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Recommended Citation
Richard W. Vitaris, Remedies Against the United States for Private Property Used or Taken, 16 Val. U. L. Rev. 257 (1982).
Available at: http://scholar.valpo.edu/vulr/vol16/iss2/2

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REMEDIES AGAINST THE UNITED STATES FOR PRIVATE PROPERTY USED OR TAKEN

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INTRODUCTION

A suit against the government for compensation for property used or taken is full of pitfalls. A case sounding in tort may be brought only before a United States district court and is subject to the Federal Tort Claims Act (FTCA). If the case sounds in contract, it generally must be brought before the Court of Claims and is subject to the Tucker Act. In other cases the government action giving rise to the suit is a taking within the meaning of the fifth amendment and the law of eminent domain governs. Finally, the government action might amount to unjust enrichment under the law of restitution. Theoretically, there is no remedy against the government for unjust enrichment. Often, however, a claim in unjust enrichment may be brought under one of the alternative theories discussed above. This article will discuss the differences and similarities in the contract, tort, and eminent domain claims which may be brought against the United States for the use or taking of private property. Many claims for unjust enrichment are in fact cognizable under one of these alternative theories, and an analytical framework for approaching problems in this area will be developed.

I. TORT CLAIMS

Prior to the enactment of the FTCA in 1946, the doctrine of sovereign immunity posed an insurmountable obstacle to suit

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† The views expressed are those of the author and do not necessarily reflect the opinions of the Judge Advocate General or any governmental agency.
1. 28 U.S.C. § 1346(b) et seq. (1976).
2. See note 27 infra.
5. See Restitution & Federal Government, supra note 4, at 600.
against the United States in tort. Under the FTCA the United States may be sued in federal district court without regard to amount. There are, however, a variety of claims which are disallowed under the FTCA. The FTCA allows recovery for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Thus, when analyzing any potential tort claim, the threshold question must be whether the plaintiff has a cause of action in tort under state law. If so, the plaintiff must consider whether his case falls within one of the statutory exceptions to suit against the United States. Unfortunately, many claims arising against the government for the use or taking of private property fall within these exceptions. The most common exceptions affecting these suits include:

1. claims based on the acts of federal employees, exercising due care, in the execution of a statute or regulation;
2. claims based on performance of some discretionary function, or duty, without regard for whether the discretion was abused; and
3. claims arising out of interference with contract rights.

If a tort claim cannot be brought under the FTCA, the plaintiff should consider whether the governmental action constitutes a taking under the fifth amendment. Where a government employee is acting in the execution of a statute or regulation, the FTCA bars suit in tort. That statute, however, might be construed as an exercise of federal eminent domain.

6. Id. at 587-91.
9. Id.
12. See note 69 infra and accompanying text.
At common law, the same transaction might give rise to a tort claim and a claim in unjust enrichment, thus giving the plaintiff a choice of remedies. The plaintiff would generally make his election based on the difference in remedies. For example, the benefit to the taker might exceed the damage to the owner, and in such a case the typical plaintiff would waive the tort and sue in restitution. When the defendant is the United States, however, this option generally is not available. This is because the United States has never waived sovereign immunity for suits in unjust enrichment. While many claims in unjust enrichment may be vindicated through a tort claim, this is not so in every case. First, the conduct of the United States is not necessarily tortious in every instance where the nation is unjustly enriched. Second, there are many occasions where a tort claim will be barred under the FTCA, thus making it impossible to bring the restitution claim and sue in tort. In these circumstances, the claimant should consider whether the facts sounding in unjust enrichment give rise to a claim in eminent domain. This will be possible only where there was an intentional tort since there is no taking under the fifth amendment unless there is an intent on the part of the condemnor to take the condemnee's property, or an intent to do an act the natural consequence of which is to take the property.

13. There are some limits to the ability of a plaintiff to waive a tort and sue in restitution. See D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES 239 (1973) [hereinafter cited as Dobbs]; Corbin, Waiver of Tort and Suits in Assumpsit, 19 Yale L.J. 221 (1910).

14. Friedman, Restitution of Benefits Obtained Through the Appropriation of Property on the Commission of a Wrong, 80 Colum. L. Rev. 504, 505 (1980) [hereinafter cited as Freidman, Restitution].

15. Note that if the facts constitute an implied in fact contract, given the expanded meaning which the Court of Claims has given to that concept, see notes 40-49 infra and accompanying text, then the plaintiff may be able to make an election of remedies. However, a plaintiff would do this at his peril since the Court of Claim's apparent willingness to find an implied in fact contract where the common law would not seems bottomed on the fact that the plaintiff would have no remedy if the court declined to do so. See id. Where plaintiff has a tort remedy available to him, the Court of Claims might well insist that the plaintiff pursue that remedy.

16. See note 4 supra, and note 39 infra and accompanying text.

17. Likewise, at common law, not every claim in restitution constituted a tort claim. Friedman, Restitution, supra note 14, at 504-05. Legal scholars, however, have urged that a recovery be allowed whenever one person appropriates, uses, or consumes the property of another. Id. at 507.

18. See notes 8-10 supra and accompanying text.

19. A plaintiff could not sue in the Court of Claims on a contract theory in such a case because relief for a claim in restitution would sound in quasi-contract. See note 39 infra. But see note 15 supra.

A common example of an eminent domain claim occurs when the government creates a private nuisance or commits a trespass. In Speir v. United States, the plaintiff successfully sued on an eminent domain theory where overflights by military helicopters substantially interfered with the use and enjoyment of her land. There is no doubt that such overflights, if conducted by a private party, would have been tortious. Had the plaintiff sued the United States in tort, however, she would have run up against a possible bar to suit under the FTCA. Accordingly, the plaintiff's only meaningful cause of action would be in eminent domain.

If the tort claim is barred, the plaintiff should also consider whether the action may be brought as a contract claim since there are various situations in which a claim may sound in both tort and contract. In addition, the United States Supreme Court has recently held that the existence of a tort claim which is barred by the FTCA does not preclude recovery on a contract theory if a valid implied in fact contract exists.

In determining whether the claim also sounds in contract, the initial hurdle is overcoming the established rule that if the claim sounds essentially in tort, then it may not be brought in the Court of Claims under the Tucker Act by "waiving the tort and suing in assumpsit." Likewise, a suit brought in a district court under the FTCA is subject to a motion to dismiss the tort claim if there is a

24. See notes 28-29 infra and accompanying text. When a case sounds in contract, of course, other problems are presented. Unlike claims under the FTCA, federal law governs contract disputes. See generally American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F.2d 640 (9th Cir. 1961). The contract claim may not be brought in the local United States district court, but rather, must be brought in the Court of Claims. Prior to the Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq. (1976), the Tucker Act permitted the district court to hear contract claims if the amount in controversy exceeded $10,000.
26. See Woodbury v. United States, 313 F.2d 291, 296 (9th Cir. 1963). This rule no longer poses an obstacle to plaintiff's suit on a contract theory where the FTCA bars a tort claim. Hatzlachh Supply Co., Inc. v. United States, ___ U.S. ___, 100 S. Ct. 647 (1980). See also note 13 supra and accompanying text.
strong basis for jurisdiction under the Tucker Act. Some cases, however, validly may be brought before either court. A well known case illustrates this point. In *Aleutco Corp. v. United States*, the plaintiff corporation bought some surplus property from the United States. The Government improperly resold some of the property to a third party and the plaintiff sued in conversion. The Government contended that the case should have been brought in the Court of Claims as the case sounded principally in contract. The Third Circuit Court of Appeals held that, while the plaintiff had a claim under the Tucker Act, the claim was also properly brought in tort. The court explained that prior to the enactment of the FTCA the immunity of the United States from suit often depended upon making the subtle distinction between tort and contract. The court was of the view that this distinction was no longer critical and that no valid policy objective would be served by denying plaintiff the forum of the district court. Unfortunately, some federal courts of appeal have not taken this liberal view.

II. CONTRACT CLAIMS

Contracts may be express or implied. Express contracts between the government and a private party are beyond the scope of this article. We deal here with the use or taking of private property by the federal government where the facts suggest a contract. There are several problems in dealing with these implied contracts. First, as seen above, many claims which sound in contract also sound in tort. Perhaps more troublesome, however, is the age-old difficulty of distinguishing between contracts implied in law and contracts implied in fact. The problem, simply put, is that only contracts implied in fact are cognizable in the Court of Claims under the Tucker Act. A contract implied in law, or quasi-contract, is a

27. Woodbury v. United States, 313 F.2d 291,296 (9th Cir. 1963). See In Re Bomb Disaster at Roseville, Cal. on April 28, 1973, 438 F. Supp. 769,780 (E.D. Cal. 1977)(determination whether claim is for breach of warranty or strict liability in tort determinative of jurisdiction of district court). Indeed, many attorneys protect themselves by filing suit in both the district court and the Court of Claims in case one of those courts should decline jurisdiction. L. Jayson, Handling Federal Tort Claims § 212.0311, at 9-20 (1980).

28. 244 F.2d 674 (3d Cir. 1957).

29. Id. at 678-79.

30. Id. at 679.


32. See notes 28-30 supra and accompany text.
restitutionary remedy for which there may be no relief against the federal government. 33

A contract implied in fact is a contract. It is an agreement based upon a meeting of the minds between the parties. However, there are two significant analytical differences between a contract implied in fact and an express contract. First, the contract implied in fact is evidenced by conduct rather than by words. 34 Second, a different measure of damages may be employed. 35 In contrast, a contract implied in law is not a real contract at all. Rather, it is a restitutionary remedy imposed to prevent unjust enrichment. It is a constructive contract or quasi-contract—a legal fiction—imposed to provide a remedy. 36 The Tucker Act provides that the government has given its consent to suit in contract whether “express or implied.” 37 The term “implied contract” within the meaning of the Tucker Act, however, has been construed to apply only to those contracts which are implied in fact. 38 Recovery on a quasi-contract theory, if it is so denominated, will not be allowed. 39

Consequently, courts occasionally have strained the analytical distinction between contracts implied in fact and quasi-contracts in order to find the former and avoid the latter. 40 For example, the classic situation in which a quasi-contract will be imposed to prevent unjust enrichment is where an express contract is held invalid. 41 Some federal courts have stood the law of remedies on its head and found an implied in fact contract in these circumstances. In the well-known case of William v. United States, 42 an air force officer who lacked the authority to bind the government contracted to have

34. 2 J. MCBRIDE & I. WACHTEL, GOVERNMENT CONTRACTS § 17.101(1) (1978) [hereinafter cited as MCBRIDE & WACHTEL].
35. See text accompanying note 51 infra.
36. DOBBS, supra note 21, at 235.
40. See DOBBS, supra note 13, at 235 n.26 & 993.
41. Id. at 269. Several commentators, however, have urged that restitution in the context of failed agreements should be classified as a contractual remedy rather than as an appendage of quasi-contracts. Perillo, Restitution in a Contractual Context, 73 COLUM. L. REV. 1208 (1973). C KNAPP, PROBLEMS IN CONTRACT LAW 948-49 (1976).
42. 127 F. Supp. 617 (Ct. Cl. 1955).
some road work performed at an installation. The Court of Claims found an implied in fact contract, but curiously based its analysis on the fact that the plaintiff had performed its part of the agreement and had bestowed a benefit on the United States—a quasi-contract analysis.43 No real attempt was made to determine the intent of those persons who did have the authority to bind the government. The court was content to focus on the equities of plaintiff's claim.44 In this respect, the Williams court ignored the long standing rule that the essential element of an implied in fact contract with the government is that the agent with whom the plaintiff dealt had the authority to enter into an express contract involving the same subject matter.45

The distinction between contracts implied in fact and contracts implied in law is likewise blurred where the United States has illegally received money from an innocent person. In this situation, the Court of Claims has routinely implied an obligation on the part of the United States to return the money. In the leading case of Kirkendall v. United States,46 the Court of Claims observed:

[When the Government has illegally received the property of an innocent citizen and when this money has gone into the Treasury of the United States, there arises an implied contract on the part of the Government to make restitution to the rightful owner under the Tucker Act, and this court has jurisdiction to hear the suit.]47

Despite the court's rhetoric, the conclusion is inescapable that the implied contract found by the court is closer to the restitutionary remedy of the constructive trust which is impressed to prevent unjust enrichment than it is to an actual contract.

In most cases where the Court of Claims finds an implied in fact contract under circumstances where the common law would ap-
ply quasi-contractual analysis, the court, to justify its actions, will take pains to find the mutual assent necessary for a contract. For example, in *Yosemite Park & Curry Co. v. United States*,48 the plaintiff had a contract with the United States which violated federal procurement regulations. Nevertheless, the Court of Claims allowed the plaintiff recovery on an implied contract theory. In analyzing the case, the court noted, “while it is clear that the Government could no longer be bound by [the] terms of the Agreement, it is equally clear that the Government bargained for, agreed to pay for, and received the benefit of YPC’s services.”49 Apparently the court used this “agreement” to find an implied in fact contract. One commentator, however, has noted that there was evidence that YPC would not have entered the contract if the illegal terms had been excluded.50 Despite the finding of mutual assent, it is submitted that the court was really using the “implied in fact contract” as a legal fiction to do what the court could not do openly—imply a contract in law to prevent unjust enrichment.

An interesting consequence of the Court of Claim’s use of the “implied in fact contract” is the remedy used. In such cases, the plaintiff is generally permitted to recover through the common count of quantum meruit;51 a form of recovery often found in quasi-contractual relief. Although quantum meruit is often an appropriate remedy where there has been unjust enrichment, the law of restitution will not provide that generous a recovery in certain circumstances.52 For example, if restitution is appropriate because an

48. 582 F.2d 552 (Ct. Cl. 1978).
49. Id. at 560.

A recovery in quantum meruit will usually be the value of the services, measuring value in the labor market. Dobbs, supra note 13, at 237. Quantum meruit is but one of several common counts. Id. Today, many attorneys use quantum meruit as a generic term to refer to all the common counts. Some of the other common counts include: quantum valebant (for the value of goods sold), money paid to the defendant's use, money had and received, use and occupation of land, and goods sold and delivered. Id. at 236-38.

52. Professor Perillo has observed that “[r]estitution in contract arises in a variety of situations, from the defaulting defendant to the defaulting plaintiff, and justice does not require that the same measure of recovery always be used. Perillo,
express contract failed, recovery in *quantum meruit* might give the plaintiff an unjustifiable windfall. This is true if the failure of the contract was for reasons unassociated with the agreement on the measure of damages. This is because recovery in *quantum meruit* may be far greater than the contract price if the bargain was not a beneficial one for the plaintiff.

Thus, in some cases, the Court of Claims has used other methods of fashioning a remedy on finding a contract implied in fact. In *Hughes Transportation Co. v. United States*, an express contract, in which the plaintiff agreed to transport certain goods, failed because the rate agreed upon was less than the minimum rate prescribed by applicable Kentucky law. The Court of Claims found an implied in fact contract and awarded the plaintiff the minimum tariff allowed by the state. The court reasoned that there was a real contract between the parties because the United States intended to contract with the plaintiff and because "neither party intended to violate Kentucky law." With respect to the remedy, the court stated that both parties intended that "freight rates lawful under approved tariffs and Kentucky statutes should apply."

At common law, principles of restitution are generally applied where an express contract fails for effect. The use of restitution allows a court to tailor a remedy appropriate to the circumstances. That, of course, technically cannot be done by the Court of Claims. Yet, it is suggested that the court did so in the *Hughes* case. It strains reason to say, as the court did in *Hughes*, that the parties intended Kentucky tariffs to apply. It seems clear that the tariff they intended to apply was that which was provided for in their written agreement. It is submitted that the United States did not intend to pay the higher tariff, but that such intent was implied by the court to prevent unjust enrichment. The court recognized its own sense of justice when it observed:

[i]t would seem unthinkable, in our opinion, that the federal government which is responsible for the enactment and enforcement of such regulatory statutes as the Interstate Commerce Act and the Motor Carrier Act, among others, and which endorses and encourages similar

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53. 121 F. Supp. 212 (Cl. Cl. 1954).

54. *Id.* at 235.

55. *Id.*
regulatory acts on the part of the states in the exercise of the states' police powers in the same field, should not be bound by the same statutory limitations on its right of contract as other shippers and users. ... 

Accordingly, the court required the Government to pay the higher Kentucky tariff since, in the court's view, the Government should have paid it all along.

Although Hughes indicates the Court of Claim's willingness to adopt a remedy appropriate to the circumstances, as would a common law court applying a restitutionary remedy, the Hughes decision is not a typical case. The Court of Claims generally uses quantum meruit as the remedy applied in implied in fact contract cases. Use of quantum meruit poses the possibility that a plaintiff may receive a windfall where principles of restitution would afford a lesser recovery. When a common law court considers a claim in restitution, it evaluates not only whether the defendant has been enriched but also whether such enrichment was unjust. An unfortunate consequence of the Court of Claims' manner of granting relief to a plaintiff on a purported implied in fact theory, in cases which are really quasi-contractual in nature, is that such an analysis does not openly consider the justice of the claim, as does an analysis of unjust enrichment.

For example, in Yosemite, the plaintiff was allowed recovery despite an illegal contract and evidence that the plaintiff would not have entered the agreement but for the illegal terms. The court determined that there was a contract implied in fact and awarded the plaintiff recovery in quantum meruit. The court reasoned that because the United States bargained for, agreed to pay for, and received a benefit over a period during which the plaintiff operated under the belief that the contract was valid, the United States should pay for the reasonable value of the benefit.

56. Id. at 234.
58. See note 52 supra and accompanying text. Since it appears, however, that the Court of Claims is playing games with legal theory in order to prevent unjust enrichment, the court might not find an implied in fact contract if the resulting remedy would provide such a windfall.
59. See, e.g., Green Tree Estates v. Furstenberg, 21 Wis. 2d 193, 124 N.W.2d 90 (1963).
60. Yosemite Park & Curry Co. v. United States, 582 F.2d 552 (Ct. Cl. 1978).
61. See note 48 supra and accompanying text.
62. 582 F.2d at 560.
If the *Yosemite* case were to be heard by a Court of Claims empowered to give quasi-contractual relief, the court could have balanced the need to provide the plaintiff a remedy against the need to deter contractors from entering into illegal bargains.63

What explains this unfortunate state of the law? In many cases the United States is unjustly enriched by the use or taking of private property. Analytically, a plaintiff should seek relief in quasi-contract. However, this type of relief may not be sought against the United States because of the peculiar jurisdiction of the Court of Claims. It is suggested that, in spite of this limited jurisdiction, some federal courts have allowed the action to be brought by finding that a contract implied in fact arose from the transaction, where to do otherwise would deny the plaintiff recovery despite the unjust enrichment of the United States. By allowing a recovery in this manner, however, courts have distorted the common law and created a potential anomaly through which, in certain circumstances, the Court of Claims might inappropriately provide recovery in *quantum meruit* that is in excess of the remedy under traditional principles of restitution.

An apparent element in a claim on an implied in fact contract is that the government has received a benefit.64 The rationale for this element of proof seems to be the rule that there is no contract absent adequate consideration flowing to the government.65 Notwithstanding that rationale, before deciding whether there is an implied in fact contract, courts carefully analyze the benefit received by the government, and measure damages based upon the value of the benefit.66 This, of course, is precisely what is done in quasi-contractual analysis.67

63. This analysis would not necessarily change the result in *Yosemite*, it would only result in giving the court greater flexibility in fashioning a remedy.
   (1) That the Government agent with whom the party dealt had the authority to enter into an express contract involving the same subject matter.
   (2) The Government must have received the supplies or services in controversy, or caused them to be used for a public benefit.
   (3) The supplies or services for which payment is sought must have been directly beneficial to the government.
   McBride & Wachtel *supra* note 34, at § 17.10[3].
65. See *Union National Bank of Chicago v. Weaver*, 604 F.2d 543, 545 (7th Cir. 1979).
67. *Restitution & Federal Government, supra* note 4, at 612. The cases in
It is submitted that a proper analysis of implied in fact contracts would not look to the value of the benefit as long as it had some value. Of course, every contract must be supported with consideration. It is fundamental, however, that the amount of consideration necessary to support a contract is slight, and that courts do not often look to the adequacy of the consideration. The courts' preoccupation with the benefit to the government suggests, ironically, their desire that an "implied in fact" contract not be found where the government has not been unjustly enriched.

Depending upon the circumstances, a plaintiff may be either better or worse off because of the peculiar jurisdiction of the Court of Claims and the technical absence of a restitutionary remedy against the United States. If the plaintiff can get his claim heard on an implied in fact contract theory, then the potential exists for recovery in excess of what would be possible in restitution. On the other hand, some claimants may be denied a remedy altogether. These claimants should consider whether the governmental conduct was tortious, and if so, whether the FTCA permits suit. Alternatively, the government action might constitute a taking under the fifth amendment.

III. EMINENT DOMAIN

The fifth amendment provides that no property shall be taken without just compensation. In spite of this prohibition, there is not a taking within the meaning of the fifth amendment every time the government takes or uses private property. The fifth amendment is directed against the enforcement of an act of the legislature which authorizes the seizure or destruction of private property against the will of the owner. Therefore, the law of eminent domain is irrelevant if the government and private parties have entered into a contractual relationship. Likewise, the law of eminent domain does not apply to the acts of government officials that are unauthorized by law, even if the officials purported to act on behalf of the government. Rights in these circumstances should be vindicated, respec-
tively, through contract and tort claims.\textsuperscript{72} Eminent domain, therefore, does not create a positive right in the individual to receive compensation from the government whenever his property is taken for public use.\textsuperscript{73} On the other hand, there is no need that the government take property under formal eminent domain procedures in order for an eminent domain suit to lie.\textsuperscript{74} Suits on a constructive eminent domain claim are well recognized.\textsuperscript{75}

A taking under the fifth amendment must have been an intentional appropriation of the property to public use.\textsuperscript{76} An unintentional taking, of course, may be compensable if it constitutes a tort, but it is not an exercise of eminent domain.\textsuperscript{77} Similarly, where the United States and a private party contracted for the government to have the use or benefit of property, there is no taking within the law of eminent domain.\textsuperscript{78} Should some dispute arise with respect to the contract, therefore, it cannot be said that there was a taking without just compensation. Rather, there is simply a contract dispute between the parties which should be dealt with under the Tucker Act.

Courts do not apply the law of eminent domain if a claimant may obtain relief through resort to some other legal theory.\textsuperscript{79} This appears at first blush to be nothing more than the traditional preference of courts to avoid basing decisions on constitutional grounds.\textsuperscript{80} Unfortunately, the courts do not state that this is the rule. Rather, the courts analyze the facts of a case in light of the elements of eminent domain. Thus, if the facts suggest that the Gov-

\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} This article does not deal with the scope of eminent domain, and the extent to which government action, i.e., regulation, which is a proper exercise of the police power, might amount to a taking. It is settled, of course, that some interference with private property may be justifiable under the police power, and would not amount to a taking under the fifth amendment. \textit{Id.} at § 6.1.
\textsuperscript{75} See United States v. Dickenson, 331 U.S. 745 (1946).
\textsuperscript{76} Vansant v. United States, 75 Ct. Cl. 562, 566 (1932).
\textsuperscript{78} Consolidated Coal v. United States, 60 Ct. Cl. 608, \textit{appeal dismissed}, 270 U.S. 664 (1926); Klebe v. United States, 57 Ct. Cl. 160 (1922), \textit{aff'd}, 263 U.S. 188 (1923).
\textsuperscript{79} See, e.g., Sun Oil Co. v. United States, 215 Ct. Cl. 716, 572 F.2d 786 (1978).
\textsuperscript{80} The Supreme Court originally viewed "constructive eminent domain" as a suit against the United States on an implied in fact contract theory. \textit{See} Tempel v. United States, 248 U.S. 121 (1918). Now, however, it is well settled that all eminent domain claims are under the Constitution. Jacobs v. United States, 290 U.S. 13 (1933), \textit{quoted in}, Cotton Land Co. v. United States, 109 Ct. Cl. 816 (1948).
ernment had some colorable claim to the property, the court will determine that there was no taking. Where a contract, whether express or implied was entered into by the government, whether or not enforceable, it is clear that the government did not intend to take property as an exercise of eminent domain. However, when this reasoning is applied to a situation where no contract developed between the plaintiff and the United States, it can result in a bar to relief, despite the fact that the government has been enriched by the use or taking of private property.

In *J.J. Henry Co. v. United States*, the Navy had a contract with a prime contractor to build a ship. The plaintiff, a subcontractor, was hired by the prime contractor to develop plans for the new ship. The subcontractor did the work and turned over the plans. The prime contractor, as per its contract with the United States, turned over the plans to the Navy. Subsequently, the prime contractor breached its contract with the United States, and never paid the subcontractor for the work performed. The United States, however, continued to use the plans developed by the plaintiff, which were turned over to the new prime contractor for use in the development of the ship. The plaintiff sued in the Court of Claims on an eminent domain theory for the value of the plans. The court held that this was not a taking under the fifth amendment because the United States was entitled to the plans under the terms of its contract with the prime contractor. The court observed:

> [t]he clear thrust of authorities is that where the government possesses property under the color of legal right, as by an express contract, there is seldom a taking in violation of the Fifth Amendment. The amendment has limited application to the relative rights in property of parties litigant which have been voluntarily created by contract.

The determination that eminent domain was inappropriate denied the plaintiff a remedy, as the court noted in dictum that there was no implied in fact contract either. *Henry*, therefore, illustrates the possibility that a plaintiff may have no recovery despite the unjust enrichment of the United States.

Where the United States and the complaining party had a meeting of the minds and thus a contract, whether express or im-

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81. 411 F.2d 1246 (Ct. Cl. 1969).
82. Id. at 1249.
83. Id.
84. Id. at 1250.
plied in fact, it is easy to see that the case should be brought as a contract claim rather than under eminent domain. It is also reasonable, where the government has engaged in tortious conduct, to expect a plaintiff to proceed in tort, rather than eminent domain, if the FTCA permits. Indeed, this is no more than a restatement of the rule that courts should avoid deciding cases on constitutional grounds. Where, however, the government takes or uses property under circumstances where the contract cannot be found, or where the tort claim is not cognizable under the FTCA, a different situation is presented. In these cases, a plaintiff may be unable to obtain any form of relief if his case is not cognizable in eminent domain. This is so, since actions which sound exclusively in unjust enrichment may not be brought against the United States.85

In Henry,86 the court denied eminent domain relief relying on the fact the the government had a claim of right to the plans under its contract with the prime contractor, and therefore, did not “take” anything from the plaintiff in the constitutional sense. If the plaintiff had contracted with the United States, the court’s reasoning would make sense—the United States would have obtained the plaintiff’s plans under color of right; and the plaintiff would have had a contract claim against the government. Even if the express contract failed for effect, he might have proved an implied in fact contract.87 However, the court determined that there was no contract, either express or implied, between the plaintiff and the United States. If that was so, then why did the United States have a claim of right to the property of Henry? The prime contractor was not entitled to the plans because he did not pay Henry for them, and he could not contract to sell what was not his to the United States.

It is submitted that the Henry case was wrongly decided. The government knew or should have known that it was taking private property without just compensation. When the court determined that Henry did not have a valid contract claim with the United States, and thus could not proceed on a contract theory, it should have allowed recovery in eminent domain. Nor should it matter whether the government officials who authorized the use of Henry’s plans without compensating him had a good faith belief that the plans were the property of the government. Eminent domain cases have applied an objective standard in dealing with the intent of the

85. See note 39 supra and accompanying text.
86. See note 81 supra and accompanying text.
87. See notes 40-45 supra and accompanying text.
government. The absence of a subjective intent to take should not defeat a claim in eminent domain. 88

In any event, it now appears that the Court of Claims has abandoned the approach followed in Henry, although it has not expressly overruled that case. In the recent case of Heinemann v. United States, 89 the plaintiff sought recovery in eminent domain for the value of a patent taken by the United States. The Government defended on the grounds that it was acting on a claim of right arising from an assignment, which it believed to be valid. The court stated

[defendant's argument is premised on the ancient claim of right doctrine. This doctrine arose and is applicable to the contract-based jurisdiction of the court. The gist of the doctrine is that no implied promise by the United States to pay compensation for its taking possession of or for its using property can be found where it is acting under a claim of right to possess or use the property. Here, however, plaintiff is not alleging that an implied promise or contract is the source of the defendant's obligation to compensate him for its having used the '381 invention. Plaintiff's claim is that the Fifth Amendment obligates defendant to pay him compensation and that the amendment attaches to the defendant whether or not defendant has intended to take or has believed that it is taking property belonging to another. That a taking without just compensation of property belonging to another is a taking under the Fifth Amendment whether or not the United States intends to take or believes that it is taking property belonging to another is a proposition which has been affirmed by this court. 90]

Whether a case sounds in eminent domain may turn on whether the government agent who took or used the property was acting intentionally. Thus, if the government action constitutes an intentional tort which cannot be brought under the FTCA, 91 the key element of an eminent domain suit is satisfied. If, however, the govern-

88. See Sioux Tribe of Indians v. United States, 315 F.2d 378 (Ct. Cl. 1963)(erroneous survey by government surveyor resulting in accidentally depriving Indians of land is a taking despite absence of intent to take, and good faith conduct by surveyor).
89. 620 F.2d 874 (Ct. Cl. 1980).
90. Id. at 879. (citing Sioux Tribe of Indians v. United States, 315 F.2d 378 (Ct. Cl. 1963)).
91. See notes 8-10 supra and accompanying text.
ment agent was merely negligent, then the plaintiff may have no grounds for relief under eminent domain since "[a]n accidental or negligent impairment of the value of property is not a taking but, at most, a tort." If suit on the tort is not permitted by the FTCA, then, the plaintiff cannot recover notwithstanding that the government might have been unjustly enriched by the transaction.

There are many cases in which the government has been unjustly enriched by the use or taking of private property but, for one reason or another, suit cannot be brought on either a contract or a tort theory. Furthermore, in many of these cases, it will not appear that the government agent either intended to take the property, or even, perhaps, intended to perform an act a natural consequence of which is the taking or use of private property. In these circumstances, perhaps out of an unspoken motive of preventing the United States from being unjustly enriched, many courts will perform the bizarre feat of finding a government agent's "intent to take" by implication. The case of Sioux Tribe of Indians v. United States illustrates the reasoning typically articulated to justify such a finding. In Sioux Tribe, a government surveyor negligently performed a survey to divide Indian land from federal land. The survey deprived the Sioux of certain lands and the tribe sued on an eminent domain theory. The Government defended with the contention that the surveyor's acts were at most negligent, and in no event rose to the level of an intentional taking. The court rejected that view stating:

[although it might be said that there was no intentional appropriation of these lands, there was, nevertheless, a taking under the Fifth Amendment. Under earlier opinions of the Supreme Court, it was said that it was necessary, to support a judgment for the taking of property by the United States, that there be a promise, express or implied, to pay for the land taken . . . . It is the taking and the failure to pay just compensation that gives rise to the cause of action.]

92. Vansant v. United States, 75 Ct. Cl. 562, 566 (1932). The recent case of Heinemann v. United States, 620 F.2d 874 (Ct. Cl. 1980), however, suggests a willingness on the part of the Court of Claims to allow some eminent domain claims where the government has been negligent. See notes 89-90 supra and accompanying text. See also Sioux Tribe of Indians v. United States, 315 F.2d 378 (Ct. Cl. 1963).
93. 315 F.2d 378 (Ct. Cl. 1963).
94. Id. at 379 (citations omitted).
It is submitted that in the cases where the reasoning articulated above is applied, no subjective intent on the part of the government to pay for the benefit bestowed can realistically be found. Rather, the court implies such an intent to pay in order to prevent unjust enrichment.95

CONCLUSION

Serious legal problems are presented when a plaintiff seeks relief from the United States when the latter has been unjustly enriched. The long standing rule, that no action in restitution will lie against the United States, bars claims which are so denominated. However, the rule has had another consequence. Perhaps, in an effort to mitigate the harshness of the sovereign immunity doctrine, federal courts have construed the law of contracts, and eminent domain, to grant relief to a plaintiff on those theories, where, but for the sovereign immunity bar, he would recover on a claim for restitution.

It is submitted, that, to accomplish this goal, federal courts have had to intentionally misapply basic principles of contract law. A contract implied in fact is a contract while a quasi-contract is not a contract, but rather, a remedy to prevent unjust enrichment. Nevertheless, careful analysis of cases in which the Court of Claims has found a "contract implied in fact" reveals that in many cases no implied in fact contract existed at all. In many of those same cases, a common law court would have found a quasi-contract. It is suggested that the Court of Claims found the "implied in fact" contract not because there really was one, but because that court's sense of justice mandated that there be a remedy to prevent the unjust enrichment of the United States in those circumstances.

How do the courts perform this contract-law hat trick? One basic requirement of a contract is that there be a meeting of the

95. The manner in which the Court of Claims finds an "intent" to take on the part of the government which does not in fact subjectively exist in order to establish eminent domain is very similar to the way they will find an "intent" to pay needed to find a contract implied in law. See notes 40-45 supra and accompanying text.

In this context, the recent case of Heinemann v. United States, 620 F.2d 874 (Ct. Cl. 1980), see notes 89-90 supra and accompanying text, is also significant. In Heinemann, the government apparently had a good faith, but erroneous, belief that they were entitled to a patent under a valid license. That court said that there was a fifth amendment taking "whether or not the United States intends to take or believes that it is taking property belonging to another." Id. at 879. Accordingly, the court implied a promise to pay from the circumstances, and thus, found a fifth amendment taking.
minds. Thus, contract law will focus on the intention of the parties, and examine their objective manifestations of intent. It appears, however, that the Court of Claims in the process of implying contracts in fact also implies that the parties were subscribing to a certain standard of conduct. Thus the court focuses on what the parties should have been manifesting and not what they were actually doing. Thus, in Yosemite Park & Curry Co. v. United States, the court ignored all of the evidence that the parties would not have contracted but for the illegal terms in the contract, and analyzed the parties intent as if their conduct had been consistently proper. Similarly, in Williams v. United States, the court disregarded the absence of assent by the contracting officer and treated the facts as if the contracting officer had known of the facts and ratified the arrangement. In short, the Court of Claims seems willing to strain the facts of a case beyond credulity, or to find by implication that the parties maintained a fair and reasonable standard of conduct. Through this approach, plaintiffs are often able to recover for claims which seem very much like claims sounding in restitution.

It is submitted that courts play the same "game" with respect to the "intent" element of claims in eminent domain. It is well established that the government must intend to take property, or at least intend an act the probable consequence of which is a taking for there to be a fifth amendment claim. In spite of that requirement, the courts will often imply the intent if necessary to avoid unjust enrichment.

In Sioux Tribe of Indians v. United States, the court implied an intent to take Indian lands from the fact that a surveyor had been careless, and the carelessness resulted in the tribe being deprived of some property. Clearly, the surveyor did not intend to survey improperly. Yet, the court knew that the plaintiff had no other cause of action, and that the government had been unjustly enriched.

It has been suggested that the Tucker Act be amended to allow claims in restitution to be brought against the United States. This

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96. Thus, at common law, a promise made in jest will be enforceable if the promisee did not know the promisor was jesting, and the expression would be reasonably understood to mean what it appeared to mean. Lucy v. Zehmer, 196 Va. 493, 84 S.E.2d 516 (1954).
97. 582 F.2d 552 (Ct. Cl. 1978), see notes 48-50 supra and accompanying text.
98. 127 F. Supp. 617 (Ct. Cl. 1955), see notes 42-45 supra and accompanying text.
99. 315 F.2d 378 (Ct. Cl. 1963), see notes 93-95 supra and accompanying text.
author indorses that proposal. In the meantime, plaintiffs must continue to walk delicately when confronted with a claim for restitution. The plaintiff should always first consider possible tort or implied in fact contract theories since courts will not entertain an eminent domain claim when other remedies are available. If, after considering tort or contract remedies, and overcoming the obstacle of selecting the right court, the plaintiff feels there is no tort or contract cause of action, he should consider a claim in eminent domain.

101. See notes 79-80 supra and accompanying text.
102. See notes 26-31 supra and accompanying text.