The Burger Court Opinion Writing Database

Kremens v. Bartley

431 U.S. 119 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 14, 1977

Dear Bill:

Re: 75-1064 Kremens v. Bartley

I join.

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 7, 1977

RE: No. 75-1064 Kremens v. Bartley

Dear Bill:

I am sorry that I'll not be able to join your proposed opinion. I plan to write separately along the following lines, which, incidentally, I think accords with the views of others of our colleagues expressed at conference:

It seems to me that your mootness-standing analysis is fundamentally incorrect. The only suggestion of mootness ever heard in this lawsuit was in connection with a change in the Pennsylvania Mental Health Act after the class action was certified. I agree with you that no reliance should be placed on this particular change of law, since obviously the class certification guarantees the continued viability of the controversy in this respect.

But I cannot accept your effort to locate an entirely novel basis for mootness: a minor change in public welfare regulations promulgated prior to class certification but after the lawsuit was

filed. The parties, amici, and district court, of course, knew all about these regulations, and not one of them has ever suggested that the regulations even arguably moot this suit.* I share the view of all of the interested parties that your suggestion of mootness is without merit.

You rely upon the new regulation at page 6, paragraph 9 of your opinion. This new provision, promulgated on September 1, 1973, affords older juveniles two minor due process guarantees: (1) notice that "you have currently been admitted" to the institution as a result of the actions of a parent, etc., and (2) the telephone number of an attorney. Frankly, I am at a complete loss to see how these two meager new procedures, well known to all concerned during the litigation, can be now said to evaporate a lawsuit which prayed for the following 10-step procedural relief plus damages:

a. the right to notice;
b. the right to a hearing;
c. the right to counsel and, if indigent, appointment of counsel;

---

* I note that you do not call for a remand and reconsideration in light of a change in law, a judgment compelled, I think, in this situation: the parties and lower court fully took the regulation into account in reaching the judgment below, rightfully finding that any expansion of process afforded by the regulation is inconsequential. See 402 F. Supp., at 1042 n. 5.

d. the right to present evidence and testimony on their own behalf;
e. the right to subpoena witnesses and documents;
f. the right to confront and cross-examine witnesses against them and those who wish them to enter a facility;
g. the right to independent expert examination and assistance;
h. the right to be involuntarily detained only upon decision of a disinterested and impartial decision-maker;
i. the right to be involuntarily detained only upon a decision that they are in need of care, treatment or observation, such decision being based on clear and convincing evidence;
j. the right to appeal and review, including provision for assistance of counsel and record and transcript without cost if appellant is unable to pay the cost thereof;
k. other procedural safeguards.

Appendix at 21a-22a, paragraph 46 of Complaint.**

** For reasons that I also do not follow, you seem to suggest that the Attorney General's "assurance" that hearings will be held "within a short while" essentially satisfies plaintiffs' requested relief, or at least renders any injury "speculative" and "hypothetical". pp. 12-13. In light of the substantial relief requested in plaintiffs' complaint, I would have supposed that the suit remains perfectly alive unless the Attorney General also "assures" the provision of the other procedural safeguards that plaintiffs had sought -- e.g., right to submit evidence, to subpoena witnesses, to cross examine, to receive counsel if indigent. I cannot read the Attorney General's bare promise of a hearing "within a short while" as encompassing all of these additional procedural ingredients. Indeed, the entire thrust of the state's position in this litigation is to contest the need or wisdom of such procedures.

Moreover, you will recall the view, I thought shared unanimously at conference, that the district court's judgment, while not granting plaintiffs all of the procedural relief that they had sought, went well beyond their due. If the premise of your mootness argument is correct -- "virtually all of the procedural rights sought in the complaint were now [voluntarily] accorded by the State to older juveniles" (p. 11) -- why is the state raising such a fuss over the district court's ruling? Indeed, in light of your premise, why has Pennsylvania even bothered to fight the suit or appeal the judgment insofar as it pertains to older children?

Let me offer my explanation. Throughout this lawsuit, the plaintiffs and state have widely disagreed on the proper procedures to govern the commitment of both young and older children to mental facilities - a disagreement that more than amply supports an Article III adjudication. With all respect, your opinion blurs this fact by ignoring plaintiffs' complaint and by adopting a curious analytical technique: you seek to demonstrate that the threshold requirement of an Article III case is not met by pointing to subsequent changes in the lawsuit <u>on the merits</u>. This approach, however, misconceives the nature of the Article III inquiry as established by numerous of our cases. The sole case and controversy issue relevant to this suit is the following: <u>at the time that the suit began and the class was certified</u>, did the name parties have a live controversy with the

State of Pennsylvania? If they did, then the class certification preserves the lawsuit from later mootness of some or all of the named parties' claims, as clearly established by your teaching in Sosna, 419 U.S., at 399; Lewis' in Gerstein v. Pugh, 420 U.S., at 110-111 n. 11; and my own in Franks v. Bowman, 424 U.S., at 752-756. In this case there is no doubt that the lawsuit was alive at commencement and at the time of class certification: the named parties, after all, were praying for a host of new procedural devices nowhere available under state law, as well as for damages. The fact that some issues such as a precommitment hearing (p. 13 of your opinion) and damages (id. at n. 11) later may have been adjudicated and resolved on the merits does not detract from the existence of a true case or controversy at all relevant stages of the litigation.***

***

Your own statement from Sosna, upon which I gather you place great reliance (pp. 14, 17-18) actually demonstrates to me why this case is in no respect moot. There can be no doubt that the "named plaintiff[s] [had] a case and controversy at the time the complaint [was] filed, and at the time the class [was] certified . . . ." Your italicization on p. 14 seems to imply, however, that the suit is moot because "there must be a live controversy at the time this Court reviews the case." But this requirement is amply satisfied here: there remains today a live controversy involving 80% of the class members (see Pennsylvania's reply brief, at 1 n. 2) and involving the named children insofar as the district court granted them more process than the state is willing to provide. I cannot believe that you are suggesting that mootness has set in since some or all of the issues involving the named plaintiffs may have dropped from the suit, for such a suggestion would be flatly inconsistent with Sosna, Gerstein, and Franks.

Thus, rather than adopting your characterization of the "posture" of the suit, p. 13, I prefer that of the State of Pennsylvania, apparently accepted by all of the parties and amici: "This appeal is not moot . . . . [The challenged statutes] presently apply, and in fact are being applied, to the vast majority of the unnamed plaintiffs." Reply brief, at 2. As for the supposed mootness of the named plaintiffs, the trivial changes in welfare department regulations upon which you rely only scratch the surface of their complaint, as evidenced by the fact that the district court did not even feel the need to discuss the regulations in detail, see 402 F. Supp., at 1042 n. 5.

I think it would be particularly inappropriate for the Court to strain to avoid decision in a case like this. The parties and, by my rough count, some 22 amici organizations and agencies view the substantive constitutional questions as ripe for review and have submitted numerous briefs to assist our deliberations. The parties have done everything that could be expected of them to preserve the suit, and the district court properly certified a class consisting of all affected minors, without hearing an objection from anyone. I believe that it is both incorrect and egregiously unfair to deny a decision to those minors who remain incarcerated and unaffected by an insignificant change in departmental regulations.

Turning to the merits:

(1) As I said at conference, it seems to me impossible to deny that the confinement of the minors here directly implicated a due process

liberty interest. That conclusion is compelled unless we are about to overrule earlier decisions, including O'Connor v. Donaldson and In re Gault.

(2) For me, what's left therefore is a consideration of the procedures that are "due". Frankly, I am no further along as to this than I was at conference. The District Court certainly went much too far. I probably will come out as I suggested I might at conference, namely that constitutional due process requires a detached decisionmaker to consider the propriety of incarceration, and a competent spokesman to represent the independent interests of the children - and no more. I am not at all convinced that either the decisionmaker or spokesman necessarily need be a lawyer, as opposed to a social welfare professional. The state should be allowed substantial room for decision here. I'm clear that a full-blown adversarial proceeding should not be mandated: nothing is to be gained by subjecting the parents to the rigors of formal cross-examination, especially when in so many, perhaps most cases, the child is likely to be returned to his parents' home should institutional incarceration prove inappropriate.

I'm not that anxious to write and will be glad to defer to any writing that accommodates these views.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 29, 1977

RE: No. 75-1064 Kremens v. Bartley

Dear Bill:

Like others, I was unable to join your first draft and find I also can't join your revision. The latter strikes me as an even more substantial departure from our decided cases and from a reasoned reading of Article III requirements. I'd therefore reach the merits, and would be willing to undertake a draft on the merits along the lines I thought a majority favored at conference, if there still is interest in that disposition.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 7, 1977

MEMORANDUM TO: Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

RE: No. 75-1064 Kremens v. Bartley

My proposed draft of the merits in the above is nearly completed and should be available some time next week. As I expected, it turned into quite a project, but I believe that the result comports both with the views that a majority expressed at conference and with the consensus of child welfare amici and literature in this area. As presently drafted, the minimal due process requirements would be essentially two-fold: (1) the guarantee of a lawyer for the child and (2) a hearing before a neutral decisionmaker within two weeks of the child's commitment. The latter follows the recommendation of the various child welfare amici that emergency and short-term respite commitment not be hindered. Moreover, I think the draft dispels the apparent confusion of the class certification which prompted Potter to favor a discretionary remand to the district court; it proves to be no problem at all in deciding this case in any practical sense.

You may prefer to await the circulation after I get back from New Jersey early next week, but if meanwhile you have any suggestions regarding my approach, I'd certainly welcome them - particularly on the question of due process protection.

Bill

W.J.B. JR.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 14, 1977

MEMORANDUM TO THE CONFERENCE

RE: No. 75-1064 Kremens v. Bartley

I enclose the following for consideration. While it requires further polishing and cite-checking, I believe that the result comports with the general views expressed by many at conference and by most of the organizations intervening as amici.

I did not include a complete jurisdictional section since, when this went to the printer, I was unsure of the new approach that Bill would take. I do discuss the practical consequences of the class certification on pp. 23-25. As is evident, I believe that a discretionary nonjurisdictional remand as proposed in Bill's new draft is a purely wasteful exercise for all concerned. On remand, all the district court can be expected to do is to declare that mentally ill children over 14 (roughly 20% of the class) are no longer in the case, and to reaffirm its minimum procedural requirements for the remaining 80%. For us to accomplish the same result, absent a remand, requires all of three pages (pp. 23-25). And, of course, any reprieve for us produced by a remand will be short-lived since we will have to confront these precise issues on the merits only next Term in J. L. v. Parham, No. 75-1690. In short, since Bill's new draft seems to recognize that our formal jurisdiction is sound, we are left with abstract objections to a class certification that was never objected to by anyone and that does not hinder careful consideration of the merits in any practical sense. I believe, therefore, that we should dispose of this suit on the merits and avoid repeating the ordeal next year.

W.J.B.Jr.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 4/14/77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1064

Jack B. Kremens, etc., et al., Appellants, *v.* Kevin Bartley et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[April —, 1977]

MR. JUSTICE BRENNAN.

Since I believe that consideration of this case is not jurisdictionally foreclosed, I turn to the merits. The District Court mandated the provision of a variety of procedural safeguards to attend a child's commitment to mental health facilities on the ground that "[t]he child who faces . . . such confinements clearly has an interest within the contemplation of the liberty and property language of the Fourteenth Amendment. . . ." 402 F. Supp., at 1046–1047. I similarly believe that institutionalization of a child under Pennsylvania's Mental Health and Mental Retardation Act is in conflict with a constitutionally protected interest and, therefore, must be accompanied by appropriate due process guarantees.

I

A

Our cases leave little room for doubt that involuntary commitment to a mental facility is an act that fundamentally infringes a liberty interest protected by the Due Process Clause. We have recognized that the spectre of physical confinement threatens a personal "interest of transcending value" to the individual. *In re Winship*, 397 U. S. 358, 364 (1970). Indeed, it is now established that the "elemental freedom from external restraint," *Arnett* v. *Kennedy*, 416

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 5/2/77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1064

Jack B. Kremens, etc., et al., Appellants, *v.* Kevin Bartley et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[May —, 1977]

MR. JUSTICE BRENNAN, dissenting.

As was true three Terms ago with respect to another sensitive case brought to this Court, I can "find no justification for the Court's straining to rid itself of this dispute." *DeFunis* v. *Odegaard*, 416 U. S. 312, 349 (1974) (BRENNAN, J., dissenting). "Although the Court should, of course, avoid unnecessary decisions of constitutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases." *Id.*, at 350.

Pursuant to Fed. Rule Civ. Proc. 23, the District Court, on April 29, 1974, certified appellee class consisting of persons 18 years of age or younger who are or may be committed to state mental facilities under Pennsylvania's Mental Health and Mental Retardation Act of 1966. The State not only did not then oppose the certification, but to this day urges that this Court render a decision on the "important constitutional issues . . . that were briefed and argued before this Court." *Ante*, at 7. Over a score of *amici curiae* organizations and parties similarly joined in presenting their views to us. Ordinarily of course, the defendant's failure to object to a class certification waives any defects not related to the "cases or controversies" requirement of Art. III, cf. *O'Shea* v. *Littleton*, 414 U. S. 488, 494–495 (1974), and would require us to proceed to the merits of the dispute.

1, 2, 5, 7-8

Style change

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 5/9/77

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1064

Jack B. Kremens, etc., et al., Appellants, *v.* Kevin Bartley et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[May —, 1977]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

As was true three Terms ago with respect to another sensitive case brought to this Court, I can "find no justification for the Court's straining to rid itself of this dispute." *DeFunis* v. *Odegaard*, 416 U. S. 312, 349 (1974) (BRENNAN, J., dissenting). "Although the Court should, of course, avoid unnecessary decisions of constitutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases." *Id.*, at 350.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 8, 1977

Re: No. 75-1064, Kremens v. Bartley

Dear Bill,

I think that this case could properly be disposed of in a manner similar to the approach you have adopted in your opinion, but I am troubled by some of your analysis. It seems to me that your reliance on the regulations as mooting out the claims of the named plaintiffs and the age group they can be said to represent presents several practical and analytical difficulties that could be avoided if the finding of mootness were instead to rest on the statute passed by the Pennsylvania legislature after this case was decided.

As a practical matter, finding that the regulations mooted the named plaintiffs' claim may seem somewhat anomalous in view of the three-judge district court's having had those regulations before it, and nevertheless concluding that substantial injunctive relief governing the entire class of plaintiffs was still appropriate.

As an analytical matter, I have some doubts that the regulations were in fact fully responsive to the complaint and prayer for relief made by the plaintiff class. As I understand the regulations, they give children notice of their rights to a hearing, a means to obtain counsel, and an opportunity for a hearing on the question of their commitment. The apparently substantial procedural protections the regulations confer, however, come into play

only when the child, unaided, decides to get the ball rolling by acting on the notice and asserting his rights. By contrast, the injunctive relief given by the district court, and requested by the plaintiffs, takes the procedural protections of the regulations a step further by making objective scrutiny of the commitment process automatic and almost immediate. This shift in the burden of going forward seems to me to be a substantial one, and it also seems to me to be clearly encompassed in the district court's enumeration of the rights the plaintiffs sought in their complaint (See 786a--"(7) right to be involuntarily detained only upon a decision of a judicial officer; (8) right to be involuntarily detained only upon a decision that they are in need of treatment, care or observation.")

It thus seems clear to me that the injunctive relief provided even the named plaintiffs is substantially greater than what the regulations gave to them. I realize that you reject that argument in your opinion by relying on the district court's description of the relief sought by the plaintiffs in addition to what was granted them by the regulations. (E.g., the regulations were deficient in "apply[ing] only to children 13 years of age or older, requir[ing] no pre-commitment hearing, and designat[ing] no time by which a post-commitment hearing must be held.") Even taking that description as binding on us, I am not satisfied, however, that the plaintiffs had no continuing controversy with the state on those very points. First, I don't believe it entirely consistent with our previous cases to accept the representations of one of the parties as mooting out a claim (here the Attorney General's representation that post-commitment hearings would occur reasonably quickly). Second, it seems likely to me that the injunction-ordered post-commitment hearing subsumed in fact many of the procedural protections that the plaintiffs anticipated the pre-commitment hearing would provide -- i.e. prompt and automatic judicial scrutiny of the propriety of the commitment -- that were in fact not provided by the regulations.

If this analysis is correct, the injunctive relief given the named plaintiffs goes further than did the regulations, and would continue to present a live controversy, were it not for the intervening passage of the new statute governing these procedural rights. By eliminating voluntary commitment altogether without the consent

of the child over 14 years of age, and in giving the full, adult range of involuntary commitment procedural protections to the protesting child, the new statute appears to genuinely moot the named plaintiffs' complaint -- if, as an amicus brief suggests and the complaint seems to support, the named plaintiffs were both 14 years old or older at the time of commitment and mentally ill rather than mentally retarded.

If the statute rather than the regulations were found to moot the controversy as to the named plaintiffs (and the narrow class of allegedly mentally ill plaintiffs 14 or older), the next question would be whether the constitutional claims of those younger than 14 and/or mentally retarded are nevertheless capable of principled resolution here. Rather than finding that consideration of their claims is barred by notions of "case or controversy" standing, my present preference would be to note that the passage of the Pennsylvania statute and the consequent mooting of the named plaintiffs claims substantially shifts the focus and character of this litigation. We are thus left in the position of seeking to evaluate due process claims of a class as to whom we have no specific consideration from the district court in terms of their particular procedural needs, even though the state's new statute clearly regards them as quite differently situated from those plaintiffs whose procedural needs the statute does remedy. Although I think it likely that properly speaking, we still confront a case or controversy as to those class members whose claims were not mooted by the new statute, (cf. Franks v. Bowman), it does not seem to me that we are really in a position on this record to render an informed decision on the constitutional claims of the remaining class members. On that basis, and as a matter of discretion and prudence, my present inclination would be to remand the case for further specific development and consideration of the remaining class members' due process claims.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

P.S. I drafted this before I received a copy of your letter to Bill Brennan, but I continue to think my approach to be basically valid.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 14, 1977

75-1064, Kremens v. Bartley

Dear Bill,

Assuming your willingness to make the few minor changes we discussed orally, I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 15, 1977

75-1064 - Kremens v. Bartley

Dear Bill,

I am glad to join your opinion for the Court, as recirculated today.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 14, 1977

Re: No. 75-1064 - Kremens v. Bartley

Dear Bill:

I gather you are revising your circulation in this case, and although I believe I am in substantial agreement with you, I shall await the revision before finally coming to rest.

I gather from your draft that at the time of the class certification the issue of a pre-commitment hearing remained a live issue and at least as to that issue, the named plaintiffs had standing for themselves and to represent the class. That question, however, has been mooted by abandonment if I understand you correctly.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

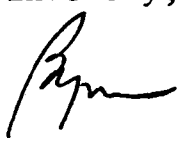
March 25, 1977

Re: No. 75-1064 - Kremens v. Bartley

Dear Bill:

I blanched a little, but I am still with you. With the passing of three-judge courts, we needed a wonderfully intricate and arcane substitute. You have found one that measures up. I can hardly wait for the next chapter in the next case, perhaps the MTM of class actions and weakness.

Sincerely,



Mr. Justice Rehnquist

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 21, 1977

Re: No. 75-1064 - Kremens v. Bartley

Dear Bill:

I am following the Kremens saga with some interest and am still with you.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 25, 1977

Re: No. 75-1064, Kremens v. Bartley

Dear Bill:

Please join me.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 3, 1977

Re: No. 75-1064, Kremens v. Bartley

Dear Bill:

Please join me.

Sincerely,

TM

T. M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 27, 1977

Re: No. 75-1064 - Kremens v. Bartley

Dear Bill:

Please join me.

Sincerely,

H. A. B.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 8, 1977

No. 75-1064 Kremens v. Bartley

Dear Bill:

This refers to your letter of March 4, accompanying your circulation of March 3.

I can at least agree - as you suggest - that this appears to be another "albatross", especially from the viewpoint of any one disposition commanding a majority. Indeed, as my notes indicate, there was considerable diversity of views expressed at the Conference as to how the case should be written.

I did think there was no serious mootness issue, and that it was necessary for us to address the merits. Although your opinion prompts me to rexamine my prior position, I will await Bill Brennan's circulation and the expression of other views.

I had thought, in view of the importance of the case to the parties (you will recall the concern of the Supreme Court of Pennsylvania), that we should at least address the merits sufficiently to reverse the District Court and indicate generally the considerations relevant to "what process is due". One alternative would be to hold this case for, and set it for reargument with, Parham. That appears to present a better opportunity for addressing the basic issues.

Sincerely,

L. Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 11, 1977

No. 75-1064 Kremens v. Bartley

Dear Bill:

This is in reply to your memorandum of April 7, addressed to Thurgood, Harry, John and me.

As thinking has evolved about this case (prompted by Bill Rehnquist's circulations and comments thereon), I may not be with you in reaching the merits. At Conference, I did express the view that we could and probably should decide the case on the merits. The Chief Justice assigned the writing of the opinion for the Court to Bill Rehnquist, and he has circulated drafts which present the case in a considerably different posture.

Although I have been unwilling to join either of Bill's circulations, I was favorably impressed by what Potter said in his letter of March 8. The new statute certainly places this case in a different posture from that considered by the District Court. In briefest summary, I think I could join a remand in which we recognize the effect of the new statute on the named plaintiffs, and leave it to the District Court to determine whether - in light of the statute - a class for certification properly remains. I have said as much to Bill Rehnquist in a couple of telephone conversations.

I may be influenced to some extent by the views several of us have expressed that the Georgia case, Parham, presents a better opportunity for addressing the basic issues.

Thus, although I will await further circulations, I am now inclined not to resolve the merits of this case if Bill writes a remand opinion that I can join.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss
cc: Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Stevens

J

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 22, 1977

No. 75-1064 Kremens v. Bartley

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: MAR 3 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1064

Jack B. Kremens, etc., et al., Appellants, *v.* Kevin Bartley et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[March —, 1977]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

I

Appellees Bartley, Gentile, Levine, Mathews, and Weand were the named plaintiffs in a complaint challenging the constitutionality of Pensylvania statutes governing the voluntary admission and voluntary commitment to Pennsylvania mental health institutions of persons 18 years of age or younger. The named plaintiffs alleged that they were then being held at Haverford State Hospital, a Pennsylvania mental health facility, and that they had been admitted or committed pursuant to the challenged provisions of the Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 P. S. § 4101 *et seq.* Various state and hospital officials were named as defendants.[1]

Plaintiffs sought to vindicate not only their own constitutional rights, but also sought to represent a class consisting of:

> ". . . all persons under 18 years of age who have been, or, may be admitted or committed to Haverford State Hospital and all other state mental health facilities under the challenged provisions of the state statute," App. 10–11 (Complaint, paragraph 7).

[1] Haverford State Hospital was initially named as a defendant but was dismissed by mutual agreement. *Bartley* v. *Kremens*, 402 F. Supp. 1039, 1043 n. 6 (ED Pa. 1975).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 4, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-1064 - Kremens v. Bartley

When I received the assignment of this case from the Chief Justice, I viewed it as an albatross not unlike Byron's UJO. My views as to the improper certification of the named plaintiffs to represent all committed juveniles regardless of age had not commended themselves to a majority, and yet there was by no means complete agreement among those who preferred to see the case decided on the merits, which, as I recall, included all but the Chief, Potter, and me. At first I had visions of trying a three or four part opinion such as Byron wrote in UJO, which had attached to the locomotive enough different cars so that a majority could get aboard.

However, as I began drafting the opinion, further study of the record and briefs convinced me that objections which I had phrased during the Conference discussion in terms of class certification were actually Article III case or controversy problems. Since all of the parties here apparently want an adjudication on the merits, their failure to raise a question as to improper class certification might preclude us from addressing that question. But if I am right that the difficulty is actually lack of case and controversy, we must, of course, inquire into that on our own motion. In the draft I have cited quotes from those

eminent authorities, Brandeis, J., and Brennan, J., to the effect that the desire of all parties for a decision on the merits does not obviate this duty.

The upshot of all this is that my initial conception of the UJO type opinion, with one section devoted to class certification and others to the merits, will not work. Since I am convinced that there is a case or controversy defect here, I cannot reach the merits. I conclude that the case as to the named appellees is moot, and that under our previous decisions the named appellees had no standing to represent the class of younger juveniles of which they were not members. If a majority of the brethren wish to deal with the merits, the case should be re-assigned, because the two views cannot in good conscience be combined in one opinion.

In a practical sense, the case and controversy requirement of Article III may seem an anachronism in the era of class actions, when lawyers seek out clients and not vice versa. If my draft obtains a Court, these same lawyers will perhaps find a younger juvenile for a named plaintiff and make the same arguments. Perhaps the case before long will be back here (although I think it quite likely that our handling of Parham v. J.L., see infra, will shape the result below in the successor to this case). So why not decide the merits now, especially since we have spent an hour of oral argument listening and more hours reading briefs? The short and obvious answer is that Article III requires a case or controversy, and that should be the end of it. It does not hurt to remind the other federal judges of this rule once in awhile.

But in this case there is, I think, a practical advantage that would result from a determination of mootness.

We are holding a related Georgia case, Parham v. J.L., for this one. My own examination of that case convinces me that we could not properly vacate and remand that decision in light of a decision of Kremens on the merits. Parham is on appeal from a three-judge court; commitment was more free wheeling -- in some cases upon application of the state itself; and the Court's remedy included a conclusion that 46 plaintiffs no longer needed commitment in a hospital and an order directing the state to employ less drastic alternative treatment facilities. The state action issue could be briefed and argued. I think that the Georgia case focuses the issues more sharply, and we will, in all probability want to hear it on the merits no matter what we do with Kremens.

Sincerely,

WWW

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 8, 1977

Re: No. 75-1064 Kremens v. Bartley

Dear Bill:

I wholeheartedly disagree with your comments and will circulate a detailed response, hopefully this afternoon.

Sincerely,

WHR, Jr.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 8, 1977

Re: No. 75-1064 Kremens v. Bartley

Dear Bill:

It may be that my adverse reactions to your letter of March 7 are partially induced by my doctor's insistence that I take valium four times a day, but if that is the case I know you will forgive me. In my opinion, your recent comments misapprehend both the facts of the case and the thrust of my proposed opinion. As I see it, the difficulty with your analysis is your reading of the protections afforded by the regulations. You refer to the changes brought about by the regulations as "minor" (p. 1), "trivial" (p. 6) and "insignificant" (p. 7). I am rather taken aback by your assertion that the regulations afford older juveniles only "two minor due process guarantees: (1) notice that 'you have been currently admitted' . . . and (2) the telephone number of an attorney." Actually, the juveniles were given a significant additional[1/] right -- the right to institute a § 406 proceeding within two business days after institutionalization. See ¶ 6 of the Regulations; proposed opinion at 5-6, n.6. This § 406 proceeding, exactly the procedure utilized by Pennsylvania for the involuntary commit-

---

1/ Prior to the enactment of the regulations, those who were involuntarily committed were given a § 406 hearing. However, what this lawsuit is all about is the fact that in the case of the juveniles who are "voluntarily" committed, this "voluntariness" stems not from their wishes, but from the wishes of their parents. The statutory structure makes it clear that, prior to the enactment of the regulations, a "voluntarily" committed juvenile was not entitled to the involuntary commitment hearing procedure of § 406.

ment of adults, provides for a judicial hearing after notice, with counsel.[2/]

In your discussion of the "merits" (p. 7), you suggest that "constitutional due process requires a detached decisionmaker to consider the propriety of incarceration, and a competent spokesman to represent the independent interests of the children -- and no more." Since the judicial hearing provided under § 406 provides more extensive procedural safeguards than these, I don't agree that the granting of this right by the regulations was "trivial" or "insignificant." Moreover, no one has suggested that the § 406 proceeding does not provide adequate due process safeguards. See 402 F.Supp. at 1056.

Although it is true that the majority opinion below did not discuss the regulations in detail, I view this as a substantial abdication of that court's responsibility, rather than as an argument for the irrelevancy of the regulations. Judge Broderick, in his dissent, extensively discussed the effect of the regulations and had this to say about the § 406 hearing:

> "In the case of juveniles 13 and over, upon their objection to remaining in the institution, future institutionalization must proceed pursuant to the civil court commitment provisions of the Act. (Section 406). Section 406 provides the procedure for an involuntary civil court commitment and requires the filing of a petition with the Court of Common Pleas, pursuant to which the Court issues a warrant requiring the allegedly ill person to be brought to Court for a hearing. Counsel appointed for the juvenile represents him at the hearing before the Court of Common Pleas. After the hearing, the Court may order an examination by two physicians or order commitment for a period

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2/ Counsel is provided for an indigent who is subject to an involuntary commitment action. 16 Pa. Stat. Ann. § 9960.6(c). See Appellants Brief at 25, n. 11.

> not to exceed ten days for an examination, after which commitment may be ordered by the Court. Plaintiffs do not attack the constitutionality of the civil court commitments under § 406 of the Act which follow the above outlined procedure." 402 F.Supp. at 1055-56.

Contrary to your assertion that the District Court disregarded the regulations because they were insubstantial (p. 6), I think the reason that the District Court gave such little attention to the regulations was because they did not apply to those under 13.[3/] However, as the proposed opinion demonstrates, in rushing to judgment, the District Court disregarded the constitutionally mandated rules of standing. Had a named plaintiff with capacity to represent the younger juveniles been a party to the proceedings, the lawsuit could have gone forward with respect to them notwithstanding the issuance of the regulations. But this was not the case.

I don't think it can be fairly disputed that, after the promulgation of the regulations, there were only three controverted issues before the court: the regulations "apply only to children 13 years of age or older, require no pre-commitment hearing, and designate no time by which a post-commitment hearing must be held." Id. at 1042. My opinion attempts to demonstrate that there was no standing with respect to the rights of those younger than 13, as well as why the other two issues do not save the case from mootness. The aspect of damages, which you raise, was never actually contested below; in fact, the plaintiffs stipulated that they would not seek damages long before the hearing and the decision on the merits. See proposed opinion at n.11.

3/ As Judge Masterson noted at a pre-trial hearing: "And it seems to me that due process, meaningful due process, is served if the procedure is available so that the unwilling child can have an independent person review the facts with respect to his institutionalization, and thats why my own preliminary [sic] is that the May 1 regulations pretty much take the steam out of your case as to the 13 to 18 year olds. App. at 185a-186a (emphasis added).

Your view seems to depend upon your suggestion that the mootness issue may be avoided because below there was no "suggestion of mootness" (p. 1) due to the regulations, and because the parties, and amici, do not suggest that the case is moot, and, indeed, wish a result on the merits (p. 2). As you have aptly pointed out in the Regional Rail Reorganization Act Cases, these observations are no substitute for the Article III case or controversy requirement. See proposed opinion at 15-16.

Given all of this, I continue to believe, contrary to your suggestion, there was no case or controversy at the time of class certification and at the time that the case was presented to this Court. Thus, my proposed draft is fully consistent with Sosna, and the other cases that you cite.

Sincerely,

WHR/mqe

Mr. Justice Brennan

Copies to the Conference

P.S. I have just received John's letter, and will respond to it shortly.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 9, 1977

Re: No. 75-1064 Kremens v. Bartley

Dear John:

I think the major difference between the views that you articulate in your letter of March 8 and those in my draft opinion is that you see the question in terms of Rule 23 whereas I see it in terms of Article III standing. I think that the quote on page 17 from my draft opinion from Simon v. Eastern Kentucky Welfare Rights Organization makes clear that constitutional standing requirements must be met, regardless of Rule 23 permutations and combinations:

> "That a suit may be a class action, however, adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.' Warth v. Seldin, 422 U.S., at 502." Simon v. Eastern Kentucky Welfare Rights Organization, supra, at 40 n.20.

You state that "when the class was certified, the named plaintiffs and the younger members of the class had a common interest in some important issues but not in others." (p. 1). You rely upon the fact that when the new regulations were promulgated, the dispute survived because all plaintiffs were contending that they had a right to a pre-commitment hearing. Although my proposed opinion seeks to deal with this issue, I think it bends over backwards to give the plaintiffs the benefit

of the doubt on this point, since in their complaint they merely alleged that they "are detained and incarcerated. . . without. . .the right to a hearing." (Complaint ¶ 46(b), App. 21.) Since the allegation was that they were already detained, and merely sought the right to a hearing, I think that a fair reading of the complaint is that the plaintiffs objected only to their inability to have a post-commitment hearing. Almost three years later the District Court inserted the word "pre-commitment" (compare App. 21 with App. 785), and treated the issue as such in its opinion. (The District Court denied that the right to pre-commitment hearing was constitutionally mandated, and plaintiffs have not appealed from that denial.)

But even assuming that this single common factor was at issue as of the date of class certification, it seems to me that when it is contrasted with the overwhelming dissimilarities in the rights of the two groups of juveniles, the conclusion is clear: whether or not representation (of the party, not by the attorney) was adequate in the Rule 23 sence, I am convinced that Article III consideration did not permit the named plaintiffs to litigate the constitutional claims of the younger juveniles. The named plaintiffs were already detained, and already had the right to a hearing whenever they wanted it. What is the incentive for an 18 year old in this position to fight for a pre-commitment hearing? Our cases make clear that it is not the adequacy of representation, in terms of the class attorney, but the party's personal stake in the outcome that is relevant for standing purposes. The named plaintiffs did not possess a sufficient personal stake in the outcome to litigate the major constitutional issues confronting the younger juveniles. The tenuous, at best, "community of interest" between the two classes of juveniles is simply not sufficient for Article III purposes. As we have stated in at least three of our cases:

> "To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents. Indiana Employment Division v. Burney, 409 U.S. 540 (1973);

Bailey v. Patterson, 369 U.S. 31 (1962)."
Schlesinger v. Reservists to Stop the War,
418 U.S. 208, 216 (1974) (emphasis added).
See Proposed Opinion at 16.

The facts tend to undercut your suggestion (p. 3) that the named plaintiffs were "in a slightly different position" from the younger juveniles. In this case, the possible presence of the pre-commitment hearing issue is not sufficient for us to conclude that older juveniles possessed the same interest or suffered the same injury as did the younger.

Sincerely,

WHR, Jr.

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 9, 1977

Re: No. 75-1064 Kremens v. Bartley

Dear Potter:

The Brennan, Stewart, Stevens and Rehnquist positions regarding the effect of the regulations have now been adequately presented to the Conference, and need not be belabored herein. Although I do disagree with you regarding the regulations (perhaps not as strongly as I do with Bill Brennan), I do think that you are correct that, whatever the effect of the regulations, the new Act assuredly makes the case moot with respect to the named plaintiffs. The fact that I view this as cumulative of the "regulation mootness" does not convince me that we may not be able to agree upon the ultimate result.

Whatever we do with the older juveniles, it is clear to me that, given both the regulations and the new Act, their battle has been won. What bothers me, and I take it troubles you also (p. 3), is the situation of the younger juveniles. The concerns that you express on page 3 seem to me to stem from the underlying standing issue. I share your view that there was "no specific consideration from the district court in terms of [the younger juveniles'] particular procedural needs. . ." For example, I do not think that it follows that an "automatic" hearing, with the attendant trauma, cross-examination, and so forth, would have necessarily been an objective sought by the younger juveniles, as it might have been for those older and more able to bear the strain. I think that this lack of consideration is a direct result of allowing the interests of the younger juveniles to be considered in a lawsuit without requiring those interests to be represented by someone with standing to do so. As I have attempted to point out in my letter to John Stevens, I do not believe that Article III allows us to regard the problem as one simply of erroneous class certification, and thereby to avoid the issue. Because

I believe what the District Court did in this regard was clearly wrong, and that the error had Article III overtones, I believe that the standing issue deserves treatment in the opinion of the Court. However we deal with the mootness of the older juveniles, I don't think that the Court can resolve the important constitutional issues confronting the younger juveniles, until those issues are presented by someone with standing to do so. I think we must tell the lower court why. I will in due course circulate a revised draft along these lines.

Sincerely,

WHR ME

Mr. Justice Stewart

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr Justice Stewart
Mr Justice White
Mr Justice Marshall
Mr Justice Blackmun
Mr Justice Powell
Mr Justice Stevens

From: Mr. Justice Rehnquist

Circulated: MAR 23 1977

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1064

Jack B. Kremens, etc., et al., Appellants, *v.* Kevin Bartley et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[March —, 1977]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

I

Appellees Bartley, Gentile, Levine, Mathews, and Weand were the named plaintiffs in a complaint challenging the constitutionality of Pensylvania statutes governing the voluntary admission and voluntary commitment to Pennsylvania mental health institutions of persons 18 years of age or younger. The named plaintiffs alleged that they were then being held at Haverford State Hospital, a Pennsylvania mental health facility, and that they had been admitted or committed pursuant to the challenged provisions of the Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 P. S. § 4101 *et seq.* Various state and hospital officials were named as defendants.[1]

Plaintiffs sought to vindicate not only their own constitutional rights, but also sought to represent a class consisting of:

> ". . . all persons under 18 years of age who have been, or, may be admitted or committed to Haverford State Hospital and all other state mental health facilities under the challenged provisions of the state statute." App. 10–11 (Complaint, paragraph 7).

[1] Haverford State Hospital was initially named as a defendant but was dismissed by mutual agreement. *Bartley* v. *Kremens*, 402 F. Supp. 1039, 1043 n. 6 (ED Pa. 1975).

Parts II and III are substantially rewritten

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

Circulated: MAR 23 1977

Recirculated:

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1064

Jack B. Kremens, etc., et al., Appellants, *v.* Kevin Bartley et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[March —, 1977]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

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Plaintiffs sought to vindicate not only their own constitutional rights, but also sought to represent a class consisting of:

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P. 9, 12, 13, 15

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Mr.

No. 75–1064

Circulated:

Recirculated:

APR 15 1977

Jack B. Kremens, etc., et al., Appellants, *v.* Kevin Bartley et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[March —, 1977]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

I

Appellees Bartley, Gentile, Levine, Mathews, and Weand were the named plaintiffs in a complaint challenging the constitutionality of Pensylvania statutes governing the voluntary admission and voluntary commitment to Pennsylvania mental health institutions of persons 18 years of age or younger. The named plaintiffs alleged that they were then being held at Haverford State Hospital, a Pennsylvania mental health facility, and that they had been admitted or committed pursuant to the challenged provisions of the Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 P. S. § 4101 *et seq.* Various state and hospital officials were named as defendants.[1]

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[1] Haverford State Hospital was initially named as a defendant but was dismissed by mutual agreement. *Bartley* v. *Kremens*, 402 F. Supp. 1039, 1043 n. 6 (ED Pa. 1975).

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1064

Jack B. Kremens, etc., et al., Appellants, *v.* Kevin Bartley et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[March —, 1977]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

I

Appellees Bartley, Gentile, Levine, Mathews, and Weand were the named plaintiffs in a complaint challenging the constitutionality of Pensylvania statutes governing the voluntary admission and voluntary commitment to Pennsylvania mental health institutions of persons 18 years of age or younger. The named plaintiffs alleged that they were then being held at Haverford State Hospital, a Pennsylvania mental health facility, and that they had been admitted or committed pursuant to the challenged provisions of the Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 P. S. § 4101 *et seq.* Various state and hospital officials were named as defendants.[1]

Plaintiffs sought to vindicate not only their own constitutional rights, but also sought to represent a class consisting of:

> ". . . all persons under 18 years of age who have been, or, may be admitted or committed to Haverford State Hospital and all other state mental health facilities under the challenged provisions of the state statute." App. 10–11 (Complaint, paragraph 7).

[1] Haverford State Hospital was initially named as a defendant but was dismissed by mutual agreement. *Bartley* v. *Kremens*, 402 F. Supp. 1039, 1043 n. 6 (ED Pa. 1975).

P. 8, 10, 11, 13, 14

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr Justice Marshall
Mr Justice Blackmun
Mr Justice Powell
Mr Justice Stevens

From: Mr. Justice

Circulated:

Recirculated: MAY 4

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1064

Jack B. Kremens, etc., et al., Appellants, *v.* Kevin Bartley et al.	On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[March —, 1977]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

I

Appellees Bartley, Gentile, Levine, Mathews, and Weand were the named plaintiffs in a complaint challenging the constitutionality of Pensylvania statutes governing the voluntary admission and voluntary commitment to Pennsylvania mental health institutions of persons 18 years of age or younger. The named plaintiffs alleged that they were then being held at Haverford State Hospital, a Pennsylvania mental health facility, and that they had been admitted or committed pursuant to the challenged provisions of the Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 P. S. § 4101 *et seq.* Various state and hospital officials were named as defendants.[1]

Plaintiffs sought to vindicate not only their own constitutional rights, but also sought to represent a class consisting of:

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[1] Haverford State Hospital was initially named as a defendant but was dismissed by mutual agreement. *Bartley* v. *Kremens*, 402 F. Supp. 1039, 1043 n. 6 (ED Pa. 1975).

Supreme Court of the United States
Washington, D. C. 20543

Agree with Bill

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 24, 1977

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 75-1064 Kremens v. Bartley

The only case held for Kremens is J.L. v. Parham, No. 75-1690, an appeal from M.D. Ga. The issue, unresolved in Kremens, of the constitutional rights of juveniles to due process protection prior to "voluntary" commitment in state mental hospitals is squarely presented. In Parham commitment was not only by parents, but also by the State Department of Family & Children Services, as guardian. A three-judge district court struck down the Georgia commitment statute as unconstitutional, and also ordered the state to expend funds to provide alternative treatment facilities for 46 juveniles who, in the opinion of the District Court, did not require hospitalization. The decision that these individuals did not require hospitalization was reached without the benefit of an evidentiary hearing. 412 F.Supp. at 139. Since in Kremens we did not resolve the scope of due process protections to be afforded to minor juveniles, I will vote to note probable jurisdiction.

Note ♦ a parties to bring the state action question. -D.

The District Court evidently assumed, without analysis, that there was sufficient state action to implicate the Fourteenth Amendment even where the placement is by the natural parents. 412 F.Supp. at 118. I obviously have no quarrel with this result with respect to children who are committed by the state as guardian, but think that we should directly confront that issue with respect to those minors who are committed by their natural parents. Since the opinion does

not make clear the exact role of the state in such a situation, I would suggest that we ask the parties to brief the issue of the existence vel non of state action with respect to the voluntary commitment of minors by their natural parents.

I agree

Sincerely,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 8, 1977

Re: 75-1064 - Kremens v. Bartley

Dear Bill:

Although my reaction to your circulation is not quite the same as Bill Brennan's, I also question the validity of your analysis.

In class litigation the interests of the named plaintiffs are seldom identical in all respects with the interests of every other member of the represented class. Their common interests are usually quite obvious when the litigation commences and differences become more important as the problems associated with the fashioning of relief are confronted. In this case, when the class was certified, the named plaintiffs and the younger members of the class had a common interest in some important issues but not in others. I am persuaded that their common interests were sufficient to enable the plaintiffs to satisfy the constitutional standing requirement even though their representation of the younger members of the class was sufficiently inadequate to require corrective action if their standing had been questioned.

When the complaint was filed, there was clearly a live controversy between the plaintiffs and the defendants with respect to the constitutionality of Pennsylvania's commitment procedures for juveniles. When the new regulations were promulgated, that dispute survived because plaintiffs were then contending that they had a constitutional right to a precommitment hearing. They sought to assert this claim on behalf of "all persons 18 years of age who have been, or, may be admitted or committed to Haverford State Hospital and

all other State mental health facilities under the challenged provision of the State statute." Until the class described in the complaint was certified, the only litigants were the named plaintiffs and the defendants.

But when the class was certified, the litigation was no longer just a controversy between the named parties; thereafter, all members of the certified class were entitled to participate in the proceeding, either indirectly as beneficiaries of the representative plaintiffs or directly in the event that the named plaintiffs' representation of their interest was, or might become, inadequate. The controversy could not thereafter be mooted merely by the death, or disassociation from the class, of the named plaintiffs. Nor could they settle or compromise the class claims without giving every member of the class an opportunity to protect his own interests.

At the time of the certification all of the named plaintiffs were over 13 years old and therefore covered by the new regulations, but the class included children under 13 to whom those regulations did not immediately apply. There was, therefore, a significant difference between the position of the named plaintiffs and the position of the members of the class who were under 13. However, there were also important similarities between these two groups. For one thing, in due course those under 13 would grow older and, in many cases, become subject to the new regulations; whatever impact the litigation might have had on the regulations would therefore have affected them. More importantly, if the plaintiffs' asserted rights to a precommitment hearing had been accepted by the District Court, the younger members of the class, as well as the older, would have benefited from that holding. To some extent, therefore, the named plaintiffs were proceeding on behalf of the entire class they purported to represent.

If anyone had objected to the adequacy of the named plaintiffs' representation of the younger juveniles, it no doubt would have been proper for the District Court to divide the class into two subclasses, and perhaps even to dismiss the younger subclass if none of its members became a named plaintiff. I am not persuaded, however, that the shortcomings in the adequacy of the existing plaintiffs' representation were so serious as to constitute a jurisdictional defect with respect to the

further participation of the younger group. It follows, I believe, that after the class certification and before the entry of the District Court's judgment, that court had the power to enter a judgment affecting the entire class and the case had not been mooted by the promulgation of the regulations.

The question then is whether the court lost its power to adjudicate the rights of the younger members of the class because of the plaintiffs' failure to appeal from the portions of the judgment rejecting their challenge to the new regulations. Obviously, the defendants did not consider the entire case moot, since they did appeal from the judgment insofar as it extended protections to members of the certified class who are under 13. The analysis in the Court's opinion indicates that they should have simply moved to vacate the judgment and dismiss the case as moot. If that sort of motion had been filed, it would have been grounded on the inadequacies of the named plaintiffs' representation of the younger members of the class. One of the questions such a motion might have required the District Court to address is whether another and younger class representative should be added as a party plaintiff. If a request to add such a party had been made, and if the District Court had the power to grant the request, as I believe it did, the case could not have been moot. It follows, I believe, that the case is not now moot because it is still not too late to remedy the defect of parties by adding an additional named plaintiff pursuant to a proper motion.

I do not believe that the judgment which has been obtained for the benefit of juveniles under 13 should be vacated on the ground that they were not adequately represented in this litigation. After all, the requirement of an adequate class representative is intended to protect the interests of those members who may be in a slightly different position from others, not to deprive them of benefits that a less-than-perfect class representative has obtained for them. At the very least, I would give the parties an opportunity to brief and argue the question.

Respectfully,

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

Personal

April 26, 1977

Re: 75-1064 - Kremens v. Bartley

Dear Bill:

After a good deal of reflection, I have finally concluded that I will join Bill Rehnquist's opinion.

In doing so, I do not disagree with your analysis of the merits, but I do have the feeling that since the judgment of the District Court must be vacated in any event, it may be wise to allow that court the broadest latitude in reexamining the issues. Normally delay in the conclusion of litigation is objectionable, but in this case, further study of this most sensitive area may produce a better disposition in the long run.

Although I am procrastinating at this point, I have the feeling that your discussion of the merits will become the opinion of the Court when the case comes back.

Respectfully,

Mr. Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 26, 1977

Re: 75-1064 - Kremens v. Bartley

Dear Bill:

Please join me.

Respectfully,

JPS

Mr. Justice Rehnquist

Copies to the Conference