago when various judges were applying directly to the Secretary of the Interior and were showing up in Samoa without any significant input from either the High Court or the Circuit.”²⁹⁶ Characterizing the trip, Goodwin wrote, “If two of our judges go to Australia via Samoa, some senator may think it is a junket, but the work is real. Getting there is difficult and tiresome. Being there is o.k. but there is more work than most travelers want.”²⁹⁷

Not surprisingly, Judge Goodwin was one of the judges appointed on Chief Justice Kruse’s recommendation by Interior Secretary Bruce Babbitt.²⁹⁸ In the April 1997 sitting, most cases were heard by five judges—Judges Goodwin and Wallace with either Chief Justice Kruse, Justice Lyle Richmond, or District Judge John Ward,²⁹⁹ and two of some five native judges.³⁰⁰ The court filed some opinions during the week the appellate court sat while others were filed in June or July; Judge Goodwin did not write any of the opinions, all of which were unanimous. The cases included a number of fairly typical criminal appeals. One from a

²⁹⁵ Letter from Michael Kruse to Alfred T. Goodwin (Dec. 24, 1991).

²⁹⁶ Memorandum from Alfred T. Goodwin to Pacific Islands Committee (Oct. 1, 1996).

²⁹⁷ Memorandum from Alfred T. Goodwin to Procter Hug, Jr. (Oct. 7, 1996).

²⁹⁸ Letter from Bruce Babbitt to Alfred T. Goodwin (Mar. 24, 1997).

²⁹⁹ This depended on who had presided at trial, so a judge would not sit on an appeal from his own ruling.

³⁰⁰ The five native judges, two of whom sat in most cases, were Sagapolutele Palaeoia, Tapopo Vaifanua, Mamea Sala, Jr., Atiulagi Pese, and Lognai Siaki.

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jury conviction for DUI case raised a number of questions: sufficiency of the evidence, problems with closing argument, convictions for both DUI and Careless Driving, and an alleged penalty for using a trial. The court rejected all the claims in affirming the conviction.³⁰¹ Also affirmed was a conviction for larceny when a person used a bank loan for a house for other purposes.³⁰² However, an appeal from a drug and gun conviction resulted in a reversal, as the evidence did not show that defendant had dominion over the land on which the marijuana plants were growing.³⁰³

Among the also-typical civil appeals, some were resolved by procedural rulings, in which the court affirmed the denial of modification of the filing date for notice of appeal, affirmed a trial court order of remand, and reversed the dismissal of a case on a motion for reconsideration and a new trial on the basis of the motion.³⁰⁴ In a case stemming from a dispute over a lease purchase agreement for airplanes and parts in which both parties sued for noncompliance and in which the FAA was also involved, the appellate court affirmed the trial court's injunction against the plaintiff and appointment of a trustee for both parties.³⁰⁵ In a suit for unpaid compensation for services with a counterclaim for damages from defects in the design and installation of a skylight at an office building, Judge Goodwin wrote to affirm the judgment for the counter-claimant.³⁰⁶ And in a tort claims suit against the government for failing to provide adequate security for the waterfront area, where plaintiff was injured while returning to his ship, the appellate panel, also per Judge Goodwin, affirmed summary judgment for the government.³⁰⁷

The cases "local in flavor" to which Justice Kruse had referred involved the registration of an honorific title ("matai"), a claim to succession to such a title, and yet another matai title claim, with all the lower court rulings affirmed.³⁰⁸ In the last of these, from Pago Pago, there was an issue of disqualification of a Samoan judge for possible partiality and another issue dealing with genealogy, where the appellate court said it

³⁰¹ Antonio Pule v. American Samoa Government, AP 09-76 (filed April 11, 1997).

³⁰² Leiataua v. American Samoa Government, AP 022-95 (filed April 9, 1997).

³⁰³ Suani v. American Samoa Government, AP 02-96.

³⁰⁴ South Pacific Island Airsystems v. American Samoa Government, AP 021-95 (filed Apr. 11, 1997); Ale v. Reid Stevedoring, AP 19-95 (filed June 9, 1997); Pal Air International v. Porter, AP 016-96 (filed Apr. 9, 1997).

³⁰⁵ Bendall v. Samoa Aviation, AP 18-95 (filed Apr. 14, 1997).

³⁰⁶ G.M. Meredith & Associates v. Blue Pacific Management Corp., AP 17-95 (filed Apr. 10, 1997).

³⁰⁷ Bradcock v. American Samoa Government, AP 16-95 (filed Apr. 10, 1997).

³⁰⁸ Lealai v. Aoelua, AP 02-95 (filed Apr. 11, 1997); Fela v. Tauiiili, AP 9-95/10-95/11-95/12-95/13-95 (filed June 6, 1997); Tualo v. Vaivao/Faate'A v. Vaivao, AP 06-85/07-95 (filed July 1997).

would not reweigh the evidence. There were also land disputes, one of which was a condemnation case in which the Appellate Division, in a Goodwin opinion, affirmed the government's fee simple title in land condemned for airport purposes.³⁰⁹ Another case involved whether a transfer of a 20-year beneficial interest in land was alienation of the land, and if the answer to that question was "Yes," whether the American Samoa Code barring alienation to non-Samoans was unconstitutional. Per Judge Wallace, the court held that transfer *is* alienation but the Code restriction satisfied strict scrutiny review.³¹⁰

Judge Goodwin sat on the High Court's Appellate Division again in June 1999, this time with fellow Pacific Islands Committee member Judge Alex Munson (D. NMI). Most of the panels had five judges but some had only four. Many of the dispositions took the form of unsigned orders or per curiam opinions, and all were unanimous; quite a number were filed during the judge's time there, with the others filed shortly after. Many cases were dismissed on procedural grounds, such as for failure to file a brief³¹¹ and, at counsel's request, for failure to move for a new trial within ten days,³¹² and the court also denied one motion to dismiss an appeal over a timing question but did grant a motion to dismiss an appeal.³¹³

There were three criminal cases on the calendar. In a sentencing case, work release had been denied after a guilty plea to felony driving with a suspended license. The court, vacating and remanding, held that the trial court *did* have discretion about sentencing alternatives and *could* have granted work release.³¹⁴ In the other two criminal appeals, both involving drugs, the convictions were affirmed. One was from a conviction for possession of methamphetamine, in which the trial judge had ruled alleged misconduct by government officers harmless as the defense could respond in open court.³¹⁵ A search warrant for marijuana was at issue in an appeal from a conviction for having a controlled substance. Judge Goodwin, in ruling that there was probable cause for the warrant and no basis for a *Franks* hearing concerning affidavits, disposed of each of defendant's arguments: The evidence was sufficient to support the

³⁰⁹ American Samoa Government v. Meredith, AP 08-95 (filed Apr. 14, 1997).

³¹⁰ Craddick Development v. Craddick, AP 014-95 (filed July 22, 1998). Judge Ward had drafted the opinion for the court, but Judge Wallace couldn't agree and Judge Goodwin joined Judge Wallace, who wrote for the court, with Ward filing a separate concurrence in the result.

³¹¹ Suani v. American Samoa Government, AP 19-97; Sale v. Leaea, AP 6-98 (filed June 24, 1999).

³¹² Amerika Samoa Bank, no docket number.

³¹³ Safue v. Iona, AP 25-98 (filed June 24, 1999); Mailei v. Fanene, AP 02-98 (date uncertain).

³¹⁴ Sagapolutele v. American Samoa Government, AP No. 22-98 (filed June 25, 1999).

³¹⁵ Pua'A v. American Samoa Government, AP 07-97 (filed June 28, 1999).

conviction. In requesting an *in camera* hearing about revealing the identification of an informant, defendant had failed to provide a transcript or other documents, which Goodwin said, “makes it virtually impossible to evaluate this argument Samana has provided this court nothing upon which this court can base a conclusion that [the trial] court abused its discretion.”³¹⁶ Furthermore, claims concerning the chain of custody of evidence had likewise been made “without any supporting evidence or documents.” While the defendant was entitled to notice about sentencing enhancement based on a prior crime, there was evidence he did receive such notice and had the opportunity to speak to recidivism.³¹⁷

As in Judge Goodwin’s earlier sitting on this court, there were claims to matai title to be decided. In one, the court had to deal with clan support, leadership, and the value of the title, while in another, where the opinion discussed clan and family matters, the court remanded because of an error in finding that the defendant had the support of a majority or more of the family’s clans.³¹⁸ Also related to family matters was affirmance of a trial court’s denial of a request to bury a relative on another’s land.³¹⁹ There was also a divorce case in which the appellate court affirmed the trial court’s granting of custody of children to the father but the mother had sought a new trial.³²⁰

A land case before the judges was a suit to set aside land registration. The High Court’s Lands & Title Division had affirmed the registration, but the Appellate Division found the registration invalid and so reversed and remanded.³²¹ The trial court was also reversed in a case over a ship explosion, where the ship’s owner sued the supplier of the exploded oxygen tanks; plaintiff had received a judgment but the trial division had vacated it. The legal fight was over the corporation to which the check was made, as one had appeared to have merged into another. In ruling that while the trial court could vacate the judgment, the appellate judges pointed out that the trial division had misread common law about foreign corporations’ capacities and on remand should follow California law.³²² Denial of prejudgment interest was affirmed in another case, thought to be “an appropriate one in which to treat the presumption favoring interest as overcome by the facts,” because “[t]he

³¹⁶ *American Samoa Government v. Saman*, AP 20-97 (filed June 25, 1999).

³¹⁷ *Id.*

³¹⁸ *Pili v. Tagaloa*, AP 10-98 (filed July 27, 1999); *Tagoilelagi v. Ulimasoa*, AP 24-98 (filed 1998). In the latter, the court, because it was already remanding for the error, also remanded concerning recusal.

³¹⁹ *Noa Lafi v. Maugaoteg*, AP 15-96 (filed Aug. 24, 1999).

³²⁰ *Sinavaiana v. Enright*, AP 08-98 (filed, June 25 1999) (opinion by Goodwin, J.).

³²¹ *Yuen v. Tuitele*, AP 14-98 (filed July 27, 1999).

³²² *Interocean Ships v. Samoa Gases*, AP 12-96 (filed June 28 1999).

amount of the debt was uncertain prior to the entry of judgment, and the creditor seeking interest was largely responsible for the uncertainty and the delay in the resolution of the case,”³²³ and a suit to recover \$100,000 owed for cash advances to buy shark fins, with various trial court findings as to differing instructions, resulted in a Goodwin opinion affirming that was quite deferential to the trial court, something which he, as a former judge, would have appreciated. As Goodwin concluded:

The trial division was presented with a business dispute, to be resolved in reliance on ambiguous fact, conflicting testimony and intentionally deceptive accounting records. The trial division was well-situated to evaluate the credibility of the witnesses and evidence offered by the parties. In the absence of credible evidence that casts doubts on the factual findings of the trial court, this court must affirm the trial court’s judgment.³²⁴

The judges for the Appellate Division’s April 2004 sitting were Judge Goodwin, his Ninth Circuit colleague A. Wallace Tashima (each wrote several opinions) and either Justices Richmond, Ward, or Kruse, plus one or two of the native judges. Again, some dispositions were filed while the visitors were still in Samoa, a result of Judge Goodwin having circulated draft opinions in lieu of bench memoranda. He wrote in one case, “This is . . . much too long to be published as an opinion, the detail was included for the purpose of serving as a bench memorandum,”³²⁵ and, in another he stated “In lieu of a bench memorandum, I’ve prepared this proposed disposition, subject to any amendments or revisions that may be necessary after hearing the parties at oral argument.”³²⁶

None of Judge Goodwin’s opinions during this term of court came in cases related to local culture, and the civil and criminal cases in which he wrote were not unusual. His two opinions in civil appeals were insurance-related. One was a workmen’s compensation case in which the insurer had denied a claim only to have benefits awarded by the Commission, which the Trial Division had affirmed. Affirming in turn, the Appellate Division found substantial evidence to support the claim and ruled that the Commission opinion met the proper standard for “unusual stress” created on the job, so the award was in accord with law.

³²³ Korea Deep Sea Fisheries Association v. Ho Pyo Hong, AP 4-97 (filed June 25, 1999).

³²⁴ Samoa Sharkfin Trading Co. v. Hong, AP 1-98 (filing date uncertain, 1999).

³²⁵ Memorandum from Alfred T. Goodwin to A. Wallace Tashima re: Agasiva v. American Samoa Government, AP 19-02 (Mar. 26, 2004).

³²⁶ Memorandum from Alfred T. Goodwin to Michael Kruse & A. Wallace Tashima re: National Pacific Insurance v. Commissioner, ASG Workmen’s Compensation Commission (Reardon, real party in interest), AP 16-02 (filed April 12, 2004) (Mar. 24, 2004).

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That the insurance company had violated a number of procedural rules had led Judge Goodwin to raise the possibility of sanctioning the company, adding, “It might be worthwhile to keep the insurance company in court [instead of dismissing] for a good scolding and to publish the opinion,”³²⁷ but the published opinion did not scold.

The other insurance case, based on a claim against the insurance company for bad faith in paying under a policy, turned in part on the rules for reformation of contracts. The case resulted from a fire caused by the negligence of an employee of a restaurant that leased the burned building. The lessee restaurant and its owner, the named insured, claimed the \$100,000 policy proceeds but the insurance company paid only \$64,300 into court and filed an interpleader action; there was also a cross-claim and the restaurant owner sought additional damages. The Trial Division gave \$100,000 to the building owner by indemnification. In affirming the judgment, Judge Goodwin wrote that the trial court had properly reformed the contract to reflect the actual ownership (not the name of the chief on whose land the building was located) but had erred in showing the building owner as the loss payee; this did not, however, affect the ultimate order, as the building owner received by indemnification even if not as the named loss payee. The claim for additional damages and a tort claim had not been properly raised, said Goodwin, and there was no error in finding that the building was a total loss.³²⁸

Judge Goodwin wrote to affirm in his three opinions in criminal appeals. A defendant convicted of burglary and sodomy on his 15-year-old cousin had claimed a restriction on closing argument, but, citing a Washington case, Judge Goodwin found the restriction acceptable “to prevent the discussion of irrelevant, or inadmissible material.”³²⁹ He noted the vigorous cross-examination and the full development of credibility questions “that lurked in the two conflicting versions of the charged conduct.”³³⁰ A conviction for assault with a bamboo stick raised questions of jury instructions, not objected to at trial, sufficiency of the evidence, and ineffective assistance of counsel. The appellate panel, with no native judges seated, did find error in an instruction on the government’s burden (inadequately explained) but found the error harmless as the result would have been the same with the proper instruction, and the judges also found no error in instructing on a lesser-included offense.³³¹

³²⁷ *Id.*

³²⁸ *Progressive Insurance Co. (Pago Pago) Ltd. v. Southern Star International dba Hong Kong Restaurant*, AP 11-02 (filed June 28, 1964).

³²⁹ *American Samoa Government v. Etulae*, AP 08-02 (filed Apr. 12, 2004).

³³⁰ *Id.*

³³¹ *Agasiva v. American Samoa Government*, AP 19-02 (filed Apr. 12, 2004).

In a child sexual abuse case, stemming from a conviction of a man for inappropriately touching his daughter, defendant's attorney had wanted a mental exam of defendant as to both competency to stand trial (and assist in his defense) and criminal intent. The Appellate Division said there was no real issue about competency and the defense had not carried its burden of showing that the exam was necessary, as defendant's odd behavior was not sufficient. Judge Goodwin did say that the testimony about the victim by the doctor who examined her was hearsay but the testimony "was also a legitimate part of the medical history the doctor said she was required professionally and legally to ascertain in cases where a child is examined in connection with a molestation investigation."³³² That, however, left open what the jury could be told. At issue was whether, in the doctor's recording and reporting, mention of the perpetrator's identity was essential. It would not be admissible, said Judge Goodwin, unless it was connected to the course of treatment and indeed it was inadmissible, but that did not matter as it "did not affect a substantial right of defendant's," it was cumulative, and it did not sway the jury.³³³

Judge Goodwin also participated in two other criminal appeals—one from a conviction for rape and kidnap, which was remanded for an evidentiary hearing on juror misconduct, and the other from a conviction for second degree murder (of an infant), which was affirmed.³³⁴ Among the civil appeals in which he participated were those involving four locked containers of fabric and 92 sewing machines left on government land, which the trial court had decided for the government (affirmed); a fall on a fishing vessel, where the judgment for plaintiff was affirmed but the award was vacated and remanded for an award of prejudgment interest; a dispute over a sidewalk; and a breach of a lease agreement, with the trial court generally affirmed but reversed as to a damage award for unpaid utility bills.³³⁵

One part of the "local flavor" in the case mix came from an eviction from family land, where the trial court judgment was vacated to allow a comprehensive action over land claims and collateral issues, as certain family members were indispensable parties.³³⁶ There were also several

³³² Niupulusu v. American Samoa Government, AP 02-02 (filed June 28, 2004).

³³³ *Id.*

³³⁴ Fiu v. American Samoa Government, AP 07-01 (filed June 16, 2004); Ropati v. American Samoa Government, AP 04-03 (filed July 27, 2004).

³³⁵ New Star Trading Co. v. American Samoa Government, AP 09-02 (filed July 28, 2004); Sardina v. F/V Kassandra, AP 01-02 (filed July 27, 2004); Malala v. American Samoa Government, AP 10-01 (filed April 12, 2004); Gebauer v. American Samoa Power Authority, AP 05-02 (filed April 12, 2004). There were also two cases dismissed on stipulation after settlement.

³³⁶ Kaleuati v. Iosefa, AP 17-02 (filed June 29, 2004) (Ward, J.).

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disputes over succession of matai titles.³³⁷ Wanting not to become immersed in family disputes (at least, no more than necessary), Judge Goodwin suggested to his colleagues that “commenting on the merits of any candidate who is not a party to the appeal” be avoided because

[w]e can not predict nature and quality of future claims that may be advanced within a family, and should not say anything in an opinion that would give precedential weight to something the trial court said by way of dicta with reference to the lineage or consanguinity of persons who, even though parties at the trial level, are not party to this appeal.³³⁸

He also suggested further narrowing this particular ruling by not reaching “the broad statutory question of the effect of gender bias within a particular village or community” but instead leaving it to be “decided in a future case where it is the decisive question before the court.”³³⁹ If the opinion were to note that the trial court “did not address the question because it concluded that the answer would not have affected the result,” counsel would be more likely to “feel that we were paying attention to his argument if we spell out the proposition that an appellate court ordinarily should not address a question which, on the facts of the pending case, is hypothetical.”³⁴⁰

B. FEDERATED STATES OF MICRONESIA

Judge Goodwin also sat in the Federated States of Micronesia (FSM) in 1995 and 2007, thus more intermittently than in Guam, NMI, or even American Samoa and the Marshall Islands. When a need arose, e.g., on a regular judge’s recusal, he was invited to sit on the three-judge Supreme Court of the Federated States of Micronesia. Arrangements for the court’s session and for travel took up much of the communication between the judges (and staff). Certainly by comparison with communication in a regular Ninth Circuit panel, it took much time for Judge Goodwin to hear from other judges, and not just because he was in California; in addition to rudimentary communication systems, the island judges sitting with him seemed to wait on each other to act and did not seem to “move paper” expeditiously.

³³⁷ *Fanene v. Taci*, AP 11-03; *Akapo v. Ava*, AP 08-03; *Va-Afusuage v. Taci*, AP 13-03 (all filed May 6, 2004) (all by Richmond, J.).

³³⁸ Memorandum from Alfred T. Goodwin to panel members re: *Va-Afusuaga v. Taci*, AP 13-03 (Apr. 26, 2004).

³³⁹ *Id.*

³⁴⁰ *Id.*

In January 1995, Judge Goodwin heard two cases that were not particularly complex. One was a divorce and child support case in which certification to other courts was denied, no abuse of discretion was found, and the child support award was found adequate. The other, affirming after consolidating eleven appeals in which summary judgment and an injunction against trespass on land had been granted, turned on proper jurisdiction, to which most of Justice Richard Benson's opinion was devoted, and on a series of alleged trial court errors, including failure to give proper weight to custom.³⁴¹

More involved was the third case, in which Judge Goodwin wrote the court's opinion. It arose from a suit for compensation and damages for property losses and personal injury as a result of actions by U.S. civilians and military in the immediate post-World War II period of 1945–1949. The trial court had dismissed the case on the basis that the statute of limitations barred tort claims, but in doing so it had not addressed the sovereign immunity of the United States government or of the Trust Territory, which was apparently immune from suit for intentional torts.³⁴² Sovereign immunity and its link to the statute of limitations became the basis of dispute within the appellate court, where serious substantive exchanges took place. Justice Wainis Simina, who was to dissent, believed the tort claims should not have been dismissed and asserted that when the plaintiffs were first able to sue determined when their cause of action accrued, a view Justice Goodwin and Justice Martin Yinug did not share although Judge Yinug held somewhat broader views of the reach of the waiver. Judge Goodwin's law clerk, whose view was that the Compact did not waive U.S. sovereign immunity, questioned whether waiver of immunity meant the U.S. then immediately became liable for actions taking place long before; immunity, she said, had not been waived for acts prior to the Compact of Free Association between the FSM and the United States.³⁴³ The court was not able to reach agreement, resulting in a 2-1 decision affirming the dismissal of the claims as "appropriately disposed of by the trial court," although Justice Goodwin wrote that some claims from the Fono Islands might still be viable if brought in the proper forum, and the plaintiffs might still bring claims under equitable tolling of the statute of limitations.³⁴⁴

³⁴¹ Youngstrom v. Youngstrom, Appeal Case P2-1994; Luzama v. Ponape Enter. Co., P11-1993 (both filed Feb. 16, 1995).

³⁴² Takuo Alep v. U.S., FSM Appeal Case No. C5-1993 (filed July 1996).

³⁴³ Memorandum from Sophie Wingerden (law clerk to Judge Goodwin) to Alfred T. Goodwin re: Takuo Alep v. U.S., FSM Appeal Case No. C5-1993 (filed July 1996). As a separate matter, the Federal Tort Claims Act did not allow suits for acts in a "foreign country" like the FSM.

³⁴⁴ Takuo Alep v. U.S., FSM Appeal Case No. C5-1993 (filed July 1996).

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Justice Goodwin's participation as Temporary Associate Justice in 2007 was to hear an election fraud case in which the appeal was from a conviction for deprivation of rights and for threats in an official and political matter; a community's mayor had told voters how to vote and had said that voting for others was illegal, and government assistance had been given only to those who cooperated.³⁴⁵ With the regular justices having disqualified themselves, Judge Goodwin served as presiding judge with Judges Aliksa V. Aliksa (Chief Justice of the Kosrae State Court) and Benjamin Rodriguez (Associate Justice of the Pohnpei Supreme Court). The court was assisted by the FSM Supreme Court's General Counsel, Craig Reffner, who served as Judge Goodwin's de facto law clerk on the case. The case was resolved in a straightforward manner, with an across-the-board affirmance on finding the evidence sufficient to support the conviction and the sentence reasonable.

On the way to the court's result on the merits, however, there was interesting by-play concerning what appeared to be two preliminary matters—the defendant's request for release pending appeal, denied by both the trial court and an appellate judge, and a request for "enlargement of time" to file briefs, which Justice Goodwin could decide as a single judge. Goodwin observed to his colleagues that he took a fairly relaxed view of requests for release pending appeal when sitting in Guam, although he did balance "harm to the public and convenience to the prisoner," and if there was little of the former, "then the prisoner can await the appeal at home if he wishes."

When sitting in the U.S. court in Guam, I usually was fairly permissive about release on bail pending appeal because the reality of release on a small island is different from release in the continental United States where a convicted person can put three or four thousand miles between himself and his keepers, and may have no incentive to stay in contact with his supervised release supervisor.³⁴⁶

While the justices were preparing for the case and before they had decided this matter, they learned that the trial judge had granted parole to defendant (for having served minimum statutory time). That mooted the request, but the order had not reached the appellate court.

The attorney who had requested enlargement of time sought a still longer period plus rescheduling of oral argument because of personal travel to Europe. Judge Goodwin's initial reaction, like his reaction to

³⁴⁵ *Wainit v. Federated States of Micronesia*, Appeal No. C2-2006 (filed Apr. 2006).

³⁴⁶ Memorandum from Alfred T. Goodwin to other judges re: *Wainit v. Federated States of Micronesia*, Appeal No. C2-2006 (Oct. 12, 2006).

similar requests stateside, was not positive. As he wrote to Reffner, “I have caused the court staff to go to a considerable amount of trouble to arrange somewhat complex air travel from California to Chuuk at a busy time for everyone, including myself. I object to letting counsel jerk the court around because of his personal plans, important as they may be.”³⁴⁷ Further inquiry revealed, however, that the oral argument order had not been served on counsel before he made his request. That led to much consideration of shifting oral argument ahead several months to March 2007, when Judge Goodwin could combine his FSM sitting with one he had scheduled in the Marshall Islands, and the three judges did agree to hear the case at the later date.

C. REPUBLIC OF THE MARSHALL ISLANDS

Judge Goodwin was to sit a half-dozen times extending through 2007 on the three-judge Supreme Court of the Republic of the Marshall Islands (RMI). Both in his initial and later sittings, he was an “outside” judge deciding big questions in a far-off republic, perhaps the primary reason for his being asked to sit there, but the judges also heard matters of local import, including family and clan relations.

Initially, with the RMI Cabinet having approved Goodwin’s appointment, Chief Justice Allen Fields requested his presence, along with that of U.S. District Judge Samuel King of Hawai’i, because the two judges were “well known in the Marshall Islands and command great respect.” That was quite important, as “several important cases involving the Constitution of the Marshall Islands and operation of the Government” were to be heard.³⁴⁸ In addition to sitting with Justice Fields in 1999 and 2002, Goodwin sat then and in following years with Magistrate Barry Kurren (D. Hawai’i), who replaced Judge King as the other “outside” judge. In 2004, Chief Justice Cadra wanted to have Judges Goodwin and Kurren appointed permanently, saying it would “give some stability to the Court and would prevent the necessity of multiple JSC [Judicial Service Commission] meetings and Cabinet appointments.”³⁴⁹ Goodwin responded, “I am willing to be appointed” again, although he was “not sure how much longer or how often I can commit to travel.”³⁵⁰ In 2004, 2006, and 2007, Goodwin sat with Chief Justice Daniel Cadra for most cases but also for some with Judges Hickson and Ingram (2006) and Plasman (2007).

³⁴⁷ ATG, memorandum to Craig Reffner, judges, Oct. 28, 2006.

³⁴⁸ Letter from Allen P. Fields to Procter Hug, Jr. (Apr. 28, 1999).

³⁴⁹ Memorandum from Daniel Cadra to Alfred T. Goodwin & Barry Kurren (June 16, 2004).

³⁵⁰ Memorandum from Alfred T. Goodwin to Judges Daniel Cadra & Barry Kurren (June 16, 2004).

Justice Fields had sought Judges Goodwin and King for three particular cases in 1999. One, which involved the court in familial relations, involved a claim for some of the proceeds of land use payments for a portion of the U.S. lease of Kwajalein atoll and a question of whether a person was the plaintiff's father. The Traditional Rights Court, on which Marshallese chiefs sat, had ruled that plaintiff was not the son of the named individual and that an Iroij (chief) could not bind any successor to provide any share of possible amounts received. The case then proceeded to the RMI High Court, which had issued the judgment necessary for appeal to the RMI Supreme Court, and that court found no clear error.³⁵¹

The other two major cases to which Fields had referred in contacting the judges concerned procedures in the RMI legislature, the Nitijela. One, in which Judge Goodwin wrote the opinion, produced attacks on the court and the judges and thus provides a view of judicial independence in developing nations.³⁵² Senators who, because of a pecuniary conflict of interest were not allowed by the Speaker of the Nitijela to vote on a bill removing a ban on gambling, brought a case in which they claimed that the bill would not have passed had the votes of two been counted and another had they been allowed to vote. After that bill passed, a bill banning gambling did pass and was properly recorded (enrolled). The High Court, looking to the final enrollment of the bill as "conclusive evidence that the statute was regularly and Constitutionally enacted,"³⁵³ had dismissed for lack of subject-matter jurisdiction and failure to state a claim. With Judge King writing, the Supreme Court affirmed.³⁵⁴

The other Nitijela case, which immersed the judges in legislative procedure, turned on the type of ballot to be used—open (wanted by the President³⁵⁵) or secret (agreed and used)—in a vote of no confidence in the President; there had been a majority but not the two-thirds vote necessary for removal. When proceedings resumed after a recess, the President and some Senators stayed away, creating the absence of a quorum; once ten days had elapsed from the introduction of the no-confidence

³⁵¹ *Elmo v. Kabua*, Civ. 97-05 (filed Oct. 1999), noted as *Elmo v. Makamura*, High Court No. 1996-175 by Allen P. Fields. Memorandum from Samuel King to Alfred T. Goodwin (July 14, 1990) from which this description is taken.

³⁵² *Kabua v. Note*, Civ. 98-03 (filed Sept. 1999).

³⁵³ Memorandum from Allen P. Fields to Alfred T. Goodwin & Samuel King re: *Kabua v. Note*, Civ. 98-03 (July 14, 1999).

³⁵⁴ *Kabua v. Note*, Civ. 98-03 (filed Sept. 1999).

³⁵⁵ "[T]he President wanted an open ballot because as the Iroij (a Marshallese Chief) he does have control over some of the Senators. They would not want to vote contrary to his wishes." Memorandum from Allen P. Fields to Alfred T. Goodwin & Samuel King (July 14, 1999).

motion, the Speaker and his allies claimed the motion was nullified. Ruling on claims by both sides, the High Court had decided in the Speaker's, not the President's favor, but did not—based on what we would call the “political question” doctrine—make a decision on the Nitijela's rules. The trial judge who made that ruling, Daniel Cadra, had been attacked (anonymously) by an adviser to the President, an American attorney who was later to attack the Supreme Court's decision. That led to Cadra's departure “before the end of his term, at the request of the President and his Cabinet,”³⁵⁶ although he was later to return as Chief Justice. Goodwin wrote for the three temporary Supreme Court Justices to affirm the High Court.³⁵⁷

That, however, was not to be the end of the matter. The President's adviser, one Lowe, almost immediately wrote to say the Cabinet wanted the judges “to know that they were embarrassed and dismayed by the glaring errors” allegedly in the opinion, including a number relating to Nitijela procedure.³⁵⁸ Judges Goodwin and King did not respond, but the departed Judge Cadra took issue with Lowe's letter,³⁵⁹ and, more importantly, Chief Justice Fields could not abide criticism of the “excellent” visiting judges who were not compensated for sitting. Fields said that the lawyer, Lowe, did not “understand the ethical duties imposed upon an attorney” nor either the Marshallese or English languages as seen in his interpretation of the rules. Nor, said Fields, did Lowe understand an independent judiciary. He emphasized this matter in noting “Lowe's desire to control the judiciary” as new chair of the Judicial Service Commission, which evaluated those seeking judicial positions. Nor had Lowe helped by calling attention to the Marshall Islands' “reputation within the United States Federal Courts, for interfering with the independence of their Judiciary.”³⁶⁰

Judge Goodwin's next sitting in the Marshall Islands again very much involved him in a case where one of the judges spoke again to the matter of judicial independence. He also sat in a land rights case and another civil suit with a default judgment for \$4.2 million and a cross-appeal for punitive damages, in which he wrote to affirm the High

³⁵⁶ Memorandum from Allen P. Fields to Alfred T. Goodwin & Samuel King (July 14, 1999).

³⁵⁷ *In re* the 19th Nitijela Constitutional Regular Session, 2 MILR 134 (1999) (Marsh. Is).

³⁵⁸ Letter from David Lowe (Special Counsel to the President) to the judges (Sept. 16, 1999), later published as *Supreme Court Ignorant?*, MARSHALL ISLANDS J. (Oct. 1, 1999).

³⁵⁹ Daniel Cadra, letter to High Court (Oct. 8, 1999), calling Lowe “a word weasel . . . trying to make an issue where none exists” and saying he “demonstrates his inability to properly read a legal opinion.”

³⁶⁰ Letter from Allen P. Fields to President, Ministers and Cabinet Members, Members of the Nitijela (Oct. 10, 1999).

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Court.³⁶¹ The most controversial case put him in the midst of a suit—in this instance by the RMI government—against the major tobacco companies. The government sought to recover its costs for RMI residents’ medical expenses incurred as a result of their smoking. When the plaintiffs’ expert’s model was defective and was re-run, it showed no damages, and the expert’s testimony was excluded as unreliable. Judge H. Dee Johnson, Jr., in the High Court, gave defendants summary judgment on all but a Consumer Protection Act claim and then found no evidence of damages; he was also caustic about lawyers who had sold the government a bill of goods about the possibility of success of this sort of litigation.

The defendants then sought a writ of prohibition or mandamus from the Supreme Court challenging the High Court’s jurisdiction. This was denied in a ruling by Justice Fields, who both took a slap at the lawyers³⁶² and discussed the RMI judiciary, attacks on it, and alleged interference by the government—the theme of his response to the criticism leveled at the court in the 1999 Nitijela case. Showing that they did not join in this excursus, Judges Goodwin and Kurren concurred specially to indicate, “We do not join in the historical material contained in the Order for the reason that we do not believe that material to be necessary to our decision on the removed question before us.”³⁶³

The appeal then proceeded to an affirmance in an opinion by Judge Goodwin. The first issue was the parties’ agreement to dismissal of the Consumer Protection Act claim with prejudice, done to have a final order for an appeal. Here, speaking of the need to avoid piecemeal litigation, Goodwin rejected the government’s request to review without requiring that the dismissal be with prejudice. On the reliability of evidence, he found that “[t]he trustworthiness concern expressed in *Daubert*³⁶⁴ and its progeny are applicable here” and that the High Court “aptly considered those factors.” He went on to remark that “[t]he courtroom is not the appropriate venue for casual musings of scientists, and the High Court

³⁶¹ *Jack v. Hisiah*, 2 MILR 206 (2002) (Marsh. Is) (filed Dec. 2002, opinion by Fields, J.), and *Air Marshall Islands v. Dornier Luftfahrt*, 2 MILR 211 (2002) (Marsh. Is) (filed late Dec. 2002).

³⁶² “While the attorneys appearing in this case are trained in the law in the United States and some are licensed and continue to practice there, they have failed to cite any case from the United States that prevents judges or jurors in those jurisdictions from hearing these same claims brought before them.” *Republic of Marshall Islands v. American Tobacco Co.*, 2 MILR 170, 171 (2001) (Marsh. Is) (Order, by Fields, J., Mar. 14, 2001).

³⁶³ *Id.* at 178.

³⁶⁴ *Republic of the Marshall Islands v. Am. Tobacco Co.*, 2 MILR 181, 188 (2002) (Marsh. Is.); see *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

properly discredited Dr. Miller's testimony on the basis of his contradictory opinions."³⁶⁵

Moreover, the RMI government had "offer[ed] no evidence to quantify" its claim that the tobacco companies' marketing caused illness and health care costs and no evidence had been provided on the proportion of health care costs attributable to the companies' misconduct, which was not responsible for all smoking and all medical treatment of tobacco-related illness: "Such a broad assertion cannot survive summary judgment without evidentiary support."³⁶⁶ Observing that "no one disputes that smoking can have negative health effects, by itself," he asserted that "that truism does not translate into an actionable claim against Tobacco," and he concluded, "Without evidence linking Tobacco's allegedly illegal activities to claims of damages, we decline to consider the Government's claims beyond summary judgment."³⁶⁷

In his later sittings in the Marshall Islands, Judge Goodwin was not to encounter cases with such a level of controversy, but he did face cases on a wide range of subjects, some with "local flavor" but many which were routine litigation. In 2004, in addition to an appeal from a tax conviction (affirmed),³⁶⁸ there was a suit over a contract for work on the Kwajalein Atoll base. There, when the contractor subcontracted some work but denied a request for some employees to reside on the base, the High Court found the United States not immune from suit, but the Supreme Court reversed on sovereign immunity.³⁶⁹ The one case with political flavor stemmed from a complaint by twenty individuals against an election officer that postal ballots had not been counted. Per Judge Goodwin, the Supreme Court affirmed the trial court's dismissal³⁷⁰ but reversed the denial of a motion to amend the complaint and vacated as moot the trial court's alternative holding.

Judge Goodwin's 2005 sitting saw two cases on rights and titles and one in which he wrote the opinion affirming the High Court in a suit against the government for the allegedly wrongful discharge of a police officers, which had been dismissed as untimely for noncompliance with

³⁶⁵ Republic of the Marshall Islands v. Am. Tobacco Co., 2 MILR 181, 189 (2002) (Marsh. Is.).

³⁶⁶ *Id.* at 191.

³⁶⁷ *Id.*

³⁶⁸ Republic of the Marshall Islands v. de Brum, 2 MILR 223 (2002) (Marsh. Is.) (filed c. June, 2004).

³⁶⁹ Pac. Int'l, Inc. v. United States and United States Dep't. of the Army, 2 MILR 244 (2004) (Marsh. Is.) (filed c. June 2004).

³⁷⁰ Judge Goodwin wrote to his colleagues, "Judge Hickson was right about his lack of jurisdiction. It would be necessary to file a new case with a live plaintiff." Memorandum from Alfred T. Goodwin to judges re: Momotaro v. Benjamin, 2 MILR 237 (2004) (Marsh. Is.) (filed June 16, 2004) (May 27, 2004).

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the Government Liability Act.³⁷¹ In 2006, he appears not to have written any opinions in the several cases in which he participated: an affirmance of a High Court dismissal of a criminal prosecution for want of prosecution, a land claims case, likewise dismissed for lack of prosecution, and an employment discrimination case for back pay when the plaintiff with stated qualifications was not hired and the person hired was without qualifications.³⁷² In the last case, in which there were problems with the untimely filing of a brief and the need for an attorney, the High Court had ruled that a job announcement was not an offer. And in 2007, again with no Goodwin opinions for the court, the justices held a status conference with parties and remanded to the High Court to hold proper proceedings under the Rules of the Traditional Rights Court. They also affirmed and dismissed appeals in two other cases—one as to land ownership, where a motion to intervene had been denied and this successor action was dismissed for *res judicata* and laches, the other an attempt to obtain relief from a \$12,000 default judgment in a suit by an unpaid seller of goods.³⁷³

VII. CONCLUDING COMMENTS

Relatively few people in the mainland United States know of federal judges' involvement in judicial systems far beyond our shores. This Article, by looking at Judge Alfred T. Goodwin as he sat not only in the federal judicial districts of Guam and the Northern Mariana Islands, but also in other south Pacific venues, has presented a picture of the types of cases heard by U.S. judges in such places. These include the standard criminal and civil cases not unlike those one would find in most federal and state courts as well as those deriving from the local culture, such as those on the powers of titled chiefs, and more politically sensitive cases. The latter encompass those relating to judicial relations between the island judiciary and the federal court system or between the island government and the United States government, with the latter of those providing a good window through which to get a sense of the United States' relations with its territories. The cases that Judge Goodwin decided as a trial

³⁷¹ *Tibon v. Jihu*, 2003-001 3 MILR 1 (2005), and *Jihu v. Alik*, 3 MILR 1 (2005) (Marsh. Is.) (filed Mar. 2005) (per Cadra, J.); *Bejen v. Republic of Marshall Islands*, 3 MILR 8 (2005) (Marsh. Is.) (filed Mar. 2005).

³⁷² *Republic of Marshall Islands v. Lemark*, 3 MILR 19 (2006) (Marsh. Is.) (filed June 2006); *Peter v. Katjang*, 1999-003 (filed June 2006); *Alik v. Public Service Commission*, 3 MILR 13, (2006) (Marsh. Is.) (filed Mar. 24, 2006).

³⁷³ *Hito v. Abner*, 2002-03 (filed Mar. 14, 2007); *Ueno v. Hosja*, 3 MILR 29 (2007) (Marsh. Is.) (filed May 17, 2007); *Pacific Basin v. Mama Store*, 3 MILR 34 (2007) (Marsh. Is.) (filed May 17, 2007).

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judge, as a member of the local appellate courts, and on the Ninth Circuit Court of Appeals are central to this Article. However, also very important are the mixed roles played by U.S. judges sitting in the south Pacific—of being not only judges hearing cases but also makers of policy concerning the court system, which entails consideration of legislative proposals. Seeing these dual roles should add to our limited knowledge of the extra-judicial roles our federal judges perform.