# The Burger Court Opinion Writing Database

## *Kerr v. United States District Court for Northern District of California*

426 U.S. 394 (1976)

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




Dissent

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 15, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 74-1023 - Kerr v. United States District Court

I have asked that this case go over several Conferences, and I suppose that a logical expectation would be that I would have an articulate statement of at least my own position with respect to it. Unfortunately, such is not the case.

Petitioners are principally the members of the California Adult Authority, who sought mandamus in the Court of Appeals for the Ninth Circuit to review what I think is a remarkably sweeping discovery order entered by the District Court for the Northern District of California in an action brought by respondent Adult Male Felons pursuant to 42 U.S.C. § 1983. The merits of that action involved claims to procedural rights respecting parole revocation, etcetera, and have no direct bearing on the issues presented by the petition.

One class of documents which were sought successfully to be discovered in the District Court were the "personnel files maintained by petitioners pertaining to each member of the Adult Authority, each hearing representative, and the Executive Officer of the Adult Authority." Petition for certiorari, vii. The Court of Appeals held that the District Court's allowance of discovery of these files was not sufficiently out of bounds as to authorize mandamus, saying:

Justice Powell,
The suggestion in this memo of taking the case to review the CA's standard for judging state claims of privilege (i.e., whether state or federal) is reasonable, although I must confess that I don't fully understand this memorandum. Relevancy must surely be judged by the same standard, regardless of the parties' identity. Perhaps a limited grant would be appropriate. (Sonny)

This I don't understand. Is he distinguishing between records of a State and records of a state agency?

that a much stricter standard, whether it be denominated as a standard of privilege or relevancy, should be applied by the federal courts than when production of records of a state agency is sought. I would therefore vote to grant certiorari on this issue, which I believe is fairly subsumed under the questions presented in the petition.

The reasoning of the Court of Appeals was based in part on the case of United States v. Reynolds, 345 U.S. 1 (1953), that court concluding that the petitioners had not properly supported their claim of privilege according to the procedures set forth in that case. In Reynolds the Court held that claims of military or state secrets must be made with particularity. Such an approach was quite understandable in the circumstances of that case, where broad claims of privilege by members of the executive branch could, as a practical matter, subvert the express waiver of sovereignty contained in these Federal Tort Claims Act, under which that suit was brought. But in this case there is no similar basis upon which to disregard the State's sovereignty interests, and the very officials charged with responsibility over the relevant documents, and who were themselves before the trial court as defendants, are asserting the claim of privilege.

This, too, I find confusing.

Sincerely,

WEW

~~Is~~ Would Justice Rehnquist agree to a grant limited to a question on this order?

"~~Whether what standards~~ state or federal law should be applied in assessing the contention of a State as a litigant that its records are privileged from discovery in a federal civil rights proceeding."