institutional perspective, presidential signing statements are simply executive analogues to legislative histories. Like legislative histories, they seek to guide the courts' subsequent determination of what statutes mean. But from an intrainstitutional perspective, legislative histories and presidential signing statements are very different. To the extent that the executive branch is more unitary than the legislative branch, presidential signing statements are not inherently self-limiting. The writer of the presidential signing statement, unlike individual legislators, has nothing to lose and everything to gain by having the statement count as much as possible. To this degree, then, presidential signing statements may represent a greater cause for concern to those worried about the balance of political control over statutory interpretation.

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COMMENTARY

The Theory of Interpretive Canon and Legislative Behavior

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The purpose of Daniel Rodriguez's essay is to demonstrate that Congress has the motive and opportunity to influence how courts interpret statutes and that, in fact, Congress is quite influential in shaping both the methods of statutory interpretation used by the courts and the actual interpretations that the courts make. In making his case, Rodriguez persuasively summarizes the argument that in some important cases vaguely worded statutes are more valuable to legislators than concisely worded laws. The essence of the argument is that vaguely worded statutes are sometimes more durable, thereby avoiding new legislation when new circumstances arise or more information is acquired.[1] The value of vagueness in contributing to the durability of statutes, however, depends on the interpretive methods that the courts (and, consequently, implementing agencies) will apply.

[1]Rodriguez's case for statutory ambiguity can be strengthened by including two additional arguments from positive theory: first, the possibility that legislators can shift the responsibility for policies some constituents oppose by giving policy discretion to the bureaucracy; and second, the possibility that, in view of the fact that administrative evidentiary processes can generate better information than legislative processes, the benefits of a more informed decision by an agency will more than offset the loss of political control due to delegation. On these matters, see Fiorina (1985), Bawn (1991), McCubbins (1985), and McNollgast (1989).

Rodriguez notes that the interpretive canons adopted by the courts constitute an incentive structure for Congress (and, we add, the president and the bureaucracy) to generate the kind of information that would influence statutory interpretation according to those canons. Thus, if the courts decide to accord one aspect of legislative history (e.g., floor debates) more weight than another (e.g., committee reports), members of Congress can direct more effort at making interpretive statements about legislation on the floor and less at carefully crafted, detailed committee reports.

Rodriguez's most novel contribution is his argument that Congress can influence the choice of canons by the court through its ordinary day-to-day activities. Congress can state in statutes whether it wants a statute to be construed narrowly or broadly and whether it wants the implementing agency to have substantial or minimal discretion in extending the reach of the statute. Both Congress and the executive branch can undertake investigations and write reports about how they want statutes to be interpreted. These activities not only will influence judges who for political or philosophical reasons want to accord weight to the opinions of elected political officials but also will convince even the most independently minded justice that, in Rodriguez's words, "Congress is *watching* them" (and likewise the president).

Rodriguez emphasizes the positive theory of statutory interpretation: how will the relevant actors (courts, agencies, Congress, the president), in pursuit of their objectives concerning policy outcomes and government processes, interact to produce a durable method of statutory interpretation? And what forces explain why interpretive methods change? But Rodriguez's approach has important normative implications as well. One line of normative inquiry addresses the issue of legislative efficiency: what set of interpretive canons maximizes the net benefit of legislation from the perspective of the coalition that enacted a statute? Another line of normative inquiry measures the political legitimacy of interpretive canons: what methods of statutory interpretation are most compatible with the normative democratic theory embodied in the U.S. system of government, the most important statement of which is the Constitution? To answer these questions requires a determination of whose preferences are worth respecting in interpreting the purpose of a statute.

The approach to statutory interpretation taken by Rodriguez reaches strong conclusions about each of these questions. As a normative matter, Rodriguez's approach leads to the rejection of both the extremely narrow "textualist" method or the extremely passive "deference to agencies" method. As a positive matter, Rodriguez's argument demonstrates that even if one is convinced by the normative case for either of the above, either approach to statutory interpretation is not likely to be politically stable. That is, it is in the interests of *all* of the relevant actors to adopt less extreme interpretive methods.

The nonpolitical view of the legislative-judicial interaction holds that the legislature is nonstrategic with respect to the courts. In such a world, the courts can influence law in a straightforward manner through designing the standards by which laws are accepted or rejected, and interpreted. Though political officials may adapt to the new environment in this view, they do so in a nonstrategic way, i.e., by writing legislation that meets the new criteria. Yet, as Rodriguez emphasizes, the process of legislation is both political and interactive with respect to the courts. If the courts change their canons, the Congress (and other political actors) will adapt to this change not only in the nonstrategic way of obeying the command, but in strategic

ways as well.[2] Because the latter are often not obvious, so, too, are the ultimate effects of a change in canons.

Two Illustrations

To highlight the importance of the positive implications of Rodriguez's approach, we discuss two of Rodriguez's illustrations of how a change in interpretive canons leads to a change in legislative behavior. Consider first the case of textualism, a set of interpretive canons associated with the new, conservative majority on the Supreme Court. Some members of the Court hope to use textualism to roll back some broad readings of legislation, notably the 1970s readings of the 1964 Civil Rights Act, e.g., *Griggs v. Duke Power* (1971). The intended effect of textualism is clear: by proscribing reliance on legislative indicia such as committee reports and floor debates, much of the support for a broad reading of legislation disappears, thus clearing away objections to a narrower reading.

As Rodriguez's discussion of the 1991 Civil Rights Act demonstrates, however, looking at the courts alone leads to a poor prediction of the effect of a judicial change in interpretive canons. The reason is that those in Congress favoring current reading have reacted to textualism's threat. The 1991 Civil Rights Act, for instance, explicitly directed the courts to interpret not only that act broadly, but all other civil rights legislation.[3] This clearly places textualist judges in a dilemma, for as legislative text speaking directly to an issue, it cannot easily be ignored.

A second illustration raised by Rodriguez concerns the increased use of presidential signing statements under Reagan, an attempt to provide a new form of legislative indicia for use by the courts. These statements, if accorded weight in statutory interpretation, would give the president an opportunity to counterbalance the influence accorded to members of Congress via judicial reliance on legislative history. Though there remains considerable uncertainty over the weight judges will ultimately accord to these statements, a decision by the courts to rely on them probably would be of advantage to the president, but not for the naive reason that the legislative process will be unchanged save for an important new set of indicia potentially used by the courts. If courts begin to rely on signing statements, Congress will adopt strategies to vitiate their importance. One such strategy is to write statutory language that limits the plausible range of interpretive messages from the president. Another is to negotiate the wording of the signing statements before final passage of an act. Just as the legislators now negotiate in a variety of ways with the president over an act's provisions, if judges start to use these statements, legislators will start to negotiate over the contents of presidential signing statements. Once their contents become subject to negotiation, they will no longer represent the president's interpretation alone, but a compromise between the president's view and those of the majority coalition in Congress.[4]

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[2]For a more detailed elaboration of how elected officials react to changes in interpretive canons, see McNollgast (1992).

[3]Rodriguez (1992), herein.

[4]Nonetheless, as we observe elsewhere, because the signing statements need not be produced until after the legislative process is completed, their contents are subject to opportunistic bias by the president (see McNollgast 1992).

Conclusion

To conclude our comment, we again emphasize that Rodriguez's paper has important positive and normative implications. Among the former, we stressed that judicial changes in interpretive canons lead to changes in legislative behavior. Political officials understand that the ultimate outcome of the legislative process depends on how courts interpret legislation. A change in the canons will change the effects of any act. Because legislators care about the latter, they will adapt both the contents of the act and the relevant indicia in order to influence later court interpretation. Understanding the result of any change in canons therefore requires understanding its implications for the legislative process. This, in turn, necessitates predictions about the adaptive strategies of political officials.

Finally, Rodriguez's view implies that a choice among canons based on normative principles cannot take place without a positive model of the legislative process. Unless the choice of canons is grounded in an appropriate understanding of the political process, it is unlikely to have its intended effect.

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