

# The Burger Court Opinion Writing Database

## *Mackey v. Montrym*

443 U.S. 1 (1979)

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



To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 18 1979

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 77-69

Alan Mackey, Registrar of Motor  
Vehicles of Massachusetts,  
Appellant,  
v.  
Donald E. Montrym, Etc.

On Appeal from the United  
States District Court for  
the District of Massa-  
chusetts.

[May —, 1979]

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

The question presented by this appeal is whether a Massachusetts statute that mandates suspension of a driver's license for refusing to take a breathalyzer test upon arrest for driving while under the influence of intoxicating liquor is void on its face as violative of the Due Process Clause of the Fourteenth Amendment.

Commonly known as the implied consent law, the Massachusetts statute provides:

"Whoever operates a motor vehicle upon any [public] way . . . shall be deemed to have consented to submit to a chemical test or analysis of his breath in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor . . . . If the person arrested refuses to submit to such test or analysis, after having been informed that his license . . . to operate motor vehicles . . . in the commonwealth shall be suspended for a period of ninety days for such refusal, no such test or analysis shall be made, but the police officer before whom such refusal was made shall immediately prepare a written report of such refusal [, which . . .]

CHANGES AS MARKED:

pp. 1, 3-17

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

Circulated: \_\_\_\_\_

Recirculated: JUN 20 1979

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 77-69

Alan Mackey, Registrar of Motor Vehicles of Massachusetts, Appellant, v. Donald E. Montrym, Etc.	} On Appeal from the United States District Court for the District of Massa- chusetts.
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[May —, 1979]

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 8, 1979

RE: No. 77-69 Mackey v. Montrym

Dear Potter:

Please join me in the dissenting opinion you  
have prepared in the above.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

May 18, 1979

Re: 77-69 - Mackey v. Montrym

Dear Chief:

I shall in due course circulate a dissenting  
opinion.

Sincerely yours,

P.S.  
/

The Chief Justice

Copies to the Conference

PS  
Please don't make  
any more changes  
All

Mr. Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

MACKEY v. MONTRIM, No. 77-69

From: Mr. Justice Stewart

Circulated: 7 JUN 1979

MR. JUSTICE STEWART, dissenting.

Recirculated: \_\_\_\_\_

The question in this case, simply put, is whether a person who is subject to losing his driver's license for three months as a penalty for allegedly refusing a demand to take a breathalyzer test is constitutionally entitled to some sort of hearing before his license is taken away. In Massachusetts, such suspensions are effected by the Registrar of Motor Vehicles solely upon the strength of a policeman's affidavit recounting his version of an encounter between the police and the motorist. Mass. Gen. Laws Ann., ch. 90, §24(1)(f). The driver is afforded no opportunity, before this deprivation occurs, to present his side of the story in a forum other than a police station. He is given no notice of any entitlement he might have to a "same day" hearing before the Registrar. The suspension penalty itself is concededly imposed not as an emergency measure to remove unsafe drivers from the roads, but as a sanction to induce drivers to submit to breathalyzer tests. In short, the critical fact that triggers the suspension is non-cooperation with the police, not drunken driving. In my view, the most elemental principles of due process forbid a State from extracting this penalty without first affording the driver an opportunity to be heard.

A.

Our decisions in Bell v. Burson, 402 U.S. 535, and Dixon v. Love, 431 U.S. 105, made clear that a person's interest in his

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1, 4, 5, 8

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Stewart  
12 JUN 1979

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**SUPREME COURT OF THE UNITED STATES**

No. 77-69

Alan Mackey, Registrar of Motor  
Vehicles of Massachusetts,  
Appellant,

v.

Donald E. Montrym, Etc.

On Appeal from the United  
States District Court for  
the District of Massa-  
chusetts,

[June —, 1979]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN  
and MR. JUSTICE STEVENS join, dissenting.

The question in this case, simply put, is whether a person who is subject to losing his driver's license for three months as a penalty for allegedly refusing a demand to take a breathalyzer test is constitutionally entitled to some sort of hearing before his license is taken away. In Massachusetts, such suspensions are effected by the Registrar of Motor Vehicles solely upon the strength of a policeman's affidavit recounting his version of an encounter between the police and the motorist. Mass. Gen. Laws Ann., ch. 90, § 24 (1)(f). The driver is afforded no opportunity, before this deprivation occurs, to present his side of the story in a forum other than a police station. He is given no notice of any entitlement he might have to a "same day" hearing before the Registrar. The suspension penalty itself is concededly imposed not as an emergency measure to remove unsafe drivers from the roads, but as a sanction to induce drivers to submit to breathalyzer tests. In short, the critical fact that triggers the suspension is non-cooperation with the police, not drunken driving. In my view, the most elemental principles of due process forbid a State from extracting this penalty without first affording the driver an opportunity to be heard.

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

CHAMBERS OF  
JUSTICE POTTER STEWART

June 15, 1979

MEMORANDUM TO THE CONFERENCE

Re: No. 77-69, Mackey v. Montrym

I shall add the enclosed footnote to  
my dissenting opinion in this case, to be appended  
at the end of the run-over sentence on page 11.

P.S. 

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7. Indeed, under the Court's own description of the post-suspension relief available under this statute, it appears that the petitioner was by no means "assured a prompt proceeding and a prompt disposition of the outstanding issues between [him] and the State." Barry v. Barchi, post at , (WHITE, J., concurring in the judgment) (Slip op., at 6) (emphasis added). This precise constitutional infirmity has led the Court in Barry v. Barchi, post, to sustain the Fourteenth Amendment claim of a horse trainer whose trainer's racing license was summarily suspended upon a probable cause showing that his horse was drugged before a race. Here, as in Barchi, the petitioner was not notified of any right to prompt post-suspension relief. Here, as in Barchi, the hearing available upon "appeal" from the administrative summary suspension, see Mass. Gen. Laws Ann. ch. 90, §28, appears to be the only meaningful post-suspension evidentiary hearing afforded. As in Barchi, the statute involved here does not specify when this review must begin, does not require that the suspension be stayed during review, and does not require the appeals board to reach a prompt decision. Further, in view of the Registrar's apparent lack of authority to make any definitive determination of the issues in any evidentiary hearing that the driver might schedule by "walking in," there seems to be no "assurance" under this statute that the driver will receive prompt post-suspension relief from a "trial level" hearing examiner. In sum, under the principle established in Barchi, the District Court upon remand for consideration of this petitioner's "as applied" challenge to his suspension, ante at 7, n. 6, will be required to sustain that challenge, unless that court finds that the petitioner was in fact given advance notice of his right to an immediate post-suspension hearing and was "assured" under the statute of an immediate and definitive resolution of the contested issues in his case.

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 23, 1979

Re: 77-69 - Mackey v. Montrym

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Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice

Copies to the Conference

cmc

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 21, 1979

Re: No. 77-69 - Mackey v. Montrym

Dear Chief:

I await the dissent.

Sincerely,

*TM.*  
T.M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 12, 1979

Re: No. 77-69 - Mackey v. Montrym

Dear Potter:

Please join me in your dissent.

Sincerely,

*T.M.*

T.M.

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 23, 1979

Re: No. 77-69 - Mackey v. Montrym

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 19, 1979

77-69 Mackey v. Montrym

Dear Chief:

Please join me.

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 23, 1979

Re: No. 77-69 Mackey v. Montrym

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 25, 1979

Re: 77-69 - Mackey v. Montrym

Dear Chief:

I shall wait for Potter's dissent.

Respectfully,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 8, 1979

Re: 77-69 - Mackey v. Montrym

Dear Potter:

Please add my name to your dissenting opinion.

Respectfully,



Mr. Justice Stewart

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