Written by **Steve Byas** on May 18, 2016

The Student Aid Funds Case and the Garland Nomination

A little-noted case, *United Student Aid Funds v. Bible* (the last name of a litigant in the case, not the Scriptures), illustrates exactly what is at stake in whether the U.S. Senate chooses to confirm Judge Merrick Garland (shown) to the U.S. Supreme Court.

The Supreme Court announced on Monday that it would not hear an appeal of the case, over the dissent of Justice Clarence Thomas. Put simply, it involves how federal agencies and departments — in this case, the U.S. Department of Education — interpret their own regulations. Unfortunately for the cause of limited government, the federal courts have generally adopted the view that their duty is to defer to the will of Congress, the president, and even federal executive branch agencies and departments, rather than to the Constitution. This stance of deference, as in the case of *NFIB v. Sebelius* (in which the Court upheld ObamaCare by a 5-4 decision), has led to both the legislative and executive branches expanding their powers beyond those granted to them by the Constitution.

In the case of *Chevron v. Natural Resources Defense Council*, the Supreme Court held that such deference should be allowed to federal agencies in the interpretation of federal law in developing their own regulations. This means unelected federal bureaucrats, in effect, are making law, despite it being the clear wording of the Constitution that all legislative powers granted in the Constitution are held by Congress, not the president or any other person in the executive branch.

At the time, Justice John Paul Stevens defended such administrative interpretations of the law. “Judges are not experts in the field,” he ruled, while he contended that bureaucrats in the agency interpreting the law are supposed to be “experts.” He also asserted that these unelected bureaucrats are closer to the electorate than are life-tenured federal judges. “While agencies are not directly accountable to the people, the chief executive is,” Stevens said, adding that presidents are usually in charge of an executive agency. (This is not even always true, as there are a growing number of “independent” agencies.)

But, what happens when the agency itself issues rules that are also ambiguous? When American citizens attempt to follow such ambiguous rules, they often run afoul of bureaucrats who interpret the rules in such a way as to bring the unlucky citizens into conflict with these subjective interpretations. This is the very essence of the rule of men, not the rule of law, despite the Constitution having

established a republic. In spite of this problem, even Justice Antonin Scalia argued in the case *Auer v. Robbins* that courts should defer to an agency's interpretations of its own regulation, unless that interpretation is "plainly erroneous or inconsistent with the regulation."

Scalia, along with Thomas and fellow justices John Roberts and Samuel Alito, later had second thoughts about the *Auer* decision, and "called for its reconsideration in an appropriate case." It taking four votes to hear a case on appeal, the untimely death of Scalia probably precluded the Court from hearing the *Bible* case on appeal. They still would have needed the wildly unpredictable Anthony Kennedy to actually reverse or modify *Auer*, but at least there would have been a chance.

Why is this case so important? The *Auer* ruling was cited by a federal appeals court's recent decision that schools must allow "transgendered" individuals to use a bathroom that fits whatever meets the "gender" with which they identify. (The Obama administration, in a letter sent to all public schools in the United States last Friday, claimed that under federal law transgender students may use not just the bathrooms but also the locker rooms of the opposite sex.)

Which leads to President Barack Obama's appointment of the supposed "moderate," Merrick Garland. Garland appears to be of the "deference" school of thought — that is, deference to the legislative and executive branches, not the Constitution. He sided with the Bush administration in blocking Guantanamo Bay detainees from using civil courts to challenge their detention, and he likewise deferred to the Obama administration in Obama's defense of some agency-made law by the Environmental Protection Agency (EPA).

Georgetown law professor Irving Gonstein has observed Garland closely, noting, "He's worked in the government, and he tends to think the people there are doing their best and working in good faith." (Garland was the federal prosecutor in both the Unabomber and Timothy McVeigh cases.) Garland is "almost always deferential to agency interpretations of statutes," added UCLA law professor Ann Carlson.

When appellate court judges struck down the draconian gun control laws of Washington, D.C., Garland, a judge on that court, voted to reconsider the action and have the entire appellate court look again at *DC v. Heller*. Fortunately, the case still made its way to the U.S. Supreme Court, which held that the Second Amendment protects an individual right to bear arms — no thanks to Judge Garland.

So, with Garland nominated by Obama to replace Scalia, the Republican-majority U.S. Senate is under pressure to hold hearings, and give him a floor vote. This pressure is coming from the Democrats in the Senate, the Democrat White House, and their allies in the mainstream media, despite the precedent of the so-called Biden Rule of 1992. At that time, Senator Joe Biden rejected the idea that Republican President George Herbert Walker Bush should be able to make a Supreme Court selection during an election year.

Now, of course, Biden protests that the situation this year is different. Of course it is — now it is a Democrat president who wants to add another member to the Court, not a Republican. That's the difference.

Despite all the propaganda saying that the Senate "owes" Garland hearings, and even a vote, the principal obligation of the Senate is to the Constitution, not Garland. It is obvious that Garland is not a person whose first duty is to the Constitution; it is rather to Congress, the president, and even to federal bureaucrats.

The Constitution — which every senator and federal judge takes an oath to uphold — in Article II,

Section 2 states that the president "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States."

Whenever a vacancy occurs on the federal bench, it is clearly an obligation of the president to make a nomination — the Constitution states that he shall nominate. But no such duty is placed upon the Senate. The president is to seek the advice of the Senate before making such a nomination, and then seek their consent.

If the president does not obtain that consent, then the nomination fails. The Constitution says nothing about the Senate being required to hold hearings, take votes, or anything else. It is a choice for the Senate to make, even if that choice is to do nothing.

It is not unusual for one house of Congress to pass a bill, and it to not even obtain a hearing in the other house. A vote is certainly not required by the Senate just because the House of Representatives passes a bill. Before the Republicans won the Senate with the 2014 elections, it was quite common for a bill to sail through the Republican House only for there to be absolutely no action on it in the Democratic Senate led by Senator Harry Reid. Several attempts at the repeal of ObamaCare met this fate of no action in the Senate. In fact, such inaction was applauded by the liberal media.

History provides many examples of the Senate failing to take up presidential nominations to the High Court. Then-Senator Barack Obama was joined by then-Senator John Kerry in an unsuccessful filibuster against Samuel Alito. In other words, Obama and Kerry were actively withholding their consent.

The Constitution does not even state that there have to be nine justices on the Supreme Court — although that has been the number since 1869. Democratic President Franklin Roosevelt even asked for Congress to raise the number of the justices to 15, but his scheme was defeated 70-20.

In our time, it has become quite clear that many Supreme Court judges are unwilling to do their duty to the Constitution, but prefer to allow the government to grow far beyond the markers set for it in the Constitution. In such a circumstance, the Senate is actually doing its duty in refusing to confirm the addition of yet another judge to the Supreme Court who would also ignore his obligation to the Constitution.

The nation deserves members of the Supreme Court whose first duty is to hear the facts of the case before them, and apply the appropriate federal law to that case, unless of course that law is in contradiction to the Supreme Law of the Land, the Constitution. Then, the judge should follow the Constitution — not a president, a Congress, or a federal bureaucrat, and certainly not "precedent," a prior court decision which might have ignored the Constitution.

Judge Merrick Garland does not appear to be one who would put the Constitution above the wishes of Congress, the president, and federal bureaucrats, and the Senate is doing its duty to ask for a nominee who will follow the Constitution.

Photo of Judge Merrick Garland: AP Images

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