

# Transcript

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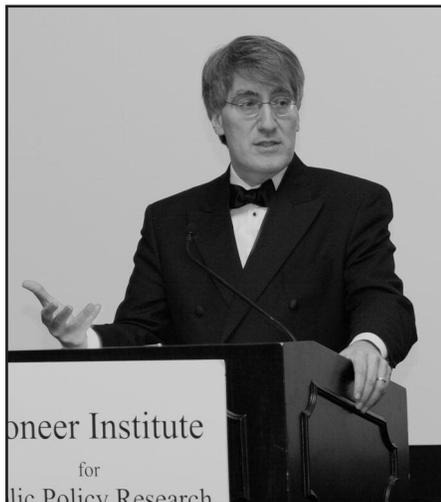
## Presidents, Politics and Supreme Court Appointments

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**MS. DIANE SCHMALENSSEE:** Ladies and gentlemen, good evening. I'm Diane Schmalensee, Chairperson of the Pioneer Institute, and I'm delighted to welcome you to the 8<sup>th</sup> Annual Lovett C. Peters Gala and Public Policy Lecture. Each year, we use this occasion as an opportunity to thank you, our friends and our sponsors, for all that you have done to help the Pioneer Institute change the intellectual climate of our state which, heaven knows, has needed it.



Since Pete Peters founded Pioneer almost 20 years ago, your generous financial and intellectual support has really helped us make a difference. Now I'd like to turn the tables for a second and ask all of us to thank Pete Peters, our founder. At 93, Pete has more energy and creative ideas than people half his age. He's an inspiration, an intellectual dynamo, and someone who brings out the very best in people. Please raise your glass to Pete.

In the spirit of thankfulness, it's my pleasure now to introduce to you John Finley. He is a deacon in the Episcopal Church and will be ordained in January.

Pioneer Institute, founded in 1988, is an independent, non-profit public policy research institute based in Boston. Pioneer generates and markets new and practical public policy ideas and peer-reviewed scholarship. Pioneer Institute research explores the application of market principles to state and local policy to advance the core values of an open society—individual freedom and responsibility, economic opportunity, social mobility, and limited government.

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He is also the founder of the Epiphany School in Dorchester—an independent, non-tuition private school that does tremendous work with disadvantaged inner-city children. John, Pioneer applauds your work. We need more of it. We also appreciate your presence and offering of the blessing. [Applause]

**REV. JOHN FINLEY:** Thank you, Diane. Those of us assembled here come from a variety of different faiths and religious experiences. Some of us may still be, indeed, discerning what we really believe. But at the end of the day, I think we are all people of hope and people of faith. So let us now bow our heads in prayer to ask for God’s blessing:

Gracious God, we give thanks to you for all that you have given us. As we eat, help us remember and honor all those who grew this food and who prepared it and who brought it to these tables. As we listen and reflect on what we hear, please help us to remember our responsibilities. Help us to know that reason and intellect are not our own, but truly gifts from your divine providence. And so tonight, inspire our hearts and minds to the work you have given us to do in the care and service of others. We ask all this, confident in your grace and the inestimable love you have for us and all whom you have made. Amen.

**MR. JIM STERGIOS:** Thank you, Reverend, Diane, and to all of you, thanks and welcome. I’d like to start by recognizing Nathan Glazer, who is sitting at my table, for his work in the public interest and for his long friendship with Pioneer, serving on our Board of Academic Advisors and being there for advice generally. He is the epitome of what Pioneer strives for and in its best moments accomplishes: he is someone who boldly sought and succeeded to change the intellectual climate. We are pleased that you and Lochi are here at the 8<sup>th</sup> Annual Peters Lecture.

To our supporters, it’s been a pleasure reconnecting with or getting to know you in the past year since I became Executive Director. We greatly appreciate your support of this unique Massachusetts organization. I am pleased to report that Pioneer is more focused, agile, and productive than at any time in our history.

During the reception, many people asked, how do you feel about the next year? Frankly, Pioneer’s well poised to work with the new administration. We’re energized by the challenges, and we have already begun working with the transition teams. We will continue to advance market-based policy approaches to keep Massachusetts competitive. This year Pioneer’s focus issues will include urban school reform, housing, pension reform, a market-driven approach to reviving our cities, and Medicaid reform.

To guests of our supporters, welcome. This evening you’ll see the intellectual firepower, the curiosity, and the energy that Pioneer is known for. This Lecture is not really about Pioneer, though. To build on what Diane has said, this event is as big as Pete Peters. Pete started Pioneer in 1988 to draw the best and brightest into thinking about how to ensure the continued prosperity of the Commonwealth by expanding the role of markets. But his realm of activity is much broader than Massachusetts. Rightfully, this Lecture honors original thinkers drawn from around the world and from various worlds of activity—from the arts, academia, politics and business.

In honoring these individuals, the Lecture is designed to enrich debate here in Massachusetts. We’ve had some fabulous speakers. We’ve had Vaclav Klaus, the former Prime Minister of the Czech Republic, who came and spoke to us when we saw democracy and free markets spreading across Eastern Europe. After 9/11, the former Senator and

current President of the New School University, Bob Kerrey, spoke to us about how to balance security with the freedoms of our constitutional system.

Of equal importance to our national security is the viability of this grand political experiment that we are as a people. Nowhere do the country's social and political divisions play out more clearly than in the role of the judiciary and the appointment process. We've seen the circus atmosphere over the last few years; frankly, we have grown accustomed to it ever since the term "Borked" came into the parlance 20 years ago. Those tensions remain exceedingly high, with social issues playing a pivotal role in how people think about judicial nominations and approvals.

While the particulars of the debate over judicial appointments may have changed over the years, we should recognize that the debate itself has existed since the founding of this country. At the time of the framers, it was there. Thomas Jefferson made long reference to it. In the time of the *Dred Scott* case, before the Civil War, there was debate about the Court. For Louis Brandeis, and the debates around his appointment, it was there. Certainly, FDR thought it was an important issue, as he attempted to pack the Court to make sure he would have control of it. I think we can recognize that the tussle over control of the Court is not just healthy tension between branches of our government. It gets to core issues of federalism and democratic rule.

We are honored to have, as the 8<sup>th</sup> Annual Lovett C. Peters Lecturer, Professor Robert George, who will be giving an address on "Presidents, Politics and Supreme Court Appointments." He is uniquely prepared for the topic at hand. In addition to Professor George's work on bioethics, on the role of the courts, on the role of public morality, he also happens to have worked at the Supreme Court of the United States, which is a rare and valuable experience for one who opines about it.

I should also add, given how provincial we are in Boston, that he has a J.D. from Harvard, along with a doctoral degree from Oxford. It is my honor to introduce Prof. Robert George. [Applause]

**PROF. ROBERT GEORGE:** Thank you much, Jim, for that very kind introduction. It is a great honor to give the Lovett C. Peters Lecture of the Pioneer Institute. The work of the Pioneer Institute has been exemplary, and Mr. Peters' devotion to the public good is legendary. I'm just a country boy from West Virginia; this full house at the Ritz Carlton cannot be here to hear me, but to honor you, Pete.

Let me also say how happy I am to be back in Massachusetts. The Commonwealth of Massachusetts operates under the oldest functioning written constitution in the world, a constitution written by the Commonwealth's greatest son, John Adams, with the help of his cousin Samuel Adams and James Bowdoin. That constitution is among the highest and greatest achievements of practical political science. Moreover, it's a living tribute to President Adams and to those who showed the world that republican government could be made viable and enduring, a proposition that was not at all clear at the time.

Republics in antiquity and in the medieval period had always failed. Many believed that republican government simply could not work, that it was a dream, a utopian ideal without real-world application. But beginning with the work of Adams, and then, of course, with the framers of the Constitution of the United States, republican government, government by reflection and choice, was shown to work. Mankind, as the first *Federalist Paper* puts it, was not forced to live forever under governments formed merely by force and by will. Reflection and choice could be the way people were governed.

That proposition was tested, of course. Lincoln uttered those famous words about “government of the people, by the people, and for the people” in the context of a reflection in which he was asking whether the republican experiment could succeed. He saw the Civil War as a test of whether any nation “so conceived and so dedicated can long endure.” And it took that tragic, bloody war to prove that republican government could survive.

This evening I have the pleasure of discussing the politics of judicial appointments, particularly appointments to the Supreme Court of the United States. This is an issue of timely concern; recent vacancies could have an historic impact on the composition of the Court. While Stephen Breyer spent almost 11 years as the junior-most Justice of the Supreme Court of the United States, two vacancies fell to President Bush in his second term. In his remaining term of office, he could conceivably get to fill a third vacancy. Since the Court has been deciding many of its most important cases by votes of 5-4 or 6-3, this could make for a decisive jurisprudential shift.

The conventional wisdom had been that the first or second vacancy on the Court during the Bush presidency would cause a political cataclysm, on the order of the Bork hearings of 1987, or the Thomas hearings in 1991. According to most commentators, the prospect of a reversal of the controversial 1973 abortion decision in *Roe v. Wade* would lead liberals and Democrats to attack whoever was nominated with ferocity equal to that of Edward Kennedy in his attack on Robert Bork. Conservatives and Republicans, it was thought, would fight back with equal fury, and the country would be plunged even more deeply into ideological and partisan division.

Well, that didn't happen with the nomination of Chief Justice John Roberts, perhaps, as some said,

because Roberts was replacing William H. Rehnquist. Liberals would not go to war over a conservative replacing a conservative. However, the cataclysm would come if President Bush had the opportunity to nominate a second conservative.

Well, that is exactly what the President did. He nominated New Jersey U.S. Court of Appeals Judge Samuel Alito to replace the retiring Sandra Day O'Connor. Because Alito, a conservative, would be replacing O'Connor, a centrist, this would mean a shift on the Court, and that would be enough to push the liberal wing of the Democratic Party into war. I expressed skepticism of that conventional wisdom at the time, stating that while the leftward-most members of the party would attack Alito because of the threat they perceived to *Roe v. Wade*, there would be no spectacle as in the Bork or Thomas hearings.

My reasoning was that first, Alito would make a credible and sympathetic witness. Second, the Republicans had a solid majority in the Senate, something that wasn't true for Bork in 1987 or for Thomas in 1991. I also expected that liberal Republicans, with a couple of possible exceptions, would stand fast. On the other side of the aisle, I noted that red state Democrats such as Byron Dorgan and Kent Conrad from North Dakota, Ben Nelson from Nebraska, and Robert C. Byrd from West Virginia were far from certain to keep faith with the left wing of the Democratic Party. In particular, I doubted they would countenance a filibuster of Alito's confirmation. The red state Democrats had one image burned into their minds by the 2004 elections. That was the defeat of Majority Leader Tom Daschle of South Dakota. Daschle's challenger, John Thune, successfully attacked Daschle's liberal positions on judicial appointments to make the case that he'd lost touch with the values of most South Dakotans.

Finally, I reasoned, abortion probably wouldn't work as an issue to stop a Republican nominee. While Massachusetts may lean towards the liberal side of that issue, people across the country are more evenly divided. On the whole, they don't like abortion and want there to be less of it. When my colleague, Professor Russell Neely, examined polls conducted by various organizations in recent years, he concluded that most Americans oppose most abortions, though most also think that exceptions to general legal prohibitions of abortion ought to be in place for hard cases such as threats to the life of the mother, rape, and incest. And so, I predicted that the call to preserve *Roe v. Wade* would not be the basis for an assault on the nominee.

I wouldn't be telling you about these predictions of mine had they not turned out to be true. [Laughter] Like the Pioneer Institute, I have found that questioning the conventional wisdom is almost always a good thing to do. If you turn out to be right, boy, people think that is really something and they remember. Nobody remembers if you turn out to be wrong.

But does this mean that *Roe v. Wade* will be reversed? And will Alito and Roberts vote to reverse it? I believe that, even if President Bush gets another vacancy to fill, and even if he is able to fill it with the jurist of his choice—which will now be harder with the Democrats in control of the Senate—the fate of *Roe* remains unpredictable. Presidents don't always get what they bargained for out of their appointees to the Supreme Court. I'm happy to predict how Senates will respond and how politics will play out, but I've learned from my own study of history that it's not a good idea to try to predict how justices will vote.

When Justice Sherman Minton retired from the U.S. Supreme Court on September 7<sup>th</sup>, 1956, President Eisenhower, with his sights fixed firmly

on reelection that November, asked his aides to find a Catholic judge from a state court to fill the vacancy. Assistant Attorney General William Rogers suggested Justice William J. Brennan of the New Jersey Supreme Court. Brennan had made a favorable impression on Rogers and Attorney General Herbert Brownell in a non-ideological speech, a speech that had nothing to do with conservatism or liberalism or judicial activism or originalism or anything like that, but covered technical matters of judicial administration. "Well, there's only one problem," Rogers said to Brownell in a conversation recounted by Brennan's biographer Kim Isaac Eisler, "Brennan is a Democrat."

"Eisenhower doesn't care about that," Brownell replied. "I just want to make sure he's really a member of the Catholic Church." [Laughter]

Brennan's religious affiliation generated opposition from the National Liberal League, whose members feared that he would decide cases not in accordance with the Constitution, but rather on the basis of his religious beliefs. Instead, Brennan turned out to be a liberal of strict observance. Brennan's conservative critics would later claim that the charge against him originally made by the National Liberal League proved to be well founded, but that his religion, ironically, was not Catholicism but liberalism.

Eisenhower was neither the first nor last President to nominate someone whose judicial philosophy differed from his. President Reagan promised during his 1980 campaign to nominate the first woman to the Supreme Court. When Justice Potter Stewart retired in 1981, Reagan appointed Sandra Day O'Connor, a former Arizona legislator who at the time was serving as a state appellate judge. O'Connor played a decisive role in preserving the abortion jurisprudence originally created in *Roe v. Wade*, and later in upholding the constitutionality of racial preferences in university admissions to

achieve diversity on campus. These are hardly stands of which a President dedicated to the pro-life cause or to the ideal of a colorblind constitution would approve.

By 1990, when Brennan retired, judicial involvement in social issues such as abortion and affirmative action had made Supreme Court appointments a political hot potato. President George H. W. Bush sought a stealth candidate—someone with no record of controversial statements that the President's opponents could use to attack his nominee. On the advice of his trusted aide, John Sununu, Bush nominated David Souter, a little known Court of Appeals judge who had spent most of his judicial career on the New Hampshire Supreme Court. Sununu himself had appointed Souter to the State Supreme Court in 1983. This stealth strategy worked, at least insofar as the President was able to win confirmation for his nominee. Souter's nomination was attacked by groups on the left, especially pro-choice activists. But once on the Court, Souter turned out to be as liberal as Brennan.

Now, although it is less common, there have been justices who disappointed liberal Presidents or their supporters. Byron White, a leading opponent of liberal judicial activism in the '70s and '80s, had been appointed to the Supreme Court by the moderately liberal President Kennedy. Of course, the issues that would establish White's reputation as a judicial conservative were not on the political or judicial radar screen when he was nominated. White may have been the same all along, but the issues changed. What made White a liberal when Kennedy appointed him was his pro-civil rights position. But by the '70s and '80s, what defined you as a liberal had less to do with civil rights than it did with issues like abortion and homosexuality.

Presidents do sometimes succeed in appointing justices who do not disappoint them or their

supporters. The same President Bush who appointed the liberal David Souter also appointed the conservative Justice Clarence Thomas. President Reagan appointed not only the moderately socially liberal Sandra Day O'Connor, but also Antonin Scalia, the court's most forceful and articulate critic of the liberal judicial activism championed by Brennan in his day and by Souter in ours.

Presidents do take politics into account when making judicial appointments. Ronald Reagan was a conviction politician; he sought to make appointments that would pay electoral dividends. Franklin D. Roosevelt's frustration with "The Nine Old Men" led to his proposal to expand the number of Supreme Court Justices to secure a favorable majority for his New Deal programs. Although the plan did not make it through Congress, and even drew the opposition of his own party, Roosevelt soon got to reconstitute the Court by filling vacancies. Now, while prudently honoring what in those days were known as the Catholic, Jewish, and southern claims to seats on the Court, Roosevelt left nothing to chance on the ideological front. He appointed reliable New Deal supporters, many of them from within the New Deal, such as Frank Murphy, Felix Frankfurter, Hugo Black, and William O. Douglas.

Political calculations have been a consideration since the beginning. George Washington was very careful to appoint a mix of northerners and southerners to the federal courts. Yet, the President who warned us against parties made sure that all his appointees were Federalists.

Now, this has never been considered scandalous, so long as the appointees are widely believed to possess the talents and virtues required to serve on the nation's highest court. The American people have never minded a President taking political considerations into account, but they do mind

when a nominee appears to be less than highly qualified. There have also been jurists appointed purely because of their eminence or brilliance in law, for example, Theodore Roosevelt's nomination of Oliver Wendell Holmes or the Republican Herbert Hoover's nomination of a Democrat, Benjamin Cardozo.

Presidents have historically regarded a nominee's political experience as something desirable. Twentieth-century examples include William Howard Taft, a former President who was appointed Chief Justice by President Warren G. Harding; Hugo Black, who had served in the U.S. Senate for a decade before his appointment; Fred Vincent, a man of vast legislative and administrative experience, who was appointed as Chief Justice by President Truman; and, perhaps most famously, Vincent's successor as Chief Justice, Earl Warren, an Eisenhower appointee who'd been Governor of California, and a plausible contender for the Presidency in 1948 and 1952.

Presidents also sometimes appoint their own trusted counselors to seats on the Court. Lyndon Johnson cunningly persuaded Justice Arthur Goldberg to resign and become the U.S. Ambassador to the United Nations. Johnson then nominated his old friend and confidant, Abe Fortas, to Goldberg's seat, which in those days was also considered to be the Jewish seat. This Presidential tendency could also account for President Bush's appointment of his trusted counselor/friend Harriet Miers. The trouble was that the President couldn't sell Miers to his own constituency, as a conservative revolt brought down her nomination.

Many Presidents, both before and after FDR, have come into conflict with the Supreme Court over the scope of judicial power to invalidate duly enacted laws as unconstitutional. President Jefferson

famously disagreed with Chief Justice John Marshall over the powers Marshall claimed for the judicial branch in the 1803 case of *Marbury v. Madison*. Were the broad view of judicial powers to be accepted, it would have the effect of, and I quote President Jefferson, "placing us under the despotism of an oligarchy." From the very beginning, a President like Jefferson was worried about the tendency of an unelected judicial elite to acquire a form of political power.

In *Marbury v. Madison*, the Supreme Court declared a piece of federal legislation to be unconstitutional. The statutory provision in question was a rather arcane one, which according to the Justices expanded the original jurisdiction of the Supreme Court without constitutional warrant. It would be more than 50 years after *Marbury* before the justices would strike down another piece of federal legislation. In the 1857 case of *Dred Scott v. Sandford*, Chief Justice Roger Brooke Taney, an appointee of President Jackson, invalidated the Missouri Compromise and declared that the Congress had no power to prohibit or restrict slavery in the federal territories.

When Abraham Lincoln was sworn in as President in 1861, he took the occasion of his inaugural address to challenge the Supreme Court's authority to issue constitutional rulings that were binding on the other branches of the federal government, beyond the particular parties to the case at hand. This is remarkable to us today because we've come to accept judicial supremacy in constitutional interpretation as a matter of course. To disobey a Supreme Court decision would be to disobey the rule of law. It would imperil the whole idea of judicial independence.

However, Lincoln didn't think so. It's instructive to think our way back into his position in 1861, trying to respond to how the *Dred Scott* decision restricted

the power of the national government to stop the spread of slavery. According to Lincoln, *Dred Scott* was not merely incorrectly decided; it was an attempt by the Court to tie the hands of the President and the Congress on the great and divisive issue of slavery. In Lincoln's eyes, republican government was not only threatened by secession, but also from the power of a judiciary that would claim that its rulings were binding as matters of policy.

No President before or since Lincoln has more starkly challenged the justices' claim to supremacy in matters of constitutional interpretation. Just listen to his words on the *Dred Scott* decision from the first inaugural address: "If the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court the instant they are made, in ordinary litigation between parties and personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal." That's the great emancipator President Lincoln's view of the scope and the power of the judiciary.

Yet, in the end, judicial claims to supremacy have prevailed. In the 1958 case of *Cooper v. Aaron*, the Supreme Court said, bluntly and without qualification, "The federal judiciary is supreme in the exposition of the law of the Constitution." President Eisenhower let that claim pass without significant comment. Sixteen years later, President Nixon faced the consequences of presidential acquiescence to judicial supremacy. In hearings inquiring into the Watergate scandal, Congress and the public learned that Nixon possessed audiotape recordings of key conversations in the Oval Office. The Office of the Special Prosecutor investigating the scandal sought to obtain those tapes by subpoena.

When Judge John Sirica granted the subpoena, the

stage was set for the showdown between the President and the Supreme Court over whether the judiciary could compel the President to release information and documents despite his claims to executive immunity and privilege, and the separation of powers. The question of the tapes was, the President contended, a non-judicial political question. In a unanimous opinion written by Chief Justice Warren Burger, one of Nixon's own appointees, the Court rejected the President's claims and ordered the tapes to be released. Politically enfeebled by the scandal and under assault from the elite media, Nixon gave up the tapes. Soon thereafter, he was driven from office in disgrace.

Even as he ordered release of the tapes, Chief Justice Burger acknowledged a scope for deference by the courts to executive branch claims of immunity and privilege in matters of defense and national security. This was in keeping with well-established practice. Presidents have always been granted greater deference by the Supreme Court on security matters than on issues of purely domestic policy. For example, in a decision that most commentators rightly view as a black mark on the judicial and executive record, the Supreme Court went so far as to uphold as constitutionally legitimate President Roosevelt's war relocation authority, which effectively incarcerated innocent Japanese-Americans as possible security threats, even dispossessing them of their property.

In the case of *Korematsu v. the United States* in 1944, Hugo Black, a Roosevelt appointee and noted civil libertarian, wrote the opinion for the Court upholding the President's policy of interning Japanese-Americans. He was joined by fellow Roosevelt appointees Felix Frankfurter and William O. Douglas, together with three others. One of the Roosevelt appointees, Justice Murphy, did dissent. Justice Breyer, speaking at Princeton last year, spoke of the irony that this internment policy was

requested by the great liberal icon, Governor Earl Warren of California, executed by the great liberal icon Roosevelt, and upheld by the great civil libertarians Frankfurter, Black, and Douglas. And who opposed it? J. Edgar Hoover, [Laughter] who said it wasn't necessary, that they weren't a security threat.

Finally, no reflection on Presidents and Justices would be complete without mentioning a Supreme Court decision that settled a contested Presidential election, *Bush v. Gore*. Seven of the nine Justices were Republican appointees, though two of them, including one appointed by George W. Bush's father, joined the two Democrats in the minority. The others formed the majority, whose order halted the recounts in Florida, leaving George W. Bush the narrow victor in the Electoral College, and thus President.

Critics of the decision say that the majority let political considerations intrude into their deliberations, and that the Supreme Court, in a reversal of roles, appointed the President. Defenders of the decision say that it prevented the country from descending into electoral chaos, with politically motivated local election officials deciding according to subjective and highly variable criteria how to handle questionable ballots. My own view is that once the Florida Supreme Court had intervened, it was inevitable that it would be decided by the Supreme Court of the United States, because they would not let the election be decided by a state court.

It's a legitimate debate, and one that will continue for as long as the republic survives. It's a wonderful case to teach, I can tell you from experience. In the aftermath of *Bush v. Gore*, Presidents have a special

reason to be cognizant of the future political significance of any Supreme Court appointments they make, and so do we.

I thank you very much for your kind attention.

## Q&A

**Q:** There are two schools of thought regarding the right to declare war. The Constitution gives Congress the authority to declare war, while at the same time making the President the Commander in Chief. On several occasions since Truman's entering into war in Korea, presidents have asserted their authority as Commander in Chief to put troops wherever. The Gulf of Tonkin Resolution and the War Powers Act seem to travel some middle ground. What is your view on undeclared war and the authority of presidents to initiate actions like Iraq and Afghanistan?



**PROFESSOR GEORGE:** It's interesting that Presidents will claim the power to commit troops, and that they don't

require the authorization of the Congress. Then they will seek congressional authorization, and Congress will give it to him. [Laughter]

My view is that fidelity to the Constitution requires that we try to be guided by the text, logic, structure and original understanding of the document. It does seem to me that Congress is abdicating its power. It's letting Presidents—Democrat and Republican, going all the way back to the Korean War—wage war without a declaration of war. Fidelity to the Constitution should require that Congress and the president take joint responsibility, in the way the Constitution does dictate, for

the great question of committing U.S. forces to war.

I myself would have voted for the Iraq war, but it is a question for deliberation and it should have been a declared war. We're not being faithful to the Constitution when we proceed in a shadowy way, with the President and the Congress kind of cooperating, but not doing it the way the Constitution itself plainly states. [Applause] If we don't like that, we should amend the Constitution.

**Q:** Professor George, I'm concerned that nine individuals can, in effect, change the direction of the country. How should the Supreme Court deal with issues such as abortion, birth control, embryonic stem cell research, in vitro fertilization and end of life questions, which people of different faiths and no faith have very different ways of understanding? Are the deeply held views of those nine individuals going to determine the direction of the country?

**PROFESSOR GEORGE:** The current situation is not the way it always was. From that, I take comfort that perhaps it's not the way it always has to be. It does help to explain why confirmation of justices is such a hot button political issue.

Politics will gravitate to where the decision-making power is. If decisions are being made in the state legislature, the demonstrators and the activists will be out in front of the state legislature. Why do we have demonstrators on abortion or homosexuality, whatever the issue is, in front of the Supreme Court? Why do Supreme Court nominations generate such partisan divisions? It's because the Supreme Court has taken upon itself the authority to resolve the issue. Politics will gravitate to where the action is.

This is a problem for a number of reasons. Courts are good at legal analysis, but they are not well suited to resolving complicated policy questions on

which reasonable people can disagree. On such issues, you're more likely to find settlement democratically, rather than judicially. That is, in itself, a judgment about policy.

More important, of course, is the Constitutional judgment. Courts should not usurp the power of elected representatives, operating through the normal procedures of republican government, to resolve such issues.

Some might say that courts should step in, even where there's nothing relevant in the Constitution, to protect the minority or the individual from the tyranny of the majority. But, of course, in the slavery case as in the abortion case, the dispute is often about who is the minority in need of protection. Was it the slave owner whose rights were going to be overridden by the majority that had power in Congress, which was going to restrict his authority to take his slaves into federal territories? Or was it the slave?

On abortion, the question is, whose rights are going to be overridden? Those of the woman who might want an abortion or the unborn child whose survival is at stake? Where there isn't anything in the Constitution, in the text, the logic, the structure, the historical understanding of the Constitution to resolve such a question, the Constitution requires that it be left to the people. The people are capable of serious moral deliberation, but you have to give them the opportunity.

**Q:** We have two new judges, Roberts and Alito. What do you see as their long-term influence?

**PROFESSOR GEORGE:** I can say they're both regarded as highly collegial people; they're people who play well with others. I don't think we'll see any of the friction one sometimes finds between Justices. There were notorious cases, like the anti-New Deal judge who refused to shake Brandeis's

hand when he came on the court. I can't remember his name, but he was so uncollegial—I think there was an anti-Semitism issue there as well—that he wouldn't even deal with somebody on the other side. We won't see that from Chief Justice Roberts or Justice Alito, nor even do I think we'll see the friction we sometimes got between Justice Scalia and Justice O'Connor, which can be read in the footnotes to their opinions.

I suspect that their jurisprudence will be very much in the originalist mode, so they'll likely be on the Scalia/Thomas side. However, unlike Scalia, whose opinions are sometimes flamboyant, I don't expect grand or dramatic opinions from them. I was struck by how the first five or six cases of the Roberts' court, including some that were thought to be controversial, came down with unanimous opinions. We've more recently seen some more opinions that weren't so united.

**Q:** Since you gave such a wonderful defense of the legislative power—even citing Lincoln to that effect—I wanted to ask you if you're prepared to overturn *Marbury v. Madison* or even *McCulloch*. [Laughter]

**PROFESSOR GEORGE:** Thank you for this question, Professor Peterson. I don't think I'd be willing to overturn *Marbury v. Madison*. But I might be inclined to interpret it as the supporters of the decision did, not the way the opponents did. Here's a wonderful historical irony. When *Marbury* was handed down, it was Jefferson and his party that interpreted it as a broad, sweeping power to tell other branches of government what to do. And that's why Jefferson said, "If we allow this to stand, we will be placing ourselves under the despotism of an oligarchy."

It was the defenders of Marshall who said, "My goodness, this is scare tactics, this is crazy. You're interpreting this case way out of proportion." They

said Marshall wasn't claiming the power to tell other branches of the government what to do. He just said that as an independent, coequal branch of government, the Supreme Court has to decide for itself the scope of its own power. They viewed it as a judicial restraint ruling. They said, "We're the court, refusing to exercise jurisdiction that has been given to us by the Congress under the Judiciary Act of 1789. We're refusing in humility and restraint to assume that jurisdiction. We might really love to run the country, but we're refusing to do it because, as we read the Constitution, it doesn't give Congress the power to give us original jurisdiction in cases beyond where the Constitution says."

Putting aside the question of whether the court was interpreting the Act of 1789 correctly, Marshall had his opponents stuck. How were they going to resist a ruling where the Court was declining to exercise power purportedly given? Marshall, his party and his followers were saying, "Look, the court's got to be able to say for itself what the scope of its own powers are. While this might cause conflicts with other branches, the American people can resolve those conflicts when they come politically."

The irony is that today, the strong supporters of active, expansive judicial review adopt the position of Marshall's critics in celebrating Marshall's case. To be consistent with Lincoln, we wouldn't have to abolish judicial review as such, just restrain its scope. My proposition is not to overturn *Marbury*, but to move it back to Marshall's, not Jefferson's, view of it. [Applause]

**MR. PETE PETERS:** Now with that, I thank you very much for coming. As you very well know, Pioneer lives entirely by generous donations from donors, and this is the giving time of year when lots of people write checks. And I hope over the next three weeks, some of you will see fit to remember Pioneer, too. With that, I bid you goodnight and thank you so much. [Applause]

2006 Lovett C. Peters Lecture in Public Policy

James Madison Program, Princeton University  
McCormick Professor of Jurisprudence & Director,  
Professor Robert P. George  
**Presidents, Politics and Supreme Court Appointments**

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