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Remarks on Civic Education

American Bar Association Opening Assembly

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JUSTICE DAVID H. SOUTER: I'm here to speak this evening because civic education in the United States is not good enough. And we have to do something about it. I'm gonna try and make the case for what I just said by talking about some ways in which we come to understand the American government and how particular governments that we know about, they work. And I want to speak about the risk to constitutional government when a substantial portion of the American populace simply fails to gain that understanding. In particular, I'll ask you to consider the danger to judicial independence when people have no conception of how the judiciary fits within the constitutional scheme. And I will ask the American Bar Association as an organization and each one of you as individuals to take on the job of responding to the danger that I see.

I'll begin by establishing a reference point by way of some autobiography describing how I came to know something about

the form and the function of the governments that were close to me when I was growing up. My first steps in that direction were taken in the town hall of Weare, New Hampshire, which is a rectangular building with white clapboards and a little tower in the front. It was a familiar place to me when I was in junior high school. I went to school plays there. I went to dances. The mothers of some of my contemporaries even tried to teach us how to dance the waltz in that room. The rate of success was low, but they tried. And I graduated from the 8th grade in that hall.

But the most important thing that I did in the town hall as a boy was to sit through the annual town meetings. And for those of you from the hinterlands who don't know what a New England town meeting is, it's probably the most radical exercise of American democracy you can find, in which all the voters of the town who want to get together show up to form the town's legislative assembly. The meeting is held early in March, which was important in the old days because that was before the mud on the roads got too bad and it was before the outdoor field work had begun.

The agenda for the meeting is a document known as the warrant, to which citizens can add by petition. And when the

meeting convenes, the three selectmen are sitting up front representing the executive body of the town and a few of the other executive officers are there, too. The fire chief is always there, the chief of police, the road agent, and they may be called on to answer questions. The meeting is run by a moderator chosen by the voters and, when I was young, the moderator in my town was a skillful man by the name of Scott Eastman, who ran a superb meeting year after year.

Sitting there as I did sometimes at the back of the hall, sometimes further down with my mother and father, I learned three basic things. The first thing I learned is that although we talk about the government, the government of the town was, in fact, a divided power. There was a clear sense of the line between the legislative power, power over things the town meeting could do, and the power to put the votes of the town meeting into effect—the executive power. People shared an equally clear understanding of who could do what within the executive sphere and who was responsible if anything went wrong. If somebody didn't get plowed out in the wintertime, the person who was on the spot was the road agent. That was his direct responsibility.

The second thing I learned, again perhaps without

being too conscious of it at the time, was that this horizontal line of divided power within the town was intersected by a vertical vision. It's between the powers of the town and the state. When a discussion started over how much money to spend on the care of roads, people knew what roads the speakers were talking about. Authority over town roads was different from authority over Class I highways, Class I roads for the state of New Hampshire, and whether we liked or didn't like the plowing or the paving on them, there was nothing we could do as town voters. It was in short a practical appreciation of the line between local power to affect our town and state power to affect many towns.

The third thing I learned, again without thinking too much about it until later on, was that the people who had the power in the town were expected to treat everyone else decently as they used their power. I learned this primarily from watching Mr. Eastman conduct the meeting. He was as fair a man as I've ever met in my life. He enforced civility, but within civil limits. He made no distinctions among the people he recognized to speak. It didn't matter whether that someone was rich or poor, young or old, sensible or foolish, everybody got the same chance to have his say.

As I remember back, one of the things that strikes me is that I don't think I ever heard anyone complaining later that he didn't get a fair shake at the meeting. Some people left disappointed when their motions didn't carry or their PE warrant article hadn't passed, but they didn't leave bitter because the moderator had been unfair to them. So although the town didn't have a judicial branch, I learned what due process is and why it matters, and I know that my concept of fundamental fairness began to form as I watched Scott Eastman conduct a town meeting in Weare, New Hampshire many years ago.

Taking all these lessons about defined powers and fair treatment stood me in good stead for what came next, and that was a formal course called civics, and kids who went to the town meeting who watched what was done and listened to what was said didn't find it all that hard to catch on to what was being taught in the civics course. We already had a primitive idea of separation of power. We could sense the line between the executive and the legislative. When our teachers taught the American three-part division of government and the legislative, executive, and judicial departments, we caught on pretty easily.

The same was true of federalism. In those days country towns didn't worry too much about what the national

government was doing, but we knew enough about divisions of power up and down to pick up the idea of federal divisions without any great trouble. And as I've already suggested, when we got to the judicial branch, we already understood its required atmosphere because we had watched Mr. Eastman moderate a town meeting. Never, I suppose, in those years was the name of Montesquieu mentioned and I don't recall hearing much analysis of the thinking of James Madison, but we learned the basics of what they had in mind.

And if anyone had put the question to one of my 9th grade classmates or to me: "What are the three branches of American government?," none of us would have failed to answer. We had at that point in our lives an understanding of the basic structure of the governments around us and we had a framework for organizing what we would learn from experience later on.

This is the point of reference that I spoke of earlier and it brings me to a matter I want to raise with you today. For the capacity of my classmates and me to name and at least roughly to understand the three branches of American government and the state and the national levels may well distinguish my 14-year-old classmates from much of today's electorate in this country. In fact, if the question is asked of the American

populace today, what are the three branches of American government, we are going to get some different answers from the ones my fellow 9th graders would have given. For the most part, we are going to get only partial answers or none at all. For we know from survey results that about two-thirds of the people in the United States cannot even name all three branches of the national government.

This is something to worry about. And when I describe the circumstances in which I learned this fact, you will know why I worry and I think you will worry, too. I learned this three years ago at Georgetown Law Center at a conference on the state of the judiciary that Justice O'Connor and Justice Breyer had convened. The speakers paid attention to threats to judicial independence--threats posed by a tax on the judges for politically unpopular decisions and threats posed by the conflicts created by partisan state judicial elections. And we came together at that meeting to think about the best ways to demonstrate in the public forum that a judge's very job is often to take the unpopular course, to take action at odds with the legislative and the executive branches, and at odds with the popular will of the moment. We were there to learn how to argue non-believers into understanding the importance of judicial

independence from political pressure, whether that pressure came from within the other branches of the government or outside the government itself.

But early on in the conference, we learned about that two-thirds statistic, that a majority of Americans might well be unable to name the other branches. And with that, we learned that the root problem we had to face about judicial independence was not attacks and pressures on the judges. We learned from the two-thirds statistic that the fundamental problem was a public majority unaware of the very structure of government. That was a condition with some obvious implications and some obviously worrisome ones. Consider some of them with me for a moment.

The two-thirds of Americans surveyed who could not name the three branches could scarcely have had any notion of the significance of separated powers or any sense of why it might be crucial for the judicial power to be independent of the legislative and the executive. If most of the American people lacked a clear conception of how the responsibility of the Judiciary differs from the obligations of the executive and legislative, than it would surely make very little sense to them to argue that the judiciary should be valued a different way

from the branches that are meant to be as responsive to the electorate as a road agent in a New Hampshire town.

The populace that has no inkling that the judicial branch has the job it does and no understanding the judges are charged with making good on constitutional guarantees, even to the most unpopular people in society. That populace will hardly find much intuitive sense when someone trumpets judicial independence or decries calls to impeach judges who stand up for individual rights against the popular will. Without some idea of separation of powers, limitations of power, and the need to enforce those limits, the idea of judicial independence must be practically meaningless.

If anyone resists these implications, if anyone is in doubt about what is at stake for the American judiciary, I can only invoke Benjamin Franklin's insight more than two centuries ago in the famous conversation with a woman in Philadelphia shortly after the 1787 Constitutional Convention adjourned. She is said to have asked him, "What kind of government the proposed constitution would give us, a monarchy or a republic?" And as probably everyone in this room knows, Franklin answered that, "It would be a republic, if you can keep it." He understood that a republic can be lost.

One way it may be lost is by a kind of erosion in the minds of its people. It will be lost by citizens who lack the understanding to feel responsible for preserving the constitutional government that they have. We saw these implications at the Georgetown conference and that is why those who came to the meeting to defend the Judiciary for doing its job left realizing that we have to take on the job of making American civic education real again. We cannot stand up for the judiciary by leaving two-thirds of America ignorant that there are three branches. And we left that conference knowing that we have to revive the basic civic knowledge that once came naturally to a teenage boy in a small town.

The group known as the O'Connor Project is working at it already, in partnership with Georgetown and now with the Aspen Institute as well. There are reform efforts in a few states that I know of, and I'm a member of one of them, charged with reviewing the New Hampshire civic education curriculum. And the ABA has to make a substantial effort, too. What better work could you do? Your president[-elect] is ready. He has pledged himself to support the creation of a committee charged with establishing working groups to look into the condition of civic education in each of the 50 states and to support the

legislation and the administrative action needed state-by-state to ensure that a rising generation will not duplicate the dangerous state of civic knowledge today.

And I ask you to make this effort a powerful one and to take part in it, every one of you, in every way that you can. You have heard me out and you know why a powerful effort has to be made. But let me sum up in the words of another judge, a judge who made the most perfect summation of the need for an independent judicial branch that I have ever heard. It was spoken in the same city in which Franklin uttered his admonition.

At a dinner I attended a few years back, whose other guests included the late Richard Arnold, one of the great judges of our time and of all time. Judge Arnold made the case for judicial independence in seven words, "There has to be a safe place." That is why citizens must be instructed in their government to be able to understand why that place has to be preserved and passed along. That is why civic education has to be raised to a new power and why every one of us in this room has to see to it that civic understanding becomes a birthright of every American. That is why we have to get to work—because there has to be a safe place.

