

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

CHAMBERS OF
JUSTICE HUGO L. BLACK

May 18, 1966

Re: Nos. 759, 760, 761 and 584 - Escobedo Cases

Dear Chief:

I want to congratulate you on doing a fine job in the opinion you have circulated in these cases. It is informative, persuasive and eloquent. The collection of quotations you have placed in the first few pages is a very happy selection. The opinion as a whole should, in my judgment, have a stabilizing influence in what has become a very emotional field of the law. I have gone over the opinion with great care tonight and have a few suggestions which are very minor in comparison with the importance of the issues you discuss.

1. When I read page 8 it struck me that some of the Court's critics would immediately say that our holding is but another phase of the racial question, when of course that is not true at all. Also, your reference to the "Southern States" on that page would likely be over-emphasized by many as an indication that what we are doing is to attack the South. Your whole opinion absolutely refutes any such possible implication but nevertheless I would hope that you could shift the emphasis on that page so as to deprive all of the slightest basis for intimating any such criticism of your opinion. I have written some pencil memoranda on that page merely as an indication of what I was thinking and not with the idea that you should adopt them as they are written. I do hope, however, that you will use page 8 to point out more emphatically that third-degree methods are not limited to any racial group or to any section of the country. That would be in line with the cases you later cite and the arguments you later make.

2. I am very happy that you cited Bramm v. United States and put the quotation you have on page 23. That shows that our

problem is a Fifth Amendment problem, since we held in Malloy v. Hogan that the Fourteenth Amendment makes the Fifth Amendment applicable to the States. In line with the Bramm quotation, however, which appears on page 23, I think the first sentence on page 24 should be changed slightly by striking out the word "federal" and substituting the words "Fifth Amendment's standard for compulsion which we implement today." Otherwise I fear that someone might infer that we are saying that the standard against self-incrimination was created by this Court in the Bramm case instead of being embodied by the Fifth Amendment.

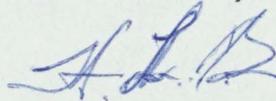
3. I would like for you to take out the clause "which are repellant to civilized standards of decency," on page 27. I do not think that we should enforce the protections of the Fifth Amendment against self-incrimination on the theory that compelled evidence is "repellant to civilized standards of decency." We should enforce that protection, I think, because the Fifth Amendment requires it. Your sentence would be equally as good with that clause stricken out and I see no reason for us to get involved in this "civilized standard" test where you are discussing so many important questions that we need to decide as nearly unanimously as possible. I have the same objection to the entire paragraph following the sentence from which I have just quoted on page 27. As for myself I do not believe that there is any "voluntariness test under the Due Process Clause of the Fourteenth Amendment." The test for me is the language of the Fifth Amendment, the one and only test. Here again I do not think we should get involved with this question. While I want to be with you all the way, I could not possibly agree to the statements to which I have just referred on page 27.

4. On page 42 you quote from Mr. Justice Brandeis' dissent in Olmstead v. United States, 277 U.S. 438, 485. I think that the statement of Mr. Justice Brandeis is an excellent one in the abstract. It happens, however, that I do not agree with his dissent in Olmstead. Here again I do not think it is necessary in this case or advisable to bring in by implication or any other way a discussion of the issue in Olmstead. If you think it necessary to keep this quotation from Olmstead, I would like for you to put a footnote in to this effect: "In quoting the above from the dissenting opinion of Mr. Justice Brandeis we, of course, do not intend to approve his views on the constitutional questions involved in the Olmstead case."

I very much hope that you will take out the language on pages 26 and 27 and substitute the words "Fifth Amendment's" for the word "federal" on page 24.

Again, I want to congratulate you on writing such a clear and forceful opinion in a complex field.

Sincerely,

A handwritten signature in blue ink, appearing to be "A.L.B.", written in a cursive style.

The Chief Justice

Strathmore
Alexandra Brilliant
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