MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, concurring.

While I join the opinion of the Court, I believe it necessary to express my views more fully.

It should be noted at the outset that the First Amendment provides that "Congress shall male no law . . . abridging the freedom of speech, or of the press." That leaves, in my view, no room for governmental restraint on the press. [Footnote 2/1]

There is, moreover, no statute barring the publication by the press of the material which the Times and the Post seek to use. Title 18 U.S.C. § 793(e) provides that "[w]hoever having unauthorized possession of, access to, or control over any document, writing . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it . . . [s]hall be fined Page 403 U. S. 721 not more than $10,000 or imprisoned not more than ten years, or both."

The Government suggests that the word "communicates" is broad enough to encompass publication.

There are eight sections in the chapter on espionage and censorship, §§ 792-799. In three of those eight, "publish" is specifically mentioned: § 794(b) applies to "Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, *publishes*, or communicates . . . [the disposition of armed forces]."

Section 797 applies to whoever "reproduces, *publishes*, sells, or gives away" photographs of defense installations.

Section 798, relating to cryptography, applies to whoever: "communicates, furnishes, transmits, or otherwise makes available . . . or *publishes*" the described material. [Footnote 2/2] (Emphasis added.)

Thus, it is apparent that Congress was capable of, and did, distinguish between publishing and communication in the various sections of the Espionage Act.

The other evidence that § 793 does not apply to the press is a rejected version of § 793. That version read:

"During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the Page 403 U. S. 722 enemy." 55 Cong.Rec. 1763. During the debates in the Senate, the First Amendment was specifically cited, and that provision was defeated. 55 Cong.Rec. 2167.

Judge Gurfein's holding in the *Times* case that this Act does not apply to this case was therefore preeminently sound. Moreover, the Act of September 23, 1950, in amending 18 U.S.C. § 793 states in § 1(b) that:

"Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect." 64 Stat. 987. Thus, Congress has been faithful to the command of the First Amendment in this area. So any power that the Government possesses must come from its "inherent power." The power to wage war is "the power to wage war successfully." *See Hirabayashi v. United States*, 320 U. S. 81, 320 U. S. 93. But the war power stems from a declaration of war. The Constitution by Art. I, § 8, gives Congress, not the President, power "[t]o declare War." Nowhere are presidential wars authorized. We need not decide, therefore, what leveling effect the war power of Congress might have.

These disclosures [Footnote 2/3] may have a serious impact. But that is no basis for sanctioning a previous restraint on Page 403 U. S. 723 the press. As stated by Chief Justice Hughes in *Near v. Minnesota*, 283 U. S. 697, 283 U. S. 719-720:

"While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."

As we stated only the other day in *Organization for a Better Austin v. Keefe*, 402 U. S. 415, 402 U. S. 419, "[a]ny prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity."

The Government says that it has inherent powers to go into court and obtain an injunction to protect the national interest, which, in this case, is alleged to be national security.

Near v. Minnesota, 283 U. S. 697, repudiated that expansive doctrine in no uncertain terms.

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression Page 403 U. S. 724 of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be.*See* T. Emerson, The System of Freedom of Expression, c. V (1970); Z. Chafee, Free Speech in the United States, c. XIII (1941). The present cases will, I think, go down in history as

the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions, there should be "uninhibited, robust, and wide-open" debate. *New York Times Co. v. Sullivan,* 376 U. S. 254, 376 U. S. 269-270.

I would affirm the judgment of the Court of Appeals in the *Post* case, vacate the stay of the Court of Appeals in the *Times*case, and direct that it affirm the District Court.

The stays in these cases that have been in effect for more than a week constitute a flouting of the principles of the First Amendment as interpreted in *Near v. Minnesota.*

[Footnote 2/1]

See Beauharnais v. Illinois, 343 U. S. 250, 343 U. S. 267 (dissenting opinion of MR. JUSTICE BLACK), 284 (my dissenting opinion); *Roth v. United States,* 354 U. S. 476, 354 U. S. 508 (my dissenting opinion which MR. JUSTICE BLACK joined); *Yates v. United States,* 354 U. S. 298, 354 U. S. 339 (separate opinion of MR. JUSTICE BLACK which I joined); *New York Times Co. v. Sullivan,* 376 U. S. 254, 376 U. S. 293 (concurring opinion of MR. JUSTICE BLACK which I joined); *Garrison v. Louisiana,* 379 U. S. 64, 379 U. S. 80 (my concurring opinion which MR. JUSTICE BLACK joined).

[Footnote 2/2]

These documents contain data concerning the communications system of the United States, the publication of which is made a crime. But the criminal sanction is not urged by the United States as the basis of equity power.

[Footnote 2/3]

There are numerous sets of this material in existence, and they apparently are not under any controlled custody. Moreover, the President has sent a set to the Congress. We start, then, with a case where there already is rather wide distribution of the material that is destined for publicity, not secrecy. I have gone over the material listed in the *in camera*brief of the United States. It is all history, not future events. None of it is more recent than 1968.