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Senator George Mitchell and the Constitution

G. Calvin Mackenzie

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G. Calvin Mackenzie

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SENATOR GEORGE MITCHELL AND THE CONSTITUTION

G. Calvin Mackenzie*

I. INTRODUCTION

In May of 1980, George J. Mitchell took the oath of office that all United States Senators have taken since 1868:

I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.¹

The fourteen and one-half years of Mitchell's Senate service were a time of institutional and political tumult. For only two and one-half of those years were the Congress and the presidency controlled by the same party; only in those same two and one-half years did Mitchell serve with a President who was a member of his own party.

The unsurprising result of this partisan division of institutional control was constant skirmishing, not only on substantive policies, but over the structure and meaning of the Constitution itself. During George Mitchell's time in Washington, the parties adopted institutional identities. Republicans had controlled the presidency for most of the period after World War II and had come to view presidential power and prerogative as the point of their partisan lance. Democrats had maintained their power base in Congress, especially in the House of Representatives, since 1930. They had come to regard the Legislature as home turf, jealously guarding it against executive encroachment and seeking constantly to expand its realm.

These were times that tested the meaning and strained the application of the Constitution like few others in our history. When the presidency is controlled by one party and Congress by the other, how is war to be made? Who bears responsibility for constructing the annual budget? How should the Senate advise and consent on appointments? And what substantive rights should the Constitution

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1. CONGRESSIONAL QUARTERLY, INC., CONGRESSIONAL QUARTERLY GUIDE TO CONGRESS 684 (2d 1976).

protect: the right to pray in schools? the sanctity of the flag? the life of a fetus?

The Congress and the President wrestled with all of these questions during George Mitchell's time in the Senate. And on all of them, Mitchell was a leading wrestler. This Article will examine a number of the most important constitutional issues that came before the Senate from 1980 through 1994. It will explore the positions George Mitchell took on those issues and seek to identify from his words and actions the constitutional philosophy that guided George Mitchell's personal efforts to "support and defend the Constitution of the United States." It will focus primarily on the controversies in which Mitchell participated most actively: the Iran-Contra investigation, the war powers debate, various confirmation struggles, and proposals to amend the Constitution itself.

II. THE IRAN-CONTRA INVESTIGATION

George Mitchell first came to national prominence as a member of the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition. This was a special Senate investigating committee established to review the covert simultaneous efforts of leading figures in the Reagan Administration to secure the release of American hostages in Iran and to support the Contra resistance in Nicaragua. The most dramatic moments in the special committee's investigation occurred during the testimony of Lt. Col. Oliver North, United States Marine Corps, a former member of the President's National Security Council staff. North admitted a series of deceits, including lying to Congress, but defended his deeds as a valiant quest in the national interest, as acts of patriotism. This inspired the best "sound bite" from the hearings, when George Mitchell, the junior senator from Maine, reminded the witness of patriotism's alternative meanings.

Although He's regularly asked to do so, God does not take sides in American politics. And, in America, disagreement with the policies of the government is not evidence of lack of patriotism.

....

Indeed, it is the very fact that Americans can criticize their government openly and without fear of reprisal that is the essence of our freedom, and that will keep us free.²

But there were more than mere sound bites to the Iran-Contra investigation. It raised some critical constitutional issues, and on these Mitchell took sides as well.

2. *Iran-Contra Investigation: Joint Hearings Before the Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Selected Comm. to Investigate Covert Arms Transactions with Iran*, 100th Cong., 1st Sess. 46 (1987) (statement of Sen. Mitchell).

Throughout the decades following World War II, the Congress and the President have jostled over the meaning of the Constitution's War Powers Clause.³ The Constitution was written long before America became a superpower with millions of men and women in uniform, even in peacetime. The simple words that grant Congress the power to declare war and the President the duties of commander-in-chief ill fit the realities of the modern world. The Iran-Contra contretemps was a striking demonstration of this.

Defenders of the initiatives of President Reagan's aides noted that covert action, flexibility, and quick and opportunistic responses are often essential to secure advantage in complex foreign undertakings. Critics, however, saw in these actions little more than a circumvention of established procedure and existing law to implement a particular set of policy views. Flexibility versus control: this was a tension as old as the Republic. As "Publius" wrote in *The Federalist*, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."⁴ That is the issue that haunted the Iran-Contra hearings: how does a government control itself without robbing those charged with implementing policy of all flexibility?

For George Mitchell, the answer is this: when flexibility and accountability are in conflict, accountability ultimately must prevail. In the memoir they jointly authored, Mitchell and Senator William S. Cohen wrote:

The selective use of "nonappropriated" funds to carry out undisclosed activities struck at the very core of government accountability, one of the fundamental tenets of the Constitution.

....

In the final analysis, the Iran-Contra affair remains a story about power—who has it, in what measure and how it is to be exercised. The Founding Fathers decided that power necessarily had to be "entrusted to someone, but that no one could be trusted with power." History and experience taught them that power unchecked led to its arrogant use and inevitable abuse, and so they diffused it deliberately and set up institutional checks and balances.⁵

For Mitchell, the Iran-Contra initiative crossed the line. This was not merely the action of an Administration within the scope of its authority to seize a foreign policy advantage. It was a conscious deceit, designed to circumvent the law and to avoid the scrutiny its

3. U.S. CONST. art. I, § 8.

4. THE FEDERALIST No. 51, at 354 (Alexander Hamilton or James Madison) (Tudor Publishing Co., 1937).

5. WILLIAM S. COHEN & GEORGE J. MITCHELL, MEN OF ZEAL: A CANDID INSIDE STORY OF THE IRAN-CONTRA HEARINGS 308-09 (1988).

actions could not withstand. The Constitution, in Mitchell's view, permitted no such evasion of accountability. "A democratic nation, based on the rule of law and respect for that law," he reminded his Senate colleagues, "cannot long remain democratic if its government officials are not accountable to that law."⁶

Later, the Iran-Contra investigation raised another constitutional question. The Independent Counsel investigating these activities began to seek indictments in 1988 of some of the leading participants. Rumors began to float that President Reagan might issue preemptive pardons to protect his former aides from judicial proceedings. Article II, Section 2 of the Constitution empowers the President to "grant reprieves and pardons for offenses against the United States." It remains unclear, however, whether such language permits a President to issue pardons in advance of formal charges or findings of guilt. President Gerald Ford pardoned Richard Nixon in advance of any formal charges for crimes the latter may have committed as President, but that exercise of the pardon power did not settle the question in the minds of many.

George Mitchell was one of those who worried about the potential for perfidy in the use of preemptive pardons. In Mitchell's view:

It would be a dangerous insult to our judicial system to shortcircuit its truthfinding processes, to embrace, not merely the presumption of innocence, to which every defendant is entitled, but a final, unappealable decision of innocence after indictment but before a jury has acted.

There is and can be no justification, after an indictment has been returned, to allow those who served close to a President to avoid the judicial process in a manner that is not available to any other citizen.

Neither the aides of powerful figures, nor powerful figures themselves, should be above the law.⁷

This theme recurs in many of Mitchell's statements on constitutional issues. We have one law, the same for all citizens. All Americans, from the meekest to the mightiest, must be equal before that law. Justice evaporates when status and power impair the equal application of the law.

III. WAR POWERS

The Iran-Contra investigation was not the only forum in which the Congress and the President battled over war powers during George Mitchell's years in the Senate. In fact, the debate was a constant of those years. While no wars were declared during this period, American forces were engaged in hostile action abroad in

6. 133 CONG. REC. S5945 (daily ed. May 6, 1987) (statement of Sen. Mitchell).

7. 134 CONG. REC. S7821 (daily ed. June 15, 1988) (statement of Sen. Mitchell).

Grenada, Lebanon, the Persian Gulf, Panama, Kuwait, Somalia, and Haiti. These were precisely the kinds of situations for which the War Powers Act was designed.⁸ In each case, the President deployed American forces without seeking a declaration of war. In almost every case, some members of Congress complained that the President had not adequately consulted with Congress as required by the War Powers Act.

Like many of his colleagues, Mitchell recognized, and often noted, the confusion created by the potentially contradictory language of the Constitution on the issue of war. "The writers of the Constitution," he once noted, "correctly reasoned that if power were sufficiently dispersed, no institution or individual could gain total power. Nowhere has their concept been more severely tested than in what they regarded as one of the greatest powers of government—the power to make war."⁹

But Mitchell struck an independent course on how this confusion might best be resolved. For many of his colleagues, especially Democrats, the answer was closer presidential adherence to the consultation requirements of the War Powers Act. While Mitchell believed that any president was obliged to follow the law, he was much troubled by the War Powers Act. His reading of the debates of 1787 reminded him that the framers of the Constitution had initially given Congress the power to "make" war, then had backed off and decided only to grant the Congress power to "declare" war. To Mitchell this suggested an intent to grant the President the authority to determine when and how American forces should be used in the national interest.

In Mitchell's view, the congressional power to declare war is limited in two ways that many of his colleagues were unwilling to admit. First, Mitchell argued, "[N]ot every hostile situation, not every dangerous circumstance—even those which may involve death and destruction of property—is war."¹⁰ The authority inherent in the power to declare war simply does not apply to every hostile action. Because these are not wars, the language of the war making clause is not triggered. Second, in Mitchell's view the "War Powers Resolution actually expands Congress' authority beyond the power to declare war to the power to limit troop deployment"¹¹

Often in his congressional tenure, Mitchell questioned the constitutionality of the War Powers Act. He urged presidents to initiate a legal challenge to the Act, to permit the federal courts to rule on its constitutionality and thereby settle the issue. In 1988, he offered a

8. 50 U.S.C. § 1541 (1988).

9. 137 CONG. REC. S101 (daily ed. Jan. 10, 1991) (statement of Sen. Mitchell).

10. 133 CONG. REC. S13327 (daily ed. Oct. 1, 1987) (statement of Sen. Mitchell).

11. 134 CONG. REC. S6177 (daily ed. May 19, 1988) (statement of Sen. Mitchell).

proposal of his own¹² to fix some of the constitutional defects of the War Powers Act. Mitchell generally opposed unchecked military adventurism. In fact, he was among the minority of senators who opposed the resolution that supported President Bush's use of force in Kuwait in 1991. But neither was he a fan of what he regarded as dubious statutory bending of the Constitution, even when it strengthened the congressional hand—and his views—in debates on military policy and strategy.

IV. CONFIRMATION OF APPOINTMENTS

During Mitchell's tenure, the Senate and Presidents Bush and Reagan engaged in several intense conflicts over appointments. In the immediate aftermath of Watergate, the Senate had taken on a new demeanor in performing its constitutional obligation to advise and consent on appointments. Willingness to question and oppose the President's nominees became more common. Senate committees beefed up their investigating staffs and undertook more comprehensive examinations of nominees' backgrounds and policy views. Videotape and computerized data bases like NEXIS and LEXIS made it easier than ever to review a nominee's past writings and statements. And the proliferation of special interest groups in Washington heightened the political stakes of appointment controversies.

The central questions for the Senate were these: how large a role should the Senate play in staffing the judicial and executive branches and what criteria should it apply in passing judgment on the nominees it was asked to confirm. On these questions George Mitchell had clear and strong views.

The Senate's role, it seemed to him, was to participate actively in appointment decisions. While the President was constitutionally obligated and entitled to take the initiative by proposing nominees, the Senate was not consigned to the role of passive follower. Mitchell said:

Under the Constitution the President has the prerogative to nominate Cabinet members. That does not mean, however, that the Senate's role in the confirmation process is automatically to approve each Presidential nominee. The Senate must evaluate the nominee's behavior and standards as well as his ability to discharge properly the duties of the office.¹³

Mitchell later reiterated:

I cannot accept the thesis that the President is entitled to have whomever he wishes for positions which require the advice and consent of the United States Senate. If we are not

12. 134 CONG. REC. S6238 (daily ed. May 19, 1988) (statement of Sen. Mitchell).

13. 135 CONG. REC. S1880 (daily ed. Mar. 1, 1989) (statement of Sen. Mitchell).

supposed to exercise our judgment about the best interests of our country then we need to take that provision out of the Constitution.¹⁴

Although Senator Mitchell voted against appointments to the executive branch when he felt it appropriate to do so, it was appointments to the judicial branch that inspired a special sense of obligation on Mitchell's part. Judicial appointments, in his view, demand active Senate participation. "The reasons for that are clear," he said during the debate on Robert Bork's Supreme Court nomination:

The Supreme Court is one of the three governing institutions of this country. Only at the time of confirmation is there any opportunity for the public, through Congress and the President, to have any influence on the Court.

The constitutional role of the Senate is as an equal participant with the President in appointments to the judiciary. The Senate is not a rubber stamp.¹⁵

This is an unusually expansive view of the Senate's confirmation power. Even Alexander Hamilton, who defended this provision of the Constitution in *The Federalist* offered a narrower construction of the Senate's role:

[O]ne man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment In the act of nomination, [the President's] judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate, should fill an office, his responsibility would be as complete as if he were to make the final appointment. There can, in this view, be no difference between nominating and appointing.¹⁶

What criteria should senators apply in making their confirmation decisions? On this question, too, Mitchell spoke often. George Bush's 1989 nomination of former Texas Senator John Tower to be Secretary of Defense posed special problems for Mitchell and many of his Senate colleagues. Rarely had the Senate denied the President the freedom to select members of his own cabinet; the last defeated cabinet nomination had been in 1959. In addition, Mr. Tower had served for more than two decades in the Senate prior to his nomination, and the Senate had a long habit of treating current and former colleagues with kid gloves. Beyond that, President Bush was newly elected and still in what traditionally has been regarded as the "honeymoon period" of his administration.

14. 135 CONG. REC. S2457 (daily ed. Mar. 9, 1989) (statement of Sen. Mitchell).

15. 133 CONG. REC. S13820 (daily ed. Oct. 8, 1987) (statement of Sen. Mitchell).

16. THE FEDERALIST No. 76, at 87, 88-89 (Alexander Hamilton) (Tudor Publishing Co., 1937).

The Tower nomination, however, was deeply troubling to many senators. Tower had acquired a reputation for womanizing and alcohol abuse. Since leaving the Senate a few years prior to his nomination, he had worked as a consultant and lobbyist for defense companies. Additionally, while in the Senate, he often had made enemies of his colleagues by treating them peremptorily.

Mitchell led off the debate on the Tower nomination with a thoughtful disquisition on the role of the Senate in the appointment process and the criteria that ought to be applied to nominations like Tower's. He reviewed the debates of the framers and quoted from scholars. He concluded that the historical record offered little specific guidance to senators.

No universally accepted criteria for judging fitness for public office exist. No standards were established by law or are contained within the Constitution to guide Senators. Ultimately, the decision is subjective, an individual Senator's judgment of the qualifications and suitability of the nominee. Difficult though that may be for us, it is clearly what the framers of the Constitution intended.¹⁷

Then he stated the general criteria he believed most appropriate: conflict of interest, character and integrity, professional competence and experience.¹⁸

But another issue troubled Mitchell in the Tower appointment controversy and in other cases that occurred during his Senate years. Is it proper for the Senate to inquire about and pass judgment on the policy views and philosophy of a nominee? The conventional wisdom and the weight of historical tradition suggested that the Senate's role was to assess the fitness of the nominee on matters of character, integrity, and preparation but that policy views were an inappropriate basis for casting a confirmation vote.

Mitchell disagreed with this constrained view of the Senate's latitude in choosing its own criteria, but he drew a fine line between including a nominee's policy views in the criteria for judgment and relying solely on that criterion. Mitchell expressed the view that senators should consider nominees' policy views and philosophy as part of a broad determination of their fitness for confirmation, but should not base their judgments solely on whether or not they agreed with a nominee on policy matters. He believed it especially important to consider the philosophies of judicial nominees because of the importance and endurance of their decisions. In the debate on Robert Bork's nomination to the Supreme Court in 1987, Mitchell said:

17. 135 CONG. REC. S2458 (daily ed. Mar. 9, 1989) (statement of Sen. Mitchell).

18. *Id.*

[The President] cannot fairly use ideology as a factor in making nominations and then criti[ci]ze Senators for using ideology as a factor in considering his nominations. His right to pick nominees politically is uncontested. He has exercised that right repeatedly. But he cannot then fairly accuse others of politicizing a process which he has made openly political from the beginning.¹⁹

During the debate on Clarence Thomas's nomination to the Supreme Court in 1991, Mitchell restated the argument:

The President selects nominees because of their views, not despite them. That is his privilege. It is the reward of election to the Presidency. He is answerable for the quality of his choices only to the voters and history It is illogical and untenable to suggest that the President has the right to select someone because of that person's views and then to say the Senate has no right to reject that person because of those very same views.²⁰

George Mitchell often voted against the nominees of the Republican Presidents with whom he served—against Bork, Thomas, and Tower, and others as well. He voted against Robert Gates's nomination to head the CIA and against William Rehnquist's promotion from Associate Justice to Chief Justice of the United States Supreme Court. Mitchell's fierce partisanship obviously inspired these decisions; there is no record of him voting against Carter or Clinton nominees. He sought, however, to lay an intellectual foundation for his votes against confirmation and to fit them to his view of the Senate—a view that considered the Senate an important partner in the task of staffing the executive and judicial branches of government.

V. AMENDING THE CONSTITUTION

George Mitchell served in the Senate during a time of constitutional ferment. Just prior to George Mitchell's arrival in Washington, the Senate had voted down a proposal to alter the electoral college. Shortly after he entered the Senate, the clock ran out on the proposed Equal Rights Amendment. During Mitchell's tenure, the Senate considered proposed constitutional amendments to overturn the *Roe v. Wade* abortion decision (1983), permit school prayer (1984), protect the American flag from desecration (1990), and mandate a balanced federal budget (1982, 1986, 1992, 1994). Mitchell's positions on these issues tell us something important about his view of the Constitution.

19. 133 CONG. REC. S14800 (daily ed. Oct. 22, 1987) (statement of Sen. Mitchell).

20. 137 CONG. REC. S14702-03 (daily ed. Oct. 15, 1991) (statement of Sen. Mitchell).

Mitchell voted for none of these constitutional amendments. In part, as one might expect, his votes reflect partisan preferences. His public statements make it clear that he would have voted for the Equal Rights Amendment had he been a Senator when it was under consideration. But Mitchell's reluctance to amend the Constitution goes beyond mere partisan inclination. His public record suggests a belief that the Constitution should be amended only as a last resort: only when an objective is critically important and there is no statutory means of accomplishing it.

Mitchell's votes against the Balanced Budget Amendment have little to do with his opinions on fiscal issues. Mitchell was fundamentally opposed to budget deficits. But in his view, the place to accomplish a balanced federal budget was in the budget process, not the Constitution.

The proponents of this amendment are very vocal about the political pressures that lead Congress to resist spending cuts. But they are not willing to be equally open about the political pressures that lead Congress to engage in charades with our Constitution The fact is that nothing can take the place of political will. Nor do slogans about balanced budgets take the place of sensible fiscal policy.²¹

Mitchell worried about the propriety of enshrining a single economic theory in the Constitution. The Constitution, he said, "is limited to those ideas . . . which do not depend on any economic or social theory to be valid."²² Then he posed the question that suggested his threshold for any constitutional change, "If a principle is not good enough to be applicable at all times, does it belong in the Constitution, which is intended to endure for all time? I believe not."²³

There was great political pressure on members of Congress to support a Balanced Budget Amendment to the Constitution. Nearly all those who voted against the amendment had to face campaign attacks suggesting that they were against balancing the budget. In recent years, simple majorities did vote for the amendment in one house or the other. But the amendment process requires a two-thirds vote in both houses, and in each recent instance enough members were willing to take the political risks necessary to defend the Constitution from this latest political gimmickry. George Mitchell was one of those who always voted against the Balanced Budget Amendment.

Nowhere was Mitchell more articulate in defining his view of what belongs and what does not belong in the Constitution than in his central role in the flag-burning controversy of 1989-90. In a

21. 128 CONG. REC. S9766 (daily ed. Aug. 4, 1982) (statement of Sen. Mitchell).

22. 128 CONG. REC. S9763 (daily ed. Aug. 4, 1982) (statement of Sen. Mitchell).

23. *Id.*

demonstration outside the 1984 Republican National Convention in Dallas, Gregory L. Johnson had poured kerosene on an American flag and set it on fire. Then Johnson and some compatriots chanted, "America, the red, white, and blue, we spit on you."²⁴ Johnson was charged with a violation of Texas law protecting venerable objects from offensive acts. He claimed that his actions were constitutionally protected by the First Amendment. In 1989 the U.S. Supreme Court voted 5-4 to sustain Johnson's claim and to declare the Texas statute unconstitutional.²⁵

In rapid response, the Congress passed the Flag Protection Act of 1989 to secure the flag from acts of vandalism.²⁶ This law went into effect without the signature of President Bush. The President wanted a constitutional amendment to protect the flag, not a mere statute, and he declined to sign the law. The new law was quickly tested, and a case challenging its constitutionality, *United States v. Eichman*,²⁷ came to the Supreme Court in 1990. In another 5-4 decision, the Court reaffirmed its earlier view that mutilation of the flag is a form of expression protected by the First Amendment.²⁸ This decision inspired further congressional calls for a constitutional amendment to protect the flag. In June of 1990, Congress voted on such an amendment. A majority supported the amendment in both houses, but in neither house did the majority reach the two-thirds necessary for approval of a constitutional amendment.

George Mitchell, as Senate majority leader, played a central role in this debate. He criticized the majority decision of the Supreme Court in the flag-burning cases. He sought to enact legal protections for the sanctity of the American flag, but he drew a careful distinction between statutory action and constitutional amendment. Mitchell sought to craft a law that banned an act—destruction of a flag—without limiting anyone's right to speak or express views on any issue. He called this "content-neutral legislation" and distinguished it from legislation designed to suppress opinion.²⁹ Why not a constitutional amendment to accomplish this purpose? Mitchell answered:

I do not believe we should ever, under any circumstances, for any reason, amend the Bill of Rights. The Bill of Rights is so effective in protecting individual liberty of Americans precisely because of its unchanging nature. Once that is unraveled, its effectiveness will be forever diminished.

24. *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

25. *Id.* See also TEX. PENAL CODE ANN. § 42.09 (1989) (statute struck down in *Texas v. Johnson*).

26. 18 U.S.C. § 700 (1989).

27. 496 U.S. 310 (1990).

28. *Id.* at 319.

29. 135 CONG. REC. S12598 (daily ed. Oct. 4, 1989) (statement of Sen. Mitchell).

If the Constitution is amended to prohibit the burning of a flag, where do we stop?³⁰

George Mitchell found no more to like in the destruction of the American flag than he did in budget deficits. But in neither case—indeed, in no case at all during his time in the Senate—did he find it appropriate to amend the Constitution to solve a policy problem or correct a disagreeable Supreme Court opinion. The genius of the American Constitution, in Mitchell's opinion, is not that it is easy to change but that it holds course so steadily when the winds of change are blowing. "The Constitution," he has said, "is a relatively brief, general statement of political and civil rights. For that reason, it has endured for over two centuries as the principal law for a nation that has undergone enormous growth and change."³¹

VI. SUMMING UP: GEORGE MITCHELL AND THE CONSTITUTION

Historians will be forced to regard the second half of the twentieth century as one of the great watersheds of American political history. No era has had to struggle more mightily or contentiously with efforts to redefine individual rights. In no earlier time have the basic procedures and institutional relationships in government been in such constant tension. At no other time has the glue of partisan loyalty so often failed to hold together governing coalitions. Only in the years preceding the Civil War were stresses on constitutional operations felt so deeply; never have such stresses endured so long.

George Mitchell was at the center of these constitutional debates for almost fifteen years. During the last six of those years, as majority leader of the United States Senate, he was one of the most influential debate participants. What did he say, what did he believe, that made a difference?

In George Mitchell's constitutional philosophy, there is a peculiar mixture of Burkean conservatism and New Deal liberalism. Mitchell believes in the Constitution as a living document, a set of ideas that should be adapted organically to the evolution of American society and public life. In all of his public statements on the Constitution, he is most eloquent talking about its meaning to the weak, the dispossessed, and the disadvantaged. For example, Mitchell often recounted his special pleasure, as a federal judge, in presiding over citizenship ceremonies.

Ceremonies were always moving for me because my mother was an immigrant and my father was the orphan son of immigrants. Neither of them had any education and they worked at very menial tasks in our society. But because of opportunity

30. 136 CONG. REC. S8212 (daily ed. June 19, 1990) (statement of Sen. Mitchell).

31. 128 CONG. REC. S9763 (daily ed. Aug. 4, 1982) (statement of Sen. Mitchell).

and equal justice under law in America, I sit here today a United States Senator.³²

For Mitchell, the Constitution is a powerful and everlasting source of hope. It is a bulwark of individual liberties, not only against powerful contemporary majorities but also against the social and economic forces which in so many other countries have kept human potential shackled in ignorance and poverty.

But Mitchell also finds in the Constitution a set of sturdy principles for government operations. He is a believer in minority rights but also in majority rule. During his time in the Senate he spoke often against efforts to thwart the will of political majorities, from the Senate's filibuster rule to proposed constitutional amendments that would have required super-majorities to change public policy. He believed that minorities have rights, and those rights deserve full protection. But he distinguished between minority rights and minority obstructionism based solely on political or procedural leverage:

[E]nshrining in the Constitution, the fundamental law of our Nation, the principle that a minority of elected representatives can prevent action favored by a majority . . . could have a far-reaching and incalculable effect on the way this Nation is governed. It tramples the fundamental idea of majority rule.

. . . .
. . . Democracy means majority rule, not minority gridlock.³³

But just as majorities ought to be able to work their will, so must they be held accountable for what they do. The need for accountability is a strong and constant theme—a centerpiece—in Mitchell's constitutional philosophy. "Representative democratic government depends on accountability. Voters have the right to judge what their elected officials are doing and the right to vote against them when they're not pleased, for any reason."³⁴

Another central theme of George Mitchell's constitutional philosophy is an abiding commitment to separation of powers. Mitchell's time in the Senate was one of constant skirmishing between the executive and legislative branches. Often members of different parties, those in the presidency and Congress, sought to enlarge and secure their advantage over one another. The advantages they could not win in elections, Republicans and Democrats sought to obtain by altering the balance of power between the executive and legislative branches.

32. 133 CONG. REC. S10479 (daily ed. July 22, 1987) (statement of Sen. Mitchell).

33. 140 CONG. REC. S2155 (daily ed. Mar. 1, 1994) (statement of Sen. Mitchell).

34. George J. Mitchell, Statement Regarding Term Limit Ballot Initiative (Oct. 29, 1993) (transcript available from author).

Mitchell's role in this struggle for institutional advantage was remarkably unclouded by partisanship. That is no small irony, for George Mitchell was a passionate partisan. But, time after time, he spoke for the long view, for enduring values, for the absolute necessity of keeping the branches separate and strong. During the Iran-Contra debate, for example, Mitchell argued:

The men who wrote the Constitution had as a central purpose the prevention of tyranny They succeeded in part because they divided the central government into three separate, coequal branches among which they dispersed power. Each has served as a check on the other. None has become dominant.³⁵

In the ongoing controversy over the application of the War Powers Act, Mitchell took a position dictated more by constitutional philosophy than partisan opportunism. While many Democrats criticized Presidents Reagan and Bush for failing to comply fully with the consultation requirements of the War Powers Act, George Mitchell raised grave doubts about the Act's constitutionality. "[T]he War Powers Resolution actually expands Congress's authority beyond the power to declare war to the power to limit troop deployment in situations short of war," Mitchell argued, and "therefore threatens . . . the delicate balance of power established by the Constitution."³⁶

Part of Mitchell's discontent with the Balanced Budget Amendment stemmed from his view that it intruded on the constitutional separation of powers. "I do not believe it is adequate," he said, "to enact a constitutional amendment that may entail such a potentially massive shift in the balance of powers between the executive and legislative branches" ³⁷ He expressed this view despite the fact that the shift he criticized would have strengthened the legislative branch in which his party most often had the upper hand.

Mitchell was consistent in his view that the public interest is best served when the branches of government are strong and vigorous in challenging each other. He opposed efforts of one branch—even his own—to trespass into another's realm of authority. But he felt no reluctance to exercise to the fullest the authority and responsibility that properly belonged to the legislative branch, whether in investigating executive misdeeds, opposing presidential appointments, or proposing statutory corrections of judicial decisions.

In his last year in the Senate, George Mitchell declined a seat on the United States Supreme Court. Even Republicans who had battled him for years thought such an appointment an appropriate next step in Mitchell's career. One could not have observed him day af-

35. COHEN & MITCHELL, *supra* note 4, at 289.

36. 134 CONG. REC. S6178 (daily ed. May 19, 1988) (statement of Sen. Mitchell).

37. 132 CONG. REC. S3326 (daily ed. Mar. 25, 1986) (statement of Sen. Mitchell).

ter day on the Senate floor, as they had, without gaining an appreciation for Mitchell's reverence for the Constitution and his steady efforts to protect it from gimmicks, fads, and misuse. On constitutional matters, the liberal partisan often seemed a legal conservative. The classical conservative stands by what works, requiring a high burden of proof for changes to fundamental ideals. George Mitchell held this view of the Constitution: "Principles which have stood that test of time should not be lightly discarded. Liberties that have seen us through civil wars and world wars should not be tampered with."³⁸

When George Mitchell entered the Senate in 1980, he swore an oath to support and defend the Constitution. Shortly before he left the Senate, he told his colleagues what he believed that oath meant:

Amending the Constitution ought to be a very serious matter. It should not be used for political cover. It should not be business as usual. This is not just another bill. This is the Constitution we are talking about.

When we take [sic] our oath of office, . . . we did not swear to uphold a particular bill or a particular budget or a particular economic policy; we swore an oath to uphold the American Constitution

The Constitution is more important than any one of us. Indeed, the Constitution is more important than all of us put together.³⁹

38. 135 CONG. REC. S13733 (daily ed. Oct. 19, 1989) (statement of Sen. Mitchell).

39. 140 CONG. REC. S2157-58 (daily ed. Mar. 1, 1994) (statement of Sen. Mitchell).