U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

December 28, 1981

MEMORANDUM FOR THE SOLICITOR GENERAL

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

I recommend CERTIORARI, limited to the court of appeals' reversal of the grant of summary judgment to the post-1973 defendants.

Because the Civil Division (including Assistant Attorney General McGrath personally) feels so strongly about this case, and because of the identity of our clients, I have scrutinized the case with great care. I have thoroughly reviewed all of the memoranda in the file, including those prepared at the rehearing stage, checked the lower court briefs, and read the court of appeals' massive opinion twice. At the end of that process, I find myself unable to recommend certiorari as to the portion of the case relating to the Black Panther Party's failure to comply with our discovery requests.

1. I concur essentially in Mr. Alito's analysis. The Civil Division does not so much disagree with the standards the court of appeals' announced as it does with the application of those standards to the facts of this case. That issue, however, particularly in a case that the Division concedes is "unusual" (rehearing recommendation, p. 11) and "extraordinary" (id. at 12), strikes me as plainly uncertworthy. Our petition would be filled with challenges to fact-bound determinations and highly discretionary rulings. Moreover, even if we were to prevail on the discovery issue, it would not necessarily follow that the district court correctly chose dismissal as the appropriate sanction for the Party's noncompliance. Indeed, Judge MacKinnon would have upheld the district court's discovery orders, and would have found that the Party violated those orders without

excuse, but he nonetheless believed that dismissal was too harsh a sanction (slip op. 79). 1 /

Although the Civil Division candidly remarks that it too "tend[s] to agree with [Mr. Alito's] analysis * * * and with his conclusion that none of [the discovery issues] presents a question that is, in itself, particularly cert-worthy" (p. 2), it nonetheless recommends Supreme Court review for three principal reasons: (a) we represent individual defendants who are being sued personally for damages; (b) if the case is returned to the district court, "the burden of litigating it will be extreme" (p. 3); and (c) this case is like Hanrahan v. Hampton, 446 U.S. 754 (1980), in which we filed a certiorari petition, because it allows the Court to address the "fundamental question [of] how can what is essentially a massive 'strike' suit against the government and its officers be controlled" (p. 3). I am sympathetic to each of these concerns, but I am unpersuaded that the discovery issues warrant a government certiorari petition.

• I have already given you my views on Civil Division's first factor in my memorandum recommending against certiorari in Conset and in the discussion we had with Assistant Attorney General McGrath on December 17. The fact that we represent individuals is entitled to some weight in a close case, but I do not believe that the issues here are even close to being certworthy. If our clients assess the situation differently, they have until February 11, 1982, to retain other counsel and to file a certiorari petition.

• The second reason offered by Civil Division also cannot be controlling in deciding whether to seek Supreme Court review. While we of course should consider the practical concerns of our trial people, the fact that this case is interlocutory, and that

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1 / I also doubt that it is in the government's interest to persuade the Court to expand the list of situations in which dismissal is appropriate for violation of a discovery order. Recent cases such as the New York census litigation (Carey v. Baldrige) and the Long FOIA fiasco indicate that we often are on the other side of the fence.

the court of appeals has only remanded for further proceedings in the district court, makes this case less rather than more certworthy in my view. We cannot ask the Supreme Court to bother itself with legal issues that lack substantial importance simply because we wish to avoid burdensome litigation in the district court. Moreover, and perhaps more important, the Division's assessment of the result of a victory in the Supreme Court may be unduly optimistic, whereas its assessment of the impact of a refusal to seek certiorari on the discovery issues may be unnecessarily pessimistic. As noted above, even if the Supreme Court agreed with us on the discovery matters, it would not follow that dismissal was the proper remedy. Judge MacKinnon's opinion shows as much. Hence, further extensive trial proceedings might still have to be conducted. On the other hand, as Mr. Alito notes, the court of appeals' remand does not necessarily require that a trial or even further extensive discovery be held: "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" (p. 4).

• Finally, our decision to seek certiorari in Hanrahan does not require a similar conclusion here. Hanrahan was a more compelling case, because the district judge, after a lengthy trial, found that the federal defendants were not responsible for the plaintiffs' injuries. This case, by contrast, was dismissed not on the merits (except as discussed below) but for the Party's refusal to satisfy its discovery obligations. It should also be pointed out that the Court denied this portion of our certiorari petition in Hampton, and Justice Powell (who wrote a strong dissent from the denial) might well recuse himself here, as he did in Velde, because former Attorney General Levi is a defendant.

In sum, the court of appeals' discovery rulings -- while arguably incorrect in some respects 2 / -- do not warrant

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2 / Because I do not favor certiorari on the discovery issues for reasons unrelated to the merits, I have not discussed whether the court of appeals' rulings are incorrect. I should note, however, that at least as to some of those rulings I have my (continued)

certiorari. The issues resolved by the court are not significant outside the bounds of this lawsuit, and they are not even unique to Bivens litigation. Particularly because, as discussed below, another issue in the case does warrant the Supreme Court's attention, I would not detract from our presentation by including a discovery challenge. See note 4, infra.

2. Although I would not include the discovery issues in a certiorari petition, I am persuaded, based upon my review of the file, that we should ask the Supreme Court to review the court of appeals' reversal of the grant of summary judgment on behalf of those defendants 3 / who did not assume office until after 1973. 4 / The district court granted summary judgment because

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doubts whether the court erred. If you are inclined to seek certiorari on the discovery aspect of the case, despite the considerations mentioned by Mr. Alito and me, the merits will then deserve further discussion.

3 / This would include defendants Griffin Bell, W. Michael Blumenthal, Clifford Alexander, Stansfield Turner, Benjamin Bailar, Edward Levi, George Bush, William Simon and William Williams. I am not certain why we limited our summary judgment motion to these defendants. Plaintiffs contended in the court of appeals (Br. 59 n.1) that "[t]he cut-off date of January 1974 was apparently an arbitrary one selected by counsel for defendants." The materials sent to me by Civil Division unfortunately do not appear to include several crucial documents related to the summary judgment matter (e.g., our motion and the supporting and opposing affidavits). I would like to see these before a certiorari petition is filed.

4 / My conclusion that this issue warrants certiorari under our normal standards fortifies my recommendation that we not clutter the petition with a challenge to the court of appeals' ruling on the discovery issues. If we include every issue decided adversely to us, rather than exercise selectivity, there is some chance that the court's egregious ruling on the summary judgment issue will be buried -- not so much by us as by our opponents. If we thereby minimize, even slightly, the likelihood of a grant of certiorari on the summary judgment issue, we will not be (continued)

(i) "Plaintiffs did not plead specific factual, nonconclusory allegations against the moving defendants," (ii) "Defendants' Motion * * * was 'properly supported' by affidavits, which evidenced their lack of involvement in the general acts which were alleged and their good faith in taking any acts with regard to the plaintiffs. Defendants' submission was substantiated by the recency of their respective present and former terms of offices which did generally not coincide with specific acts alleged in the Amended Complaint," and (iii) "Plaintiffs did not oppose defendant's Motion with a sufficient evidentiary submission of their own, and instead relied on the affidavit of their counsel pursuant to Rule 56(f)" (J.A. 253). The court of appeals did not dispute these findings; it reversed solely because the Party "had not yet been given sufficient time to take discovery" as to the post-1973 defendants (slip op. 72).

This is an outrageous ruling. First, as the Civil Division notes, the Party had received massive discovery, including documents related to the post-1973 period, and plaintiffs had more than a year in which to request additional discovery prior to responding to the summary judgment motion. As the district court found (J.A. 253-254): "[P]laintiffs have had ample opportunity to take * * * discovery and have taken discovery. Despite this discovery, plaintiffs have not made a timely evidentiary sumbission to the Court in opposition to defendants' Motion." Second, these defendants were not in office during the period of time covered by the complaint, and it is obvious that they could not have been responsible for the injuries the Party alleged. (In fact, some of the defendants did not even assume office until after the complaint was filed.) The complaint contains no specific factual allegations relating to the post-

acting in the best interests of Messrs. Levi, Bush, and the other prominent post-1973 defendants. I note in this regard that the letter from Bennett Boskey, speaking for former Attorney General Levi, strongly urges that we seek certiorari "at least with respect to the" reversal of summary judgment, and Boskey's letter focuses on that aspect of the case rather than the discovery aspect.

1973 defendants. 5 / While substitution of parties is appropriate in injunctive suits against the government, it goes without saying that a defendant (even a federal official) should not be required to pay damages absent a showing that he was personally involved in proven wrongdoing. Finally, and most important, it is essential that we establish in the Supreme Court that a plaintiff may not sue a federal official in a Bivens action on the basis of conclusory assertions, in the hope that he may be able to strengthen his case in discovery. As we told the Court only a few weeks ago in our Velde reply brief (p. 16): "[E]asily-made allegations, unsupported by specific facts, should not be enough to require federal officials (including, as in this case, the former Attorney General) to undergo a trial. Plaintiffs in Bivens actions should not be permitted to allege essential elements such as willfulness and malice without any elaboration, in the hope that they might be able to elicit evidence helpful to their case in depositions and discovery. To 'ensure that federal officials are not harassed by frivolous lawsuits' (Butz v. Economou, 438 U.S. [478,] 508 [(1978)], complaints such as respondents' should be quickly dismissed." 6 /

These principles are fully applicable in this case, and it would serve a salutary purpose (both here and in connection with Velde) to bring instances like this to the Court's attention. The Party should not have been allowed to charge these high-

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5 / The complaint, in fact, contains no specific factual allegations against any of the defendants. It instead repeatedly asserts that "defendants and their agents" took various actions that allegedly violated the Constitution, but it identifies no defendant by name. I would be prepared to argue in the Supreme Court that a complaint such as this should be disposed of on a motion to dismiss in a Bivens case. But we apparently did not argue the case in that manner in the lower courts.

6 / The plaintiffs in Velde also claimed that they needed further discovery before answering the defendants' summary judgment motion. There is some reason to believe, therefore, that the Court's decision in Velde may address the Fed. R. Civ. P. 56(f) point.

ranking federal officials with constitutional violations, much less to sue them for damages, without some inkling that they were personally responsible for wrongdoing. And if they had such an inkling, they should have been able to say something of an evidentiary nature in response to our summary judgment motion. Instead, they produced not a single factual allegation and complained instead that they needed more discovery. The court of appeals went along with these shenanigans, and I would challenge that ruling in the Supreme Court. A petition drafted to address this one narrow (but extremely important) issue would have more chance of success (and hence would be of more lasting benefit to present and future Bivens defendants) than would the sort of diffuse petition we would be forced to produce if we included an argument related to the complicated and fact-bound discovery matter. 7 /

Kenneth S. Geller KSG
Deputy Solicitor General

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7 / Defendant Moore has raised the First Amendment privilege issue in his certiorari petition (No. 81-774). Hence, the Court will have a chance to review that issue, regardless of what we do, if it believes certiorari is warranted.