UNITED STATES GOVERNMENT

Memorandum

TO : The Solicitor General DATE: November 19, 1981

FROM : Samuel A. Alito

SUBJECT: The Black Panther Party v. Smith
No. 80-1302 (D.C. Cir., July 8, 1981)

TIME

A petition for a writ of certiorari would be due on December 14, 1981.

RECOMMENDATIONS

Recommendations in favor of petitioning for a writ of certiorari have been received from the Civil Division; its Torts Branch; the FBI; the CIA; ATF; the Department of the Army (oral); former Attorney General Bell; former Attorney General Levi; former CIA Director Colby; former IRS Commissioners Alexander, Thrower, and Walters; former Postmaster General Blount; former FBI Director Kelley, former assistant to the President, Huston; former Attorney General Mitchell (oral); former CIA Director Turner (oral); former CIA Director Helms (oral); former ATF Directors Davis and Serr; and former Postmaster General Bailar (oral).

The IRS recommends against, but does not oppose, the filing of a petition.

I recommend against filing a petition for a writ of certiorari.

DISCUSSION

The facts of this case and the prior proceedings are set out in the numerous attached memoranda and the opinion of the court of appeals (Maj. Op. 10-20). In my memorandum concerning the request for authorization to petition for rehearing en banc (a copy of which is also attached), I analyzed separately each of the legal issues involved and concluded that none possessed the exceptional importance usually required for en banc review. After reviewing the issues, I think that earlier analysis was essentially correct and that petitioning for certiorari is therefore inappropriate.

This case presents three major issues, one of which involves three subsidiary questions. I will not repeat the discussion contained in my earlier memorandum but will simply respond to some of the points made in the Civil Division's memorandum recommending certiorari.

1. Dismissal of the complaint as to the Black Panther Party. The district court dismissed the Party's complaint under Fed. R. Civ. Proc. 37 for failure to comply with three discovery orders. The majority of the court of appeals reversed, finding that the Party was justified in refusing to comply with one of the orders; that it substantially complied with the second; and that it might have been justified in refusing to comply with the third. Judge MacKinnon, concurring in part and dissenting in part, felt that the Party's noncompliance with two of the orders was unjustified, and he failed to discuss the third order. The Civil Division recommends that we challenge the court of appeals' holding with respect to the two orders discussed by Judge MacKinnon. However, even if the Supreme Court were to agree with our arguments, it would not follow that dismissal of the complaint would be the appropriate sanction. For example, Judge MacKinnon, who accepted the arguments that the Civil Division would have us make, felt that dismissal was not warranted. The Civil Division memorandum does not discuss this point, and I still believe it would be difficult to argue that the Party's failure to comply with the discovery orders constituted the sort of "willfulness," "bad faith," (Societe Internationale v. Rogers, 357 U.S. 197, 212 (1958)) or "callous disregard" of responsibilities required to justify the extreme sanction of dismissal after a majority of the court of appeals (rightly or wrongly) found that the Party was justified in disobeying one of the district court's orders, that it substantially complied with another , and that it might have been justified in refusing to comply with the third.

a. The Party's refusal to have its officers respond individually. The Civil Division would have us adopt the position taken by Judge MacKinnon. But, as noted in my earlier memorandum, the only difference between the majority's position and Judge MacKinnon's is that a few additional steps are required before individual responses are ordered. Accordingly, our quarrel with the majority seems rather trivial.

b. The Party's failure to clarify adequately certain answers to interrogatories. The Civil Division recommends against raising this largely factual issue.

c. The Party's refusal to furnish the names of certain officers and members on First Amendment grounds. The court of appeals held that the Party's claim of privilege had to be balanced against the defendants' need for the information sought, and it seems difficult to argue with that general proposition. The Civil Division suggests that the majority erred when it concluded that the district court opinion failed to reveal the careful balancing required, but it seems inappropriate to take that fact-bound issue to the Supreme Court. If the district court did in fact balance the interests as required, it would be far simpler for that court, on remand, to issue a new opinion stating with greater specificity what it had done.

The Civil Division also quarrels with some of the majority's legal analysis -- e.g., concerning the meaning of NAACP v. Alabama, 357 U.S. 449 (1958) -- but it is not apparent that that analysis is essential to the court's holding. Indeed, Judge MacKinnon, who agreed with us on most of these points, also felt that a balancing test was appropriate.

There appears to be some merit in the argument (see, e.g., letter from CIA counsel at 2) that the majority erred in stating that once a plaintiff asserts a privilege of this nature, the burden shifts to the defendant to show the need for the information sought (see Maj. Op. at 54). However, I think the majority's statement ("If [defendants] cannot show that their need for the undisclosed identities is substantial * * *.") is based upon the majority's view that the Party had not merely asserted the privilege but had made a colorable showing in support of its claim (see Maj. Op. at 52 n.153). The issue thus becomes a rather technical one: was the Party's showing sufficient to shift the burden. In an ordinary case, an issue like that would certainly not attract the Supreme Court's interest.

2. Dismissal of the complaint as to Newton. I view this issue much as I do the First Amendment question discussed above. The holding of the court of appeals -- that the case must be remanded so that the district court can balance the competing issues more explicitly -- appears relatively innocuous. The majority probably went too far in some of its statements about the weight to be accorded the assertion of privilege in this case and the circumstances under which the sanction of dismissal would be appropriate, but I would question whether those statements are sufficient to justify a petition for a writ of certiorari.

3. Summary judgment in favor of the post-1973 office-holders. I agree with the Civil Division that this is the most attractive issue in the case, but as they note, this "is essentially a how much is enough question" (Memo at 5). In an ordinary case, we would probably not even consider petitioning on this issue.

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In sum, none of the legal issues presented by this case seems to warrant Supreme Court review. What is especially significant, to my mind, is that every issue except for the one the Civil Division suggests against raising was not decided against the government with finality. Nor is it apparent to me that the decision of the court of appeals will necessarily require protracted proceedings in the district court. The court of appeals' decision here is not comparable, in my view, to that in Hanrahan v. Hampton, 446 U.S. 754 (1980), where the court of appeals vacated the judgment entered in favor of public-official-defendants after an 18-month jury trial. If the district court remains firm in the present case, each of the issues could be decided once again in our favor after a few additional steps are completed.

While I adhere in general to the analysis in my earlier (hastily prepared) memorandum, I would add two observations. First, the case as a whole may be more worthy of Supreme Court review than the sum of the individual legal arguments. While none of the individual legal issues appears to be of great significance, there is something to be said for the argument that the decision as a whole is important because it interferes with the efforts of the district courts to prevent the

harassment of present and former public officials through meritless litigation. My problem with this argument is that it depends upon an impressionistic view of the case that I am not sure the Supreme Court will share. Second, this is not an ordinary lawsuit, and the issues may consequently take on added significance. I am frankly somewhat uncertain how much weight to give these factors. Thus, while I am convinced that the individual legal issues do not warrant the filing of a petition for a writ of certiorari and recommend against that course of action, I recognize that a decision to the contrary has something to recommend it.