U.S. Department of Justice

TORTS BRANCH
Gregg (BkH)

JPM:REK:MJohnston:bet
145-12-3025

Washington, D.C. 20530

12 NOV 1981

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: The Black Panther Party, et al. v. William French Smith, et al. (D.C. Cir. No. 80-1302)

TIME LIMITS

A petition for a writ of certiorari is due December 14, 1981.

RECOMMENDATIONS

Recommendations in favor of petitioning for a writ of certiorari have been received from: our Torts Branch; the Federal Bureau of Investigation; former Attorney General Griffin B. Bell; former Attorney General Edward H. Levi; former CIA Director William E. Colby; former IRS Commissioner Randolph W. Thrower; former Postmaster General Winton M. Blount; and former assistant to the President Tom Charles Huston.

Our Torts Branch advises us that oral recommendations in favor of petitioning for a writ of certiorari have been made by: the Bureau of Alcohol, Tobacco and Firearms; the Department of the Army; former Attorney General John Mitchell; former CIA Director Stansfield Turner; former CIA Director Richard Helms; and former Postmaster General Benjamin F. Bailar.

The Internal Revenue Service recommends against, but does not oppose, petitioning for a writ of certiorari.

I recommend in favor petitioning for a writ of certiorari.

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in fashioning a discovery order designed to ensure that plaintiffs would provide all relevant information available to them and in dismissing plaintiffs' case for their refusal to comply with that order.

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2. Whether it was proper to grant summary judgment to certain individual defendants where the uncontradicted record reflected that those defendants had not been involved in any unlawful actions taken against plaintiffs and when nearly one year had passed since plaintiffs had asserted that they needed further discovery before responding to the summary judgment motion.

STATEMENT

The facts of this case are fully set forth in the memoranda previously prepared in connection with seeking rehearing en banc (copies attached).

DISCUSSION

The various issues raised by the decision of the court of appeals were discussed in some detail in the memoranda prepared in connection with seeking rehearing en banc. We tend to agree with Mr. Samuel A. Alito's analysis of those issues and with his conclusion that none of them presents a question that is, in itself, particularly cert-worthy. Of the four 1/ issues decided adversly to the federal defendants, two (plaintiffs' privilege claims; summary judgment for certain individual defendants) resulted simply in remand to the district court for further consideration, one (plaintiffs' compliance with the order to clarify their answers to interrogatories) was based on the court of appeals' assessment of the facts, and one (the propriety of the order that the Black Panther Party's officers respond individually to interrogatories) involves a relatively minor, technical question of interpretation of the Federal Rules of Civil Procedure.

Nonetheless, we feel compelled to recommend in favor of petitioning for certiorari:

(1) The Department of Justice represents in this case a number of former high government officials who are being personally sued for sizeable damages arising out of alleged actions they took while in office. All of these officials who have

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1/ Mr. Alito designated the appropriateness of dismissal as a sanction in this case as a fifth issue. Since the court of appeals based its decision on the validity of the underlying discovery order, the question of whether the court improperly substituted its own judgment for that of the district court as to the appropriate severity of sanctions is not directly raised.

Two other relatively minor issues were also decided adversly to the federal defendants (see Alito Memorandum, footnote 1).

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to date responded to our inquiries strongly urge seeking Supreme Court review of the court of appeals' decision. 2/ Although the Department is not bound by such recommendations, it does seem appropriate to accord them substantial deference.

(2) If this case is returned to the district court for further proceedings in its present posture, the burden of litigating it will be extreme. The complaint contains some 20 paragraphs of charging allegations, many with multiple subparts, and is based upon thousands of alleged incidents. The allegations made in one subparagraph of the complaint concerning one incident form the subject of the complaint in Hampton v. Hanrahan, a case that "is said to have been 'the largest case tried to a jury in the history of the United States judiciary.'" Hanrahan v. Hampton, 446 U.S. 754, 760 (1980) (Powell, J., dissenting). Plaintiffs can be expected to engage in burdensome and harassing discovery against the various defendants. The FBI alone estimates that it has a million and a half pages of documents that will come within plaintiffs' discovery requests -- and that substantial claims of privilege will have to be asserted as to much of this documentary evidence by the Attorney General personally. Meanwhile, plaintiffs' own intransigence in responding to discovery will make it difficult if not impossible to substantially cut-down on the scope of this case -- particularly since the district court can be expected to be far less aggressive as a result of the admonition that it has received from the court of appeals.

(3) Although the individual issues raised by the court of appeals' decision may not be particularly cert-worthy when considered individually, the cumulative effect of that decision poses a fundamental question: how can what is essentially a massive "strike" suit against the government and its officers be controlled.

In the similar and related, but much simpler, Hampton case the Supreme Court recently declined to grant certiorari to review a court of appeals decision vacating a directed verdict

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2/ A petition for certiorari has already been filed on behalf of George C. Moore, a former FBI official who is being represented by private counsel because of a potential conflict problem.

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for the defendants and ordering a new trial. Three justices dissented, however, and in an opinion by Justice Powell stated:

> [T]his is not ordinary litigation. Although it may appear on the surface to be an unexceptional civil rights suit for damages, the extraordinary magnitude of the litigation and the nature and scope of the evidence demonstrate that this law suit differs from the civil damages actions to which our courts are accustomed.
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> * * *
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> "[T]his case has important overtones of unbridled denigrating attacks on governmental officials." * * * [T]he presence of this collateral objective, related only tangentially if at all to the recovery of damages, imposed a special duty on the courts to bear in mind the admonition of Butz v. Economou, 438 U.S. 478, 508 (1978), that "federal officials [not be] harassed by frivolous lawsuits."

446 U.S. at 763-764.

We believe that the potentially cert-worthy question presented by this case is simply a much broader version of the one recognize by the dissenters in Hampton: whether the cumulative effect of the court of appeals' decision improperly frustrates the district court's attempt to discharge its "special duty" to prevent the judicial process from being used for the massive harassment of federal officials and agencies by plaintiffs with a patent lack of bona fides.

* * *

(1) Arguably, the easiest portion of the court of appeals' decision to challenge is its reversal of the grant of summary judgment in favor of those individual defendants who did not assume office until after 1973. Reversal was based on the ground that plaintiffs had not been given sufficient

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time to take discovery. 3/

Plaintiffs' complaint contains no specific factual allegations relating to the post 1973 defendants. These defendants submitted affidavits denying their involvement in any improper acts. Although nearly one year passed between the time when plaintiffs asserted that they needed further discovery before responding to the motion for summary judgment and the time when that motion was granted, plaintiffs submitted no evidence in opposition to the motion. Since plaintiffs had been provided with significant documentary discovery during the course of that year, the district court's finding that they had "ample opportunity to take * * * discovery and have taken discovery" seems fully justified. The court of appeals' appears to have misinterpreted a stipulation that discovery occur in "waves," since that stipulation did not preclude plaintiffs from taking "first wave" discovery relating to their claims against the post 1973 defendents. In short, although the issue is essentially a how much is enough question, on the facts of this case a finding that still more time for discovery was necessary before summary judgment could be entered seems a gross distortion of the balance sought in Butz v. Economou. See Hanrahan v. Hampton, supra, 446 U.S. at 765 (Powell, J., dissenting) ("We recognized * * *that our decision would invite litigation * We therefore cautioned the judiciary to exercise their authority under the rules of procedure in order to protect official defendants from groundless claims.").

(2) The court of appeals' reversal of the dismissal sanction presents a more complicated challenge because of the multiplicity of grounds upon which dismissal had been predicated. The district court's order compelling plaintiffs to make discovery was the culmination of a protracted series of discovery disputes. (1) Plaintiffs had repeatedly simply failed to respond at all to discovery requests. (2) When they did respond their interrogatory answers were riddled with averments of lack of sufficient information, claims of privilege, incomplete disclosures, and representations that conflicted with prior positions that they had taken. (3) The district court's order compelling further answers can thus be seen as an attempt to fashion a scheme that would comprehensively resolve these shortcomings. The plaintiff Party was ordered to augment its incomplete answers and explain any inconsistencies; to secure answers from its officers instead of simply from a self-designated representative; and to respond in spite of its claim of privilege to interrogatories that the court considered essential to the defendants' ability to prepare their defenses. Plaintiff Newton was

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3/ Several of the post 1973 individual defendants were made defendants in this action almost immediately upon their assumption of office. As to those individuals it is possible to argue that no discovery was proper since any claim that they had committed acts while in office for which they could be held personally liable is clearly spurious.

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similarly ordered to respond in spite of his claims of privilege. The district court imposed the dismissal sanction because it found that its order had been violated in every respect.

(a) Although our Torts Branch disagrees, we do not believe that it would be tactically sound to ask the Supreme Court to review the court of appeals' finding that plaintiffs did comply with the order to augment their incomplete interrogatory answers and explain inconsistencies. Review of this finding could be no more than impressionistic unless the Court is willing to engage in a detailed analysis of the record. On balance, we believe that the fact that plaintiffs had submitted incomplete and inconsistent answers can better be used to justify the propriety of the remaining elements in the district court's order compelling discovery.

(b) Since answers previously provided by the Party's designated representative had been incomplete and ambiguous, the district court's order that Party officers individually answer interrogatories should be a defensible exercise of the court's discretion. The concurring and dissenting opinion of Judge MacKinnon makes a plausible case in support of the district court's legal authority to exercise such discretion.

(c) The court of appeals held that the Party has a First Amendment privilege not to disclose the names of its officers unless the defendants can demonstrate a substantial need for disclosure. It remanded for the district court to reassess the need to compel disclosure and directed that if the district court continues to believe that compelled disclosure is necessary it should (1) re-enter an order requiring the Party to respond and (2) carefully tailor any sanction for a refusal to comply with that order, entering a dismissal "only as a last resort." This holding may be faulted on a number of bases:

--Judge MacKinnon's dissenting argument that the district court had already performed the balancing test required by the majority, and reached a correct result, is supportable on the record. The Party's claim that the associational rights of its officers will be chilled if their identities are disclosed is unsupported by anything other than mere assertion. The defendants' lack of success in obtaining meaningful discovery from the Party, on the other hand, seems a clear indication that they needed to learn the identities of potentially crucial witnesses.

--The court of appeals accords an undue degree of deference to a claim of First Amendment privilege where the privilege is invoked by a party in litigation. Cf. Herbert v. Lando, 441 U.S. 153 (1979). Such a claim should be treated as any other privilege claim and, if the privilege is overcome, under the rule of National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976), the district court has discretion to

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enter whatever sanction it finds appropriate for a refusal to respond. 4/

--The court of appeals' reliance on NAACP v. Alabama, 357 U.S. 449 (1958), is seriously misplaced. The court totally ignores the difference between discovery aimed at disclosure of an organization's membership lists and discovery aimed at disclosure of the identities of that organization's officers. Judge MacKinnon's dissent forcefully points out this distinction and the lack of support that NAACP v. Alabama provides for the majority's ruling because of it.

--As Judge MacKinnon also points out, another distinction between this case and NAACP v. Alabama is that the Black Panthers are not the NAACP. A vital issue in this case is whether there were legitimate law enforcement reasons for investigating the Panthers. Knowing who the Panthers are is plainly an important element in establishing the propriety of any actions taken against the Party. Moreover, to the extent that we can assert that the Black Panther Party is essentially a criminal organization, it might be appropriate to question whether its members and officers even have a First Amendment privilege of association.

(d) The court of appeals also remanded for further consideration of Newton's claims of Fifth Amendment privilege, requiring the defendants to show that they have a substantial need for the information as to which the privilege is claimed. Again, the court's decision can be faulted on a number of grounds:

--In many instances Newton's Fifth Amendment privilege claim appears facially improper in that he claimed the privilege in order to avoid incriminating other people. See Rogers v. United States, 340 U.S. 367, 371 (1951).

--The court of appeals accorded undue deference to an assertion of Fifth Amendent privilege in ruling that Newton's claims may only be dismissed as a last resort when he refuses to make discovery on the basis of the privilege. A party to a civil case is not entitled to invoke the Fifth Amendment without prejudice to his case. See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). As Judge MacKinnon's dissent points out, any Fifth Amendment privilege that Newton might claim must be balanced against the defendants' equally important due process right to all relevant evidence. In striking such a balance the district court should have discretion to fashion the appropriate remedy for a refusal to make discovery.

4/ The court's ruling may also be faulted under the Hockey rule since it compels the district court to give the Party a second bite at the apple even if on remand the district court concludes that its original order was correct.

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--Finally, the court of appeals' concern that the district court may have applied a per se waiver rather than a balancing test when it ordered Newton to respond is misplaced. A Fifth Amendment privilege is waived where the party claiming it has partially testified as to the matters which he claims are privileged. Brown v. United States, 357 U.S. 148, 154-156 (1958); Rogers v. United States, supra, 340 U.S. at 373. The matters as to which Newton claims a privilege are matters which he has put at issue in the allegations of his complaint. Whether he is viewed as having waived (for the purposes of this suit) his privilege as to the details of those matters by having disclosed general "facts" about them or whether the defendants' need to take discovery as to those matters is viewed as outweighing Newton's privilege is of little consequence. To permit a plaintiff to prosecute a claim as to which he refuses to make discovery would be grossly unfair.

CONCLUSION

For the foregoing reasons I recommend in favor of petitioning for a writ of certiorari.

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Civil Division

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