

ANOTHER CHAT WITH THE LADY IN THE GROCERY LINE: *CLINTON v. JONES*

*John B. Mitchell**

I had gone to the grocery store for a few breakfast items, and was standing in the ten-items-or-less line, counting how many items each of the four people ahead of me had in their baskets. My hopes for a quick exit from the grocery store were dashed, however, when it turned out that two people were using debit cards—one who had forgotten her number and a second whose magnetic tape was worn—the third person had an out-of-state check, a basket full of purchases, and fifty-three cents cash, and the fourth had brought a shopping bag full of coupons.

So there I was in the line scanning all the racks of tabloids laden with stories about some newly discovered connection between Elvis and Michael Jackson, and the Clinton-Paula Jones Saga, when the person behind me said, “Hello, Mr. Mitchell.” It was a woman whose children had graduated from the same high school as mine, and with whom, in a grocery line such as this one, I’d once gotten into a lengthy discussion about some Supreme Court case.¹ We began talking about our kids and the changes in our lives since they had begun lives of their own, and so the conversation went until she glanced at the tabloids and said, “Wasn’t that *Jones* case² where the Supreme Court let a sitting President be sued just terrible? Now we have this whole mess.” I knew from prior experience that I should change the subject, feign ignorance, anything—anything but respond in substance. I knew that. I knew that those who did not learn the lessons of history were doomed to repeat them. Yet I began . . .

Well, I haven’t really given it a lot of thought, but the case seems to make sense. After all, it’s pretty central to our whole

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1. See John M. Mitchell, *Don't Ever Discuss Rust v. Sullivan With A Lady In A Grocery Line*, 9 Const. Comm. 25 (1992).

2. *Clinton v. Jones*, 520 U.S. 681 (1997).

idea of this country that this is a nation of laws and not of men . . . or women. We don't accept the Divine Rights of Kings. And personally, I like the idea that no one is above the law, not even the President.

I couldn't agree more, Mr. Mitchell. No person in this country should be above the law. But that really doesn't settle it. That Jones case was about what the law was. Could or couldn't a sitting President be sued? The Supreme Court said yes. I just think they got it wrong and should have said no. I don't think the President is above the law. I think it's the law that keeps him from being sued.

But why shouldn't he be sued? If he hurts someone, he certainly should be as accountable as you or me.

I agree that as a person, the President is just like you or me. But I'm not talking about an individual. I'm talking about the office, the institution, the Presidency.

Go on.

Well, you've got to admit that the President is unique in our government. There's hundreds of legislators and dozens of federal judges, but only one President. One person to do the job . . .

There is a vice-president if the President can't function.

Vice-President. Are you kidding? People elect a vice-president because they have to put them on the ballot. No one wants them actually to lead the country.

Okay. But the Jones court recognized and acknowledged all the points you are making.

I'm not through yet. They may have talked about those things. I wouldn't know; I only read about the case in the paper. But did they address the reality of the role of the American President in the latter part of the Twentieth Century?

What do you mean?

Well, the President of the United States isn't just a national figure, he's a world figure. After all, think about the role of America in the world. This is the most economically and militarily powerful nation on earth, wouldn't you agree?

I guess so.

You know, we were a minor power for much of our history, but now this nation is at the center of the world community. In many ways, it is the world's leader. If you think the world economy is affected by problems in the Asian Markets, imagine the

impact of serious economic difficulties in America. Now with all that, there is one and only one figure who guides and represents us nationally and internationally. And that's the President. He's the figure the world equates with America. Will you grant me that?

There are other branches of our government. People do petition their Congressman and the Court for redress.

That's true, Mr. Mitchell. I still don't think that changes my position. I am talking about perceived, and likely real, leadership. The President is our leader, not some Congressman or judge. And it's with that leadership role that these lawsuits interfere.

I fail to see how, even if all that is correct, a civil lawsuit imperils the nation and the world. I think you've assumed that the legal process is significantly more intrusive than it actually is. The President's lawyers may be working overtime, with corresponding billing, but a defendant in a lawsuit has only the most intermittent role. An interrogatory to answer here, a phone conversation with the attorneys there. It's simply not that big a deal.

You're talking about the formal process.

Of course. What else is there to talk about? The lawsuit is the formal process. Also, before you start conjuring up the image of a President stuck in a courtroom for a month-long trial, rest at ease. Requiring the President to give video testimony is as far as it's likely to go. No court has ever said that a judge could force a sitting President to personally come into their courtroom for a trial.³

But no court has said they can't under any circumstances, have they?

Well, no

And it will be a court that will decide whether that court can or cannot order the President to attend?

Yes. But, if you read the tenor of all the scholarship and court opinions

So it's not impossible that a particular court would hold that they had the power, is it?

Not impossible, but I sincerely doubt an appellate court or the U.S. Supreme Court would let some trial court do that.

3. *Id.* at 1643.

Again, the courts will decide what the courts can do. Forgive me, Mr. Mitchell, if I don't find great comfort from that. Anyway, that really wasn't my point. I do not agree that the only or even main concern is interference with the Presidency by the literal activities of the formal process.

What then are you talking about?

I don't think that you can even begin to talk about the real impact of a lawsuit on the ability of the President to function without frankly looking at the role of print and electronic media in our culture.⁴ Look at this magazine rack, look on your television. This media pervasiveness isn't like anything in the past. And a lawsuit exponentially magnifies the media intensity. People can always talk about some scandal, I know. But when it is in a formal court proceeding, there is a process which can force people to give information. What is that called?

Discovery. It's called discovery.

Yes, discovery. And within this forum, this formal process, lawyers can now do things which focus attention on the incident in ways that could not be done with just some informal accusation. Some informal accusation would cover the front page and Headline News and vanish, like much of our news, in a week. But the formal court process provides an engine to keep fueling the story, and media can then inundate us.

I thought you said you didn't care about the formal process.

I guess I meant that the real problem is not that the President will have to answer some questions from the other side—although even that is a distraction from the job, and could be a big distraction if these suits become more common—it is the existence of the formal process in the media-dominated world in which we now live. Put that formal process, the President as defendant, and the media in the first act, and it's pretty clear what will happen in the third. This person who is both world and national leader will waste a lot of time with lawyers and advisors on how to deal with both the suit and the media firestorm from the suit, when he should be spending that time discussing education, overcoming racial inequality, helping achieve peace in the Middle East, and an endless number of other very serious challenges we elected him to tackle. Also, it has to be distracting to have this going on. Even if his advisors and aides are not drawn in as was recently the case, it

4. See, e.g., Ronald K.L. Collins and David M. Skover, *The Death of Discourse* 3-24 (Westview Press, 1996).

still has to take up his attention. How could it not? Especially when at press briefings the reporters want to talk about the lawsuit far more than they're interested in some global trade agreement or health care plan. Now I don't know about you, but if I'm flying, I don't want my pilot thinking about anything except steering that plane

But Presidents are always occupied with politics and political advisors. Think about election years. How is this any different?

Simple. That's just a price for our democratic system of government. Elections and politics were there at the beginning and deeply embedded in the Constitution, our way of life, and our very conception of ourselves as Americans. This suit is none of that. Also, the prolonged media barrage that can accompany the long, ongoing process of a suit diminishes the dignity of the office and risks weakening the world's view of our Presidency in a way coverage of a Presidential election does not.

I don't know how much post-Watergate-Kennedy-sex-exposé-Iran-gate dignity is left in the office.

I'm not so cynical. I think it means something. I don't like to see the Presidency become another topic for talk-shows and tabloids. And you know, I'm not even saying the President shouldn't be sued and held accountable. Sure he should. I'm just saying that the trial should be delayed until he's out of office and no longer has the job to do.

Well, you make a plausible policy argument in favor of a law against suing a sitting President. But there is no such law. You see, when you look at the Constitution there's not a word in that document that says that a sitting President cannot be sued.⁵

Is there anything like that in the Constitution?

Sure. Members of Congress can't be sued for anything they say in the Congress. It's right in there in black and white—The Speech and Debate clause.⁶

5. For an argument that the portion of the Constitution which prevents Congressmen from being "arrested" in Congress (Art. I § 6, cl. 1) is a basis for finding the President immune from civil suit during his term of office, see Akhil Reed Amar and Neal Kumar Katyl, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 Harv. L. Rev. 701 (1995); but see Bradford E. Beigun, *Presidential Immunity in Civil Actions: An Analysis Based Upon Text, History and Blackstone's Commentaries*, 82 Va. L. Rev. 677 (1996).

6. U.S. Const., Art. I, § 6, cl. 1.

So are you saying that the only things the Constitution covers are right there in black and white?

Well, of course, you've got to do some interpretation. All I'm saying is that there's nothing in there about not suing a sitting President.

But you're not saying that the fact that there is no specific language about whether you can sue a sitting President automatically means that the problem has nothing to do with the Constitution, are you, Mr. Mitchell?

Well, it should give you some pause that there's nothing there.

There was nothing about abortion rights either. Am I right?

And that troubled some judges and legal scholars

But the right is still seen as a real constitutional right, isn't it? And it's not written in the Constitution. Also, didn't the Supreme Court give a whole bunch of rights to criminal defendants?

You might be thinking of all these rights to attorneys—at police questioning,⁷ free attorneys for indigent defendants,⁸ and at line-ups.⁹ Is that what you have in mind?

What about these cases I read about that get thrown out because the judge says that the police should have had a warrant or something. What is that about?

I think you're referring to the exclusionary rule.¹⁰ The idea is that to protect our Fourth Amendment rights we tell police that if they don't follow the law, they can't use what they find in their searches. It's classic deterrence. The police do not want to lose the evidence, so they follow the law. Who knows if it works, but that's the theory.

Are any of these things you've just told me about written in the Constitution?

Not in so many words. But the idea of all these cases is that the lawyer, or the exclusionary rule, or whatever, is needed to make an explicit constitutional provision—the Fourth, Fifth, or Sixth Amendments—work.

So part of the Constitution isn't just what's there, but also what's necessary to make what's there work in practice.

7. *Miranda v. Arizona*, 384 U.S. 436 (1966).

8. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

9. *United States v. Wade*, 388 U.S. 218 (1967); *Kirby v. Illinois*, 406 U.S. 682 (1972).

10. *Mapp v. Ohio*, 367 U.S. 643 (1961).

I just noticed that coupon on those blueberry English muffins in your basket, that's quite a deal. Where did . . .

I mean, these are very practical, pragmatic approaches to the Constitution, aren't they? The Court seems to be looking at the Constitution, then looking at how things really are—how police question suspects, what motivates police in conducting a search, what line-ups are really like—and then they add to what's in the Constitution what is needed in a practical, realistic sense to make that part of the Constitution work.

I see where you're going, but . . .

Sure. Why is this situation with the President any different? We might disagree on whether you really need to stop lawsuits in order to make the parts in the Constitution about the President work—although as you can tell from what I've already said on the subject, I don't think there's much room to disagree—but if it is needed as a practical matter, why would the fact that it's not written in the Constitution make any more difference as to the President than in these cases you just told me about?

I see your point, but recognize that all the things you're talking about are from the part of the Constitution that deals with individual rights. The Presidency deals with the organization of our government and its powers.

Oh, that's interesting. I never thought of the Constitution that way. It makes sense. But, Mr. Mitchell, why does that matter? I mean the point is the Court sometimes reads the Constitution and adds things that aren't there because those things are needed to make what is there work. Doesn't that ever happen with the powers section? You said that legislators can't be sued for what they say. Can everyone else in the government be sued?

Um . . . not really. Judges¹¹ and prosecutors¹² have absolute immunity for their official actions.

I'm really embarrassed. I guess they left out a lot in my high school civics class when we studied the Constitution. I honestly don't remember reading that in my copy of the Constitution.

Uh, it's not exactly written in there.

I'm sorry, Mr. Mitchell. I don't understand.

It's not in there. The Court found that preventing judges and prosecutors from being sued for their official acts was

11. *Pierson v. Ray*, 386 U.S. 547, 552 (1967).

12. *Imbler v. Pachtman*, 424 U.S. 409, 410 (1976).

needed to ensure that they would not have their official decisions and duties skewed by fear of a lawsuit. We need them to do their jobs fairly and impartially, and worrying about each of their decisions potentially leading to a lawsuit against them obviously interferes with that goal. Anyway, here we're not talking about a suit founded in actions taken in the course of the President's official duties. We're talking about private acts that took place before he was even President.

I understand that. But what you're saying is that even in this powers section of the Constitution, sometimes the Court adds to the specific language of a provision to make it work. By the way, just out of curiosity, what if the suit was based on the President's official acts.

Absolutely privileged.¹³

Is that one in the Constitution?

No. The privilege is based on the same theory as the immunity for judges and prosecutors.

I see. By any chance, does the President have any other constitutional privileges?

There is a qualified privilege for communications within the Executive. That's the case about the Nixon tapes.¹⁴ The Court said the President had a privilege, but it was not absolute. The greater need of the criminal prosecutor in that case outweighed the privilege in the balance, at least where the President did not make any specific claim that the information involved something like state or military secrets.

And this privilege was found because we need the President to be able to freely communicate within the White House, or something like that?

Yes.

Good. I think I'm getting the hang of this. And was this one written into the Constitution?

Not really.

Interesting. You know one thing I'm curious about.

Hey. Look at this article on Michael Jackson and Princess Di—have these tabloids no shame? I mean . . .

13. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

14. *United States v. Nixon*, 418 U.S. 683, 706-07 (1974).

Uh huh. No. What I'm curious about is whether anything like this has ever happened before?

Well, you know Thomas Jefferson and Chief Justice John Marshall got into a bit of a tangle over the Aaron Burr case when Marshall ordered Jefferson to turn over some documents and Jefferson didn't think he had to. Marshall disagreed, and Marshall, being the chief justice, represents the law.¹⁵

Excuse me, Mr. Mitchell, what does that have to do with suing a sitting President?

It shows that the Presidency is not immune from the process of the judiciary. Same thing the Court held almost two hundred years later in the Nixon tapes case.

But making the President turn something over that is needed for someone else's criminal trial is nothing like this. The President is not the defendant. The focus of the trial, the media, and the public attention are not on him. So again, I don't see what Aaron Burr has to do with this.

Just some historical evidence of what those who founded the country had in mind about the relation between the courts and the President.

I'll admit, Mr. Mitchell, that I'd put a lot more stock in what they had in mind if they said it on Oprah, or 60 minutes, or Larry King Live. Then I'd know that they appreciated the reality of our world. Now, I'll grant you that they didn't intend, as you said at the beginning, that the President be some monarch who stands above the law. Other than that, I don't know what they really intended. I don't know them or live in their world. I don't even claim to know what most of the people I know really have in mind when they say things. But, I'm certain that they wanted the President to be effective in the job, that at least they intended that, and that's all I'm saying. So, I picture someone trying to drag George Washington into court to sue him for the cost of the cherry tree he chopped down, and somehow I just don't think it would be allowed. But let me ask again. Has any sitting President ever been sued before?

Three times. Teddy Roosevelt, Truman, and Kennedy.¹⁶

What happened?

15. *Clinton v. Jones*, 520 U.S. at 681.

16. *Id.* at 1643.

They all settled, so there is no court precedent about whether the President can be sued. But these instances are nevertheless instructive for our purposes.

How so?

Well, here are three sitting Presidents of three different cultural generations who faced suit for acts committed prior to their taking office. You don't hear about any of them screaming for constitutional protection, or that the suits interfered with their ability to carry out their official duties. From this I'd infer that these civil suits are in reality no big deal, and your fears are seriously exaggerated.

I'm not sure that follows, Mr. Mitchell. Even if it was not a big deal then, that does not mean that it would not be a big deal now. Kennedy was President in a time when the media focused on Jackie's pillbox hats and didn't say a peep about his apparently insatiable sexual appetite. Need I say more? Anyway, how can we be certain that the suits were no big deal? Maybe the Kennedy suit . . . what was it about?

Automobile accidents during the campaign.

Well, for all we know these automobile suits did distract Kennedy, if only a little bit. And during moments of distraction by these suits, he committed us to the Bay of Pigs and Vietnam.

Now, surely you don't really contend

I'm just pointing out that you're guessing as much as I am. In fact, none of us can conclude, without much more information, what the actions or inactions of three Presidents in their civil suits meant. Do we have any other Presidents who had to go to court?

Not go to court, and they weren't civil defendants, but Reagan, Ford, Carter, and Clinton all gave video testimony from the White House.¹⁷

What were the circumstances?

They were all criminal cases and the Presidents were giving testimony for the trial.

Like the Reagan and Ford attempted assassinations?

Yes. Those were two of the instances.

So these cases really have nothing to do with our situation. Those are criminal cases in which the President is just a witness, not the defendant. Is that right?

17. *Id.* at 1649-50.

Yes. I believe that's a correct statement.

So none of my concerns about interfering with the Presidency really come into play. Oh, I know what I want to ask you. What if a sitting President was accused of shooting someone? Could he be tried?

Sure. Again, the President is not above the law.

You mean some state police could just arrest him and drag him from the White House in handcuffs to stand trial?

Well, I don't think courts would be comfortable with that magnitude of intrusion. I think he'd have to be impeached first, then he could be arrested and tried in the state's criminal court.¹⁸

If he was impeached, he wouldn't be President anymore.

No he wouldn't. That's the point of impeachment.

So, if a sitting President has murdered someone, he can't be a defendant so long as he is President?

There's no case that specifically says so—it really doesn't come up on a regular basis—but my considered judgment is probably not. Of course, that behavior might reasonably lead to the conclusion that the President was “unable to discharge the powers and duties of his office,” and the Vice-President would take over.¹⁹

But even though a sitting President probably cannot face murder charges, you're saying he can be made a defendant in a fender-bender accident in this grocery parking lot.

Yes. The Constitution specifically provides for impeachment for “High Crimes and Misdemeanors.” He could be removed through impeachment for such a crime, and then tried.

Can the “high crimes and misdemeanors” take place before the President takes office?

That's an interesting question. Generally, we think of the conduct taking place during the term of office, but impeachment is a political process and it's pretty much up to the Congress to say what counts as so undermining the office that the President should be removed. A previous murder would probably do it. Maybe even criminal dealings with a financial institution.

Do these crimes have to be real crimes?

18. For example, in *The Federalist* No. 69, Hamilton wrote: “The President of the United States would be liable to be impeached, . . . , removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law.”

19. See U.S. Const., Amend. XXV, § 4.

You mean like violate some criminal code? No, I don't think so. At least that's the lesson the commentators have drawn from the impeachment proceedings against Nixon.²⁰ It could be anything which deeply undermines confidence and trust while in office.

What about serious sexual harassment while in office? I wouldn't think that would even begin to fall within the President's official acts. So there's no immunity for that. Might that be the basis for impeachment?

Possibly.

Then, I guess it might also be the basis for impeachment if it happened the week before the President takes office.

Perhaps. I see where you're going, but even if you're right and the President can be removed for such a wrong and then as a private citizen face civil suit, only a few types of civil injuries would justify impeachment. Most plaintiffs still would be forced to wait until the President leaves office. And that's talking theoretically. In practice, what are the chances any President ever will face impeachment—after all, Nixon and Andrew Johnson are the only ones so far—let alone for some claim of past sexual harassment?

You might be surprised. Anyway, I look at this whole thing about "high crimes" and impeachment differently. Frankly, it makes more sense to me that if you are so solicitous of the office of the Presidency that you will not let him be a defendant in a case where he is accused of putting a bomb on an airplane that killed the candidate of the other party and eighty others—that this sense of protecting the Presidency is so great that even in this most extreme case the President probably will not be amenable to the civil authorities so long as he is President—then I can not imagine how one could let the office of the Presidency be troubled by a lawsuit for money.

Oh, I've been meaning to ask about the kids, you know it's been

So, there are no actual cases dealing with civil suits and the President.

No. There is one, but it really doesn't apply to the Jones situation.

20. See Laurence H. Tribe, *American Constitutional Law*, 294, 294 n.21 (Foundation Press, 2d ed. 1988).

Really? Well, why don't you tell me about it anyway.

Sure. It's the *Fitzgerald* case we already talked about.²¹ President Nixon was somehow involved in the firing of Fitzgerald, who basically was a whistleblower who squealed on the Department of the Air Force while he was a management analyst. So he sues President

Was Nixon in office?

He was at the time the decision to terminate was made, but not at the time of the lawsuit.

What did the court say?

The United States Supreme Court said Nixon was absolutely immune from suit.²²

Well, there you have it. What have we

Wait a minute. That case doesn't help. In *Fitzgerald*, the decision to terminate Fitzgerald had been made as part of Nixon's official duties as President. Or, as the Court said, within the "outer limits" of his responsibilities. As I said before, the idea was exactly the same as the immunity from suit for prosecutors and judges. You don't want to inhibit the President in his official decision-making by adding into the decision-making process that he might be personally sued if he decides one way as opposed to another. That's not in our country's interest. I don't want the President always worrying about his own financial interests when making a decision. I want him to think only about what's best for our country, and so did the *Fitzgerald* court.

Obligations to large campaign contributors, lobbyists, and the latest polls aside

You know what I mean. Anyway, *Fitzgerald* does not help you.

But they gave the privilege when he wasn't even in office, and here we have a sitting President.

Yes. But you see in *Fitzgerald*, while the President was no longer in office, the acts that were the basis of suit were acts done while he was President and within the outer limits of his official duty. In *Jones* you have the opposite. A sitting President all right, but the acts have nothing to do with his job as President. They took place long before he assumed office. And that's the difference. *Fitzgerald* does not apply.

21. *Nixon v. Fitzgerald*, 457 U.S. 731 (cited in note 13).

22. *Id.* at 749.

So the judges in Fitzgerald weren't concerned with civil suits against a President from the point of view that it just generally interferes with his job—taking time and focus away from his main duties?

Well, there was language in the opinion about not wanting to interfere with the President in the sense you're saying, but it's just dicta.

Dicta?

Yes. Just talk. It doesn't count as precedential law because it wasn't necessary for the Court's opinion. That's the rule. If it's not necessary, it doesn't count. And we call that superfluous language dicta. Now in *Fitzgerald*, Nixon was no longer in office, so if the court granted immunity from civil suit it couldn't be founded on some concern that the ongoing suit would interfere with his work. The only grounds that could justify the decision under the facts before them was the one based on the idea that we don't want our Presidents to fear future personal lawsuits anytime they make an official decision as President.

Why would the Court say something and, as we say, put it in writing, if they didn't mean it? I mean, this language was not put under some section entitled "dicta," was it?

No. But these are first-week-of-law-school rules of case reading.

Well, I don't know about your rules of case reading, and of course I'll take your word for it, but the point is that the highest court in the land still said it, and wrote it down for posterity to read. So even if these words don't count for purposes of some technical legal game, they're still there. And their very existence—the fact that judges of the Supreme Court would write it down for all of us to read—tells me that the concern is valid, legitimate.

Perhaps. That still does not make *Fitzgerald* precedent for the *Jones* situation.

Anyway, I don't buy the distinction. The point is that you want the President to make decisions that are solely motivated by concern for the nation, not skewed by some personal concern, like being a defendant in a lawsuit such as Fitzgerald. Is that the idea?

Generally.

So I don't see the difference between the situation in Fitzgerald and the situation in Jones when you look at it practically. In both cases, there is some factor that can interfere with the President making his best decisions for the nation. In both, this

factor involves the President's personal self-interest. Fitzgerald didn't want the President making bad decisions because of the fear that maybe, some time in the future, someone will personally sue him as he tries to retire into the golden years of ex-Presidency. Here, we don't want the President to make bad decisions because he is occupied with, distracted by, and publicly defending himself over, an actual lawsuit that is actually taking place while he is trying to do the job of President.

Those health bars in your cart. How many calories

Also, this idea about not wishing to interfere with the President's decision-making: there are many things the President does that are plainly within the scope of his official duties that don't at all seem to involve any kind of real decision-making.

I don't quite know what you mean.

First day of the baseball season. President throws out the first ball, but it slips from his hand and hits some fan. Or, I think when Ford was President, he used to play celebrity golf and hit spectators with wild hooks and slices. Now what decision does fear of suit impinge? Whether to throw a straight fastball or slider on Opening Day, or whether to use a driver or three wood to tee off? Still, in these circumstances I don't think you'd want them sued while in office and have such a suit interfere with them doing the serious job we elected the President to do. And what if the President sexually harasses someone while in office? Again, surely this conduct cannot be considered to have anything to do with the President's official decision-making. So are you going to let that suit go forward?

You know, all we've been talking about is the President

Correction, the Presidency. We haven't been talking about a particular individual. We've been discussing an institution, the top figure of a branch of government.

Fine, the Presidency. That's all we've been talking about. But what about the plaintiff, what about the individual who claims that she's been injured? You're proposing that she wait for her suit until after the President steps down from office—four, eight, up to ten years if he is initially the Vice-President who takes over mid-term for the President.²³ And in the meantime, her witnesses can leave the country, their memories fade so that they eventually forget crucial details of events, or

23. U.S. Const., Amend. XXII, § 1. See also Note, *President Clinton's Claim of Temporary Immunity: Constitutionalism in the Air*, 11 J. Law & Politics 555, 597 n.249 (1995).

they eventually forget crucial details of events, or they might even die. Also, during the long delay, vital documents can be lost or destroyed. And all the while, the injury and losses go on over the years without compensation. So what about the victim; don't you care about her?

Now, Mr. Mitchell, that's not really fair. Of course I care about someone who is wrongly injured. But on the other side of the story we're talking about not interfering with the functioning of our nation's leadership, and I guess if one side has to give way, it's the single individual as opposed to the rest of the nation. It would be unfortunate if the plaintiff lost a witness or key document during the delay, but that kind of thing must happen all the time anyway. Someone runs a light and hits your car and there are all kinds of witnesses. If they're good responsible citizens, they stop and leave their names and numbers. But they also might just drive away, in too much of a hurry to stop or not wanting to get involved.

I'm sure it does happen all the time, but it's not because they are ordered by their government not to pursue their lawsuit, making it impossible for them to take depositions to preserve testimony or to order the opposing party to turn over documents. We have no control over fate. That is not true of the laws we choose to follow as a country.

It seems to me that we don't really have a choice about the Constitution being the law of the land. And I believe that law exempts a sitting President from suit. You're concerned about a civil plaintiff having his or her interests sacrificed to what I believe are the clearly the broader interests of the country in having an effective, unhampered leader.

I certainly am. Though again, we disagree on how greatly a lawsuit interferes with the President's ability to carry out his responsibility.

I understand. My point is that we're asking the plaintiff and all potential future plaintiffs to make a potential sacrifice—after all, the plaintiff may not lose witnesses or documents during the delay, and it may be far easier suing an ex-President. But let's assume the ultimate sacrifice. They can't sue. They cannot get some amount of extra money in their lives. If they are entitled to it, that's unfortunate. Although one may want to recognize for a moment that most countries do not have people suing each other everytime they turn around, and in these countries one lives with one's losses. Anyway, I wouldn't feel good about this person not

being able to sue. But again, that's their sacrifice for the good of this country. And considering that we're willing to send our young men and women to die in a war, or even to arrest a dictator in Panama, the sacrifice seems quite minor by comparison and one, if I am a citizen, I must accept.

Wait a minute. How can you compare a civil suit against the President to a war which threatens our country's interests? It seems you've given a new definition to hyperbole.

I don't know whether I have or not, I'll take your word for it. But I'm quite serious. The interests of the nation as a whole are simply greater than one person's ability to sue for damages. Isn't there any instance when people who had legitimate civil suits nevertheless had their interests subordinated to the greater interests of this country?

Well it was totally different. But there was something of that nature during the Iranian hostage crisis You know, our kids' high school won the state girls' basketball championship this year. Did you follow that?

Yes I did. My neighbor's daughter was on the team Why don't you tell me about the situation with the Iranian hostages?

Well, you remember when Iran took the American hostages during Carter's presidency?

Sure.

As part of the deal to release the hostages, all Iranian assets which had been frozen in the United States were released, and all civil litigation in American courts against Iranian interests by American nationals was ordered stopped. The plaintiffs were then forced to go to an Iran-United States claims tribunal where they were to engage in arbitration for their money. The problem was that the tribunal had very little money to dole out—less than a billion dollars—although, in theory, if the plaintiffs didn't get enough, they could have sued the U.S. in the Court of Claims.²⁴

So when it's in the national interest, we're willing to bar—not just delay—private civil suits.

Surely, you can't be comparing getting back our hostages with avoiding embarrassing our President due to his private misbehavior?

24. *Dames and Moore v. Regan*, 453 U.S. 654, 679-680, 679 n.8, 680 n.9 (1981) (it is consistent with accepted principles of international negotiations for the President to settle claims of U.S. citizens against foreign interests by Executive Orders).

My point is simply that when the national interest is at stake, civil suits take a back seat. And I think having an effective, fully functioning President is as much at the core of our national interests as I can imagine. Let's talk about the hostage crisis. In the middle of those tense and delicate negotiations, would you have wanted the President to be dealing with some juicy civil lawsuit? Also, Mr. Mitchell, if we really care about the extreme sacrifice this citizen is making, Congress can appropriate a fund. If the plaintiff can't pursue his or her case because of the delay, we'll provide some hearing where the plaintiff can get some prescribed measure of compensation based on their claim. You know, like worker's comp—but here, it would be so much for property loss, so much for personal harm, so much for emotional harm.

You know, I've hesitated saying this. But I've always thought of you as a bit of a feminist, and I can't believe that you'd put so little importance in the notion that a man with the top job in our country can sexually harass women with impunity. What could be a more important issue for our nation?

You said a number of things, so I'll give you a number of responses. I have been concerned about women's issues—my issues—since I was in high school. I'm what you'd call an old-fashioned women's-libber. That means I have a job, raise a family, and run a home. I am deeply offended by how men in power use their power, sexually and otherwise. I am not talking about immunizing the President from liability for his actions, just delaying the day of reckoning. Also, sexual harassment and discrimination may be the topic of this case, but we're not just talking about this case. The question is whether a sitting President may be sued. That means any kind of case—fender-bender, contract dispute, claim of fraudulent dealings and so on.

Yes, but those cases—with the exception of the fraudulent dealings—are not going to interfere with the Presidency within your conception. They will not draw the obsession of the media because they do not have the aura of scandal.

There is an irony there. These sexy cases are plainly the most distracting because of the media. They're also the easiest to create. Someone claims that the President said or propositioned such and such, and we're off and running. It's a lot harder to come forth once the President is elected claiming that he ran into your car if it didn't happen. Where are the pictures of the damages, the repair bills, the witnesses? Now don't get me wrong. I'm hardly in the camp of those who used to say that women fantasize about and

make up rapes and sexual assaults. I don't think many women would willingly put themselves through what goes with being the key prosecution witness in a rape case if they did not believe that it happened—the public retelling in front of a room of strangers, remaining immersed in the experience until the case is resolved, responding to police and prosecutors' probings, being subjected to cross-examination, and then risking that the jury will formally express doubts about your experience and hand down an acquittal. No, I don't think many would fabricate in light of that fate. But I don't feel the same way about this. Here you're talking about improper conduct which is basically verbal, and the defendant is the now President of the United States. In contrast to a rape complaint, there's far more to gain and seemingly far less to lose.

What if you filed your suit before the President took office? Maybe you even began some discovery, might even be on the eve of trial. Would you stop that case?

Absolutely. I don't see why not. Seems like the same problem with suing the President whether the case started before or after the President took office. In fact, this person who already started the suit may be better off, aside from having to abruptly change gears emotionally, because they may already have gathered much of their evidence. But let me go back to your original comments. I am disgusted at the idea that any man, let alone the man who occupies the White House, might have done the things alleged in the suit. But I still don't think that justifies interfering with the ability of future Presidents to lead this country. For me, the answer is to make it an issue in the next election and vote the scoundrel out. Realistically, then, you're talking about a few years' delay in the suit.

Let's go back to basics, okay?

Fine.

You're envisioning this mass of lawsuits. But what lawsuits? When have you ever seen anything like this before? Remember, if the case arises while the President is already in office, *Fitzgerald* will bar the suit—perhaps even your case where the President beans someone on the opening day of the baseball season. So, we're only talking about cases which arose before he became President. That's only happened three times in our history, and the last time before this one was Kennedy, nearly four decades ago. You're conjuring up a monster that's not there.

Not until it is. And my point is that when it is, the Constitution should not let a sitting President be sued. Also, don't be so

certain that the past gives us a very good clue about the future in this regard. We are living in the brave new world of electronic media, virtual reality, tell-all best sellers, talk-shows where no detail is too intimate. In that world, the rewards for controversy and scandal are great, and the incentives to find a way to bring suit commensurate. With the lawsuit comes rewards unrelated to any potential jury verdict. Book contracts, talk-show appearances, speaker's fees, exclusives sold to the tabloids, ten minutes of fame. Then, of course, there's the lawsuit and the potential for settlement from a White House seeking to avoid having the President hassled by the formal suit and dragged through the media. And that assumes that the only interests are economic or the personal desire for fame. In this new media-driven world in which we live, image and public belief are always up for grabs to the next media-generated creation. That leaves the playing field wide open to use lawsuits for political advantage to embarrass the President and his party.

Fine. So you delay the lawsuit until the President is out of office. That won't stop the person from holding a press conference or other interview with the media, and there you are right back where you started.

There's some truth to what you're saying, but as I've said before, a lawsuit qualitatively changes things. Every week, the public focuses on a new issue. There it is on the cover of every magazine and tabloid, filling talk and news shows on television. And then just as suddenly it disappears from the public's consciousness to be replaced by the next media-enhanced national personality or concern. Lawsuits, on the other hand, both create and fuel an ongoing reality. As we discussed, when you mix court-imposed processes—what you call discovery—with the self-interests of clients and lawyers, you have a lawsuit-media dance which just continues and accelerates. Let me give you one little example—the O.J. Simpson trial. Do you and I have any disagreement about the fact that in that case the judicial process was replaced by a media process, and a carnival at that? Now take the O.J. trial and multiply it by a thousand and you have the trial of the sitting President of the United States. People already are so fascinated by trials that we have Court T.V. and shows about legal issues with point-counterpoint formats. There would be no stopping the media barrage and public obsession if the President were a party. Televisions would be burning around the clock. And it wouldn't matter if the President were actually there or on video. It would all be on T.V. The country and its leadership would simply be stopped in

its tracks for months. The real business of the country and our role in the global community would all but grind to a halt.

Well, I don't imagine the President actually going to trial during his term.

Why not? I can't see anything in what you are saying that would prevent it. Especially if the President was in office for several terms. After all, how long could he stall? Or are you now creating a privilege that allows him to be sued and for discovery to progress, but that will not allow the actual trial to commence?

Let me suggest a compromise. Why not give some minimal credence to the interests of the plaintiff by at least granting the plaintiff authority to take depositions of non-Presidential witnesses? You know, people other than the President or his staff. Then the plaintiff may be less prejudiced from the possible loss of witnesses, while the President has his concerns met since he will not really be involved in any hearing or future process while he is President.

Sounds reasonable, but it won't work. The fact that the witnesses are or are not officially connected with the Office of the President won't make any difference. Again, their depositions and the information generated by those depositions will still fuel all the media intrusions and distractions we've discussed.

Don't misunderstand me. I see your point. I agree that the court cannot directly control the media. Where I disagree is this—I believe the court system will ensure that the lawsuit interferes as little as possible with the Presidency. For example, there's something called Rule 12(b) which allows courts to throw out baseless suits, and Rule 11 which gives judges the power to sanction parties and even attorneys for bringing frivolous claims.²⁵

I don't imagine that this happens as soon as a lawsuit is filed?

No, of course not. But it can happen fairly early in a case.

I don't see how it can be very early, especially if it's one person's word against another's as to what was said or promised, or such. Seems like it could go on for months or more. I mean what happens after a suit is filed?

25. See Fed. R. Civ. Pro. 11 and 12(b). But note that under the latest version of new Rule 11, a party has a "Safe Harbor" of 21 days to withdraw the offending pleading before sanctions may be imposed. See Fed. R. Civ. Pro. 11(c)(1)(A). I think it just as well that I omitted this from my conversation with the Lady in the Grocery Line.

You have time—generally twenty days—to file an answer or a motion to dismiss.²⁶

What can you base the motion on?

Generally, that what is claimed in the lawsuit isn't a recognized legal grounds for a claim or, even if the grounds is recognized, the plaintiff does not state facts which constitute a violation of the rights comprising the recognized legal grounds. The motion could also raise more technical grounds concerning jurisdiction and the like, but insufficiency of the claim would probably take care of your concerns.

I don't see how. Again, these are probably going to be cases where the plaintiff claims one thing, and the President denies the incident altogether, or there is a legally significant difference between his version and the plaintiff's. How will that get thrown out before there is any of this discovery? I just don't see it. And once you've begun discovery, you're talking months and months. The information both about and from discovery then provides tinder for the media. Anyway, even if the case is thrown out after these motions, realistically it will consume time needed by the country and distract the President for close to a couple of months.

You know, it's not like the President doesn't have any extra time. I mean the President doesn't work seven days a week, twenty-four hours a day. He spends time with his family, takes vacations and other breaks just like the rest of us.

As far as the President taking off a few days, I say great. He needs a bit of leisure if he's not going to burn out. I want him to have some relaxation from the constant pressure and stress of the job, and have time to spend with his family so that he can retain the calm and perspective required for good decision making. And I certainly don't want to see any of this precious and necessary uncommitted time used up by having to deal with some civil suit.

Okay. But the court can play a bigger role than you imagine in ameliorating your concerns. Whoever brings a frivolous suit against the President is going to pay big time in Rule 11 sanctions, and the attorneys will pay both monetarily and in terms of their reputations.

These are the dreaded Rule 11 sanctions, huh? I don't doubt a court could really sock it to them—court costs, President's legal fees and other expenses. But to many people, this will be a small price for the publicity, talk-shows, and exclusives on articles. And

26. Fed R. Civ. Pro. 12(a)(1).

I don't buy it about the attorneys' reputations. They'll cry "foul" in the media, appeal the decision from court to court, all the while prolonging public attention on the case. Political enemies of the President—many of whom will be rich, connected, and powerful—will support the attorneys and the suit, claiming that the court's decision was politically motivated. And meanwhile, the attorneys will have their faces all over the national media, getting a few million dollars worth of free advertising and name recognition. After all, most people don't know the name of an attorney when they need one. Now they'll know the names of the local attorneys who took on the President. What are those quotes that no publicity is bad publicity and it doesn't matter what they say about you so long as they spell your name correctly?

What I am saying is that even without any made-up constitutional privilege to delay suits while the President is in office, the court fully has the power and ability to ameliorate any unnecessary burden on the President. Courts are hardly insensitive to the seriousness that accompanies any form of lawsuit against a sitting President. And Rules 11 and 12(b) surely can help, even if they are not perfect solutions. Few things in our imperfect world are. Also, the trial court basically has control over the pace and timing of the case. Therefore, the court will undoubtedly make all reasonable accommodations to the President's schedule and needs.

Well, as I've said, the formal intrusion into the President's time is only part of the problem, and perhaps not the major one. It's the taking of information generated by the formal process and using that information to develop a media storm that both diverts the President's and his staff's time and concentration from significant national and international issues, and leads to the accompanying loss of respect for the institution of the Presidency.

Courts can't do anything about that. That just comes with fame and position in our culture.

I disagree. Courts can do something about it. The judges in Jones did something counter-productive about it by refusing to recognize any privilege from civil suit while in office. They obviously could have done the opposite, and done good in the process, by finding the privilege protecting the President from civil suit that I believe must be implicit in our Constitution. And as for reasonably accommodating the President's schedule, I'm having trouble envisioning the process. Who will have the final say on whether an accommodation is reasonable or not?

The court, of course.

Then it seems the court is telling the President how to run the country. Isn't that against separated power or something?

You mean the principle of separation of powers. That means that no branch can take on the others' work, at least without some delegated permission, and no branch can significantly interfere with the workings of the other. But this does not involve any of those situations. This is a court being a court, holding the President to the law, and therefore acting as a check on the President.

Fine. How is the President to ask for an accommodation, and give the court the information it needs to decide whether it is reasonable, without divulging privileged information or state secrets to some judge on some state bench in Florida, or Idaho, or Oregon or such?

Why do you think that would happen?

Think about it, Mr. Mitchell. Does the President have to tell the Court, "I can't really deal with this now. I have a major health bill going through Congress, we're on the brink of war with North Korea, and I'm involved in secret negotiations with the Bosnians?"

Of course not. No court could demand those kind of state secrets. The *Nixon* court would have undoubtedly barred access to such information.

Really. Well then, what if the President simply tells the court, "Trust me. I can't deal with this now, but I can't reveal why"? Or, "I've got an emergency, but I can't tell you what"?

I don't know. Most judges probably would just laugh if an ordinary defendant responded in a contested matter that he can not give the basis for his position, but that the judge should just "trust him." Even a claim of privilege requires that you give concrete reasons why you are plausibly entitled to its benefit. But the President is not an ordinary defendant, so I really don't know.

What if he says, "I'm sorry, but I'm too busy for the next four years. And even though I see some spaces in my calendar now, I have to leave those open for emergencies?"

I don't think so. That would *de facto* give him the immunity *Jones* denied.

If I have a case in court and I want to change some court date because I want to go to my sister's wedding, am I right to believe

that the court can both question me about whether there even is such a wedding and, even if the court believes me, can decide my personal life must give way to the calendar of the court?

You're correct. Though I believe a court would never doubt your veracity and that, judging from my own experience, you would have little trouble moving the judge to your side. But to answer your question, yes, a judge could and often will do both.

So can the state trial judge refuse to accept the President's representations about his need for accommodation?

I guess so.

So if the President merely says, "Can't tell you why," the judge could say "That's not good enough"?

I guess in theory.

Will the judge ask to see the President's calendar or call his top advisors to double check his story?

I doubt that. But the judge could ask for some documentation to support the President's request for accommodation. You know, if the judge did ask for some confirmation it's not like the whole world would see the President's secret itinerary. The judge would do the inspection *in camera*.

Why would the judge take photos of the documents?

No. *In camera* means the judge would do it in private. Just the judge would see what the President was handing over.

Great. So some local judge who got his or her position who knows how now gets to take home these possibly important papers, so he or she can peruse them while watching "Wheel of Fortune." I'm not at all sure that I want to give this person access to information which might be of a nature that it is important to my country that it be kept confidential. After all, just because this person wears a robe over his or her clothes does not mean I want him or her making the President of this country turn over whatever will convince the judge that the President's schedule really has priority in this one, specific instance—because that is all the judge will be deciding—over the convenience to the plaintiff and the court's calendar. Would you agree with me that if the judge refuses to accept the President's position that the scheduling interferes with his duties unless the President provides some form of concrete proof which satisfies the judge, there are going to be serious problems?

That might be a bit problematic.

Yes it would be, especially if one has any concerns about keeping Presidential strategies and state secrets . . . well, secret. Okay, so imagine the President gives this judge the information— "I have to prepare for and go to a conference on such and such, and therefore need to postpone the next phase of the case." Can the state court trial judge for whatzit county tell the President that that's not a good enough reason to change things in his court and that the President should send the Vice-President to the conference on such and such?

Well, personally I'm not sure I can see why the President necessarily needs a postponement for that.

Because he said he did, Judge Mitchell. Are you going to second guess his position on what his job requires?

Not me. But I suppose in theory some judge could.

So now everytime he needs an accommodation, the President has to negotiate with this judge about how the President is to prioritize his time. I don't know much about this separation of powers, but from what you told me, seems like this judge is both telling the President how to do his job and trying to use his official powers to make him do it the judge's way. I guess the judge might even try to hold the President in contempt if the President decided that his view of his schedule and job was the right one, and that he just couldn't let the judge interfere with that. Again, I don't know what this separation of powers stuff really is, but that kind of direct interference sure sounds like it.

Well, the other branches interfere with the President all the time, and there's no separation of powers problem.

Really?

Sure. The Supreme Court can hold that certain executive actions are unconstitutional. Congress can overturn a Presidential veto and, as you saw in Watergate, can conduct investigations of the President and his staff. Surely, all those things interfere with the office of the President, and we haven't even gotten to impeachment.

I did enjoy those Watergate hearings and was happy to see Nixon get it, tapes and all. However, those situations you just noted are totally different. Those are things which interfere, but they're meant to. They're built into our structure of government, mechanisms in our carefully considered system of checks and balances. It's interference we want, interference we consciously included in our Constitution. But private civil suits against a sitting

President for some wrong he supposedly did before he became President have nothing to do with our governmental structure. You know that, Mr. Mitchell.

What about cases that really can't wait? Let me give you one example. Imagine the First Lady wishes to divorce the President and obtain custody of their children. Will she and the children have to wait until the President is out of office?

No. That's a tough one, but I don't think so.

I knew you'd decide that way. So how, beside emotion, do you justify not delaying this case? You have to admit that in terms of distraction and media frenzy, this case would be beyond parallel. Our own little Charles and Di.

It would undoubtedly be very distracting, but I think that there are a number of reasons to treat this situation differently. Realistically, I think this would be remarkably unlikely. In fact, my impression is that divorce is the last thing that couples in the top political echelons want. They endure bad marriages because they don't want to hurt one spouse's political career, particularly when it leads to the White House. But I won't count that as a reason because I'll admit that anything is possible and nothing really surprises me in the insane world in which we now live. So, here are my reasons why I think the situation so unique that I would permit the divorce and custody case—First, the available pool of potential plaintiffs is extremely limited. In fact, it's limited to one person in the world. Second, the choice of the President as the target of the suit is in some basic sense coincidence. No political blackmail or advantage is at its roots. Rather, it is a function of private, family relationships of the individuals. Third, though money is clearly involved, it does not involve money damages. I guess a will contest might also fall into the same category. And that difference is important. Surety bonds, worker's comp type funds and the like can deal with any unfairness from delaying someone's suit for damages. Here, on the other hand, I think it's worse not to let the legal action go on. What choice is there? You can't keep people from divorcing and leave the custody issues unresolved. I guess on further thought you could even delay any disputes over a last will and testament, but not ones like divorce and custody that sort out private, family relationships. Of course, I admit that I am a product of my times, no-fault divorce and all. Forty years ago, people would have said that they have to stay together and bear the consequences of their adult choices, at least for the sake of the kids. Funny, some people I know are saying

that again. Also, I guess someone could say that with taking the office of President, one accepts certain responsibilities and limitations on one's life that the rest of us do not. I mean, I get to go places without the Secret Service. And this would apply to both spouses, since in our current view of the Presidency both the President and the President's spouse are part of the office. So, you could take the position that the greater need and good of the country outweighs the non-Presidential spouse's rights to a divorce during the President's term of office. So maybe I wouldn't even permit a divorce.

Very interesting. Let's look at a more basic example. The President runs over some poor soul the day prior to Inauguration, and the person cannot pay for the operation he most desperately needs.

Can't the President get him the money through one of his aides, or is that one of those things where his lawyers would tell him to stay away from the man because it would be taken as admitting it was the President's fault?

No. Actually, the fact that you offer to pay or actually pay someone's medical expenses cannot be brought into a trial. We don't want to discourage people's best impulses by fear it will hurt them at trial.²⁷

Fine. So there's no real problem. Or again there could be some worker's comp type of insurance fund for these situations.

Let me approach this one last way. Assuming the person who claims they were injured could show a compelling interest that their case go forward and that the case will only minimally affect the President's time, would you at least allow that specific case to proceed while the President is still in office? That would be a tough showing for the plaintiff to make, and those who could meet this standard would be the great exception.

Your standard is superficially appealing, but absolutely not. In the first place, when you say that it must minimally affect the President's time, I believe that you are again solely referring to the impositions of the formal process in isolation from its social and cultural context. In the second, whatever the standard, it will be some trial judge from who knows where who will initially decide whether or not the case is "compelling" or the intrusion "mini-

27. See Fed. R. Evid. 409 ("Evidence of furnishing or offering or promising to pay medical, hospital, or other similar expenses occasioned by an injury is not admissible to prove liability for the injury.").

mal.” Then, depending on that decision, other courts will look at the trial court and at each other. I don’t think that courts should be deciding the President’s priorities and I’m not willing to risk letting them meddle in the endeavor. I’ll leave the cases you’re talking about to public pressure and the President’s desire to do the right thing. So, I’m back to where I started, Mr. Mitchell. The second best way to avoid this kind of mess surrounding the Jones case is to recognize that a delay of the suit until the President is out of office best fulfills the constitutional conception of the Presidency.

Second-best? This temporary immunity is all we’ve been discussing. I wasn’t even aware that there was anything else you had in mind, let alone a first-best notion. Please, there’s still one more person in line ahead of us, so tell me: what’s the best way to avoid what you characterize as the current mess?

Simple. Elect a woman as President.