

THE LIMITS OF THE POWERS OF US PRESIDENTS

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*Transcript of lecture given at the Sorbonne School of law
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ABOUT MATTHEW DILLER

Dean of Fordham Law School, New York, Matthew Diller has been, for the academic year 2017-2018, visiting scholar at Paris 1 Panthéon-Sorbonne University. Throughout his academic career, Matthew Diller is interested in social welfare law and policy issues ranging from public assistance, social security to disability law and policies.

During his stay at Paris 1 Panthéon-Sorbonne, Matthew Diller gave a speech during a conference on another widely discussed topic in the United-States, as well as in the rest of the world: the powers of the United States President and more specifically, their control by the Constitution of the United States. The exercise of the U.S. presidential powers remains a contemporary intellectual topic finding a particular echo in the election of the 45th U.S. President, Donald Trump. This election has raised, and is still raising, a myriad of concerns from both the civil society and the academic community. It is in this context that Matthew Diller enlightened us on the articles and amendments provided by the U.S. Constitution in order to control the U.S. presidential powers. Hence, after recalling and illustrating, the separation of powers and the possibility to raise veto, Matthew Diller expatiated on the 25th amendment providing the appointment of a new vice-president.

Undoubtedly, the contribution of Matthew Diller will allow people not acquainted with U.S. Constitutional Law to apprehend its peculiarities with respect to the current U.S. presidency.

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À PROPOS DE MATTHEW DILLER

Doyen de l'École de droit de l'université Fordham de New York, Matthew Diller a été, lors de l'année universitaire 2017-2018, chercheur invité à la Sorbonne. Tout au long de sa carrière, Matthew Diller s'est intéressé au droit et aux politiques de la sécurité sociale dans toutes ses dimensions de l'assistance publique à la sécurité sociale, en passant par les programmes, politiques et questions juridiques relative au handicap.

Lors de son séjour à la Sorbonne, Matthew Diller s'est entretenu lors d'une conférence sur un autre sujet d'actualité faisant couler beaucoup d'encre tant aux États-Unis que dans le monde : les pouvoirs du Président des États-Unis et particulièrement son encadrement par la Constitution américaine. L'exercice du pouvoir présidentiel aux États-Unis demeure un des sujets de réflexion contemporains toujours aussi vif et qui a trouvé un écho particulier lors de l'élection du 45^e Président, Donald Trump. Cette élection a suscité – et suscite toujours – de grandes craintes tant de la société civile que dans le monde universitaire. C'est dans ce contexte que Matthieu Diller nous offre son éclairage sur les articles et amendements qu'offre la Constitution étatsunienne pour encadrer les pouvoirs présidentiels. Après avoir rappelé, et illustré, la séparation des pouvoirs mais aussi la possibilité d'opposer un veto, Matthew Diller discute avec précision de l'amendement 25 disposant de la nomination d'un nouveau vice-président.

Indéniablement, cette contribution de Matthew Diller permettra aux non-spécialistes du droit constitutionnel américain d'appréhender ses subtilités au regard de la présidence actuelle.

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TRANSCRIPT[†]

Good afternoon, everybody. My name is Matthew Diller. I'm the Dean at Fordham University School of Law in New York. I want to talk to you about a subject that all of us in the United States have been thinking about since November 2016—the role of the executive in our constitutional system of government. Our constitution has been around for over 200 years. It is a very bare-bones, elemental constitution, which leaves a lot to be filled in through tradition, experience, and interpretation. Since November 2016, everyone has been really focused on the question of “What can the president do and not do?” and “What are the limits on the president’s powers?” I will just be upfront with you and say I’m from New York City, and the vast majority of us were dismayed with the outcome of the election. We spent more time thinking about the parts of the Constitution that limit the powers of the president so that we could sleep better at night. I don’t know how many of you have studied the U.S. Constitution. So for some of you this might overlap with what you have studied, but I think it will have new dimensions too.

Before we talk about the limits of the powers of the president, we have to spend some time on what the affirmative powers of the president are so that we can see how they are limited. There are two sources of presidential power. The first is in Articles 1 and 2 of the Constitution, and I will talk briefly about that. I’ve given you copies of the Constitution to follow along if you can. I feel honored to be able to spread the Constitution of the United States. Article 2 establishes the Office of the President and sets forth the powers of the presidency. Article 1 establishes the legislature, which is our Congress. The president has some direct powers with respect to legislation and the legislative process. On a day-to-day basis, many of the powers of the president have been delegated to the president through Congress. Congress enacts laws that establish government agencies and government programs that the president, as the chief executive officer of the United States, is responsible for implementing. So we really want to look for the range of powers of the president. A lot of them are not only in the Constitution, but also in the legislative delegation.

These basic powers of the president come from Article 2. I won’t talk about them in detail because I will talk about them more specifically later. I do want to mention the veto power. That’s a legislative power. In Article 1 of our Constitution, when Congress passes a proposed law (a proposed law is called a bill), it goes to the president for his signature. If the

[†] We are grateful to Valentin Depenne, Secretary-General of the Sorbonne Student Law Review, for his transcript of Dean Diller’s conference.

president does not sign the bill or vetoes it, it does not become law. However, if it isn't signed by the president, it can still become law if Congress repasses it with a two-thirds supermajority vote. That's the president's direct role in legislation.

Let's go to what really interests me in this day and age, which is the limits on the president's power. One set of limits comes from the structure of government in the United States, which is our principle of federalism. In the United States, we have 51 sovereigns. Each state is considered a sovereign, and the federal government (the national government) is an additional 51st sovereign. There is a complex relationship between them. For those of us who are interested in the limits of the president's powers, one of the first places we look is to the states. In particular, if the national government is not regulating in an area, generally, the states are free to regulate. Where this comes up in my mind is a lot of advocates and supporters of environmental and health and safety regulations are now looking to state governments for protection. One good example of this is greenhouse gasses. President Trump wants to roll back all regulation of greenhouse gasses on a national level. The states can still regulate greenhouse gasses. In 2005, when George W. Bush was president, he was not in favor of regulating greenhouse gasses. Six states in the Northeast adopted an interstate agreement acknowledging that they would regulate carbon dioxide emissions in their states. That's just one example of how states can, to some extent, fill the void. The risk here is that anything regulated by the states is subject to the Supremacy Clause, which means when the national government does act, it trumps the states' laws and agreements.

I want to talk for a moment about what is called the commandeering principle. There's a series of Supreme Court decisions from the 1990s that basically limits the ability of the national government to interfere with functions of the state governments. The most important principle is that the national government cannot commandeer state officials to enforce national law. That's a very important point. It was obscure when the Supreme Court decision came down in the '90s, but it's now moved to the front of debate in the U.S. with regard to the issue of immigration. States and localities are increasingly saying they will not allow their police departments and other law enforcement agencies to cooperate or participate in enforcing the immigration laws and arrest undocumented immigrants within their jurisdictions.

The commandeering principle says the national government cannot force state governments to cooperate or participate. That would be an interference with the state's sovereignty. That has led to a number of cities declaring themselves to be sanctuary cities, where the cities would protect undocumented immigrants. That's a very controversial and

ambiguous notion in the United States. When I say ambiguous, I mean that the states won't actively enforce the immigration laws, but they also can't stop the national government from enforcing its laws. They can't keep the federal officers out, but they can refrain from helping them. This is particularly important with respect to sharing information, especially about things like arrests. If someone is arrested for a particular crime and it turns out he is an immigrant without a proper visa, will the local law enforcement tell the national law enforcement about it or not?

Recently, local officials are increasingly deciding not to do this. The Trump administration has argued that states and localities are required to cooperate. President Trump has threatened to withhold federal funding from states and localities that don't cooperate. The reason the emphasis is on funding is because the federal government can't directly order states and localities to cooperate. That would violate the commandeering principle. The Feds can't commandeer state officials. Withholding funding is an indirect way to achieve the same goal: unless state and local governments cooperate with immigration, the Trump administration is threatening to cut off federal funding. Can they do that? They may be able to do that to some extent. The states have to agree to conditions in order to receive federal funding. But there are also limits on what the federal government can require of the states through legislation. One of the big limits is a Supreme Court case that says that the federal government can't condition funding on a wholly unrelated state issue. So, you can't withhold highway funding or education funding because the state won't enforce immigration laws. There has to be a connection between the funding and the conditions. This topic will be a major subject for debate over the coming years.

Other limits over the president's powers come from the separation of powers. The United States government's powers are limited in one of two ways. One is through the federal-state structure. The other is the separation of powers among the different branches of government. Under our Constitution, we have three branches of government: the first is the legislature, which is Congress; then there's the president, who is the chief executive officer of the government; and the third is the judiciary. The functions of each branch set limitations on the others. Under Article 2 of the Constitution, it says the executive powers shall be vested in the president. That's been interpreted to mean that the president is vested with executive power, but not vested with judicial power, and not vested with legislative power.

Let's talk about some of the more specific limits on the power of the president. One is that the president is the commander of the armed forces of the United States, which, of course,

is a tremendously important power. There are two key limitations on this power. One, Congress has to appropriate the money for the military. So, the president is always dependent on Congress to fund the military. Therefore, if the president ignores Congress's will and gets Congress upset, Congress can always cut the funding. That will always, to some degree, bring the president back in conversation with Congress. The second is Congress, under the Constitution, has the sole power to declare war. This sounds a lot more powerful than it is—the last time Congress declared war was in 1941. So, we've had major conflicts, including the conflicts we are currently engaged in, that have never been declared to be wars by Congress. There doesn't have to be a declaration of war every time the United States sends troops into battle. There was a lot of interesting debate over this when the United States went to war in Iraq in the 2000s. People argued that a declaration of war was, strictly speaking, constitutionally necessary with some congressional approval. So, Congress passed an authorization for the use of military force in Iraq in 2001, which is still the legal basis for the U.S.'s military involvement in the Middle East today. This is somewhat stunning. Congress's power to declare war turns out to be less significant than you would think.

The president has the power to pardon criminals. There are a couple of key points to know about this. The president recently pardoned a local sheriff in Arizona who had been found in contempt of court for violating the civil rights of immigrants. He had not yet received a sentence, so the proceedings were not yet over. Despite this, President Trump pardoned him. Under our Constitution, he can do that. There's no real review or check on how the president exercises the pardon power, but there are a few limitations. One is that the president can only pardon federal crimes. So, if there's a state crime, then the president can't pardon that person. That has led people to call for states to investigate Trump and his associates, because any convictions would be beyond Trump's power to pardon.

The treaty power is very important and much in the news. Under the Constitution, the president has the power to enter into treaties on behalf of the United States, subject to the advice and consent of the Senate, which means it has to be approved by the Senate. The challenge to it is that in recent years, presidents have entered into international agreements that have the international force of law of treaties but are not treaties for purposes of U.S. domestic law. They are what we call executive agreements. The reason this is important is that an executive agreement is not confirmed by the United States Senate under the treaty power. A great example of this is the Paris Climate Accord, which, for international law purposes, is a treaty. For U.S. domestic purposes, it is an executive agreement. When it was implemented in the United States,

President Obama enacted it as a regulation with his traditional domestic powers the way one would enact any other regulation domestically. It never went through the mechanism of being approved by the Senate as a treaty. The Constitution is silent about withdrawing from treaties. Let's say the Paris Climate Accord had been ratified by the Senate. The Constitution is silent about whether Senate agreement is required to withdraw from a treaty. People disagree on whether there's a necessity for Senate ratification of a withdrawal from a treaty. It's less important. Both the Paris Climate Accord and the Iran Sanction Agreement are not treaties under U.S. law. They were never sent to the Senate for ratification. They were only enacted domestically through the president's domestic powers.

The appointment power is very important because when it comes to running a government and shaping it to the individual will of the president, the ability to put one's own people into key positions of power is obviously central. In the United States, the president appoints all the secretaries (equivalent to your ministers)—all the heads of offices, but they are subject to confirmation by the United States Senate. So the Senate could reject nominees, and already with Trump a couple of nominees have withdrawn because it was seen as unlikely that the Senate would approve them. This remains a very active check and balance.

I want to spend a minute talking about the filibuster rule. How many of you have heard of the filibuster? The filibuster rule is an internal rule of the United States Senate providing that in order to close off debate on a matter and bring it up for a vote, you need a supermajority in the Senate. You need 60 of those senators. You only need 51 to actually confirm a nomination or approve a proposed law, but to get to the vote you need 60, or else it never comes up for a vote. For those of us who are Democrats, like myself, that's key during Trump's presidency. If the Democrats have at least 40 senators, they can stop things from coming up for a vote. There are a couple of wrinkles to this. One is that the filibuster is an internal rule to the Senate itself, which means it's subject to change by a simple majority of the Senate. There was a period of years when one side would threaten to filibuster and the majority would say, "You keep filibustering, we're going to change the rule." A confrontation would ensue, which would lead to a compromise. The threat that the rule could be changed weakens the power of the rule. Recently, the rule was changed with respect to judicial nominees. The filibuster no longer applies to judicial nominees, which is how Justice Gorsuch, who was a Supreme Court nominee of Trump confirmed last spring, was approved. The Democrats threatened to filibuster and the Republicans changed the rule to say that the filibuster doesn't apply to judicial nominees. It still applies to other officers, agency heads, ambassadors, and other officers of the United States.

One more point on appointments. Congress has to establish the offices. Congress has to fund the offices. Congress can set qualifications for who holds the office. What Congress can't do is say, "We, Congress, want this person to be appointed as a secretary." There have been cases before the U.S. Supreme Court that have struck down statutory systems retaining the appointment power in Congress as infringing on the president's power.

One of the requirements of Article 2 is that the president has to take care that the laws are faithfully executed. Basically, this is what it means to be an executive and to execute the laws. Of course, that means the president must execute the laws, not violate the laws. The other thing about this is the power to remove officers has been read into the "take care" clause. The Constitution makes points about hiring officers. It doesn't say anything about firing officers or removing officers. There's been a lot of debate and discussion over whether Congress can limit the president's power to fire officers. That's been a hotly debated issue regarding the presidency for basically a hundred years. The basic outcome is, for key executive officers, Congress can't limit the president from firing someone. The ability to remove someone from office is part of taking care of executing the laws. Congress can put limitations on a number of positions by requiring that the president have good cause for removing people. There are many high-level offices in the United States where the tenure of these officials is protected by these good-cause requirements. The phrase "independent agencies" in the United States, such as the Federal Communications Commission and the Federal Trade Commission, means that those commissioners can only be removed by the president for good cause. That's considered a significant limitation on the president's power. How much Congress can limit the president's ability to remove officers continues to be a highly debated issue.

The veto power I mentioned can be overridden with a two-thirds vote.

Let's talk for a minute about limits on powers derived from delegation. On a day-to-day basis, this is really critical. Much of what the president does is under authority that has been granted to him by statutes passed by Congress. When Congress passes the statutes, it sets standards and requires procedures, and the president can be held accountable to those standards and procedures. A great example of this would be the Clean Air Act, which is one of the basic environmental statutes in the United States adopted in the late 1960s. It tells the executive branch, "You have the power to create regulations which limit air pollutants in order to protect health and safety." It will require when and how the president should use this power. This power is delegated to the Environmental Protection Agency, which is an agency, or a ministry as you would call it, within the executive branch. A statute called the Administrative Procedure Act,

the APA, would govern how the Environmental Protection Agency, the EPA, conducts its business. What's important here is that when an agency enacts a set of regulations, it has to go through particular procedures. It has to provide advance notice and opportunity for public comment. That all sounds very simple, right? When it issues its final regulations, it has to explain its reasoning and explain its views on the comments it received. An agency's explanations can be challenged in court. If they are found not to be sufficient, the court can overturn the regulation. It's been cumbersome and slow for agencies to issue regulations because this procedure has gotten more and more involved. When the EPA issues regulations, manufacturers often sue to challenge them, and it takes years for them to go into effect. That can be very frustrating if you're in favor of the regulations. That cumbersome process can seem like a major problem. However, and this is the important point, the courts have held that when an agency rescinds regulations—when it takes them back, or deregulates—it has to use all the same procedures that it used when it initially issued them. It has to give notice and opportunity for comment. It has to give reasoned explanations for rescinding them. It can't just say the president didn't like it. It has to point to evidence of the effects of the negative regulations. The reasoning can be challenged in court, and it can take years.

The reason I'm stressing this is because I'm going to give a key example. President Trump has announced that he's pulling out of the Paris Climate Accord, as I'm sure you all know. As I said, the Paris Climate Accord was not a treaty under U.S. law. It was an executive agreement. It was implemented by a set of regulations adopted by the Obama administration through this process using domestic authority, and Obama called his regulations the Clean Power Plan, which regulated carbon dioxide emissions by power generation. All of those regulations went into effect. Now President Trump wants to get rid of them and has announced that he will be repealing the Clean Power Plan. Because of all of these limitations, he cannot just say, "All of these regulations are gone," even though they were issued by an executive department. He has to propose to withdraw them. He has to provide explanations to withdraw them. He has to take comments on whether or not to withdraw them. He has to provide explanation on why he is accepting or rejecting the comments. Those explanations are subject to contest in court. It could take years. That is a major check on the president. To deregulate requires the same process as regulation, and that's a cumbersome process.

Judicial limitations on the president's power. This has been mentioned already in some of my discussion. Executive actions can be challenged in the courts. They are subject to challenge for violation of the Bill of Rights, which is the individual set of rights guaranteed by

the Constitution in the first ten amendments: freedom of speech, freedom of religion, due process, etc. Executive action is also subject to challenge for violating statutory requirements, and that's related to what I was saying in the last slide. If the executive agency rescinds regulations without proper reasons, you can sue to challenge that. One limitation to this, which I just want to dwell on for a moment, is the case of controversy requirement. In order to bring a lawsuit in the United States in the U.S. courts, you need "standing" to bring the case, which means the court has to find that whatever you're suing about is a case for controversy within the meaning of the Constitution. That means you need to be an individual or an organization directly affected by the government action, and you need to show that the remedy will alleviate the harm that you're suffering. There are also some things that are considered political controversies and not cases. These are non-justiciable. I don't know if you have justiciability principles in France. My guess is that you probably do. These come up on some macro-level, grand issues. I'll give you an example. In the 1960s, the Vietnam War was incredibly controversial. There were many people opposed to the Vietnam War. Many lawsuits were filed challenging the legality of the Vietnam War on a number of bases. One was that Congress never declared war. How can we have a war if Congress never declared war? The courts did not hear those cases. They considered them to be political questions, that the plaintiffs did not have standing, or there was no case for controversy. There is some level of generality that will deem things to be not justiciable. In the Vietnam War cases, the courts said yes, Congress did not declare war. But it had provided funding for the Vietnam War, it had approved all the funding requests, and there were many statutes that showed complicity in the Vietnam War. The Court decided Congress can take care of itself on things like that. In many cases of controversy between the president and Congress, the courts will just step aside, saying this is for the president and Congress to solve through the political process themselves.

I want to just touch on one other important subject that everyone has their mind on, especially us in the Northeast of the United States, and it may have even occurred to people in France. Which is: Under the Constitution, how do you remove a president? We have two mechanisms for this. The first is what's known as impeachment. I won't talk about this at length, but the Constitution sets up a process that is kind of framed as a judicial process. It's interesting because it's Congress that actually impeaches—the House of Representatives files the accusation, and the Senate acts as the jury and the judge. It's all framed in terms of crimes. The president can be accused of treason, bribery, or other crimes or misdemeanors. It looks like criminal law models. Maybe one of these scandals will explode and show major criminality.

Some people think it already has. A key point for impeachment to come into play is it has to come through Congress, and at the moment both houses are controlled by Republicans. This is really not a realistic option unless something totally disastrous happens.

I want to spend a little time on the next one. How many of you have heard of the 25th Amendment? I thought I would get a different response on that. The reason you haven't heard of it, first, is because it's one of our newest amendments. It was adopted in 1967. It deals with unsettled issues of presidential succession and has a provision for the removal of a president that many people don't realize is tucked in there. On the face of it, it deals with many different issues, like if the office of vice president is vacant, as has happened many times, how do we get a new vice president? If you pause to think about it, when John F. Kennedy was assassinated and Johnson was president, we had no vice president for several years until Lyndon Johnson was elected as president. There was no mechanism in the Constitution for getting a new vice president. The 25th Amendment creates a mechanism where the president can nominate and Congress can name a new vice president. That's how Gerald Ford got to be president. Richard Nixon resigned and Spiro Agnew had been elected vice president and then resigned. Congress, through the 25th Amendment, had appointed Ford as vice president, and then he became president.

That's not what I really wanted to spend time on. I really want to focus on Sections 3 and 4 of the 25th Amendment. Section 3 deals with when the president is unable to discharge the powers and duties of his office. He can transmit a declaration to that effect and name the vice president as acting president. He can do this on a temporary basis. This has happened a number of times, mostly when presidents have undergone medical procedures. In a nuclear age, it doesn't make sense to have any ambiguity about who's in charge or who has authority. So if the president is going to go under anesthesia, he will appoint, using this power, the vice president as acting president while he's out.

Section 4 of the 25th Amendment provides that the vice president and the majority of the principal officers of the executive bodies or such other bodies Congress may by law provide, may transmit to the Senate and the Speaker of the House the written declaration that the president is unable to discharge the powers and duties of his office and the vice president shall immediately become acting president. The vice president and the majority of Congress can declare the president unable to carry out the duties of his office. In such a case, the vice president becomes acting president and the president is removed from his authority immediately. However, if the president disagrees—if there's a conflict about this—the president can then file

a written objection with Congress, and Congress will have 21 days to resolve the matter. To ultimately remove the president in this manner requires two-thirds vote of Congress. This is a fascinating provision. The thing that's so interesting about this is that it is the only way to remove the president without criminality. Impeachment requires crimes. The 25th Amendment doesn't require any criminal conduct at all.

Many people have been looking at this. As people get more anxious about President Trump, they focus on whether the 25th Amendment is an answer. The people who wrote the 25th Amendment, what they would say is that this is intended to deal with disability. This is not about being competent. This is not about a president who was elected and we decided we made a bad mistake. That's not what this is about. It's not for correcting a big mistake at the ballot box. You can dig down one level deeper. Many people say, let's not be so quick; let's not say that this is unrelated to medical issues. Because if you see medical issues as encompassing both physical issues and mental health, there's a case to be made. The 25th Amendment case on Donald Trump is if he is unable by reason of a mental disability or psychological disability to carry out the duties of his office. On this point, people may begin to discuss it. I've seen some reports that say that something like a third of all presidents may have had psychological issues. If a psychological issue was a disqualifying factor in itself, then half of all presidents would have been removed because it tends to be extreme personality types that end up being president in the first place. There are also examples, like during the American Civil War, when Lincoln's son died from tuberculosis and he went into a terrible depression. Could he or should he have been removed by the 25th Amendment? The 25th Amendment didn't exist 100 years ago, of course. If it had, would he have been subject to removal? No one wants that. So people are cautioning not to be too fast on declaring things to be psychologically incapacitating on mental health grounds. You can imagine that debate, as things continue to unfold, gaining some steam. The American Psychological Association put out an opinion last year saying that it's inappropriate for psychologists to venture opinions on the psychological state of people they haven't examined. That was a way of saying that psychologists shouldn't be offering professional opinions that Trump is crazy, because they haven't examined him. You might think he's crazy, but that's not a professional opinion.

The bottom line is, for the 25th Amendment to be involved, the vice president and the majority of the president's cabinet must be on board. If the president contests it, two-thirds of each house of Congress must agree. So we're nowhere near close to this, but people are fantasizing about it and now you can too.

I would like to wrap up. I set out to think about this topic in the wake of the election. Thinking about, can I sleep better at night knowing that there are substantial checks on the powers of the United States president such that the president cannot do all kinds of crazy things by himself and we'll all be okay? The answer is kind of mixed. There are a lot of things that look like checks on the president. They look like checks on paper, but a great qualification is that the checks all come from different branches. If Congress is controlled by the same party as the president, then they don't work so well. This whole system is based on the idea that we have three independent branches that act independently, but if the president and Congress are not acting independently—if they are all part of the same political party that are all acting together in concert—then a lot of these limitations don't really function as limitations at all. Some of them do. Some of them will continue. There's a lot of resilience in the American system, which is why—to a certain extent—those limitations on rescinding regulations have a lot of practical bite, rather than some of the requirement of going back to Congress. Anytime you can get the courts involved, that's going to be a lot more substantial check than bringing Congress into play. It's all still in flux. We will see. I can't say I have necessarily succeeded in comforting myself or you, but I will say we have some questions to think about.