

Goodwin on Judging

Introduction	2
I. Judging Style and Jurisprudence	4
A. Committed to a Position?	4
B. Law, Justice, and Compassion	8
C. Activism and Due Process.....	12
D. On Government.....	14
1. For Courts or Legislatures.....	14
2. Federal or State Courts	17
3. Administration and Bureaucracy	20
a. Bureaucracy Disliked.....	20
b. Deference to Agency Action.....	21
II. Appellate Judging.....	25
A. Oral Argument	25
B. On Opinions	28
1. Length.....	28
2. Breadth	31
3. Published or Not?	35

* BA, Antioch College; MA, PhD (political science), University of Oregon. Professor of Political Science Emeritus, University at Albany-SUNY. Residing at Eastham, Mass. Contact: wasb@albany.edu.

A version of this paper was presented at the meetings of the Pacific Northwest Political Science Association, Bend, Or., October 10, 2014.

The author wishes to thank Judge Alfred T. Goodwin, for allowing access to his case files, and Carolyn Long, for her careful reading of an earlier version, which led to a number of changes.

In conducting research for this Article, the author has, with the permission of Judge Alfred T. Goodwin, made use of his papers, which are held in the Alfred T. Goodwin Papers at the Oregon Historical Society, Portland, Oregon. The Ninth Circuit's unpublished memorandum dispositions from 1971 through 1977 were examined in the San Francisco library of the U.S. Court of Appeals for the Ninth Circuit; those from 1977 until they were reported in the *Federal Appendix* and for which the text is unavailable on Westlaw were made available in the judge's chambers. Transcripts of interviews and conversations, and copies of letters and e-mails, are on file with the author.

C. Comeback Cases	38
D. Court Administration	41
III. Trial Judging.....	43
A. Judge and Jury.....	44
B. Assisting Pro Se Litigants?	54
A Concluding Comment.....	57

INTRODUCTION

More needs to be known about judges' thinking about judging, particularly from comments the judges do not make for publication, as in remarks to friends or in within-court comments to colleagues situations in which they are less likely to be guarded and their language may be more direct.¹ We should therefore be able to learn from someone who has been a judge, state and federal, trial and appellate, for over 55 years—a judge who did not hesitate to express his views; who wrote in a fluent, highly-readable style that is a pleasure to read; and who also made colorful remarks to friends.² Judge Alfred T. Goodwin did not write systematically about judging, as, for example, did the late Judge Frank Coffin of the First Circuit³ or has the prolific Judge Posner,⁴ nor has he provided a concise statement of his jurisprudential views. Not only that, but it might be that he does not *have* a systematic jurisprudence.

¹ Judge Posner refers to the “neglected literature” of judges’ writing about judging. RICHARD A. POSNER, *HOW JUDGES THINK* 256 (2008).

² He has been heard to say, “Don’t ever cash a check from a person who wears yellow boots.” (Alternatively, “Don’t ever buy yellow boots. No one will cash your checks.”) Another reference to boots, which stems from his wearing them, was that a particularly inept public figure “doesn’t know enough to pour piss out of a boot.” These comments were made in the author’s presence. But it wasn’t only comments made face-to-face that had a light touch. For example, in a case in which “Freddie Mac” would not deal with a broker who encouraged rapid prepayment of loans, Judge Goodwin wrote, “In the debt market, packaged loans are a product offered for sale. If potential buyers do not want to buy the product, Freddie Mac is under no obligation to order more of it. Like dog food, if dogs won’t eat it, the store won’t buy it.” *Family Home & Fin. Ctr. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 836 (9th Cir. 2008). When he had made the dog food comment during post-argument conference, another member of the panel encouraged him to include it in the opinion. Conference memorandum from Judge Andrew Kleinfeld to panel (Apr. 28, 2008), re: *Family Home & Fin.*, 525 F.3d 822 (on file at Oregon Historical Society) [hereinafter OHS]. And *see* the judge’s caustic comment, in his conference notes in a challenge to gun convictions on the ground the gun did not cross state lines, “This is nonsense on stilts.” Alfred T. Goodwin (hereinafter: ATG), notes re: *United States v. Gomez*, 302 Fed. App’x. 596 (9th Cir. 2008).

³ FRANK M. COFFIN, *ON APPEAL: COURTS, LAWYERING AND JUDGING* (1996).

⁴ POSNER, *supra* note 1; RICHARD A. POSNER, *REFLECTIONS ON JUDGING* (2013).

One can, nonetheless, identify jurisprudential views from his comments to colleagues, the great number of which come from his many years on the U.S. Court of Appeals for the Ninth Circuit, beginning in 1971 and extending well beyond his becoming a senior judge.⁵ For his nearly ten years on the Oregon Supreme Court, there is little “paper” that records exchanges between the justices because they worked in close proximity to each other in the same building and talked often to each other in chambers or in conference. Nor is there much on paper from Judge Goodwin’s times as a trial judge, as trial judges, sitting alone, are not working on cases with colleagues to whom memos must be sent, and Judge Goodwin did not write memos to the file about his reactions to cases, although one can extract his views from transcripts from the U.S. District Court. The judge’s views of trial judging presented in this Article come to us from observations he made while a federal appellate judge, primarily about the actions of the U.S. district judges whose rulings he was reviewing, and it is for that reason that his views on trial judging are placed after material on appellate judging.

Because Judge Goodwin did not try to set out a theory of judging, some order must be brought to his various comments, primarily those extracted from intra-court communication, opinions, and other documents, but themes in his thinking can be readily identified. They are presented largely in quotations from the judge because his views on judging should be presented in his “voice.” The Article starts with what might be called judging style or mode of judging, beginning with the judge’s shift of positions during cases and continuing with aspects of what might be called his jurisprudence. That treatment begins with his emphasis on “law not justice,” his position on the place of compassion within a case, and his views on other judges’ activism through due process. This is followed by the aspects of ideology, a set of views of how the polity should be governed. There particular attention is given to the judge’s views on separation of powers and federalism as basic elements of government, particularly the extent of deference to be extended to other government branches and entities. That includes whether matters are for the court or the legislature, whether certain issues are for federal or state courts, and how much deference should be given to administrative officials’

⁵ These were obtained from the judge’s case files from his service on the U.S. Court of Appeals for the Ninth Circuit, to which the author was granted access. Those files contain memoranda he wrote to members of the three-judge panels on which he sat.

decisions, where one can also see the judge's general dislike of bureaucracy.

Next examined are aspects of appellate judging, in which Judge Goodwin spent most of his career, including the usefulness of oral argument and elements of opinions, including their length or brevity; their relative breadth; and whether dispositions should be published opinions or unpublished, non-precedential memoranda. The judge's concerns about institutional process is seen in one of his bugbears—the handling of cases that return to the appellate court after remand—and in his views on court administration, which were formed in part during his service as the Ninth Circuit's Chief Judge. The Article concludes with Judge Goodwin's views of trial judging, especially deference to trial judges and how appellate judges should handle trial judges who have erred, and his approach to *pro se* litigants, especially whether and how courts should assist them. The judge's views on lawyers in court are not explored in this Article.⁶

I

JUDGING STYLE AND JURISPRUDENCE

Judge Goodwin can be said to have a middle-of-the-road posture. Because he is not a forthright “middle-of-the-roader,” it is difficult to call his stance an ideology but he can be contrasted with judges, at either end of the political spectrum, whose ideology can be quite clearly identified and who act on it self-consciously. Judge Goodwin can legitimately be called a “moderate,” self-restrained in his approach to legislation and administrative action, a stance inferred from his comments on other judges' activism and his dislike for substantive due process. Also worthy of attention is his vacillation during consideration of cases, part of his personal style, with which this part begins.

A. Committed to a Position?

When Judge Goodwin held a position, seldom did he press it upon his colleagues, but on many matters he seemed not strongly committed, often saying “I have no passion in this matter.” He also frequently shifted positions during the consideration of a case, for

⁶ Judge Goodwin's views of those who practice in court—a judge's views on lawyering, particularly less-than-competent lawyering, can be found in Stephen L. Wasby, *As Seen From Behind the Bench: Judges' Comments on Lawyer Competence*, 38 J. LEGAL PROF. 47 (2014).

example, changing sides by first joining one opinion and then joining the dissent. While this willingness to shift could be seen as a virtue in that it showed he was open to persuasion and willing to accept correction, other judges, particularly those quite sure of their positions and who adhere to them “no matter what” might well be annoyed by a colleague if once agreeing with one position, then, on reading another judge’s views, shifted in the latter’s direction. After one such instance, he commented, “Having now put Judge Reinhardt, his law clerks and his secretaries to a lot of extra work . . . I appreciate the educational benefits that I have derived from the exercise.”⁷

In any event, one seldom found Judge Goodwin so committed that he would not reconsider the position he had initially adopted or to which he had agreed. When in the minority, he was not often so committed to that position that he would dissent, although that is in keeping with an appellate court’s norm of a low rate of dissent. A colleague has noted Goodwin’s view that withholding dissents in certain types of cases was worthwhile: “I agree with Judge Goodwin’s comments in another setting that there is little reason to write a dissent in cases like this, even if I feel strongly about it.”⁸

In one instance of Judge Goodwin’s shifts, initially he had indicated agreement with Judge Alarcon’s opinion, with Judge Pregerson dissenting; then he joined the Pregerson dissent. With the opinion-writing reassigned, Judge Pregerson circulated a proposed opinion, Judge Goodwin withdrew his concurrence from it and returned to Judge Alarcon’s disposition.⁹ A somewhat similar shift can be seen in a case involving whether juries viewing a shackled prisoner was a *per se* violation of defendant’s due process rights requiring reversal or was subject to harmless error analysis. Judge Goodwin was first reported to be “more reluctant” to adopt the former position,¹⁰ but communications made clear that he preferred harmless

⁷ Memorandum from ATG to panel (Mar. 1, 1982) re: *Dixon v. Dupnik*, 688 F.2d 682 (9th Cir. 1982) (on file with OHS).

⁸ Memorandum from Dorothy Nelson, Judge, to panel (Sept. 3, 1992) re: *Fogel v. United States*, 985 F.2d 572 (9th Cir. 1993) (unpublished table decision) (on file with OHS). Under the court’s rules, if a dissenter to an unpublished disposition asked for publication, the disposition would be published.

⁹ This activity was reported by Judge Alarcon. Memorandum from Arthur L. Alarcon, Judge, to panel (Feb. 19, 1992) re: *United States v. Carbajal*, 993 F.2d 885 (9th Cir. 1993) (unpublished table decision), *appeal on remand from* 956 F.2d 885 (9th Cir. 1995) (on file with OHS).

¹⁰ Conference memorandum from Mary Schroeder, Judge, to panel (Jan. 7, 1998) re: *Rhoden v. Rowland*, 172 F.3d 633 (9th Cir. 1999) (on file with OHS).

error analysis. Later he wrote to his colleagues to indicate his shift toward harmless error: “After the argument I was persuaded that California criminal courts will not stop shackling prisoners unless we force them to do so by turning a bunch of hard core felons loose. I now think that we should try to live with the harmless error crowd.”¹¹

Judge Goodwin certainly was not hesitant to admit his indecision. In an en banc case, he spoke of “wobbling around like a bear on a bicycle” but reported that he was “falling off on [one] side.”¹² The conference memo in another case reported “Judge Goodwin is ‘wobbly’ but might go along with reversing,” which reflected his own notes of “G is wobbling slippery slope.”¹³ And his colleagues knew of his willingness to shift positions. As having been persuaded by a proposed dissent, he wrote, “Judge Sneed has known me long enough to not be surprised when I change my mind.”¹⁴ At times, although it might not be surprising for a moderate judge to have difficulty coming down on one side of a close issue, he was apologetic: “I apologize for my vacillation, but it is hard to be resolute on a point as close as this one seems to me to be.”¹⁵

While he also didn’t try to sound assured or attempt to make a virtue of his vacillation, he could tout the virtues of indecision, as when he said while sitting with the Tenth Circuit: “To waffle, among judges, is a sign of educability, intellectual curiosity, and a reasonable control over one’s normal inclination to be dogmatic.” He added, “At some point, we all have to fall off of the wire on one side or the other, but it is okay to change feet a few times before we let go.”¹⁶ Some of his uncertainty was, to be sure, about particular areas of law, a hesitancy not to go beyond one’s limits. He said, for example, “As an Oregon lawyer, I am a little diffident about dealing extensively with California community property,” and thus asked the other two panel

¹¹ Memorandum from ATG to panel (July 14, 1998) re: *Rhoden*, 172 F.3d 633 (on file with OHS).

¹² Memorandum from ATG to Associates (Apr. 1, 1980) re: *California Med. Ass’n v. Fed. Election Comm’n*, 641 F.2d 619 (9th Cir. 1980) (en banc) (on file with OHS).

¹³ Conference memorandum from Dorothy Nelson, Judge, to panel (July 11, 1994) re: *Flaten v. Sec’y Health & Human Serv.*, 44 F.3d 1453 (9th Cir. 1995) (on file with OHS); ATG, note on argument calendar sheet, July 11, 1994. A conference memo is written by the presiding judge after argument.

¹⁴ Memorandum from ATG to panel (Mar. 19, 1990) re: *Rivera-Rosa v. INS*, 899 F.2d 19 (9th Cir. 1990) (unpublished table decision) (on file with OHS).

¹⁵ Memorandum from ATG to panel (Jan. 18, 1974) *United States v. Phillips*, 497 F.2d 1131 (9th Cir. 1974) (on file with OHS).

¹⁶ Memorandum from ATG to panel (Jan. 19, 1994) *Homeland Stores v. Resolution Trust Corp.*, 17 F.3d 1269 (10th Cir. 1994) (on file with OHS).

judges, one of whom was a district judge from California, to read carefully.¹⁷ But it was not simply uncertainty about what the law was (or should be): he was willing to reveal that his commitment to a position was not whole-hearted. Thus he wrote, “I have no strong leanings one way or the other,”¹⁸ or, while saying “I will stand my ground on affirming,” added “although I must say I do [so] with the minimum of enthusiasm.”¹⁹ Or, as he put it in another case, “I am not enthusiastic enough about my view of this case to take on the burden of creating a circuit split at this time,” particularly as a more appropriate opportunity would come.²⁰

Judge Goodwin’s malleability in composing opinions was also clear. When another panel member had questioned one part of his large proposed Goodwin opinion, he wrote, “I have no ego involvement in this mess and am willing to write for a committee.”²¹ In still another case, in an unsent memo he indicated he was acting as the panel’s “scrivener,” “having no abiding convictions of my own on this melancholy subject” (of an Iranian student of Jewish faith, claiming persecution), and he redrafted his opinion to embody the views of another member of the panel.²² He was also clear about accepting correction and in lacking ego in his work: “I am totally without shame and perfectly agreeable to changing my written work to accommodate suggestions. I would rather than an opinion written properly and clearly than to have it stand as a monument to my own obstinacy.”²³ Indeed, Judge Goodwin seriously valued an appellate court’s collegiality that included judges’ correcting each other. Shortly after he joined the Ninth Circuit, in tentatively suggesting some editorial suggestions about an opinion, he expatiated in an

¹⁷ Memorandum from ATG to panel (Oct. 7, 1977) re: *In re Paderewski*, 564 F.2d 1353 (9th Cir. 1977) (on file with OHS).

¹⁸ Memorandum from ATG to panel (May 23, 1974) re: *United States v. Davis*, No. 73-2761 (9th Cir. June 24, 1974), no citation (on file with OHS).

¹⁹ Memorandum from ATG to panel (Oct. 25, 1973) re: *Sparkman v. United States*, No. 72-2684 (9th Cir. Nov. 9 1973), no citation (on file with OHS).

²⁰ Memorandum from ATG to panel (Aug. 14, 1997) re: *United States v. Doe*, 122 F.3d 1074 (9th Cir. 1997) (unpublished table decision) (on file with OHS).

²¹ Memorandum from ATG to panel (Nov. 4, 1994) re: *Zodiac Inv. v. Cal. Pozzolan (In re Zodiac Investment)*, 45 F.3d 438 (9th Cir. 1994) (unpublished table decision) (on file with OHS).

²² Memorandum from ATG to panel (not sent), re: *Moghianian v. U.S. Dept. of Justice, Bd of Immigration Appeals*, 577 F.2d 141 (9th Cir. 1978) (superseded by statute) (on file with OHS).

²³ Memorandum from ATG to Fred Hamley, Judge, (Apr. 7, 1970) re: *Carnation Co. v. NLRB*, 429 F.2d 1130 (9th Cir. 1970) (on file with OHS).

extended note on the collegiality he had experienced on the Oregon Supreme Court and what would be the case were all Ninth Circuit judges in one building rather than scattered over the western landscape:

If we were all officing in one building, I would just run down the hall and talk to you about it. Writing memos seems so formal.

.....

I have always felt that one of the advantages of the collegial court is the informal editorial help that the judges can give each other. . . . it was very natural and convenient for us to discuss each other's split infinitives, dangling modifiers, and turgid prose with a minimum risk of wounding any feelings. As a result, I developed a fairly tough skin, and no longer have any pride of authorship or attendant infatuation with the sound of my own words.

I am looking forward to getting some good help from my fellow judges now that I am once again toiling as a soldier on the appellate anthills.²⁴

Because of the value Judge Goodwin placed on collegiality, he would work toward achieving a compromise, as when he said in one case, "I certainly do not want to waste judicial resources to force a dissent when we might iron out our differences."²⁵ This was especially so when he was dealing with a resistant judge who persistently pressed his position. Yet there were some limits to how far he would go in the search of consensus, particularly when dealing with a resistant judge who persistently pressed his position. In the same case, only a week earlier he had written, "After expending all the time I can allocate to this case without convincing Judge Kozinski, I admit defeat and suggest that he proceed with his dissent."²⁶

B. Law, Justice, and Compassion

Judge Goodwin was one of those judges well aware that the law, at least as a judge understood it, and justice might pull in different directions, thus posing the question of "[t]o which should a judge adhere?" There was also the related matter of the extent to which a judge should exercise compassion. (One is reminded of the cartoon in

²⁴ Memorandum from ATG to panel (Jan. 4, 1972) re: Woodhall v. Comm'r, 454 F.2d 226 (9th Cir. 1972) (on file with OHS).

²⁵ Memorandum from ATG to panel (Feb. 18, 1994) re: Van Ausdle v. Shalala, 19 F.3d 32 (9th Cir. 1994) (unpublished table decision) (on file with OHS).

²⁶ Memorandum from ATG to panel (Feb. 11, 1994), re: Van Ausdle v. Shalala, 19 F.3d 32 (9th Cir. 1994) (on file with OHS).

which a lawyer is urging the judge to show compassion on the lawyer's client, but the judge says, "I used up all my compassion on the morning calendar.") On this matter, "The whole question of how much a judge should permit her heart to rule her head is a tough one." And Goodwin added, "After 40 years . . . I'm still looking for the answer."²⁷

While recognizing the difficult situations in which litigants found themselves, Judge Goodwin adopted the basic position that "we do law, not justice."²⁸ What equity might allow was not necessarily what the law required, as when he said that "the equities may be [another judge's] view, but the law is the other way."²⁹ And in an immigration case, he wrote, "We are not sitting on the Woolsack. The law is on the side of the Immigration Service, whatever the abstract equities may be."³⁰ In acknowledging that his personal preferences—what he thought was the just result—conflicted with the result propounded in his opinions, he would go with what he thought the law required. While telling his colleagues "I don't much enjoy obeying the law when justice would be better done by not following it," he talked about "the difference between *lex* and *ius*, two good words that we sometimes tend to confuse," which he thought the case "exquisitely illustrates." As he spelled out the options,

We can avert our eyes, dismiss as moot, and sleep well, having seen "justice flow down like a river." Or, like Lemuel Shaw and Captain Vere, we can follow the law. Take your pick. My preference, and a just result on the facts, would be to dismiss the appeal because the sentence has been served and Garcia's debt paid.³¹

In the particular case, he held that the case was not moot because, if the district court's sentence were vacated, on resentencing the defendant could be sent back to prison, and he then affirmed the downward departure from the Sentencing Guidelines because district judge had not erred in taking into account the defendant's youth, naivete, and supportive family.

²⁷ Letter from ATG to Stephen L. Wasby (hereinafter SLW) (Aug. 10, 1994) (on file with author).

²⁸ Memorandum from ATG to panel (Jan. 19, 2001) re: Makofsky v. Apfel, 248 F.3d 1139 (5th Cir. 2001) (unpublished table decision) (on file with OHS).

²⁹ Memorandum from ATG to panel (May 25, 1979) re: Phatanakitjumroon v. INS, 577 F.2d 84 (9th Cir. 1978) (on file with OHS).

³⁰ ATG, writing on face of memorandum from Judge Betty Fletcher (Sept. 27, 1994) re: Watkins v. INS, 63 F.3d 844 (9th Cir. 1995) (on file with OHS).

³¹ Memorandum from ATG to panel (June 25, 1991) re: United States v. Garcia, 952 F.2d 408 (9th Cir. 1992) (unpublished table decision) (on file with OHS).

There were some criminal appeals in which Judge Goodwin would have preferred to affirm convictions but found that previously enunciated law would not permit the affirmance. Thus he observed, “Now and then an appellate court has to let a guilty person walk because the prosecutor goofed [by improperly impeaching a witness]. In this case, I’m afraid the law must prevail over justice.”³² However, in another criminal appeal when tension between precedent and preference was evident, he would have justice—for him, affirmance of a conviction. At conference, he said he “would like to affirm” a conviction for assaulting a federal officer, but he realized a case about a question to be asked of jurors might compel reversal.³³ On receiving a proposed disposition affirming, Goodwin wrote to himself “we may not get away with it, but it is a just result.” However, he also remained wary of the practical effect on the court of its exercise of compassion, as when he said that sending a case back to a different judge might produce an acquittal, “sympathy just breeds strident petitions for rehearing.”³⁴

There were also some times when the law’s lack of clarity, or the absence of solid authority on either side of case, provided an opening for beliefs in justice or its equivalent to hold sway. Faced with such a situation early in his time on the Ninth Circuit, he wrote to his panel colleagues that “I don’t claim any great line of authority in support of my result. On the other hand, no one has come up with any cogent cases dictating the opposite result.” That led him to say, “In such cases, my pappy always told me, ‘when in doubt, do the right thing.’”³⁵ And there certainly were times when the judge had alternatives and could either proceed in a formalistic or “law-like” way or, by acting more flexibly, could alleviate suffering at least somewhat. Thus when stockbrokers had taken advantage of an incompetent individual and the district judge had allowed jury forms which led to confusion and kept the victim’s family from being made whole, Judge Goodwin proposed a result that “will put the Ryans back in approximately the shape they were in before the salesman

³² Memorandum from ATG to panel (Feb. 24, 1995) re: *United States v. Dickerson*, 51 F.3d 282 (9th Cir. 1995) (unpublished table decision) (on file with OHS).

³³ Conference memorandum from Procter Hug, Jr., Judge, to panel (Feb. 7, 1991) re: *United States v. Barbosa*, 927 F.2d 611 (9th Cir. 1991) (unpublished table decision) (on file with OHS).

³⁴ Memorandum from ATG to panel, re: *United States v. Krikorian*, 956 F.2d 1168 (9th Cir. 1992) (unpublished table decision) (on file with OHS).

³⁵ Memorandum from ATG to panel, re: *Fiberchem v. General Plastics*, 495 F.2d 737 (9th Cir. 1972) (on file with OHS).

took advantage of the drunk and the punitive damages and mental-suffering damages add up to a bit more than enough to pay the attorneys without dipping into the principal.” He chose that over “[a] more fastidious approach” of remanding the case “for an accounting and recalculation of damages,” which would “require more lawyers’ fees with little benefit to the corpus of the estate or to the defendants.”³⁶ (Ultimately, the panel did remand on damages.) There were other instances in which he looked for ways to provide relief, as when the Board of Immigration Appeals had refused to reopen the case for consideration of the birth of a child, where at conference Goodwin “indicated that if there were any way to grant relief, it would be okay with him. He would like to find a way to grant voluntary departure.”³⁷

Immigration cases were the ones most likely to prompt the recognition that following the law meant people toward whom compassion ought be shown would not be served. In one asylum case of a Salvadoran whose father was singled out by the regime but where persecution was not necessarily “on account of” political motivation, Judge Goodwin “felt it was a very close case, but that we are stuck with an affirmance because of the *Elias-Zacharias* standard.”³⁸ In proposing an opinion proposing early in his Ninth Circuit tenure, he stated his “view that this court should not attempt to resolve the heartbreaking problems of students and tourists who gain entry and then, on concert with unscrupulous lawyers, try to improve their hold,”³⁹ and in the per curiam disposition he wrote, “We do not reach the many compassionate arguments that might be made on behalf of gifted, industrious, and ambitious persons seeking admission to the United States.”⁴⁰

Years later, in dealing with undocumented aliens with U.S. citizen children where the parents were subject to deportation, he wrote, “It is a tragedy, but we are really without jurisdiction to remedy the situation”; he thought the best that could be hoped for was for the

³⁶ Memorandum from to panel (Apr. 27, 1977) re: *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460 (9th Cir. 1977) (on file with OHS).

³⁷ Conference memorandum from Procter Hug, Jr., Judge, to panel (Apr. 15, 1993) re: *Watkins v. INS*, 63 F.3d 844 (9th Cir. 1995) (on file with OHS).

³⁸ Conference memorandum from Diarmuid O’Scannlain, Judge, to panel, Oct. 3 1994, re: *Ulloa-Chavez v. INS*, 41 F.3d 1514 (9th Cir. 1994) (unpublished table decision) (on file with OHS).

³⁹ Memorandum from ATG to panel, Nov. 14, 1972, re: *Lacanilao v. INS*, 470 F.2d 1172 (9th Cir. 1972) (on file with OHS).

⁴⁰ *Lacanilao*, 470 F.2d at 1172.

parents to obtain a voluntary departure “and start rebuilding some kind of a life in Mexico until the citizen children can bring them in as green card candidates.” He was, however, unmerciful in his view of the “bounty-hunting ‘notarios’ who con their fellow countrymen into pay a fee for a hopeless asylum application which immediately calls the attention of the ‘ICE’ to their case.” He thought those notarios “worse than the coyotes who collect the fee for bringing the refugees across the border, and then dump them into the arms of the border patrol.”⁴¹

C. Activism and Due Process

Not only has Judge Goodwin been on the “law” side of the law-justice conundrum, he has felt very strongly—and negatively—about activist judges, who often used due process to write the law they thought should be. In talking generally about judicial activism, he wrote that “[f]ear of judicial activism may lurk in the hearts and minds of the people, but this fear tends to become acute only after episodic prodding by lawyers,” adding that

when, in the name of due process, judges do something the commentator does not like, the result is called activism; when judges fail to do something the commentator wants them to do, the refusal is called reaction, or insensitive; and when the judges make some law that judges should not make, but which pleases the majority of the commentators, it is called judicial statesmanship.⁴²

The judge was not hesitant to make tart comments about instances of such activism, as he did in a message to all his Ninth Circuit colleagues. His comment began, “Today’s and yesterday’s mail plopped onto my desk two great examples of authors who ‘have opinion, need case’ and writing without having a case before them.” In addition to calling attention to a death penalty habeas corpus case, he continued:

Today we are edified to learn that a Christian landlord who has not been sued, prosecuted or even scolded by a letter to the editor, can sue in federal court to have a city ordinance trumped by the free exercise clause. This will be of interest to California Moslems who won’t have to rent their condos to infidels who would create an

⁴¹ Memorandum from ATG to panel (July 9, 2008) re: *Alejo-Ceja v. Holder*, 356 Fed. App’x 50 (9th Cir. 2009) (unpublished table decision) (on file with OHS).

⁴² Alfred T. Goodwin, Remarks at 13, Symposium on Constitutional Reform, University of Oregon School of Law, Eugene, Oregon, Sept. 26, 1987 (later in 57 OR. L. REV. 1 (1988)).

abomination by practicing Christianity in the owner's habitat, thereby imposing an unforgivable sin upon the hapless owner.⁴³

Judge Goodwin had a problem with what activist judges produced in the name of due process, but almost even more than these specific results, he found distasteful the (mis)use of "substantive due process." He called "[o]ne of my long time pet-peeves . . . the propensity of the Supreme Court to drop murky references to procedural due process and substantive due process, which then encourages further obfuscation as the words get picked up by lawyers and judges and applied hit or miss through constitutional discussion." As to the terms, he railed that "the grammar is terrible," as "[p]rocedural process, due or otherwise, should be in a text book as the classic example of redundancy" and "[s]ubstantive process, due or otherwise, is an oxymoron." He knew he was on the losing side of that battle ("I know I have lost this battle"), but he "refuse[d] to participate in the debauchery of the English language"⁴⁴

Judge Goodwin admitted that his views of substantive due process had been formed years before, as he had "attended law school while the professors were still suffering from *Lochner* shock," which made him "take a dubious view of substantive due process in all its forms, especially in the tempter's form of opinions with which I sort of agree, or even applaud the result," As recent examples, he cited the competing majority and dissenting opinions in "*Compassionate Dying*" (*Compassion in Dying*⁴⁵), with the debate between the two "a well written polemic on each side about why self destruction is either good and therefore a personal right protected by the Due Process Clause of the Fourteenth Amendment, or bad, and therefore not constitutionally protected at all."⁴⁶ His law school training had also included Thayer's view of the judicial role, as developed by Learned Hand in his "view of the judicial function in a parliamentary

⁴³ Memorandum from ATG to Associates (Jan. 15, 1999) (on file with OHS). In an earlier opinion, Judge Goodwin had written, "'Procedural due process' is a tautology that has become jargon. Our use of it does not imply approval of the term, but only our surrender to its prevalence. It is probably too late to express continuing dismay over the use of the oxymoron 'substantive due process.'" *Brower v. Inyo County*, 718 F.2d 540, 544 n. 4 (9th Cir. 1987), *rev'd*, 489 U.S. 593 (1989).

⁴⁴ Memorandum from ATG to panel (Feb. 10, 1997) re: *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997) (on file with OHS).

⁴⁵ *Compassion in Dying v. Washington*, 122 F.3d 1262 (9th Cir. 1997) (en banc).

⁴⁶ Letter from ATG to SLW, (Mar. 12, 1996) (on file with author).

republic,” with Hand having taken Thayer’s very restrictive view very seriously” and with Hand, “of course, the preferred role model.”⁴⁷

The *Lochner* theme reappeared in Judge Goodwin’s writing to colleagues that he probably would not “live long enough to see the Supreme Court undo the mischief that was done when it invented substantive due process in the *Lochner* line of cases,” then “buried it in the 40’s 50’s and 60’s, and reinvented it in *Roe v. Wade* in the 1970s.”⁴⁸ Speaking further of the Supreme Court, he spoke of “the mess created by the Supreme Court in *Schlesinger v. Ballard*⁴⁹ when the Court conflated substance and procedure by dragging the Fourteenth Amendment into the Fifth Amendment so it could sanctify the oxymoron of ‘substantive due process.’”⁵⁰ As a result, “I don’t want my name to appear on a per curiam opinion giving further currency to this nonsense,” and he added, “I don’t want to leave any more of my fingerprints in this court’s continuation of substantive due process under its ‘equal privileges’ alias or under any other similar confection.” His decision “to dig in and resist,” he said, came from having read Charles Black’s *A New Birth of Freedom*, which he called “a great little book.”⁵¹

D. On Government

1. For Courts or Legislatures

A judge’s jurisprudence includes his view of the role of government. That ideology includes what should be handled by legislatures and what by courts. Some judges accept legislative action and, exercising judicial self-restraint, try to defer to Congress as much as possible, while others, seemingly in aid of their own preferences, are far less willing to accept what Congress has done. As a moderate who as a judge took a generally self-restrained position, Judge Goodwin generally would follow the legislature’s lead. This is seen in his frequent comments in conversation that “I’ve enforced many stupid laws” and in his default position, seen in a message to his colleagues, that “when in doubt, in a case as political as this one, we

⁴⁷ Letter from ATG to SLW, (Aug 10, 1994) (on file with author).

⁴⁸ Memorandum from ATG to panel (May 11, 1999) *DeMello v. Ney*, 185 F.3d 866 (9th Cir. 1999) (unpublished table decision) (on file with OHS).

⁴⁹ *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

⁵⁰ Memorandum from ATG to panel (May 11, 1999) re: *DeMello*, 185 F.3d 866.

⁵¹ *Id.*; CHARLES BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* (1994).

ought to vote to sustain what Congress has done, even when it has done it badly.”⁵² When the U.S. Olympic Committee (USOC) had sued the sponsors of Gay Olympics over use of “Olympics,” where Judge Goodwin had upheld the copyright action,⁵³ he was later to criticize the USOC (“The arrogance of the Olympic Committee people was not lost on me”) while saying “but I’m not a member of Congress.”⁵⁴

Judge Goodwin would sustain Congress even when not happy with legislative action. For example, he disliked congressional actions to strip the courts of jurisdiction but he was willing to uphold such action: “Much as I loathe and despite the motives of Congress in stripping federal courts of jurisdiction, I think that they have succeeded in this case.”⁵⁵ Yet there might be limits to his acceptance of legislative action, as will be seen below concerning Congress’ adding to federal crimes and as can be seen in comments about a colleague who “turns out to be a parliamentary supremacist,” under whom, with “busybodies . . . on a rampage,” “[l]egislatures probably could restore Onanism to its former glory as a capital felony, and nose picking could, by a majority vote in two houses, and signed by the governor, become at least a misdemeanor.”⁵⁶ (However, he did not state he would not enforce such laws.)

The judge did the best he could with the statutes before him, and he would have Congress make decisions as to the law, including filling in ellipses and correcting problems. Faced with an immigration case of someone coming to this country to marry but not staying married to that person very long and then marrying someone else, he saw “a statutory hiatus, an opaque hiatus, a matter not covered by the statute.” However, he thought “Congress would rather fill in the blanks in this statute than have us do it,” even though he realized his

⁵² Memorandum from ATG to Associates (Apr. 1, 1980) re: *Cal. Med. Ass’n v. FEC*, 641 F.2d 619 (9th Cir. 1980) (en banc) *aff’d* 453 U.S. 182 (1981).

⁵³ *Int’l Olympic Comm. v. S.F. Arts & Athletes*, 781 F.2d 733 (9th Cir. 1986).

⁵⁴ Interview of Alfred T. Goodwin by Stephen L. Wasby, (Jan. 17, 1996) Pasadena, Calif. He noted further, “To me, it was an exclusive franchise case; to [Judge Alex] Kozinski, it was a First Amendment case; to gay people, it was a slap in the face.” For Judge Kozinski’s dissent from denial of rehearing en banc, see 789 F.2d 1319, 1320 (9th Cir. 1986).

⁵⁵ Memorandum from ATG to panel (Aug. 17, 2004) *ANA Int’l Inc. v. Way*, 393 F.3d 886 (9th Cir. 2004) (on file with OHS). Reinforcing him, Judge William Fletcher wrote, “Judge Goodwin’s dislike for congressional preclusion of judicial review finds expression in this case law.” Memorandum from Fletcher to panel, re: *ANA Int’l Inc.*, 393 F.3d 886 (Aug. 30, 2004).

⁵⁶ Letter from ATG to SLW (Mar. 12, 1996) (on file with author).

position toward the immigrant might be “churlish.”⁵⁷ Although he noted elsewhere that when ambiguity produces two possible meanings of a statute, “courts can, and sometimes do, choose one of the two meanings in an effort to select the meaning Congress would have chosen if the ambiguity had been called to its attention”⁵⁸; his focus was on the statute rather than possible legislative intent where the statute was ambiguous. Thus when the court reversed a conviction for making of a false statement in a gun purchase because being charged in an “information” was not the same as in an “indictment,” In a special concurrence, Judge Goodwin observed that while “I am satisfied that Isaacs is just the sort of person Congress had in mind when it enacted the statute,” he couldn’t rewrite it.⁵⁹ In a case about whether an addict importing heroin for her own use was eligible for sentencing to rehabilitation, he said, “Congress may well have intended to include such individuals. If so, however, that intent is too well veiled for us to ignore the language of the statute itself.”⁶⁰ Related was that he believed that judges ought not to do what was for Congress to enact, as could be seen in a complaint about his colleagues’ actions about sentencing: “This court does not have statutory or any other jurisdiction to review sentences except for illegality.” He then noted that contrary dicta “suggest that, by accretion, this court is adopting a policy of sentencing review that has been widely advocated for Congressional action.”⁶¹

Judge Goodwin also acknowledged the possibility that the legislature might correct him but also suggested that they should do so if dissatisfied. Thus in a case which held that the National Labor Relations Board (NLRB) did not have jurisdiction over truckers or farmers engaged in large-scale farming, he observed:

The social and economic problems related to large-scale corporate farming are more appropriately resolved by debate and committee

⁵⁷ Memorandum from ATG to panel (Apr. 17, 2008) re: Choin v. Mukasey, 537 F.3d 1116 (9th Cir. 2008) (on file with OHS).

⁵⁸ *Id.*

⁵⁹ *United States v. Isaacs*, 539 F.2d 686, 689 (9th Cir. 1976) (Goodwin, J., concurring specially).

⁶⁰ *United States v. Mason*, 496 F.2d 1091, 1093 (9th Cir. 1974). Charles H. Carr (C.D. Cal.), sitting by designation, complained in a concurrence that “the result will work a tremendous hardship on addicts who import drugs for their own use and . . . are ineligible for treatment under rehabilitative programs that offer advantages similar to those of NARA. This can benefit no one.” *Id.*

⁶¹ ATG, notes on separate yellow-lined page, re: *Nolan v. United States*, 688 F.2d 847 (9th Cir. 1982) (unpublished table decision) (on file with OHS).

study in Congress than by adversary proceedings in court. If Congress is troubled by the reasoning in [a Fifth Circuit case], it is free to translate its intent into clearer legislation.⁶²

Likewise, in a case on whether income of a trust was taxable, with a question of whether certain parties were adverse (and thus not taxable) or non-adverse (and taxable), the majority affirmed taxability but Judge Goodwin dissented, agreeing that an individual was adverse. He then said, “If this conclusion is one that Congress finds counterproductive in terms of the revenue, then it is up to Congress to plug the loophole.”⁶³

2. *Federal or State Courts*

In addition to his views that many matters were better left to Congress, Judge Goodwin had some definite beliefs about whether matters belonged in federal court or state court, where he had also served.⁶⁴ His stance was affected not only by a certain view of federalism but also by a concern about (in)convenience to the federal judiciary, an institutional perspective that the federal courts should not be cluttered with matters that could easily be taken care of elsewhere. One can see this in a bankruptcy case in which the filings had been inadequate, making the judges’ task more difficult, where he observed that “whatever hidden agenda these parties may have in fussing about clouds on title in Arizona land should be taken up with the state courts.”⁶⁵ Yet his view was not merely a matter of “keep it out of our [federal] court”; he supported the work of the state courts and did not want to poach on them. A case on insurance policy limits where there was no relevant Hawaii Supreme Court case to follow shows this, as Goodwin observed, “We want to be careful about the

⁶² NLRB v. Ryckebosch, 471 F.2d 20, 21 (9th Cir. 1972).

⁶³ Paxton v. Comm’r, 520 F.2d 923, 928 (1975) (Goodwin, J., dissenting).

⁶⁴ The judge also had views—outside the scope of this Article—on whether certain matters belonged in criminal court at all, for example, whether a senile man who had “exhibited himself in a grossly undesirable way” at a school playground ought better “be treated by social service agencies rather than by the criminal law process.” Alfred T. Goodwin Oral History, Oregon Historical Society, 1985-1986, Transcript, pp. 230–31.

⁶⁵ Memorandum from ATG to panel (Feb. 19, 1991) re: Courtney v. Nalbandian Family Irrevocable Present Trust Interest I, 930 F.2d 27 (9th Cir. 1991) (unpublished table decision) (on file with OHS). He continued, “We should not waste our judicial resources trying to find out what happened in the bankruptcy court if the parties are not interested in telling us.”

statement of the rationale for the decision, so that we do not decide some question that Hawaii courts might decide for themselves.”⁶⁶

The judge’s attitude about (mis)use of federal courts for matters otherwise properly in state court could be seen in a Sec. 1983 suit against officers and a city for an arrest (for resisting arrest) for which the defendant had been found not guilty, when he called it a “[g]arden variety state tort case, has no business in federal court.”⁶⁷ His dislike for constitutionalizing tort cases was also evident in his remarks when a doctor was sued for having detained for a psychological evaluation someone then found not committable: “This is not a federal constitutional case; the plaintiff should be in state court on a garden-variety negligence claim”⁶⁸ He objected on similar grounds to the broad expansion of RICO (the Racketeer Influenced and Corrupt Organizations Act), asking a temporary law clerk to help with the question “whether it is possible that Congress intended civil RICO jurisdiction to include garden variety disputes among family members over the kind of trust presently proliferating in the estate planning industry.” He recognized that “artful pleading can make something that isn’t a duck look like a duck”⁶⁹ but he found the case “just the kind of dispute state court judges, sitting on the woosack, have handled very well for centuries, without federal intervention.”⁷⁰

The judge also clearly preferred state courts over federal courts for domestic relations cases and certainly did not want the federal courts used to extend disputes begun in state court. When he sat in the Second Circuit and faced a divorce and custody dispute that had been removed from the New York State courts to federal court, he argued for abstention: “If it is truly a tort case and not a disguised attempt to get an advisory opinion from a federal court on the relative virtues of competing state court decisions, it is a proper case for abstention.” Showing his displeasure with the parents, he continued that after the courts of New York and Heidelberg worked out custody, “there will

⁶⁶ Memorandum from ATG to panel (Apr. 5, 1989) re: *Allstate Ins. Co. v. Hara*, 878 F.2d 385 (9th Cir. 1989) (unpublished table decision) (on file with OHS).

⁶⁷ ATG, notes on summary sheet, *Davison v. Veneman*, 857 F.2d 1477 (9th Cir. 1988) (unpublished table decision).

⁶⁸ Conference Memorandum from Susan Graber to panel as to ATG views, *Jensen v. Lane Cnty*, 222 F.3d 570 (9th Cir. 2000) (on file with OHS).

⁶⁹ There is perhaps unintended irony in this usage, as Judge Goodwin was a University of Oregon alumnus, and thus an “Oregon Duck.”

⁷⁰ Memorandum from ATG to panel (June 26, 2008) re: *Walter v. Drayson*, 538 F.3d 1244 (9th Cir. 2008) (on file with OHS).

be a few years left of the childhood for punitive expeditions into the federal courts for diversity tort jurisdiction.”⁷¹

Apart from the question of whether federal or state courts were the preferred venue for certain matters, and related to his view that federal courts should not be used for small matters, Judge Goodwin disliked the nationalization of certain crimes. His views on “using federal criminal calendars to take in home invasion robberies” colored his views of a colleague’s proposed opinion.⁷² His views were even clearer in a securities forgery case, in which he wrote a more full-throated exposition of his approach to federalism: “I am concerned we are . . . undercutting our effort to prevent making a federal case out of every bad check crime.”⁷³ At a later stage in the decision of the case, Goodwin added a more developed statement of his views on the subject:

I, too, am concerned that Congress is ‘federalizing’ or creating redundant overlapping jurisdiction by creating federal crimes in a knee-jerk reaction to perceived trends in public policy with no visible federal interest. The most recent manifestation of Congress pursuit of the crime of the month club was this week. Congress decided that late term abortion was a federal crime. That project, hot on the heels of wife beating, caused me to begin to reexamine my thinking on giving Congress plenary authority to increase the federal criminal bureaucracy and to further denigrate the states in our so-called federal system. Dual jurisdiction of federal and state crimes multiplies the opportunity for prosecutors to shop for the strictest possible penalties, with little concern either for federalism or for judicial resources.⁷⁴

⁷¹ Memorandum from ATG to panel, re: *Minot v. Eckardt-Minot*, 13 F.3d 590 (2nd Cir. 1994) (on file with OHS).

⁷² Memorandum from ATG to panel (May 17, 2001) re: *United States v. Le*, 256 F.3d 1229 (11th Cir. 2001) (on file with OHS).

⁷³ Memorandum from ATG to panel (July 8, 1994) re: *United States v. Barone*, 39 F.3d 981 (9th Cir. 1994), *revised*, 71 F.3d 1442 (9th Cir. 1995) (on file with OHS). On the face of the memo in which another judge had sent the bench memo for the case, Judge Goodwin had written, “G[oodwin] & R[einhardt] reluctant to federal bad check cases.”

⁷⁴ Memorandum from ATG to panel (Nov. 10, 1995) re: *Barone*, 39 F.3d 981 (on file with OHS). In a letter to a former federal prosecutor written at the same time, he conceded “a place for true federal crimes” but said “there should be an identifiable federal purpose behind each such crime.” He continued, in language not unlike that quoted in the text, “Unfortunately for the development of a principled division between what should be rendered unto Little Caesar (State) and Big Caesar (Federal) prosecutors, Congress makes the decisions. Congress is conspicuously trendy. Car jacking, late term abortions (hard to find a federal angle there), wife beating (even hard to find a federal angle—certainly not commerce) illustrate the trendy. We live in the age of the federal crime of the year, whatever Congress has been getting mail about.” Letter from ATG to Rory K. Little (Nov. 9 1995) (on file with author).

These views were not merely philosophical musings but had bite, as he wrote, “I no longer wish to encourage Congress along the path to creation of another ‘dual jurisdiction crime,’” and said that Congress could amend the statute if it disagreed with his position.⁷⁵

3. *Administration and Bureaucracy*

Like his deference to trial judges (treated later), Judge Goodwin exhibits considerable, but not totally unlimited, deference to decisions of administrative agencies. That deference took place within the context of his intense dislike of bureaucracy and of his general views of the reach of government, about which he has definite qualms even as he defers to its agencies. In a letter responding to questions about his views on Oregon adoption law, one could see those qualms as he objected to government withholding information from adoptees about their birth parents, but he went beyond that matter to say, “I have come around to the belief that the government spends too much time regulating what people can read, eat, or ingest in the form of chemicals and I think the same kind of paternalism denies the people information about their ancestors.” In short, “the government should keep its nose out of people’s private business.”⁷⁶

a. *Bureaucracy Disliked*

Judge Goodwin’s dislike of bureaucracy, in court and out, was almost palpable. One could see it in his reference to “the bureaucratic double talk” a social service agency used in a case in which social workers, without authorization, removed a girl from a home, where he combined his dislike for bureaucracy with that for “busybodies”: “The message the jury tried to send to the courthouse is that busybodies in government can go too far, and in this case they crossed the line. I would leave [the judgment] alone, and let the message sink in.”⁷⁷ In a case on excessive delay in processing a claim, he referred to “[t]his kind of bureaucratic bungling,”⁷⁸ and he remarked that a strategy was “bureaucratic” because it was “simple to

⁷⁵ *Id.*

⁷⁶ Letter from ATG to Patricia J. Gross (Nov. 16, 1975) (on file with author).

⁷⁷ Memorandum from ATG to panel and Judge Gerard Tjoflat (Oct. 25, 1996) re: Riley v. Camp, 84 F.3d 437 (11th Cir. 1996) (unpublished table decision) (on file with OHS).

⁷⁸ Young v. Robins, 848 F.2d 199 (9th Cir. 1988) (unpublished table decision). Yet Judge Goodwin would not hold the agency actions to be violations of due process although they “may or may not be vexatious,” as there were mechanisms within the state to obtain redress.

employ . . . but also because it is mindless.”⁷⁹ That word reappeared in the judge’s comment on an agency not articulating a reason for its treatment of a job description in a visa case, when he said that for the panel to uphold the agency “would merely reinforce the conventional wisdom that bureaucracy is both arrogant and mindless unless its chain is jerked once in a while.”⁸⁰ Related to bureaucratic arrogance was high-handedness, as seen in his sharp comment that the Secretary of Labor had overreached in imposing penalties because the object of those penalties had not been subservient: “The Secretary’s basis for the substantial penalties ordered is simply that White Glove had the temerity to embark upon a program of self-insurance without first obtaining departmental approval.”⁸¹

Judge Goodwin’s general dislike of bureaucracy view was perhaps more obvious in a comment that he made in open court as a U.S. district judge. In an environmental case where the question of compliance with procedures was at issue, he referred to the General Services Administration—the judiciary’s “landlord”—in saying, “Well, the only bureaucracy I have much day-to-day experience with is the GSA and I know one has to keep after them all the time to even get them to keep the rooms at proper temperature, much less these statements. So my experience is not optimistic, as far as other agencies are concerned.”⁸² Nor did the judge have much faith that the federal executive branch would carry out its responsibilities. In noting the Supreme Court’s cutting back on private causes of action under the anti-discrimination statutes, he told his colleagues on an Eleventh Circuit panel, “I have no confidence that the Attorney General of the United States will enforce Title VI, VII or IX. Congress may have been firing with blank ammunition.”⁸³

b. Deference to Agency Action

Interesting as is the dyspepsia bureaucracy gave Judge Goodwin, most frequently as a judge he deferred to administrative action, with

⁷⁹ Memorandum from ATG to panel (Mar. 15, 2000) re: Cent. State Transit Leasing Corp. v. Jones Boat Yard, 206 F.3d 1373 (11th Cir. 2000) (on file with OHS).

⁸⁰ Memorandum from ATG to panel (Jan. 5, 2007) re: David Parsons & Assocs. Inc v. Ridge, 220 Fed. App’x 625 (9th Cir. 2007) (on file with OHS).

⁸¹ White Glove Bldg. Maint. v. Hodgson, 459 F.2d 175 (9th Cir. 1972).

⁸² Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Or. 1971), Sept. 24, 1971, Transcript pp. 10–11.

⁸³ Memorandum from ATG to panel (Oct. 15, 2002) re: Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333 (11th Cir. 2002) *rev’d* 544 U.S. 167 (2005) (on file with OHS).

the potential disjuncture explained by his overall self-restrained view of judging. Certainly all agencies did not receive blanket deference nor were all agencies equal in the extent of deference to which he felt them entitled. For example, he told his colleagues that there might be differences between the Tax Court and executive agencies in the amount of deference but also said “the Tax Court does have nationwide experience in dealing with issues similar to those in this case. I believe it deserves some level of deference.”⁸⁴ And there clearly were limits to the judge’s deference, as when he agreed that the Coast Guard Commandant exceeded his authority in suspending a federal license held as a requirement of obtaining a state license. As the regulation came 100 years after the statute, it was not entitled to deference.⁸⁵ And he could also be critical of the government, prodding it to “get its act together.” For example, in a jab at the IRS, he noted that “the government itself is the party best able to create certainty in this area. Clarification of the conflicting regulations . . . and government abstention from arguing for different standards in different cases depending upon the short-run effect upon the revenue . . . would be helpful.”⁸⁶

Most often Judge Goodwin’s deference was to agency judgments but it was revealed in other ways as well. One was that regulatory statutes providing remedies “should be liberally construed,” as when he likened authority under the Packers and Stockyards Act to the Federal Trade Commission’s powers and reinforced that broad reading with a refusal to substitute what he might have done for the official’s actions: “If I were Secretary, I might not have considered the anticompetitive potential . . . to be as grave as the incumbent apparently has considered it, but I am content to leave the decision in his hands.”⁸⁷ He also reinforced agency authority by insisting that plaintiffs exhaust administrative remedies before seeking judicial intervention which would require inconvenience to judges and expenditure of judicial resources. Thus the “irreparable” injury a party claimed in an FTC case was “negligible in comparison to the inconvenience to the courts if courts start hearing interlocutory

⁸⁴ Memorandum from ATG to panel (Feb. 19, 2008) re: *E.J. Harrison & Sons v. Comm’r*, 270 Fed. App’x 667 (9th Cir. 2008) (on file with OHS).

⁸⁵ *Soriano v. United States*, 494 F.2d 681 (9th Cir. 1974).

⁸⁶ *Estate of Christ v. Comm’r*, 480 F.2d 171 (9th Cir. 1973).

⁸⁷ *Cent. Coast Meats v. U.S. Dep’t of Agric.*, 541 F.2d 1325, 1328–29 (9th Cir. 1976) (Goodwin, J., dissenting).

appeals every time somebody thinks an agency is putting their industry to some expense.”⁸⁸

A strong statement of Judge Goodwin’s support for agency judgment appears in an opinion he wrote relatively early in his Ninth Circuit tenure in a case involving the agreement of the Machinists Union and Lufthansa Airlines not to deal with a nonunion entity. Here he deferred to the Labor Board’s decision on whether to outlaw “hot cargo” agreements involving “any person” (not just “labor organizations” and “employers”). As he put it, “Whether the issue involves a jurisdictional determination or a substantive application, the expressed judgment of the Board is entitled to great weight on such questions of law and statutory interpretation.”⁸⁹ At a more micro level, in a number of Social Security disability cases, Judge Goodwin showed more deference to interpretations of credibility by administrative law judges (ALJ) than did his colleagues, although at times he was willing to go along in reversing ALJs on such matters.⁹⁰ Most often, however, the judge supported an agency determination that could have gone either way. Thus he wrote, “The medical evidence was such that the Administrative Law Judge could go either way and there is no basis for us to hold that any particulate [sic] result was compelled by the evidence.”⁹¹ In another case he was to write in like vein, “On general principles that a tie goes to the runner, I would like to affirm the ALJ on close calls,” but his reason there was partly the institutional one of limiting appeals: “[O]therwise the rapidly growing cottage industry of seeking review of unfavorable welfare decisions would soon overwhelm us.”⁹²

He can also be seen deferring to the judgment of the Social Security Administration even when he would have come out differently. As to a disability claimant he thought “seems clearly unemployable,” the judge wrote, “But, as I understand the law, we don’t reverse these cases merely because we disagree. I cannot say

⁸⁸ Memorandum from ATG to panel (Feb. 18, 1977) re: *California ex rel. Christensen v. FTC*, 549 F.2d 1321 (9th Cir. 1977) (on file with OHS).

⁸⁹ *Marriott Corp. v. NLRB*, 491 F.2d 367, 370 (9th Cir. 1974).

⁹⁰ *See, e.g., Sanders v. Barnhart*, 68 Fed. App’x 103 (5th Cir. 2005); *Fernandez v. Barnhart*, 68 Fed. App’x 820 (9th Cir. 2003). An example, from the same time, of affirming an ALJ on a number of points is *Gardner v. Barnhart*, 160 Fed. App’x 428 (5th Cir. 2005).

⁹¹ Memorandum from ATG to panel (Jan. 5, 1987) re: *Franks v. Bowen*, 811 F.2d 1507 (9th Cir. 1987) (unpublished table decision) (on file with OHS).

⁹² Memorandum from ATG to panel (July 29 1998) re: *Brouse v. Chater*, 161 F.3d 11 (9th Cir. 1998) (unpublished table decision) (on file with OHS).

that there was no substantial evidence to support the findings of the agency,” and he said further “but I am not the fact finder.” Thus he affirmed the denial of disability benefits although over a dissent.⁹³ In a later case, criticizing his colleagues’ proposed opinion, he echoed the point about the fact-finder when he spoke of “the general proposition that the trier of fact is best suited to the resolution of fact-specific individual credibility determinations . . . it is my view, and I believe it is the law of the circuit, that it is properly left to the ALJ to evaluate both the claimant’s credibility and the conflict medical evidence and to choose amongst the varying assessments of the claimant’s condition.” He criticized the proposed opinion for “reweigh[ing] the evidence in a manner inconsistent with our precedent”⁹⁴ and felt strongly enough on this point to dissent. Saying the case was “very close . . . for the medical witnesses, the Administrative Law Judge, and for this court,”⁹⁵ he reiterated his “general proposition” language and went further to uphold the ALJ who had not been without error, including “unwarranted pejorative comments about a party,” but he asserted the court “should nevertheless refrain from deciding factual questions properly committed to the administrative agencies and the district courts.”⁹⁶

Judge Goodwin’s posture could be less deferential when he was dealing with the Immigration and Naturalization Service (INS) and the Board of Immigration Appeals (BIA), which were not the Ninth Circuit’s favorite agencies. He did support the INS’s normal process, as when he rejected a complaint that delay by INS in making a decision deprived the claimant of visa opportunities. He said that “[t]he BIA decided the case in the regular course of its business. It committed no act that would have prevented [the claimant] from” setting forth new information. “Thus, there is no hint that the BIA might have been negligent, let alone that it had engaged in affirmative misconduct.”⁹⁷ He was even willing to uphold the agency when it had used the wrong standard: “[T]his court has the duty to see that the

⁹³ Memorandum from ATG to panel (Oct. 2, 1981) re: *Stone v. Schweiker*, 671 F.2d 504 (9th Cir. 1981) (unpublished table decision) (on file with OHS). Continuing as to his own views, he said, “The claimant’s own testimony at the hearing satisfied me that anybody who hired him would also be crazy, and that he was totally unfit for any kind of work at all.”

⁹⁴ Memorandum from ATG to panel (Feb. 16, 2005) re: *Reinertson v. Barnhart*, 127 Fed. App’x 285 (9th Cir. 2005) (on file with OHS).

⁹⁵ *Reinertson*, 127 Fed. App’x at 291 (Goodwin, J., dissenting).

⁹⁶ *Id.* at 292.

⁹⁷ *Lee v. INS*, 576 F.2d 1380, 1382 (9th Cir. 1978).

agency employs a correct legal standard, but it is necessary to reverse an agency decision only when it appears that the standard was both incorrect as a matter of law and that the rights of the petitioner were adversely affected by that application.”⁹⁸ However, he was unwilling to defer as much as one of his colleagues: “I am not quite ready to institutionalize Judge Wallace’s view that the agency can define both the standard to be followed and the conditions that will activate its discretion.”⁹⁹

II APPELLATE JUDGING

The first aspect of appellate judging to be addressed here is the judge’s view of the utility of oral argument, followed by his views on aspects of opinions—their breadth or narrowness, their length, and whether they should be published. Attention is also given to what was a real “hobbyhorse” for Judge Goodwin—his insistence that a panel, once having decided a case, should take any appeals that return after the remand to the district court.¹⁰⁰ The Section ends with some of Judge Goodwin’s thoughts on court administration, stemming in some measure from his service as the circuit’s Chief Judge.

A. Oral Argument

Oral argument is thought to be a standard part of the proceedings in an appeal, although in fact it is not held in every case. Whether to hold it—or, conversely, whether to dispense with it and SOB a case (submit on the briefs)—is a decision the judges on a panel must make, and it is not infrequently the subject of communication shortly after the members of a panel receive the briefs. While the judges usually make the decision on their own initiative, at times the parties indicate their willingness to submit on the briefs. For Judge Goodwin, it depended on who sought to waive argument: “Ordinarily, if the appellant consents to waive argument I have no objection Under no circumstances would I take a case off calendar at the request of the

⁹⁸ *Moghianian v. U.S. Dep’t of Justice, Bd. of Immigration Appeals*, 577 F.2d 141, 142 (9th Cir. 1978).

⁹⁹ Memorandum from ATG to panel (Apr. 28, 1978) re: *Moghianian*, 577 F.2d 141 (on file with OHS).

¹⁰⁰ For the judge, riding horses is no mere hobby: not only has he regularly gone on trail rides but he “rides to roundup,” and one of two 1969 *National Geographic* pictures of him shows him on a horse at rodeo (the other is in judicial robes at the Oregon Supreme Court).

appellee if the appellant objects.”¹⁰¹ The decision not to hear argument had to be unanimous, and when another judge wanted argument, Goodwin would go along when he did not particularly wish to hear it. In such a case, he said that nonetheless, “I don’t think we should dispense with argument unless it is unanimous. So I have no objection to wasting the client’s time and money on an argument.”¹⁰² (The judge who had wanted argument changed his mind.)

If Judge Goodwin had no problem with cases decided on the briefs without argument, he appeared not to like argument without briefs. Around 1980, the Ninth Circuit adopted an Argument Without Briefs program, in which the lawyers would file only a short statement of the issues. Another judge observed about a case that “it is difficult to believe that the case was on the argument without briefs program. It simply demonstrates Judge Goodwin’s wisdom in leading the successful movement to abolish that program.”¹⁰³

In the judges’ intra-panel discussions, more often than not Judge Goodwin indicated his preference for argument, which was basically his simple default position: “Typically, I prefer to allow the litigants to argue their case before live human beings; deciding whether to submit on the briefs can take as long as oral argument.”¹⁰⁴ However, there were exceptions to this preference. In one case from Alaska with an obvious result, when another panel member was willing to have twenty minutes of time for argument because the defendant faced a jail sentence (what Judge Goodwin called “the 17 months versus 20 minutes formula”), Goodwin said he “hate[d] to see the taxpayers squander airfare and hotel expenses for 2 lawyers to come down from Anchorage.”¹⁰⁵

Judge Goodwin would often opt for hearing argument even if the litigant was not likely to be of much help, because there were other values for the judges, such as saving time. Thus even when the issues were clear and the briefs suggested the judges wouldn’t get good

¹⁰¹ Memorandum from ATG to panel (Feb. 6, 1986) re: Porzig v. Nolden (*In re Fitzsimmons*), 719 F.2d 938 (9th Cir. 1986) (unpublished table decision) (on file with OHS).

¹⁰² Memorandum from ATG to panel (Oct. 6, 1998) re: Chatman v. Stone, 165 F.3d 35 (9th Cir. 1998) (unpublished table decision) (on file with OHS).

¹⁰³ Memorandum from Stephen Reinhardt to panel (Sept. 2, 1982) re: Dixon v. Dupnik, 608 F.2d 682 (9th Cir. 1982) (on file with OHS).

¹⁰⁴ Memorandum from ATG to panel (Feb. 29, 2000) re: Aguilar v. Union Pac. R.R. Co., 213 F.3d 641 (9th Cir. 2000) (unpublished table decision) (on file with OHS).

¹⁰⁵ Memorandum from ATG to panel (Nov. 30, 1993) re: United States v. Buchholz, 15 F.3d 1090 (9th Cir. 1993) (unpublished table decision) (on file with OHS).

argument, the litigant's lawyer would have felt heard and would not pester the judges subsequently. In a case submitted on the briefs, the judge had said in a note that "we will learn nothing of value from oral argument in this case. However, it may be more economical of our time and energy to give this appellant 15 minutes in which to ventilate his grievance than to answer his mail for the next 6 months or so if we refuse to hear him."¹⁰⁶ His rationale of allowing ventilation also applied when a civil litigant was pro se: "Ordinarily, I prefer to hear oral argument in pro se civil cases, even though it is frequently a waste of time. The reason is that a pro se civil litigant who knows we have heard his argument will not squawk very loud when we write a short disposition. If we do not hear his argument, we will have to write a longer disposition and waste still more time reading long, passionate petitions for rehearing." Moreover, he added, even if the pro se is not helpful, the other side (e.g., the government) might contribute.¹⁰⁷ In like manner, he observed in another case that "my comfort level on a short disposition is enhanced by the knowledge that I actually heard the lawyers state their case."¹⁰⁸

Among the reasons why the judge wanted to hear argument was that he had questions he wished to ask.¹⁰⁹ Another reason, stated in a Social Security disability case, was that "[o]ral argument may not be helpful, but these cases frequently require some interpretation of the administrative record. I find that 10 to 15 minutes of argument will save sometimes an hour or two of chambers' time because we can ask questions and focus on significant points."¹¹⁰ Another reason extended beyond information argument might provide. He told his colleagues in one case, "I usually lean toward listening to the arguments if the parties want to argue. In this case, I am more curious to see what these idiots look like than apathetic about their

¹⁰⁶ Memorandum from ATG to panel, re: *Batts v. Contra Costa Cnty.*, 865 F.2d 864 (9th Cir. 1988) (unpublished table decision) (on file with OHS).

¹⁰⁷ Memorandum from ATG to panel, re: *Smalls v. United States*, (9th Cir. 2003) (on file with OHS).

¹⁰⁸ Memorandum from to panel (May 2, 2003) re: *Boylston Apartments Ltd. P'ship v. State Farm Fire & Cas. Co.*, 65 Fed. App'x 647 (9th Cir. 2003) (on file with OHS).

¹⁰⁹ "I have some questions for counsel, who appear to be well paid and are likely to want to argue." Memorandum from ATG to panel (Feb. 19, 2008) re: *E.J. Harrison & Sons Inc. v. Comm'r*, 270 Fed. App'x 667 (9th Cir. 2008) (on file with OHS).

¹¹⁰ Memorandum from ATG to panel (Apr. 17, 1992) re: *Matney v. Sullivan*, 967 F.2d 588 (9th Cir. 1992), and 981 F.2d 1016 (9th Cir. 1992) (unpublished table decision) (on file with OHS).

arguments.”¹¹¹ And, particularly when the panel was likely to reverse summarily, the judge thought it wise to hear the lawyers, as he didn’t want to do to them what the Supreme Court did to his court: “A summary reversal without argument reminds me of the Supreme Court’s odious practice of summary ‘GVR’ on our cases. We can spare a few minutes for counsel to explain their positions.”¹¹²

B. On Opinions

Judging results in opinions. A considerable part of Judge Goodwin’s thinking about appellate judging dealt with what would be an appropriate opinion. This subsumes their length and their breadth or narrowness and whether they should be published.

1. Length

Judge Goodwin was concerned about the length of dispositions, both published opinions and non-precedential memorandum dispositions. This was not merely a matter of style: he wanted opinions to stay to the point, in part so that they would be narrow rather broad in scope (see below) and would not contain dicta. Because of his belief that opinions should be short, he often commented to his colleagues when his own offerings were longer than he would have preferred, and he conceded he violated his own preference, as when he said “I sometimes fall victim to the urge to overwrite.”¹¹³ In another case, he wrote an unsent apology for an opinion longer than he would have preferred: “This opinion grew to perhaps undue length because further study made it unsatisfactory to base a reversal on the simplistic statement that the case is a ‘civil’ matter.”¹¹⁴ After the other members of the panel had commented, he sent a message to say “I fully realize this opinion is far longer than the relatively insignificant problem remaining in the case would

¹¹¹ Memorandum from ATG to panel (Feb. 28, 2005) re: *United States v. Roberts*, 128 Fed. App’x 26 (9th Cir. 2005) (on file with OHS).

¹¹² Memorandum from ATG to panel (Dec. 23, 2004) re: *Duff v. Barnhart*, 121 Fed. App’x 697 (9th Cir. 2005) (on file with OHS).

¹¹³ Memorandum from ATG to panel (May 31, 1988) re: *Long v. Cooper*, 848 F.2d 1202 (11th Cir. 1988) (on file with OHS).

¹¹⁴ Draft memorandum from ATG to panel, written on Atlanta Airport stationery, re: *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974) (on file with OHS). Interestingly, he wrote that he followed the route of the circuit’s cases, “one of which reversed me as a district judge.” *Id.*

ordinarily justify. It is like explaining nuclear fusion—once you start, it is hard to find a good stopping point.”¹¹⁵

Another opinion “got longer than I wanted it to be, but I felt that the facts need to be examined with care. It is close.”¹¹⁶ Or, in sending “an overlong opinion,” he said, “The jurisdictional points all seem to require answers, even though it makes tiresome reading—I hope it will save someone else some trouble some day.”¹¹⁷ And, as to an opinion that “grew a little longer than I intended,” it was “partly, I suppose, to answer some of the doubts expressed after argument.”¹¹⁸ Another reason for length appeared in a case in which as a district judge he had sat on the Ninth Circuit by designation. He explained to a circuit judge that his opinion was long in an effort to bring the third judge on board: “The opinion is longer than I would like to have it, but if [the third judge] concurs in it maybe I can take out some of the material I wrote for his benefit. If he dissents, I will probably leave more of the discussion in the opinion to show what the disagreement is about.”¹¹⁹

Judge Goodwin also wanted memorandum dispositions (“unpublished” rulings) to be succinct. After questioning and criticizing a proposed memorandum disposition and suggesting compressing and rearranging it, he ended by saying, “I am sorry, but I would much prefer the kind of memorandum disposition Judge Sneed frequently urged us to use, setting out briefly the assignments of error in the trial court that we are going to reach, and dispatching each one with a quick citation to existing circuit precedent.”¹²⁰ He was particularly displeased with long memorandum dispositions, some of which he would later suggest were recycled bench memorandums. He stated his preference when he explained why he had opted for a published rather than an unpublished disposition in a case: “I have an

¹¹⁵ Memorandum from ATG to panel (May 21, 1974) re: *Cleaver*, 499 F.2d 940 (on file with OHS).

¹¹⁶ Memorandum from ATG to panel (Jan. 29, 1974) re: *United States v. Patterson*, 492 F.2d 995 (9th Cir. 1974) (on file with OHS). He added, “(I tried to write it the other way and it wouldn’t write.)” *Id.*

¹¹⁷ Memorandum from ATG to panel (Jan. 23, 1974) re: *Hancock Fin. Corp. v. Fed. Sav. & Loan Ins. Corp.*, 492 F.2d 1325 (9th Cir. 1974) (on file with OHS).

¹¹⁸ Memorandum from ATG to panel (Jan. 29, 1974) re: *Fiberchem v. General Plastics Corp.*, 495 F.2d 737 (9th Cir. 1974) (on file with OHS).

¹¹⁹ Memorandum from ATG to Fred Hamley (Mar. 12, 1970) re: *Carnation Co. v. NLRB*, 429 F.2d 1130 (9th Cir. 1970) (on file with OHS).

¹²⁰ Memorandum from ATG to panel (June 18, 2006) re: *United States v. Teague*, 165 Fed. App’x 547 (9th Cir. 2006) (on file with OHS).

institutional bias against lengthy memorandum dispositions and I find it difficult to address the numerous defendants and issues involved in a short unpublished disposition.”¹²¹ In one complaint about the length which he directed at a judge visiting from another circuit, he wrote: “At the risk of being churlish, I again suggest that the . . . disposition be an authored published opinion. It’s too long to comply without customary short memo disposition format and its too well-written to go to waste.” He added that “when one of these long unpublished dispositions shows up in Westlaw, it has the names of three judges, but no author. In order to protect the innocent, these long ones should be authored.”¹²²

Judge Goodwin could also direct displeasure over long memorandum dispositions at himself, as in a message explaining to panel colleagues “an outrageously long memorandum” he was sending “which should not be published because it contains no new law and very little law at all. But I felt I had to detail the evidence because the panel was a little dubious about the probative sufficiency of the government’s case on the issue of guilty knowledge.”¹²³ The disposition was, however, later published because of a panel member’s dissent.¹²⁴

It should be added that not only the length of opinions concerned Judge Goodwin, as he was also concerned about the length of time his court took to complete some of its cases. Some of that resulted from the court’s normal processes, but some came from particular judges not seeming to be able to circulate opinions they had been assigned.¹²⁵ His concern about the problem surfaced obliquely when, faced with the question of sanctioning an attorney for delays—in filing briefs and responding to inquiries—he said he “can’t in good

¹²¹ Memorandum from ATG to panel (July 23, 2003) re: *Bell v. Clackamas County*, 341 F.3d 858 (9th Cir. 2003) (on file with OHS).

¹²² Memorandum from ATG to panel (May 21, 2001) re: *United States v. Rousseau*, 257 F.3d 925 (9th Cir. 2001) (on file with OHS).

¹²³ Memorandum from ATG to panel (Jan. 4, 1974) re: *United States v. Ledesma/United States v. Quaroz-Santi*, 499 F.2d 36 (9th Cir. 1974) (on file with OHS).

¹²⁴ This case dates from before the Ninth Circuit’s regular use of unpublished dispositions, which usually had only brief fact statements because the parties knew the facts.

¹²⁵ Judge Goodwin would comment off-the-record as to particular judges who regularly caused delay. When he was serving as a district judge to handle a number of Eastern District of California cases (habeas and criminal) as part of a Ninth Circuit program to assist that district with its backlog, he could not complete a number of his cases for a considerable period of time because they depended on an en banc opinion being written by one of the slowest judges on the court.

conscience join in the sanction order” (\$1,000 fine and 6-month suspension) because of “several cases discussed at nearly every court meeting in which we judges have slept for 2 or 3 years on cases after submission” He added, “His client will punish him enough.”¹²⁶ When he was sitting in the Eleventh Circuit and one of its judges apologized for not acting on a petition for rehearing, Judge Goodwin responded that “[i]n the Ninth Circuit these embarrassing delays between petition for rehearing and a published disposition are laid out for all to see, because we publish the date of submission as well as the date of filing,” whereas in the Eleventh Circuit, “the delay is more or less occult, except between the court and the parties.”¹²⁷

2. *Breadth*

Judge Goodwin was concerned not only with an opinion’s length but, more importantly, with its breadth. His preference was for narrow opinions, ones that said no more than was necessary and did not wander afield. As he wrote when sitting in the Eleventh Circuit, “I favor shorter, narrowly drawn opinions . . . [e]specially in diversity cases in which we are likely to meddle with the law of a state. I favor the narrowest possible writing We should say no more than we absolutely must say on this issue.”¹²⁸ But it was not only narrow opinions he sought; he wanted *sound* ones. Thus when faced with the choice of affirming (on the basis of qualified immunity) or remanding, he wrote that he was “unable to find a way to affirm and produce a sound opinion as well. Certainly, the latter is more important.”¹²⁹ And he wanted *clarity* as well, to provide guidance particularly to lower courts. This led him to write, “I hope our opinion will not be a hazard to navigation for future judges entering the wilderness of ‘plain meaning’ in construing statutes that the legislatures have tinkered with to keep up with changing technology.

¹²⁶ Memorandum from ATG to panel (Jan. 27, 1992) re: Anning-Johnson Co. v. Coliseum Constr., 956 F.2d 274 (9th Cir. 1992) (unpublished table decision) (on file with OHS). Agreement was reached on a \$500 fine and 3 months suspension.

¹²⁷ Memorandum from ATG to panel (Oct. 15, 1998) re: Rash v. Rash, 147 F.3d 1291 (11th Cir. 1998), *amended by*, 173 F.3d 1376 (11th Cir. 1999) (on file with OHS).

¹²⁸ Memorandum from ATG to panel (May 31, 1988) re: Long v. Cooper, 848 F.2d 1202 (11th Cir. 1988) (on file with OHS).

¹²⁹ Memorandum from ATG to panel (June 16, 2000) re: Jensen v. Lane County, 222 F.3d 570 (9th Cir. 2000) (on file with OHS).

We should not use ‘ambiguous’ loosely, or we will become very busy.”¹³⁰

One aspect of a narrow opinion was that it did not reach issues unnecessarily. Thus in a “spotted owl” case in which environmental groups challenged *ex parte* communications with the “God Squad” (the Endangered Species Committee), Judge Goodwin concurred separately because he didn’t agree on the need to rule on whether the President was subject to the Administrative Procedure Act.¹³¹ Further indicating his preference for stripped-down dispositions, he wrote in another case, “I believe it is unnecessary and unwise to scatter dictum, in a per curium opinion, upon the complicated question whether the cases decided prior to *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964), can modify or clarify that decision,” so he submitted a “memorandum” disposition under the court’s then-new Rule 21, “leaving out all discussion not necessary to the decision.”¹³² And as he said more generally in another case, “it is a good general rule to try to follow what we are told is the practice of the Supreme Court: Don’t reach a question unless you have to. If necessary to the decision, keep it as narrow as possible.”¹³³

He also argued for the narrower (and easier) issue in a case by suggesting resolving it on qualified immunity rather than reaching a *Bivens* issue: “I continue to believe that we should resist the temptation to reach out and decide important constitutional issues until absolutely necessary . . . I again suggest we leave the *Bivens* issue for a more compelling case.”¹³⁴ As this suggests, the judge’s preference for narrowing of issues to be dealt with was related to whether, as he saw it, a case was appropriate for dealing with an issue. As just noted, he might think it better to finesse dealing with an issue now in order to let it be dealt with in a later case. That also could be seen in an airline labor dispute over an injunction and the Norris-LaGuardia Act. A dissent within the panel was likely, but a law clerk had found a procedural defect (lack of a separate document

¹³⁰ Memorandum from ATG to panel (Jan. 29, 2001) re: *United States v. Davidson*, 246 F.3d 1240 (9th Cir. 2001) (on file with OHS).

¹³¹ *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1551 (9th Cir. 1993) (Goodwin, J., concurring).

¹³² Memorandum from ATG to panel (Mar. 2, 1973) *United States v. Richards*, (9th Cir. 1973), no citation. (on file with OHS).

¹³³ Memorandum from ATG to panel (Mar. 20, 2000) re: *Bennett v. Washington Cnty.*, 213 F.3d 641 (9th Cir. 2000) (unpublished table decision) (on file with OHS).

¹³⁴ Memorandum from ATG to panel (Mar. 23, 1999) re: *DeMello v. Ney*, 185 F.3d 866 (9th Cir. 1999) (unpublished table decision) (on file with OHS).

as the basis for the appeal). This prompted Judge Goodwin to suggest that “[r]ather than invest the considerable additional time that would be necessary to satisfy my now ravenous curiosity about the substantive questions lurking in this case, it occurred to me that a better case might come along later,” especially in light of a case filed during the pendency of the present one, “and that if we dismiss this appeal for want of jurisdiction, as I believe we must, we might be doing everyone a favor.”¹³⁵

Judge Goodwin had pragmatic as well as principled reasons for narrower opinions. For one thing, he found no virtue in telling the losing party multiple times it had lost. In a case in which the panel had discussed whether to write on one issue or several and the author of the proposed disposition said he tried to address the parties’ issues, Goodwin wrote, “The loser won’t feel better when she learns there were seventeen reasons why she lost.”¹³⁶ In addition, he said, dealing with issues that were unnecessary to be considered might prompt petitions for rehearing (PFRs), which would mean more work. In an unsent draft memo, he criticized a colleague’s proposed disposition for having “a lot of detail of the other issues which will lead counsel to wonder why we went into such great detail on those issues, but gave short shrift to the crucial consent issue,” and he wanted the author to “substantially condense[]” that discussion of other issues “so that counsel won’t pester us with petitions for what they may perceive as unequal treatment of the consent issue.”¹³⁷

The judge’s concern for limiting more judge-work could be seen in other comments. Thus in one case he preferred to affirm than to dismiss for lack of jurisdiction, in order to avoid more paper: “The reason I originally preferred to dispose of the appeal on the merits is that less paperwork is involved. . . . [W]e shouldn’t let the press of business make us relax our jurisdictional standards, but I was trying to put an end to the matter.” An order to dismiss, which however seemed necessary, would result in “petitions to reinstate it, affidavits to read,

¹³⁵ Memorandum from ATG to panel (July 19, 1977) re: *Wien Air Alaska v. Air Line Pilots Ass’n*, 566 F.2d 1186 (9th Cir. 1977) (unpublished table decision) (on file with OHS).

¹³⁶ Memorandum from ATG to panel (Mar. 20, 2000) re: *Bennett v. Washington County*, 213 F.3d 641 (9th Cir. 2000) (unpublished table decision) (on file with OHS).

¹³⁷ Draft memorandum from ATG to panel (Aug. 26, 1987) re: *United States v. Gamez*, 829 F.2d 1129 (9th Cir. 1987) (unpublished table decision) (on file with OHS).

correspondence with counsel . . . and other tiresome details, before the file can be closed.”¹³⁸

Judge Goodwin also wanted to avoid piecemeal litigation; thus he wanted not only narrow rulings but he also wanted the elements of a case dealt with at one time, not seriatim. When faced with a case in which there was no final order as to one defendant, he argued for a remand so there would be final orders as to all parties and issues, with the case then to return to the court of appeals. “Otherwise, we may have a piece-meal appeal and a huge waste of judicial time on a relatively trivial legal matter.”¹³⁹ A couple of months later, he said the same case “is not a case that will benefit anyone by our entertaining a piecemeal appeal on the 14th amendment question for three-fourths of the defendants, and then another appeal later on any remaining questions.”¹⁴⁰ For the same reasons, he disliked interlocutory appeals. Thus he “welcome[d]” the Supreme Court’s decision in *Midland Asphalt*¹⁴¹ limiting such appeals, “because it will slow down lawyers who seek interlocutory appeals solely to keep cases from ever coming to trial.” In this context, he spoke of a situation he knew in his role as Chief Judge, of “an 83-year-old district judge who is facing 30 separate interlocutory appeals filed by a well-known pettifogger who is deliberately trying to milk this case for attorney fees without ever going to trial.”¹⁴²

Part and parcel of Judge Goodwin’s desire for narrow opinions was his concern about some judges’ injection of dicta into their opinions, related to his distaste for (activist) judges with an agenda, because the agenda led them to include material in opinions that he thought not necessary to the disposition but which were, he believed, placed there for later use. When one (conservative) judge intervened in a case to complain about use of certain language in an opinion, Judge Goodwin told his panel colleagues, in one of his more caustic comments, that “the judge who blew the whistle in this episode probably yields to no one in the country in success in smuggling dictum into opinions to be dredged up later when it can be used as ‘authority’ for some personal

¹³⁸ Memorandum from ATG to panel (Apr. 4, 1988) re: *United States v. Young*, 554 F.2d 1072 (9th Cir. 1977) (unpublished table decision) (on file with OHS).

¹³⁹ Memorandum from ATG to panel (Mar. 25, 1996) re: *Buckner v. Napa*, 83 F.3d 426 (9th Cir. 1996) (unpublished table decision) (on file with OHS).

¹⁴⁰ Memorandum from ATG to panel (May 7, 1996) re: *Buckner*, 83 F.3d 426.

¹⁴¹ *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989).

¹⁴² Memorandum from ATG to panel (Apr. 3, 1989) *United States v. Wobser*, 88-1239, no citation (on file with OHS).

agenda item that finally presents itself in a case.” He added, “When I was in law school, such judges were known as the ‘Have opinion, need case’ jurisprudes.”¹⁴³

When, in another case, a panel member proposed a “lengthy rewrite” of a proposed Goodwin opinion, he criticized that colleague for trying to insert dicta into the case for future purposes. He first noted that there was no need in the present case for the definition the suggested language would provide, nor did a Supreme Court ruling of concern to that judge apply, so he had not incorporated the proposed language. He then asserted directly, “It seems to me that Judge O’Scannlain’s reason for wanting to add this discussion of ‘closer review,’ admittedly not presented in this case, is to lay the groundwork for a future case, when the issue is presented to another panel.” He then said that the requested additional discussion “is *dicta*, something I try to avoid,” and he saw “no reason to inject unnecessary, speculative *dicta*, concerning an issue not presented in this case and to extend the discussion with conjecture.”¹⁴⁴

3. *Published or Not?*

With the U.S. courts of appeals having started in the 1970s to designate some dispositions as not-for-publication (and non-precedential) and with the proportion of such dispositions reaching over 80 percent in the Ninth Circuit, each panel, and thus each judge, had to decide whether a disposition should receive a published opinion or an “unpublished” memorandum disposition (memodispo) and what belonged in the latter.¹⁴⁵

What went into unpublished dispositions was also related to Judge Goodwin’s other concerns such as that the court write as narrowly as possible: “I favor the narrowest possible writing, and usually so for an unpublished memo disposition because it makes no law at all.”¹⁴⁶ Another was length, seen when he wrote to the author of a proposed disposition, “I am having a problem with this 20-page opinion that reasonably could have been disposed of in a 3-page

¹⁴³ Memorandum from ATG to panel (Apr. 10, 1995) *Fuller v. Oakland*, 47 F.3d 1522 (9th Cir. 1995) (on file with OHS).

¹⁴⁴ Memorandum from ATG to panel (June 22, 2010) re: *United States v. Mitchell*, 624 F.3d 1023 (9th Cir. 2010) (on file with OHS).

¹⁴⁵ See Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67 (2004).

¹⁴⁶ Memorandum from ATG to panel (May 31, 1988) re: *Long v. Cooper*, 848 F.2d 1202 (11th Cir. 1988) (on file with OHS).

memorandum.”¹⁴⁷ His general view was that if a disposition were to be unpublished, “then the only readers interested already know all there is to know about it and further writing will neither convince the unconvinced nor save the saved.”¹⁴⁸ And he was also to write, “I am torn, on All Fools’ Day, between my loathing of publishing opinions on state law questions and my loathing of sixteen-page memorandum dispositions.”¹⁴⁹

While he wanted strong opinions, he also could argue for publication when the opinion might not be strong. In a case on the payment of commission on sales by a company which acquired a defunct business, he preferred publication of the opinion “not because it is a great work of art, but because it is not.” He went to say:

It is good for judges to publish their weaker, more doubtful opinions, so law reviews and other critics from within or without the profession can shoot at them. It is dangerous for any court to yield to the temptation to conceal uneasy compromise and cavalier treatment of precedent behind unpublished memorandum. . . . [W]e should never silently add to our criteria for nonpublication anything resembling the convenience of the court in reaching a desired result by withholding reasoning which, if printed, would find daylight too harsh for contemplation.¹⁵⁰

He expressed the same view relative to what we now call “transparency” when he argued unsuccessfully for publication in another case: “While it may not be a prudent deployment of judicial resources to publish what I am sure will be a spirited and well-written debate on this relatively undeserving case, we probably should have at it so we won’t be accused of hiding a dirty spot under the schmatte.”¹⁵¹ And he was aware that the court was subject to criticism for what was perceived to be such action: “Having recently had an op ed column from the [*Wall Street Journal*] called to my

¹⁴⁷ Memorandum from ATG to panel (Aug. 12, 1992) re: *Fogel v. United States*, 985 F.2d 572 (9th Cir. 1993) (unpublished table decision) (on file with OHS).

¹⁴⁸ Memorandum from ATG to panel (Oct. 24, 1980) re: *United States v. Valenzuela-Alegria*, 634 F.2d 637 (9th Cir. 1980) (unpublished table decision) (on file with OHS).

¹⁴⁹ Memorandum to ATG to panel (Apr. 1, 2005) re: *Marturello v. Nat’l R.R. Passenger Corp.*, 127 Fed. App’x 328 (9th Cir. 2005) (on file with OHS).

¹⁵⁰ Memorandum from ATG to panel (Mar. 29, 1974) re: *Fiberchem v. Gen. Plastics Corp.*, 495 F.2d 737 (9th Cir. 1974) (on file with OHS).

¹⁵¹ Memorandum from ATG to panel (Jan. 5, 2007) re: *David Parsons Assocs. Inc. v. Ridge*, 220 Fed. App’x 625 (9th Cir. 2007) (on file with OHS).

attention, I am a bit gun-shy about burying the bones of a difficult bunch of legal questions in the unpublished landfill.”¹⁵²

Also leading Judge Goodwin to favor publication was his awareness that lower court judges and lawyers, and even agencies, took guidance from the court’s published opinions. As a panel colleague noted in arguing against publication of a case, “I know that Judge Goodwin feels an opinion may be of benefit or guidance to the Oregon bar.”¹⁵³ In one immigration case, Goodwin wrote, “There are no published cases dealing with Chinese immigrants fearing persecution from smugglers or fearing persecution for illegal departure. Publishing may help some other panels that will have to address similar issues.”¹⁵⁴ And in suggesting that a disposition written by a senior district judge be published, he noted that the author’s proposed disposition

meets our circuit guidelines for publication. It deals helpfully with prior Ninth Circuit cases which have been cited by the immigration bar as support for conflicting positions. It provides much needed light on the subject or “persecution” in countries like Fiji, Bosnia, India, and Ireland where populations of diverse ethnicity or religious revelations engage in local hostility toward each other.¹⁵⁵

And in a “ruminating” in a case for the Eleventh Circuit about certain arrangements between corporations, he said, “the district judges in Alabama may be glad to have this opinion available in future cases involving sidetrack agreements between power companies, lumber companies, paper mills, etc. and railroads.” He thought “opinions of this kind should be published” because, if they were not, “[t]he specialized bar digs them up from their indecent burial in Westlaw and Lexis, and figures out how to insinuate their language into briefs and arguments in the district courts anyway.”¹⁵⁶ He had spoken on the same theme to Ninth Circuit colleagues:

The mischief sown within our profession by our unpublished memoranda, which, in specialized areas of the practice, are

¹⁵² Memorandum from ATG to panel (Jan. 22, 1996) re: *Gutierrez-Tavares v. INS*, 92 F.3d 1192 (9th Cir. 1996) (unpublished table decision) (on file with OHS).

¹⁵³ Robert McNichols, Judge (E.D.Wash., sitting by designation), to panel, Feb. 9, 1982, re: *Gage v. Rinehart*, 676 F.2d 709 (9th Cir. 1982) (unpublished table decision).

¹⁵⁴ Memorandum from ATG to panel (Aug. 5, 1996) re: *Li v. INS*, 92 F.3d 985 (9th Cir. 1996) (on file with OHS).

¹⁵⁵ Memorandum from ATG to panel (Dec. 10, 1997) re: *Singh v. INS*, 134 F.3d 962 (9th Cir. 1998) (on file with OHS).

¹⁵⁶ Memorandum from ATG to panel (Jan. 23, 1996) *Mooney v. CSX Transp. Inc.*, 79 F.3d 1159 (11th Cir. 1996) (unpublished table decision) (on file with OHS).

informally copied and circulated, is well known . . . I frequently encounter language in a brief that I recognize as lifted from an ‘unpublished’ disposition. (Some law firms have an associate run a Westlaw check from panel members after their names are disclosed. After this practice becomes more widespread, it will probably be malpractice not to do it.)¹⁵⁷

There were situations in which, after a panel issued a non-precedential disposition, someone would request publication – usually lawyers for a specific industry favored by the ruling. In one such instance, where Judge Goodwin had argued initially that the ruling should not be published “as it does not involve any novel questions of federal law and simply involves interpreting state insurance law,” with “such questions [left] in the state courts where possible,”¹⁵⁸ he thought “[w]e are being used once again by the insurance lawyers to write California insurance law. This is a by-product of diversity removal, because virtually all big insurance cases seem to be removed.” Despite his apparent reluctance, he voted to publish because of “all the fine tuning that went into this first impression opus.”¹⁵⁹

C. Comeback Cases

When a panel has decided a case and remanded it to the district court and an appeal is made from the decision on remand, the Clerk’s Office asks the panel if it wishes to retain the case or let it go in the normal course to another argument panel. The inclination of many judges is not to accept the comeback case, with a major reason that judges now have new law clerks and, to the extent that the judges are reliant on their clerks, no one in chambers would be familiar with the case. Judge Goodwin, however, was persistent in his belief that a panel had a responsibility to deal with the aftermath of a case it had remanded, because the remand order might have caused difficulty for the district court, and he regularly “vented my pet peeve about panels that routinely turn down all comeback cases.”¹⁶⁰ As an incentive to

¹⁵⁷ Memorandum from ATG to panel (Mar. 20, 2000) re: *Bennett v. Washington County*, 98-36230, 213 F.3d 641 (9th Cir. 2000) (unpublished table decision) (on file with OHS).

¹⁵⁸ Memorandum from ATG to panel (Dec. 7, 1993) re: *Lunsford v. Am. Guar. & Liab. Ins. Co.*, 18 F.3d 653 (9th Cir. 1994) (on file with OHS).

¹⁵⁹ Memorandum from ATG to panel (Feb. 10, 1994) re: *Lunsford*, 18 F.3d 653.

¹⁶⁰ Memorandum from ATG to panel (May 31, 2007) re: *Bouley v. Del Papa*, 237 Fed. App’x 280 (9th Cir. 2007) (on file with OHS).

get his colleagues to agree to take the returned case, he would offer to undertake the writing assignment.¹⁶¹

His general argument was that “when a rather lengthy disposition orders a remand for the district court to hold an evidentiary hearing, it is better for the three judges who issued the disposition to review the fidelity of the district judge’s performance on remand than for three other members of this court to have to try to read our minds as well as that of the district judge.”¹⁶² He also remarked that his “general view” was that “judges who remand cases for resentencing ordinarily should keep the case to save the time of other judges who might have to interpret the terms of the remand.”¹⁶³ Those comments were stated positively but Judge Goodwin could be highly critical of panels that failed to take these cases. Writing about a case that “reinforces my belief that panels that make a mess of a case should take the ‘come-back’ off and clean up their mess,” he argued, “The earlier panel made . . . an improvident remand to scold a federal district judge who had not decided a question the panel thought deserved an answer,” even though the panel knew the case was moot.¹⁶⁴ In another case, repeating his observation that he “hate[d] it when panels don’t clean up their own mess,” he said that “The last panel that handled this case left a lot of shoveling for someone else to do,” and he added, “If we end up remanding this, and if I live long enough, I guess we ought to agree to take it back when it returns, as it surely will.”¹⁶⁵

Judge Goodwin offered a number of mutually-reinforcing reasons why panels should take these cases. One was that “[o]ur learning curve is much shorter than any new panel would have.”¹⁶⁶ Another reason was to “save three judges having to read all the stuff we’ve already read,”¹⁶⁷ or as he put it in another case, rejection of the

¹⁶¹ See, e.g., “I’d be happy to undertake the writing assignment if we take the case.” Memorandum from ATG to panel, *Jensen v. Lane County*, 312 F.3d 1145 (9th Cir. 2002) (on file with OHS).

¹⁶² Memorandum from ATG to panel (Aug. 20, 1993) re: *McNeese v. Borg*, 15 F.3d 1087 (9th Cir. 1994) (unpublished table decision) (on file with OHS).

¹⁶³ Memorandum from ATG to panel (Aug. 20, 1993) re: *United States v. Robinson*, 12 F.3d 1110 (9th Cir. 1993) (unpublished table decision) (on file with OHS).

¹⁶⁴ *Id.*

¹⁶⁵ Memorandum from ATG to panel (May 20, 1996) re: *Paymaster Corp. v. Am. Bankers Ins. Co. of Fla.*, 91 F.3d 154 (9th Cir. 1996) (unpublished table decision) (on file with OHS).

¹⁶⁶ Memorandum from ATG to panel, *Jensen v. Lane Cnty.*, 312 F.3d 1145 (9th Cir. 2002) (on file with OHS).

¹⁶⁷ Memorandum from ATG to panel (Dec. 15, 1993) re: *United States v. Yokley*, 17 F.3d 397 (9th Cir. 1994) (unpublished table decision) (on file with OHS).

comeback case would mean that “3 other innocent bystanders will have to read an awful lot of badly briefed material without any benefit to the law of the circuit.”¹⁶⁸ Moreover, “I think as a general policy panels that remand cases should take them when they come back just to save three other innocent parties’ having to read themselves into the problem.”¹⁶⁹ In addition, the first panel was “generally familiar with the factual background” of a case.¹⁷⁰ In these cases as in others, he told his colleagues that the returning case could be submitted on the briefs, as when he remarked that “I doubt very much that it will require oral argument, and the authoring judge can probably wrap it up rather promptly.”¹⁷¹ In a case in which he had been the author of the “factually quite complex” initial case, by taking the comeback case the panel could “keep the lawyers from playing games with facts and procedures that were before us and would be mysterious to three new judges.” He added, “A well-developed learning curve should not go to waste, as busy as we all are.”¹⁷²

Generally, Judge Goodwin would have the initial panel take the case “when the only issue before this court on a comeback case is whether the trial court correctly interpreted and followed the terms of the remand,” with “no reason why three new judges should be drawn to look over the remand and the district court’s response to it.”¹⁷³ However, he would also take a comeback case even when it had only a tenuous relationship to the prior iteration. Thus in one case he “would have no objection to taking [a] case” even where “this appeal presents a completely different question than was presented in the case we decided” and “in the interest of judicial economy, our panel might save only a few minutes and our new clerks could be as innocent as those of any other panel.” He would take the case because

¹⁶⁸ Memorandum from ATG to panel (May 16, 2000) re: *United States v. Almador-Galvan*, 110 F.3d 70 (9th Cir. 1997) (on return of case after remand) (unpublished table decision) (on file with OHS).

¹⁶⁹ Memorandum from ATG to panel (July 25, 1994) re: *Lincoln Sav. & Loan Sec. Litig. v. Keating (In re Am. Cont’l Corp.)*, 49 F.3d 541 (9th Cir. 1995) (on file with OHS).

¹⁷⁰ Memorandum from ATG to panel (Mar. 15, 1993) re: *Zanzucchi v. United States*, 990 F.2d 1266 (9th Cir. 1993) (unpublished table decision) (on file with OHS).

¹⁷¹ Memorandum from ATG to panel, re: *Forces Action Project v. California*, 57 Fed. App’x 322 (9th Cir. 2003), *superceded on denial of rehearing*, 61 Fed. App’x 472 (9th Cir. 2003) (on file with OHS).

¹⁷² Memorandum from 17.2.3 to panel (Apr. 24, 1992) re: *Harper House v. Thomas Nelson*, 91-55426/91-55550/91-55774, 5 F.3d 536 (9th Cir. 1993) (unpublished table decision) (on file with OHS).

¹⁷³ Memorandum from ATG to panel (Oct. 14, 2008) re: *Soldano v. United States*, 318 Fed. App’x 599 (9th Cir. 2009) (on file with OHS).

“it looks like these plaintiffs are persistent, and that the next decision of the court will probably provoke further appeals, and it may be a more tidy package to deal with if only one panel handles the case.” He argued further that “[r]emands frequently produce unanticipated consequences, and this one looks pregnant with them.”¹⁷⁴ Yet he could draw the line on taking comeback cases, declining to do so if the new appeal had “a lot of technical issues about jurisdiction and standing that would require new research, and any randomly drawn panel could deal with the case effectively while minimizing the use of judicial resources.”¹⁷⁵

D. Court Administration

Judge Goodwin was no more a fan of bureaucracy in the nation’s judicial branch than he was of government bureaucracy generally. One of the reasons that as Chief Judge¹⁷⁶ he did not move from his chambers in Pasadena to circuit headquarters in San Francisco was that he wished to avoid the proximity to central circuit staff it would entail. His relatively short tenure as Chief Judge can also be partly explained by his dislike for administrative matters, to which may be added his dislike for meetings, about which he observed, “I have no objection to attending meetings to discuss whatever the conveners want to discuss, but the time can probably be more usefully expended on getting some old cases decided.”¹⁷⁷

Judge Goodwin’s objection to judicial bureaucracy went quite deep, to a belief in an independent judiciary, which he believed central court administration threatened. As he wrote to all Ninth Circuit Court of Appeals judges, “The care and maintenance of an independent federal judiciary, which frequently has to stand between the people and their government to remind the government that it is of, by and for, the people, is too important to let it be taken over by the secretariat,”¹⁷⁸ as he called that central court bureaucracy.

¹⁷⁴ *Id.*

¹⁷⁵ Memorandum from ATG to panel, re: *Forces Action Project*, 57 Fed. App’x 322 (on file with OHS).

¹⁷⁶ For an examination of the work of a circuit chief judge, drawing on Judge Goodwin’s experience, see Stephen L. Wasby, *The Work of a Circuit’s Chief Judge*, 24 JUST. SYS. J. 63 (2003).

¹⁷⁷ Letter from ATG to Chief Judge J. Clifford Wallace (July 22, 1993) (on file with author).

¹⁷⁸ Memorandum from ATG to Associates (Aug. 31, 2001) (on file with OHS).

Judge Goodwin's views about court bureaucracy can best be seen in his never-positive comments about the Administrative Office of the United States Courts (AO). He was firmly committed to decentralized judicial administration and opposed to any increase in the power of nationally-centralized court administration. He worked hard to defeat a proposed amendment to the statutes that would have given the Judicial Conference of the United States (JCUS), the federal judiciary's policy-making body, the authority to engage in rule-making directed at the courts, and toward that end he actively communicated with other members of the JCUS committee on which he served.

Judge Goodwin has pointed to Chief Justice Warren Burger, the first Chief Justice since William Howard Taft to be interested in court administration, as having begun the centralization Goodwin disliked: "I thought Warren Burger was too eager to centralize court administration in Washington, which he succeeded in doing." The power of that centralized court bureaucracy was strengthened when Burger's successor, Chief Justice Rehnquist "was too detached and delegated much too much to the AO staff, mostly JAG Colonels, hired by Burger, who expanded the AO phone book from one sheet of paper under Earl Warren to 67 pages with attached units" ¹⁷⁹ By contrast, "Earl Warren truly believed that the circuit conferences [should be "councils"] were perfectly able to handle most of their administration. Things were better then." ¹⁸⁰ Warren, says Goodwin, wanted the AO "to assist the courts in supplies and services," but it had "become a management bureaucracy with its own agenda." ¹⁸¹

What made matters worse from Judge Goodwin's perspective was that the "secretariat," as he called the central court bureaucracy, was in charge, not the judges who should have been. There were, he said, two JCUS committees "supposed to provide judicial supervision of the AO," but those committees "have been turned upside down by the secretariat which dictates their agenda, drafts rough drafts of policy statements, and then gets their votes in support of the bureaucratic agenda," so that the "'do nothing' committees [were] managed entirely by the secretariat." ¹⁸² Adding to Goodwin's distaste for a central judicial bureaucracy were specific actions to which he objected—what he called in one instance "a busybody project by a

¹⁷⁹ E-mail from ATG to SLW (Jan. 22, 2001) 4:44PM EST (on file with author).

¹⁸⁰ *Id.*

¹⁸¹ Memorandum from ATG to Associates (Aug. 31, 2001) (on file with author).

¹⁸² E-mail from ATG to SLW (Sept. 12, 2001) 10:16 EDT (on file with author).

few misguided bureaucrats”—such as the wish of the AO computer staff “to archive all our unpublished stuff with authors noted (probably for statistical purposes) so the AO could hire more staff to keep track of productivity of judges.”¹⁸³ (When legislators made inquiries of a similar sort, he objected just as much.¹⁸⁴)

III TRIAL JUDGING

The focus now moves to Judge Goodwin’s views on trial judging, with attention both to his view of the relation between judge and jury and his deference to trial judges. Judge Goodwin had enjoyed being a trial judge at both the state (1955-1959) and federal levels (1969-1971). One could see this when, shortly after he joined the Ninth Circuit, a district judge sitting with a Ninth Circuit panel mistakenly referred to him as a district judge: “I am still proud to be addressed as a district judge, and, as a matter of fact, my assignment to sit as a district judge does not expire until the first of June.”¹⁸⁵ Judge Goodwin certainly knew of workload differences between the trial and appellate benches. While sitting by designation with the Ninth Circuit while a U.S. district judge, he noted, “I have been extremely busy with a trial docket. The three of us closed 84 cases last month and 83 the month before, with one judge in San Diego a good share of the time, so we haven’t been spending our time in riotous living.”¹⁸⁶ More importantly, being a trial judge made one humble: “Now that I am trying cases most of the time instead of writing opinions, I am finding out once again how easy it is for a trial judge to commit error.”¹⁸⁷

Judge Goodwin was also clear on the difference between trial judges’ work and appellate judges’ reviewing function, seen in a conference memo reporting that judges on a panel “agreed that had

¹⁸³ E-mail from ATG to SLW (Apr. 6, 2000) 2:35PM EDT (on file with author).

¹⁸⁴ As in this comment: “Senator Grassley will soon have a staff bird dog counting up how many unpublished dispos were probably written by law students, and will tell us to quit asking for more judges, and just take on more externs.” E-mail from ATG to SLW (Apr. 6, 2000) 2:35PM EDT (on file with author).

¹⁸⁵ Memorandum from ATG to panel, P.S. to District Judge Charles Carr (C.D. Cal.), Mar. 14, 1972, re: *Lanier v. United States*, 459 F.2d 61 (9th Cir. 1972) (per curiam) (on file with OHS).

¹⁸⁶ Memorandum from ATG to Fred Hamley (Apr. 7, 1970) re: *Carnation Co. v. NLRB*, 429 F.2d 1130 (9th Cir. 1970) (on file with OHS).

¹⁸⁷ Memorandum from ATG to Fred Hamley (Mar. 4, 1970) re: *Carnation Co.*, 429 F.2d 1130 (on file with OHS).

one of us been the trial court judge, we probably would have held that the interrogation was custodial, but on our standard of review we had to affirm.”¹⁸⁸ It could also be seen in his criticism of colleagues for finding facts: “It is self-evident . . . that the majority is weighing the evidence, a task ordinarily left to the trier of fact. The inferences to be drawn from such evidence as . . . should be grist for the fact-finding mill.”¹⁸⁹

A. Judge and Jury

Judge Goodwin generally deferred to fact-finders, whether judge or jury. One question for trial judges is what to let the jury decide, and some judges are more deferential to, or less likely to interfere with, jury verdicts. Goodwin’s support for jury decision-making could be seen in a case he thought should go back for the jury to determine whether the behavior of a railroad engineer was “wanton” in not slowing much with children on a trestle. The conference memo in the case said, “Judge Goodwin is influenced on this case by his view from practice and judging on the role of summary judgment and the type of question that should go a jury.”¹⁹⁰ Indeed, Goodwin did disagree with his fellow panel members and concurred separately to lay out his views more extensively. The court, he said, “faces the ageless question whether the application of an uncertain standard is, on the facts of a particular case, work for the court or work for the jury,” and he continued, “When words like ‘reasonable’ and ‘unreasonable’ appear in a standard of conduct, intuition suggests that juries are better fitted than are judges to make the choice, because reasonableness is based largely on accumulated human experience.”¹⁹¹

Yet there could be situations in which, as a trial judge, he was unsure about whether to let a jury have a matter, even if subject to his latter correction. In a major antitrust case he tried as a district judge, he accepted certain testimony subject to its later exclusion even if that meant the jury’s verdict would have to be undone: “I have a good

¹⁸⁸ Conference memorandum from Mary Schroeder to panel (Jan. 31, 1994) *Tagala v. Hames*, 19 F.3d 29 (9th Cir. 1994) (unpublished table decision) (on file with OHS).

¹⁸⁹ *Tchir v. Unified Western Grocers*, 135 Fed. App’x 39, 42 (9th Cir. 2005) (Goodwin, J., dissenting).

¹⁹⁰ Conference memorandum from Ronald Gould to panel (Feb. 22, 2005) re: *Marturello v. Nat’l R.R. Passenger Corp.[Amtrak]*, 127 Fed. App’x 328 (9th Cir. 2005) (on file with OHS).

¹⁹¹ *Marturello*, 127 Fed. App’x at 335 (Goodwin, J., specially concurring).

notion to just let this come in and let the jury fool around with it and then set aside their verdict if they find that there was fraudulent concealment, because it just seems to me the evidence is so contradictory on that point.”¹⁹² Also in that case, he “about decided to let the jury have the question and then worry about it afterwards, see what they do with it,” explaining that “it’s a type of thing that if it were just an ordinary old tort case, I would say it was a jury question and let the jury hammer it out.”¹⁹³

Stating deference to both jury and judge, Judge Goodwin supported affirmance of a judgment “solely for the reason that I was brought up in a jurisdiction which gives powerful presumptions to jury verdicts and treats judicial findings of fact as the equivalent of jury verdicts.”¹⁹⁴ He had earlier stated he felt “extremely reluctant to reverse a trier of fact on a fact question when the record contains some evidence, even though the evidence is slim, in support of the ultimate finding of fact.”¹⁹⁵ He also stated that on damages, “again, I am inclined to resolve all reasonable doubts in favor of the trier of fact.”¹⁹⁶ And he said all of this despite his view that had he been the trial judge, he might have decided differently. He noted how thin he found the plaintiff’s case (“about as skinny as I have ever seen survive a nonsuit”) and said “if I had been the trial judge I would have found that the plaintiff did not carry the burden of proof” on proximate cause.¹⁹⁷

When the trial judge was the finder of fact, Judge Goodwin similarly expressed his unwillingness or at least hesitancy to overturn factual findings. Thus in one instance he concurred as to a district judge’s finding on malpractice despite being “dubious” about that finding.¹⁹⁸ In a case involving a claim of discharge for disability relating to drug rehabilitation, he agreed with his colleagues “that there is a lot of suspicious conduct pointing to pretext,”¹⁹⁹ but “the

¹⁹² Mt. Hood Stages v. Greyhound, Civ. 68-374 (D. Or.), Apr. 24, 1973, Transcript, p. 5959.

¹⁹³ *Id.* at 5969, 5971.

¹⁹⁴ Memorandum from ATG to panel (Oct. 25 1973) *Sparkman v. United States*, 77-3684/72-2754 (9th Cir. 1973), no citation (on file with OHS).

¹⁹⁵ Memorandum from ATG to panel (Oct. 13, 1973) re: *Sparkman* (on file with OHS).

¹⁹⁶ Memorandum from ATG to panel (Oct. 25, 1973) re: *Sparkman* (on file with OHS).

¹⁹⁷ *Id.*

¹⁹⁸ Memorandum from ATG to panel, re: *Mueller v. United States*, 813 F.2d 408 (9th Cir. 1987) (unpublished table decision) (on file with OHS).

¹⁹⁹ Memorandum from ATG to panel (Jan. 25, 1996) *Keller v. Fresno City College*, 78 F.3d 593 (9th Cir. 1996) (unpublished table decision) (on file with OHS).

bottom line on a fact question is whether we say the trial judge's finding of no pretext is clearly erroneous."²⁰⁰

Judge Goodwin's deference to trial judges was not only because they were finders of fact but because they were fully responsible for trial court proceedings. He started with a presumption that those trial judges whose work he was reviewing had known what they were doing. During his sitting in the Second Circuit, he wrote that, unless the district judge "needs a formal exercise for training purposes," the judge's language should not be stretched "to say he did not understand that he had the authority to depart downward from the guidelines." Instead, it seemed to Judge Goodwin "much more likely that an experienced trial judge knew exactly what he could do," and thus he "would not place too much emphasis on the words in which the judge expressed his reasons in order to create an ambiguity and a need for another sentencing hearing."²⁰¹ Further support for a district judge's good work could be seen in the comment, "The proposed opinion fails to do justice to the district court's explanation."²⁰²

Judge Goodwin was particularly likely to believe a district judge had acted properly when he knew that judge. Thus, he was willing to accept that Judge Robert Jones (D.Or.) had used the proper approach although he had not specifically said he had, as a conference memo reported: "Though Judge Jones may not have said he applied the modified categorical approach, he is experienced and knows the law so well that Judge Goodwin was confident that's what he did."²⁰³ Dealing with a case appealed from then District Judge Edward Leavy, later to be his long-time Ninth Circuit colleague, Goodwin said, with respect to the question of the control a corporation had, "Judge Leavy was a state trial judge for some 24 years before he joined us and I would defer to his characterization."²⁰⁴ (In a case involving another Judge Leavy [sic], Judge Goodwin remarked, "I was impressed with

²⁰⁰ Memorandum from ATG to panel (Dec. 26, 1995) re: *Keller*, 78 F.3d 593 (on file with OHS).

²⁰¹ Memorandum from ATG to panel, re: *United States v. Chase*, 14 F.3d 591 (2nd Cir. 1993) (unpublished table decision) (on file with OHS). The judge was Judge Frank Billings (D. Vt.).

²⁰² Memorandum from ATG to panel (Aug. 12, 1992) re: *Fogel v. United States*, 985 F.2d 571 (9th Cir. 1982) (unpublished table decision) (on file with OHS).

²⁰³ Conference memorandum from Richard Clifton to panel (May 5, 2005) re: *United States v. Swift*, 138 Fed. App'x 985 (9th Cir. 2005) (on file with OHS), *superseded by* 145 Fed. App'x 895 (9th Cir. 2005).

²⁰⁴ Memorandum from ATG to panel (Apr. 24 1987) *Diamond Fruit Growers Inc. v. Lavalley Indus. Plastics, Inc.*, 817 F.2d 758 (9th Cir. 1987) (unpublished table decision) (on file with OHS).

the careful reasoning of the magistrate which was adopted by District Judge Leavy [sic: Levi], a very careful and capable district judge.”²⁰⁵)

The deference to trial judges included giving them flexibility and allowing some errors without making them out to be of constitutional dimension. Faced with a situation on federal habeas where a state judge “misspeaks himself in dealing with less included crimes,” Judge Goodwin said he didn’t see how that “amounts to constitutional error.”²⁰⁶ He also was willing to let pass criticism of a district judge raised by a law clerk. The clerk had questioned whether the district judge ever opened the seal on sealed documents in a case during the judge’s *in camera* inspection of them but said he “did not know the propriety of accusing the judge of not having read what she says she based her decision on.”²⁰⁷ (The panel’s unpublished memorandum said it was up to the district judge as to how to review records.) Yet Judge Goodwin was not always gentle to erring district judges. For example, he disagreed with a colleague’s proposed disposition for “attempts to salvage specific findings and conclusions of the district court that, in my opinion, are not deserving of the effort.”²⁰⁸

Judge Goodwin’s own trial court service may help explain the deference he gave trial judges, deference which seemed to go well beyond an application of the deferential standards of review like “abuse of discretion” and “clearly erroneous” he applied as an appellate judge. He gave particular deference to trial judges’ sentencing, where his own experience in the pre-Sentencing Guidelines era affected him, as one can see in his observation that “under discretionary sentencing the sentencing court can choose any sentence within the statutory maximum (I operated as a district judge under that happy regime 35 years ago).”²⁰⁹ In a different, stronger statement, writing that “[s]entencing is a matter for the trial court,” he went on to say, “Exactly what conditions are imposed on a particular

²⁰⁵ Memorandum from ATG to panel (Jan. 23, 2004) re: Gavaldon v. Cambra, 89 Fed. App’x 628 (9th Cir. 2004) (on file with OHS). The reference is to then Judge David Levi (E.D. Cal.), who became Dean of Duke Law School.

²⁰⁶ Memorandum from ATG to panel (Apr. 30, 1981) re: Gaines v. Cupp, 652 F.2d 62 (9th Cir. 1981) (unpublished table decision) (on file with OHS).

²⁰⁷ Memorandum from Peter Kirsch, law clerk, to ATG (Mar. 15, 1985) re: Gamez v. U.S. Dep’t of Justice, 762 F.2d 1017 (9th Cir. 1985) (unpublished table decision) (on file with OHS). The law clerk left this matter out of benchmemo.

²⁰⁸ Memorandum from ATG to panel (Feb. 17, 1992) re: United States v. Benally, 960 F.2d 153 (9th Cir. 1992) (unpublished table decision) (on file with OHS).

²⁰⁹ Memorandum from ATG to panel (Nov. 16, 2005) re: United States v. Davis, 154 Fed. App’x 635 (9th Cir. 2005) (on file at OHS).

probationer should be left to the sentencing court, which has at its disposal all of the evidence, its own impression of the defendant, and, under settled circuit law, wide discretion to choose conditions for supervised release.” He closed by remarking, “We have a review function, but it remains deferential.”²¹⁰ Related to his resolving doubts in favor of the finder-of-fact was whether he might have handled sentences differently were he the trial judge, as when he said he did “not believe that I should let my ideas about sentencing intrude into the rather narrow function of appellate review.”²¹¹

Related to the leeway to trial judges on sentencing was a somewhat plaintive statement, made while sitting in the Seventh Circuit, about what had happened to trial judging: “The subjective nature of ‘acceptance of responsibility’ in light of all the facts, and the behavior of the convicted person at the hearing, make the award or the denial of the reduction one of remaining area of sentencing in which the judge can exercise a judicial function”; in the particular case, he “preferr[ed] to leave it to the sentencing judge to apply common sense to the testimony they hear and the defendants they observe.”²¹² Likewise, in sustaining another sentence, he said the court “declin[e]d to speculate from the single fact of a disparate sentence that the able and experienced trial judge, who had before him facts not before us, pronounced an unconstitutional sentence.”²¹³ He also “would not reach out to reverse a district judge who did not know about a [Supreme Court] case and thought he had no choice” but to do what he had done (in this case, about equitable tolling).²¹⁴ Judge Goodwin could take a similar approach to trial judges’ treatment of attorneys’ fees. As he observed in advocating for a position that would provide flexibility, [W]e prefer to give the district judges as much discretionary freedom as possible in order to deal with the wide variety of factual situations” they faced.²¹⁵

Not only did Judge Goodwin leave trial judges’ work undisturbed even when he might disagree with it, but he also sought to facilitate

²¹⁰ Memorandum from ATG to panel (Jan. 8, 2004) re: *United States v. Williams*, 356 F.3d 1045 (9th Cir. 2004) (on file with OHS).

²¹¹ Memorandum from ATG to panel (Oct. 25, 1973) *Sparkman v. United States*, 72-3689/72-2754 (9th Cir. 1973) (on file with OHS).

²¹² *United States v. Dvorak*, 41 F.3d 1215, 1217 (7th Cir. 1994).

²¹³ *Nolan v. United States*, 688 F.2d 847 (9th Cir. 1982) (unpublished table decision).

²¹⁴ Memorandum from ATG to panel (Dec. 3, 1992) re: *Allen v. Bunnell*, 983 F.2d 1075 (9th Cir. 1993) (unpublished table decision) (on file with OHS).

²¹⁵ Conference memo from ATG to panel (Dec. 12, 1986) *Maldonado v. Lehrman*, 811 F.2d 1341 (9th Cir. 1987) (on file with OHS).

that work. While he was sitting on the Ninth Circuit by designation while still himself a trial judge, he suggested that an opinion include some information that would assist the district judges. “I would prefer to keep most of the factual background in the opinion, as all too often District Judges are provided only conclusory opinions furnishing no clues as to their operative facts,” as the facts in the case before him “explain a good deal that is not generally known to lawyer and judges about the working of the Army Research and National Guard systems.” Furthermore, in the proposed opinion, “The discussion of the failure to exhaust administrative remedies is good because it will give the trial judges and the U.S. attorneys something to look for in similar cases.”²¹⁶ He would give guidance particularly where the trial judge had committed error: “Our remand should give some guidance to Judge Snyder with respect to the application of the California insurance statutes.”²¹⁷

As the judge was not always “sweetness and light” in granting deference, such guidance might come as part of reversing the trial judge. Judge Goodwin may have been “troubled by reversing a trial judge”²¹⁸ even while doing so in the instant case, but he could issue warnings and criticism. Thus, speaking of waking up trial judges, he wrote in one Second Circuit case, “[A] published opinion reversing for abuse of discretion ought to have a salutary effect on trial judges everywhere.”²¹⁹ And he could require district judges to redo actions to get them right, part of his belief that they should clean up their own errors. When a judge had not attached his findings to the pre-sentence report, Judge Goodwin would “send back to attach,”²²⁰ and the resulting unpublished memorandum affirmed defendant’s sentence but remanded for the district judge to correct his error. In another case where there were differences between defendants in the restitution order, Judge Goodwin thought the district judge should explain his actions. He agreed with a colleague “that while the disparity may be

²¹⁶ Memorandum from ATG to panel (Nov. 17, 1970) re: *Johnson v. Laird*, 432 F.2d 77 (9th Cir. 1970), *aff’d* 435 F.2d 493 (9th Cir. 1970) (on file with OHS).

²¹⁷ Conference memorandum from Diarmuid O’Scannlain, judge, to panel (Feb. 7, 2008) *Metro. Bus. Mgmt. v. Allstate Ins. Co.*, 282 Fed. App’x 544 (9th Cir. 2008) (on file with OHS).

²¹⁸ Memorandum from ATG to panel, re: *United States v. Jackson*, 798 F.2d 473 (9th Cir. 1986) (unpublished table decision) (on file with OHS).

²¹⁹ Memorandum from ATG to panel (Jan. 19, 1994) re: *United States v. Arboleda*, 20 F.3d 58 (2d Cir. 1994) (on file with OHS).

²²⁰ ATG note in margin of law clerk memorandum (Oct. 28, 1987) re: *United States v. Sterling*, 843 F.2d 502 (9th Cir. 1988) (unpublished table decision) (on file with OHS).

ultimately justifiable, it does not hurt to remind the district court of the need for a credible explanation.”²²¹ Likewise, he would remand for a statement of sentencing reasons as a “cost of educating judges.”²²² In arguing against sending a remand of a habeas case to a different judge for reconsideration of equitable tolling, he said the remand “would be a lesson to Judge Ware, to not so quickly dismiss a habeas petition as time barred when it was arguably eligible for equitable tolling. I would not burden an innocent judge with cleaning up this procedural mess.”²²³

However, Judge Goodwin could believe the remand exercise pointless. In a case with a double jeopardy claim and a possible remand for resentencing, he would “go along with reversal . . . although he feels it may be an empty formality in this case” and “will go along with the remand but does not feel that the resulting sentence will be any different.”²²⁴ He wrote extensively in another case about the futility of remanding for resentencing despite the district judge’s having committed some error; he would not remand in a case that “does not warrant the waste of judicial resources involved in a remand for a formal exercise in sentencing a defendant who is likely to receive the exact sentence appealed from, and which was well within the discretionary range of a sentencing judge no matter which guideline was followed.”²²⁵

It was not only some sentencing remands Judge Goodwin considered futile. He wrote in a civil case that “[a] remand would be formally sound, but, in my judgment, pragmatically not a fruitful expedition.”²²⁶ Indeed, in the panel’s unpublished disposition, he

²²¹ Memorandum from ATG to panel (Feb. 28, 2005) re: *United States v. Roberts*, 128 Fed. App’x 26 (9th Cir. 2005) (on file with OHS).

²²² ATG, comment on face of benchmemo from another chambers, re: *United States v. Whitmarsh*, 899 F.2d 1226 (9th Cir. 1990) (unpublished table decision) (on file with OHS).

²²³ Memorandum from ATG to panel (Jan. 29, 2004) re: *Von Haney v. Cambra*, 89 Fed. App’x 640 (9th Cir. 2004) (on file with OHS). He added that the trial judge’s “handling of the case was not unlike thousands of other cases where a trial judge makes a mistake that may or may not indicate some displeasure with the defendant or with his counsel, but unless there is real bias, shown in the record, we don’t reassign the case. That is the chief district judge’s job.”

²²⁴ Conference memorandum from Diarmuid O’Scannlain to panel (June 5, 2009) re: *United States v. Hector*, 577 F.3d 1099 (9th Cir. 2009) (on file with OHS).

²²⁵ Memorandum from ATG to panel (Dec. 18, 2008) re: *United States v. Lee*, 308 Fed. App’x 81 (9th Cir. 2009).

²²⁶ Memorandum from ATG to panel (June 24, 1974) re: *GMF Acceptance v. Harley-Davidson Motor Co.*, 74-1144 (9th Cir. July 3, 1974) no citation (on file with OHS).

wrote concerning the possibility that the district court, if it considers the matter further, might come out at the same place: “To march up the hill and down again to pay proper respect to form does not, in this case, appear to be a profitable deployment of judicial time.”²²⁷ And he might also avoid a remand in other types of cases when he did not think much of the district judge’s competence, as when he observed that “it would be an enormous waste of time to send the case back for Judge Carroll to further address the ‘other insurance’ question. He would probably get it wrong anyway.”²²⁸

If Judge Goodwin was willing to criticize his district court confreres, his deference to them even when he was reversing them could be seen in his inclination to let them down gently. Thus he wrote concerning overturning a restitution order as not tied to the “offense of conviction,” “On the reversal, I tried to let the trial judge down as gracefully as possible.”²²⁹ This could also be seen in his approach to reversing a trial judge he knew who had not held an evidentiary hearing on defendant’s claim of ineffective assistance of counsel: “I think we might be more kind to the trial judge who has a well-established reputation as being very careful and very fair in his Rule 11 guilty plea proceedings.”²³⁰ When a colleague could not find a softer way to say what needed to be said, Judge Goodwin responded: “I guess my solicitude for the feelings of the trial judge is based on a very old friendship going back to law school. . . . I, too, am unable to soften the blow.”²³¹

A case illustrating Judge Goodwin’s willingness to provide an easier landing came when a district judge misunderstood a California Supreme Court ruling on attachment. Rather than ordering the judge to act, Goodwin’s proposed opinion allowed the judge to set up the case to get an issue properly established for appeal; it did not “tell the district judge how he should decide the state question under the

²²⁷ *GMF Acceptance*, no citation.

²²⁸ Memorandum from ATG to panel (Dec. 19, 1991) re: *Skandia Am. Reinsurance Corp. v. St. Paul Fire & Marine Co.*, 951 F.2d 362 (9th Cir. 1991) (unpublished table decision) (on file with OHS).

²²⁹ Memorandum from ATG to panel (Feb. 4, 2000) re: *United States v. Romines*, 204 F.3d 1067 (11th Cir. 2000) (on file with OHS).

²³⁰ Memorandum from ATG to panel (Aug. 20, 1999) re *United States v. Picard*, 99 F.3d 462 (9th Cir. 1999) (unpublished table decision), *withdrawn and replaced by*, 202 F.3d 280 (9th Cir. 1999) (on file with OHS).

²³¹ Memorandum from ATG to panel (Oct. 21, 1991) re: *Picard*, 99 F.3d 464. The judge was Malcolm Marsh (D. Or.), who had called Judge Tashima after the initial memorandum disposition.

conformity rule. It is merely a polite way of saying that we don't want to mandamus the district judge when it appears that local law has now been changed so that he has an opportunity to dispose of the case in his own way."²³²

Judge Goodwin was also willing to provide a district judge an explanation of why the court of appeals was reversing, even if it was in a non-precedential ruling. He said the length of one such disposition was necessary "because we are reversing a district judge . . . it is necessary to explain to the limited readership of these memos why we are reversing." Yet he also had institutional reasons for what he had written: absent the explanation in the disposition, "we would be inviting a substantial petition for rehearing."²³³ Likewise, he might think that while a district judge deserved criticism, it wasn't worth the effort, as when he wrote that "[s]colding the district judge in an unpublished disposition does not commend itself to me as a useful deployment of my time," in part a result of his concerns about "the flotsam and jetsam of our 'unpublished' catalog."²³⁴ Indeed, a few years earlier he had spoken against using a published opinion to criticize a district judge: "I see no reason to criticize an able district judge in a published opinion, particularly since a district judge's alternative holdings can often simplify our job on appeal."²³⁵

When he sat in the Eleventh Circuit, one of his law clerks raised the question of publishing criticism of a judge as a public rebuke but noted that the two Eleventh Circuit judges on the panel had recommended using an unpublished disposition, and the panel released such a disposition. Nonetheless, Judge Goodwin's language was critical when he said the judges were:

troubled by the appearance of treating the pending litigation as a war game between teams of lawyers with one client absorbing enormous losses and the other receiving a substantially new building free of charge. . . . The punishment of the out of state

²³² Memorandum from ATG to panel (Apr. 20, 1972,) re: *Mohasco Indus. v. Lydick*, 459 F.2d 959 (9th Cir. 1972) (on file with OHS).

²³³ Memorandum from ATG to panel, re: *Skandea Am. Reinsurance Corp. v. St. Paul Fire & Marine Co.*, 951 F.2d 362 (9th Cir. 1991) (unpublished table decision) (on file with OHS).

²³⁴ Memorandum from ATG to panel (Apr. 19, 2006) re: *United States v. Sappa*, 178 Fed. App'x 724 (9th Cir. 2006) (on file with OHS). His memorandum disposition did not discuss probable cause, to which he had referred, but affirmed the district court on other bases.

²³⁵ Memorandum from ATG to panel (May 11, 1999) re: *DeMello v. Ney*, 185 F.3d 866 (9th Cir. 1999) (unpublished table decision) (on file with OHS).

contractor for its incomplete research into Alabama's law seems on its face not to fit that particular crime.

By the exercise of reasonable forbearance on the part of the court, the contracting parties could have been allowed to resolve their controversy on the merits

The retention of this case by the district court lead [sic] to undesirable appearances of 'home town umpiring,' with the district court bestowing a substantial economic windfall on the 'home team'

. . . .

The use of the Alabama protective law here as a sword instead of a shield created at least an appearance of unfairness which the district court could easily have avoided.²³⁶

Judge Goodwin faced a particular problem when he had to deal with courtroom statements by his former District of Oregon colleague Judge Gus Solomon, known for being harsh. Goodwin's conference notes said, "Gus wasn't too smooth, but he was right."²³⁷ A law clerk, however, wrote, "On the cold record that action appears imperious," with the record showing that Judge Solomon was "peeved" and at sentencing had focused on the defendant's use of the right to trial, which the law clerk believed "manifests prejudice toward the defendant."²³⁸ Judge Goodwin referred to a revised proposed disposition as "this obviously vulnerable exercise in cosmetic repair work,"²³⁹ in which he modified a sentence in response to a comment by a panel colleague.²⁴⁰ The end result read as follows:

While the trial judge could have expressed his displeasure with the defendant more carefully and thus would have avoided the appearance of bias, we believe the judge's oral statement of his belief that the defendant had given false testimony was intended to be an admonition to this and other defendants upon the importance of their oath when they elect to testify, rather than as an indication of animus toward the person he was about to sentence.²⁴¹

²³⁶ *Akers Grp. Int'l v. Bank of Brewton*, 66 F.3d 341 (11th Cir. 1995) (unpublished table decision).

²³⁷ ATG, conference notes, *United States v. Solomon-Olivarria*, 539 F.2d 719 (9th Cir. 1976) (unpublished table decision) (on file with OHS).

²³⁸ Memorandum from law clerk to ATG (June 14, 1976) re: *Solomon-Olivarria*, 539 F.2d 719 (on file with OHS).

²³⁹ Memorandum from ATG to panel (June 16, 1976) re: *Solomon-Olivarria*, 539 F.2d 719 (on file with OHS).

²⁴⁰ Memorandum from Walter Ely to panel (June 24, 1976) re: *Solomon-Olivarria*, 539 F.2d 719 (on file with OHS).

²⁴¹ *United States v. Solomon-Olivarria*, 539 F.2d 719 (9th Cir. 1976) (unpublished table decision).

B. Assisting Pro Se Litigants?

A matter that straddles trial and appellate judging is how to deal with pro se litigants, especially whether courts should provide them with assistance when it is clear that, as often happens, they are out of their depth. Judge Goodwin was inclined to put the matter as whether courts should engage in social work for pro se litigants.

That the judge was willing to countenance some help to pro se litigants was evident in a memo to colleagues in which he noted a Ninth Circuit case that agreed with other circuits “that say it is discretionary to engage in social work where a pro se has floundered out of bounds and needs help getting back in court,” such as by suggesting conversion of a habeas claim to a Sec. 1983 action.²⁴² In a further example, he tried to deal fairly with “a sincere but hopeless pro se appellant” by suggesting circulating to the whole court Judge Oliver Koelsch’s unpublished disposition explaining an appeal and the difference between district courts and appellate courts “as an example of a compassionate message to a losing ‘pro per’ litigant.”²⁴³ An example of giving a “pro per” some flexibility as to rule compliance took place when a such a plaintiff thought that by designating the record, the transcript would be part of it. Here Judge Goodwin would give the pro se litigant time to remedy the omission: “It has been our general policy to allow pro se appellants some leniency regarding failure to comply with procedural rules.”²⁴⁴

Nonetheless, Judge Goodwin wouldn’t give a pro se extra rights. As he put it at some length in a civil case in affirming the district court’s denial of relief:

A person who elects to save money or, in his opinion, to improve his chances of success by representing himself, is free to do so. The self-representer does not thereby become a super citizen. . . . [and] has the same duty to comply with statutes and rules of court and rules of common sense that would apply to someone representing him.²⁴⁵

²⁴² Memorandum from ATG to panel (Dec. 3 1992) re: Allen v. Bunnell, 983 F.2d 1075 (9th Cir. 2003) (unpublished table decision) (on file with OHS).

²⁴³ Memorandum from ATG to panel (Feb. 23, 1987) re: De La Cerda v. Chemeketa Cmty. College Dist., 813 F.2d 714 (9th Cir. 1987) (unpublished table decision) (on file with OHS). Judge Koelsch agreed if he could remain anonymous.

²⁴⁴ Memorandum from ATG to panel (Aug. 12, 1991) re: Steppe v. Engelhardt, 959 F.2d 241 (9th Cir. 1992) (unpublished table decision) (on file with OHS).

²⁴⁵ United States *ex rel* Sinclair v. Hanover Ins. Co., 599 F.2d 1059 (9th Cir. 1979) (unpublished table decision).

Indeed, he might show a lack of sympathy for a pro se litigant who made a frivolous filing. In a statement that showed the limits of the social work judges should exercise toward such litigants, he said, “I do not see how we can say the district judge abused his discretion in sanctioning a plaintiff who repeatedly filed frivolous motions that contained knowingly false statements. I feel sorry for the appellant, but we are court of appeals and not a social service agency.”²⁴⁶ And he objected to a colleague’s actions he thought went outside the bounds of an adversary system. As he put it, “Even though Marinez is acting pro se, this is still an adversary proceeding, and we would be overstepping our bounds by accepting Judge Noonan’s suggestion” to do research and take judicial notice. Pointing out that the plaintiff could have gone to state court with a medical malpractice case, Goodwin asserted:

He prefers acting as his own lawyer, treating it as a constitutional deprivation case. He has not retained us as counsel. We have done our duty when we hold as a matter of law that there is a factual dispute that requires a trial. We have no duty to determine the facts in our court. I would consider it the unauthorized practice of law to engage in the research necessary to take judicial notice.²⁴⁷

In that vein, in another case, he wrote, “I believe this court is in a poor position to do all the social work that needs to be done in [a] case” of a litigant with mental problems.²⁴⁸ And, although realizing he might be in the minority among his colleagues, he thought that the court of appeals’ staff attorneys did too much to help uncounseled, or poorly represented, parties. He observed tartly, “I don’t think the staff attorneys have enough work to do if they spend their time thinking up reasons for our judges to write advisory opinions on possible departures that could have been made in a Guidelines sentence at the

²⁴⁶ Memorandum from ATG to panel (Apr. 19, 1991) *Bartram v. Duekmajian*, 931 F.3d 896 (9th Cir. 1991) (unpublished table decision) (on file with OHS).

²⁴⁷ Memorandum from ATG to panel (July 27, 1993) re: *Martinez v. Kunimoto*, 993 F.2d 883 (9th Cir. 1993) (unpublished table decision) (on file with OHS). In another case, he spoke to the shift of a claim to a constitutional basis, “Petitioner raised no federal constitutional question and I do not believe it is our duty to try to create one for him.” Memorandum from ATG to panel (June 7, 1993) re: *Fitch v. Borg*, 996 F.2d 1224 (9th Cir. 1993) (unpublished table decision) (on file with OHS).

²⁴⁸ Memorandum from ATG to panel (Aug. 26, 1992) re: *Sullivan v. Conoco, Inc.*, 978 F.2d 716 (9th Cir. 1992) (unpublished table decision) (on file with OHS). Earlier, he noted that if this plaintiff was mentally disturbed, “she should be in therapy somewhere and not taking up the time of a busy trial court trying to get some kind of a gameshow award for her mental suffering.” *Id.*

bottom of a guideline,”²⁴⁹ and he wrote to the Director of Staff attorneys, “I do not think the staff attorneys should do as much pro bono work as they do.”²⁵⁰ This, however, may have reflected court institutional concerns, as he had recently concluded his service as the circuit’s chief judge, which would have given him greater contact with the Office of Staff Attorneys.

For all his resistance to “social work,” Judge Goodwin was also supportive of the court’s program of assisting pro se litigants in obtaining pro bono counsel. In a case in which a prisoner—filing pro se and 100 miles away—had alleged aggravation of a medical condition, the district court had denied the prisoner’s request for appointment of counsel, and Judge Goodwin thought perhaps not sufficient the efforts by the district court’s law clerk in calling five lawyers, because “[a] factually complex medical case is even more disturbing to a layperson than a legally complex one.” Faced with a pro se litigant, a district judge could help with legal issues *if* the pro se told his story, but if “the litigant cannot even gather the facts necessary to tell his story, the district court simply cannot know whether or not he has a legally cognizable claim, thus interfering with “the courts’ truth-seeking function more profoundly than is appropriate, more profoundly than we should tolerate.”²⁵¹ In his proposed opinion, Judge Goodwin not only spoke of the general rule of construing liberally claims by pro se litigants but also said the claims should be “evaluated in light of the complexity of her claims and her ability to litigate them.” He concluded that “courts should be particularly tolerant of weakness in a pro se litigant’s case which may be attributed to the very problem supporting the litigant’s request for a lawyer.”²⁵²

While Judge Goodwin could be solicitous, he was not so with respect to some other prisoner complaints, often brought pro se. He was particularly unhappy when someone “went on the lam,” saying to his colleagues, “I see no reason to reward this fugitive by applying to his case a newly discovered rule of law which, two and a half years later, makes erroneous an instruction that was not categorically

²⁴⁹ Memorandum from ATG to panel (Mar. 30, 1992) re: *United States v. Maldonado-Hernandez*, 962 F.2d 15 (9th Cir. 1992) (unpublished table decision) (on file with OHS).

²⁵⁰ Memorandum from ATG to Michael Clancy (Apr. 7, 1992) (on file with OHS).

²⁵¹ ATG, memorandum to panel (Aug. 29, 1994) re: *Locklin v. Scalzo*, 46 F.3d 1142 (9th Cir. 1995) (on file with OHS).

²⁵² *Locklin*, 46 F.3d 1142.

erroneous when given.”²⁵³ Thus he filed a separate opinion stating, “The defendant demonstrated the harmlessness of the error by jumping bail and remaining a fugitive until after the law was changed.”²⁵⁴ In a prisoner suit against prison officials, the judge was especially tart. After observing that prison officers probably never knew of the prisoner, much less abused him, he continued:

Since prisoners can’t be effectively sanctioned for frivolous §1983 actions, they can badger and harass public officials with a certain amount of impunity. We should not publish an opinion encouraging them to do so, however. . . . it looks to me we are being used by this prisoner for his own amusement, and I would like to get on with more important business.²⁵⁵

And he was also less than positive about a person claiming to be a lawyer who had filed a frivolous appeal. He would award attorneys fees and costs against that person “because the appeal is frivolous on its face and is brought by a person who claims to be a lawyer.”²⁵⁶ This view was consonant with his approach to sanctions for filings that were an imposition on the court. Thus in a bankruptcy case, at conference Judge Goodwin recommended sanctions for repeated and frequent filings by one side; in the one case of four consolidated cases in which the panel author didn’t provide for sanctions, Goodwin argued for and obtained them. The resulting unpublished disposition noted over forty appeals involving the bankruptcies, making an “unreasonable burden on the Rudnick bankruptcy estate and this court.”²⁵⁷

A CONCLUDING COMMENT

After such an extensive examination of Judge Alfred Goodwin’s views on judging, there is little point in concluding by summarizing what has already been said. One can, however, make a few brief

²⁵³ Memorandum from ATG to panel (Feb. 7, 1977) re: *United States v. Valle-Valdez*, 554 F.2d 911 (9th Cir. 1977) (on file with OHS).

²⁵⁴ *Valle-Valdez*, 554 F.2d at 911 (Goodwin, J., concurring in part and dissenting in part).

²⁵⁵ Memorandum from ATG to panel (June 7, 1994) re: *Housley v. United States*, which produced both an opinion, 35 F.3d 400 (9th Cir. 1994) and an unpublished disposition, 35 F.3d 571 (9th Cir. 1994) (unpublished table decision) (on file with OHS).

²⁵⁶ Memorandum from ATG to panel (Dec. 14, 1995) re: *Canatella v. City & County of San Francisco*, 74 F.3d 1245 (9th Cir. 1996) (unpublished table decision) (on file with OHS). He added that “I won’t dissent if the majority wants to be generous with this idiot,” and the panel awarded only costs.

²⁵⁷ *Allustiarte v. Rudnick (In re Rudnick)*, 62 F.3d 1425 (9th Cir. 1995) (unpublished table decision).

conclusions. Judge Goodwin has been a judge who believes in restraint yet is open to exceptions; who respects the views of other judges, both trial and appellate, and the views of officials in the other branches of both state and national government; and who is concerned about the relationship between discretion and the law in judging. Perhaps most obviously, while not a jurist, Judge Goodwin is thoughtful about what it means to be a judge, and through his language he can teach much to others.