The Burger Court Opinion Writing Database

California v. Byers

402 U.S. 424 (1971)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

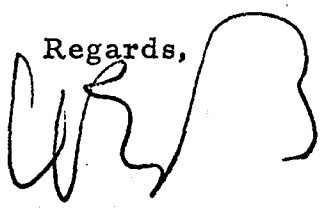
January 28, 1971

Re: No. 75 - California v. Byers

MEMORANDUM TO THE CONFERENCE:

Attached is proposed opinion in the above.

Regards,



Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: The Chief Justice
JAN 28 1971
Circulated: ____________
Recirculated: ____________

Re: No. 75 - California v. Byers

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case presents the narrow but important question of whether the Fifth Amendment's privilege against self-incrimination is infringed by California's so-called "hit and run" statute which requires the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address. Similar "hit and run" or "stop and report" statutes are in effec t in all fifty states.and the District of Columbia.

On August 22, 1966, respondent Byers was charged in a two-count indictment with two misdemeanor violations of the California Vehicle Code. Count 1 charged that on August 20 Byers passed another vehicle without maintaining the "safe distance" required by § 21750. The second count charged that Byers had been involved in an accident but had failed to stop and identify himself as required by § 20002(a)(1).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 1, 1971

Re: No. 75 - California v. Byers

MEMORANDUM TO THE CONFERENCE:

Enclosed is revised proposed opinion in the above.

WEB

Regards,

Changes throughout

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: The Chief Justice

Circulated: DEC 1 1971

Recirculated: _____

No. 75 -- California v. Byers

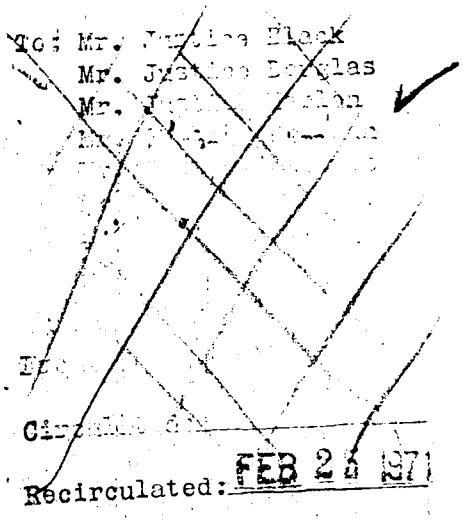
MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case presents the narrow but important question of whether the Constitutional privilege against compulsory self-incrimination is infringed by California's so-called "hit and run" statute which requires the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address. Similar "hit and run" or "stop and report" statutes are in effect in all fifty states and the District of Columbia.

On August 22, 1966, respondent Byers was charged in a two-count indictment with two misdemeanor violations of the California Vehicle Code. Count 1 charged that on August 20 Byers passed another vehicle without maintaining the "safe distance" required by § 21750. The second count charged that Byers had been involved in an accident but had failed to stop and identify himself as required by § 20002(a)(1).

3rd Draft

Changes on Pages 3, 4, 5, 6, 8, 8a (new)



JOHN:
This is not being circulated until you vote. The changes from the 2nd draft are not significant

WEB

No. 75 -- California v. Byers

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case presents the narrow but important question of whether the Constitutional privilege against compulsory self-incrimination is infringed by California's so-called "hit and run" statute which requires the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address. Similar "hit and run" or "stop and report" statutes are in effect in all fifty states and the District of Columbia.

On August 22, 1966, respondent Byers was charged in a two-count indictment with two misdemeanor violations of the California Vehicle Code. Count 1 charged that on August 20 Byers passed another vehicle without maintaining the "safe distance" required by § 21750. The second count charged that Byers had been involved in an accident but had failed to stop and identify himself as required by § 20002(a)(1).

CHAMBERS OF
THE CHIEF JUSTICE

Supreme Court of the United States
Washington, D. C. 20543

MAR 24 1971

MEMORANDUM TO THE CONFERENCE:

No. 75 - California v. Byers

I enclose first printed version of the above. It has undergone considerable reorganization separating into Part (1) the holding that the statutory reporting is not incriminating in the Fifth Amendment sense and Part (2) in effect an alternative holding that the reporting by a driver is not testimonial in the Fifth Amendment sense. The latter is entirely consistent with Schmerber & Wade, among others, which tend to the narrower, and literal Fifth Amendment language.

Regards,

WEB

TM

Changes throughout
order of sections reversed

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st PRINTED DRAFT

From: The Chief Justice

Circulated: _____

Recirculated: MAR 24 1971

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[March —, 1971]

Mr. Chief Justice Burger delivered the opinion of the Court.

This case presents the narrow but important question of whether the constitutional privilege against compulsory self-incrimination is infringed by California's so-called "hit and run" statute which requires the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address. Similar "hit and run" or "stop and report" statutes are in effect in all 50 States and the District of Columbia.

On August 22, 1966, respondent Byers was charged in a two-count indictment with two misdemeanor violations of the California Vehicle Code. Count 1 charged that on August 20 Byers passed another vehicle without maintaining the "safe distance" required by § 21750. The second count charged that Byers had been involved in an accident but had failed to stop and identify himself as required by § 20002 (a) (1).

This statute provides: [1]

> "The driver of any vehicle involved in an accident resulting in damage to any property including ve-

[1] As an alternative § 20002 (a) (2) requires that the driver shall "Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the cir-

4-14-71
(see JMH letter of 4/15)

No. 75

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

Dear John

I think a full court opinion in Byers v Calif. is terribly important when we consider the impact of the carnage now by automobiles — which far exceeds Vietnam casualties.

Would you be willing to mark what parts of my opinion trouble you? Maybe I can omit parts or divide

the opinion into Parts I, II, III
so that we can have a
count for some rationale.

Regards

Warren

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 26, 1971

No. 75 - California v. Byers

Dear John:

On reflection after reviewing your April 23 memo of proposed changes, I conclude I might lose some votes and unsettle an otherwise close case. At this stage of the term, I think the best thing to do is get the opinions down and your separate opinion may well chart the course for the next go-around in this area.

I do appreciate the painstaking work that you put in on this.

Regards,

WEB

Mr. Justice Harlan

1,2,3,6,7,9

Nothing significant.
LES

Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: The Chief Justice

Circulated:

Recirculated: MAY 6 1971

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[May 17, 1971]

Mr. Chief Justice Burger announced the judgment of the Court and an opinion in which Mr. Justice Stewart, Mr. Justice White, and Mr. Justice Blackmun join.

This case presents the narrow but important question of whether the constitutional privilege against compulsory self-incrimination is infringed by California's so-called "hit and run" statute which requires the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address. Similar "hit and run" or "stop and report" statutes are in effect in all 50 States and the District of Columbia.

On August 22, 1966, respondent Byers was charged in a two-count indictment with two misdemeanor violations of the California Vehicle Code. Count 1 charged that on August 20 Byers passed another vehicle without maintaining the "safe distance" required by § 21750. The second count charged that Byers had been involved in an accident but had failed to stop and identify himself as required by § 20002 (a)(1).

This statute provides: [1]

> "The driver of any vehicle involved in an accident resulting in damage to any property including ve-

[1] As an alternative § 20002 (a)(2) requires that the driver shall "[l]eave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the cir-

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[February —, 1971]

Mr. Justice Black, dissenting.

Since the days of Chief Justice John Marshall this Court has been steadfastly committed to the principle that the Fifth Amendment's prohibition against compulsory self-incrimination forbids the Federal Government to compel a person to supply information which can be used as a "link in a chain of testimony" needed to prosecute him for a crime. *United States* v. *Burr,* 25 Fed. Cas. 38, 40 (CA Va. 1807). It is now established that the Fourteenth Amendment makes that provision of the Fifth Amendment applicable to the States. *Malloy* v. *Hogan,* 378 U. S. 1 (1964). The Court's opinion today practically wipes out this protective constitutional safeguard against arbitrary government first most clearly declared by Chief Justice Marshall in the trial of Aaron Burr. *United States* v. *Burr, supra.* In writing this principle out of the Constitution the Court retreats from a cherished guarantee of liberty fashioned by James Madison and the other founders of what they gladly proclaimed to be our free government. One need only read with care the Court's opinion with its citations from past cases to understand the shrinking process to which it today subjects a vital safeguard of our Bill of Rights.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: Black, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 3-23

No. 75.—October Term, 1970

Recirculated: _____

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[March —, 1971]

Mr. Justice Black, with whom Mr. Justice Douglas joins, dissenting.

Since the days of Chief Justice John Marshall this Court has been steadfastly committed to the principle that the Fifth Amendment's prohibition against compulsory self-incrimination forbids the Federal Government to compel a person to supply information which can be used as a "link in a chain of testimony" needed to prosecute him for a crime. *United States* v. *Burr,* 25 Fed. Cas. 38, 40 (CA Va. 1807). It is now established that the Fourteenth Amendment makes that provision of the Fifth Amendment applicable to the States. *Malloy* v. *Hogan,* 378 U. S. 1 (1964). The Court's opinion today practically wipes out this protective constitutional safeguard against arbitrary government first most clearly declared by Chief Justice Marshall in the trial of Aaron Burr. *United States* v. *Burr, supra.* In writing this principle out of the Constitution the Court retreats from a cherished guarantee of liberty fashioned by James Madison and the other founders of what they gladly proclaimed to be our free government. One need only read with care the Court's opinion with its citations from past cases to understand the shrinking process to which it today subjects a vital safeguard of our Bill of Rights.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1, 4

3rd DRAFT

From: Black, J.

SUPREME COURT OF THE UNITED STATES

Circulated: APR 5 1971

Recirculated:

No. 75.—October Term, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[April —, 1971]

Mr. Justice Black, with whom Mr. Justice Douglas and Mr. Justice Brennan join, dissenting.

Since the days of Chief Justice John Marshall this Court has been steadfastly committed to the principle that the Fifth Amendment's prohibition against compulsory self-incrimination forbids the Federal Government to compel a person to supply information which can be used as a "link in a chain of testimony" needed to prosecute him for a crime. *United States* v. *Burr,* 25 Fed. Cas. 38, 40 (CA Va. 1807). It is now established that the Fourteenth Amendment makes that provision of the Fifth Amendment applicable to the States. *Malloy* v. *Hogan,* 378 U. S. 1 (1964). The plurality opinion today practically wipes out this protective constitutional safeguard against arbitrary government first most clearly declared by Chief Justice Marshall in the trial of Aaron Burr. *United States* v. *Burr, supra.* In writing this principle out of the Constitution the plurality opinion retreats from a cherished guarantee of liberty fashioned by James Madison and the other founders of what they gladly proclaimed to be our free government. One need only read with care the opinion with its citations from past cases to understand the shrinking process to which it today subjects a vital safeguard of our Bill of Rights.

The opinion of The Chief Justice labors unsuccessfully to distinguish this case from our previous holdings

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75.—OCTOBER TERM, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[May —, 1971]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

Since the days of Chief Justice John Marshall this Court has been steadfastly committed to the principle that the Fifth Amendment's prohibition against compulsory self-incrimination forbids the Federal Government to compel a person to supply information which can be used as a "link in a chain of testimony" needed to prosecute him for a crime. *United States* v. *Burr*, 25 Fed. Cas. 38, 40 (CA Va. 1807). It is now established that the Fourteenth Amendment makes that provision of the Fifth Amendment applicable to the States. *Malloy* v. *Hogan*, 378 U. S. 1 (1964). The plurality opinion, if agreed to by a majority of the Court, would practically wipe out the Fifth Amendment's protection against compelled self-incrimination. This protective constitutional safeguard against arbitrary government was first most clearly declared by Chief Justice Marshall in the trial of Aaron Burr in 1807. *United States* v. *Burr, supra.* In erasing this principle from the Constitution the plurality opinion retreats from a cherished guarantee of liberty fashioned by James Madison and the other founders of what they gladly proclaimed to be our free government. One need only read with care the past cases cited in today's opinions to understand the shrinking process to which the Court today subjects a vital safeguard of our Bill of Rights.

B

Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: Black, J.

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

Circulated: FEB 4 1971

Recirculated: _____

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[February —, 1971]

Mr. Justice Black, dissenting.

Since the days of Chief Justice John Marshall this Court has been steadfastly committed to the principle that the Fifth Amendment's prohibition against compulsory self-incrimination forbids the Federal Government to compel a person to supply information which can be used as a "link in a chain of testimony" needed to prosecute him for a crime. *United States* v. *Burr,* 25 Fed. Cas. 38, 40 (CA Va. 1807). It is now established that the Fourteenth Amendment makes that provision of the Fifth Amendment applicable to the States. *Malloy* v. *Hogan,* 378 U. S. 1 (1964). The Court's opinion today practically wipes out this protective constitutional safeguard against arbitrary government first most clearly declared by Chief Justice Marshall in the trial of Aaron Burr. *United States* v. *Burr, supra.* In writing this principle out of the Constitution the Court retreats from a cherished guarantee of liberty fashioned by James Madison and the other founders of what they gladly proclaimed to be our free government. One need only read with care the Court's opinion with its citations from past cases to understand the shrinking process to which it today subjects a vital safeguard of our Bill of Rights.

pp. 1-4

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Brennan, J.

Circulated: ______________

Recirculated: 3-15-71

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[February —, 1971]

Mr. Justice Brennan, with whom Mr. Justice Marshall joins, dissenting.

I agree with my Brother Black that, for the reasons given by him, the Fifth and Fourteenth Amendments prohibit California from punishing respondent for failing to comply with the statutory requirement that he admit his involvement as a driver in an automobile accident by stopping and reporting his name and address.[1] Moreover, I do not think that the force of my Brother Black's reasoning may be avoided by my Brother Harlan's approach. As I understand it, my Brother Harlan's view is that current technological progress enabling the Government more easily to use an individual's incriminating statements against him in a criminal prosecution should be matched by frank judicial contraction of the privilege against self-incrimination lest the Government be hindered in using modern technology further to reduce individual privacy.[2] Sufficient refutation of

[1] Although this case was tried and decided prior to our decisions in *Marchetti* v. *United States,* 390 U. S. 39 (1968), and *Grosso* v. *United States,* 390 U. S. 62 (1968), the principles applied in those cases must be applied here. *United States* v. *United States Coin & Currency, ante.*

[2] "Technological progress creates an ever-expanding need for governmental information about individuals as well as an increased capacity to use the information gathered for a multiplicity of purposes; that progress means also that the perceivable risks of

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[March —, 1971]

Mr. Justice Harlan, concurring in the result.

Although I concur in the judgment rendered by the Court, I find this case much more difficult than does the opinion of The Chief Justice.

I

The respondent, Byers, as a driver of a vehicle involved in an accident resulting in property damage, was required by § 20002 (a)(1) of the California Vehicle Code to stop his vehicle at the scene of the accident, locate the owner or person in charge of the vehicle with which he collided, and give that person his name and address. The parties have stipulated that the accident was caused by petitioner's violation of § 21750 of the California Vehicle Code.[1] The California Supreme Court has held that in circumstances where a driver involved in an accident has reason to believe his compliance with the statute creates a substantial risk of disclosure of incriminating evidence, the Fifth Amendment requires that the State must either excuse his noncompliance if he properly pleads the privilege in a subsequent prosecution for failure to comply or forgo the use of any information disclosed by the State's compulsion. Construing the state statute as wholly nonprosecutorial in purpose, the court then held that imposition of a restriction on the use of the informa-

[1] The text of § 20002 and § 21750 are reproduced in The Chief Justice's opinion, at —, *ante*.

1, 5, 7-8, 10-14, 18, 20-24

Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 75.—October Term, 1970

Recirculated: APR 9 1971

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[April —, 1971]

Mr. Justice Harlan, concurring in the result.

For the reasons which follow, I concur in the judgment of the Court.

I

The respondent, Byers, as a driver of a vehicle involved in an accident resulting in property damage, was charged in a two-count complaint with overtaking another vehicle in a manner proscribed by § 21750 of the California Vehicle Code and failing to comply with the requirements of § 20002 (a) of the California Vehicle Code.[1] The parties have stipulated that the accident was caused by petitioner's violation of § 21750 of the California Vehicle Code. Appendix, at 36. The California Supreme Court has held that in circumstances where a driver involved in an accident has reason to believe his compliance with the statute creates a substantial risk of disclosure of incriminating evidence, the Fifth Amendment requires that the State must either excuse his noncompliance if he properly pleads the privilege in a subsequent prosecution for failure to comply or forgo the use of any information disclosed by the State's compulsion. Construing the state

[1] The text of § 20002 (a) is reproduced in The Chief Justice's opinion, at —, *ante*. Section 21750 of the California Vehicle Code provides:

"The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe opertion of the overtaken vehicle. . . ."

April 15, 1971

Re: No. 75 - California v. Byers

Dear Chief:

Your handwritten note was received late yesterday afternoon. Of course I shall try to come up with some suggestions, and you will be hearing from me early next week.

Sincerely,

JMH

The Chief Justice

April 23, 1971

Re: No. 75, California v. Byers

Dear Chief:

This is a follow-up to my note to you of April 15, 1971.

I have reread your proposed opinion of March 24, and, in response to your request that I suggest modifications which would enable me to join at least a part of your opinion, I offer the following suggestions as to Part (1).

The thrust of these suggested changes is twofold: first, Part (1) would now explicitly recognize that Byers faced a substantial risk of self-incrimination within the meaning of our past cases. Second, Part (1) would now treat the relevant portions of Sullivan as dicta, as I think they indeed are. A third point of substantive difference between us i.e., that in Byers we are limiting the holdings of our Marchetti line of cases would, I think, be sufficiently implicit in Part (1) as modified.

I find myself unable, in any event, to join Part (2) of your opinion. Further, as the author of most of the cases we are limiting in Byers, I think it incumbent upon me to write in explanation of my own change of approach. Therefore, if you accept these changes, I will file my own opinion as one concurring in Part (1) of your opinion and in the judgment of the Court.

1) Pp. 3-4 -- carryover sentence beginning with "But". -- Eliminate the sentence and substitute the following:

> "Our prior holdings specifying the minimal level of risk of incrimination necessary to support an assertion of the privilege suggest that the privilege is applicable whenever, from the individual's point of view, there exists a substantial

risk of self-incrimination. Malloy v. Hogan, 378 U.S. 1, 11-14 (1964); Hoffman v. United States, 340 U.S. 367, 374 (1951). Were we to apply the standard articulated in Malloy and Hoffman to the instant case, we would, perhaps, have to conclude that Byers' circumstances warranted an assertion of the privilege. But these cases did not involve a regulatory scheme where recognition of the privilege, even to the limited extent of imposition of a use restriction on information gained by compelled self-disclosure, necessarily entailed a conflict between state pursuit of a noncriminal regulatory objective on the one hand and enforcement of criminal laws on the other hand."

2) P. 4 -- first full paragraph -- Rewrite as follows:

"United States v. Sullivan, 274 U.S. 259 (1927), strongly suggests that in such circumstances the presence of substantial risks of self-incrimination within the meaning of Malloy and Hoffman is not enough to support an assertion of the privilege. There a bootlegger was prosecuted for failure to file an income tax return. He claimed that the privilege against compulsory self-incrimination afforded him a complete defense because filing a return would have tended to incriminate him by revealing the unlawful source of his income. Speaking for the Court, Mr. Justice Holmes suggested, albeit in dictum, that this claim amounted to 'an extreme if not extravagant application of the Fifth Amendment.' Id., at 263-64.5/ Yet the requirement that Sullivan, whose income was derived largely or entirely from illegal sources, disclose the amount of his income certainly involved, from Sullivan's point of view at the time he was required to disclose, a substantial risk that he would be supplying the Government with a useful 'link in the chain' of evidence."

3) Pp. 4-5 -- carryover paragraph, first full sentence on p. 4 -- Eliminate "The components of this requirement were articulated in" and substitute:

"The California Supreme Court, in concluding that the Fifth Amendment required a use restriction as a precondition to compelling Byers to disclose his involvement in the accident, relied principally on our decisions in"

4) P. 6 -- first full paragraph, first two sentences -- Substitute the following, omitting the Albertson cite:

> "In contrast, § 20002(a)(1) is directed at persons involved in automobile accidents resulting in property damage."

5) P. 7, third full sentence -- Substitute the following:

> "But the minimal level of disclosure required of individuals coming within the sweep of § 20002(a)(1) simply does not entail the same degree of focus on criminal conduct as was involved in Marchetti and related cases."

6) End of Part (1) -- Add the following sentence:

> "In these circumstances, we hold that the Fifth Amendment does not require imposition of a use restriction as a precondition to enforcement of § 20002(a)(1) of the California Vehicle Code."

7) P. 7, second full paragraph, 1st sentence -- Substitute the following for the phrase beginning "Even" and ending with "sense":

> "Even if we were to conclude that the usual standard for risks of incrimination was applicable to this reporting requirement,"

[Note: This last change comes in Part (2), but is suggested only as a conforming change in light of the projected modifications of Part (1).]

If the foregoing changes, or their equivalent, are agreeable to you and those who have already joined you, I could go along with Part (1) and thus you would have a Court for one dispositive ground.

Sincerely,

JMH

The Chief Justice

STYLISTIC CHANGES

Pp. 4, 6-8, 10, 14, 17, 18, 23, 25

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. [illegible]

4th DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

No. 75.—OCTOBER TERM, 1970

Circulated:

Recirculated: APR 27 1971

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[May —, 1971]

MR. JUSTICE HARLAN, concurring in the result.

For the reasons which follow, I concur in the judgment of the Court.

I

The respondent, Byers, as a driver of a vehicle involved in an accident resulting in property damage, was charged in a two-count complaint with overtaking another vehicle in a manner proscribed by § 21750 of the California Vehicle Code and failing to comply with the requirements of § 20002 (a) of the California Vehicle Code.[1] The parties have stipulated that the accident was caused by petitioner's violation of § 21750 of the California Vehicle Code. Appendix, at 36. The California Supreme Court has held that in circumstances where a driver involved in an accident has reason to believe his compliance with § 20002 (a) creates a substantial risk of disclosure of incriminating evidence, the Fifth Amendment requires that the State must either excuse his noncompliance if he properly pleads the privilege against self-incrimination in a subsequent prosecution for failure to comply or forgo the use of any information disclosed by the State's

[1] The text of § 20002 (a) is reproduced in THE CHIEF JUSTICE's opinion, at —, *ante*. Section 21750 of the California Vehicle Code provides:

"The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe opertion of the overtaken vehicle. . . ."

6th DRAFT

From: Harlan, J.

Circulated: _____

Recirculated: MAY 4 1971

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, *v.* Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[May —, 1971]

Mr. Justice Harlan, concurring in the judgment.

For the reasons which follow, I concur in the judgment of the Court.

I

The respondent, Byers, as a driver of a vehicle involved in an accident resulting in property damage, was charged in a two-count complaint with overtaking another vehicle in a manner proscribed by § 21750 of the California Vehicle Code and failing to comply with the requirements of § 20002 (a) of the California Vehicle Code.[1] The parties have stipulated that the accident was caused by petitioner's violation of § 21750 of the California Vehicle Code. App. 36. The California Supreme Court has held that in circumstances where a driver involved in an accident has reason to believe his compliance with § 20002 (a) creates a substantial risk of disclosure of incriminating evidence, the Fifth Amendment requires that the State must either excuse his noncompliance if he properly pleads the privilege against self-incrimination in a subsequent prosecution for failure to comply or forgo the use of any information disclosed by the State's

[1] The text of § 20002 (a) is reproduced in The Chief Justice's opinion, at —, *ante*. Section 21750 of the California Vehicle Code provides:

"The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe opertion of the overtaken vehicle. . . ."

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[February —, 1971]

Mr. Justice Brennan, dissenting.

I agree with my Brother Black that, for the reasons given by him, the Fifth and Fourteenth Amendments prohibit California from punishing respondent for failing to comply with the statutory requirement that he admit his involvement as a driver in an automobile accident by stopping and reporting his name and address. That, is, strictly speaking, the only issue before us and I would therefore affirm the judgment of the California Supreme Court reversing respondent's conviction. I am, however, constrained to add that I cannot agree with the California Supreme Court's conclusion that the statutory requirement may be enforced if the State is merely precluded from using the compelled evidence and its fruits in a criminal prosecution. Since the statute requires an individual to admit that he has engaged in conduct very likely to be the subject of criminal punishment under the California traffic laws, the requirement in my view may be enforced only if those reporting their involvement in an accident pursuant to the statutory command are immune from prosecution under state law for traffic offenses arising out of the conduct involved in the accident. See *Piccirillo* v. *New York*, — U. S. —, — — — (1971) (dissenting opinion); *Mackey* v. *United States*, — U. S. —, — (1971) (concurring opinion).

Circulated
2-8-71

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[February —, 1971]

Mr. Justice Brennan, dissenting.

I agree with my Brother Black that, for the reasons given by him, the Fifth and Fourteenth Amendments prohibit California from punishing respondent for failing to comply with the statutory requirement that he admit his involvement as a driver in an automobile accident by stopping and reporting his name and address.* That is, strictly speaking, the only issue before us and I would therefore affirm the judgment of the California Supreme Court reversing respondent's conviction. I am, however, constrained to add that I cannot agree with the California Supreme Court's conclusion that the statutory requirement may be enforced if the State is merely precluded from using the compelled evidence and its fruits in a criminal prosecution. Since the statute requires an individual to admit that he has engaged in conduct very likely to be the subject of criminal punishment under the California traffic laws, the requirement in my view may be enforced only if those reporting their involvement in an accident pursuant to the statutory command

*Although this case was tried and decided prior to our decisions in *Marchetti* v. *United States*, 390 U. S. 39 (1968), and *Grosso* v. *United States*, 390 U. S. 62 (1968), I believe that the principles announced in those cases must be applied here. See *United States* v. *United States Coin & Currency*, — U. S. —, ——— (1971) (dissenting opinion). I therefore feel it appropriate to reach the merits.

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2-19-71

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[February —, 1971]

Mr. Justice Brennan, with whom Mr. Justice Marshall joins, dissenting.

I agree with my Brother Black that, for the reasons given by him, the Fifth and Fourteenth Amendments prohibit California from punishing respondent for failing to comply with the statutory requirement that he admit his involvement as a driver in an automobile accident by stopping and reporting his name and address.* That is, strictly speaking, the only issue before us and I would therefore affirm the judgment of the California Supreme Court reversing respondent's conviction. I am, however, constrained to add that I cannot agree with the California Supreme Court's conclusion that the statutory requirement may be enforced if the State is merely precluded from using the compelled evidence and its fruits in a criminal prosecution. Since the statute requires an individual to admit that he has engaged in conduct very likely to be the subject of criminal punishment under the California traffic laws, the requirement in my view may be enforced only if those reporting their involvement in an accident pursuant to the statutory command

*Although this case was tried and decided prior to our decisions in *Marchetti* v. *United States*, 390 U. S. 39 (1968), and *Grosso* v. *United States*, 390 U. S. 62 (1968), I believe that the principles announced in those cases must be applied here. See *United States* v. *United States Coin & Currency*, — U. S. —, ——— (1971) (dissenting opinion). I therefore feel it appropriate to reach the merits.

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, *v.* Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[February —, 1971]

Mr. Justice Brennan, with whom Mr. Justice Marshall joins, dissenting.

I agree with my Brother Black that, for the reasons given by him, the Fifth and Fourteenth Amendments prohibit California from punishing respondent for failing to comply with the statutory requirement that he admit his involvement as a driver in an automobile accident by stopping and reporting his name and address.[1] Moreover, I do not think that the force of my Brother Black's reasoning may be avoided by my Brother Harlan's approach. As I understand it, my Brother Harlan's view is that current technological progress enabling the Government more easily to use an individual's incriminating statements against him in a criminal prosecution should be matched by frank judicial contradiction of the privilege against self-incrimination lest the Government be hindered in using modern technology further to reduce individual privacy.[2] Sufficient refutation of

[1] Although this case was tried and decided prior to our decisions in *Marchetti* v. *United States*, 390 U. S. 39 (1968), and *Grosso* v. *United States*, 390 U. S. 62 (1968), the principles applied in those cases must be applied here. *United States* v. *United States Coin & Currency, ante.*

[2] "Technological progress creates an ever-expanding need for governmental information about individuals as well as an increased capacity to use the information gathered for a multiplicity of purposes; that progress means also that the perceivable risks of

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3-22-71

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75.—OCTOBER TERM, 1970

California, Petitioner, *v.* Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[March —, 1971]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

I agree with my Brother BLACK that, for the reasons given by him, the Fifth and Fourteenth Amendments prohibit California from punishing respondent for failing to comply with the statutory requirement that he admit his involvement as a driver in an automobile accident by stopping and reporting his name and address.[1] Moreover, I do not think that the force of my Brother BLACK's reasoning may be avoided by my Brother HARLAN's approach. As I understand it, my Brother HARLAN's view is that current technological progress enabling the Government more easily to use an individual's incriminating statements against him in a criminal prosecution should be matched by frank judicial contraction of the privilege against self-incrimination lest the Government be hindered in using modern technology further to reduce individual privacy.[2] Sufficient refutation of

[1] Although this case was tried and decided prior to our decisions in *Marchetti* v. *United States,* 390 U. S. 39 (1968), and *Grosso* v. *United States,* 390 U. S. 62 (1968), the principles applied in those cases must be applied here. *United States* v. *United States Coin & Currency, ante.*

[2] "Technological progress creates an ever-expanding need for governmental information about individuals as well as an increased capacity to use the information gathered for a multiplicity of purposes; that progress means also that the perceivable risks of

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 29, 1971

RE: No. 75 - California v. Byers

Dear Hugo:

I am enclosing my dissent in the above. Will you notice that I am joining your revised dissent as recently circulated. Will you, therefore, please join me.

Sincerely,

Bill

W.J.B. Jr.

Mr. Justice Black

cc: The Conference

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[April —, 1971]

Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall join, dissenting.

Although I have joined my Brother Black's opinion in this case, the importance of the issues involved and the wide range covered by the two opinions supporting the Court's judgment in this case make further comment desirable. Put briefly, one of the primary flaws of the plurality opinion is that it bears so little relationship to the case before us. Notwithstanding the fact that respondent was charged both with a violation of the California Vehicle Code which resulted in an accident, and with failing to report the accident and its surrounding circumstances as required by the statute under review, the plurality concludes, contrary to all three California courts below, that respondent was faced with no substantial hazard of self-incrimination under California law. My Brother Harlan, by contrast, recognizes the inadequacy of any such conclusion. As I understand his opinion, he would simply hold that current technological progress enabling the Government more easily to use an individual's compelled statements against him in a criminal prosecution should be matched by frank judicial contraction of the privilege against self-incrimination lest the Government be hindered in using modern technology further to reduce individual privacy. Needless to say, neither of these approaches is consistent with the Constitution.

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4-21-71

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, *v.* Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[April —, 1971]

Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall join, dissenting.

Although I have joined my Brother Black's opinion in this case, the importance of the issues involved and the wide range covered by the two opinions supporting the Court's judgment in this case make further comment desirable. Put briefly, one of the primary flaws of the plurality opinion is that it bears so little relationship to the case before us. Notwithstanding the fact that respondent was charged both with a violation of the California Vehicle Code which resulted in an accident, and with failing to report the accident and its surrounding circumstances as required by the statute under review, the plurality concludes, contrary to all three California courts below, that respondent was faced with no substantial hazard of self-incrimination under California law. My Brother Harlan, by contrast, recognizes the inadequacy of any such conclusion. In his view, our task is to make the Bill of Rights "relevant to contemporary conditions" by judicial "nonapplication" of its provisions when we think the Constitution errs. *Ante,* at [19], [18 n. 5]. In the context of the present case, this appears to mean that current technological progress enabling the Government more easily to use an individual's compelled statements against him in a criminal prosecution should be matched by frank judicial contraction of the privilege against self-incrimination lest the Government be hindered in using modern technology

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5-4-71

8th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75.—OCTOBER TERM, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[May —, 1971]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

Although I have joined my Brother BLACK's opinion in this case, the importance of the issues involved and the wide range covered by the two opinions supporting the Court's judgment in this case make further comment desirable. Put briefly, one of the primary flaws of the plurality opinion is that it bears so little relationship to the case before us. Notwithstanding the fact that respondent was charged both with a violation of the California Vehicle Code which resulted in an accident, and with failing to report the accident and its surrounding circumstances as required by the statute under review, the plurality concludes, contrary to all three California courts below, that respondent was faced with no substantial hazard of self-incrimination under California law. My Brother HARLAN, by contrast, recognizes the inadequacy of any such conclusion. In his view, our task is to make the Bill of Rights "relevant to contemporary conditions" by simply not applying its provisions when we think the Constitution errs. *Ante,* at [20]. In the context of the present case, this appears to mean that current technological progress enabling the Government more easily to use an individual's compelled statements against him in a criminal prosecution should be matched by frank judicial contraction of the privilege against self-incrimination lest the Government be hindered in using

Final

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1970

California, Petitioner, v. Jonathan Todd Byers. } On Writ of Certiorari to the Supreme Court of California.

[May 17, 1971]

Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall join, dissenting.

Although I have joined my Brother Black's opinion in this case, the importance of the issues involved and the wide range covered by the two opinions supporting the Court's judgment in this case make further comment desirable. Put briefly, one of the primary flaws of the plurality opinion is that it bears so little relationship to the case before us. Notwithstanding the fact that respondent was charged both with a violation of the California Vehicle Code which resulted in an accident, and with failing to report the accident and its surrounding circumstances as required by the statute under review, the plurality concludes, contrary to all three California courts below, that respondent was faced with no substantial hazard of self-incrimination under California law. My Brother Harlan, by contrast, recognizes the inadequacy of any such conclusion. In his view, our task is to make the Bill of Rights "relevant to contemporary conditions" by simply not applying its provisions when we think the Constitution errs. *Ante,* at [20]. In the context of the present case, this appears to mean that current technological progress enabling the Government more easily to use an individual's compelled statements against him in a criminal prosecution should be matched by frank judicial contraction of the privilege against self-incrimination lest the Government be hindered in using

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 28, 1971

No. 75 - California v. Byers

Dear Chief,

I think your opinion for the Court is basically excellent and would like very much to join it. As it is presently written, however, I cannot do so for two reasons:

(1) I cannot subscribe to an opinion that says that the Fifth Amendment is directly applicable to the States. The provision of the Constitution applicable to this case is the Fourteenth Amendment, as it may have "absorbed" or "incorporated" a particular provision of the Fifth Amendment.

(2) I cannot subscribe to an opinion that says the Constitution accords a privilege against self-incrimination. What the Constitution guarantees is a right against compulsory self-incrimination.

I fully realize that my views are considered no more than eccentricities by some of our colleagues, but to me they are of considerable importance.

If you would be willing to make the verbal changes necessary to meet my problems, I should be glad to join your opinion. Otherwise, I shall simply write a short concurrence.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 1, 1971

Re: No. 75, California v. Byers

Dear Chief:

I am glad to join your excellent opinion for the Court in this case, as recirculated today.

Sincerely yours,

P.S.

P. S.

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 25, 1971

No. 75 - California v. Byers

Dear Chief,

I agree with your opinion as recirculated on March 24.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

January 28, 1971

Re: No. 75 - California v. Byers

Dear Chief:

Please join me in your opinion for the Court in this case.

Sincerely,

B.R.W.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 18, 1971

Re: No. 75 - California v. Byers

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

February 1, 1971

Re: No. 75 - California v. Byers

Dear Chief:

Please join me.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

February 8, 1971

Re: No. 75 - California v. Byers

Dear Chief:

If, by chance, your opinion does not command a majority of the Court, I probably shall wish to write a short dissent about traffic carnage. If you obtain a majority, this may well be neither necessary nor desirable.

Sincerely,

HAB

The Chief Justice

March 24, 1971

Re: No. 75 - California v. Byers

Dear Chief:

I have reviewed your printed circulation of March 24. I adhere to my concurrence heretofore expressed.

Sincerely,

HAB

The Chief Justice