

## Sec. 8—Powers of Congress

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

States.<sup>1650</sup> Chief Justice Stone found that enemy combatants, who without uniforms come secretly through the lines during time of war, for the purpose of committing hostile acts, are not entitled to the status of prisoners of war but are unlawful combatants punishable by military tribunals. Because this use of military tribunals was sanctioned by Congress, the Court has found it unnecessary to decide whether “the President may constitutionally convene military commissions ‘without the sanction of Congress’ in cases of ‘controlling necessity.’”<sup>1651</sup>

***Eminent Domain.***—An oft-cited dictum uttered shortly after the Mexican War asserted the right of an owner to compensation for property destroyed to prevent its falling into the hands of the enemy, or for that taken for public use.<sup>1652</sup> In *United States v. Russell*, decided following the Civil War, a similar conclusion was based squarely on the Fifth Amendment, although the case did not necessarily involve the point. Finally, in *United States v. Pacific Railroad*,<sup>1653</sup> also a Civil War case, the Court held that the United States was not responsible for the injury or destruction of private property by military operations, but added that it did not have in mind claims for property of loyal citizens taken for the use of the national forces. “In such cases,” the Court said, “it has been the practice of the government to make compensation for the property taken. . . . although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clauses.”<sup>1654</sup>

Meanwhile, however, in 1874, a committee of the House of Representatives, in an elaborate report on war claims growing out of the Civil War, had voiced the opinion that the Fifth Amendment embodies the distinction between a taking of property in the course of military operations or other urgent military necessity, and other takings for war purposes, and required compensation of owners in the latter class of cases.<sup>1655</sup> In determining what constitutes just compensation for property requisitioned for war purposes during World War II, the Court has assumed that the Fifth Amendment is appli-

<sup>1650</sup> 317 U.S. 1 (1942).

<sup>1651</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 592 (2006). But see, *id.* at 591 (“Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8, and Article III, § 1, of the Constitution unless some other part of that document authorizes a response to the felt need.”).

<sup>1652</sup> *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1852).

<sup>1653</sup> 120 U.S. 227 (1887).

<sup>1654</sup> 120 U.S. at 239.

<sup>1655</sup> H.R. REP. NO. 262, 43d Cong., 1st Sess. (1874), 39–40.