The Burger Court Opinion Writing Database

United States Parole Commission v. Geraghty

445 U.S. 388 (1980)

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

November 16, 1979

Re: 78-572 - U.S. Parole Commission v. Geraghty

Dear Harry:

Your draft and my editorially revised Roper passed in today's circulations. There are some "tensions", e.g., the final sentence on your page 11. This is not surprising between a case with a clear economic and property interest and one with quite a different element. I may need to clarify possible ambiguities; for example, I rest firmly on Roper's economic interest in spreading the legal costs over the class and on the idea that appealability is not terminated by the final judgment here, rather than on any "obligation" of Roper to the putative class. Geraghty does not seem to have a parallel economic interest.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

February 1, 1980

PERSONAL

Re: 78-572 - U.S. Parole Commission v. Geraghty

Dear Harry:

For me the issue in this case has largely a surface relationship to our Roper problems. I will examine developments on my return from the A.B.A.

Regards,

WEB

Mr. Justice Blackmun

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

CHAMBERS OF
THE CHIEF JUSTICE

March 11, 1980

PERSONAL

Re: 78-572 - U.S. Parole Commission v. Geraghty

Dear Lewis:

I could join your dissent if

(a) on line 9, page 9, after "paid" you insert "into court but not accepted by plaintiffs . . . .";

(b) change the final sentence of the first full paragraph to read:

"One can disagree with that analysis yet conclude that Roper affords no support for the Court's holding here."

Regards,

Mr. Justice Powell

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

CHAMBERS OF
THE CHIEF JUSTICE

March 11, 1980

Re: 78-572 - U.S. Parole Commission v. Geraghty

Dear Harry:

I have made a final review of this case after reading Lewis' revised dissent in Roper. As you know, I have never viewed these cases as being governed by the same principles; for me the application of traditional concepts of mootness calls for reversal of Geraghty and affirmance of Roper, since the former has no vestige of interest in the litigation.

If Lewis makes some changes in his dissent in this case, I may join him.

Otherwise, I will simply dissent "solo".

Regards,

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

March 12, 1980

Re: 78-572 - United States Parole Commission
v. Geraghty

Dear Lewis:

Thank you for the accommodation in your dissent, which I now join.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

September 28, 1979

RE: No. 78-572 United States Parole Commission v. Geraghty

Dear John:

I see no reason whatever why you should recuse yourself in the above.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 19, 1979

RE: No. 78-572 United States Parole Commission v. Geraghty

Dear Harry:

I am happy to join your opinion for the Court in the above.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 6, 1980

Re: 78-572 - United States Parole Commission v. Geraghty

Dear Lewis:

Please add my name to your dissenting opinion.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 20, 1979

Re: No. 78-572 - U.S. Parole Commission
v. John M. Geraghty

Dear Harry,

Please join me.

Sincerely yours,

Byron

Mr. Justice Blackmun

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 29, 1979

Re: No. 78-572 - U.S. Parole Com. v. Geraghty

Dear Harry:

Please join me.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 9, 1979

Re: No. 78-772 - United States Parole Commission
v. Geraghty

Dear Chief:

This note will confirm my comment to you yesterday by telephone that, after further examination of this case, my vote is to affirm. Accordingly, now that the case has been assigned to me, I shall endeavor to write it in that direction.

I would have thought, however, that the same person should write this case and No. 78-904, Deposit Guaranty National Bank v. Roper. They fall in the same area and perhaps might have been covered in a single opinion. Inasmuch, however, as you wish to retain Roper for yourself, I suggest that we plan (if the votes in Guaranty hold firm) to bring the two cases down together. I would not wish us to be working at cross-purposes, even to a slight degree.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 16, 1979

Re: No. 78-572 - United States Parole Commission, et al. v. Geraghty

Dear Chief:

This circulation of a proposed opinion in the above case will bring into focus the connection between this case and your pending opinion in No. 78-904, Deposit Guaranty National Bank v. Roper. In my letter of October 9 and in your memorandum of November 1, each of us expressed some concern about conflict between the two opinions.

I have endeavored to draft Geraghty so that it would provide a minimum of tension with Roper. Indeed, as you will observe, Roper is cited in Geraghty several times.

You, of course, already have a Court in Roper. Despite this fact, I call to your attention two minor points in the Roper opinion that might create problems with Geraghty. These are the only ones, I believe, that are of some concern to me:

1. On pp. 6-7 and n.7 in Roper there is an implication that a plaintiff who settles his individual claim may not appeal a denial of a class certification. The case authority cited is the dissenting opinion (although it is not described as a dissent) in United Airlines, Inc. v. McDonald. This does not directly conflict with the opinion in Geraghty, since Geraghty also does not involve a voluntary settlement. I am not persuaded, at least at this point, that the settlement situation is all that easy and clear. I would prefer that it be left open until presented in a "concrete" factual context.

2. On pp. 8-10 your opinion seems to approve the distinction in the Electrical Fittings case between a judgment on the merits and "true" mootness. The Roper opinion states on page 9:

perceived the critical distinction
he definitive mootness of a case or
versy, which ousts the jurisdiction of
eral court and requires dismissal of the
and a judgment in favor of a party at
intermediate stage of litigation, which
oes not in all cases terminate the right to
appeal."

understand this language, I think it could be read as
ting the Solicitor General's argument that "expiration"
a claim is different for Art. III purposes from a judg-
ent on the merits of the claim. This may not be fully
consistent with Geraghty.

I shall be interested in your reactions to this. If my concern as to these two points in Roper is alleviated, I would be in a position to join your opinion in that case.

Sincerely,

Harry

The Chief Justice

cc: The Conference

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

From: Mr. Justice Blackmun

Circulated: 16 NOV 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–572

United States Parole Commission et al., Petitioners, *v.* John M. Geraghty. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[November —, 1979]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case raises the question whether a trial court's denial of a motion for certification of a class may be reviewed on appeal after the named plaintiff's personal claim has become "moot." The United States Court of Appeals for the Third Circuit held that a named plaintiff, respondent here, who brought a class action challenging the validity of the United States Parole Commission's Parole Release Guidelines could continue his appeal of a ruling denying class certification, even though he had been released from prison while the appeal was pending. We granted certiorari, 440 U. S. 945 (1979), to consider this issue of substantial significance, under Art. III of the Constitution, to class action litigation,[1] and to resolve the conflict in approach among the Courts of Appeals.[2]

[1] The grant of certiorari also included the question of the validity of the Parole Release Guidelines, an issue left open in *United States* v. *Addonizio*, 422 U. S. —, — (1979) (slip op., at 5–6). We have concluded, however, that it would be premature to reach the merits of that question at this time. See *infra*, at —.

While the petition for a writ of certiorari was pending, respondent Geraghty filed a motion to substitute as respondents in this Court five prisoners, then incarcerated, who also were represented by Geraghty's attorneys. In the alternative, the prisoners sought to intervene. We deferred our ruling on the motion to the hearing of the case on the merits.

[*Footnote 2 is on p. 2*]

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 29, 1979

Dear Chief:

Re: No. 78-572 - United States Parole Comm'n v. Geraghty

I am reluctant about your suggestion that the Court hold the case is moot here but that post-mootness intervention would save the controversy. I think the issue of class certification and the issue of the merits are separate, and that the one who made the motion for class certification is the proper one to defend it on appeal.

Sincerely,

Harry

The Chief Justice

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 29, 1979

Re: No. 78-572 - United States Parole Comm'n v. Geraghty

Dear Bill:

I fully understand your concern and discomfiture, for I agree that our past cases seem to move first in one direction and then in another. As a consequence, the drafting of the proposed opinion for this case proved to be, for me at least, a difficult task. I believe, however, that my handling of these past cases, including in particular footnote 7, is an honest one.

I shall recirculate shortly with minor revisions, some of which are occasioned by the changes made by the Chief Justice in his new draft of the opinion in Roper. My changes may or may not alleviate your concerns.

I am not sure that I understand your discomfiture with part V, as expressed in the next to the last paragraph of your letter of November 21. I had thought that the opinion (page 17) indicated that the District Court did not have sua sponte responsibility to construct subclasses. In the new draft, I am emphasizing this, and I believe that the additional language should satisfy your concern on this point.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

STYLISTIC CHANGES and pp. 11, 17

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 29 Nov 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–572

United States Parole Commission et al., Petitioners, *v.* John M. Geraghty.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[November —, 1979]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case raises the question whether a trial court's denial of a motion for certification of a class may be reviewed on appeal after the named plaintiff's personal claim has become "moot." The United States Court of Appeals for the Third Circuit held that a named plaintiff, respondent here, who brought a class action challenging the validity of the United States Parole Commission's Parole Release Guidelines, could continue his appeal of a ruling denying class certification even though he had been released from prison while the appeal was pending. We granted certiorari, 440 U. S. 945 (1979), to consider this issue of substantial significance, under Art. III of the Constitution, to class action litigation,[1] and to resolve the conflict in approach among the Courts of Appeals.[2]

[1] The grant of certiorari also included the question of the validity of the Parole Release Guidelines, an issue left open in *United States* v. *Addonizio*, 442 U. S. —, — (1979) (slip op., at 5–6). We have concluded, however, that it would be premature to reach the merits of that question at this time. See *infra*, at 17.

While the petition for a writ of certiorari was pending, respondent Geraghty filed a motion to substitute as respondents in this Court five prisoners, then incarcerated, who also were represented by Geraghty's attorneys. In the alternative, the prisoners sought to intervene. We deferred our ruling on the motion to the hearing of the case on the merits.

[*Footnote 2 is on p. 2*]

pp. 16-18

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: FEB 11 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, v. John M. Geraghty. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[November —, 1979]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case raises the question whether a trial court's denial of a motion for certification of a class may be reviewed on appeal after the named plaintiff's personal claim has become "moot." The United States Court of Appeals for the Third Circuit held that a named plaintiff, respondent here, who brought a class action challenging the validity of the United States Parole Commission's Parole Release Guidelines, could continue his appeal of a ruling denying class certification even though he had been released from prison while the appeal was pending. We granted certiorari, 440 U. S. 945 (1979), to consider this issue of substantial significance, under Art. III of the Constitution, to class action litigation,[1] and to resolve the conflict in approach among the Courts of Appeals.[2]

[1] The grant of certiorari also included the question of the validity of the Parole Release Guidelines, an issue left open in *United States* v. *Addonizio*, 442 U. S. —, — (1979) (slip op., at 5–6). We have concluded, however, that it would be premature to reach the merits of that question at this time. See *infra*, at 17.

While the petition for a writ of certiorari was pending, respondent Geraghty filed a motion to substitute as respondents in this Court five prisoners, then incarcerated, who also were represented by Geraghty's attorneys. In the alternative, the prisoners sought to intervene. We deferred our ruling on the motion to the hearing of the case on the merits.

[*Footnote 2 is on p. 2*]

Roper citations changed to conform with recirculation and

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–572

United States Parole Commission et al., Petitioners, *v.* John M. Geraghty.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[November —, 1979]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case raises the question whether a trial court's denial of a motion for certification of a class may be reviewed on appeal after the named plaintiff's personal claim has become "moot." The United States Court of Appeals for the Third Circuit held that a named plaintiff, respondent here, who brought a class action challenging the validity of the United States Parole Commission's Parole Release Guidelines, could continue his appeal of a ruling denying class certification even though he had been released from prison while the appeal was pending. We granted certiorari, 440 U. S. 945 (1979), to consider this issue of substantial significance, under Art. III of the Constitution, to class action litigation,[1] and to resolve the conflict in approach among the Courts of Appeals.[2]

[1] The grant of certiorari also included the question of the validity of the Parole Release Guidelines, an issue left open in *United States* v. *Addonizio*, 442 U. S. 178, 184 (1979). We have concluded, however, that it would be premature to reach the merits of that question at this time. See *infra*, at 17.

While the petition for a writ of certiorari was pending, respondent Geraghty filed a motion to substitute as respondents in this Court five prisoners, then incarcerated, who also were represented by Geraghty's attorneys. In the alternative, the prisoners sought to intervene. We deferred our ruling on the motion to the hearing of the case on the merits.

[*Footnote 2 is on p. 2*]

March 13, 1980

Re: No. 78-572 - United States Parole Comm'n v. Geraghty

Dear John:

Thank you for the suggestion in your letter of today. I am glad to follow through and shall insert the cite on page 11.

Sincerely,

HAB

Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 13, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 78-572 - United States Parole Comm'n v. Geraghty

On page 11 of the proposed opinion I am inserting the following immediately after the numeral in the eighth line of the second paragraph:

"See also Coopers & Lybrand v. Livesay, 437 U.S., at 469."

HAB.

March 19, 1980

Re: No. 78-572 - United States Parole Comm'n v. Geraghty

Dear John:

Through some slip-up, the citation to Cooper & Lybrand did not get into the galley form of the opinion as announced today. I am asking Mr. Cornio to see that it appears in the slip opinion as it is forthcoming from the GOP. I am sorry about this.

Sincerely,

HAB

Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 19, 1980

MEMORANDUM TO THE CONFERENCE

Re: Holds for No. 78-572 - United States Parole Commission, et al. v. Geraghty

There are five holds for Geraghty. These are Nos. 78-1008, 78-1169, 78-1286, 79-5649, and 79-5885. The second and third were consolidated on appeal to the CA7 and that court disposed of them in one opinion.

1. No. 78-1008, Satterwhite v. City of Greenville, Texas. The named plaintiff filed suit alleging sex discrimination and moved for class certification. The District Court denied this motion without holding an evidentiary hearing. It later ruled against petitioner on the merits of her claim, finding she had not been discriminated against on the basis of sex. On appeal, a CA5 panel affirmed as to the merits but reversed the denial of class certification. 549 F.2d 347 (1977). Upon rehearing, the panel, by a divided vote, vacated its prior decision with respect to the class action issues and remanded the case for an evidentiary hearing. 557 F.2d 414 (1977). Sitting en banc, the CA5 vacated the panel opinion, held the plaintiff was not a proper class representative, and remanded the case with instructions to dismiss. 578 F.2d 987 (1978). There were four dissenters. The Court reasoned that petitioner "is not a proper class representative because she neither has claims typical of the members of the class nor has an adequate common interest or nexus with them." Id., at 991. It relied on the fact that it now knew that petitioner was not a member of the class she sought to represent, even at the beginning of the law suit. The CA indicated that there might be situations in which a named plaintiff could continue to represent the class, notwithstanding a non-meritorious individual claim, especially where class certification was denied after a hearing. Further, failure to move for a hearing reflected on the adequacy of representation.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

September 28, 1979

78-572 U.S. Parole Commission v. Geraghty

Dear John:

I agree with Bill Brennan that there is no reason for you to recuse in this case.

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 28, 1979

78-572 U.S. Parole Commission v. Geraghty

Dear Harry:

As I was on the "short side" in both Roper and Geraghty, I expect to write a dissent.

I probably will use Geraghty as the principal case for my dissent, with a brief separate dissent in Roper.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

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

78-572

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 4, 1979

Rule 23 Class Action Suits

Dear Chief, Bill and Harry:

I have some material from Professor Maurie Rosenberg, who succeeded Dan Meador at the Justice Department, on studies and proposals as initiated by Dan with respect to Rule 23.

These were provided me by Maurie after the Justice Department apparently declined to make them available to our library - for reasons I do not know.

In any event, they are available upon request. I have just received them, and have them in my Chambers. I doubt that they have any relevance to our two pending cases, but they are available to you - or to others - if desired.

Sincerely,

L. Lewis

The Chief Justice
Mr. Justice Brennan
Mr. Justice Blackmun

lfp/ss

January 30, 1980

78-572 U.S. Parole Comm. v. Geraghty

Dear Potter and Bill:

I am circulating my dissent in the above case this afternoon.

If my records are correct, both of you voted tentatively as I did at Conference. I believe all of the votes are in except yours. I would welcome company, and therefore invite your comments. Indeed, even if you conclude not to join me, I would still welcome any suggestions - as I view what is written in this case in particular as likely to have a significant effect on Article III jurisprudence.

Although there is some tension between Geraghty and Roper, that you have joined, there are some distinctions. At the practical level (emphasized by the CJ in his Roper opinion) there is a major distinction between the two cases. If Roper were decided the way that I think it should be, members of the putative class - having slept on their rights for nine years more or less - may be barred by the statute of limitations.

In Geraghty, no one will be adversely affected by applying conventional Article III mootness. Geraghty's counsel, as you will remember, was refreshingly candid about this. He agreed that his only client, Geraghty, had nothing whatever to gain by class certification. Moreover, counsel stated that there would be no problem in commencing another suit to test the validity of the parole procedure. There were plenty of available clients still imprisoned with terms long enough to assure they would not be paroled during the course of litigation.

In short, a fresh suit - for which "captured clients" are available - would ensure that the issue is litigated. The reasons principally relied upon in Roper for preserving the class action simply do not exist in Geraghty.

Sincerely,

Mr. Justice Stewart
Mr. Justice Rehnquist

lfp/ss

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

From: Mr. Justice Powell

1-30-80

Circulated: JAN 30 1980

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, *v.* John M. Geraghty. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE POWELL, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante,* at 8–12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante,* at 12–16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

1,3,5-7,9,11,15

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

From: Mr Justice Powell

Circulated: FEB 8 1980

Recirculated:

2-7-80

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, v. John M. Geraghty.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 8–12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 12–16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

2,4,12-13

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

2-13-80

From: Mr. Justice Powell

3rd DRAFT

Circulated: _____

Recirculated: FEB 13 19

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, *v.* John M. Geraghty.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 8–12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 12–16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

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

From: Mr. Justice Powell

3-4-80

Circulated: _____

4th DRAFT

Recirculated: MAR 10 1980

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, *v.* John M. Geraghty. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante,* at 8–12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante,* at 12–16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

March 11, 1980

78-572 U.S. Parole Commission v. Geraghty

Dear Chief:

Thank you for your letter of this date.

I am happy to make the changes in my dissent that you suggest.

These will be made, and I hope to circulate by tomorrow.

Welcome aboard!

Sincerely,

The Chief Justice

lfp/ss

1, 9

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

From: Mr. Justice Powell

3-12-80

Circulated: _____

5th DRAFT

Recirculated MAR 12 1980

SUPREME COURT OF THE UNITED STATES

No. 78-572

United States Parole Commission et al., Petitioners, *v.* John M. Geraghty. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App., at 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 8–12. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 12–16. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 21, 1979

Re: No. 78-572 - United States Parole Commission v. Geraghty

Dear Harry:

As you undoubtedly sensed from my "join letter" to the Chief in No. 78-904 - Deposit Guaranty National Bank v. Roper, I felt somewhat pushed to the brink in joining him, and do not feel able to join your opinion in its present form. Because the area has been so confused, not only by opinions which I have joined but by opinions which I have written, I feel this letter takes you to task, if it does that at all, no more than it does me and perhaps some of our colleagues.

There is no doubt in my mind, in retrospect, that Franks v. Bowman, 424 U.S. 74, virtually stood my opinion in Sosna v. Iowa, 419 U.S. 393 (1975) on its head. I think you recognize as much in your footnote 6, where you state that in Franks the Court held that "the class action aspect of mootness doctrine does not depend on the class claim's being so inherently transitory that it meets the 'capable of repetition, yet evading review' standard." And, as you point out in your text on the same page, this standard was developed totally outside of the class action context.

Since as I indicated in my join letter to the Chief, I was not at all sure that the views I expressed in Geraghty

at Conference represented the majority view, I will not burden you further with minor disagreements with your opinion. I do think, and you are frank enough to suggest as much, that it is flatly inconsistent with both Indianapolis School Commissioners v. Jacobs, 420 U.S. 128 (1975), Weinstein v. Bradford, 423 U.S. 147 (1975), and Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976), so far as the "relation back" in class actions is concerned.

You say at the top of page 12 that the cases previously referred to "demonstrate the flexible character of the Article III mootness doctrine". To me this is a great understatement, and it ought not to be the law of the Constitution, even if it is the case law. I had thought that in Kremens v. Bartley, 431 U.S. 119 (1977), which you cite at page 10, we held that there was indeed a prudential group of considerations attending the mootness doctrine, but that they were in addition to mootness -- that even though a case were not technically moot, such considerations might prevent a federal court from considering the merits of the litigation. I certainly did not intend my vote in any of the cases which you cite to demonstrate "the flexible character of the Article III mootness doctrine." I think that if a case is technically moot, in the sense that there is no longer a case or controversy, then it is not a question of "flexibility or "prudential considerations", but that a court of the United States must simply refuse to proceed further with the litigation other than to dismiss it.

Perhaps many of these rather off the cuff observations are less at odds with your opinion than they presently seem to me to be, and I would welcome any suggested changes or suggested revisions in my own reasoning which would lead me to a different conclusion. It does not presently seem possible to me, however, to join Part V of your opinion because that part sanctions the Court of Appeals' requiring the District Court to consider the possibility of certifying

classes sua sponte. I guess that I was too long in the practice to think that a party who did not raise and preserve his claim at every stage of the litigation was entitled, not only to a decision on the merits in the Court of Appeals in the case which may be moot, but to a consideration by the trial court of matters which might result favorably to him which he had never pressed upon the trial court.

I can go along with much of your opinion; as presently advised, the bottom line for me would have to be "vacate" the judgment of the Court of Appeals, even though it in turn vacated the judgment of the District Court.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 1, 1980

Re: No. 78-572 - United States Parole Commission v. Geraghty

Dear Lewis:

Please join me in your dissent in this case. I have joined the Chief's opinion in Roper, and therefore do not anticipate joining your forthcoming dissent in Roper. Frankly, I think our cases on "mootness" are at sixes and sevens, and that any litigant or any court can derive support from statements made in one or another of them. Because I think Harry's opinion for the Court in this case is not lacking in precedental support, and because I think there is undoubted tension between a "join" in Roper and a dissent in this case, I shall probably write separately to explain my position. I hope to do so within the next two or three days.

Sincerely,

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

September 28, 1979

MEMORANDUM TO THE CONFERENCE

Re: 78-572 - United States Parole Commission v. Geraghty

The briefs on the merits have reminded me that I was a member of the Seventh Circuit panel that affirmed Geraghty's conviction in 1974, see United States v. Braasch, 505 F.2d 139. I did not, however, sit on the panel that subsequently refused to review a reduction in his sentence, see 542 F.2d 442.

Since the appeal on which I did sit raised no questions concerning the severity of Geraghty's sentence--and really had nothing whatsoever to do with the various issues now before us--I do not think there is any reason for me to recuse myself. However, I thought I should advise you of the facts and if there is any contrary feeling on the Court, I would welcome your advice.

Respectfully,

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 16, 1979

Re: 78-572 - United States Parole Commission
v. Geraghty

Dear Harry:

Please join me.

Respectfully,

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 13, 1980

Re: 78-572 - United States Parole Comm.
v. Geraghty

Dear Harry:

Having re-read your opinion for the Court in the light of the most recent circulations, I remain firmly with you. I have one very minor suggestion that you may feel entirely free to reject.

It occurs to me that the reliance in Coopers & Lybrand on the McDonald holding that appealability is proper after final judgment, was even more significant in rejecting the collateral order rationale for appealability than in the rejection of the "death knell" rationale. I wonder therefore, if you might want to consider simply inserting a citation to Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, on page 11 of your opinion immediately after your quotation from McDonald in the second paragraph. Alternatively, you might wish to insert that cite on page 13 immediately after the cite to McDonald.

If you think it is too late to tamper with opinions that are probably ready to come down, just forget about this suggestion but I thought it might at least be worth your thinking about.

Respectfully,

Mr. Justice Blackmun