

Article

Japanese Way of Judicial Appointment and Its Impact on Judicial Review

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ABSTRACT

Japanese judiciary has been described as passive or self-restrained in judicial review. The Supreme Court of Japan has declared statutes to be unconstitutional in only eight cases since 1947. Among explanations of Japanese court's self-restraint, this paper focuses judicial appointment.

Attention is paid to the judicial reform in the early 21st century, particularly the setting up of the Lower Court Judges Nominating Consultation Commission, which was established in 2003. This paper tries to answer the question: "Does the judicial reform in the early 21st century have an impact on constitutional review?" by taking a socio-legal approach.

Consideration is made on four sections: (II) adoption of the Constitution after World War II; (III) procedure of judicial appointment in the second half of the 20th century; (IV) judicial reform and birth of the Lower Court Judges Nominating Consultation Commission in the early 21st century, and (V) effectiveness of recent judicial reform on judicial activism.

In conclusion, the answer to the question is that the judicial reform in the early 21st century does not seem to have an impact on judicial review. There are mainly three backgrounds: separation of powers in postwar Japan with little checks and balances, the persistence of arbitrary judicial personnel management within the court, and an ideology of "nameless faceless judiciary." A few signs of change have been emerging, among others, a change of power from the LDP to the Democratic

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Party; however, judicial appointment in itself does not seem to have an impact on judicial review in Japan.

Keywords: *Judicial Review, Judicial Selection, Judicial Reform, Lower Court Judges Nominating Consultation Commission, Nameless Faceless Judiciary*

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I. INTRODUCTION

Constitutional courts in Asian countries, such as Taiwan, Korea and Mongolia are becoming a real constraint on government.¹ Merit selection of judges, under which judges are screened based on merit mostly through judicial selection commission composed of lawyers and citizens,² gains the world-wide attention to avoid politicized judges in the expansion of judicial power.³

The situation of Japan seems to be different at first sight. In Japan, constitutional matters are decided in ordinary courts. The Japanese judiciary has been described as passive or self-restrained in the area of judicial review.⁴ The Supreme Court of Japan has decided many cases since the end of World War II.⁵ However, it has declared statutes to be unconstitutional only in eight cases so far. These eight cases were on issues concerning family (April 4, 1973; June 4, 2008), public offices election (April 14, 1976; July 17, 1985; September 14, 2005), regulations on pharmacies (April 30, 1975), properties (April 22, 1987), and postal services (September 11, 2002).⁶

There are also lower courts' decisions that ruled statutes unconstitutional. They rarely escaped reversal by higher courts on appeals. However, issues concerned in such lower courts cases are relatively more varied than the eight Supreme Court decisions discussed above. They include such matters as the constitutionality of the house-to-house visiting in public offices election campaign, Self-Defense Force (at Sapporo District Court, Naganuma case in 1973), Residents Register Network System (at Osaka High Court in 2006), Air Self-Defense Force's mission in Iraq (at

1. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003); Jiunn-rong Yeh & Wen-Chen Chang, *The Changing Landscape of Modern Constitutionalism: Transitional Perspective*, 4(1) NTU L. REV. 145, 145 (2009).

2. Takayuki Ii, *Merit Selection no Shiten Kara Mita Kakyuu Saibansho Saibankan Shimei Shimon Iinkai [Lower Court Judges Nominating Advisory Commission Seen from the Viewpoint of Merit Selection]*, 60(10) JIYU TO SEIGI [LIBERTY AND JUSTICE] 10, 10 (2009).

3. APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER (Kate Malleson & Peter H. Russell eds., 2006).

4. Hidenori Tomatsu, *Judicial Review in Japan: An Overview of Efforts to Introduce U.S. Theories*, in FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 251 (Yoichi Higuchi ed., 2001). It is important to note that Japanese court is also pointed out to have been relatively active and shaped policy by itself in some civil fields except politically sensitive cases. DANIEL H. FOOTE, SAIBAN TO SHAKAI: SHIHOU NO "JYOSHIKI" SAIKOU [THE COURTS AND SOCIETY: STEREOTYPES OF JUSTICE REEXAMINED] 211-73 (Masayuki Tamaruya trans., 2006).

5. Selected Supreme Court cases (in English) decided by 1990 can be found in JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60 (1964); THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-70 (Hiroshi Itoh & Lawrence W. Beer eds., 1978); LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN: 1970 THROUGH 1990 (1996).

6. English version of major Supreme Court judgments, <http://www.courts.go.jp/english/judgments/index.html> (last visited Sept. 6, 2010).

Nagoya High Court in 2008)⁷ and others.

When we turn our eyes to those lower court judges who have ruled statutes or governmental policy unconstitutional, it seems that they would face pressure as a result of having made such rulings. A judge, who decided the house-to-house visiting to be unconstitutional in 1968, was later discriminated in post-assignment and wage payment.⁸ The Chief Judge in the Naganuma case was interfered with the judgment beforehand by his superior (Hiraga) before he handed down the judgment. He made public the interference but was subsequently disciplined for this and was transferred to regional court branches without an opportunity to be posted in more “attractive” posts such as those in metropolitan areas.⁹ Osaka High Court Chief Judge, who decided the Residents Register Network to be unconstitutional, committed suicide three days after the judgment (the reasons for his suicide is unknown). The Nagoya High Court Chief Judge presiding the above-mentioned Air Self-Defense Force case retired before the statutory retirement age, although the retirement took place before the time of the actual delivery of the judgment.

This phenomenon of “judicial passivism” in constitutional review may be caused by these judicial bureaucracy control,¹⁰ in which the Supreme Court has a discretion to decide judicial personnel, as well as many related issues, such as liquidation of problematic prewar statutes (e.g., law on keeping public order), process of legislation (especially, role of the Cabinet Bureau of Legislation), influence by researchers of the Supreme Court, method of constitutional judgment and legal ideology.¹¹

The Japanese judicial system has been studied by foreign as well as Japanese scholars.¹² However, Judicial Reform (also known as Justice

7. This decision concerning the constitutionality of the Air Self Defense Force’s Iraq mission was finalized because the state, which won the ruling, could not appeal and the plaintiffs did not appeal either.

8. HARUHIKO ABE, INU NI NARENAKATTA SAIBANKAN: SHIHO KANRYO TOUSEI NI KOSHITE 36 NEN [A JUDGE WHO COULD NOT BECOME A DOG: 36 YEARS RESISTING JUDICIAL BUREAUCRACY CONTROL] 69-87, 216-37 (2001).

9. MASAO FUKUSHIMA ET AL., NAGANUMA JIKEN HIRAGA SHOKAN: 35 NENME NO SHOGEN—JEITAI IKEN HANKETSU TO SHIHO NO KIKI [NAGANUMA CASE AND A LETTER FROM HIRAGA: WITNESS IN THE 35TH YEARS—UNCONSTITUTIONAL DECISION OF SELF DEFENCE FORCE AND CRISIS OF THE JUDICIARY] 29-115, 190-236 (2009).

10. Setsuo Miyazawa, *Administrative Control of Japanese Judges*, in LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY 263 (Phillip C.S. Lewis ed., 1994); Masaki Abe, *The Internal Control of a Bureaucratic Judiciary: The Case of Japan*, 23 INT’L. J. SOC. L. 303 (1995).

11. Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 1(2) INT’L J. CONST. L. 224 (2003).

12. To name some works written in English, e.g., David J. Danelski, *The Supreme Court of Japan: An Exploratory Study*, in COMPARATIVE JUDICIAL BEHAVIOR: CROSS-CULTURAL STUDIES OF POLITICAL DECISION-MAKING IN THE EAST AND WEST 121 (Glendon Shubert & David J. Danelski eds., 1969); HIROSHI ITOH, THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES 9-41, 159-282 (1989); David M. O’Brien & Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL

System Reform) in the early 21st century has brought in partial changes to the system of judicial appointment. This is particularly due to the new establishment of the Lower Court Judges Nominating Consultation Commission (hereinafter *JNCC*). Except a few works,¹³ the functions and implications of this new body has not been thoroughly studied. This paper intends to fill this gap in the literature.

In contrast to the situation in lower courts, the Judicial Reform has not brought in any significant reform to the procedure on Supreme Court Justice's appointment. There are opinions that the rulings of constitutionality in the public servants' right of workers cases around 1970 were a result of a change in the composition of the Supreme Court Justices.¹⁴ If such is the case, judicial appointment might have an impact on judicial review. This paper tries to answer the question: does the judicial reform in the early 21st century (which includes the setting up of the *JNCC*) have an impact on judicial review? The research method adopted is a socio-legal approach. Here, judicial appointment is understood to encompass not only formal appointment procedure but also informal selection process, qualifications, availability of opportunities, and career ladders that lead to judicial position.¹⁵

This paper will first discuss the adoption of the Constitution after World War II (Section II below). It will then analyze the lower court judges' appointment procedure in the second half of the 20th century (Section III below), the establishment of the *JNCC* in the early 21st Century (Section IV below), and the effectiveness of recent judicial reform on judicial activism (Section V below). "Judicial activism" denotes multiple meanings, not necessarily limited to judicial invalidation of laws and regulations. This paper uses this term in contrast to "judicial passivism" discussed above.

II. ADOPTION OF THE CONSTITUTION AFTER WORLD WAR II

The modern justice system of Japan was established after 1868 (Meiji

PERSPECTIVES FROM AROUND THE WORLD 37 (Peter H. Russell & David M. O'Brien eds., 2001); J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN (2003); John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in LAW IN JAPAN: A TURNING POINT 99 (Daniel H. Foote ed., 2008).

13. Daniel H. Foote, *Recent Reforms to the Japanese Judiciary: Real Change or Mere Appearance?*, 66 HOUSHAKAIGAKU [SOCIOLOGY OF LAW] 128, 142-56 (2007); Takayuki Ii, *Nihon ni Okeru Saibankan Sennin Seido no Saiteii: Merit Selection no Keijyu to Henyou* [*Repositioning Japanese Judicial Selection System: Succession and Acculturation of the American Merit Selection*], 8 AOMORI L. & POL. SCI. REV. 62 (2007).

14. Tamiji Ishizaka et al., 20 KEISHŪ 901 (Sup. Ct., Oct. 26, 1966); Agriculture & Forestry Trade Union, 27 KEISHŪ 547 (Sup. Ct., Apr. 25, 1973).

15. MARY L. VOLCANSEK & JACQUELINE L. LAFON, JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES 2-3 (1988).

Era). Under the 1889 Constitution of the Empire of Japan (the first constitution in the modern justice system) and the 1890 Court Organization Law, the Emperor appointed judges for life.¹⁶ After the end of World War II, Japan was placed under the control of the General Headquarters of the Supreme Commander for the Allied Powers (hereinafter *GHQ*). The GHQ was mainly consisted of Americans, and the reform of the postwar Japan regime including justice system received strong American influence.¹⁷

The postwar Japanese judiciary system has many characteristics in common with that of the United States. This is due to the new Constitution adopted in 1947, which was originally drafted by the GHQ. Under the pre-War 1890 Constitution, the judicial organ was part of the Ministry of Justice. The 1947 Constitution established judicial supremacy and independence. It freed the judiciary from the control of the Ministry of Justice and made it an independent and autonomous branch of government. The judiciary was given exclusive power and jurisdiction on judicial administration and rule-making power with Judicial Conference, adjudication on all legal disputes, and judicial review (to determine the constitutionality of any law, order, regulation, or official government act). The new Constitution also introduced a change in the term of appointment of lower court judges. The term of office is ten years now (Article 80), as compared with the life tenure under the 1890 Constitution. The new Constitution also makes the Supreme Court Justices subject to a review of his or her appointment by the people. This is influenced by the merit selection system in some American states.¹⁸

The 1947 Constitution provides for a separation of powers with checks and balances among the legislative, executive and judicial branches. The courts are empowered to determine the constitutionality of any order, regulation or official act issued or taken by the Cabinet, various subordinate administrative branches, or any law passed by the Diet in actual cases or controversies.¹⁹ The Cabinet has the power to nominate the Chief Justice of the Supreme Court and to appoint other Supreme Court Justices and lower court judges. Concerning the Supreme Court Justices, the appointment shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed

16. Saibansho Kōseihō [Court Organization Law], Law No. 6 of 1890, art. 67.

17. ALFRED C. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN: A PARTICIPANT LOOKS BACK (1976); SHOICHI KOSEKI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION 68-191 (Ray A. Moore ed. & trans., 1997).

18. JOANNE MARTIN, MERIT SELECTION COMMISSIONS: WHAT DO THEY DO? HOW EFFECTIVE ARE THEY? 1-23 (1993); CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 125-45 (1997).

19. Norikazu Kawagishi, *The Birth of Judicial Review in Japan*, 5 INT'L J. CONST. L. 308 (2007). Art. 81 of the 1947 Constitution provides that the Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

again every ten years. Among fifteen Supreme Court Justices, at least ten must have more than twenty years of any legal practices, but the remainder are not required to pass the bar exam.²⁰

Article 6, Section 2. The Emperor shall appoint the Chief Judge of the Supreme Court as designated by the Cabinet.

Article 79, Section 1. The Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law; all such judges excepting the Chief Judge shall be appointed by the Cabinet.

Section 2. The appointment of the judge of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten (10) years, and in the same manner thereafter.

Section 3. In cases mentioned in the foregoing paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed.

The qualification of the lower court judges excluding Summary Court Judges is to have more than ten years of any legal practices.²¹ The appointment method is as follows:

Article 80, Section 1. The judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court. All such judges shall hold office for a term of ten (10) years with privilege of reappointment, provided that they shall be retired upon the attainment of the age fixed by law.

These judicial selection systems seem to be imitations of the merit plan in the United States or the recommendations of the American Bar Associations in 1937,²² under which judges shall be appointed by the governor or the assembly from nominees by the judicial nominating commission, and subject to retention election at the end of their term of office. In Japan, immediately after the end of World War II, the Justice Appointment Consultation Commission, which was established for the first

20. Saibanshohō [Court Act], Law No. 59 of 1947, art. 41.

21. *Id.* art. 42.

22. KENZO TAKAYANAGI ET AL., NIHONKOKU KEMPO SEITEI NO KATEI II [THE MAKING OF THE CONSTITUTION OF JAPAN PART II] 238-39 (1972).

selection of Supreme Court Justices, performed almost the same role as the judicial nominating commission in the United States.²³

It is pointed out that the appointment system of lower court judges under the Constitution is a compromise between the opinion that judges should be appointed for life and the one that judges should be elected with certain terms of office.²⁴ Since judicial independence also depends on the appointment system of lower court judges, the 1947 Constitution provides that the Cabinet makes such appointment from the nominees put forward by the Supreme Court.

According to Tanaka,²⁵ the GHQ might have supposed that the Supreme Court, which could include up to five lay persons out of 15 judges, would perform the task of a judicial nominating commission. On judges' appointment, the Constitution, in any way, originally intended to leave a choice for the Cabinet. In fact, an early draft of the Constitution dated February 4, 1946 provided as follows:

The judges of the inferior courts shall be appointed by the government from a list which shall be composed of at least two persons nominated by the Supreme Court and two persons nominated in such other manner as the Diet may provide.²⁶

The GHQ's draft (*MacArthur's Document*), which was submitted to the Japanese Government on February 13, provided as follows:

The judges of the inferior courts shall be appointed by the Cabinet from a list which for each vacancy shall contain the name of at least two persons nominated by the Supreme Court. All such justices shall hold office for a term of ten years with privilege of reappointment . . .²⁷

The Japanese government considered the MacArthur's Document and prepared a new draft in Japanese. The Second Draft of the Constitution of Japan written on March 2 provided as follows:

23. ITOH, *supra* note 12, at 19-24.

24. TAKAYANAGI ET AL., *supra* note 22, at 241.

25. HIDEO TANAKA, EIBEI NO SHIHOU: SAIBANSHO, HOURITUKA [COURTS AND THE PROFESSION IN ENGLAND AND IN THE UNITED STATES] 423 (1973).

26. Original Drafts of the Revised Constitution (Feb. 4, 1946) (on file with National Diet Library of Japan) art. LIX. NIHONKOKU KENPOU SEITEI NO KATEI [CIRCUMSTANCES OF DRAFTING THE CONSTITUTION OF JAPAN] 107 (Hideo Inumaru ed., 1989).

27. GHQ Draft of the Constitution of Japan (Feb. 13, 1946) (on file with National Diet Library of Japan) art. LXXII; SHUSENGO NO SHIHUSEIDO KAIAKAKU NO KEIKA I [DETAILS OF THE JUDICIAL REFORM AFTER THE WAR PART I] 114-15 (Yorihiko Naito ed., 1959).

The judges of the inferior courts shall be appointed from the persons that shall be at least double the numbers (for each vacancy) nominated by the Supreme Court. All such judges hold office for a term of ten years with privilege of reappointment.²⁸

During the deliberations on March 4 and 5, however, the provision “for each vacancy shall contain the name of at least two persons” was dropped. It is estimated that the GHQ thought it enough for such requirement to be specified in the relevant law instead of within the Constitution.²⁹ However, it was not provided in the 1947 Court Act [Saibanshohō]. It is also possible that the GHQ might have supposed that for each vacancy many persons would be nominated to the Cabinet. However, if such is the case, their anticipation or expectation has been betrayed. In reality, such has not been achieved in the practice of nomination by the Supreme Court.

III. THE PROCEDURE OF JUDICIAL APPOINTMENT IN THE SECOND HALF OF THE 20TH CENTURY

A. *Lower Court Judges*

1. *Source of Judges*

The GHQ is supposed to have anticipated that judges would be appointed from practicing attorneys.³⁰ But this is hampered by the provision in the 1947 Court Act on Assistant Judge [Hanji-Ho] positions and their being part of the team of inferior court judges. These Assistant Judges are recruited from the Legal Training and Research Institute (hereinafter *LTRI*) graduates, as one kind of inferior court judges. There could have been many kinds of sources of supply aside from Assistant Judges, but in reality, there were not so many attorneys, public procurators, professors or others who wished to be appointed as judges. Therefore, almost all judges have been appointed from Assistant Judges, who are directly recruited from new graduates of the LTRI.

2. *Recruitment Practice*

The LTRI gives passers of the bar exam (the first exam) trainings of

28. Nihonkokukenpō: Sangatsu futsuka an [Second Draft of the Constitution of Japan] (Mar. 2, 1946) (on file with National Diet Library of Japan) art. 83; DETAILS OF THE JUDICIAL REFORM AFTER THE WAR PART I, *supra* note 27, at 125.

29. TAKAYANAGI ET AL., *supra* note 22, at 241.

30. TANAKA, *supra* note 25, at 445-46.

legal writing as well as on-the-job trainings at the courts, public prosecutor offices and law firms. It is placed under the Supreme Court and its classes are taught by active judges, public prosecutors and attorney instructors working for the term of several years. Trainees must pass the graduation exam of the LTRI (the second exam) to become judges, public prosecutors or attorneys. The appointment of Assistant Judges formally starts with applications from potential graduates of the LTRI in the Supreme Court.

The prescribed number of newly employed assistant judges and public prosecutors is limited to around 100 each yearly. The position of judges and public prosecutors is competitive; however, requirement of employment is not necessarily clear. It is said that the LTRI has a recruitment practice in that instructors (who are judges) advise promising LTRI students to apply for Assistant Judge positions. Assistant Judges are virtually limited to those candidates who are young, the judge instructors consider favorable and get good grades at the second exam.

On appointment of Assistant Judges to become judges, the Supreme Court explains that the Assistant Judges, who are not likely to be nominated in the light of performance evaluations and health etc., usually take advice before submitting their applications, so it is rare for those who actually put in applications not to be reappointed.³¹ From this account, the case seems nearly the same as the nomination of Assistant Judges in that both judicial recruitment and consideration for the nomination are conducted before the formal nominating decision by the Supreme Court conference.

3. *Nominating Process*

Since 1999, due to the shortening of the period of the apprenticeship at the LTRI from two years to one and half years, the time of the appointment was October (from new LTRI graduates and attorneys) and April (for Assistant Judges seeking appointment to judges, judges for reappointment and attorneys). The period of the apprenticeship is one year for law school graduates. Nowadays, about 100 new LTRI graduates, 170 Assistant Judges and judges, and less than 10 attorneys are nominated every year. Additionally, there are around 30 Assistant Judges and judges returned from other offices, such as Ministry of Justice.³²

New LTRI graduates who apply to become Assistant Judges are required to submit “Application to Assistant judge” [Hanjiho Ninyou Negai] and

31. Saikōsaibansho [Supreme Court], Saibankan Seido no Kaikaku ni Tsuite [On the Reform of the Judge System] (Feb. 19, 2001) (unpublished paper presented at the 48th meeting of JSRC).

32. In 2002, number of nominees were 312; 106 LTRI graduates to Assistant Judges, 164 Assistant Judges and judges to judges, 5 lawyers to Assistant Judges and judges, and 22 Assistant Judges and 15 judges returned from other offices to Assistant Judges and judges.

“Personal Information Form” [Shinjou Tyousho]. The latter includes provisions of such information as name, address, experience, family, health, hobby, books recently interested in, close friends’ name, occupation and address, applicant’s character, motive to apply to the judiciary, guidance instructor at the LTRI. Assistant Judges and judges seeking nomination are required to submit “Application to judge” [Hanji Ninyou Negai].

Additionally, before the Supreme Court conference for the nomination is held, in practice, the chiefs of seven bureaus of the General Secretariat of the Supreme Court interview the applicants who are from new LTRI graduates and attorneys. Interviews for all new LTRI graduates are usually conducted in late September in two days, after the results of the mid-September graduation examination are known to the chiefs.

When Assistant Judges are nominated, the Supreme Court conference is held only once immediately before the date of appointment. Ordinarily, the conference takes one hour or so including the time to discuss other issues. The material for consideration is only the draft of the nomination list with only the names of such applicants that the General Secretariat thinks fit. In the case of Assistant Judges and judges that seek reappointment, the Supreme Court conference is held twice in early March. At the first conference the nomination list is delivered from the General Secretariat to each Supreme Court Justice and at the next conference (usually next Wednesday) the nomination is made. The material put forward for their consideration is usually a list of only the applicants’ names. The second conference takes about a few hours or so including other topics to discuss.

Judicial nomination is formally decided in the Supreme Court conference. But the conference is supplied with limited material: only a draft of the nomination list with limited number of applicants. The conference also has limited time for the consideration. With such limitations, the nomination process is almost a mere confirmation of the draft prepared by the General Secretariat of the Supreme Court. Hence, the General Secretariat plays a crucial role in nominating lower court judges.

The number of non-nominees (applicants not having been nominated) is at least 53 from 1947 to 1968, and 59 from 1970 to 2002 (Table 1). The fact that there are few Assistant Judge applicants who are not nominated by the Supreme Court seems to support the argument that there is screening process before the formal application step.

Nearly all Assistant Judges and judges have been permitted to be appointed or reappointed to judges. There were about ten persons who were not appointed or reappointed to judges from 1957 to 1969.³³ There were

33. Norimasa Yazaki, former Chief of Personnel Bureau of the General Secretariat of the Supreme Court, said that there was about one person a year who was not nominated against his or her will at the Committee on the Judiciary of the House of Councilors on June 10, 1969.

three between the year 1970 and 2002 (including the well-known non-nominated case of Assistant Judge Miyamoto in 1971). But in 2004, the Supreme Court did not nominate 8 new LTRI graduates to Assistant Judges and 2 Assistant Judges or judges to judges, as will be discussed later.

Table 1 Number of Nominees and Non-Nominees to Assistant Judges and Judges from 1970 to 2002

The Year	Graduates from the LTRI	Nominees to Assistant Judges	Non-nominees to Assistant Judges	Non-nominees to Judges
1970	512	61	3	1
1971	506	63	7	0
1972	495	58	3	0
1973	493	65	2	0
1974	506	85	2	0
1975	543	84	4	0
1976	537	78	3	0
1977	487	70	4	0
1978	463	76	2	0
1979	465	61	5	0
1980	454	63	4	0
1981	484	61	0	0
1982	499	62	2	0
1983	483	57	5	0
1984	436	58	0	0
1985	447	61	1	0
1986	450	63	0	0
1987	448	62	3	0
1988	482	71	0	0
1989	470	58	0	0
1990	489	81	0	0
1991	506	94	0	0
1992	508	65	0	0
1993	506	94	0	0
1994	594	102	1	0
1995	633	99	2	0
1996	699	99	1	0
1997	720	102	1	1
1998	726	93	2	0

The Year	Graduates from the LTRI	Nominees to Assistant Judges	Non-nominees to Assistant Judges	Non-nominees to Judges
1999	729	97	0	0
2000	742	87	0	0
2000 (fall)	788	82	0	
2001	975	112	0	0
2002	988	106	2	1

Source: SHIHO KENSHUJO, SHIHO SHUSHUSEI BINRAN [THE LEGAL APPRENTICE HANDBOOK] 46-47 (2004); author.

4. Selection Criteria

The nomination or selection criteria of lower court judges as well as the investigation process by the General Secretariat are unclear. The Supreme Court explains that in the appointment of Assistant Judges, grades, aptitude and health are considered. There were cases especially in the 1970s that some applicants who were members of the Young Lawyers League [Seinen Houritsuka Kyoukai] did not receive nomination. In 1994, there was a non-nomination case concerning one new LTRI graduate, which raises suspicion due to his particular experience (*Kamisaka* case). And the Supreme Court had not disclosed to the candidates the reasons for non-nomination.

It is claimed that test results and answers provided by the applicants to questions during the interview with bureau chiefs of the General Secretariat are very important factors for inclusion in the draft nomination list. The information filled in on the "Personal Information Form" would be helpful at the interview. In addition, younger applicants tend to be favored.³⁴

5. Appointment

The Supreme Court prepares the nomination list, which is in practice has separate sections for each category of judges: Chief Judges of the high court, Judges, Assistant Judges, and Summary Court Judges. But the number of candidates who were put on the lists is just one more than the vacancies. Therefore, except one, all will be accepted.³⁵ This was the situation except for a short period after the end of war.³⁶ This practice has given the Supreme

34. The Supreme Court reported that the age of the nominees to Assistant Judges in 2003 ranged from 23 to 35, and the average age was 26.42. The average age of the state examination was 27.42 in 2001, so in considering one and half years of apprenticeship, the nominees to Assistant Judges are about three years younger than others.

35. Saikōsaibansho, *supra* note 31, at 8. This practice is in the case of nominating inferior court judges except Summary Court Judges. The latter are nominated the same number as the vacancies.

36. According to Chuichi Suzuki, former Chief of Personnel Bureau of the General Secretariat of

Court the de facto power in appointing lower court judges.

In addition, the time between nomination and appointment is short. Assistant Judges (recently about 100) are nominated by the Supreme Court conference about three days before the time to be appointed in October.³⁷ Judges are nominated about one month before the appointment.³⁸ Attorneys are decided to be nominated about four months before the appointment in the convenience of the applicants; however, it seems that the period of the formal nomination to the Cabinet is about one month before the appointment.

Materials sent to the Cabinet for appointment consideration are: the list that includes only the nominees' names and previous post; and an accompanied paper with particulars on their qualifications and the post to be assigned. Therefore, the Cabinet gets almost no detailed information for their consideration on the appointments.

Hence, the nomination process impacts on judicial appointment as a result of limitation in three aspects: number of nominees, time for consideration, and materials for consideration. The situation between the Supreme Court and the Cabinet resembles the one between the General Secretariat of the Supreme Court and the Supreme Court. The appointment of the inferior court judges by the Cabinet follows the nomination by the Supreme Court, which follows the draft prepared by the General Secretariat. The Cabinet's appointment is in reality a mere endorsement of the General Secretariat's decision.

Despite the limitations as discussed above, the Cabinet does not seem to have made any objections to the Supreme Court. In fact, it is said that the Cabinet has never refused to appoint any candidates nominated by the Supreme Court and it just appointed all the marked nominees.³⁹ The actual state of affairs is unknown, but there might be tacit negotiations or

the Supreme Court, immediately after the establishment of the Supreme Court, nomination lists were made in which for each vacancy double number of persons were included. But after a short period, administrative negotiations took place and the practice of making a list that includes an equal number of persons to each vacancy plus one started. *See* KENPO TYOSAKAI [COMMISSION ON THE CONSTITUTION], KENPO TYOSAKAI DAIICHI IINKAI DAI ICHI-NANA KAI KAIGI GIZIROKU [MINUTES OF THE 1ST-7TH MEETINGS OF THE 1ST COMMITTEE OF THE COMMISSION ON THE CONSTITUTION] 11 (1959).

37. For example, associate judges were nominated on Nov. 8 and appointed on Nov. 11 by the Cabinet in 2002.

38. For example, Assistant Judges and judges were nominated on Mar. 12 and appointed by the Cabinet around Apr. 12 and 13 in 2003. The draft of the nomination list was delivered at the 9th conference held in Mar. 5 that started at 10:30 am and ended at 11:30 am and nominees were decided according to the draft in the 10th conference in Mar. 12 that started at 10:30 am and ended at 14:10 pm, see Minutes of the 9th and 10th Saibankan Kaigi [Judicial conference] (Mar. 5 and 12, 2003).

39. *See* remark of a senior judge of the General Secretariat of the Supreme Court, in Minutes of the 4th meeting of the Asu no Saibansho O Kangaeru Kondankai [The Roundtable Conference to Consider the Court of Tomorrow] (July 22, 2002).

agreements between the Court and the Cabinet.⁴⁰

6. *Assignment*

Nomination includes the assignment to a particular court and the position. Under the current system, personnel management for judges at the lower courts is conducted pursuant to decisions made by the Judicial Conference of the Supreme Court, as one component of its judicial administration function.⁴¹ However, personnel management for judges at the lower courts seems to lack transparency and objectivity. When a person is appointed as an associate judge, he or she is assigned to a court and will rotate about every three years. Which court an associate judge is firstly assigned to is substantially decided by the Personnel Bureau of the General Secretariat of the Supreme Court. This may or may not be in accordance with the will of an associate judge himself or herself. If the first assignment is to the Tokyo District Court, it is seen as an elite course.

After becoming an associate judge, he or she may request where to serve next in the “Second Judge Card,” which is required to be submitted every year. However, whether or not his or her wish is granted depends on the decision of the Personnel Bureau and the Chief Judges of the High Courts. Assistant Judges and judges keep on rotating all over the country during their judicial career. Some judges become presiding judges of a division of a family court, district court or high court, the chief judges of these courts, or judges of the Supreme Court, while others remain in lower positions. The criteria on assignment and the increase in wages (raises) for judges after twenty years of services are unknown, too.

B. *Supreme Court Justices*

Under the current system, the Emperor appoints the Chief Justice of the Supreme Court, based upon the nomination by the Cabinet. The Cabinet appoints the other Supreme Court Justices. However, the Cabinet’s nomination process and the appointment process are not necessarily transparent. Justice Appointment Consultation Commission was established in 1947 pursuant to the provisions of the Court Law, but it was dissolved soon afterwards. Problems have been pointed out. They include the entrenchment of fixed proportions for the numbers of justices who come

40. It might be crucial what “administrative negotiations” was in the remarks of Suzuki, *supra* note 36.

41. In terms of judicial administration function of the Supreme Court, see Takaaki Hattori, *The Role of the Supreme Court of Japan in the Field of Judicial Administration*, 60 WASH. L. REV. 69 (1984).

from each field.

As of July 2010, among the fifteen justices, six are career judges, four are attorneys, two are public prosecutors, two are public servants (one from the Ministry of Foreign Affairs, and the other from the Ministry of Public Welfare and Labor), and one is a former law professor and judge. There had been only one female justice (from the Ministry of Public Welfare and Labor) since 1994, however, one more female justice entered in April 2010. Justices from attorneys tend to write minority opinions and decide cases to be unconstitutional.

The criteria of appointment are unclear. It seems that each field has its good will and basically selects candidates by itself. The Cabinet Secretary explains the appointment process as follows.⁴²

- The Supreme Court Justices are appointed by the Cabinet after hearing opinions of the Supreme Court Chief Justice.
- The hearing of the Chief Justice is conventionally conducted for the personnel management that reflects as far as possible the actual circumstances of the Supreme Court.
- The Chief Justice generally gives opinions on candidates' field, several candidates, and the most splendid candidate.
- Candidates' list is submitted to a Cabinet council through Prime Minister's judgment (a) upon the Chief Justice's presentation of several candidates (in relation to candidates from judges, attorneys and public prosecutors), or (b) upon the selection by the Cabinet secretary (in relation to candidates from persons of learning and experience including administration and foreign affairs).
- Supreme Court Justices are selected from utmost objective and fair point of view in consideration of their important status, which is subject to popular review.
- Current fields that the Supreme Court Justices come from are results of synthetic consideration of the Supreme Court's mission and cases it dealt with and others.⁴³
- Selection process and reason of selection are made clear as far as possible at a press conference by a Chief Cabinet secretary after

42. Naikaku Kanbou [Secretary of the Cabinet], Saikousai Saibankan no Ninmei ni Tsuite [On the Appointment of the Supreme Court Justices] (paper presented at the 5th meeting of the Daigokai Shihōseido Kaikaku Suishin Honbu Komon Kaigi [Adviser Assembly of the Judicial Reform Promotion Office], July 5, 2002).

43. *Id.* The mission of the Supreme Court is constitutional judgments and unification of statute interpretations. Cases dealt with by the Supreme Court are approximately 6,400 (civil cases are approximately 4,500, criminal cases are approximately 1,900 and grand bench cases (constitutional judgment and precedent change) are 8) per year as of 2000.

unofficial decision of appointment. Detailed process of judicial selection including other candidates is not publicized.

Most Supreme Court Justices are appointed at their sixties and work for several years before their statutory retirement age: seventy. They must decide many cases and some of them retire before seventy due to their heavy workloads.

In addition, it has been observed that the system of popular review of Supreme Court Justices has no practical meanings. People can only dismiss a Justice by putting a “X” mark next to his/her name. There is no detailed information related to each individual Justice subject to the review process. It is not possible for the people to make meaningful judgments. In consequence, none of the 157 justices who have been subject to popular review have been dismissed in the 21 elections since after World War II to August 2009.

IV. JUDICIAL REFORM AND BIRTH OF THE LOWER COURT JUDGES NOMINATING CONSULTATION COMMISSION IN THE EARLY 21ST CENTURY

A. *Reforms to Judges in the Early 21st Century*

Japanese courts have been reluctant to exercise judicial review especially on constitutional cases and politically sensitive cases. In spite of the strong autonomous power, courts and judges seem to be manipulated by the General Secretariat of the Supreme Court, which is mainly administered by judge officials. Japanese judiciary system is different from that of the United States in many aspects. First, for example, concerning the sources of judges, most judges of the inferior courts are selected from Assistant Judges, who are recruited from young LTRI graduates. Some attorneys have been nominated to judges in Japan, but they are in the minority unlike the United States. American judges are generally selected from experienced attorneys. Second, the methods of judicial selection are different. Third, judges rotate approximately every three years based on the personnel plan of the Personnel Bureau of the General Secretariat of the Supreme Court and Chief Judges of the High Courts. The wage rise after about twenty year services is also in practice decided by the Supreme Court.

In 1999, the Justice System Reform Council (hereinafter *JSRC*) was established in the Cabinet to work out a recommendation on the reform of the judicial system (which includes the judiciary system). The JSRC held 63 meetings in two years and submitted its final recommendations to the Cabinet in June 2001. After that, the Office for Promotion of Judicial System

Reform was established in the Cabinet to proceed on the drafting of the necessary bills to implement the judicial reform.

The JSRC proposed reforms to the judge system.⁴⁴ The ratio of judges to 100,000 people in Japan was 1.87 in 2004, which was a small figure as compared with some foreign countries.⁴⁵ The JSRC recommended an expansion of the judge population. There was an annual increase of about 75 Assistant Judges and judges from 2001, though this might not be a large figure.

On the judiciary system, the JSRC at the beginning had set “Housoichigen” (the system which appoints judges from legal professionals, especially attorneys, except judges) as an issue of discussions. However, after severe debates among members on termination of the Assistant Judge system, the JSRC decided not to use the word “Housoichigen.” Instead, the JSRC tried to reform the judge system concretely from three perspectives; diversification of the sources of supply, reexamination of the procedures for appointment and securing transparency and objectivity of the personnel system for judges.

First, to diversify the sources of judges, a new system commenced in April 2005. Assistant Judges will gain diversified experience through posting to legal profession positions other than the judges. But, it is expected that only ten Assistant Judges will be able to experience attorneys’ practice per year. The JSRC has recommended promotion of judicial appointment from lawyers, which however has not been fully realized.⁴⁶ And to push the judicial appointment from lawyers and to enrich the trial of the courts, the Mediation Officers in civil and family cases (kaji tyouteikan and minji tyouteikan) at part-time services were established in the conference between the Supreme Court and the Japan Federation of Bar Associations (hereinafter *JFBA*). This quasi part-time judge system started in 2003 and 30 Mediation Officers have been recruited from attorneys per year. The JSRC also recommended that the Special Assistant Judge [Tokurei Hanji-ho] system (under which those who are specially designated from among the Assistant Judges having over five years of experience are empowered to exercise the same authority as judges) should be terminated and the research clerk system be expanded, but these have not realized.

44. Takayuki Ii, *Saibankan Seido Kaikaku no Rinen to Jitsuzou* [Ideal and Real Picture of the Judge System Reform], 5 SHIHOU KAIKAKU TYOUSASHITSU HOU [RES. OFF. FOR JUD. REFORM REV.] 11, 15-29 (2005).

45. The number of judges in the same proportion to people was 10.85 in the United States; 7.25 in England and Wales; 25.33 in Germany; 8.78 in French, see SAIBANSHO DATA BOOK 2004 [COURT DATA BOOK 2004] 25-26 (Saikōsaibansho [Sup. Ct.] ed., 2004). Its original source varies from 2002 to 2004 by countries.

46. The number of attorneys who become judges is around five per year: 46 from 1991 to 2001 and 43 from 2002 to 2008.

Second, concerning the appointment of judges, the JSRC recommended that “in order to reflect the views of the people in the process whereby the Supreme Court nominates those to be appointed as lower court judges, a body should be established in the Supreme Court, which, upon receiving consultations from the Supreme Court, selects appropriate candidates for nomination, and recommends the results of its consideration to the Supreme Court.”⁴⁷ This proposal was put into practice as the JNCC, as will be discussed later.

Third, to secure transparency and objectivity of the personnel system, the judicial evaluation process, which has been conducted informally since mid-1950s, is now made public and prescribed in the Supreme Court rule in 2004. But the evaluation process is still unclear and the significance of the evaluation result in relation to the assignment remains to be unclear. The JSRC recommended to consider the system of wage increases (raises) for judges, which included a possible simplification of the current compensation grades (there are 23 grades except for Supreme Court Justices and Chief Judges of High Courts). However, nothing has been done again.

To enable the views of the people to be reflected broadly in the management of the courts, the Family Court Council system was reinforced and bodies similar to the Family Court Councils were newly established in District Courts in 2003.

In addition, concerning the Supreme Court Justices, the JSRC recommended that studies should be made on the appropriate mechanisms for the purpose of securing transparency and objectivity with regard to the appointment process. The establishment of the judicial selection board such as the Justice Appointment Consultation Commission in 1947 was given as an example for the reform, but almost nothing has changed. There is only a minor change: from 2002, new Supreme Court Justice’s short personal history and reason of appointment are provided by the Cabinet Secretary after his or her appointment. The system for popular review of Supreme Court Justices was recommended to be activated, but thereafter almost nothing has changed in reality.

B. *Birth of the Lower Court Judges Nominating Consultation Commission*

1. *Process of Establishment*

Japan has had one formal judicial selection board. In 1947, the Justice Appointment Consultation Commission was established for the initial

47. Justice System Reform Council, Recommendations of the Justice System Reform Council (June 12, 2001), http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html (last visited Sept. 6, 2010).

selection of Supreme Court Justices but it was abolished soon afterwards. Besides, there is the Summary Court Judge Selection Committee of the Supreme Court which selects Summary Court Judges mainly from court clerks.⁴⁸ In recent years, judicial screening committees for attorneys have been established in eight Federations of Bar Associations and three bar associations in Tokyo, though they are not national institutions. Hence, the JNCC is almost the first formal judicial selection board for the lower court judges in Japan.

As described above, the JNCC was created on the recommendation of the JSRC. Originally, the idea of establishing an inferior court judges nominating advisory body was raised by the JSRC and it was accepted by the Supreme Court on February 19, 2001,⁴⁹ though the Court did not propose any reforms about the judge system except the need to cope with the specialization at the beginning of the JSRC.⁵⁰ It seems that the Supreme Court had watched the debates in the JSRC and decided to conduct a feasible self reform before the JSRC has the chance to demand deeper and wider reform.

The JSRC made some additions to the Supreme Court's suggestion so as to enable the advisory body to substantially exercise its own judgments on candidate selection. The JSRC recommendations have highlighted the significance of such matters as the manners for the Supreme Court's consultations with the body, the transparency of the selection process (including disclosing the selection standards, procedures, schedule and other matters), the establishment of subsidiary bodies in each geographical region and the due efforts to secure impartiality and fairness with regard to the composition and selection of members of the body. The recommendation proposed that "in consideration of the import of the Constitution, which allocates the selection of appropriate candidates for the judiciary to the Supreme Court from the standpoint of securing the independence of the judiciary, the opinion of the body regarding the selection results can have no legally binding effect on that Court. However, from the standpoint of accountability, if the Supreme Court does not nominate for appointment a candidate deemed appropriate by the body, the Supreme Court shall, upon request by that candidate, disclose to the candidate the reasons for non-nomination."⁵¹

48. The committee is prescribed in a Supreme Court rule to be composed of judges (3), public prosecutors (1), attorneys (2), those with social knowledge and experience (3).

49. Saikōsaibansho, *supra* note 31, at 3-4.

50. Saikōsaibansho [Supreme Court], *Nijūisseiki no Shihou Seido o Kangaeru: Shihou Seido Kaikaku ni Kansuru Saibansho no Kihonteki na Kangae Kata* [Contemplating a Judicial System for the 21st Century: The Court's Basic Point of View Regarding Judicial Reform] (Dec. 8, 1999) (unpublished paper presented at the 8th meeting of JSRC).

51. Justice System Reform Council, *supra* note 47.

The JNCC was put into concrete shape mainly in the Supreme Court through the consideration of the Supreme Court General Rules Consultative Committee.⁵² The Office for Promotion of Justice System Reform, which was created in the Cabinet on December 1, 2001 to realize the recommendation by the JSRC, was also responsible to consider the judge system reform in its Housou Seido Kentoukai [Examination Committee on the Legal Professionals System]. The Committee discussed the result of the consideration of each (five) conference of the Supreme Court General Rules Consultative Committees. Finally, based on the report submitted by the General Rules Consultative Committees, the Supreme Court made “Rule on the Lower Court Judges Nominating Advisory Commission” at its conference on February 12, 2003.

By the rule, the JNCC is required to examine all the applicants to the judiciary and the Supreme Court is prohibited from giving opinions on the qualifications of applicants to the JNCC. The JNCC has the power to consult the applicant, related institutions and individuals. Eight Regional Committees have been established over the country to collect information about the applicants.

2. *Composition*

JNCC members (11 persons in total) are appointed by the Supreme Court from judges (2), public prosecutor (1), attorneys (2) and non-lawyers (6). Two members are female and others are male. All members were over 58 years old as of 2003.⁵³ Members of each Regional Committee (except the Tokyo regional committee) (5 persons in total) are appointed by the Supreme Court from judge (1), public prosecutor (1), attorney (1) and non-lawyers (2) by the Supreme Court. The Regional Committee in Tokyo has ten members. Six out of eight Regional Committees have female members (1 person each) but others are all male. Term of service is three years, for both members of the JNCC and members of the Regional Committees. They can be reappointed. The JNCC and its Regional Committees are administered by the general bureau of General Secretariat of the Supreme Court and the eight secretariats of the high courts located in each region respectively.

There are merits and problems in this JNCC system. First, though a majority of the JNCC members are non-lawyers, they include one former

52. General Rules Consultative Committee in 2002 was consisted in 20 members; judges (5), public prosecutors (2), attorneys (3), law professors (3), professors major in other fields than law (2) and others (5) (persons of enterprise, consumer organization, mass media, mayor and a judicial scrivener).

53. Commissioners were born between 1932 and 1946. The oldest member is a former Supreme Court Justice, who had been a law professor. 9 out of 11 members were born in the 1940s.

Supreme Court Justice and two law professors.⁵⁴ And, the former judge was elected to be the chair by the members. The attorney members are former chiefs of the secretariat of the JFBA. Second, as the power of appointing members is solely given to the Supreme Court, there is a possibility that persons who are likely to conform to the Court might be selected as members. Third, the Regional Committees' members are limited in number and non-lawyers are not a majority.⁵⁵ Fourth, an independent administrative function is vital to activate a committee, but it is the administrative bureaus of the secretariat of the courts which principally select nominees, and administer the JNCC and Regional Committees. The idea of establishing independent administration offices for the JNCC and Regional Committees was insisted in the rulemaking discussion but turned down in the end. So, judges work at the secretariat of administrative bureau of the courts as officials prepare materials for each meeting, attend the JNCC meeting and sometimes discuss with members. In addition, officials of personnel bureau of the courts attend the JNCC meeting as an expositor with permission of the members.⁵⁶

3. *Screening Process*

The JNCC held its 1st meeting on June 9, 2003 and 2nd and 3rd meetings on July 1 and 14. In these meetings, matters concerning its basic screening process were decided. These meetings were largely based on the materials prepared by the General Secretariat of the Supreme Court. The draft of time schedule of the meeting, process of the screening, standards of the selection were all given in the materials and the JNCC only confirmed them. The role of the JNCC was limited by time and material for screening.

There were mainly three patterns of screening according to the type of the applicants: new graduates of the LTRI applying to become assistant judges; Assistant Judges seeking nomination to judges' position and judges seeking re-appointment; and attorneys applying for appointment as Assistant Judges or judges. The JNCC did not screen all applicants, but only "persons to be intensively screened," who were pre-selected by the working group composed of some JNCC members.

The working group decided the "persons to be intensively screened" in

54. Other three lay members are a scientist, an announcer and a former public official. The latter two are female.

55. Non-lawyer members of Regional Committees are mostly law professors and non-legal academics. Some members are those concerned in mass media and ombudsman.

56. In the General Secretariat of the Supreme Court, approximately 40 judges work as officials about three years. The positions at the General Secretariat are seen to be one of the elite courses for judges. In fact, most Supreme Court Justices appointed from judges have experienced to work at the General Secretariat.

one or two meetings based almost only on the applicants' grades of the graduation test of the LTRI (in the case of screening new graduates of the LTRI) and the short reports concerning summarized evaluation on the applicants for previous ten years by the Chief Judges of the District Courts or High Courts they belong to. All attorneys are deemed to be the "persons to be intensively screened."

In the screening meeting of the JNCC for new LTRI graduates, their grades at the LTRI and the record of their interview with the General Secretariat of the Supreme Court that had been held before the JNCC meeting were almost the only material available for reference. In the case of Assistant Judges seeking nomination to full judges and judges seeking re-nomination to judges, the Chief Judges' short reports above and information that sometimes come from Regional Committees are almost the only materials for reference. Information must be factual and concrete with the names of the respondents.⁵⁷ Concerning the attorneys who applied to judgeship, materials for the screening are: the record of their interview in the General Secretariat of the Supreme Court, grades of the LTRI (when the attorney has not practiced for more than ten years), materials made by the bar's judicial selection committees' that recommended the applicants, the views that come from Regional Committees, information from judges and prosecutors,⁵⁸ and information from lawyers and people who directly know the applicants.⁵⁹ The JNCC does not conduct interview with applicants and cannot even see the original evaluation documents on the applicants that had been conducted in the court every year.

The meetings of the JNCC are close-door. The minutes of the meetings are put on the website but they are summarized and with no disclosures on the speakers' names.⁶⁰ So, it is hard to understand the actual discussions and opinions that lead to the final decision.

The activities of the JNCC are also limited by the time schedule, which was drafted by the administrator. In practice, new LTRI graduates and attorneys are nominated in October, Assistant Judges and judges in March and attorneys in June and December. But, in 2003, the JNCC's screening meeting to decide the competency for Assistant Judges was held only once on October 6 (the 5th meeting), three days after the meeting of the working group and one day before the Supreme Court conference for the nomination was made. Screening and selection of Assistant Judges, judges and attorneys

57. The JNCC does not take into account the external judicial evaluation that is made by grades item by item and bar polls that the bar itself collects the questionnaire.

58. Names of the attorneys who applied to judges are circulated among judges and prosecutors from 2003.

59. Questionnaires are sent to those the applicants submit to the Supreme Court.

60. Summarized Minutes of the JNCC, <http://www.courts.go.jp/saikosai/about/iinkai/kakuyu/saibansyo/index.html> (last visited Sept. 6, 2010).

were conducted on September 8 (4th meeting) after pre-screening by the working group and the determination of the “persons to be intensively screened” were determined according to the opinion of the working group and views gathered by the Regional Committees on them. After the working group meetings (on November 25 and 26), with some views collected through Regional Committees, “qualified” and “not qualified” persons for nomination were decided on December 2 (the 6th meeting) and delivered to the Supreme Court.

In 2004, meetings of JNCC are scheduled at nearly the same intervals as 2003; on June 18 (for the selection from attorneys), on September 9 (for the screening of Assistant Judges, judges and attorneys), on October 4 (for the selection of Assistant Judges from new LTRI graduates) and on December 3 (for the selection of judges). The working group is to be met three or four days before the JNCC meeting; on September 6, on October 1 and two days including November 29.

4. *Selection Standard*

The selection standard was drafted by the administrator and was confirmed by the JNCC. There are three major standards to be examined. They are: the ability in disposal of cases, the ability to administer the division and other internal communications in the courts and the general quality and ability to perform the adjudicatory function. Under those items, there are more detailed criteria such as legal knowledge, leadership ability, ethics, flexibility, etc. In the selection, the JNCC decided the competence of the applicants from an overall view including the above-mentioned major and detailed criteria as well as the candidates’ health and experiences in the posts of Assistant Judges (if applicable).

The establishment of the selection criteria as aforesaid indeed promotes the transparency and objectivity of the nominating process. The content of each item and point of view mentioned above seems to be neutral. However, these standards are abstract. It is unclear which standard will be given priority in the selection process. One cannot tell how the grades of the LTRI graduation test or the state of health will affect the selection.

5. *Final Decision*

In 2003, the JNCC screened 109 new graduates from the LTRI and decided eight to be “not qualified” for Assistant Judges (Table 2). Concerning the Assistant Judges and judges seeking nomination, 6 persons were determined to be “not qualified” among 181 candidates. On attorneys’ applications to judgeship, 4 out of 11 candidates were decided to be “not

qualified.” And one former judge who wished to be re-nominated was considered to be “not qualified.”

Table 2 Recommendations of the Lower Court Judges Nominating Consultation Commission from the Year 2003 to 2008

The Year	Nomination to Assistant Judges from the LTRI Graduates	Nomination to Judges from Assistant Judges and Judges	Nomination to Assistant Judges and Judges from Attorneys	Others (Returning Assistant Judges and Judges from Transferred Positions, etc.)
2003	○101 *a × 8	○175 × 6	○ 7 × 4	○ 48 *b × 1
2004	○108 × 7	○176 *c × 4	○ 2 × 2 *d	
2005	○124 × 9	○186 × 4	○ 7 *e × 1	○ 19
2006	○115 × 8	○190 × 4	○ 3 × 2	○ 27
2007	○118 × 7	○203 × 4	○ 6 × 6	○ 22
2008	○ 99 × 4	○162 × 4	○ 8 × 3	○ 22
2009	○106 × 1	○186 × 3	○ 1 × 2	○ 13

Source: Summarized Minutes of the JNCC, *supra* note 60.

Note: The JNCC started to screen applicants to judgeships to be appointed from Oct. 2, 2003. The number of recommendations does not include the ones of applicants who declined their applications before final recommendations of the JNCC.

*a Nihon Bengoshi Rengoukai [The Japan Federation of Bar Associations], Kicho Houkokusho [Keynote Report] (unpublished paper presented at Dai 21 Kai Shihou Symposium [the 21st Judiciary Symposium], June 24, 2005).

*b Minutes of the 15th Asu no Saibansho o Kangaeru Kondankai [the Roundtable Conference to Consider the Court of Tomorrow] (Feb. 28, 2005), http://www.courts.go.jp/saikosai/about/iinkai/asu_kondan/asu_kyogi15.html (last visited Aug. 31, 2010).

*c Speculated number from the Summarized Minutes of the JNCC and the minute of the 15th Roundtable Conference to Consider the Court of Tomorrow.

*d The Japan Federation of Bar Associations, *supra* note a.

*e Besides, two applicants who had less than three years experiences as attorneys were recommended as qualified (they are classified in “Others” category).

6. *Nomination*

The Supreme Court conference on October 7 decided the nominees (100) and non-nominees (8) from new LTRL graduates according to the material and nominated them on the same date. The conference took only one hour and fifteen minutes.⁶¹ And the conference on December 10 decided the nominees (7) and non-nominees (3) from attorneys and one non-nominee from former judge.⁶² Six attorneys were formally nominated and Assistant Judges and judges were nominated to judges except 2 candidates at the 8th conference on March 3 in 2004.⁶³ As to the Assistant Judges and judges seeking nomination, the draft list was presented at the 7th conference which took place a week before.

In short, the Supreme Court conference endorsed the JNCC's recommendation. Therefore, 8 new LTRI graduates, 2 Assistant Judges or judges, 2 attorneys and 1 former judge were not nominated to assistant judge or judges (2 attorneys and 4 Assistant Judges or judges withdrew their application after the recommendation of the JNCC and before the conference of the Supreme Court that decides nomination). As compared with the past, the establishment of the JNCC resulted in the highest number of non-nominees at least since 1970, as the Table 1 indicates.

V. THE EFFECTIVENESS OF RECENT JUDICIAL REFORM ON JUDICIAL ACTIVISM

A. *Lower Court Judges*

1. *Possible Effect of the JNCC*

What function does the JNCC perform in the judicial appointment procedure? The JSRC recommended the establishment of the judicial nominating advisory board to secure transparency of the selection process and to reflect the views of the people in the nominating process. These purposes seem to be partly fulfilled, as all applicants are screened in the JNCC which has lay members. The higher number of non-nominees from

61. The conference started at 9:50 am and ended at 11:05 am, MINUTES OF THE 28TH SAIBANKAN KAIGI [JUDICIAL CONFERENCE] OF 2003 (Oct. 7, 2003). There was another theme besides judicial personnel matter at the conference.

62. The conference started at 10:30 am and ended at 11:25 am. Themes of the conference were seven including judicial personnel matter, MINUTES OF THE 36TH SAIBANKAN KAIGI [JUDICIAL CONFERENCE] OF 2003 (Dec. 10, 2003).

63. The conference started at 10:30 am and ended at 11:50 am. Theme of the conference was only judicial personnel matter, MINUTES OF THE 8TH SAIBANKAN KAIGI [JUDICIAL CONFERENCE] OF 2004 (Mar. 3, 2004).

new LTRI graduates than before may mean that some apprentices put in their applications under the expectations that the JNCC might select all applicants equally and neutrally.⁶⁴ The Supreme Court has started to disclose the reasons for non-nomination upon request.

On the other hand, the JNCC's activity is limited. This is reflected in the number of candidates, the time for screening, and materials for consideration at the screening process. The number of applicants was limited by the working group beforehand to the "persons to be intensively screened" only as discussed above. The selection process is limited to one meeting for new LTRI graduates and two meetings for the Assistant Judges, judges and attorneys. The JNCC screens from the applicants those who will be categorized as "persons to be intensively screened," which had been decided mainly based on courts' inside materials and additional information from Regional Committees. It may be possible that, for persons the court would not like to nominate or re-nominate, it will prepare the materials in such a manner that the JNCC will likely come to the decision of their being "not qualified."⁶⁵

The JNCC is entitled to interview the candidates, but it has not used this power even in relation to the persons decided as "not qualified" by the year 2008.⁶⁶ In 2003, one attorney who was not nominated demanded the JNCC for detailed reason on its decision of "not qualified." The JNCC did not respond to him. But in the 8th meeting on March 29, 2004, members agreed to conduct the interview with the "persons to be intensively screened" when it considers necessary. The Supreme Court conference ought to be responsible to its nomination, but by the year 2008 it has endorsed the opinions of the JNCC. If this practice continues, the JNCC may substantially take up the responsibility for the nomination and therefore a heavy burden, for better or for worse.

64. The Supreme Court commented that the apprentices, who normally would not have applied to Assistant Judges due to their grade in the LTRI, might have applied this time by the establishment of the JNCC, *Saikousai Kakosaita no Hachinin Ninkan Kyohi* [Eight Justice Apprentices Disqualified Reaching the Highest in History], YOMIURI SHINBUN TOKYO CYOKAN, Oct. 8, 2003, at 35. The Delegate of the Chief Justice of the Supreme Court (the chief of general bureau of the General Secretariat of the Supreme Court) answered that LTRI judge instructors and personnel bureau of the General Secretariat might have not advised the apprentices and Assistant Judges and judges beforehand to apply or not to apply to the judgeships after the establishment of the JNCC at the Committee on the Judiciary of the House of Councilors on Mar. 24, 2004.

65. *Shiho Seido Kaikaku Tokushu: Saibankan mo Datsu "Shushin Koyo"* [Feature Story on Judicial Reform: Even Judge's "Life Employment" is Collapsing], ASAHI SHINBUN TOKYO CYOKAN, Dec. 29, 2003, at 22 (reporting remarks of an executive judge of the General Secretariat that the Supreme Court would terminate the "gosousendan houshiki" [a convoy system], which means that the court will stop taking care of all judges by the retirement age as before).

66. The interview was scheduled to an attorney candidate in 2006, but was cancelled due to his withdrawal.

2. *Determinants of the Function of the JNCC*

Two judicial reforms have brought fundamental changes to Japan's judiciary system. One was immediately after World War II, the other at the turn of the 21st century. Both reforms were in some points influenced by the justice system of the United States. However, the functioning of the JNCC is affected by not only the structure and other matters of the commission itself, but also by the state of judicial selection in Japan as part of her societal system. Therefore, investigation of the determinants of the JNCC's functioning should also involve analysis on the circumstances in which the JNCC situates.

First, from the point of view of the legal transplantation, the manner of the actual operation of the introduced system is crucial. In Japan, the postwar system of lower court judicial appointment was based on the concept of separation of powers between the Cabinet and the Supreme Court. But in practice, the Supreme Court almost had the sole decision power on appointment of lower court judges. This practice will still strongly influence the performance and function of the JNCC, which is established in the nomination process of the Supreme Court. Judicial selection, as before, concerns the application of separation of powers in practice, which may still have the traditionally Japanese practice or culture of "Nemawashi" [Prearrangements] practice or culture in Japan.

Second, the issue of the legal transplantation generally applies to Japan's judiciary system. Judges are rotated about every three year. Their compensation increment after twenty years of services is decided with or without their will. Such practice provides the Supreme Court with judicial personnel power as well as judicial nominating power. So, in a sense, the initial appointment and reappointments of inferior court judges may not be significant, because the Supreme Court can almost freely decide on the transfer, compensation increment, or re-nomination of judges during their term of service. The recent judicial reform has not fully removed the arbitrariness of the Supreme Court in such matters. As a result, it can be expected that the judicial personnel system hitherto will continue. This situation will hamper the role of the JNCC and the judicial selection process as a whole.

Daniel H. Foote calls the Japanese judiciary "nameless and faceless."⁶⁷ As Foote points out, Japanese judiciary values uniformity over all others.

67. DANIEL H. FOOTE, *NA MO NAI KAO MO NAI SHIHOU: NIHON NO SAIBAN WA KAWARU NOKA [FACELESS NAMELESS JUDICIARY: WILL JAPANESE JUDICIARY CHANGE?]* (Masayuki Tamaruya trans., 2007). Under his argument, uniformity attaches the highest importance in Japanese judiciary. It is reinforced through periodical transfers and possible discrimination for making "non-conformable" decisions.

Uniformity is achieved to the extent of sacrificing the existence of judges' names and faces. Under such circumstances, the significance of judicial selection only lies in the factors of whether they have the competence to handle large number of cases and whether they value uniformity of court decisions.

Third, the formation and administration of the JNCC surely affects its function. The JNCC was established to realize the JSRC's recommendations. While the recommendation itself was relatively fair, there seemingly are problems in the process of formulation of rules on the administration of the JNCC. The Supreme Court General Rules Consultative Committee, which included lay members, was responsible in such process. It formulated the rules in such manner that give the courts power over the JNCC's administration and the appointment of its members. On some agenda items of the JNCC's meeting, the courts make the decision themselves prior to the meeting without any involvement from the JNCC at all. As a result, the JNCC, as discussed above, is bound by the number and choice of candidates put forward, time and material for consideration. There is not much demand among its members for reforming the current selection practice which is in reality led by the court.

Fourth, the state of administration of justice in Japan would also affect the JNCC. In Japan, the role of her justice system in the society has commonly been called as "niwari shihou" [20% Judiciary], which means that the judiciary has performed only 20% of its full competence. By the 1990s, the business circle, the Cabinet, the legislature and the people have not shown interests in strengthening the role of the judiciary. Recent judicial reform seems to attract people's attention, but their interests in the issue of administration of justice are not high even now. Mass media has started to pay attention to the judiciary in general, due to the introduction of the saiban-in system (a quasi-jury system) in 2009. However, there are few media reports on judicial selection and the JNCC. The focus is mainly on the saiban-in system.

B. *Supreme Court Justices*

As we have seen, appointment procedure of the Supreme Court has not almost been touched in the early 21st century judicial reform. And there is no prospect for reform. For example, present Chief Justice Takesaki is exceptionally appointed directly from the Chief Judge of a High Court, however, the reason for his promotion is unknown.

Remarkably, a few active Supreme Court Justices have been emerging. Tokuji Izumi, who wrote 36 individual opinions including 25 minority opinions in his six years and two months terms of office (November 2002 to

January 2009), insists that judges should have their faces.⁶⁸ He emphasizes that courts have tasks of protecting individual's human rights, especially in three fields: spiritual rights, such as thought and expression, rights to function democratic society smoothly and minorities' rights.⁶⁹ Sigeo Takii, another former Supreme Court Justice from an attorney, who wrote 23 individual opinions in major cases in his four years and four months terms of office (June 2002 to October 2006), discusses that stance of courts has gradually been changing.⁷⁰ He tells that the appointment process of the Supreme Court should be thought more widely in two points: how bar associations recommend qualified attorney candidates to the Supreme Court Justices and discussion about new appointees by the Diet.⁷¹

With prominent figures such as Izumi and Takii, Supreme Court Justices seem to have gradually come to have their "faces." In fact, we can see their faces and creed in the Supreme Court Internet website.⁷² Related books and blogs have been published.⁷³ Each justice's constitutional judgment has become called into question in the popular review. One week before the 2009 popular review, a citizen group comprised of 40 members including prominent lawyers advertised on major newspapers to dismiss two Supreme Court Justices who had decided the election case in 2007 contradicting "one man, one vote" to be constitutional. In the result, the two Justices got a slightly higher number of dismissal votes (Wakui, 7.7% and Nasu, 7.5 % each) than other 7 candidates (6.0% to 7.0% each). Such a big campaign was unprecedented in Japan.

VI. CONCLUSION

As we have seen, based on the draft by the General Headquarters of the Supreme Commander for the Allied Powers, the 1947 Constitution established judicial supremacy and independence. It provided for a separation of powers with checks and balances. The court was empowered to determine the constitutionality of any law, order, regulation or official act by the Article 81.

68. *Saikousai Hanji yo Motto Shaberou* [Supreme Court Justices, Let Us Speak Our Opinions More Clearly/Interview with Izumi T.], ASAHI SHINBUN TOKYO CYOKAN, Aug. 22, 2009, at 15. Izumi was a rare person who actively wrote many minority opinions while in office though he had been a career judge.

69. *Id.*

70. SHIGEO TAKII, SAIKOU SAIBANSHO WA KAWATTA KA: ICHI SAIBANKAN NO JIKO KENSHOU [HAS THE SUPREME COURT CHANGED?: SELF-VERIFICATION BY ONE JUDGE] 68-332 (2009).

71. *Id.* at 346-49.

72. Saikou Saibansho no Saibankan [Justices of the Supreme Court], <http://www.courts.go.jp/saikosai/about/saibankan/index.html> (last visited Sept. 6, 2010).

73. *See, e.g.*, MASAKI NAGAMINE, SAIKOU DESUKA? SAIKOUSAI! [IS IT SUPREME? SUPREME COURT!] 6-78, 210-327 (2007).

Under the postwar Constitution, judges are appointed by the Cabinet, excluding the Chief Justice. Lower court judges are appointed from a list of persons nominated by the Supreme Court. All such judges hold office for a term of ten years with privilege of reappointment. Supreme Court Justices are subject to popular review. The candidates were screened by the Justice Appointment Consultation Commission immediately after the end of World War II, but it was dissolved soon afterwards. These judicial selection systems seem to be imitations of the merit plan in the United States. It means a selection on merit, in which judge's abilities are initially screened by the judicial nominating commission and subject to popular retention election.

The GHQ was supposed to have anticipated that judges would be appointed from practicing attorneys, but this was hampered by the Assistant Judge positions. In reality, almost all judges have been appointed from Assistant Judges, who are directly recruited from new graduates of the Legal Training and Research Institute, LTRI.

Lower court judges are formally nominated by the Supreme Court, but the nomination process was not necessarily transparent. From the year 1970 to 2002, non-nominees to Assistant Judges were 59. This few numbers seem to support the argument that there is screening process before the formal application step.

Furthermore, the appointment of lower court judges by the Cabinet follows the nomination by the Supreme Court. It is said that the Cabinet has never refused to appoint any candidates nominated by the Supreme Court. This means that the Supreme Court has de facto power in appointing lower courts judges.

The process of appointment for the Supreme Court Justices was not transparent either. Justices are conventionally appointed in almost fixed proportions from career judges, attorneys, public prosecutors, public servants and a law professor. Appointment of the Supreme Court Chief Justice is also unclear.

In order to cope with these problems, reexamination of the procedures for appointment became one of the topics in the early 21st century national judicial reform. As a result, the Lower Court Judges Nominating Consultation Commission, JNCC, was set up in 2003. It consists of eleven members which include six lay persons.

The JNCC is consulted to screen all applicants to the judgeship from the Supreme Court. Then, the commission collects information about applicants via its regional committees and related persons. Finally, the commission decides "adequate" or "inadequate" to each applicant and recommends its decisions to the Supreme Court.

The JNCC has merits and problems. Merits are that judicial nomination process has got clearer and more open than before. Problems are that the

JNCC is nearly embedded in the Supreme Court's nominating process. And the nomination of judges by the Supreme Court follows the recommendations by the JNCC. In the result, non-nomination is growing in number than before.

In terms of lower court judges, the setting up of the JNCC seems to be the merit selection of judges for the second time following immediately after World War II. The new selection method of lower court judges resembles that of the state of Hawaii. On the other hand, judicial appoint procedure is virtually unchanged. In practice, the Supreme Court has the sole decision power on appointment of lower court judges. This affects the working of the JNCC. The recommendation by the JNCC is directly linked to the nomination by the Supreme Court and the appointment by the Cabinet. The actual state of affairs is unknown, but it might be that the General Secretariat of the Supreme Court practically dominates the judicial appoint procedure.

The appoint procedure of the Supreme Court Justices is also virtually unchanged. However, there are a few minor changes these days. A few active judges have appeared even from a career judge. Furthermore, there was a big campaign to dismiss judges before the popular review last month and seemed to have effects to some extent. This might reflect the people's growing attention to the judiciary largely due to the introduction of the Saiban-in system, which is a public participation in justice as European lay assessors.

The above has discussed the impact of judicial reform in the early 21st century on judicial review, mainly from the perspective of the function of the JNCC. In conclusion, the answer to the question set out in this paper is that the judicial reform in the early 21st century does not seem to have an impact on constitutional review.

There are mainly three backgrounds. First, separation of powers in postwar Japan entails little checks and balances. This would be caused by the long ruling by the Liberal Democratic Party and the Supreme Court, both of which had been on the same wavelength.

Second, arbitrary judicial personnel management persists within the court. In a sense, judicial appointment may not be significant in Japan, as the Supreme Court can almost freely manipulate judges by the transfer and compensation increase. This is the peculiar Japanese context, in which bureaucracy control within the judiciary still persists, as a result of which the JNCC is bound and does not have strong power in judicial appointment.

Third, an ideology of "nameless faceless judiciary" exists. Under Foote's argument, uniformity attaches the highest importance in Japanese judiciary. Uniformity is achieved to the extent of sacrificing the existence of judges' names and faces. It is reinforced through periodical transfers and possible discrimination for making "non-comfortable" decisions. Under such

circumstances, the significance of judicial selection lies in the factor of whether they have competence to handle large number of cases and whether they value uniformity of court decisions.

This paper's argument is constrained in terms of time factor. It might take a few more years for the recent judicial reform in Japan to display any tangible impact on judicial performance or independence, let alone "judicial activism" in terms of invalidating parliamentary enactments.

There are a few signs of change, among others, a change of power from the Liberal Democratic Party to the Democratic Party. The LDP, which kept ruling Japan almost without interruption after the World War II, has lastly gone out of power in the 2009 election. This may bring in changes to the relation between the Cabinet and the Supreme Court, which in turn alter a way of judicial appointment and judicial review.

Saiban-in court, which started in August 2009 all over the country, draws high media and public attention. With these recent structural changes and the public's attention in justice issues,⁷⁴ Supreme Court's judicial control is expected to be gradually relaxed. If these movements lead to a clearer and more open judicial appointment procedure (including that of the Supreme Court Justices), there may be competent candidates entering the judiciary and making sound judgments in constitutional cases.

The Supreme Court has tried to bring in some change to the stiff career judge system by advancing judicial appointments from attorneys since the late 1980s, which however has not been successful so far, as aforesaid. In order to realize the import of Article 42 of the Court Law, which anticipates that judges will be drawn from a variety of sources, it is necessary to promote strongly the appointment of lawyers as judges. To recommend human rights conscious attorneys by bar associations to Supreme Court Justices will have direct impacts to activate judicial review, as Takii advocates.

However, judicial review is expected to be activated by other factors, such as a change of stances of elite judges in the General Secretariat of the Supreme Court, relaxation of judicial control and citizen's critical views toward judiciary, rather than by a change of judicial appointment. It may sound strange, but judicial appointment in itself does not seem to have an impact on judicial review in Japan, which has experienced history peculiar to her, at least for the time being.

74. Lives of former judges including above-mentioned Abe and Fukushima were broadcasted in midnight documentary program titled "Hohuku no Kase [Shackles of Robe]" (Chukyo Television Broadcast, Sept. 14, 2009).

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