

The Burger Court Opinion Writing Database

Seattle Times Co. v. Rhinehart

467 U.S. 20 (1984)

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

May 2, 1984

Re: 82-1721 - Seattle Times Co. v. Rhinehart

Dear Lewis:

I join.

Regards,

A handwritten signature in cursive script, appearing to read 'W. Powell', with a long, sweeping underline that extends downwards and to the right.

Justice Powell

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

Personal May 10, 1984

RE: 82-1721 - Seattle Times Co. v. Rhinehart

Dear Lewis:

I have some concern about your most recent draft in this case. In the first draft, the holding of the Court appeared as follows:

"We therefore hold that where, as in this case, a protective order is limited to the narrow context of pretrial civil discovery and does not restrict the dissemination of the information gained from other sources, it does not offend the First Amendment."

In the most recent draft to circulate, the holding of the Court is stated:

"We hold that the protective order issued in this case does not offend the First Amendment. It was entered by the trial court upon a showing that constituted good cause as required by Rule 26(c). Also, it is limited to the context of pretrial civil discovery, and does not restrict dissemination if the information is obtained from other sources." (footnote omitted).

The footnote to this latter holding reads:

"It is apparent that substantial government interests were implicated. Respondents, in requesting the protective order, relied upon the rights of privacy and religious association. Both the trial court and the Supreme Court of Washington also emphasized that the right of persons to resort to the courts for redress of grievances would have been 'chilled.'"

The two paragraphs stating the holding of the Court are clearly different, significantly because the latter adds a requirement that "good cause" be shown under the State's rule. As I recall the Conference, we thought this added element was essential. However, even aside from the addition, I read the latest draft to take on a

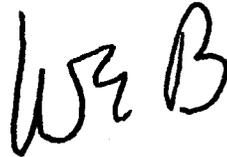
significantly different tone from the first, so that it now suggests that a First Amendment balancing is required each time a court issues a protective order during pretrial discovery. Whereas in the first draft, it was clear that if the "good cause" requirement is satisfied, if the order is limited to the pretrial discovery context, and if the order does not limit dissemination of information obtained from other sources, it satisfies the First Amendment, the latter draft implies that a different balance might be struck if different privacy interests were asserted. This plays right into what is implicit in the suggestion in the concurrence that the Court is deciding no more than that the balance tilts in favor of permitting the order in this particular case.

The tone change I suspect will prove very important, and I cannot join that. I could join if you replace the holding paragraph on the last page of the latest draft to read something like the following:

"We hold that because the protective order issued in this case was entered by the trial court upon a showing of good cause as required by Rule 26(c), was limited to the context of pretrial civil discovery, and did not restrict dissemination of the information if it was obtained from other sources, it does not offend the First Amendment."

This modification would recapture the holding in the first draft, and remove the doubt that I think now exists as to whether an order meeting the three specified conditions might nonetheless fail to satisfy the First Amendment.

Regards,

A handwritten signature in black ink, appearing to read "W. B. Powell". The letters are stylized and somewhat cursive.

Justice Powell

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 25, 1984

Re: Seattle Times Co. v. Rhinehart, No. 82-1721

Dear Lewis:

As you will recall, I agreed at Conference that the protective order issued by the Washington courts could be upheld on the basis of the privacy and religious rights of the respondents. I am pleased to see that your draft opinion takes that basic approach, first by noting an appropriate standard for review of the First Amendment interests implicated by a protective order (at 10-11), and then by recognizing that the government may have a substantial interest in preventing the abuse of its processes that might result from the public release of information damaging to reputation and privacy (at 13-14). I am concerned, however, that some of the discussion in your opinion could be read to depart from this analysis.

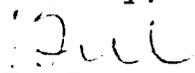
In particular, as your opinion suggests at 13-14, the governmental interest that should be balanced against the petitioners' First Amendment interests is the substantial interest in protecting the privacy and religious rights of litigants or other parties from whom confidential information is discovered. See generally Herbert v. Lando, 441 U.S. 153, 178-180 (1979) (POWELL, J., concurring). As now written, however, the holding of your opinion could be understood to suggest that the countervailing governmental interest is simply in preserving the integrity of its judicial process. E.g., at 15 ("We therefore hold that where, as in this case, a protective order is limited to the narrow context of pretrial civil discovery and does not restrict the dissemination of the information gained from other sources, it does not offend the First Amendment."). Without further definition, however, that governmental interest could justify virtually every protective order ever issued by a court. In other words, the government's interest in the smooth functioning of its discovery process is present in every case. Yet, if a court issued a protective order without any reason, or if a State rule provided for protective orders in all cases regardless of special circumstances, I think we would agree that there might be First Amendment interests that would invalidate such an order. In sum, the reason this particular protective order is permissible is because it protects the privacy and religious rights of the respondents, and not

because it serves to protect the State's discovery process in the abstract.

If the case arose in the federal courts, we could protect First Amendment interests by policing the courts under Rule 26's "good cause" requirement, and therefore could hold that the Rule satisfies constitutional requirements. See, e.g., Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981). For cases arising in the state courts, however, we must accept the State's interpretation of its own rules. As a result, our constitutional approval of those interpretations should require that the courts do more than simply assert the State's interest in the judicial process. In this case, the Washington courts satisfied whatever specific requirements the Constitution might require by finding that the respondents "had a recognized privacy interest" and that release of the discovered information "would allegedly and understandably result in annoyance, embarrassment and even oppression." Upholding the protective order because of the presence of such a finding would not impose a very heavy burden on the state courts. Nor, in my view, would it lead to substantial amounts of litigation.

I wonder if you could see your way to amending your draft opinion along these lines?

Sincerely,


WJB, Jr.

Justice Powell

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 3, 1984

Re: Seattle Times v. Rhinehart, No. 82-1721

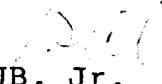
Dear Lewis:

Thank you for your note of May 1, and for your consideration of my suggestions. If you could find your way to incorporating them I would be pleased to join your opinion.

I'm bothered by one other matter, and hope you might address it, though my join is not conditioned on this change. Its about the first full paragraph on page 12, and note 20 attached thereto, which discuss rights of access to pretrial discovery. Although it is undoubtedly true that discovery proceedings "are not public components of a civil trial," I am not so sure that the materials generated by discovery are not, as a matter of modern practice, open to the public. Indeed, recent amendments to the Federal Rules of Civil Procedure (Rules 5(d) and 30(f)(1)) suggest that such materials must be filed with a court and therefore, absent a court order to the contrary, are open for inspection by the public and the press. Because of this I would much prefer either omission of the paragraph and its footnote entirely, or their severe limitation. And, because this is not a public/press access case (i.e., the Seattle Times is a litigant who automatically has access to discovered materials), I would much prefer the omission.

Finally, although I join, I may add a paragraph or so in concurrence.

Sincerely,


WJB, Jr.

Justice Powell



CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

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

May 4, 1984

No. 82-1721

Seattle Times v. Rhinehart

Dear Lewis,

Please join me.

Sincerely,

WJB by RL

Justice Powell

Copies to the Conference

To: The Chief Justice
Justice White
~~Justice Marshall~~
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: MAY 9 1984

Recirculated: _____

WJB
Please join me in your
Concurring opinion
M

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1721

SEATTLE TIMES COMPANY, ET AL., PETITIONERS *v.*
KEITH MILTON RHINEHART ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF WASHINGTON

[May —, 1984]

JUSTICE BRENNAN, concurring.

The Court today recognizes that pretrial protective orders, designed to limit the dissemination of information gained through the civil discovery process, are subject to scrutiny under the First Amendment. As the Court acknowledges, before approving such protective orders, it is necessary to consider whether “the practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression’ and whether ‘the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.’” *Ante*, at 11 (quoting *Procunier v. Martinez*, 416 U. S. 396, 413 (1974)).

In this case, the respondents opposed discovery, and in the alternative sought a protective order for discovered materials, because the “compelled production of the identities of the Foundation’s donors and members would violate the First Amendment rights of members and donors to privacy, freedom of religion, and freedom of association.” *Ante*, at 4. The Supreme Court of Washington found that these interests constituted the requisite “good cause” under the state’s Rule 26(c) (upon “good cause shown,” the court may make “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense”). 654 P. 2d 673, 690 (1982). Given this finding,

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 25, 1984

No. 82-1721 Seattle Times v. Rinehart

Dear Lewis,

I agree.

Sincerely,



Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 9, 1984

Re: No. 82-1721-Seattle Times Co. v. Rhinehart

Dear Bill:

Please join me in your concurring opinion.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

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

Rob-
✓

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 14, 1984

Re: No. 82-1721, Seattle Times Co. v. Rhinehart

Dear Lewis:

I thought you might like to have the following trivia called to your attention:

1. Footnote 11 refers to "n. 11." Should this be "6"?
2. Should the references to petitioners in the fifth line of the paragraph beginning on page 4 and the fifth line from the top of page 5 be, instead, to respondents?

Sincerely,

Harry

Justice Powell

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 14, 1984

Re: No. 82-1721 - Seattle Times Company v. Rhinehart

Dear Lewis:

Please join me.

Sincerely,



Justice Powell

cc: The Conference

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL
84 MAY 14 AM 0:05

04/23

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: **APR 24 1984**

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1721

SEATTLE TIMES COMPANY, ET AL., PETITIONERS *v.*
KEITH MILTON RHINEHART ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF WASHINGTON

[April —, 1984]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the issue whether parties to civil litigation have a First Amendment right to disseminate, in advance of trial, information gained through the pretrial discovery process.

I

Respondent Rhinehart is the spiritual leader of a religious group, the Aquarian Foundation. The Foundation has fewer than 1,000 members, most of whom live in the State of Washington. Aquarian beliefs include life after death and the ability to communicate with the dead through a medium. Rhinehart is the primary Aquarian medium.

In recent years, the Seattle Times and the Walla Walla Union-Bulletin have published stories about Rhinehart and the Foundation. Altogether 11 articles appeared in the newspapers during the years 1973, 1978 and 1979. The five articles that appeared in 1973 focused on Rhinehart and the manner in which he operated the Foundation. They described seances conducted by Rhinehart in which people paid him to put them in touch with deceased relatives and friends. The articles also stated that Rhinehart had sold magical "stones" that had been "expelled" from his body. One article referred to Rhinehart's conviction, later vacated, for sodomy. The four articles that appeared in 1978 concentrated on an "extravaganza" sponsored by Rhinehart at the Walla Walla

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 1, 1984

82-1721 Seattle Times v. Rhinehart

Dear Bill:

This is my first opportunity to reply to your letter of April 25. I appreciate your giving me the opportunity to consider your concerns.

I would be glad to omit the concluding sentence in Subpart C on p. 15, and add the following as a final three sentences in the opinion on page 16:

"We hold that the protective order issued in this case does not offend the First Amendment. It was entered by the trial court upon a showing that constituted good cause as required by Rule 26(c). Also, it is limited to the context of pretrial civil discovery, and does not restrict dissemination if the information is obtained from other sources."

In addition, I would add a footnote, keyed to the above, reading substantially as follows:

"25. It is apparent that substantial government interests were implicated. Respondents, in requesting the protective order, relied upon the rights of privacy and religious association. Both the trial court and the Supreme Court of Washington also emphasized that the right of persons to resort to the courts for redress of grievances would have been 'chilled'. See supra n. 23."

I would be reluctant, Bill, to imply that a state's interest in the integrity of its judicial process would not in some situations be sufficient to constitute the requisite good cause.

If the foregoing substantially meets your concerns, I will see if these changes are acceptable to the Justices who have joined me.

Sincerely,

Lewis

Justice Brennan

lfp/ss

May 2, 1984

82-1721 Seattle Times v. Rhinehart

Dear John:

This is a belated thank you note for your comments on the first draft of my opinion.

Your comments are constructive, and I plan to include the substance of them in a second draft.

Sincerely,

Justice Stevens

lfp/ss

May 4, 1984

82-1721 Seattle Times Co. v. Rhinehart

Dear Sandra:

I received your letter yesterday after we had "gone to press" with some revisions in this case. I believe the changes in my second draft (see particularly n. 20, p. 12) address - at least in part - the concerns you expressed.

As the First Amendment issue was the principal issue presented by the case, and I understood we granted Seattle Times to address it, I think it is appropriate, and may be helpful, to write it substantially as I have.

My new note 20 deals with the variation in practice as to the filing of interrogatories and depositions. In most of the federal districts, there are local rules on the subject. In the Eastern District of Virginia, depositions and interrogatories usually were left in the hands of the lawyers unless one party or the other wished to have the intervention of the court. Under Rule 5(c), now mentioned in my footnote 20, that practice may well have changed. But the important point is that the court controls the situation, as it should.

It may be, as you suggest, that in this case some of the material had already been filed with the trial court before the protective order was issued. I read the protective order as applying to the information that respondents identified as violating their privacy and rights of association. This seems entirely appropriate to me.

In sum, I think the importance of our opinion is to make clear that where good cause is shown with respect to discovered material, the trial court has authority under the Rules to protect it from public disclosure unless and until the information is used in the trial.

I hope the changes made in my second draft will have your approval.

Sincerely,

Justice O'Connor

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 4, 1984

82-1721 Seattle Times v. Rhinehart

Dear Bill:

I appreciate your willingness to join my opinion.

I have made changes on page 12, and rewritten note 20, that I think meets in large part your further suggestion. I prefer to leave the paragraph in the opinion, but I do think the footnote substantially clarifies the situation. I should have referred to Rule 5(d) in my first draft.

Sincerely,

Lewis

Justice Brennan

lfp/ss

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

pp. 10, 11, 12, 15, 16

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 JUSTICE MARSHALL

84 MAY -4 P1:05

From: Justice Powell

Circulated: _____

Recirculated: MAY 4 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1721

SEATTLE TIMES COMPANY, ET AL., PETITIONERS *v.*
 KEITH MILTON RHINEHART ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
 OF WASHINGTON

[May —, 1984]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the issue whether parties to civil litigation have a First Amendment right to disseminate, in advance of trial, information gained through the pretrial discovery process.

I

Respondent Rhinehart is the spiritual leader of a religious group, the Aquarian Foundation. The Foundation has fewer than 1,000 members, most of whom live in the State of Washington. Aquarian beliefs include life after death and the ability to communicate with the dead through a medium. Rhinehart is the primary Aquarian medium.

In recent years, the Seattle Times and the Walla Walla Union-Bulletin have published stories about Rhinehart and the Foundation. Altogether 11 articles appeared in the newspapers during the years 1973, 1978 and 1979. The five articles that appeared in 1973 focused on Rhinehart and the manner in which he operated the Foundation. They described seances conducted by Rhinehart in which people paid him to put them in touch with deceased relatives and friends. The articles also stated that Rhinehart had sold magical "stones" that had been "expelled" from his body. One article referred to Rhinehart's conviction, later vacated, for sodomy. The four articles that appeared in 1978 concentrated on an "extravaganza" sponsored by Rhinehart at the Walla Walla

May 11, 1984

82-1721 Seattle Times v. Rhinehart

Dear Chief and Bill:

As your letters of May 10 express similar concerns, I reply to you both.

The Chief's letter does suggest a revision of the holding paragraph to read as follows:

"We hold that because the protective order issued in this case was entered by the trial court upon a showing of good cause as required by Rule 26(c), was limited to the context of pretrial civil discovery, and did not restrict dissemination of the information if it was obtained from other sources, it does not offend the First Amendment."

I can accept the Chief's suggested paragraph, with minor language changes as follows:

"We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.24/

Actually, it does not seem to me that the differences in the paragraphs we are discussing are really substantive, particularly in view of the way the opinion itself is written. This is a First Amendment case, and accordingly its relevance has to be addressed.

Sincerely,

The Chief Justice
Justice Rehnquist

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 11, 1984

82-1721 Seattle Times v. Rhinehart

Dear Bill:

As you said, I seem to be a bit "in the middle" as a result of my making the changes that you suggested.

You have seen Bill Rehnquist's letter circulated to the Conference. The Chief has now written a letter, not circulated, in which he states he cannot join my revised draft. As Bill Rehnquist and the Chief joined the initial draft, I owe them a good deal of deference - as I mentioned in my letter of May 1, to you.

In my view, the perceived differences are not really great. I suggest changing the final paragraph slightly to read as follows:

"We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.24/

I believe this language will address the concern you expressed in your letter of April 25, 1984. If you agree, I will submit this to the Chief and Bill Rehnquist.

Sincerely,



Justice Brennan

lfp/ss

Stylistic Changes Throughout

P. 16

Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: MAY 15 1984

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1721

SEATTLE TIMES COMPANY, ET AL., PETITIONERS v.
KEITH MILTON RHINEHART ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF WASHINGTON

[May —, 1984]

JUSTICE POWELL delivered the opinion of the Court.

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In recent years, the Seattle Times and the Walla Walla Union-Bulletin have published stories about Rhinehart and the Foundation. Altogether 11 articles appeared in the newspapers during the years 1973, 1978 and 1979. The five articles that appeared in 1973 focused on Rhinehart and the manner in which he operated the Foundation. They described seances conducted by Rhinehart in which people paid him to put them in touch with deceased relatives and friends. The articles also stated that Rhinehart had sold magical "stones" that had been "expelled" from his body. One article referred to Rhinehart's conviction, later vacated, for sodomy. The four articles that appeared in 1978 concentrated on an "extravaganza" sponsored by Rhinehart at the Walla Walla

HAB

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 29, 1984

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Seattle Times v. Rhinehart, No. 82-1721

One case was held for Seattle Times:

Rhinehart v. Seattle Times, No. 82-1758: This case involves Rev. Rhinehart's objection, on 1st Amendment grounds, to the trial court's production order. The Supreme Court of Washington affirmed this order after approving the protective order that was designed to address Rev. Rhinehart's concerns. Our decision in Seattle Times also approves the protective order. There is no conflict regarding the issuance of the production order. Also, the TC's decision seems reasonable. The information that Rhinehart does not want to produce may be relevant to the issue of damages.

I would deny the petition.

LFP

W

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 26, 1984

Re: No. 82-1721 Seattle Times Co. v. Rhinehart

Dear Lewis:

Please join me.

Sincerely,

WHR

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 10, 1984

Re: No. 82-1721 Seattle Times v. Rhinehart

Dear Lewis:

I cheerfully joined your first draft in this opinion, and did not pay close attention to the revisions in your second draft until Bill Brennan's concurrence came around today. The holding of the Court, as I understood it from your first draft, appears at page 15:

"We therefore hold that where, as in this case, a protective order is limited to the narrow context of pretrial civil discovery and does not restrict the dissemination of the information gained from other sources, it does not offend the First Amendment."

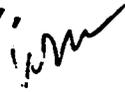
Now, however, the holding of the case found on page 16 of the second draft reads:

"We hold that the protective order issued in this case does not offend the First Amendment. It was entered by the trial court upon a showing that constituted good cause as required by Rule 26(c). Also, it is limited to the context of pretrial civil discovery, and does not restrict dissemination if the information is obtained from other sources." (emphasis supplied)

It seems to me that the second draft lends support to Bill's concurrence in a way that I would prefer it did not, suggesting that every pretrial order is subject to First Amendment analysis on a case-by-case basis, rather than being governed by the more generic statement in your first

draft. If the second draft remains as it is, I may well want to write separately.

Sincerely,



Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 14, 1984

Re: No. 82-1721 Seattle Times v. Rhinehart

Dear Lewis:

I am perfectly content with the revised version of the final paragraph in your opinion in this case which you suggest in your letter of May 11th. It seems to me that the text of footnote 24, as it now reads in the second draft, is not entirely consistent with the revised language in the text, and perhaps should be modified or deleted, but so far as I am concerned that is up to you.

Sincerely,



Justice Powell

cc: The Chief Justice

*I talked to the Chief
& he agrees
5/14
LJP*

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 25, 1984

Re: 82-1721 - Seattle Times Co. v. Rhinehart

Dear Lewis:

You have written a persuasive and important opinion with which I am in virtually complete agreement. I do, however, have three concerns that I hope you will consider:

1. On page 11 you cite the Chief Justice's opinion in Houchins in a way that I am afraid will have the effect of elevating it to a Court opinion. You will recall that you and I dissented from the broad position that he took on page 11 of his opinion. I wonder if you would either omit the citation entirely, or perhaps qualify it with some indication that we do not completely endorse it.

2. In footnote 20 on page 12 you quote from the Chief's opinion in Gannett. He is quite wrong in stating that "it has never occurred to anyone" that a deposition might be a public proceeding. In 15 U.S.C. § 30, Congress provided that depositions in antitrust cases should be public. Moreover, this quotation implies that the defendant's Sixth Amendment right to a public trial would never encompass a pretrial proceeding. Could you either omit the footnote entirely, or at least the quotation?

3. On page 10 you introduce your statement of the critical question by stating that the "information" obtained by discovery is protected by the First Amendment. This is a new concept that I really do not understand and, I am afraid, may confuse future analysis. The Amendment does not protect information; it protects the

communication of information and ideas. In my opinion it does not guarantee the right to communicate information that a litigant obtains only by virtue of a court order that limits its use to the litigation.

I believe we are ultimately holding that the First Amendment does not protect a litigant's communication of information that is covered by a valid protective order. In other words, such speech is not a species of "protected speech." I therefore wonder if you have properly framed the decisive question at the bottom of page 10 as whether an order is an invalid restraint "on protected speech."

May I suggest that you consider a revision of the paragraphs at the bottom of page 10 and the top of 11 to read something like this:

"It is, of course, clear that information obtained through civil discovery authorized by modern Rules of Civil Procedure would rarely, if ever, fall within the classes of unprotected speech identified by decisions of this Court. In this case, as petitioners argue, there certainly is a public interest in knowing more about respondents Rhinehart and the Aquarian Foundation. This interest may well include most--and possibly all--of what has been discovered as a result of the Court's order under Rule 26(b)(1). It does not necessarily follow, however, that a litigant has a ~~completely~~ unrestrained right to disseminate information that has been obtained through pretrial discovery. For even though the broad sweep of the First Amendment seems to prohibit all restraints on free expression, this Court has observed that "freedom of speech ... does not comprehend the right to speak on any subject at any time." American Communications Assn. v. Douds, 339 U.S. 382, 394-395 (1950).

"The critical question that this case presents is whether a litigant's freedom comprehends the right to disseminate information

that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used. In addressing that question it is necessary to consider whether the "practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression" and whether "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved." Procunier v. Martinez, 416 U.S. 396, 413 (1974); see Brown v. Glines, 444 U.S. 348, 354-355 (1980); Buckley v. Valeo, 424 U.S. 1, 25 (1976)."

This is just a rough attempt at a reformulation of the paragraphs that trouble me. I merely propose it because it is sometimes easier to consider specific language than a general suggestion.

With these exceptions, I am prepared to join you. Indeed, perhaps you can persuade me that I simply join the opinion as it is now drafted.

Respectfully,



Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 7, 1984

Re: 82-1721 - Seattle Times Co. v. Rhinehart

Dear Lewis:

Please join me.

Respectfully,



Justice Powell

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 3, 1984

No. 82-1721 Seattle Times Co. v. Rhinehart

Dear Lewis,

I have read your opinion with interest. You have found a clever way to avoid making every motion for protective order a constitutional issue. I expect to be able to join it, but I still have a few concerns.

This case probably does not require us to address the broad and difficult question of a 1st Amendment public right of access to pretrial discovery material. Petitioners acknowledge they have been granted access by statute and they simply want to publish the information.

It is my understanding that some of the material to which the protective order was applied had already been obtained and filed with the court records as a public record. It is typical of the practice in a number of states for the rules to provide for the filing in the public record of answers to interrogatories and depositions. Your opinion draws no distinction between protective orders issued before the discovery is obtained and those issued after material has been obtained and made a matter of public record. I think the distinction may be important and the 1st Amendment may well require case-specific particularized findings (as in Press-Enterprise) by a court which decides there is good cause for restricting publication of material already in the record. I am troubled, therefore, by the first paragraph on p. 12 and by footnote 20. At least in some jurisdictions pretrial discovery material which has been filed in the public record is a traditionally accessible source of information.

Perhaps it would help to also add a footnote on p. 16 noting that the Washington Supreme Court has apparently interpreted the trial court's protective order as

terminating once the discovered material is made public by the judicial process or by the parties independently of discovery. See Joint Appendix at 131a and n. 9. Thus, any discovery material which has already been made public by being filed in records of the court in compliance with state or local rules would not be encompassed by this protective order.

It also seems to me that it would be useful to add to the last sentence of Part IV C on p. 15 the requirement that the protective order must be issued on a proper showing of good cause. The trial court will be exercising its discretion which, I assume, is to be on a "good cause" standard.

If you feel these suggestions are not inappropriate or "out of line" with your views, perhaps these concerns can be easily accommodated.

Sincerely,

A handwritten signature in cursive script that reads "Sandra".

Justice Powell

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 15, 1984

No. 82-1721 Seattle Times Company v. Rhinehart

Dear Lewis,

Please join me.

Sincerely,



Justice Powell

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