

## Sec. 8—Powers of Congress

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

same category as the power to levy and collect taxes, duties, and excises. It belongs to the war powers of the Government. . . .”<sup>1607</sup>

Both theories found expression in different passages of Chief Justice Stone’s opinion in *Hirabayashi v. United States*,<sup>1608</sup> upholding executive imposition of a curfew on Japanese-Americans pursuant to legislative delegation. On the one hand, he spoke to Congress and the Executive, “acting in cooperation,” to impose the curfew,<sup>1609</sup> while, on the other hand, he noted that a delegation in which Congress has determined the policy and the rule of conduct, leaving to the Executive the carrying-out of the policy, is permissible delegation.<sup>1610</sup>

A similar ambiguity is found in *Lichter v. United States*,<sup>1611</sup> upholding the Renegotiation Act, but taken as a whole the Court there espoused the second theory. “The power [of delegation] is especially significant in connection with constitutional war powers under which the exercise of broad discretion as to methods to be employed may be essential to an effective use of its war powers by Congress. The degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition. . . . Thus, while the constitutional structure and controls of our Government are our guides equally in war and in peace, they must be read with the realistic purposes of the entire instrument fully in mind.”<sup>1612</sup> The Court then examined the exigencies of war and concluded that the delegation was valid.<sup>1613</sup>

## CONSTITUTIONAL RIGHTS IN WARTIME

## Constitution and the Advance of the Flag

**Theater of Military Operations.**—Military law to the exclusion of constitutional limitations otherwise applicable is the rule in the areas in which military operations are taking place. This view was assumed by all members of the Court in *Ex parte Milligan*,<sup>1614</sup> in which the trial by a military commission of a civilian charged with disloyalty in a part of the country remote from the theater of military operations was held invalid. Although unanimous in the result, the Court divided five-to-four on the ground of decision. The

<sup>1607</sup> 88 U.S. at 96–97. Cf. *United States v. Chemical Foundation*, 272 U.S. 1 (1926).

<sup>1608</sup> 320 U.S. 81 (1943).

<sup>1609</sup> 320 U.S. at 91–92, 104.

<sup>1610</sup> 320 U.S. at 104.

<sup>1611</sup> 334 U.S. 742 (1948).

<sup>1612</sup> 334 U.S. at 778–79, 782.

<sup>1613</sup> 334 U.S. at 778–83.

<sup>1614</sup> 71 U.S. (4 Wall.) 2 (1866).