TO: MR. JUSTICE POWELL

FROM: Ellen

RE: No. 78-904 Roper

I have made the language changes you suggested, and rewritten Part II(b) based on a combination of your proposed redraft and footnote. The result shortens my draft by about a page; it is also somewhat shorter than your first proposal. I have tried to make less of an issue of attorney's fees by combining the costs and fees issue. I believe this is an accurate way to view the case: fees are simply one other item of the "expenses" that are claimed in the vaguest terms and in any event legally irrelevant. I have made these two points generally about the entire expense question. As redone, I don't think the "cannot be traced" section is overly long, and I don't think it is marginally relevant. I suspect that, as a matter of fact, there are some costs that have not been recouped that would be sufficient - if Petr were liable for them - to satisfy Art. III under the Court's precedents. Consequently, I would recommend that we leave in text the few remaining sentences in this draft that explain what would happen if the record did support the Court's assumptions.

I also made a minor change on pg. 9, 1st sentence of Part III. 

Ellen
U. S. Parole Commission v. Geraghty

Remind me to talk to Ellen about the possibility of adding a footnote with a Cf. reference to HAB's dissent in Vitek in which he addresses the subject on Article III requirements.
March 10, 1980

78-904 Deposit Guaranty v. Roper

Dear Potter:

Here is the proposed revision of my dissent in this case.

Although the rationale has not been changed, I have made substantial revisions to meet the Chief's even more substantial changes in his opinion for the Court. In his present draft, the Chief - unlike Harry's opinion in Geradty - recognizes what I have thought were settled Article III principles. He then misapplies them, as I view it, by finding the continuing "personal stake" in the sharing of fees and expenses. But the fee arrangement was a 25% contingency, and no present expenses are identified for which petitioner has any responsibility.

I send this to you before circulating as you are my only constituent. If you find it to be satisfactory, I will recirculate promptly and possibly these cases can be brought down next week.

I hope you had a good trip to San Francisco.

Sincerely,

Mr. Justice Stewart

1fp/ss
March 10, 1980

Re: No. 78-904, Deposit Guaranty v. Roper.

Dear Lewis,

Your revised dissenting opinion seems fine to me, and I am glad to continue to add my name to it.

Sincerely yours,

Mr. Justice Powell
March 13, 1980

Re: 78-904 - Deposit Guaranty National Bank v. Roper

MEMORANDUM TO THE CONFERENCE:

The opinion circulated March 12 is being amended as follows:

Line 4, second paragraph, page 6, by inserting after "court" "without their consent"

Line 5, second paragraph, page 6, by inserting a new sentence:

"Neither the rejected tender nor the dismissal of the action over plaintiffs' objections mooted the plaintiffs' claim on the merits so long as they retained an economic interest in class certification."

Regards,

[Signature]
March 14, 1980

Re: 78-904 - Deposit Guaranty National Bank v. Roper

MEMORANDUM TO THE CONFERENCE:

A small change in this opinion is made to add the essence of note 6, on page 7, to a sentence on page 10, line 5, first full paragraph, following the word "question":

"In their desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails."

Regards,

[Signature]

[Name]
March 14, 1980

Re: 78-904 - Deposit Guaranty National Bank v. Roper

MEMORANDUM TO THE CONFERENCE:

A small change in this opinion is made to add the essence of note 6, on page 7, to a sentence on page 10, line 5, first full paragraph, following the word "question":

"in their desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails."

Regards,

[Signature]

* C.J.'s clerk will give me their new draft (with some changes, pg. nos., on Saturday).
March 14, 1980

No. 78-904 Deposit Guaranty v. Roper

Dear John:

I did not see your new footnote 3 until after we adjourned today. Perhaps my use of the term "fiction" did not convey my thought.

You have now added citations to cases that require some response, and I also take this opportunity to clarify the use of the term "fiction". I have tried to make clear that it seems to me you would create a legal fiction for the purpose of achieving review of denial of certification. This might be one way to achieve this purpose, although I would prefer that it be worked out more carefully in a much needed revision of Rule 23.

I suggest that you and I agree on our "battle of footnotes" before we recirculate. And, if you would prefer that I omit the word "fiction", I will be most happy to do so.

Sincerely,

Mr. Justice Stevens

LFP/lab
<table>
<thead>
<tr>
<th>Date</th>
<th>Amount</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>03/3/15</td>
<td>400.00</td>
<td></td>
</tr>
<tr>
<td>03/11/15</td>
<td>500.00</td>
<td></td>
</tr>
<tr>
<td>03/17/15</td>
<td>600.00</td>
<td></td>
</tr>
<tr>
<td>03/21/15</td>
<td>700.00</td>
<td></td>
</tr>
<tr>
<td>03/25/15</td>
<td>800.00</td>
<td></td>
</tr>
</tbody>
</table>