

**PROFESSOR EVAN MCKENZIE**

**SPEAKS OUT**

**EXCERPTS FROM HIS APPEARANCE**

***ON THE COMMONS***

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**SEPT 20, 2001**

Published by

**CITIZENS AGAINST PRIVATE GOVERNMENT HOAs, INC**

Nov 26, 2001

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## **Second Edition to Privatopia?**

SB: But the question is, is there going to be a follow up to *Privatopia*?

EM: Well, I've written some articles since *Privatopia* came out. I've written a couple of large new articles, and an article in *Urban Affairs Review*, and I have some other things planned, some other articles planned. I wrote a piece about a really incredible episode in Las Vegas involving a place called Bonanza Village, and I presented that and that paper at a conference at the University of California at Irvine, and that's going to be published either in a book of edited volume of articles on the phenomenon of gated communities around the world, or if that doesn't happen, then I'll publish it elsewhere.

But yeah, I'm still writing on this issue. And I will continue to do that. And I have in mind one possibility is at some point putting out a second edition of *Privatopia* with chapters at the end that cover some of the recent developments such as the growth and activities of the homeowners movement and the really what I think kind of insidious development here that is taking place between cities and homeowner associations. In other words, where I left off in *Privatopia* I was talking about how this was really driven by developers and that was essentially true at that time, but I really feel that in recent years in a number of parts of the country, Las Vegas being one of them, the cities are becoming the driving force and in some cases they're insisting the developers use homeowner associations even if they don't want to because they bought into this way of doing things. It's really become a form of privatization. And so I think those developments need to be talked about and in some detail.

And another thing that I'd like to explore is the whole gated community phenomenon which has a lot of somewhat disturbing aspects to it. So, either I'll write another book about it, or I will revise *Privatopia* and in the second edition keep what's in there but add some things to it. I'm writing a book right now that's about something different, and that one I hope to finish by the end of maybe May or June, and after that we'll see where we go from there. But in the meantime I'm still writing articles on it.

## **Privatization of Local Government**

SB: But you're still very interested in this phenomenon, in the movement, or in what's happening, the privatization of local government.

EM: Oh, I'm very interested in it. I think this is an incredibly important topic. It relates to so many different things because homeowner associations and common interest housing developments are one very important example of a larger phenomenon, and that is really -- it's a little bit hard to characterize, but government is being carried out increasingly not by big public governments like the City of Chicago or Orange County in California. I mean, those governments still exist, but they've delegated large parts of their functions over particular parts of their jurisdiction to all kinds of special districts. And homeowner associations in a way are kind of like a special district. So, you have all kinds of things like tax increments financing, or TIF districts, Improvement Districts, and Special Improvement Districts, and all these little Support Authority Districts, and on and on and on.

So what you have here now is sort of a metropolis that is carved up into zillions of little special purpose districts. Now, there may be some good things about that. Maybe there's some efficiency gains. I don't know. It's possible after the argument is made in favor of this. That it's efficient to do things this way. But more and more aspects urban governors are really placed outside popular control by this endless proliferation of special districts. And the visibility of the activity of the local government goes way down because nobody ... you know, if your city council passes a law about mosquito abatement you might know about it.

But if it's parceled out to some little mosquito abatement district like we have here in Chicago, they could make any decision they want and the newspapers cover it, nobody knows where their meetings are, nobody hears a things about it, and half the time the people who run these districts are not even elected, they're appointed. And more and more and more of our resources are being controlled by all these little tiny special districts, and often enormous amounts of money. In the case of homeowner associations we know they're controlling 10's of billions of dollars.

SB: And so this is a way for the local government to collect the taxes, but at the same time distance themselves from their constituents, because every time you go to them there is this hands off approach, "Oh, by the way, go deal with it with your homeowners association. That's private. We don't want to get involved."

EM: Yes, yes. What they do is they set up an arrangement whereby they get a tremendous increase in property tax revenues because these development involve land that before the homeowner association run development comes in there is nothing on it. It's just agricultural land, or some big empty lot, or something of this sort. In some cases of urban infill development it might be a public housing project like here in Chicago, Cabrini Green. This notorious, horrible housing project that generates no tax revenue is not being turned into a common interest development run community. And so the

city -- the net revenue to the city or the county are just enormous. And so to make the deal even sweeter with homeowner associations, the people who move into those developments not only have to pay those property taxes but they also have to pay for their own utilities. In some cases they're paying to have the streets plowed, and the streets lit, and the leaves picked up, and the trash collected. Every kind of municipal service is privatized. So then the cost of constructing all the infrastructure is added to the cost of the houses. That jacks up the price of new housing for everybody.

SB: But this was supposed to be affordable housing wasn't it?

EM: Yes, but it becomes much less affordable this way because the city isn't going to build any infrastructure. They hand all that off to the residents essentially. And then the services and the maintenance of the infrastructure and all kinds of municipal services, that becomes a pay as you go fee again passed on to the residents, and the city says, "Thank you very much for your tax revenues." And then you call and ask them for something and they say, "Go see your homeowner association."

And the cities have caught onto this, and the county's have caught onto this, especially in those rapidly growing parts of the country where this has become virtually the sort of default way of doing things now. And nobody wants to think past the bottom line here. They still are not clearly thinking about the political and social and economic consequences of doing what they're doing, but they're coming. There will come a time when they are going to recognize what they have done.

SB: But beyond all that Evan, there's another thing that's happening here. Homeowners are being taxed, if you will, and they're paying for programs now to teach them their duties to a homeowners association and we're starting to see this crop up in different parts of the country.

EM: Yes, well, some people are... Chomsky is a linguist, teaches linguistics at MIT and he's a big political radical, but he uses the term "the manufacture of consent". Actually, that term doesn't come from Chomsky. It was Walter Lipman back in the 1920's who said this originally, but it's "**the manufacture of consent**". So, since the problem now the industry and others are realizing is that a lot of people are not consenting to be governed this way. So now the new idea is well we'll manufacture that consent, we will educate them. And I assume the next step is that as benevolent way of enforcing the rules, if you violate the rules maybe they'll just send you off to a re-education center. Is that too far fetched? You know what you need here is you pay your fine and then we'll send you off and have you re-educated.

## **Foreclosures**

SB: But there are a lot of people who are losing their homes. What an easy way to get rid of homeowners you don't particularly want in the neighborhood. "You've got grass clipping. You're mowing your lawn and you've got grass clippings on the sidewalk, therefore we're going to fine you, and then we're going to sell your house on the courthouse steps and we're going to move you out of here. We don't need people like you around." But that's happening.

EM: Well, that would not surprise me at all. I don't have data on exactly who is getting foreclosed on. I know the number of foreclosures is enormous and if we are going to have difficult economic times, probably sadly that will increase. But, you know, what really troubles me -- see, I can understand why it is necessary to collect assessments to support an association. If you live in a place that has this type of government and you have to pay for certain things, then obviously people have to pay their assessments. But what has happened here unfortunately is that Boards are just contracting out to these lawyers, collections lawyers basically, the ability to make all the decisions about how to do that. That's the problem. And it's one thing to say we need to collect our assessments. Yes you do. But the Board has other responsibilities, and if the Board makes the decision about how to collect the assessments, which is what they should be doing, then the Board will balance that with their other needs such as maintaining some sense of community and cohesion in the entire development and not just nailing people to the wall and driving them out of their community and engaging in what I would call "sharp practices".

I mean, a sane Board of Directors would not want to do that. But what they're doing is because as volunteers they don't want the responsibility, I assume in most cases, they just contract the whole thing out to a law firm, and the law firm as you know will say, "Well, that's okay, we won't charge you anything for this. We're going to collect all our fees from the people who didn't pay, or the people who broke the rules. We'll collect all our fees from them." And then they really go after them. And then people lose their homes not because of the assessments -- that's the whole justification for this is the Association needs the assessment. But you can try to pay the assessments and you'll still have a lien on your house because you have to pay the attorney's fees first. So it becomes really a matter of attorney's fees.

## **HOA Attorneys**

EM: Well, yeah, exactly. I think the whole justification for this is the survival of the

association, but increasingly it becomes a matter of the survival of the attorneys and the other professionals who make their living off these associations. And you know, I think you **know I've been very critical of the industry over the years because they have not policed themselves and they have bitterly resisted letting any local government police these professionals.** And you have to have one or the other. And I really feel that the industry has to either accept...they either have to have very meaningful self-regulation which would be subject to some kind of scrutiny from outside so we can see what they're doing, or there has to be State regulation of these professionals. And personally I think that's the only way to go.

I think this has to be a government responsibility to make sure that these professionals are not gouging people. Because right now the lawyers who practice in this field in many cases are just shooting fish in a barrel. The individual owner can't even get an attorney because virtually everybody who practices law in this area on a regular basis and therefore meaning just about everybody who knows anything about this specialized area will only represent associations. They won't represent owners.

SB: How can you walk into a court room -- I mean, this is what my thinking is -- how can you walk into a court room one day and say, you know, here's my client. The association has every right in the world to fine the homeowner and then walk in the next day with a homeowner saying, you know, my client here is being fined and it's an unconstitutional delegation of sovereign power, and therefore the associations shouldn't have the authority to fine. I mean, you lose credibility. It would seem to me you either firmly believe that you can do something, or you firmly believe that it's an absolutely disgusting factor so you don't want to have anything to do with it.

EM: Well, let me give you a different perspective on that. Based upon the way American lawyers practice law, that's the way things go. We have a legal profession that's sharply divided, for example, between criminal prosecutors and criminal defense attorneys and never the twain shall meet. And in personal injury law we have PI plaintiff lawyers who represent the injured party and then we have defense attorneys who represent insurance companies, and they have nothing to do with each other. And I could go on and on and on. We have creditors lawyers and debtors lawyers, and bankruptcy. Now that in fact...that's they way things typically are organized here.

And by the way, in the case of homeowner associations what we have is lawyers who specialize in representing associations, and no lawyers who represent owners. That's the actual situation. We don't even have another side. But here's what lawyers are supposed to be able to do. **Lawyers are supposed to be professional advocates whose job it is to represent clients, not entire social interests. They are not supposed to be in hock to some industry.** They are supposed to be advocates for

position.

And in England they still can do this. In England you might be theoretically you'd be prosecuting one day, defending the next. And ideally, lawyers would be able to represent the owner one day, and present his or her point of view, and then on another day represent an association. Now, not the same one, because the conflict of interest arises from representing particular clients. But what I'm really criticizing here in a way is the way the legal profession is organized and particularly as that impacts this particular field because every single practicable -- I think it's almost literally true -- there are virtually no attorneys in the entire United States of America who specialize in representing the owners. There aren't any.

And so we have the whole legal profession, essentially, to the extent that it cares about this issue, is on the side of the associations. Now that is a tremendous distortion, and then when they set up a Law Revision Commission you have a whole lot of representatives of one side of the argument, which is by the way a side that they have a right to present, but the problem is there is nobody representing the other side. The only other side to the extent that anyone speaks up for consumers or owners, it would be that you hope that you get a law professor in there who has an even-handed view of it and isn't a former president of the Community Associations Institute or something.

SB: Every time, in my experience dealing with homeowners and people who are having problems, and from what I've been led to believe, every time there is one attorney who represents a homeowner, often pro bono, and then is inundated with calls from other homeowners because finally there's someone there who has actually stepped out from the shadows and said, alright, you know, let's put an end to some of this nonsense. What I'm hearing now is that industry attorneys are going in and threatening them and saying if you don't quit representing -- especially if they win -- if you don't quit representing homeowners we're going to tie you up in so much paperwork that you will never have time to take care of your other clients who probably are better payers, have more money to pay.

EM: But I do know that it is a common practice with, let's say, small personal injury firms, that when they're up against an insurance company in a high stakes case, the insurance company's lawyers will try to do that. They will simply try to put them out of business. They'll say, you're going to spend so much time on this case that you're never going to be able to do another one.



## **Problems with the voice of the Consumer – Homeowner**

EM: Yeah. And it happens. It's a major problem, but it's not against the rules to litigate as hard as you can, see? It's not against the rules to do things like that as far as I know, I mean up to a point.

The problem though is that somehow you have millions of millions of people out here, individuals, who need something. They need to be represented in the public policy process. They need to be represented before the court. And they can't find a way to make their voice heard. And the core problem here is something -- there is an economist named Manser Olsen (s/l), and he talks about this exact issue many, many years ago with respect to consumers in general. He wasn't speaking of homeowner associations. The book is called *The Logic of Collective Action*. It's an economics classic. He called what we have here a "collective action problem." He said when you compare producer interest and consumer interest, there is always going to be an imbalance. And he was criticizing people who all would say, oh, don't worry, you know, if you've got these consumers out there and there is any demand and they have any need for anything or a demand for anything, suddenly people will serve that demand. So supply and demand will take care of everything. And he said, no it won't.

Here's why it won't. Because you have a particular kind of a problem here. Everybody's interest in the consumer side is relatively small. The collective interest is enormous. It's staggering. It's billions and billions and billions of dollars worth of real estate. Phenomenal. Might even be a trillion for all I know. It's an enormous amount of mortgage debt and equity that owners represent here. But it's comprised of millions of smaller interests. Now, people have to evaluate for themselves what is the benefit to me of engaging in collective action, or joining an interest group, of forming an interest group, of calling people on the phone and lobbying. And they have to think, what am I going to get out of that versus what do I have to put into it? If you're a consumer and you do that calculation, individually 99% of those consumers are going to say it's not worth it for me to do any collective action.

But switch over to the producer side. If you're a lawyer practicing and your whole livelihood comes from this industry, this form of housing, is it worth it for you to get involved with CAI? Or some other group? Is it worth it? Oh yeah. Because are the benefits to you going to out weigh whatever cost you put into it? Oh yes. So now, producer interests, relatively few people, but intensely interested with a huge financial stake. Those people organize. They form interest groups. They form all kinds of groups. They talk to each other all the time. But consumers don't. Consumers don't. They individually say, well I just want my problem solved, which is a major issue because as soon as their problem is solved, they're gone. And so they don't form the

long-lasting groups that they need to advance their interest, and it's weird because they control all this money ultimately through the association.

Ultimately the owners could control the association and they should be controlling it. Ultimately the producer groups are just basically controlling the associations. And unless the owners want to take back their own association, and/or intervene in the policy process so that they can restructure the laws and enable themselves to do that and protect their interests, they don't have a prayer. Because as isolated individuals -- it's the same for the individual lawyer, it's too small an interest. It's too small...you're just not big enough to fight against these organized interests unless you, yourself, get organized.

### **Flying the American Flag Controversy and civil rights**

SB: We've got so much to talk about. One of the things that is happening right now is in the wake of the tragedy of last week is people want to show their patriotism, their unity, and they've got some form of demonstration they want to put flags. And we're hearing from a whole lot of people that their association will not allow them to fly flags. And that's a big, big issue.

And we have a news release from Arizona. Three legislators have formally asked Arizona Homeowners, associations in particular, to please suppress their prohibitions until they can go in and enact legislation. Is Bush, Gov. Jeb Bush in Florida saying pretty much the same thing? I found Pathway Homeowners Association yesterday that they are reminding landlords and homeowners associations that in regard to Government Code Sec. 434.5(a) there is an existing law that prohibits homeowners associations from interfering with the homeowner or tenant's legal rights to display an American flag. People should be allowed to fly the flag.

EM: Yes. Well, you know, this is one of the most -- to me -- one of the most outrageous examples of what's wrong with homeowner association's governance. This whole question of flags and also political signs, because associations routinely all across the country, tell people they can't put up political signs. You can't put up a sign "George Bush for President", "Al Gore for President", or whatever on your own lawn or in your own window of your own house, your own condo, your own townhouse. I think this is just not only ... it's insane because these signs and flags could not possibly be viewed as damaging to property values. That is a completely insane idea. And of course there's no ... it's ludicrous to even...there's no conceivable rationale for it.

But it just underlines the deeper problem that these associations are operating outside the framework of the United States Constitutional and the Bill of Rights. And it's not just the flag. I mean, this needs to be highlighted. It's not just that we need an exception for the flag, we need to understand that the exception here is we've got millions of people who are having their basic Constitutional rights stripped away from them on the flimsiest most bogus of excuses by people who just can't stand to look around the neighborhood and see that one house looks different from another because one has a flag and the other one doesn't. They want this fascist uniformity all across the entire community and the notion that individual people in their homes in the United States of America have to worry about these neighborhood condo Nazis on a day-to-day basis is so profoundly un-American. It is just one of those unbelievable outrages I've ever heard of.

And thank goodness, finally, the American Civil Liberties Union is beginning to take an interest in this issue. At the Twin Rivers case, in New Jersey, at which I'm going to be an expert witness, it is high time that we recognize what has happened to American civil liberties because of the rise of private government. That's what these things are. They're private government. And if people don't have the most basic civil liberties in their home and it's all given away because of some phoney-baloney contract that they couldn't even negotiate, if that's all it takes for us to lose our civil liberties then we are doomed. We are doomed. Because if all you need to do is impose a contractual agreement on somebody that comes down from some big corporation, and their civil liberties are gone, we're all in trouble. We're all in big trouble. So this needs to be highlighted. People need to write to their newspapers. They need to call the TV stations. They need to focus the spotlight on these activities in their own areas, wherever it happens, because this is an absolute outrage.

### **Private Contracts & the CC&Rs**

SB: How did we get from providing funding for the necessary services to prohibiting flags?

EM: Yeah well, you know, I hope my book has a large part about tracing how this peculiar institution evolved, and if you went back 100 years you would find that it was basically just rich people who lived this way. And I can accept the argument that if a bunch of wealthy people want to get together and go live in Bel Aire or some place and they want to have a bunch of deed restrictions on their land, and they agree, and they all know what they're getting into, and they sit down and say with their lawyers and they negotiate the agreements that are satisfactory to them, I have no problem

with saying that if they want to agree to oppress each other, and to give up their rights for the sake of security, that they should be able to do it. That's fine. That's part of our free country I guess. If you want to go off and do this, fine. But that's not what's happening here.

What has happened here is that large institutions, first large scale, the real estate industry, and now more insidiously, cities and counties have basically decided that this is the way we're all gonna live. In the rapidly growing parts of the country, this is the way you're gonna live, like it or not. So, it basically makes a mockery of this entire justification that it's a contract. That you're bound by the terms of a contract. The reason a contract is binding is because you consented to it. But what we're talking about here are contracts that nobody can even negotiate. You can't negotiate one line of your homeowner association CC&Rs. Not one line.

And the reason is because it was all written and recorded against your lot before the houses were built. Before...when this was just a gleam in the eye of some developer. All those things are recorded. It's all take it or leave it. And that type of thing, contracts like that, with some other characteristics as well, are called adhesion contracts. And basically it's a take it or leave it contract, drawn up by somebody who has all the power and imposed on the person who doesn't have any power. And that makes a mockery of the whole logic of contract law. Because contract law, the only reason contracts are binding again is because you agreed to it. And if you don't really know what you're agreeing to, and you don't have much choice in the matter, and you can't negotiate then where is the rationale for holding people to the terms?

But this is what we're doing. And cities...and now we end up with these wako restrictions that are sort of one size fits all, put together by generation after generation of corporate lawyers. The restrictions get bigger and thicker and more repressive every day. And now they're trying to write in all sorts of things about how you can't sue a developer for construction defect. And the developer -- like in the case of Celebration in Florida, the developer basically, in this case Disney, basically retains a veto power over everything the association does forever. And things like this. Now these clauses like this really, in my view, go beyond anything that was ever intended in the law of restricted covenants. This is government by contract. **Government by restrictive covenant. And that has got to be a public policy issue.**

This whole logic of contract goes out the window when it's above governance. At some point we have to think about meaningful consent in the governmental arena. We have to talk about consent within the meaning of constitutionalism. In other words what I'm saying is it should not be possible for a person to be held to a contract that violates their basic Constitutional rights. We do not allow, in the enforcement of

contracts, race restrictive covenants that ban the sale of a house to an African-American, or an Asian, or a Catholic, or something of that sort. Those contracts are null and void., and they have been since 1948, and that what needs to happen to these other unconstitutional provisions. Judges should stand up and say "We will not enforce these things, they are against fundamental public policies, they are unconstitutional, and we are not going to allow big institutions to take away individual's constitutional liberties by contract. We're just not gonna allow it to happen." That's what needs to take place. And if the judges won't do it, the legislators need to do it.

SB: But what's happening is the judges are saying, "Look it's a contract, and here it is. You agreed. Sorry. Go home, homeowner."

EM: Yes, this is the sad part of it. You know, I went to law school too. I practiced law for 10 years and I know how judges think. I know how lawyers think. We are taught from the first semester of law school that contracts are sacred. The contract is the bed rock fundamental principle of Western law. More fundamental than any other aspect of law is contract. And when you convince a judge that there is a valid contract, they roll right over. They roll right over. It's like waving a magic wand or something. They shrink to the size of a pea when they see a contract. And it's really unfortunate because we, you know, they can't keep genuflecting in the name of contract. They've got to understand that what we have here is government by contract, and when we have government in the American system we're talking about prostitutionalism, and that implies basic liberties. We should not throw out our basic liberties just because there's a contract in the room.

SB: I agree with you, but the interpretation seems to be is that when you find this piece of paper you agree to abide by the rules and regulations and you agreed to give up this constitutional right. I start this show quite often with your now leaving the American Zone and that's essentially what's happening.

EM: You know what? When I was prosecutor for several years, and every time that we took a guilty plea from a defendant you went through something called "A Change of Plea" form. You see, defendant's can't just plead guilty, they have to plead guilty making a knowing and intelligent waiver of every single right that they're giving up, and we'd have the defendant here and look -- I've heard this done a million times -- you sit there in the court room and the judges say, "Do you understand that by pleading guilty you're giving up this right? And that right? The right to a trial? The right to subpoena witnesses? The right to cross examine those witnesses? And on and on and on and on. The right to confront the witnesses against you, etc., etc., etc. And every single question the defendant would have to say yes, yes, yes. And even that's

not enough. They have to put their initials on a form where they initial every single one of these rights that they're giving up and sign it at the bottom.

Now maybe if we're going to down this road, maybe what needs to happen here is essentially a change of plea form for homeowner associations. They need a bill of rights that shows what rights you get to keep, and maybe we need a very explicit waiver form that explains in common sense plain language exactly what you're giving up. So, for example, in the case of these non-judicial foreclosures where they basically steal your house right out from under you without even taking you to court, maybe that needs to be all spelled out in really simple language so that anyone with an 8th grade education can understand the risk they are taking by going into an association in a State that allows non-judicial foreclosure. And if that happened and people said, "Wait a minute, you mean you can take my house away from me without even going to court?" Maybe they wouldn't buy that house.

## **The Big Picture and the Courts**

SB: But what's happened is the industry has gone in and incrementally lobbied for and got these things. Nobody sees the big picture. It's the big picture setting to a next meal.

EM: Right. There's only two place you're going to get anyone to notice the big picture. One is judges in individual lawsuits, and the other is the State legislature on the rare occasions when they revisit the issue at the largest scale. And what I'm saying is Shu, is that judges when a non-judicial foreclosure case comes out of one of these counties where you can't buy anything else, that judges ought to take judicial notice of that fact, that there is no meaningful choice. And that could be used, in my view, as an argument.

This is something I've written in a law review article. It needs to be viewed as an argument for saying that the contractual term that is oppressive and burdensome is not enforceable. It is not enforceable because it was not really contracted for. If it's an oppressive term that was imposed on a weaker part by a stronger party. And in this case, the strong party is stronger part by the virtue of the fact there is nothing else you can buy in that area. You're stuck in this sort of housing and this collections technique is allowed. I think that there should be judicial provisions here for saying that these terms are unenforceable in certain conditions. The judges should simply refuse to enforce them.

SB: What can we do? I mean, that's what the judges should do and unfortunately I've sat in

court and heard judges tell the homeowners to go and work it out with the association's attorney because -- and I'm quoting directly here -- I know everyone in his family and they're all reasonable people, go work it out with them.

EM: I see that as part of a larger picture here. You know what's going on here? If you look at almost every large county that has a big city in it, all across the country, Cook County here has Chicago, and on and on and on. The court systems are just filled to the rooftops with criminal cases because of the war on drugs, the crackdown on crime, mandatory sentencing laws and other things, there has been an enormous increase in the number of criminal cases and criminal defendants. And in 1980, like for example in San Diego where I practiced law, in 1980 about the time I started practicing law, half the court time was spent on criminal cases and half was spent on civil. By 1990, when I left the practice of law and started teaching, it was more like about 75/25 in favor of criminal.

Every death penalty case that goes through an urban court system you can pretty much say goodbye to a court room for a year, because that court is going to do practically nothing else. It will go to one judge, and that judge normally is going to do nothing else -- or virtually nothing else -- for a whole year. So in part what has happened here is that civil liberties generally have been forced out of the public court system. They get much less judicial time.

And one of the offshoots of that is a sort of privatization of justice. And homeowner association cases have become highly privatized. When I was representing homeowner associations in construction defect cases, we hardly ever got to see a real judge, I mean a public judge. We'd get to see retired judges. We'd pay 'em \$250 an hour and they'd meet us in the conference room of a bank or in a hotel room or something, and that's where we did our work was before these *rent-a-judges*. It's all privatized.

Now the ordinary person can't afford to engage in this sort of private judicial proceeding. They don't have the money to put up for this sort of thing, so they end up trying to get a little pittance of time from some public judge -- some real judge in other words -- and they can't get it. These cases are viewed as a nuisance. And it's really sad because there are very important rights and liberties. And obviously, from the standpoint of the owner, their major financial investment is at stake in these cases and they're viewed as a nuisance. This is really awful, and this is one of the things that I think I would hope an owners movement can start to bring to the attention of judges and legislators.

## **Homeowner Rights Advocacy and the Need to Organize**

EM: But it gets back to the same issue. Isolated and alone the owner is in a very, very bad position. They have got to organize. And that means -- and this is something I really wanted to mention before we run out of time -- that's the state of the homeowner advocates.

I mean, in the last chapter of my book I talked about how this was beginning. And I talked about the Maryland Homeowners Association and some other organizations. And it's grown since then. And now suddenly you see organizations springing up in a whole bunch of states -- George's group, and so now you've got Arizona and Texas, and obviously Nevada and California and Florida, and a whole bunch of other places in addition to just a few that there were at the beginning, and that's great.

But here's the thing, and I don't mean this discouragingly, I'm just saying this realistically. It's still a disjointed rabble. They're not organized together yet. And several people have tried -- Jean Couturier tried, other people have tried to try to get some kind of a national presence because these are becoming national issues. Of course, there are state issues too. There's no question. But look at the industry. The industry has organized at the national level. It has CAI. And the industry has also organized at the state and local level -- CAI chapters -- and in other management organizations.

Now, the only way you're going to be competitive is if you organize the same way. You have to have a national presence and you have to have local presence as well. And these issues are ... this is hard to do. It's like CAI has difficulties along those lines. There are, I think, plenty of CAI local chapters doing things that the national CAI would find horrifying and it would like them to stop doing, but they can't always do it because it's not organized like General Motors.

And the owner's movement is worse. This is what I keep saying, again and again. Owners get into this because they get interested in this issue because they have a quarrel, they have a problem with their house. And that's what they want to talk about. When they call me or they send me things, it's always about their quarrel. I've got a 30-page single spaced letter describing people's wars with their homeowner association. If I read all these things in detail and analyzed them and everything, I'd never be able to do anything else. It's unbelievable and there are horror stories. Horror stories.

SB: And it's the desperation that really gets to me.



EM: Oh yes, it's awful. These things are just terrible. They tap people's phones, and peer through their windows. They've taken their property. Driven them out of their homes. It's just appalling some of the things that have happened. But, here's the thing. You have to be able to get past your own issue to see the bigger picture. You have to organize over some things more significant than just what happened to you. Because once you're quarrel is over with, you're gone. And this is what I think has been happening. And somehow -- this is another thing Manser Olsen talked about, by the way -- how can you make a group of consumers organize, and there are ways to do it. You need to find a patron. You need to find a sponsor. Someone who will underwrite the organizational costs, that's one thing. And that needs to be done. Somehow the foundation, a major organization like AARP, or Consumer Union. Somebody has to underwrite some organizational costs here to try to make a national presence. That's one thing that has to happen.

But the second thing that has to happen is people have to be willing to set aside their personal grievances, their demands for being the big honcho, the big dog in the meat locker in their little area, and they have to be willing to let somebody else run the show. And this has been another problem because in many cases some of the homeowner advocates around the country, I swear, are their own worst enemy because of the tactics they use, the things they say. They won't trust anybody, they preach that you can't trust anyone except me. You know, not me personally, because I'm on their enemies list too in some cases, but they will say, you know speaking about themselves, "I'm the only person you can trust. Everybody else is a crook." And this sort of thing. This makes it very hard for any local government or state government official, let alone a national government official, to side with a group that behave that way. They can't take on the cause. They look like nuts.

And that has to stop. You have to present a public image that is consistent with the importance of the cause. You cannot just take positions that are paranoid, that are obviously totally unrealistic like we're gonna abolish all the existing homeowner associations or something like this. Given the way local governments are funded now, you've got to offer an alternative.

SB: The real problem is the funding and let's find a solution for the funding. I think that where we've got with associations is we've talked about some of the problems, but we can do away with a lot of that nonsense.

EM: Yeah, there could be kind of sunset provision here, and these things should not be set up forever. What we need is a kind of a sunset provision that these associations are expected to wind down and assume some sort of public form, and this is something Stanley Scott said about, ooh, gee, in what? 1964, when these things were first

starting to pop up around the country and he was public administration scholar at Berkeley. He said, you know, we need to set a time limit on this and at some point have these things turn into something else, something that is subject to public control. And I think some kind of reform along these lines needs to be sought out. Either that or some other framework, some other framework.

SB: But if that's the problem, that's where we need to be concentrating, and I agree with you in terms of getting set up nationally to try and do something and we've got a little bit of a start there I think.

EM: Yeah, I think it's starting. It is starting. The internet has been a huge shot in the arm.

And you're show and the show that you and Fred Pilot did, and all the other things that other people have done around the country on the internet and elsewhere have started things moving. And it will never be the same.

SB: Well I think the thing is education. A lot of people thought it was just me, and it really isn't just me. It's happening across the country, and I think that's the big picture. And people are finding out about *Privatopia*, they're finding out about other books, and they're starting to open their eyes. We start off with my Board doesn't like me to this is a bigger problem.

EM: Right. That's the key, Shu. You have to start by getting educated. I absolutely agree with you. That is the key. You have got to get educated.

SB: And Evan, we're out of time. Thank you so much for joining me today.