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JUSTICE EDWARD GODFREY AND THE "PUBLIC PURPOSE" DECISION

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It was Wednesday, December 7, 1994, about noon. I had just completed my last Environmental Law class for the term and had been rewarded by the traditional round of applause from the students. With books and class notes in hand, I passed my office bent on picking up my mail in the faculty secretary's office and thinking about a lunch I had to go to. As I passed the Moot Court room, there was a thunderous round of applause. A moment later Ed Godfrey, a wry smile on his face, came out the back door of the classroom. We exchanged greetings and I said something to the effect of, "They love you." Ed said, "That was my last class. Thirty-seven years of teaching law, one year of English, one year of chemistry, that was my last class."

Thus, unheralded, do academic careers end. None of Ed's friends or colleagues were there to join in the applause. Dean Zillman was not there. I'm certain that none of the students in the course, whose applause expressed their goodwill toward Ed for a semester's work well-done, knew the full measure of what had ended that day. I was more moved than Ed was—I felt a small rush of emotion, for this was the man who had hired me almost thirty years ago. I had admired him from that day to this. I stuck out my hand and said, "Congratulations." The smile that had never left his face during this brief exchange broadened. He said, "Thank you." Without any more fanfare, in the low-key, unassuming way that had characterized everything Ed had ever done for, and within, the institution, he slipped out the back door and up the stairs to his office.

I completed my errand, rushed off to lunch, and marveled at the accomplishment and dignity that Edward S. Godfrey brought both to that moment and to a whole career in the law. Would that any of us could do half as well. It seems to me presumptuous, then, to examine the substance of this man's judicial scholarship. I will not undertake the task in depth, but instead will use just two cases to attempt to convey an insight into the man and his approach to the law.

The first, *New England Telephone & Telegraph Co. v. Public Utilities Commission*,[1] is a case that I had long forgotten (rate appeals do not generally stir the jurisprudential soul), but which was brought back to my attention only a few days before the events described

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1. 448 A.2d 272 (Me. 1982).

above. The case had found its way into the Administrative Law textbook I was using.[2] It would be discussed on the last day of the fall semester class. In the Reporter the case takes up forty-three pages and requires fifty-six headnotes to lay out all of the issues raised. In the text, however, the case occupies barely a page-and-a-half and is used to illuminate a narrower set of issues, i.e., the degree to which courts will examine the working relationship between agency decision-makers and staff, the decision-makers' duty to conduct an independent review of the record, and the presumptions that can and should operate in that context.[3]

In the Reporter and in the text, the opinion, after laying out the facts of the case, begins and ends on themes that are quintessential Ed Godfrey. First, a strong note of judicial deference to those legislatively clothed with the responsibility and authority to establish a telephone rate structure;[4] then a statement of the "presumption of regularity that we [the judicial branch] accord to the proceedings of the Commission . . . ."[5] The presumption could be overcome, but only by clear evidence to the contrary. Finally, the opinion notes that, "The record reveals no misuse [or improprieties] by the Commission . . . . [Therefore] we have no basis for finding that the Commission's rejection of NET's proposed rate design was unjust or unreasonable."[6] As to the full range of issues raised in the appeal, the Public Utility Commission's order was sustained in most respects, but vacated in certain (relatively minor) particulars.[7]

Implicit throughout the whole of the opinion is Ed Godfrey's respect for ordered government, his preference for clear lines of authority and responsibility, a firm (and very traditional) approach to presumptions and burdens of proof, a willingness to examine every detail of the case, and an overarching assumption that those who by law are given responsibilities and duties will attempt to faithfully discharge these duties and that in most instances they will succeed. Accordingly, these individuals are entitled to judicial deference, respect, and support.

In short, beyond a desire for clarity and precision and an attention to detail that he brings to every endeavor, Ed looks for and expects to find the best in people. He assumes that they will measure up to their larger selves. He is prepared to sustain efforts that meet, or come close to meeting, these expectations. In an age of growing cynicism (even nihilism), this approach may seem hopelessly optimistic or romantic, but in truth it is neither of these. Ed's approach

2. BERNARD SCHWARTZ, ADMINISTRATIVE LAW: A CASEBOOK (4th ed. 1994).
3. *Id.* at 646.
4. New England Tel. & Tel. Co. v. Pub. Util. Comm'n, 448 A.2d at 279.
5. *Id.*
6. *Id.* at 314.
7. *Id.* at 278, 315.

is practical and self-fulfilling. If we give our best and look for the best in others, we are more likely to find that these "others" produce their best. The instant case, indeed, Ed's whole life in the law, suggests that his approach works. We would do well to find the courage to order our own lives along similar lines.

The second case I would note is *Common Cause v. State*.[8] This case, noted primarily for its acceptance of an expanded view of "public purpose," raised a number of complex issues that cannot be addressed here. Given Ed's propensity for careful disposition of all points raised, suffice it to say that he addressed each argument fully and, consequently, this case also occupies considerable space in the Reporter. Interestingly, the case raises several of the same legal principles that *New England Telephone* raised. The outcome (a sustaining of City of Portland and state agency decision-making) underscores some of the characteristics of Ed's thinking already noted—presumptions that those in power will act with regularity; judicial deference; respect for those clothed with duties, responsibility, and authority.

The *Common Cause* holding raises two issues not seen in *New England Telephone* that give insight into Ed Godfrey's judicial thinking and legal perspective. The first involves "standing" questions; the second involves the respect or latitude to be accorded citizen "referendum" mechanisms. On standing, Ed's opinion begins by rejecting one line of plaintiffs' reasoning and substantive argument.[9] He does so by noting and adhering to conventional standing requirements: "The general rule is that a litigant may not assert the constitutional rights of third parties."[10] With respect to the main issues in the suit, the opinion moves on quickly to note that the states are not bound to deny standing in taxpayer suits based on federal case law, and that "the great majority of states permit their taxpayers to sue to enjoin illegal expenditures by state officials."[11] The opinion then examines the reasons, "none of them entirely satisfactory,"[12] for the difference in treatment of taxpayer suits at federal as opposed to state levels. Ed then analyzes some details of standing law, such as whether the injury was direct or indirect, and whether the remedy sought was preventive or remedial.[13] Not finding a sufficient basis to deny plaintiffs standing on any of these grounds, the opinion confers standing on grounds that are both broad and ringing:

8. 455 A.2d 1 (Me. 1983).

9. *Id.* at 6-7.

10. *Id.* at 6.

11. *Id.* at 8.

12. *Id.* at 9.

13. *Id.* at 10-11.

> [I]t is a central function of American courts to protect and relieve the individual from injurious unconstitutional conduct by government officials. Where taxpayers offer to show that such conduct has occurred, that it threatens to injure them by increasing their taxes, and that it cannot be stopped except by judicial intervention, a court having all the powers of a court of equity may not turn them away . . . .[14]

Regarding the respect courts should accord citizen "referendum" processes, Ed Godfrey (who, as noted, is both a traditionalist and a jurist inclined to presume that those in authority have acted with regularity) was instinctively reluctant to overturn the vote of the electorate on either of the grounds raised, i.e., that unlike issues were impermissably joined or that the electorate was misled.[15] The court clearly saw the imperfections of the State's actions; it recognized the possibility that an electorate may be so misled by political gamesmanship that there is no alternative but to set aside a "referendum" vote.[16] But in the final analysis, the outcome on this issue was dictated by where Ed Godfrey began: "We consider [these] challenges bearing in mind that it is important to efficient operation of the state government that there be a high degree of finality in referendum votes. After the electorate has acted, every reasonable intendment will be indulged in favor of the validity of the vote."[17] That is a high presumption for plaintiffs to overcome—and they failed in this case. The concluding line of this portion of the opinion, though evidencing some misgiving, says it all: "Referendum Question No. 1 was not so 'clearly misleading' as to require that the referendum be set aside."[18]

These two aspects of *Common Cause* illustrate dimensions of the jurisprudence of Justice Godfrey (and of Godfrey, the man) beyond those already noted. To begin with, it seems clear that Ed is inclined to the view that plaintiffs, and important issues, should have their day in court. That is what the system—in particular the judicial branch—is all about. He is not prepared to throw all of the conventional rules of standing overboard, but neither is he prepared to allow narrow or crabbed rules of standing to block plaintiffs' efforts to raise, and have resolved on the merits, issues that pose serious constitutional questions or questions that implicate the legitimacy of pending governmental actions. Ed is not prepared to allow the highest court of the state to duck such issues even though the court's

14. *Id.* at 9-10.
15. *Id.* at 13-15.
16. *Id.* at 14.
17. *Id.*
18. *Id.* at 15.

disposition of them may be politically unpopular.[19] That sort of personal and judicial courage is somewhat out of vogue today.

Ed's disposition of the "referendum" issue is vintage Godfrey. You look for the best, you hope for the best, but people, who must in the final analysis implement the democratic process, are what they are. The day-to-day workings of democratic government are never perfect, but they are entitled to great respect. They may often be described as chaotic, even "misleading," but if ordered government is to survive, these processes (here a "referendum") may not be lightly overturned. Ed Godfrey knows this—so do we all in some sense. With these factors in mind, Ed clearly asked the right question in this case. Were the workings of the democratic process here so misleading as to require that they be set aside? He (and the full court) concluded that they were not. Reasonable people may differ in their answer to that question, but that is beside the point. Ed Godfrey asked the right question and it was answered. There is ample evidence and reasoning to support that answer. But more, there is respect for the electorate, for even imperfect democratic processes, and finally for those who must implement the day-to-day workings of our government. Again, Ed's approach is practical; it is traditional without being rigid; it is conducive to stability in the law and in the larger society. The jurisprudence has the character of the man. It is easy to like both.

19. The opinion notes: "[A] court of equity may not turn [plaintiffs] away because possible political repercussions from the ultimate decision on the merits may lead to hostile criticism of the judiciary." *Id.* at 10.