MEMORANDUM

TO: Ellen
DATE: Jan. 17, 1980
FROM: Lewis F. Powell, Jr.

78-572 Geraghty

I have reviewed carefully, and with much interest, the revised draft of 1/16/80 of an opinion in this case. I congratulate you on a closely knit and persuasively reasoned dissent. You have restructured the opinion along the lines I suggested very well indeed. I also thank Greg for doing an early edit to accommodate my time problem.

Apart from self evident editing, I have tried to eliminate what seemed to me to be marginal statements - both in the notes and text. Some, it seemed to me, added little. Others, seemed to reach out a bit for arguments that might be debatable. Actually, my eliminations have not been numerous; yet, when you and Greg reread the opinion, bear in mind that our basic points are so strong, it would be unwise to present marginal arguments.

The long rider I have dictated for page 9 is designed merely for emphasis and increased clarity. But I do raise this rather fundamental question. If, indeed, Roper preserves the essence of Article III should I reconsider my
tentative decision to dissent in that case as well as in Geraghty?

I have not yet reexamined Roper, which I read several weeks ago. I will, of course, do this, and suggest that you complete your preliminary draft of the dissent. Then I would welcome the views of both of you on the question I raise.

The distinction we draw on page 9 appears to put Geraghty in a substantially different light from Roper. This does not surprise me too much, as I have always perceived Geraghty as the more shocking of the two decisions by this Court. Moreover, unless Justice Stewart has changed his mind in Geraghty, he may be a possible join in our dissent. Nor has Justice Rehnquist come to rest, as I understand it.

In order to move this along, I suggest that it go to the printer today, hoping to obtain a Chambers Draft before I leave for Florida tomorrow afternoon. I could then review that and let you know by telephone if I have changes. Meanwhile your co-clerks can review the Chambers Draft. This is an important dissent. The Court is making a major departure from Article III jurisprudence. The law reviews are certain to examine the opinions with care. Ours must be the soundest reasoned even if not the most popular result.

L.F.P., Jr.
Before going to press on this, I'd like to draw your attention to two things:

1. What we say about Art. III here is in some tension with your concurring opinion in United States v. Richardson, 418 U.S. 166 (1974). Particularly at pages 184 and 196-197, you seem to adopt the Harlan view from Flast v. Cohen, that the barriers against the "public action" are prudential only. I think that your more recent opinions for the Court reject that view (Warth v. Seldin, and Gladstone, Realtors, for example), and that Richardson should be read in light of the stricter Art. III limits imposed in those cases.

2. On a more mundane level, I have added some citations and clarified the language of Footnote 6. In the course of editing, I had previously dropped the second paragraph of that footnote, in which I had acknowledged that the obligation to give notice upon settlement and the duty to represent class members have
been imposed by some courts even before certification. It destroys the flow of the footnote to put that thought back in, and I have concluded that it is not inconsistent with what we now say.

Finally, I have found no direct support for the last sentence in note 6. The closest I have come is Newberg's treatise, where he says that the Sosna/Pranks result is analogous to the well-settled rule that a trust does not fail for want of a trustee.
Mr. Justice:

To press?

Ellen

On the United States v. Richardson concern, I have reflected further and believe that the bridge was crossed in Warth, Simon, and Gladstone. To the extent there are contrary implications in Richardson, they do not survive those Court opinions.

I agree with this.

TFP

1/29/80
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

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

Dear Lewis:

Please add my name to your dissenting opinion.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference
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
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
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

1fp/ss
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
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,

Mr. Justice Powell

Copies to the Conference
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."
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."
April 22, 1980

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

Dear Henry:

I return my opinion in this case with your suggested editorial changes, and in general they seem fine as usual.

Both my clerk and I do have some question as to what seems to me to be an unnecessary use of "hyphens". My impression is that recently your office has been suggesting the addition of more hyphens than usual. I am inclined to leave stylistic decisions of this kind to you, and if your usage is being accepted generally by other Chambers I will acquiesce.

I do note that the Government Printing Office Style Manual (January 1973), page 75, §6.16 addresses the use of a hyphen "to form a temporary or made compound", and states that "restraint should be exercised" in this usage. This would apply, in my view, to "personal stake requirement" and "class action context".

The matter is not one of vast consequence, and accordingly if you will let me know that your present usage of hyphens is being followed uniformly in Court opinions, I will be content. I do think uniformity with respect to stylistic matters of this kind is desirable, and therefore I will rely on your judgment.

Sincerely,

Mr. Henry C. Lind
lfp/ss