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SUBJECT: Supreme Court Decision in the Times and Post Cases.

1. This message outlines the decision of the Supreme Court in the Times and Post cases and should provide guidance for all posts in handling both private and public inquiries regarding that decision.

2. The per curiam opinion of the Court states ~~simply~~ that

> "The District Court for the Southern District of New York in the New York Times case and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit in the Washington Post case held that the Government had not met the burden ['of showing justification for the enforcement of such a restraint']. We agree."

The vote was six to three in favor of the newspapers, with the Chief Justice (Burger) and Justices Harlan and Blackmun dissenting, and each of the nine Justices wrote a

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L:CNBrower:ilm	7/1/71	20522	The Under Secretary

CLEARANCES:
O - Mr. Macomber
L - Mr. Stevenson
EA - Mr. Green
S/S - Mr. Brewster

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a separate opinion.

3. It is important to note that the Court did not RPT not hold that newspapers may never be restrained by a court under any circumstances from publishing material which would affect national security. Of the nine Justices only two, Black and Douglas, supported such extreme view.

4. It is, however, certain that the burden of proof the Government would have to meet in any future case in order to obtain an injunction is extremely high insofar as a majority of the present Court is concerned. While the three dissenters did not expressly state the standard they would adopt, they all would appear at least to support the examples set forth by the Court in its 1931 opinion in Near v. Minnesota:

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"'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.' Schenck v. United States, 249 U.S. 47,52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."

Mr. Justice Stewart supported the following standard:

"We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am

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convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people."

There is some indication also that Mr. Justice Stewart would have particular difficulty approving a prior restraint in the absence of specific authorizing legislation. Mr. Justice Brennan expressed himself as follows:

"Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the

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suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the ~~material~~ material at issue would cause the happening of an event of that nature.... Thus, only governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."

Mr. Justice White did not subscribe to a specific standard but simply held that whatever the standard is it was not met by the Government, particularly since there was no statute specifically authorizing an injunctive suit in this situation:

"I do not say that in no circumstances would

~~the First Amendment~~

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the First Amendment permit an injunction against publishing information about Government plans or operations. Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden which it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these."

Mr. Justice Marshall appears to be of the view that under no circumstances could an injunction issue in the absence of a specific statute authorizing injunctive relief.

5. The Legal Adviser concludes that while prior restraints

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~~XX~~ remain hypothetically possible in a limited number of cases, as a practical matter the type of situation which would meet the present Court's standards will rarely, if ever, arise.

6. It should also be noted that a majority of the Court expressed itself quite clearly to the effect that the Government does not lack ability to take legal action with respect to this situation in that it may still pursue criminal prosecutions against the individuals involved and even against the newspapers. Mr. Justice White devotes a great portion of his opinion to detailed substantiation of the applicability of the Espionage Act to the newspapers in these circumstances, although he naturally adds the caveat that "I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if they published all the ~~mx~~ material now in their possession." Mr. Justice Stewart concurred in Mr. Justice White's opinion, and added in his own separate opinion that "Congress has passed such laws

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['specific and appropriate criminal laws to protect government secrets'], and several of them are of very colorable relevance to the apparent circumstances of these cases." The Chief Justice also stated that "I am in general agreement with much of what Mr. Justice White has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense." Mr. Justice Marshall also felt criminal prosecution might be possible. Only Mr. Justice Douglas took the view that the Espionage Act would not apply to newspapers in this case, although even he recognized that "These disclosures may have a serious impact." Clearly a majority of the Court regards criminal prosecution as the most appropriate means of enforcing government secrecy, the need for which was recognized eloquently by Mr. Justice Stewart:

> "Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality

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and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident."

7. One should remember that the three dissenters, strictly speaking, did not make a specific finding that any of the documents in question in fact should be the subject of an injunction. Rather their common view was that the matter had been handled in such a frenetic frenzy during its quick trip through the District Courts and Courts of Appeals that it should be remanded for further albeit expeditious hearings to afford the government a proper opportunity to present its evidence. They felt that under the circumstances First Amendment interests would not be prejudiced by a slight additional delay in publication, since the

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newspapers themselves had characterized the papers as being of historic rather than current interest and had withheld their publication for a period of at least three months after obtaining possession of the papers. Characteristic of the dissenting Justices' attitude toward the proceedings below was the closing phrase in the Chief Justice's opinion:

> "We all crave speedier judicial processes but when judges are pressured as in these cases the result is a parody of the judicial process."

8. The respective Justices' concurring and dissenting opinions included some literary flashes expressing the depth of the competing views held by the respective Justices. Mr. Justice Black stated:

> "In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing

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the workings of government that led to the Viet Nam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do."

Mr. Justice Blackmun on the other hand closed his opinion with a ringing admonition to the newspapers:

"I strongly urge, and sincerely hope, that these two newspapers will be fully aware of their ultimate responsibilities to the United States of America. Judge Wilkey, dissenting in the District of Columbia case, after a review of only the affidavits before his court (the basic papers had not then been made available by either party), concluded that there were a number of examples of documents that, if in the possession of the Post, and if published, 'could clearly result in great harm to the nation,' and he defined 'harm' to mean 'the death of soldiers, the destruction of alliances, the greatly

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increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate...' I, for one, have now been able to give at least some cursory study not only to the affidavits, but to the material itself. I regret to say that from this examination I fear that Judge Wilkey's statements have possible foundation. I therefore share his concern. I hope that damage already has not been done. If, however, damage has been done, and if, with the Court's action today, these newspapers proceed to publish the critical documents and there results therefrom 'the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate,' to which list I might add the factors of prolongation of the war and of further delay in the freeing of United

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States prisoners, then the Nation's people will know where the responsibility for these sad consequences rests."

9. In summary, the Supreme Court, deeply divided on the factual issue presented in the case, nonetheless appears to have a thin majority supporting the proposition that national security may justify a prior restraint on newspaper publications in extreme circumstances and a larger majority approving the use of criminal prosecutions under the Espionage Act to punish and deter unauthorized disclosures which fall within the Act. Whether the disclosures which appear to be present in this case fall within the Act remains to be seen. On the other hand it appears that the practical applicability of these tools is so circumscribed that together with the actual disclosures which will now ensue in this case they are not likely to

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reassure foreign governments to the extent we would desire.

10. In these circumstances it is clearly incumbent on government to devise better means of preventing unauthorized disclosures in the first instance with respect to that material which our diplomatic and national security activities require be protected. At the same time we will be seeking better ways to declassify much material that no longer needs to be classified for these reasons. This extensive and complex task is well under way, having been launched at the President's direction last January.

END

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