

Sec. 8—Powers of Congress

Cls. 11, 12, 13, and 14—War; Military Establishment

flict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come.”¹⁶⁰²

Delegation of Legislative Power in Wartime

During wartime, Congress has been prone to delegate more powers to the President than at other times.¹⁶⁰³ The Court, however, has insisted that, “[i]n peace or war it is essential that the Constitution be scrupulously obeyed, and particularly that as in times of peace the respective branches of the government keep within the power assigned to each by the Constitution. On the other hand, . . . [i]n time of crisis nothing could be more tragic and less expressive of the intent of the people than so to construe their Constitution that by its own terms it would substantially hinder rather than help them in defending its national safety.”¹⁶⁰⁴ Few cases, however, actually discuss when a wartime delegation of legislative power might be excessive.¹⁶⁰⁵ Two theories have been advanced at times when the delegation doctrine carried more force than it has in recent years. First, has been suggested that, because the war power is inherent in the Federal Government, and one shared by the Legislative and Executive Branches, Congress does not really delegate legislative power when it authorizes the President to exercise the war power in a prescribed manner. But this view overlooks the fact that the Constitution expressly vests the war power as a legislative power in Congress. Second, it has been suggested that Congress’ power to delegate in wartime is as limited as in other situations, but that the existence of a state of war is a factor weighing in favor of the validity of the delegation.

The first theory was fully stated by Justice Bradley in *Hamilton v. Dillin*,¹⁶⁰⁶ upholding a levy imposed by the Secretary of the Treasury pursuant to an act of Congress. To the argument that the levy was a tax the fixing of which Congress could not delegate, Justice Bradley noted that the power exercised “does not belong to the

¹⁶⁰² 335 U.S. at 170.

¹⁶⁰³ For an extensive consideration of this subject in the context of the President’s redelegation of it, see N. GRUNDSTEIN, *PRESIDENTIAL DELEGATION OF AUTHORITY IN WARTIME* (1961).

¹⁶⁰⁴ *Lichter v. United States*, 334 U.S. 742, 779–80 (1948).

¹⁶⁰⁵ In the *Selective Draft Law Cases*, 245 U.S. 366, 389 (1918), a “contention that an act [was] void as a delegation of federal power to state officials” was dismissed as “too wanting in merit to require further notice.” Likewise, “the contention that . . . vesting administrative officers with legislative discretion [is unconstitutional] has been so completely adversely settled as to require reference only to some of the decided cases.” *Id.* (citing three cases). A wartime delegation was upheld by reference to peacetime precedents in *Yakus v. United States*, 321 U.S. 414, 424 (1944).

¹⁶⁰⁶ 88 U.S. (21 Wall.) 73 (1875).