

UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

TO : David L. Norman, Chief
Appeals and Research Section
Civil Rights Division

DATE: April 10, 1967

very present

JD:AGM:ecw

FROM : Alan G. Marer, Deputy Chief
Appeals and Research Section
Civil Rights Division

- ① *Particularly poor*
- ② *Policy reasons*

AGM

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

I have read Mr. Norris' memorandum on this case in which he recommends that we should not petition for certiorari. I agree with that conclusion, and I also agree that "whether or not the Department should seek review by certiorari" is "essentially a policy question."

I cannot accept the Eighth Circuit's reading of the statute, which excludes from coverage statements volunteered to the F.B.I. in order to avoid "patently absurd results." (Slip opinion, pp. 4-5). There would be nothing "absurd" about construing the statute's liberal language to cover this case; nor is there anything in the legislative history which plainly indicates the statute does not mean what it literally says.

However, it seems to me that it was a mistake to authorize this prosecution in the first place. The Eighth Circuit noted that the accused policeman "admitted that he had scuffled with Friedman while he was in custody on two occasions, each lasting about one and one-half minutes, and that Friedman admittedly had some small, observable injuries," and seems to have implied that on those facts it was bad policy to bring the prosecution. Even assuming a gross exaggeration on Friedman's part about what happened, prosecution of a case like this is bound to deter legitimate complaints of police misconduct. With this I am in complete agreement with what was said by the Court of Appeals. Were a prosecution like this brought in Mississippi against a Negro for falsely accusing a Sheriff of brutality, it would have a disastrous impact. And a Supreme Court ruling in our favor in Friedman, with attendant widespread publicity in the South, could well have the same effect.

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To be sure, it is undesirable for police officers to be falsely accused of brutality, particularly in the explosive situation which now exists in many of our cities. I cannot believe, however, that this problem can be solved by prosecutions under section 1001. If I had to make a policy judgment about that, I would think there is at least as much reason to believe that such prosecutions, even if well founded, would aggravate the problem.

Ordinarily the fact that a prosecution was unwisely initiated in the first place may not be sufficient grounds to abandon it after reversal. But in this case the Supreme Court is bound to notice that the accusation arose out of some actual physical contact between the accused policeman and the defendant, and it is also bound to be troubled by the intimidating effect ~~which~~ on others. ~~which~~ We would thus take some risk, if certiorari is granted, of losing on the merits and having the Supreme Court give the statute a very restrictive and (I think) unwarranted construction which will reach far beyond the police brutality context. Considering that risk, together with the doubts about whether this case should have ever been brought, I recommend against certiorari. If an appropriate non-police brutality case arises concerning statements to the F.B.I., that will be time enough to take the matter to the Supreme Court. Since Friedman is inconsistent with other lower court decisions, letting it stand would not seriously embarrass us in other contexts.

What are the bases for the "policy judgment" in not seeking cert?

(a). Police officer admitted some scuffle w/ defendant - not guilty?

(b). Police brutality claim - ^{But lawyer advised} want pre access to report in brutality cases

(c). They investigate us - give statement write it down - distinction between response

(d). Certain investigations. ^{certainly don't like penalty}
- Preliminary investigations - not much energy
- FBI investigations.

- The holding is not consistent with the policy considerations

- Live with it or not - not look to re-litigate it, confusion might be undesirable to apply for cert and have Court make some decision

What is distinguishing fact of the Freedman case?

- What about the Prisoners?