



SCHWARTZ *Report*

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May, 2017

P F THE WALL

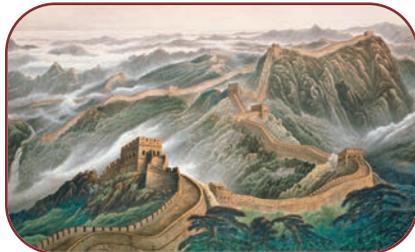


Photo credit to Xu Renlong "The Great Wall" painting, 2002.

When we moved to Hockessin our two boys were young and their Aunt Dede thought it would be a wonderful idea to get them a dog. We had been in our new home only a week or two when she showed up with a beautiful black Labrador puppy, who the breeder had named Goldy's Magnolia Blossom. We called her Maggie for short. The boys loved that dog, as we all did. However, they were not above teasing her every once in a while. One of the things they would do, when playing Pink Floyd's "The Wall", was to whisper to her "Pink Floyd the wall". It must have sounded to her doggie ears like go get the ball. Once said, this normally stoic creature would start running around like crazy. Such a fond memory got me thinking that nowadays, if you say "Donald Trump the wall" to pundits on either side of the debate on the border wall, you are liable to cause a similar frenzy. Rather than jump into the middle of the controversy, I would like to look at it from a real estate perspective. To get such a structure built you will need to deal with the folks who presently own the property where it is to be constructed. That's a property rights issue. I have written in previous Schwartz Reports about the government's power to seize private property. Now we are facing one of the largest potential uses of that power in memory. Eminent domain is the term given to the power of government to appropriate private property for public use without the owner's consent. The terms "condemnation" and "taking" refer to the act of a government exercising its power of eminent domain. This power is recognized as fundamental to government. However, in the United States, that power is restrained by the Fifth Amendment of the U. S. Constitution, which states that private property shall not be taken for public use without just compensation. The two key points that call out for a clear definition here are what constitutes public use and what constitutes just compensation.

Until midway through the 20th century, most courts inter-

preted "public use" to cover such things as roads, buildings, power lines, etc. These were to be projects either owned directly by a governmental entity or by private parties who would have a legal obligation to serve the entire public such as utility or transportation companies. This limited understanding of public use predominated at the time of the Constitution's ratification and was extended to the states in 1868 when the Fourteenth Amendment made the Bill of Rights, of which the Fifth Amendment is part, applicable to state governments.

Most of the recent controversial eminent domain cases such as *Kelo v City of New London, Connecticut* have involved transfer via eminent domain from one private individual or entity to another, something that seems to stray far from the original intent. U. S. Supreme Court Justice William Patterson wrote in 1795 when the Constitution was not yet a decade old: "The despotic power, as it is called by some writers, of taking private property, where state necessity requires, exists in every government. It is, however, difficult to form a case in which the necessity of a state can be of such a nature, as to authorize or excuse the seizing of landed property belonging to one citizen and giving it to another citizen."

In recent years, the definition of what constitutes public use has broadened cementing the belief that government planners should have nearly limitless authority to take property to promote growth, combat crime and blight, etc. The majority ruling in *Kelo* concluded that virtually any potential public benefit qualifies as a "public use" even if the government cannot prove those benefits will ever materialize, which in fact happened in the targeted Fort Trumbull section of New London.

Building a great wall along the U. S. southern border would seem to pass the test of public utility. However, the public's benefit is another question. As stated earlier, you can't

build a physical wall without some ownership interest in the land on which it is to be erected. Simply put, to build such a wall, the U. S. government would have to control all 1,954 miles of the boarder. Most of that land is now privately owned. In Texas, for example, the U. S. government owns only 100 miles of its 1,254 mile border.

Even if most owners accepted "fair market value" for their land; it would require deal making of monumental and hypnotic proportions to entice the hundreds of recalcitrant land owners to part with the use of their property. How would the government arrive at compensation they would deem "just?" Some would not want to sell at all and would fight confiscation in court. A 2009 Department of Homeland Security Inspector General's report put it this way: "Acquiring real property from non-federal owners is a costly, time consuming process requiring negotiations

and sometimes condemnation." Some condemnation proceedings invariably would drag on or not succeed at all.

It has been pointed out that Mr. Trump's own level of success in such negotiations has not been flawless. Evan Siegfried wrote about this in a recent Wall Street Journal editorial: "In the 1990's he [Trump] failed to persuade Vera Coking, an Atlantic City, N.J. widow, to sell her house on the site of a proposed Trump Plaza parking lot. The city's Casino Reinvestment Development Authority attempted to force her out using eminent domain, but Mrs. Coking prevailed in court." With such a record it might be better to consider "virtual" or "electronic" alternatives. Building a physical wall along the southern border will be a real estate challenge to say the least. Furthermore, history is not replete with successful wall building stories.

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