Res Geraghty:

CITAB claims that Rogers supports Geraghty, as we note at pg 6—
I believe it is unnecessary to repeat the cross-cite.

2 On pg 12, how about

"Absent such identification, the claim of concrete injury is indeed an empty"

Ellen
March 1, 1979

Re: No. 78-572: US Parole Comm'n v. Geraghty;
No. 78-904: Deposit Guaranty Nat'l Bank v. Roper;
No. 78-1008: Satterwhite v. Greenville, TX.

Dear Harry,

I do not object to granting Geraghty across the board.

Sincerely yours,

[Signature]

Mr. Justice Blackmun

Copies to the Conference
cmc
MEMORANDUM TO THE CONFERENCE:

I vote as follows:

78-572 - U.S. Parole Commission v. Geraghty - Grant in full

78-904 - Deposit Guaranty National Bank v. Roper - Grant Questions 1 and 2

78-1008 - Satterwhite v. Greenville, Texas - Hold for 78-572 and 78-904.

Regards,

[Signature]
U. S. PAROLE COMMISSION

vs.

GERAGHTY

Relisted for Mr. Justice White.

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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,

Mr. Justice Stevens

1fp/ss

cc: The Conference
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

c: The Conference
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,

[Signature]

[Handwritten note:]

Dear John, I agree with Bill Brennan that there is no reason for you to recuse in this case.
SUPPLEMENTAL MEMORANDUM

TO: Mr. Justice Powell
FROM: Ellen
DATE: October 1, 1979
RE: US Parole Commission v. Geraghty, No. 78-572

The SG has filed a helpful reply brief addressing some of the key arguments. The brief does not, however, convincingly answer resp's most persuasive point - that denial of class certification must be reviewable to prevent that issue from forever evading review.

The SG cites the Jacobs case and the dicta in Spangler v. Pasadena Board of Education to the same effect. As you pointed out, these dicta are controlling if they are the law. But neither case dealt with appeal from a denial of class status, since the actions had been treated as class actions below. Resp has raised strong policy concerns suggesting that the result should be different here. Although I think he is wrong, the answer is not as simple as the SG contends.

The SG also answers the motion to intervene filed by 5 prisoners with live claims in this Court, arguing that the Court is without jurisdiction to grant the motion because intervention cannot revive a dead case.

On the merits, the SG adds some current statistics: in 1978, 11% of the PC's decisions delayed release until after the guideline range, while 10% allowed early release.
As in the preceding case (Depot Guarantee Bank v. Rippe), the issue is whether an Act 3
claim or controversy survives where the named IT retains a stake in litigation & the court
has refused to certify the class.

Here, Reps., a prisoner, brought a class
action suit challenging the U.S. Parole
Guidelines. The DC refused to certify
the class & Reps. appealed. But
before appeal was argued, Reps. was released
and he no longer claims any personal
interest in the case.

Relying on United Auto. v. McDonald, CA 3
held absence of an interested IT and
absence of a certified class did not
moot the case.
Judge (for S.G.)

Relief on Jacobs v. Pasadenia.

No claim certified; Refs. released

from prison while appeal was pending.

This case is different from Roper.

There the DC entered judgment in favor of the TT and never accepted the payment.

Here, the TT was seeking parole - that he accepted. (But Bynum sees no difference)

Agree that ultimate 5 in both cases

in "mootness."

Here claim itself expired before any

claim was certified.

After individual claim becomes moot,

the individual claimant (named TT) no longer

can represent the claim. Sosa.

(But is different from Roper because

-in this situation the A could not "buy-

off" the claim in some way. But in Roper

Parol estoppel could moot case by granting parole)

The parole held was in normal

course. It was not done to end the

lawsuit.
Flaxman (Reply)

Admit that now no longer has any personal stake in that, since reman; volatility of guide lines.

There is no problem here as to similar suits being brought by other parties. Then, no problem of SL line running vs other reman raising same issue.

Jones (Reply)
Vote 4 1/2 to 4 1/2
Chief with ask for memos.

78-572 U.S. Parole Commission v. Geraghty  Conf. 10/5/79

The Chief Justice

Mr. Justice Brennan

Mr. Justice Stewart

Thanks S.G. suggest way to distinguish their from Roper. May be difficult to write out.
Mr. Justice White

Affirm

Can't distinguish Rogers

Mr. Justice Marshall

Affirm

Mr. Justice Blackmun

Affirm in Part & Rev. in Part named IT can't appeal.

But would allow intervention to carry case forward (but no me intervened)

Need not reach merits of

Guideline

Would allow intervention even if either have or no demand.
Mr. Justice Powell

Again, I'd have to see how this writer was determined to be distinguishable in a principled way from the way the Court has voted in Roper. No way can this case be disadvantageous. Counsel admitted he has any number of clients in prison, but not III most recently must in light ...

Mr. Justice Rehnquist

Easier than Roper - but still not easy. With some affirming, Mr. Donald can be distinguished. We need a reason no more than W.G.B. stranded in Bowman to avoid Justice. Case also would be met if it had died before a motion to intervene.

Mr. Justice Stevens

Logically, this is exactly same as Roper. There must be a period after for 30 days in which case is alive whether it dies, withdraws, or is paid off. Here, case was alive on appeal because appeal was taken within 30 days.
Re: No. 78-752 - 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,

The Chief Justice

cc: The Conference
November 16, 1979


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:
"The Court perceived the critical distinction between the definitive mootness of a case or controversy, which ousts the jurisdiction of a federal court and requires dismissal of the case, and a judgment in favor of a party at an intermediate stage of litigation, which does not in all cases terminate the right to appeal."

If I understand this language, I think it could be read as adopting the Solicitor General's argument that "expiration" of a claim is different for Art. III purposes from a judgment 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,

The Chief Justice

cc: The Conference
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,

Mr. Justice Blackmun

Copies to the Conference
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
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,

Mr. Justice Blackmun

cc: The Conference
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,

[Signature]

Mr. Justice Blackmun
Copies to the Conference
cmc
November 28, 1979

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

Dear Harry:

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

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

Sincerely,

Mr. Justice Blackmun

1fp/as

cc: The Conference
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,

Mr. Justice Rehnquist

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

Dear Harry:

Please join me.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference
Having reviewed your draft of 12/28, I can well understand why you found it rather difficult to write a dissent. Apart from the absence of a precedent that fairly can be said to be wholly controlling, and in view of the multiplicity of standing cases (both Article III and Prudential) including the mootness cases, the Court's opinion presents a "moving" target. It agrees with Roper that the application of Article III must be on an "issue by issue" basis; it bisects the mootness doctrine into "flexible" and "less flexible" cases, and it defines a "live controversy" in a wholly unique way.

Nevertheless, Ellen, your draft is too long - as I am sure you recognize. Nor is my familiarity with the myriad of cases sufficiently familiar to enable me to give you precise guidance as to how best to eliminate five or six pages from the text and perhaps also reduce somewhat the notes. I nevertheless make the following observations.

1. With the rider I have dictated (and attached hereto) the introductory paragraph on page 1 is OK.

2. I also think your part I (pp. 2-6, inclusive) is a fine basis introduction - though it is confined to
non class action cases. The text in Part I is a bit forbidding because of the multiple citation and repetitive citation of the full titles of cases. Possibly you can do something about this.

3. Part II of the draft moves into a discussion of the class action cases. This Part includes six and a half pages of text. It reads well, and is supportive of our position. Yet, I view Part III, commencing on page 13, as the heart of our dissent. To the extent that we will discuss in Part III cases now in Part II, I suggest that we hold our fire on these cases until we are attacking or responding to the Court opinion.

I do think that much of what you have written in Part II is excellent, and I am not sure how best to preserve it without appearing to be repetitious and unduly prolonging the opinion.

What would you think of combining Parts II and III, and weaving your treatment of the authorities discussed in Part II into our principal attack on the Blackmun opinion that we now make in Part III.

4. After our Part I, I would move directly to a description of what the Blackmun opinion says and really does to Article III mootness. Part III commencing at page 8 is a good starting place. He takes quite a few
liberties, as I view it, with prior decisions, paying scant attention to the fact that Gerstein lends no support to HAB because its decision turned on the short time span involved so that cases almost always would evade review. The same situation existed in Spanier, although there a class had been certified - as you correctly emphasize.

I have dictated, and will give you herewith, some random thoughts as to what we might say in response to the Court's new distinction between "flexible" and "less flexible" mootness. I think this can be the focal point of our attack. Despite what I have said above as to the central importance of HAB's Part III, I suppose what he says commencing at the bottom of page 14 and going through page 15 in his redefinition of "personal stake" actually is the most radical portion of his analysis.

He identifies three "imperatives" of a continuing live dispute: (i) a sharply presented issue; (ii) a concrete factual setting; and (iii) a self interested party who actually is contesting the case.

The last of these imperatives is conspicuously absent in the present case, despite HAB's conclusion that "these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired." He then
makes the astonishing statement:

"Respondent here continues vigorously to advocate his right to have a class certified."

Is there anything in the record that indicates any interest on respondent's part? To be sure his lawyer is here, but he concedes that his respondent no longer has the slightest interest in the outcome of the litigation.

Then, as you demonstrate quite well, HAB's splitting the mootness "atom" into two, is unprecedented and unsound (see p. 16).

In sum, Ellen, we will have a stronger - and more readable - dissent if we move at a fairly early point to define our targets - drawing them specifically and fairly from HAB's opinion. Then, we should attack them with precedent and logic. As to the precedents, you have already distinguished those Harry relies upon, and emphasized those that support our view. Your task is to do this as a part of our basic rebuttal, rather than spreading it out.

***

I know that it is easier for me to suggest this restructuring of the draft than it will be to accomplish this. I will appreciated your doing this, taking such time as may be necessary. Our dissent is important, at least in the interest of continuity of doctrine. We also should let the law schools know that at least some of us think the Court's decision is a radical departure from precedent and principle.

L.F.P., Jr.
MEMORANDUM

TO: Ellen
FROM: Lewis F. Powell, Jr.

DATE: Dec. 31, 1979

Geraghty

Having reviewed your draft of 12/28, I can well understand why you found it rather difficult to write a dissent. Apart from the absence of a precedent that fairly can be said to be wholly controlling, and in view of the multiplicity of standing cases (both Article III and Prudential) including the mootness cases, the Court's opinion presents a "moving" target. It agrees with Roper that the application of Article III must be on an "issue by issue" basis; it bisects the mootness doctrine into "flexible" and "less flexible" cases, and it defines a "live controversy" in a wholly unique way.

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I have dictated, and will give you herewith, some random thoughts as to what we might say in response to the Court's new distinction between "flexible" and "less flexible" mootness. I think this can be the focal point of a major thrust of our attack.

Despite what I have said above as to the central importance of HAB's Part III, I suppose what he says commencing at the bottom of page 14 and going through page 15 in his redefinition of "personal stake" actually is the most radical portion of his analysis.

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L.F.P., Jr.