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Friedman v. United States,
No. 18245 (C.A. 8)

We are faced with a decision whether to petition for a writ of certiorari in the Supreme Court to review a decision by the Eighth Circuit holding that false statements to the FBI do not come within the prohibition of 18 U.S.C. 1001. Our 30 day period in which to file expires next Saturday, April 15. The delay was due to our assumption that the Criminal Division was going to handle it and their assumption (a correct one) that we should handle it. You will see from the attached file that Mr. Vinson has asked to see our recommendation before it goes to the Solicitor, so that he can express his views.

Attached is a detailed memorandum prepared by Grady Norris in which he recommends against petitioning for certiorari. He concludes that the court of appeals was wrong on the law, but he bases his recommendation quite frankly on policy considerations. Mr. Marer's short memorandum is also attached in which he concurs in the recommendation on policy grounds.

At a time when the nation is experiencing a number of racial disturbances some of which seem to grow out of or feed on hostility to authority generally and police particularly, one might ask whether it is an appropriate time to give even the appearance of restricting the making of complaints against police officers under 18 U.S.C. 242. It could be argued that we should encourage the expression of grievances to government agencies at all levels regarding the activities or conduct of police. Lawyers may have no difficulty understanding the legal significance of the distinction between bona fide statements and false statements to the FBI; but we might ask whether it might be that clear to ordinary laymen, especially members of racial minority groups.

There are other reasons why false statements made in connection with investigations under 18 U.S.C. 242 should not be the basis of a prosecution under section 1001. The standard practice upon receipt of a 242 complaint is for the FBI to do a "preliminary investigation." This is a routine and minimal investigation involving interviewing the police officer or officers involved, checking appropriate medical records pertaining to the condition of the complainant, and interviewing two witnesses not parties to the dispute. Following a preliminary investigation, no further action is taken unless the Department determines that there is reasonable cause for going ahead based upon the facts reflected by the preliminary investigation. When we balance the potential harm which could result by way of deterring legitimate complaints against the potential harm of conducting preliminary investigations based on false complaints the scales would probably tip against proceeding under 1001, especially in view of the relatively small number of false complaints.

In a few areas of federal law enforcement there are violations of criminal laws which are not normally prosecuted but the offender instead is admonished. This is true for example with violations of the Communications Act by tow truck operators who monitor police radio calls. See the attached memoranda by Messrs. Kauder and Groark. Some such alternative approach could be taken regarding false complaints of section 242 violations.