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**From the Selected Works of Seth Barrett Tillman**

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Extract from Karen Crabbs Fernandes' Delegation and the Administrative State (unpublished Ph.D. dissertation) citing Levinson-Tillman exchange and other Tillman publications

Seth Barrett Tillman, *None*



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DELEGATION AND THE ADMINISTRATIVE STATE:  
THE NEW PROCESS OF GOVERNING AND ITS EFFECT ON THE DEMOCRATIC SOUL

A Dissertation  
submitted to the Faculty of the  
Graduate School of Arts and Sciences  
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degree of  
Doctor of Philosophy  
in Government

By

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not lead to a curtailment of our liberty and freedom if we could formulate correctly the idea of a “democratic republic” (Diamond 1987, 665). The question was how to structure such a government.

#### D. American Democracy and the Non-Delegation Doctrine

The most obvious place to begin a discussion about the structure of our government, and what that structure is meant to provide, is with the Constitution and its original intent,<sup>41</sup> although the importance of original intent is subject to debate.<sup>42</sup> Aware of some of the pitfalls of democracy as outlined by the philosophers above and equally aware that even assuming a direct democracy were desired, it would not be feasible in such a large country,<sup>43</sup> the Framers of the

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other than by voting; these include “direct contact, protest, and campaign activity or contributions” although admittedly many factors affect whether a person has the opportunity to use these devices).

<sup>41</sup> See Berger, *Federalism, The Founders' Design*, 16-17 (noting that it has long been accepted practice to begin statutory or constitutional interpretation by looking to the express words used in the document and the intent of the parties in writing it); see also Dicey, *The Law of the Constitution*, 15-16. One cannot be entirely sure that the intent of the Framers is always reflected in the language of the Constitution, inasmuch as (1) opinions about the meaning given to certain passages diverged among those debating ratification, and (2) the Constitution as written is purposely written in broad language. See Rakove, *Original Meanings*, 3-22; McGowan, “Ethos in Law and History”; Tillman, “The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation.” Others, however, as noted at the beginning of this note, argue that those responsible for drafting the Constitution were legal technicians of sorts, who used precise language from the English legal tradition which was meant to convey a specific meaning. See Berger, “Jack Rakove’s Rendition of Original Meaning.”

<sup>42</sup> The debate centers around judges’ and political scientists’ views that the judiciary is meant only to interpret whether laws enacted by Congress are constitutional or, in contrast, whether judicial activism is called for, i.e., that the job of the judiciary is to right wrongs in society which the legislature has been unable to correct. See, e.g., Rakove, *Original Meanings*; Wolfe, *The Rise of Modern Judicial Review*; Bork, *The Tempting of America*; Garraty, ed., *Quarrels That Have Shaped the Constitution*; Tribe, *Constitutional Choices*; Hyneman, *The Supreme Court on Trial*; Loss, ed., *Corwin on the Constitution*, Vol. II (The Judiciary); Berger, “Jack Rakove’s Rendition of Original Meaning.”

<sup>43</sup> *Corwin on the Constitution*, Vol. I (The Foundations of American Constitutional and Political Thought, the Powers of Congress, and the President’s Power of Removal), 162; Lecky, *Democracy and Liberty*, Vol. I, 57-58; Roberts, *Athens on Trial*, 10, 81-84 (noting that the American Founders considered

powers are to be exercised.”<sup>163</sup> While this appeared to signal a shift in the Court’s reasoning on delegation, the justices distinguished between delegation of authority between the houses of Congress, which was impermissible under the Constitution versus delegations of Congressional authority to agencies.<sup>164</sup> The latter was permissible because the agencies were required to implement the standards set forth by Congress. The Court stated that

the Constitution provides Congress with abundant means to oversee and control its administrative creatures. Beyond the obvious fact that Congress ultimately controls the administrative agencies in the legislation that creates them, other means of control, such as durational limits on authorizations and formal reporting requirements, lie well within Congress’ constitutional power.<sup>165</sup>

Subsequently, the Supreme Court again sidestepped the issue of delegation in *Mistretta v. United States*, 488 U.S. 361 (1989). It also did not indicate why this case, which had life and death implications and criminal elements which had in the past formed a basis for ruling against the government, was not one which violated the Constitution (Schoenbrod 1993, 45).

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<sup>163</sup> *INS v. Chadha*, 462 U.S. at 945; but see Tillman, “A Textualist Defense of Article I, Section 7, Clause 3” (arguing that not all legislative actions require that both houses of the legislature agree and present the legislation to the president); Strauss, “Was There a Baby in the Bathwater?”; see also Tillman, “The Domain of Constitutional Delegations Under the Orders, Resolutions, and Votes Clause.”

<sup>164</sup> *INS v. Chadha*, 462 U.S. at 952-55; see also Schoenbrod, *Power Without Responsibility*, 44; but see Pierce, “Political Accountability and Delegated Power,” 407-8 (arguing that *INS v. Chadha* and other recent Supreme Court cases have established that Congress can only control agency decision-making through the process of statutory enactment).

<sup>165</sup> *INS v. Chadha*, 462 U.S. at 955 n.19 (citations omitted); see also *ibid.*, n.18; Schoenbrod, *Power Without Responsibility*, 44. Although not specifically relying on the non-delegation doctrine in *Clinton v. New York*, 524 U.S. 966 (1998), the Supreme Court also invalidated Congressional legislation which allowed the president broad discretion to cancel specific spending items in appropriations bills as well as certain tax benefits (the line item veto). See Epstein and O’Halloran, “The Nondelegation Doctrine and the Separation [sic] of Powers: A Political Science Approach,” 947-48. For a critique of the Court’s decision in *Clinton v. New York*, see Rappaport, “The Selective Nondelegation Doctrine and the Line Item Veto”; Kline, “The Line Item Veto Case and the Separation of Powers.”

therefore left it to the agency to fill in, agency personnel, although exhibiting an expertise perhaps not held by congressional staff in an area such as immigration, also struggle to formulate rules, particularly when there are always exceptions.<sup>403</sup> These exceptions would then still come to light only on a case-by-case basis, leading to the same uncertainties and possible court intervention and legislative amendments -- a process (like that of Chinese nationals seeking asylum here) which can take years and appears to be never ending.

Furthermore, to the extent Congress was able to act quickly to repeal or express dissatisfaction with an agency rule, it has been pointed out that this rarely occurs, in part because attempts to expedite the review procedure has resulted in insufficient information with which Congress can assess the application and effect of the rule. An additional problem is that forcing agencies to report to Congress seriously hampers their ability to carry out their mission and, at any rate, with the Supreme Court's decision in *Chadha*, any attempt to repeal an agency's rule would require a high level of commitment from the legislature, yet still be subject to veto by the President. In that sense, and this has also been noted elsewhere, the Supreme Court has greatly hindered members of Congress from ever taking back delegated power, even assuming it was theirs to delegate in the first place.<sup>404</sup> The result is often piecemeal legislation which merely

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<sup>403</sup> See *Guyadin v Gonzales*, \_\_\_ F 3d \_\_\_, 2006 WL 1461135 at \*4 (2d Cir. May 26, 2006) (“Statutes, regulations, and case law regularly change, and the cases before IJs [immigration judges] require subtle legal analysis as well as robust factfinding generally dependent on credibility assessments that a reviewing court cannot duplicate.”).

<sup>404</sup> One scholar has proposed a clever way, which just might work, in which to “force” the Supreme Court to overrule its decision in *Chadha*. See Tillman, “*Overruling INS v Chadha*: Advice on Choreography,” responding to Sanford Levinson, “Assuring Continuity of Government” ( a critique of Tillman’s “Model Continuity of Congress Statute”) (all forthcoming) Congress should authorize a salary increase for the upper echelon of federal employees, but make the judiciary’s increase subject to a single-house order. Once presented to and signed by the President, the Office of Legal Counsel will explain to the President that without both Houses agreeing on the raise, such legislation is unconstitutional, as per *Chadha*. Tillman’s prophesy is that it will take little time for at least one federal judge to sue for his wages

complicates the laws, too multifarious as it is.

Nevertheless, Lowi's suggestion that the development of an elite core of independent and integrated administrative class, what he calls a "Senior Civil Service" (Lowi 1969, 304) has particular draw, despite appearing to increase the independence and growth of the fourth branch. Although Lowi appears to propose a type of excellence and knowledge which is sought out in the French bureaucracy through recruitment from the grandes écoles, he also notes that by recruiting from the agencies themselves, our administration would maintain a balance of legal and technical skill, yet at the same time promote pluralism by allowing greater access to the bureaucracy by various groups which have complaints about or issues with agency actions (ibid., 304-5).

While perhaps not gaining the "prestige" that the French administration has attained, Lowi's proposal would at least lend some legitimacy to the American bureaucracy, particularly because the members would be culled from various agencies and, therefore, hopefully maintain neutrality (ibid., 304). Furthermore, it could put into effect Mill's proposal for the bureaucracy: leaving policy to the representatives while allowing for a "legislative commission" to draft the legislation in order to prevent piecemeal amendments and ensure comprehensive legislation "'capable of fitting into a consistent whole with the previously enacted laws'" (Warner 2001, 408 (quoting Mill, *On Representative Government*, 77)). In fact, Mill wrote that the purpose of such a commission within the bureaucracy was to provide laws which are "'framed with the most accurate and long-sighted perception of its effect on all the other provisions'" -- "[a]chieving this is impossible when the laws are voted on clause by clause," as has been shown elsewhere in this paper (ibid.).

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and that he will prevail when the case reaches the Supreme Court. Tillman, "*Overruling INS v Chadha* "

*Law Journal* 51 (Summer 2002): 1131-85.

Tillman, Seth Barrett. "The Domain of Constitutional Delegations Under the Orders, Resolutions, and Votes Clause (Reply to Gary S. Lawson)." *Texas Law Review* 83 (April 2005): 1389-97.

———. "The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation." *West Virginia Law Review* 105 (Spring 2003): 601-19.

———. "Overruling *INS v. Chadha*: Advice on Choreography." *Pierce Law Review* 4 (2006) (forthcoming).

———. "A Textualist Defense of Article I, Section 7, Clause 3: Why *Hollingsworth v. Virginia* was Rightly Decided, and Why *INS v. Chadha* was Wrongly Reasoned." *Texas Law Review* 83 (April 2005): 1265-1372.

Ting, Jan. "Immigration Law Reform After 9/11: What has been Done and What Still Needs to be Done." *Temple International and Comparative Law Journal* 17 (Fall 2003): 503-21.

Verba, Sidney. "Would the Dream of Political Equality Turn out to be a Nightmare?" *American Political Science Review* 1, No. 4 (December 2003): 663-79.

Wardle, Lynn D. "Divorce Violence and the No-Fault Divorce Culture." *Utah Law Review* 1994: 741-75.

Warner, Beth E. "John Stuart Mill's Theory of Bureaucracy within Representative Government: Balancing Competence and Participation." *Public Administration Review* 61 (July/August 2001): 403-13.

Wible, Brent S. "The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry after *St. Cyr*." *Georgetown Immigration Law Journal* 19 (Summer 2005): 455-93.

White, Daniel J. "The Nondelegation Doctrine Revisited: *Whitman v. American Trucking Associations*." *University of Cincinnati Law Review* 71 (Fall 2002): 359-82.

Wright, Benjamin F. "*The Federalist* on the Nature of Political Man." *Ethics* 59, No. 2 (January 1949): 1-31.

Wyatt, Bradley J. "Even Aliens Are Entitled to Due Process: Extending *Mathews v. Eldridge* Balancing to Board of Immigration Appeals Procedural Reforms." *William and Mary Bill of Rights Journal* 12 (February 2004): 605-36.

Yoo, Donald W. "Exploring the Doctrine of Imputed Political Opinion and its Application in the Ninth Circuit." *Georgetown Immigration Law Journal* 19 (Spring 2005): 391-407.