

Judicial Role in a Nonjudicial Setting

Some Empirical Manifestations and Consequences

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One welcome by-product of a major comparative study of recent state constitutional conventions has been a series of interviews with the judges who served as convention delegates. They are particularly interesting, not only because of the paucity of interviews with sitting judges, but because they permit us to directly compare the attitudes of judges with those of other political elites. To date, this has not been possible.

Initial analysis of the responses of the judges who served as delegates to the New York Constitutional Convention, reported in these pages, lent support to the concept of an independent judicial role or perspective, systematically differentiating judges from other political groups, including lawyers (Sprague et al., 1970). This conclusion has been reinforced by further study, based on the comparison of the responses of judges and other convention delegates in two states—New York and Maryland—and on the comparison of the responses of the judges and other delegates before and after the conventions.¹

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TABLE 1
A COMPARISON OF JUDICIAL AND NONJUDICIAL ATTITUDES
TOWARD CONSTITUTIONAL CONVENTIONS

	New York				Maryland				
	Judges	Lawyers	Other Delegates	Judges	Lawyers	Other Delegates	Judges	Lawyers	Other Delegates
1. "Constitutional conventions are as political as anything else." ^a									
Idealist (disagree)	86%	57%	56%	100%	69%	55%			
Realist (agree)	14%	43%	44%	0%	31%	45%			
n	(21)	(93)	(48)	(6)	(55)	(55)			
2. "A constitutional convention is something special and is, therefore, above politics." ^b									
Idealist (agree)	74%	47%	49%	100%	53%	62%			
Realist (disagree)	26%	53%	51%	0%	47%	38%			
n	(19)	(85)	(47)	(6)	(57)	(55)			

a. In New York, when judges are compared with lawyers, χ^2 is significant at .02; when judges are compared with other delegates, χ^2 is significant at .02; when judges are compared with all nonjudicial delegates, χ^2 is significant at .02. In Maryland, when judges are compared with lawyers, χ^2 is significant at .20; when judges are compared with other delegates, χ^2 is significant at .05; when judges are compared with all non-judicial delegates, χ^2 is significant at .05.

b. In New York, when judges are compared with lawyers, χ^2 is significant at .05; when judges are compared with other delegates, χ^2 is significant at .10; when judges are compared with all nonjudicial delegates, χ^2 is significant at .05. In Maryland, when judges are compared with lawyers, χ^2 is significant at .05; when judges are compared with other delegates, χ^2 is significant at .10; when judges are compared with all non-judicial delegates, χ^2 is significant at .05.

ATTITUDES PRIOR TO THE CONVENTIONS

The first round of interviews was conducted prior to the business of the conventions; we are thus directing attention to the intellectual baggage which the delegates brought with them, before their experience in the convention had impinged upon their attitudes. Delegates were asked to note their agreement or disagreement with a series of statements, including the following: "Constitutional Conventions are as political as anything else"; "A Constitutional Convention is something special and is, therefore, above politics." As a rough shorthand, responses identifying conventions with politics have been labeled "realistic," and responses suggesting that conventions are other than political have been labeled "idealistic." Table 1 demonstrates that the responses of the judges to those two questions differentiate them sharply from the other delegates. Clearly the judges are much more "idealistic" than the other delegates—including lawyer delegates when they are separately tabulated. The symbol "constitutional convention" rang a judicial—as distinguished from a legal—bell. It is most interesting that the patterns of response in Maryland and New York are strikingly similar.

These differences do not appear to be a function of the socioeconomic variables generally considered significant by political scientists (Sprague et al., 1970; Beiser, 1969).² Differences in attitude were elicited only by questions regarding constitutional conventions and politics. They did not appear when socioeconomic or general social attitudes were considered.³

ATTITUDES AFTER THE CONVENTION

The obvious problem at this point is to determine whether the differences between the responses of judges and others to attitude questions amount to anything more than superficial "window dressing." Was it simply the case that the judges felt obliged to mouth pious platitudes which were in no way related to their actual behavior or perceptions? In both conventions the judges were active participants. In New York they occupied positions of

formal leadership. In both they were perceived as sources of leadership by other delegates on sociometric indicators. A factor analysis of New York roll call votes revealed judges responding within the two closely cohesive party blocs. Every judge had a higher rate of voting correlation with every other judicial delegate of his own party than he did with any judicial delegate of the opposite party. In the much more fragmented Maryland Convention, a factor analysis found the judges distributed across three of the four blocs.

Another important distinction between the Maryland and New York Conventions should be noted. The institutional setting of the New York Convention maximized party politics. Delegates were chosen in elections in which they were identified by party labels. The convention was organized along party lines, and it resembled the state legislature in many details. Party affiliation was the major determinant of voting (Cohen et al., forthcoming). In Maryland, on the other hand, the setting differed significantly. Party politics played virtually no role in the selection process, or in the activities of the convention (Swanson et al., 1970).

It is from our postconvention interviews that we are best able to confront the issue of the depth of the initial attitudes held by the judges. The postconvention interviews reveal a striking change in the attitudes of the New York judges. As indicated by Table 2, they no longer argued that a constitutional convention is apolitical. During the course of the convention they had become constitutional realists. In Maryland, by contrast, the attitudes of the judges on this score remained virtually unchanged.⁴ That is to say, having undergone an intensely partisan experience, the New York judges abandoned their idealistic conception of what a constitutional convention is all about. The judges in Maryland, whose convention experience was nonpartisan, continued to espouse the idealist position.

The significance of this is twofold. First of all, if the judges' postconvention attitudes are a function of their experience as delegates, it seems reasonable to infer that their preconvention attitudes were a function of their experience as judges. Secondly, the deference expressed by the judges toward constitutional conventions in the initial interviews must have involved more than

TABLE 2
THE CHANGE IN JUDICIAL ATTITUDES TOWARD
CONSTITUTIONAL CONVENTIONS DURING THE
NEW YORK CONVENTION

	Judges	Lawyers	Other Delegates
1. "Constitutional conventions are as political as anything else."	(n) ^a	(n) ^a	(n) ^a
Idealist (disagree) prior to the convention	86% (21)	57% (93)	56% (48)
Idealist after the convention	20% (15)	20% (80)	27% (52)
Loss of idealism (difference in percentage points)	66	37	29
2. "A constitutional convention is something special and is therefore, above politics."			
Idealist (agree) prior to the convention	74% (19)	47% (85)	49% (47)
Idealist after the convention	31% (15)	34% (80)	33% (52)
Loss of idealism (difference in percentage points)	43	13	16

a. n here is the total number responding to each question. The differences in number responding should not be taken as cell entries indicating frequency of agreeing or disagreeing with the question. Thus, for example, eighteen of twenty-one judges were idealists before the convention, while three of fifteen were idealists afterward.

compliance with popular expectations. If the New York judges were willing to be candid in their postconvention interviews, why should we question their candor in the first-round interviews? And how are we to understand the continued insistence by the Maryland judges that constitutional conventions are nonpolitical?

There is additional evidence which suggests that the attitudes expressed by the New York judges in this respect were deeply held. The delegates were asked whether they were glad they had served. Nearly all of the nonjudicial delegates responded affirmatively, but fewer than half of the responding judges indicated that they were glad they had come (Table 3). In Maryland, by way of contrast, all seven judges responded positively.

Table 4 indicates that there was a strong relationship between the judges' shift to more "realistic" perceptions during the convention, and their general happiness.⁵ All seven of the judges

TABLE 3
DELEGATE REACTION TO THE NEW YORK CONVENTION

"Would you say, as of now, that you are glad that you became a delegate, or sorry?"			
	Judges	Lawyers	Other Delegates
Glad	47%	92%	92%
Not glad ^a	53%	8%	8%
n	(15)	(78)	(52)

χ^2 is significant at the .01 level

a. "Not glad" includes those who stated that they were sorry they attended, those who said that they could not decide whether they were glad, and two judges who said they were "glad," but went on to say they would never do it again. Refusals to answer, or incomplete interviews are not so counted.

TABLE 4
**THE RELATIONSHIP BETWEEN A LOSS OF
CONSTITUTIONAL-IDEALISM AND JUDICIAL UNHAPPINESS**

	Loss of Idealism ^a	
	Yes	No
Glad ^b	2	5
Not glad	7	0

Fisher's p is significant at the .05 level

a. "Yes" under "loss of idealism" means that during the course of the convention, the judge switched from the idealist to the realist position on one or both of the following statements: "Constitutional conventions are as political as anything else"; "A constitutional convention is something special and is, therefore, above politics."

b. Glad-not glad is based on the question: "Would you say, as of now, that you are glad that you became a delegate?" (see note to Table 3).

who declined to say that they were glad they attended had shifted from an "idealist" to a "realist" answer on at least one of the two questions. On the other hand, five of the seven judges who were glad they attended the convention experienced no such shift in attitude. In other words the measurable change in the judges' attitudes indicated that their experience was both disillusioning and painful.

Responses to two open-ended questions are enlightening. Delegates were asked: "What did you like least about being a delegate?" and "In what ways would you say that the convention turned out to be different from what you expected?" The theme

TABLE 5
THE RELATIONSHIP BETWEEN PARTY TACTICS AND
JUDICIAL UNHAPPINESS

	Party Tactics Were: ^a	
	Appropriate	Inappropriate
Glad ^b	6	1
Not glad	2	6

Fisher's p is significant at the .05 level.

a. Based on the question, "Do you feel that the arguments and tactics employed by party leaders in persuading delegates to support the party's position on particular issues were appropriate for a constitutional convention?"

b. Based on the question, "Would you say, as of now, that you are glad that you became a delegate?" (see note to Table 3).

which pervades the responses of the judges who were not glad they served as delegates was that the convention was "too political"; it was a "super-legislature," marked by "political domination." One judge called the new constitution a "political football," while another noted his "bitter disappointment" that the convention had become a "political donnybrook," rather than a meeting of statesmen.

The delegates were asked whether "the arguments and tactics employed by party leaders in persuading delegates to support the party's position on particular issues were appropriate for a constitutional convention." Table 5 demonstrates the close relationship between the judges' responses to the tactics of party leaders and their satisfaction with having been delegates. The judges who were glad they had attended did not object to the tactics of the party leaders; the judges who felt that the leaders' tactics were not appropriate for a constitutional convention were not glad they had attended.⁶

SUMMARY AND IMPLICATIONS: THE IMPACT OF **JUDICIAL ROLE PERCEPTION**

How are we to understand the pattern of attitudes which the judges held prior to the conventions? Why should persons in

judicial positions, as distinguished from other lawyers and other politicians, be constitutional “idealists” in this day and age? Judges encounter constitutions in their work on the bench, and it seems reasonable to suggest that the attitudes which this study identified were developed in the judicial setting. The implication of this—thirty years after the heyday of legal realism—is that *judges perceive their function when dealing with constitutions in other than political terms*. Whatever political scientists may say about the political nature of the judicial process, judges share norms which minimize the place of politics in constitutional matters. They have been socialized in a particular institutional setting to believe that a constitutional convention is not “as political as anything else.” Perhaps they also believe that constitutional law is “not as political as anything else.”

One would not expect these perceptions to be the only ingredients of judicial behavior. Judges in both New York and Maryland have had active political careers. We would suppose that in addition to their judicial role perceptions, delegates would have internalized expectations, norms, and values concerning political parties. Indeed, a convention delegate might well hold a perception of his role as a member of a political party which would be in conflict with his perception of his role as a judge.

The reaction of the judges to the New York Convention is fully in accord with the suggestion that they were cross-pressured by their perceptions of their roles as party members. David Truman, in applying the cross-pressure concept to the internal politics of interest groups, observed that “felt conflicts of this sort are painful” (quoted in Goodman, 1967: 473). Jay S. Goodman found evidence that legislators with overlapping interest group and legislative party memberships demonstrated the tensions associated with being in a situation of cross-pressures. In the Rhode Island context, cross-pressured legislators acted in accordance with the strongest intrainstitutional force—the party—but manifested distinct attitudinal unhappiness (Goodman, 1967). The New York Convention functioned so as to accentuate partisan loyalties, which would cut against the expressed judicial role preferences. Thus if such cross-pressure tensions as Truman suggests were to

occur we would expect to identify them in New York, rather than in Maryland. As we have seen, this is precisely what occurred.

Presumably, and here we are moving beyond our data, the judges developed their norms and expectations regarding political party in their pre-judicial careers. The concept of a “nonpolitical” judicial role (which may still be widespread in our culture) was activated after they were elevated to the bench. While many New York judges have continued to be involved in party politics, the fact that this involvement takes place in a different institutional setting has prevented conflict with their perception of the proper judicial role. The New York Constitutional Convention drew upon both sets of role perceptions. It is extremely interesting to discover that judges whom one would expect to be politically sophisticated⁷ share role perceptions such that behavior inconsistent with them produces considerable and measurable attitudinal reactions.⁸

SUGGESTIONS FOR FUTURE RESEARCH

Where do we go from here? If possible, a research instrument designed to identify role perceptions, and conceptions of the proper judicial function, ought to be systematically administered to judges and such other elite groups as lawyers, legislators, journalists, and corporate and political executives. A comparison of the responses of the judges and the others would allow us to speak more intelligently about decision-making by judges as contrasted with decision-making by nonjudges.

Secondly, it would seem important to identify differences between different categories of judges, if they exist. We assume, without evidence, that the members of the United States Supreme Court would have responded differently than did the judges in New York and Maryland to many questions. But perhaps not. If we can demonstrate a difference in role perception between the Supreme Court and the lower courts—or between trial courts and appellate courts in general—or between the courts of different states, we will have contributed to our understanding of the operation of the judicial bureaucracy.

Finally, considerable effort must be devoted to the task of demonstrating the impact of judicial role perception on judicial behavior. If, for example, we had characterized the role perceptions of all of the judges of a collegial court with some degree of precision, we could then attempt to see whether or not the role categories helped "predict" the decisional patterns of the judges.

Firm judgments should be avoided until much more evidence is available. But there is little reason to doubt that our understanding of judicial behavior can be considerably enhanced by research focused on the concept of judicial role.

NOTES

1. First-round interviews were obtained with 22 of the 23 sitting or retired judges who served as delegates to the New York Convention of 1967, and with all 7 of the sitting or retired judges who were delegates to the Maryland Convention which met later that year. Postconvention interviews were obtained with 15 of the New York judges, and with all 7 of the Maryland judge-delegates.

The judges interviewed in New York sat on the following courts: Court of Appeals-4 (including 2 retired judges); Appellate Division of the Supreme Court-4; Supreme Court-7; Surrogate's Court-3 (including one retired judge); County Courts-2; Civil Court of New York City-1; Court of Special Sessions, New York City-1 retired judge.

The judges interviewed in Maryland sat on the following courts: 2 retired Court of Appeals judges; 2 sitting and 2 retired Circuit Court judges; 1 retired judge of the Supreme Bench of Baltimore City.

In both states, individuals who had served as judges for very brief periods (in no case as long as a year), or whose judicial service was as justices of the peace, were not counted as judges for the purposes of this study.

In no sense can the judges interviewed be said to constitute a representative sample of their state judiciaries. Any conclusions we draw must be restricted to the universe under study, however suggestive they may appear to be.

2. Socioeconomic factors considered include religion, education, economic background, party affiliation, and age. A detailed analysis of the responses of the New York judges failed to reveal a connection between the idealist-realist response and the level of the court on which the judge served.

3. We compared the responses of the delegates to a standard series of questions designed to elicit liberal/conservative views on socioeconomic matters. The New York judges were slightly more liberal than the other delegates, though none of the differences was statistically significant. The Maryland judges were more liberal on two of the four questions, and more conservative on two. We also compared the delegates' responses to three questions which reflect general attitudes of trust/distrust, and found no differences among the different types of delegates in each convention nor between conventions (Beiser, 1969).

4. One Maryland judge had declined to answer the questions on the first round of interviews. He now took the idealist position on one, and the realist position on the other. The other six judges continued to express the idealist position on both questions.

5. The difference in the number of judges included in Tables 3, 4, and 5 results from an incomplected first-round interview.

6. It might be argued that the satisfied delegates were those who had achieved their policy goals in the convention. Since over ninety percent of the nonjudicial delegates were "glad," this seems most unlikely. There is no evidence in the open-ended questions that dissatisfaction with the details of the new constitution was related to the judges' overall contentment. The judicial unhappiness identified in the postconvention interviews seems clearly to have been a reaction against process rather than against substance.

7. In both Maryland and New York, judicial selection is intimately bound up with party politics, and in many cases, judgeships are earned at least in part by loyal service to a political party.

8. These conclusions are in accord with Henry Glick and Kenneth Vines' major study of four state supreme courts. Distinguishing between a "law interpreter orientation" and a "law maker orientation," they found that more than half of the 26 state supreme court judges interviewed adhered to the less "realistic" position. They conclude: "Many state supreme court judges simply have not been influenced by the more innovative and sophisticated statements of the law-maker and pragmatist roles in the legal writings" (Vines, 1969).

They also support Theodore Becker's suggestion that their role perceptions may differentiate judges from other political elites, and that the consequences of this *may be* to render decision-making in the judicial setting different from other forms of decision-making (Becker, 1964).

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