Inside the Supreme Court of Japan—From the Perspective of a Former Justice

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I. THE SUPREME COURT IN THE ERA OF REFORM ........................................ 196
II. THE SUPREME COURT IN COMPARISON .................................................. 199
III. MEMORABLE CASES ............................................................................. 205
IV. TOGETHER WITH JUDICIAL RESEARCH OFFICIALS ............................... 211
V. CONCLUSION .......................................................................................... 212

XVIII. THE SUPREME COURT IN THE ERA OF REFORM

My term was from September 3, 2008 until February 27, 2012.¹ This was a brief time, but it was fulfilling. I was assigned to the First Petty


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¹ Japanese Supreme Court justices serve for short terms. In particular, the terms of justices who are former lawyers, particularly the ones from the Tokyo Bar Association, of which I am also a member, are especially short. In recent years, several served not much more than three years. David S. Law suggests that such short tenures are institutionalized by the Liberal Democratic Party to hedge the risk of there being liberal justices. David S. Law, The Anatomy of a Conservative Court: Judicial Review in Japan, 87 Tex. L. Rev. 1545 (2009), translated to Japanese, 79 SEIKEI-RONSO, No. 1(2) (Shinichi Nishikawa trans., 2010). I believe this is a mere speculation. I have two reasons
Bench. When I was appointed, Chief Justice Nirō Shimada alleviated my tension with his kind words. Moreover, I was welcomed by my former students from my time as an instructor at the Legal Training and Research Institute who were at the General Secretariat and the Office of Judicial Research Officials, and my friend Justice Kōhei Nasu helped me for disagreeing. First, the bar associations have deliberately selected candidates whose terms would not exceed the terms of justice candidates who are former chief judges of the High Courts. Second, until recently there had been a strict allocation of five seats for justice candidates from the bar association, and each of the four major bar associations—the Tokyo Bar Association, the Tokyo First Bar Association, the Tokyo Second Bar Association, and the Osaka Bar Association—has taken an allocated seat since the bar association slots were reduced to four. The largest bar association, the Tokyo Bar Association, lost one of two seats, and was forced to shorten the terms of many qualified candidates. In fact, potential candidates with terms of seven to eight years were never considered. In recent years, this rigid bar association allocation has become somewhat more lenient. I see this as a great movement that the Japan Federation of Bar Associations has moved towards seeking qualified candidates broadly from the entire Japan bar membership. They should mainly recommend candidates who are around sixty years old so that they can work at least ten more years. With the terms of several years, the justices would have to retire just when they get on track of new career. Each justice’s personality must shine and be known by the public in order to make an energetic Supreme Court. Otherwise, the revolving-door appointment in which judges go in and out will forever be known as a “nameless, faceless judiciary.” DANIEL H. FOOTE, NA MO NAI KAO MO NAI SHIHŌ [NAMELESS, FACELESS JUDICIARY], 81 (Masayuki Tamaruya trans. NTT Publication 2007).

2 Japan’s Supreme Court consists of fifteen judges (Court Act, Article 5). They are divided into three petty benches (sho-hotei), each of which consists of five judges. All the judges sit together as the grand bench (dai-hotei) for cases involving a constitutional issue for which there exists no Supreme Court precedent, for cases involving non-constitutional issues in which a petty bench has considered it appropriate to overrule a precedent set by the Supreme Court (Court Act, Article 10), for cases in which a petty bench has felt it appropriate to decide in the grand bench and for cases where the verdict of the judges in a petty bench ended in a tie. Chapter 1. General Background of the Country, CCH INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CYBER LAW 2013, at §3, available at 2013 WL 4299388.—Trans.

3 The institute is in charge of the research and the training of judges, and the judicial training of legal apprentices. The Institute’s professors conduct research and training activities under the control of the President, The Legal Training and Research Institute of Japan, SUP. CT. OF JAPAN, http://www.courts.go.jp/english/institute_01/institute/index.html#Intro (last visited December 20, 2013).—Trans.

4 Refers to an internal organization of the Supreme Court that carries out administrative duties. For an overview of the Judicial System in Japan, see SUP. CT. OF JAPAN, http://www.courts.go.jp/english/judicial_sys/overview_of/overview/index.html#02 (last visited December 20, 2013).—Trans.

5 The duty of judicial research officials is to conduct research necessary for the trial and decision of a case under the instruction of the presiding justices or judges. The Institute recruits these experts from among specialists in the fields of intellectual property and other specialties as well as from among jurists. Id.—Trans.
acclimate into the circle of the Supreme Court justices. I attended my first justice meeting on September 10th and without delay, joined Petty Bench deliberations on the 11th. After just a month’s passing, my attorney days seemed like an ancient memory. The Court was freer and more open than anticipated. Ample debate was allowed during judicial deliberations because it was an environment of easy-going relationships. We could even debate about issues that were proactively raised at our Judicial Assembly sessions (although these were rare).

In my opinion, the Supreme Court has quite clearly changed in comparison with the 1970s. The changing times, represented by the end of Cold-War structures, a pull-back of revolutionary forces, and an overall conservative stabilization of society as both post-industrial and mature, presumably set the background for this. Moreover, the relationship between political forces and the judiciary had been without antagonism for a long while. During my term, we observed phenomena which came to be labeled as the politicization of policy affairs and political party liquefaction as seen in the [rapid] changes from the Fukuda Cabinet to Aso’s, then to Hatoyama’s, to Kan’s, and finally to Noda’s [as successive Prime Ministers of Japan]. There was also a scandal within the prosecutor’s office. In contrast to the chaos within the legislative and executive branches, I believe that the Supreme Court properly supported the judiciary in its role among the three branches [of government] and that this contributed to the stability of Japanese society [as a whole].

With regard to recent justice system reform, the Supreme Court speedily carried out reforms in accordance with the recommendations of the Justice System Reform Council. The Court pursued reforms in seven

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6 The Judicial Assembly is body with formal authority over internal governance of the judiciary in Japan. “(1) The Supreme Court shall execute judicial administration affairs through deliberations of the Judicial Assembly and under the general supervision of the Chief Justice of the Supreme Court; (2) The Judicial Assembly shall consist of all Justices, and the Chief Justice of the Supreme Court shall be the chairperson.” *Saibanshōhō* [Court Act], Law No. 59 of 1947, art. 12. But see id. at art. 13 (“The Supreme Court shall have a General Secretariat, which shall handle administrative affairs of the Supreme Court.”). See generally, Mark A. Levin, *Civil Justice and the Constitution: Limits on Instrumental Judicial Administration in Japan*, 20 PAC. RIM L. & POL’Y J. 265, 308-09 (2011).—Trans.


areas: (1) promotion of the appointment of lawyers as judges; (2) adoption of more diverse professional externships for assistant judges; (3) establishment of the Lower Court Judges Nomination Consultation Commission to select appropriate candidates for lower court judges; (4) establishment of appropriate mechanisms for personnel evaluations of judges (by making clear and transparent who should be the evaluator, by clarifying standards for evaluation, by disclosing the contents of evaluations to the candidate, and by establishing appropriate complaint procedures); (5) establishment of councils in the family and district courts to enable the views of the people to be reflected broadly in the management of the courts; (6) establishment of professional law schools by sending numerous judges to serve as instructors as part of legal training system reforms; and finally, (7) implementation of the saiban-in system in criminal proceedings. Some issues within the justice system certainly remain, but it can be fairly said that the judiciary accomplished substantial internal reforms.

At the time of my appointment, the Supreme Court was in the midst of a major systemic reform; it was a fine time to be there.

XIX.  THE SUPREME COURT IN COMPARISON

Japan’s Supreme Court is often criticized for its judicial passivity in comparison with the U.S. Supreme Court. It is well-known that the U.S. Supreme Court justices are in the midst of partisanship, as political ideologies play an extremely important role in their selection. I believe it

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10 See generally Mark Levin and Adam Mackie, *Truth or Consequences of the Justice System Reform Council: An English Language Bibliography from Japan’s Millennial Legal Reforms*, 14 ASIAN-PAC. L. & POL’Y J., 6 (2013) (bibliographic list of fifty English language articles concerning Japan’s introduction of a lay judge system).—Trans.

11 The Japan Judges Network Symposium titled “Ten Years of the Judicial System Reform—up till now and from now on” Part II, panel discussion “The Present State of the Judicial System Reform and Appraisal of Judges, etc.” 2168 HANREI JIHÔ 3 (2013), highlights remaining issues, but also offers positive feedback on the Supreme Court’s effort as a whole.

12 This criticism of Japan’s Supreme Court as being judicially passive can be seen among U.S. scholars as well. A recent critique can be found in David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009), translated into Japanese, 79 Seikei-Ronso, No. 1(2) (Shinichi Nishikawa trans., 2010), where Law criticized the judicial administration and appointment procedures of the Supreme Court justices based on interviews with legal professionals and scholars, etc. His analysis seems out of place as to the present Supreme Court.

13 Many sources address this point. See, e.g., DANIEL H. FOOTE, *NAO NAI KAO MO NAI SHIHO [NAMELESS, FACELESS JUSTICE: WILL JAPAN’S COURT CHANGE?]*, 81
is only natural that these justices, once appointed, proactively take part in constitutional review, particularly in a society where political authority constantly shifts between two dominant political parties and citizens accordingly approve the partisan character of the Supreme Court justices. And thus, it makes ample sense that decisions carrying out constitutional review are sometimes criticized for being political despite ostensible legal appearances. But Japanese society is different from U.S. society because the Japanese citizenry expects non-partisanship to be a distinctive feature of Supreme Court justices. Today, none of the fifteen justices is a member of or has received a recommendation from any political party. In recent years, the Cabinet has deferred to the Supreme Court’s proposals when it considered the appointment of at least eleven justices who were previously judges, attorneys, or scholars. To me, there is no doubt this distinctively Japanese approach is worth retaining for the future.

I therefore assumed my post intensely questioning what would be the most fitting approach to constitutional review in a non-partisan institution such as the Supreme Court of Japan.

Throughout my term, results from a number of research studies concerning the U.S. Supreme Court were published. I read and mulled

(Masayuki Tamaruya trans. NTT Publication 2007).

14 The de facto quota system that operates with regards to selection of Japan’s Supreme Court justices, (also discussed supra note 1), see Lawrence Repeta, Reserved Seats on Japan’s Supreme Court, 88 WASH U. L. REV. 1713 (2011).—Trans.

15 These points have been debated in English language publications concerning Japan. See e.g., Frank K. Upham, Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary, 30 LAW & SOC. INQUIRY 421 (2005). Law also weighs in on this issue with a nuanced interpretation that suggests a balancing of powers between the Chief Justice and political authorities in the selection of new justices, supra note 1, 1550-51.—Trans.

16 For comprehensive and detailed research, see Tsukasa Mihira, Shihō Sekkyoku Shugi no Seijiteki Köchiku—America Renpō Saikō Saibansho no Sekkyokusyugi no Haikei [Political Construction of Judicial Activism—Context of the U.S. Supreme Court’s Judicial Activism], 163 HÔGAKU-RONSO 163 Nos. 2, 4, 5 [Kyoto University Hôgaku-Kai] (2008); Tsukasa Mihira, Shihō Sekkyokusyugi no Seijiteki Köchiku to America no Shihō Hatten—America Kenpō Chitsujo Keisei no Dōtaitekihaaku ni Mukete [Political Construction of Judicial Activism and American Judicial Development—For Dynamic Comprehension of the U.S. Constitutional Order Formation], 165 HÔGAKU-RONSO Nos. 1, 3 [KYOTO UNIVERSITY HÔGAKU-KAI] (2009); Tsukasa Mihira, Saikō Saibansho o Meguru Politics—20 Seiki Kōhan Ni Okeru America Renpō Saikōsaibansho no Sekkyokuska no Haikei to Nihon eno Shisa [Politics Surrounding The Supreme Court—The Background of The U.S. Supreme Court’s Growing Activism In The Late Twentieth Century And Suggestions To Japan], 82 HÔRITSU-JIHO No. 4 [Nippon Hyoron Sha Co., Ltd.] (2010). These articles are collectively published in IKEN SHINSA SEI O MEGURU POLITICS—GENDAI AMERICA RENPO SAIBANSHO NO SEKKYOKUKA NO HAIEKI [THE POLITICS OVER JUDICIAL REVIEW—the BACKGROUND OF THE U.S. SUPREME COURT’S JUDICIAL ACTIVISM TODAY] (Seibundo 2012). See also the preface authored by Tanase and articles authored by five U.S. judicial politics scholars, SHIHÔ NO KOKUMINTEKIKIBAN—NICHIBEI NO SHIHÔ SEIJÌ TO SHIHÔ RIRON [PUBLIC BASE FOR THE
over them. According to these publications, referenced below, the U.S. Supreme Court has dramatically shifted between periods of liberal and conservative judicial activism. It has been said that in recent years, the U.S. Supreme Court is in the midst of “a cold rain of right-wing activism.” This research makes clear that the U.S. Supreme Court’s judicial activism after the New Deal was accomplished by political forces, which brought forward the iconoclasm of the Warren Court that followed. The dominant political power of the day advantageously employed judicial review to remove resistance to policy implementation. For example, the Warren Court’s judicial activism concerning voting equality was an intentional creation of the Kennedy Administration. The working class represented a liberal base that supported the Democratic Party; an influx of the working class into metropolitan areas created a population surge that led to underrepresentation in metropolitan areas and overrepresentation in rural areas. Meanwhile, strong resistance made it impossible to legislatively cure this discrepancy. Thus, in *Baker v. Carr*, the Kennedy Administration and its Justice Department presented their arguments to the Supreme Court both at oral argument and with amicus briefs. The administration wiped out concerns held by more moderate justices by actively providing its political support to the process of judicial review. The administration’s strong support for the *Baker* decision shielded the Supreme Court from criticism by federal lawmakers. This full support from the government is said to have enabled the Supreme Court not only to find unconstitutionality in a series of subsequent cases concerning malapportionment, but also to establish the principle of “one person, one vote.”


18 A landmark United States Supreme Court case, which held that legislative apportionment that was alleged to deprive plaintiffs of equal protection rights in violation of the Fourteenth Amendment presented a justiciable issue. *Baker v. Carr*, 369 U.S. 186 (1962).—Trans.

19 See Tsukasa Mihira, *Shihō Sekkyoku Shugi no Seijiteki Kōchiku” to America no Shihō Hatten—America Kenpō Chitsujo Keisei no Dōtaitekihaakku ni Mukete [“Political Construction of Judicial Activism” and American Judicial Development—For Dynamic Comprehension of the U.S. Constitutional Order Formation]*, 165 HŌGAKU-
Incidentally, partisanship is clearly evident in German and French Courts as well.\(^{20}\) [The appointments of] most of the sixteen positions for the justices of the German Federal Constitutional Court, divided into two sections, are allocated to two main political parties. The party that originally recommended a retiring judge will recommend his or her successor with the other party’s consent. The Constitutional Council of France is comprised of nine members, including somewhat surprisingly, former presidents of the Republic who are appointed as life-term members. One third of the nine members are appointed every three years by the president of the Republic, the president of the National Assembly, and the president of the Senate who each vote for three members. Selectors have considerable discretion in making appointments, even to the extent that they can be observed freely appointing their own friends. Seventy members have been appointed from 1958 to 2010, and only seventeen have never been involved in political activities, for example, by being ministers or lawmakers. As such, German and French courts appear to be intertwined with the political process. There is no doubt that partisanship in the compositional makeup of courts influences judicial activism in these two nations.\(^{21}\)


\(^{21}\) Judicial activism exercised by the Constitutional Court of Korea, which was established in 1988, is quite shocking. I even wonder how I should evaluate it. See Kankoku Kenpō Saibansho—Juūyō Hanrei 44 [The Constitutional Court of Korea—Important Cases 44], (Lawyers’ Association of ZAINICHI Korean ed., Nihon Kajō Shuppan 2010); Lee Beom-jun, Kenpō Saibansho—Kankoku Gendaishii o Katari [Constitutional Court—Discussion on Modern Korean History], (Lawyers’ Association of ZAINICHI Korean trans., Nihon Kajō Shuppan 2012), Nikkan Kenpōgaku no Taiwa I—Sōron/Tōchi Kikō [Dialogue I on Comparative Japanese-Korean Constitutional Law—General Theory/Governing System], (Noriko Kokubun, Pyon Shin, Köji Tonami eds., Shōgakusha 2012). The Constitutional Court of Korea is expected to actively exercise constitutional review power for the sake of democratization and modernization because there is still some remaining impact of oppressive legislation under the military administration that had lasted for many years and feudalistic holdovers. The Court underwent a period of immaturity, and then rapidly burgeoned due to special circumstances of President Roh Moo-hyun’s Administration. The Constitutional Court of Korea appears to have a strong sense of power. We should continue to observe this Court although Korea and Japan vastly differ in their history, politics, and culture as well as constitutional perspective.
At the request of Nagoya University, I conducted ninety-minute classes on the Japanese judiciary at the start of every January throughout my term as a Supreme Court justice. The class, held in the courtroom after students toured the court building, was for students from the greater Asian region who were studying in Japanese graduate schools. I held the class four times as a modest contribution towards to show my humble support for realizing the rule of law in the Asian region. Now, Justice Masaharu Ōhashi kindly continues this role. Each time I held the class, roughly thirty students came in with many questions. Of these, two recurring questions were especially difficult to answer: first, how could the judiciary maintain independence from politics under a Constitution that authorized the Cabinet to appoint judges for all courts—from lower courts to the Supreme Court; and second, why did the Japanese Supreme Court so rarely find laws to be unconstitutional. Each year, while giving an explanation for this, one that included the actual circumstance of the selection process of the Supreme Court justices for the care given in the Court’s making recommendations and a custom of deference from the Cabinet in such process, the existence and functions of the Cabinet Legislation Bureau, and the recent development of our “conciliatory

22 I explained to the exchange students that in Japan the Cabinet submits most legislative bills during which the Cabinet Legislation Bureau strictly reviews the constitutional compliance of the bills. As a result, there is very little unconstitutional legislation to begin with. Thus, a simple comparison of numbers of unconstitutional decisions is inappropriate. As the constitutional review system, the Japanese system strives for the perfect advance-check review and this may be more suitable than the American system that emphasizes on a post-check review. At the Investigative Subcommittee on the Constitutional Investigative Governing System during the 156th House session of the Parliament on May 15, 2003, Osamu Tsuno, former Director of the Cabinet Legislation Bureau testified about the actual situation of the Constitutional review in detail. Then-Chief Justice of the Supreme Court Shigeru Yamaguchi stated that the Cabinet Legislation Bureau is one of the reasons for few unconstitutional decisions; Makoto Ōishi authored several research articles on the Cabinet Legislation Bureau’s functions. See generally Makoto Ōishi, WAGA KUNI NI OKERU GŌKENSEI TŌSEI NO NIJÛ KÖZŌ—GŌKENSEI TŌSEI NO RIPPÔ KATEIRONTEKI KŌSATSU [DUAL STRUCTURE OF THE CONSTITUTIONAL GOVERNING SYSTEM—OBSERVATION THROUGH THE LEGISLATIVE PROCESS ON THE CONSTITUTIONAL GOVERNING SYSTEM FUNCTIONS], in KENPÔ SOSHÔ NO GENJÔ BUNSEKI [ANALYSIS OF THE CURRENT CONSTITUTIONAL PROCEEDINGS] 423 (Hidenori Tomatsu & Yasuji Nosaka, eds., Yūhikaku 2012) (This article is from the perspective of the Constitutional governing system in a broader democratic governing structure. The article examined the functions of the Cabinet Legislation Bureau as supporting institution to the Cabinet and both Houses of the Parliament (the dual structure of the constitutional governing system) and cast doubt on the evaluation of “judicial passivism” upon analyzing the number and substance of unconstitutional decisions.); Also, it was pointed out that the difference between Japan and German/French Courts which also conduct the advance check review is rooted in how they perceived their roles as the defender of fundamental human rights. See Iwao Satō, NAIKAKU HÔSEIKYOKU TO SAIKÔ SAIBANSHO—THE SYSTEM PLACEMENT OF TWO CONSTITUTIONAL REVIEW INSTITUTIONS AND THE CHANGE IN THE POLITICAL SYSTEM], in SHIHÔ NO KOKUMINTEKIKIBAN—NICHIBEI NO SHIHÔ SEIJI TO SHIHÔ RIRON [PUBLIC
judicial activism,” which fits neither the U.S. Supreme Court model nor the Western European Constitutional Court model but rather stands as a Japanese model giving a third possibility for Asian societies, I would realize the complexity and weight of the need for making changes to fit the circumstances of the times in order to maintain judicial autonomy in Japan.

I disagree with the structural reform idea, the so-called mezzanine concept (of establishing a separate appeals court specifically for matters claiming illegality with regard to ordinary laws and regulations) for establishing a constitutional court system, because in actuality, it would turn the Supreme Court into a constitutional court. Such a plan would inevitably enhance the politicization of the Court and partisanship of the justices. In light of Japan’s governance system, I do not believe this model would be beneficial. Moreover, it is hardly coincidental that the Court, which owes its broad perspective to being vested with authority to conduct constitutional review, has clearly contributed to the proactive advancement of the law because it is the final appellate court for ordinary cases as well. When taking into consideration the balance of these two functions, it is


23 There are fewer sources in English concerning the work of Japan’s Cabinet Legislation Bureau. Undoubtedly the most thorough explanation is in Mamoru Seki, Naikaku teishutsu hōritsuan no ritsuan katei [The Drafting Process for Cabinet Bills], 19 LAW IN JAPAN 169 (1986) (Daniel H. Foote, trans.). More recently, John Haley offers a brief description that focuses on the technical role of the Bureau. JOHN O. HALEY, THE SPIRIT OF JAPANESE LAW 35 (1998).—Trans.

24 The best translation here is not obvious. The original Japanese adjective, presumably Justice Miyakawa’s original phrasing, is subtly nuanced. “穏やかな” (odayakana) may be translated as “1) calm, placid, tranquil; pacific, mild” or 2) “moderate, reasonable, conciliatory . . . amicable, smooth.” KENKYUSHIA SHIN WA-EI DAIJITEN (KENKYUSHIA’S NEW JAPANESE-ENGLISH DICTIONARY) (5th ed., electronic version, 2008).—Trans.

25 This does not mean that the Court would spare less effort in reviewing ordinary appeals cases, especially individual remedial proceedings. In actuality, few cases require strict constitutional review that is hard to decide based on precedents. There are many reversals on individual remedial proceedings but at the same time it is not uncommon that the Court dismisses or declines to review despite having doubt concerning lower courts’ decisions. Japan is experiencing legal stability in the area of ordinary dispute resolution so that there are less cases that deserve the Court’s constitutional review. In fact, it is not true that the Court is too overwhelmed with ordinary civil and criminal cases to conduct constitutional review and check administrative actions. For example, each justice submitted his or her opinion memorandum, justices had several deliberations to fully explore the issues on most important administrative decisions by the First Petty Bench during my term that are published in law reports. The justices also concluded to either dismiss or declined to review many administrative cases after engaging in full deliberations. The justices’ chambers spend a lot of hours on assigned cases, but the justices can hardly relax because there are hidden treasures that may form novel jurisprudence. It is simply that the justices
imperative to fulfill both roles by appointing members with sufficient expertise.

A fundamental limitation on judicial power must be recognized in [the court’s claim to] democratic legitimacy. It is also necessary to consider Japan’s particular political, historical, social, and cultural circumstances. With these contemplations in mind, by the middle of my term, I had become deeply concerned with how I could reconcile the problems of modern society from a strict position of Constitutionalism.

XX. MEMORABLE CASES

Of all the cases with which I was involved, approximately 135 cases had such precedential value as to be published in law reports.

One of the important roles that must be fulfilled by the modern judiciary is to function as a safety net for consumers being pushed around in economic markets. Recently, the Supreme Court has quite consciously stepped into this role. Some memorable cases demonstrating the Supreme Court’s new role include the judgment regarding the statute of limitations and presumption against the malicious beneficiaries of money allocate less time to filter cases when they are busy with reviewing cases.

Supreme Court justices who are former attorneys have superior ability to review ordinary cases. This does not mean that these justices were appointed only based on such ability. At least some of my former colleagues who were former career-judges had preference for active constitutional review and were well equipped with ability to do so, however they were not necessarily proactive about constitutional review because of differences in their opinions about the Court’s role for such review. Thus it is inappropriate to say that the justices tend to be passive about constitutional review in general. The current Supreme Court justices do not share the same judicial philosophy. It is a group of distinct characters, and it has changed since the Court was “filled with the spirit of wa [harmony],” which was describe by former Supreme Court Justice Masami Itō twenty years ago. MASAMI ITŌ, SAIBANKAN TO GAKUSHA NO AIDA [BETWEEN JUDGES AND SCHOLARS], 116 (Yūhikaku 1993). There are issues with the current situation with appointment of justices. However, what we should do with appointment is extremely difficult to answer. There was a proposal to establish an Appointment Council within the Cabinet, and the Japan Federation of Bar Associations also adopted a resolution pertaining to such idea in 2003. However, historians have revealed that there was “ugly political maneuvering” in connection with appointment of members for the Appointment Council when the Supreme Court of Japan was first established and such appointment resulted in some problems. Even aside from the Council proposal, it is difficult to come up with a reform proposal to avoid the risk of tainting the appointment process with political influence.

The Japanese Supreme Court and its justices manage a stunning caseload. In Justice Miyakawa’s three and a half years on the bench, he would have participated in the decision making for thousands of cases. See Law, supra note 1, at 1578 (“in practical terms . . . on a typical working day, each five-member petty bench must dispose of eight to ten cases per day; ten is the more appropriate figure if one assumes, as one justice indicated, that the Court works approximately three hundred days per year.”).—Trans.

Saikō Saibansho [Sup. Ct.] Jan. 22, 2009, Hei 20 (ju) no. 468, SAIKŌ SAIBANSHO SAIBANREI JÔHÔ [SAIBANREI JÔHÔ] 1, 10,
lenders; the decision regarding the commission house’s duty to explain and notify; the decision regarding claims for compensatory damages arising out of major defects in new construction; and several decisions regarding the interpretation of insurance policy clauses.

The Supreme Court indicated a re-direction towards vitalizing its engagement with administrative appeals in the following decisions: two decisions regarding calculation of attorneys’ fees for citizens’ suits; the decision recognizing the legitimacy of an administrative disposition regarding a city’s legislative act; the decision affirming the illegality of pre-approval of safety standards in litigation seeking a revocation of a building permit; and the decision affirming an award of compensatory damages in the amount equivalent to the excess payment of real property tax, arising from a damage action against the municipal government, without having to raise the claim in an administrative revocation suit.

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36 Saikō Saibansho [Sup. Ct.] June 3, 2010, Hei 21 (ju) no. 1338, SAIKÔ
As for financial transactions, the Supreme Court, by adopting an orthodox interpretation of contracts and other agreements, demonstrated a respect for the predictability and decision-making rationale of economic individuals in order to avoid hindering business activities. For example, the Court decided in favor of financial institutions in both a case regarding a financial institution’s claim against a city for restitution arising out of the loan contract and a case regarding a claim seeking restitution against a prefectural government pertaining public lands held in trust.

The Supreme Court also wrestled with its decision-making in criminal matters. I served as the presiding justice on two cases that I remember vividly: a case recognizing a self-defense justification and a case involving the violation of the Judicial Scrivener’s Act. In both cases, the court overturned the lower court convictions and acquitted the defendants.

I wrote eight dissenting opinions and twenty concurrences as separate published opinions (the dissenting opinions included the two Grand Bench cases challenging the 2007 House of Councilors election and the 2010 House of Representatives election, the case in which


39 Justice Miyakawa served as the presiding justice for his five-member petty bench panel in these particular cases, and not as the chief justice of the Supreme Court as a whole.— Trans.


43 Saikô Saibansho [Sup. Ct.] Mar. 23, 2010, Hei 20 (gyo tsu) no. 129, SAIBANSHO SAIBANREI JÔHÔ [SAIBANREI JÔHÔ] 1, 37,
Japanese wives who remained in China after WWII sought compensation from the government (dismissed), the case in which victims of hit-and-run accidents sought insurance payouts, the Type 3 *Kimigayo* litigation, and the Hikari City mother and child murder case. I will express my sentiments about the constitutional cases – two election lawsuits and eight Type 3 *Kimigayo* lawsuits – in further consideration of the discussion in Section II above, but because there is a pending election case in the Supreme Court, my comments as to that topic will be brief and somewhat abstract.

I believe that longstanding voting inequalities have not only diminished Japan’s political vitality and its capacity to adapt to changing times, but also create circumstances that invite suspicion of the very legitimacy of politics. The parliament and the cabinet are primarily responsible for their failures to act, but the Supreme Court also owes a responsibility to the people. It goes without saying that the judiciary must be cautious when interfering with the political process; it must humbly respect the legislature and wait for it to act. However, while the Court continues to throw easy pitches out of the strike zone, the legislature lets


46 Hikari is a city located in Yamaguchi Prefecture in Western Honshu.—Trans.

these go by and hits back mere stopgap measures. This ultimately points towards contempt of court.

I wrote dissenting opinions in each of the two Grand Bench decisions (September 30, 2009 and March 23, 2011) based upon the above considerations. The separation of powers presumes there will be tension with the political branch and thus the Court should not simply try to avoid making waves in order to improve the foundation of democratic politics. Some might disagree, but I believe popular support is with the judiciary here.

There have been three types of *Kimigayo* litigation. In the first type, the First Petty Bench reviewed four lawsuits challenging the constitutionality of workplace superiors’ directives. The second type involved three lawsuits alleging illegal abuse of discretion in employment disciplinary actions, and the last type involved a lawsuit seeking injunctive relief. All but the first cases challenging constitutionality were assigned to the First Petty Bench. The judgments of these lawsuits were issued in order of their case numbers so the Second Petty Bench decisions were issued first, but [in fact,] the First Petty Bench began and finished its deliberation before the Second Petty Bench.

I have strong memories of these cases. My schedule was tight. I went to Vancouver and Seattle in the fall of 2010 on an official overseas visit. The Grand Bench deliberation on the 2009 House of Representatives Election case was scheduled to begin three days after my return, and deliberation on the *Kimigayo* lawsuit was scheduled for just two weeks after that.

I perused the case materials on the *Kimigayo* suit and typed up my thoughts during my overseas visit, whenever I was in my hotel room. I outlined the majority of my dissenting opinion during this visit. The liberal ambiance of Canada and the U.S. and the distance from Tokyo may have impacted my thinking. A directive [to sing *Kimigayo*] was not designed to achieve a value-neutral objective of efficiently conducting ceremonies. The imposition of adverse dispositions [*i.e.*, potential disciplinary employment sanctions] forced faculty members with historical perspectives, world views, and pedagogical understandings similar to the plaintiffs to act against their beliefs. After reviewing the totality of

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48 The baseball metaphor here, translated literally, is Justice Miyakawa’s. We understand this as expressing a degree of frustration. The Supreme Court had repeatedly handed down extremely deferential decisions (the “soft pitches”) to be an impetus for full-on legislative or executive action without explicitly commanding it. However, despite these softer measures, the legislature and executive branches in fact failed to carry out meaningful reforms, and adopted instead unexceptional measures.—Trans.

surrounding facts as found by the lower courts, the official directives the plaintiffs received could not be interpreted any other way.

Records revealing the statements and behavior of the people who had issued the directives indicated their efforts were meant to bar what they viewed in others as heresy. I considered this case to be subject to a strict scrutiny review precisely because it centered on issues concerning the freedoms of the spirit of a minority.\(^{50}\) The majority’s reasoning was based upon a conclusion that that the act of standing up to sing the national anthem was nothing more than an act of common courtesy when viewed generally from an objective perspective. I felt very uncomfortable with the majority’s employment of a generalizing perspective, and we could not reach consensus on this issue. I unexpectedly recalled the writing of Jerome Frank\(^{51}\) that I had read in my youth. And I had yet another point of view. I believed that a creative and lively society rests upon there being respect for diversity, and thus, I simply could not permit such intolerance against the plaintiffs’ simple action of failing to stand up.

The majority also demonstrated its willingness to intervene in the second type of lawsuits, where illegal abuse of discretion in employment disciplinary actions was alleged. In the injunction suit in which I served as presiding justice, I was positively impressed to see the senior judicial research official and the judicial research official who had been assigned to the case\(^{52}\) engaged in eager discussions about whether the administrative research office might extend administrative remedies there.

\(^{50}\) We follow Professor Lawrence Repeta’s translation of this term, “精神的自由” (seishinteki jiyū), which pertains to a number of provisions in Japan’s Constitution “such as the freedom of thought, freedom of religion, freedom of speech and others, as well as socioeconomic rights, including the right (and obligation) to work.” Lawrence Repeta, *Freedoms of the Spirit in Japanese Law* 1 (Jan. 25, 2008) (unpublished paper) (on file with translator Levin). Professor Repeta importantly notes: “in the sixty years since the Constitution took effect, however, there has not been a single case in which the Supreme Court held a government action unconstitutional because it violated the "freedoms of the spirit" guaranteed by the Constitution.” Id. See also, Lawrence Repeta, *Limiting fundamental rights protection in Japan: The role of the Supreme Court, in Critical Issues in Contemporary Japan* 37, 43-47 (Jeff Kingston ed. 2014).—Trans.

\(^{51}\) It is not surprising that Justice Miyakawa might have read from the works of Jerome Frank as a student, but rich and insightful to observe the international impact of Frank’s writing. Yale Law Professor and U.S. Circuit Court Judge Jerome N. Frank, perhaps best known as one of the founders of the legal realist school, was one of the great legal academics of the twentieth century. A speedy search of the HeinOnline database finds memorial tributes to Professor Frank in the Yale Law Journal, University of Chicago Law Review, and the Journal of Legal Education, by such distinguished contemporaries as Thurman Arnold, Charles E. Clark, Felix Frankfurter, and William O. Douglas (citations omitted).—Trans.

\(^{52}\) The role of judicial research officials in assisting the justices of Japan’s Supreme Court (and their role in shaping the resulting jurisprudence) is extensively described in Law, *supra* note 1, beginning from page 1579.—Trans.
Ultimately, this series of cases had regrettable outcomes, but I retained a sense of fulfillment.

XXI. TOGETHER WITH JUDICIAL RESEARCH OFFICIALS

The assistance I received from the Office of Judicial Research Officials was spectacular.\(^{53}\) Their initial research on pending issues was nearly flawless and they would submit follow-up reports only several days after a request was made. At the time, the Office of Judicial Research Officials employed thirty-seven members.\(^{54}\) The office was headed by a Chief Judicial Research Official and divided into three sections—civil, criminal, and administrative—each of which was headed by the Senior Judicial Research Official. Even in comparison to other systems, this is a very productive and successful system.

I occasionally disagreed with the Judicial Research Official’s memoranda and opinions, sometimes even with regard to cases where deliberations were pending. Judicial Research Officials ordinarily draft memoranda based on precedent and then-prevailing theories within the Court. These memorandums are truly meticulous and thoroughly cover all the basic information without failure. The problem with the memoranda is that they do not contemplate how things may have changed over time, and sometimes even the logical reasoning within them fails. There were times when, after reading only the memorandum and its attachments, I would have a different impression; sensing further inquiry was needed, I extensively read the records and recent publications on the pertinent issues, and then reached a different conclusion from which I prepared my own memorandum. Sometimes, I would debate with the Case Judicial Research Official before deliberation and reconsider my conclusion. Other times, I retracted my opinion because I thought such a ruling would be premature for the Court, and it would be better to come to these issues again later after observing future decisions of the lower courts and emerging trends of scholastic theories. On the other hand, my opinions sometimes received unanimous votes during deliberations and the Court’s rulings from these cases would be published in key case reporters and the like. Of course, there were also times when the Judicial Research Officials’ findings would come to be viewed as undisputable. Other judges’ interactions with Judicial Research Officials are surely similar, with perhaps some variation.

Accordingly, the commonly-heard criticism which labels Japan’s Supreme Court’s decisions as being the decisions by its Judicial Research

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\(^{53}\) Again, much background (and additional sources) with regards to judicial research officials can be found in Law, supra note 1, from page 1579. — Trans.

\(^{54}\) The headcount here indicates the number of career judges working in the Office of Judicial Research Officials at the time. Id. at 1579. One assumes the office included others on the staff such as secretarial and office support. — Trans.
Officials does not reflect reality. Certainly Judicial Research Officials’ memorandums are written from an orthodox perspective, but this is sufficient, and asking for more would be detrimental. It is only natural that their memorandums tend to be conservative. It is the Supreme Court justices’ role to decide what more to add to the Research Official’s memos.

When I wrote separate opinions, Judicial Research Officials reviewed them for typos and accuracy of citations, but never to provide substantive comments. For example, when I wrote the dissenting opinion for the second appeals judgment of the Hikari City mother child murder case, I reached out to the Chief Criminal Judicial Research Official and the Case Judicial Research Official for their opinions, after mulling over my own. They simply said, “There is no precedent to support your findings, but we have nothing to say with respect to what a justice has decided.”

I never once wanted the individual assistance that U.S. Supreme Court clerks offer. I believe only competent practitioners with 10+ years of working experience (such as judicial training instructors) or academic scholars with equivalent career can serve as meaningful personal assistants to the Supreme Court justices. I do not think that people like clerks are necessary for Japanese justices in the process of drawing their conclusions based on the basic information from the Judicial Research Official’s memorandum. It would be fine to add academic scholars to the Office of Judicial Research Officials as in the Constitutional Court of Korea, but in my personal opinion, there is no need for individual assistants to be assigned to justices.

XXII. CONCLUSION

As I reflect on my law career, I am as fond of my days at the Supreme Court as I am of my three years as instructor at the Legal Training and Research Institute. More than anything, I am delighted to have been able to contribute to the development of the law. I had some busy times, but most days were humane and calm. Looking back, I realize that Supreme Court justices truly depend on the support of a huge number of people; my only remorse is that I might have measured up to their efforts with more diligence.

55 Our English fails to preserve the eloquence of the original remarks in Japanese: “先例がないことですが、裁判官のご決断ですから私どもとしても申し上げることはありません。”—Trans.