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

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

CHAMBERS OF
THE CHIEF JUSTICE

June 2, 1976

Re: 74-1023 - Kerr v. USDC

Dear Thurgood:

Given the "lateness of the hour," I feel I should let you know that I cannot join your proposed disposition. In my view, the District Judge acted irresponsibly and he needs an opinion that will not let that remain in doubt or leave him to "freewheel."

Regards,

WEB

Mr. Justice Marshall

Copies to the Conference

231

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

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1976

Re: 74-1023 - Kerr v. United States District Court

Dear Thurgood:

I join -- and with thanks to you and Brother Rehnquist for working this out. Would that we had time for this more often!

Regards,

WEB

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 14, 1976

RE: No. 74-1023 Kerr v. U.S.D.C. for Northern District of California, et al.

Dear Thurgood:

I agree.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 8, 1976

RE: No. 74-1023 Kerr v. U.S. District Court

Dear Thurgood:

I agree.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 21, 1976

No. 74-1023 - Kerr v. U. S. Dist. Ct.

Dear Thurgood,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 7, 1976

No. 74-1023, Kerr v. U. S. D. C.

Dear Thurgood,

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

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R WHITE

April 14, 1976

Re: No. 74-1023 - Kerr v. USDC ND California

Dear Thurgood:

I join your suggested opinion in this case.

Sincerely,

Byron

Mr. Justice Marshall

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 13, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 74-1023, Kerr v. United States District Court for the Northern District of California

The tentative vote on this case was to vacate and remand for consideration of the question of mootness. However, on studying the matter, I concluded that disposition on grounds of mootness would be inappropriate since the underlying case has not as yet come to trial and the plaintiffs still seek the contested documents. Accordingly, I have drafted a rather narrow opinion affirming the denial of mandamus. The mootness issue is discussed in footnote 5.

T. M.

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1023

Henry W. Kerr et al., Petitioners, *v.* United States District Court for the Northern District of California et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1976]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this case, petitioners sought issuance of writs of mandamus from the United States Court of Appeals for the Ninth Circuit to compel the District Court to vacate two discovery orders in the underlying action in which petitioners are defendants. The Court of Appeals refused to issue the writs. We hold that in the circumstances of this case—and particularly in light of the availability of an alternative, less extreme, path to modification of the challenged discovery orders—issuance of the writ is inappropriate. We therefore affirm.

I

Seven prisoners in the custody of the Department of Corrections of the State of California filed a class action in the United States District Court for the Northern District of California on behalf of themselves and "on behalf of all adult male felons who now are, as well as all adult male felons who in the future will be, in the custody of the California Department of Corrections, whether confined in an institution operated by the De-

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 7, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 74-1023 -- Kerr v. U.S. District Court

After talking with Bill Rehnquist, I have made the alterations in my opinion that are reflected in the attached draft. Hopefully, the compromise that Bill and I worked out will better enable us to dispose of this case.

T.M.

5, 9, 10-12 Stylistic Changes

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

From: Mr. Justice Marshall

Circulated: _____

Recirculated: JUN 7 1976

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–1023

Henry W. Kerr et al., Petitioners, *v.* United States District Court for the Northern District of California et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1976]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioners, defendants in a class action, sought issuance of writs of mandamus from the United States Court of Appeals for the Ninth Circuit to compel the District Court to vacate two discovery orders. The Court of Appeals refused to issue the writs. We hold that in the circumstances of this case—and particularly in light of the availability of an alternative, less extreme, path to modification of the challenged discovery orders—issuance of the writ is inappropriate. We therefore affirm.

I

Seven prisoners in the custody of the Department of Corrections of the State of California filed a class action in the United States District Court for the Northern District of California on behalf of themselves and "on behalf of all adult male felons who now are, as well as all adult male felons who in the future will be, in the custody of the California Department of Corrections, whether confined in an institution operated by the De-

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 15, 1976

MEMORANDUM TO THE CONFERENCE

Re: Case being held for 74-1023, Kerr v. United States District Court for Northern District of California

No. 74-1499, Enomoto v. United States District Court for Northern District of California - This case is very similar to Kerr itself. Petitioners, state officials, are defendants in a §1983 class action filed by a group of state prisoners challenging classification procedures with respect to maximum security housing in several California prisons and contending that the conditions of maximum security confinement in those institutions constitute cruel and unusual punishment. The prisoners made a broad request for discovery, seeking, inter alia, all logs maintained in the segregated housing units of the subject prisons, all "incident reports" describing violent incidents, suicide attempts or work stoppages in such units and all medical and psychiatric reports on inmates who are confined in a segregated unit at one of the subject prisons. Petitioners sought to avoid producing the documents in question without first having them reviewed in camera by the District Court. The District Court refused their request for in camera review. Petitioners filed a petition for mandamus with the Ninth Circuit. The petition was denied without opinion. Subsequently, the Court of Appeals, citing to its decision in Kerr, denied petitioner's petition for rehearing.

As in Kerr, all that petitioners seek is in camera review of the documents. Respondent claims that, as was asserted to be the situation in Kerr, no claim of privilege has been asserted by a high-level official and that no claim of privilege has been made with the requisite specificity.

Particularly since the Court of Appeals cited Kerr in denying rehearing, it seems appropriate to allow that court to reconsider its decision in light of our opinion in Kerr and our language as to the value of in camera hearings in evaluating claims of privilege. Accordingly, I will vote to grant, vacate and remand for reconsideration in light of Kerr.

T. M.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 30, 1976

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

Dear Thurgood:

Your proposed disposition of the case may well be the proper one, and I may join your opinion eventually. Lewis' expressions, however, in his letter of April 23, coincided with his and my views expressed at conference. For the moment, therefore, I shall also await Bill Rehnquist's writing.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 2, 1976

MEMORANDUM TO THE CONFERENCE

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

This case continues to afford me difficulty as it obviously does everyone else. A good bit of this discomfort, I suspect, is due to the unsatisfactory nature of the proceedings below, the unlimited recommendations of the magistrate, the content of the Court of Appeals opinion, the "fishing expedition" aspect, and the "on again, off again" nature of the suit itself.

Thurgood has written a very astute opinion and perhaps proposes the best disposition possible of the issues that are before us at this stage. One problem I have with it is its description of what the Court of Appeals said and held. Of course, if Thurgood's opinion becomes the opinion of this Court, then the CA 9's opinion says no more than what this Court says it says.

On the other hand, I am convinced, as Bill Rehnquist and Lewis are, that the petitioners are entitled to some relief and that the Court of Appeals granted little, if any. (That, perhaps, is the beauty of Thurgood's opinion in that it assumes that the CA 9 did grant some relief and remands the case on that assumption.)

For the moment, I am inclined to go along with the dissent, and I tentatively so vote. No word, however, as yet has been received from the Chief Justice. If he also is inclined to the dissent, then we have a 4 to 4 vote, which one might say is an unsatisfactory resolution of the case. The other side of that coin is that if we end up 4 to 4, and the case is not brought down but is put over the Term, the delay may prompt the case to moot itself out a second time. If the Chief joins Thurgood, there is a court and the case can come down. If he joins the dissent, then perhaps the case merits some further discussion around the conference table.

I would like to find a happy solution to this one, but I confess that I do not know the way.

Harry

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 8, 1976

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

Dear Thurgood:

Please join me in your recirculation of June 7.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 23, 1976

No. 74-1023 Kerr v. U.S. District Court

Dear Thurgood:

Although I agree that mandamus normally is not an appropriate means of reviewing a District Court's action with respect to discovery, the discovery allowed by the District Court in this case appears to have raised some extremely important issues.

In view of this, I have thought that the summary disposition by CA9 was too cavalier to give the District Court any guidance.

As I indicated at the Conference, I was willing to remand on mootness if the orders below were all vacated. Alternatively, my vote was to remand with an opinion, giving the District Court some guidance. When I speak of guidance, I have in mind emphasizing the genuine interest of the state in protecting from public disclosure some of the sensitive information that may have been in the requested files.

I recognize that the case comes to us in an awkward posture. At the moment, I am not sure of my ultimate position beyond a general dissatisfaction with the way in which the DC and CA9 dealt with this case. Accordingly, I will await Bill Rehnquist's opinion.

Sincerely,

Lewis

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 21, 1976

No. 74-1023 Kerr v. U.S. District Court

Dear Bill:

I would appreciate your adding my name to your excellent dissent in the above case.

Sincerely,

Lewis

Mr. Justice Rehnquist

CC: The Conference

LFP/gg

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 7, 1976

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

Dear Thurgood:

Please join me in your recirculation of June 7.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 15, 1976

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

Dear Thurgood:

I think I will write separately in this case; whether my opus turns out to be a concurrence in the result or a dissent will depend on where the muses lead me.

Sincerely,

WHR

Mr. Justice Marshall

Copies to the Conference

To: The Chief Justice
Justice Brennan
Stewart
ite

p. 34

MAY 21 1976

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–1023

Henry W. Kerr et al., Petitioners, *v.* United States District Court for the Northern District of California et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1976]

MR. JUSTICE REHNQUIST, dissenting.

I would have fewer reservations about the affirmance of the judgment of the Court of Appeals for the Ninth Circuit in this case if I could agree with this Court's suggestion that the Court of Appeals granted some sort of relief to petitioners. But the Court of Appeals did not, as this Court seems to assume, remand this case to the District Court for a hearing upon an appropriate claim of privilege by petitioners. While it is true that the Court of Appeals' opinion did not, in terms, "foreclose the possible necessity of . . . in camera review," it had that effect by denying petitioners' request for a writ of mandamus when the writ had been sought for the specific purpose of compelling the District Court to conduct an *in camera* inspection of these documents, a procedure which the District Court had previously refused to undertake. Far from "supply[ing] petitioners with a remedy far short of mandamus to achieve precisely the relief they seek" (*ante*, p. 10), the Court of Appeals has afforded petitioners no relief at all. On the extraordinary facts presented by this record, I think petitioners were entitled to relief.

The District Court, upon request of California state

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 7, 1976

Re: No. 74-1023 - Kerr v. USDC for the Northern District of California

Dear Thurgood:

I withdraw my dissent and join your circulation of June 7th.

Sincerely,

Mr. Justice Marshall

Copies to the Conference