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POLITICAL QUESTIONS AND JUDICIAL REVIEW:
A COMPARISON

KISABURO YOKOTA*

INTRODUCTION

Japanese courts prior to the 1946 Constitution did not have the power of judicial review. The concept of a governmental act being unconstitutional and subsequently reviewable by a court was simply not a part of either the governmental structure or the Meiji Constitution. This power was first given to the courts by the new postwar Constitution. In Article 81 it provides:

The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation, or official act.

Although the power of judicial review is granted in unmistakable terms, Japanese courts have proceeded with great caution and discretion in their exercise of the power. One aspect of the Japanese courts’ caution is illustrated by its use of the political question doctrine. Under this doctrine the judicial branch recognizes the validity of determinations of the political branches and does not review them to see whether they conform to the Constitution. The rationale is that the Constitution itself places some questions solely under the competence of the political branches of the government.

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This English version of the article was redrafted and substantially supplemented by the joint work of Hiroshi Itoh, Ph.D. candidate, University of Washington, Political Science Department, and E. Charles Routh, Articles Editor, Washington Law Review.


Professor Toshiyoshi Miyazawa in his prewar writings was the first to introduce in Japan the notion of tōchi kōi (an act of government) using the French law concepts as his model. The underlying theories and types of cases involving the act of government which Miyazawa expounded from French law had little, if any, utilization in actual judicial decision-making and aroused almost no interest in the doctrine among other jurists. See note 78 infra.

See also J. Maki, COURT AND CONSTITUTION IN JAPAN xvii (1964) [hereinafter cited as Maki].

2 See Maki at xix.


[ 1031 ]
The Japanese Supreme Court has utilized this theory of the political question, apparently based in part on American and European experience, and has tended to refuse to review cases presenting "political questions." Since the Japanese courts have only recently had the power of judicial review, they have not yet clearly established a policy of what constitutes a political question or when, if ever, such a case will be reviewed.

Also, unlike American decisions, Japanese decisions rarely express the underlying policies within the text of the opinion. In Japanese Supreme Court decisions, however, a policy on judicial review is often tacitly recognized; the opinions by judges supplementing the Court's opinion may explicitly contain such a recognition.

The Japanese use of political question doctrine can best be viewed against the backdrop of American experience with a similar doctrine. Such a comparison has at least two advantages. First, the Japanese Court is obviously aware of developments in this area in both American and European jurisprudence. Consequently discussion of the American experience may show how the Japanese Court has adopted western concepts of the political question or act of state.

But perhaps more significantly such discussion will provide a touchstone for a comparative study of the differences in the two countries' utilization of the doctrine which reflect different attitudes on, and functional distinctions in the procedure of, judicial review, as well as changes resulting from the different governmental structures. During the subsequent case development of the political question doctrine in the two legal systems certain themes should be kept in mind.

Japan is a unitary, not a federal, state. As a consequence, the complex weave of judicial interrelationships attendant to federal system in the United States is unknown in Japan. Also there is little need for distinctions between review of local or regional governmental actions and review of national governmental actions. Further, Japan as a uni-

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"Most Japanese scholars and judges use the terms "seiji mondai" (political question) and "tochi kōi" (act of government) interchangeably. The latter term is virtually synonymous with the German words "Hoheitsakt" and "Regierungsaufk" and the French "acte de gouvernement." For the sake of uniformity and consistency, the term "political question" will be used throughout. However, as will be apparent, the term does not correspond to, in all particulars, "political question" as used in American jurisprudence.

Such a use of foreign doctrine, while helpful for comparative purposes, should not obscure the underlying complexities of Japanese law as a uniquely Japanese institution arising from the structural development of contemporary Japanese political and social life.

"See discussion in text at note 76 infra."
tary state obviously does not have an equivalent of the Guarantee Clause. Thus the whole area of Guarantee Clause issues, considered political questions in the United States, has no equivalent in Japanese law.

Second, Japan's parliamentary form of government dictates a different structure of national government. The American emphasis on the coequal and coordinate branches of the national government is not fully duplicated in Japan. The executive branch in Japan is separate from but subordinate to the Diet. Thus Article 66, paragraph 3 of the Japanese Constitution states that the Cabinet, in the exercise of executive power, "shall be collectively responsible to the Diet." The concept of legislative supremacy is rather clearly stated in Article 41, which provides that the National Diet "shall be the highest organ of state power." The inevitable tension between this Article and Article 81, ensuring judicial review, is implicit in many of the Japanese Supreme Court's decisions involving the political question doctrine.

A third consideration is a functional analysis of the procedural techniques of judicial review. The United States Supreme Court has developed over a period of time a substantial arsenal of techniques for limiting, at the Court's discretion, the cases which it decides. Denial of certiorari, lack of substantial federal question or a failure to satisfy the multitude of jurisdictional requirements all can act as discretionary checks on the Court's calendar. The jōkoku appeal does not provide similar flexibility. An obvious question which must be considered is the extent to which the political question doctrine in Japan fulfills a broader functional purpose than the political question doctrine in the United States.

I. THE UNITED STATES EXPERIENCE

Unlike the Japanese Constitution, the United States Constitution does not expressly provide for judicial review. But the principle of judicial review was asserted by the Supreme Court early in American

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7 For a discussion of the uses and limitations of the various appeal procedures available to the Japanese litigant see MAKI at xxiv.
8 There is some authority for the view that where there is an ombudsman or its functional equivalent, the courts are under less pressure to review what might be considered a political question. Consequently, the ombudsman where present, may fulfill some of the functional work of the courts. Conversely the courts may be more ready to classify a dispute as a political question when the citizen has redress available through the ombudsman system. See W. GELLHORN, OMBUDSMAN AND OTHERS 372-419 (1966). Gellhorn points out that the inadequacies of the Japanese formal review mechanisms have led to an increasing use of other, more informal, techniques for redress of grievances.

Having enunciated the principle of judicial review, the Court indicated some possible limitations on it. The Court said: "Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." But aside from its reference to the executive's constitutionally vested political power, the *Marbury* Court neither articulated a fully developed theory of the "political question" nor the way in which it limited judicial review.

In subsequent cases involving "political questions," the Court seemed to reason that it had no power (in the sense that it lacked Article III jurisdiction) to entertain such questions. For example, in *Luther v. Borden* the Court decided that it was confronted with a political question and must defer to the judgment of the political department. The issue before the Court was which of two governments in Rhode Island was legitimate. The Court determined that this issue presented a political question because: (1) the political branch of government had always determined whether proposed constitutions were ratified by the people, and (2) the Constitution expressly authorized Congress to suppress insurrection. The Court emphasized the express language in the Constitution delegating power to Congress and seemed to conclude that the power of Congress was exclusive and, therefore, the Court had no power to review Congress' determination.

In a more recent case, *Colegrove v. Green* Mr. Justice Frankfurter reasoned that cases of a political nature "ask this Court what is beyond its competence to grant." He said that "verbal fencing about 'jurisdiction'" was inappropriate when deciding if something were "of a peculiarly political nature and therefore not meet for judicial determination." After examining the issue of legislative apportionment involved in *Colegrove*, Frankfurter concluded that the question was not justiciable because the Court was incapable of fashioning affirmative relief, the Constitution vested exclusive control of such matters in Congress, and historically the matter was one left to the

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5 U.S. (1 Cranch) 137 (1803).
6 Id. at 170.
7 48 U.S. (7 How.) 1 (1849).
8 Id. at 42.
9 328 U.S. 549 (1946).
10 Id. at 552.
political branch. In the Frankfurter formulation the constitutional exclusivity argument became one factor in determining whether an issue was political, whereas in *Luther v. Borden* the exclusivity argument may have been the sole determining factor.

In *Baker v. Carr*, a subsequent reapportionment case, the Supreme Court of the United States finally articulated with some clarity its political question doctrine. Recognizing that it was the "ultimate interpreter of the Constitution," the Court proceeded to isolate the factors it would use to determine on a case-by-case basis whether an issue was political in nature and thus not justiciable. Emphasizing that the "non-justiciability of a political question is primarily a function of the separation of powers" the Court isolated five categories of cases in which the political question issue is commonly confronted: (1) foreign relations; (2) dates of duration of hostilities; (3) validity of enactments; (4) status of Indian tribes, and (5) republican form of government. "Political question" cases in these categories contained on their face one or more of the following elements: (a) a textually demonstrable constitutional commitment of the issue to a coordinate political branch; (b) a lack of judicially discoverable and manageable standards for resolving it; (c) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (d) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (e) an unusual need for unquestioning adherence to a political decision already made, or (f) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

In *Baker v. Carr* the Court has defined with some particularity the self-imposed judicial review limitations embodied in the political question doctrine. Of special significance in *Baker* is the candor with which the Court limits the political question doctrine to "the relationship between the judiciary and the coordinate branches of the federal government, and not the federal judiciary's relationship to the States." Therefore, when the doctrine is applied in a federal system the self-imposed limitations do not, in fact, limit the judiciary as much as they would were the government not federated.

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15 *Id.* at 553-555.
17 *Id.* at 210.
18 *Id.* at 211-226.
19 *Id.* at 2117.
20 *Id.* at 210.
Another group of cases, which might also be loosely described as presenting "political questions" are never even heard by the Court. When the Court declines to exercise its certiorari power and denies review to politically sensitive cases, there is of course no holding that the case presents a political question. Thus the Court, unless they must reverse the lower court decision, can avoid issues which might be characterized as political.

An excellent example is *Mora v. McNamara*, involving a suit by three draftees to prevent their departure for Vietnam, coupled with a request for a declaratory judgment that the war was "illegal." The suit was dismissed and the Supreme Court denied certiorari. Mr. Justice Stewart and Mr. Justice Douglas dissented strongly with the denial of certiorari, stating that the Court should at least confront whether the issues presented were political questions and thus non-justiciable. *Mora* is by no means the only example of the Court's use of the certiorari power and other discretionary devices to avoid the basic threshold questions of justiciability.

II. THE JAPANESE EXPERIENCE

A. Case Law

**Political Questions:** The first Japanese case involving the political question arose out of the so-called Sunakawa Incident which took place in July 1957 at Tachikawa Air Base near Tokyo. According to a United States-Japanese agreement, the Japanese government was to expand a runway at the American air base. When governmental surveyors went to the surrounding farmland to survey the area which would be taken by the expansion, they were confronted with demonstrators who were opposed to the extension of the runway. During a riot which ensued some rioters trespassed on the American base. Seven of these rioters were arrested by the Japanese police and charged with illegal entry of an American base. The special criminal law under
which the accused were charged imposed a penalty heavier than that for the identical crimes of trespass included in the minor offenses law. Because the law was enacted to implement the United States-Japan Security Treaty of 1951 and an administrative agreement supplementary thereto, counsel for defense not only denied the guilt of the defendants but also asserted that under Article 9, the Security Treaty itself was illegal, thus raising a constitutional defense. The Tokyo District Court acquitted the defendants at trial. The court refused to accept the doctrine of political question, reviewed the constitutionality of the Treaty, and held the Treaty unconstitutional and invalid. The Tokyo Public Prosecutors' Office immediately used the "jumping" jōkoku appeal procedure to appeal directly to the Supreme Court. The Grand Bench of the Supreme Court quashed the lower court decision and remanded the case.

Although all fifteen justices concurred in reversing the judgment rendered by the trial court there were separate opinions. Eleven justices concluded that the question was non-justiciable because of the political question doctrine. The remaining four justices either denied or did not resort to the doctrine of political question but reached the same conclusion as the majority did after a substantive review of the constitutionality of the Security Treaty and the administrative agreement. Because this was the first time that the Supreme Court was confronted with a case clearly involving the doctrine of political question, the many separate opinions concerning the doctrine add further elaboration to the rather brief opinion of the Court; although, of course, not all of the various views expressed have equal weight. The Court, in part, stated:

The Security Treaty in the present case must be regarded as having a highly political nature which...possesses an extremely important relation to the administrative agreement based on article 3 of the Japan-United States Security Treaty) (Law No. 138, 1952) provided in article 2:

Any person who, without due cause, enters any place the entrance of which is prohibited or does not leave any place when requested, within facilities or areas in use by the U.S. armed forces shall be sentenced to penal servitude for not more than one year or a fine or not more than 2,000 yen or minor fine....

The title of the statute was changed in 1960 by Law No. 102, as a result of the amendment to the Treaty, but the substance remains the same.

See 13 Keishū 3305.

22Code of Criminal Procedure art. 406 and Keiji soshō kisoku (Rules of Criminal Procedure) (Supreme Court Regulation 32, 1948) art. 254 provides in effect that the public prosecutor can appeal directly to the Supreme Court when a district court rendered a decision holding that certain statute or governmental act to be unconstitutional.

tion to the basis of the existence of our country as a sovereign nation. There are not few points in which a legal decision as to the unconstitutionality of its content is simply the other side of the coin of the political or discretionary decision of the cabinet, which concluded the treaty, or of the National Diet, which gave its consent to it. Consequently, the legal decision as to unconstitutionality has a character which, as a matter of principle, is not adaptable to review by a judicial court, which has as its mission a purely judicial function; accordingly, it falls outside the right of judicial review by the courts, unless there is clearly obvious unconstitutionality and invalidity. It is proper to interpret this primarily as a matter that must be entrusted to the decision of the cabinet, which possesses the power to conclude treaties, and of the National Diet, which has the power to approve them; and it ultimately must be left to the political review of the sovereign people.

The Court continued to note in dicta that the retention of the United States Armed Forces in fact was in accord with the intent of Article 9, of Article 98, paragraph 2, and also of the Preamble of the Constitution, and as such cannot be regarded as being “patently unconstitutional and invalid.”

There are many questions raised by the opinion of the Court, which was the first expression of judicial efforts to utilize this new concept of the limitation to the judicial power in Japan. First, in spite of the Court’s statement that the determination of the constitutionality of the Security Treaty was not subject to judicial review, the Court actually reviewed the treaty and the accompanying administrative agreement. Although the supplementary opinions by Justices Fujita, Irie and Tarumi demonstrate that the courts have a right to decide whether cases fall into the category of the political question or not, the majority opinion is not clear as to how far the courts should go in determining the justiciability of a case involving an allegedly political question.

It should be noted here that some Japanese jurists deny the doctrine of political question as applied to Japanese legal order partly because they believe that the doctrine does not allow a review of ancillary jurisdiction much less a substantive review. They refute the contention that the issues considered to be political questions should not be reviewed and if necessary held unconstitutional because of any greater “evils” which might result from such a judicial decision. They believe the contention is untenable because only after subjecting the political question to judicial review could the suspected illegality of the action and the “uncontrollable consequences” which would arise from judi-
cial nullification of the action be ascertained. This criticism by the opponents of the political question doctrine indicates their lack of appreciation, if not misunderstanding, of the theory and practice by the Court asserting a legal right to determine whether or not a given case falls within the category of political question based on a substantive review as well as a review on ancillary jurisdiction. Nonetheless it points to an initial problem area, namely, a theoretical distinction between a narrow judicial review focusing on whether a given case is a matter of political question and excluding any judicial determination of constitutionality, on the one hand, and a broader judicial review adjudicating the substantive constitutionality, on the other hand.

Additionally, when the Court held that the Security Treaty and the administrative agreement fell within the category of political question because of their highly political nature and the important relation they had to the existence of the country, it raised two questions in the minds of certain justices: (1) the relation between the political question and the treaty, and (2) the feasibility of the ground given by the Court, rendering the treaty and administrative agreement non-justiciable political questions. Pointing to the Court's "misleading” opinion on the first point, Justices Fujita, Irie, Tarumi and Ishizaka made their views clear by stating that treaties in general never were non-justiciable as political questions. Justice Tarumi construed the domestic aspects of treaties as generally subject to judicial review just as domestic laws, although the court cannot deny the validity of treaties in international law. However, once a political question is involved, Tarumi states, those parts of the treaties dealing with the domestic law also lie outside the judicial competence. Next, in answer to the majority opinion's statements on the political question doctrine, Justices Okuno and Takahashi question the wisdom of denying review whenever any issue has a high political content or is so indivisibly related to important national politics that it becomes an issue of political question. They fear that the position of the majority group will, in the long run, lead to undue restraints on the judicial power inasmuch as acts like concluding treaties and the passage of laws are, for the

28 See T. ISOZAKI, TÔSHIRÔSETSU HIHAN (Criticism on the act of government doctrine) 93-122 (1965). See also text at note 85 infra.
29 13 Keishû at 3250, 3258, 3267.
30 Many jurists however express the opinion that judicial review does not extend to treaties in general. See, e.g., T. MIYAZAWA, KEMPO (Constitution) 385 (1962); M. Ito, KEMPÔ NYÔMON (Introduction to Constitutional Law) 247 (1966).
31 13 Keishû at 3257.
most part, of a highly political nature relating to important national politics, and could readily be deemed unreviewable by the courts.\textsuperscript{31}

Closely related to this point is a third criticism of the criteria for determining what is "clearly unconstitutional." Although the opinion of the court does not indicate any such criteria, Justices Shima, D. Kawamura and Ishizaka believe that the "spirit of pacifism and international cooperation" embodied in the Constitution or a general conformity to the Charter of the United Nations offer a general guideline to determine an abuse of the discretionary power given to the political branches of government.\textsuperscript{32} However, other Justices like Kotani, Irie and Fujita argue that what the majority opinion regards as "clearly unconstitutional" is something which, in actuality, exists only in name and not in reality. Based on this observation, Kotani concludes that whenever unconstitutionality exists in the discretionary actions of the political departments, then such actions are subject to constitutional review by the courts regardless of the "magnitude" of the alleged unconstitutionality.\textsuperscript{33} Unlike Justice Kotani, who thus completely eliminates the doctrine of political question, Justices Fujita and Irie, in spite of their view that "clear unconstitutionality" is an overly abstract and unworkable standard, subscribe to the doctrine of political question as derived from the separation of powers.\textsuperscript{34} Since the opinion of the court is silent about a theoretical ground to support the political question in the present case, the concurring opinion of these two justices provides the base theoretical rationale for it. They conceive of the political question as a consequence of the mutual checks and balances of the three powers of government and as necessary to prevent the absolute supremacy of the judicial power over the legislative and the executive. They argue that although the Constitution does not provide for the doctrine of the political question expressly, such a limitation upon the judicial power should be construed to be "inherent in the intrinsic nature of the constitutional judicial power because of such considerations as the high political content of acts of government, the character of the courts as judicial organs, and the procedural limitations necessarily accompanying justice."\textsuperscript{35} Justices Ishizaka and Tarumi also make a passing remark on the separation of powers and it seems that the majority of the justices have discovered a rationale for

\textsuperscript{31} Id. at 3281-82.
\textsuperscript{32} Id. at 3243, 3261.
\textsuperscript{33} Id. at 3275-79.
\textsuperscript{34} Id. at 3250-51.
\textsuperscript{35} Id. at 3246.
the political question doctrine in the separation of powers as that term was interpreted by their colleagues Fujita and Irie.\footnote{Id. at 3256, 3266.}

Three justices, Kotani, Okuno and Takahashi, dissented from the majority group on the political question issue. Justice Kotani relies partially on the provisions of Articles 81 and 76(3) of the Constitution as a rationalization for his denial of the political question doctrine, and concludes that because there will be no "clearly obvious unconstitutionality" in actuality, the decision of the majority group virtually precludes any judicial review of most of the important actions taken by the political branches of government, thereby downgrading the constitutional idea of judicial supremacy and the rule of law to rule by "force" and "authority." Justices Okuno and Takahashi take a different position and do not apply the political question doctrine in the present case. Unlike Kotani, they do not necessarily deny the doctrine but insist that a criterion for its application should be sought in the distinction between a legal judgment and a political judgment and that so long as a case is reviewable in purely legal terms, the political question doctrine should be excluded. Then both justices examine the constitutionality of the Security Treaty and admit that at least the evaluation of the international and military situation given in the Preamble to the Treaty is a "so-called political question" and as such must be accepted by the courts.\footnote{Id. at 3283-84.} They conclude by finding other parts of the Treaty constitutional.

One aspect of the Sunakawa decision which created considerable controversy was its dicta to the effect that a political question might be reviewed if it presented "clearly obvious unconstitutionality or invalidity."\footnote{For example, Justices Okuno and Takahashi state as follows: [T]he Security Treaty has been concluded in accordance with the provisions of Article 5(c) and Article 6(a) of the Treaty of Peace on the premise that there is danger of armed attack on Japan "because irresponsible militarism has not yet been driven from the world" (this evaluation of international situation cannot be subject to review and judgment by the courts because it is a so-called political question).} Yet, as we shall see presently, the Supreme Court did not always apply this dicta in later cases. On the other hand, the judgment in Koshiyama,\footnote{Id. at 3235.} which was not treated as a traditional "political question" case, stated that in case of extreme inequality in the apportionment of Diet election districts, a problem of unconstitutionality might
arise and become justiciable, thus paying at least lip service to the Sunakawa dicta. However, this level of inequality was not found in Koshiyama.

The so-called “second Tomabechi case” came to Tokyo District Court when plaintiff Tomabechi renewed a suit demanding his salary and a confirmation by the court, contending that because the dissolution of August, 1952, was unconstitutional and invalid, he still was a member of the House of Representatives. In response, the State (jōkoku appellee) resorted to the political question doctrine, also contending in the alternative that the dissolution met the constitutional requirement of advice and consent of the Cabinet. The district court dismissed the political question defense of the state and held that a dispute over the validity of a dissolution is justiciable. The lower court further stated that in this case the dissolution lacked the necessary advice and consent. However, this remarkable decision, judging the dissolution unconstitutional and consequently void, was set aside by the intermediate appellate court when, in spite of a basic agreement with the trial court on the political question problem, the court held as a matter of fact that the events which took place at a Cabinet meeting and the subsequent “advice and consent” given to the Emperor on the decision to dissolve the house should be left to the discretion of the Premier and those Cabinet members who have knowledge of the full political situation involved. Thus, despite the categorical rejection of the political question defense, the court nevertheless accepted the governmental judgment holding that there was the requisite advice and consent.

Upon a jōkoku appeal, the same members of the Supreme Court who decided the Sunakawa case half a year previously handed down their judgment. Although all justices agreed in dismissing the appeal, four justices, Kotani, Okuno, D. Kawamura and Ishizaka dissented on the political question issue. The four justices held the dissolution constitutional only after a substantive review of the case. The opinion of the Court, representing the views of ten justices, reiterated the points expounded in the Sunakawa case, stating that the dissolution of the house was an act of an extremely important political nature, relating to the basic government of the state and was thus outside the

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49 18 Minshū at 273.
42 Id. at 1265 et seq.
43 Id. at 1206, 1210.
44 Id. at 1213, 1215, 1218.
purview of judicial review. Because the court had no power to examine the defendant's contention that the government had misapplied constitutional provisions relating to the dissolution, the intermediate appellate court had made an error in reaching the merits of the advice and consent issue. The opinion of the Court sought the rationale for the doctrine of political question not only in the principle of separation of powers as the principle was explained by Justices Fujita and Irie in Sunakawa, but also held alternatively that an act raising political questions should not be nullified because of the grave and undesirable consequences, both in law and politics, resulting from such a decision. The opinion states in part:

The dissolution of the House of Representatives causes the members thereof to lose their qualifications contrary to their will and causes the functioning of the House, the highest organ of the State, to stop however temporarily such a stoppage may be and also induces the formation of a new composition of the House and a new cabinet through an ensuing general election. In this sense, the act of the dissolution is of a great legal significance. Furthermore, a dissolution is conducted often when the cabinet seeks to find the general opinion of the people on its major policies or on its own continued existence, so that its political significance is likewise grave.

Okuno, in a joint opinion with Kotani, wrote that the dissolution fell within the definition of "official act" in Article 81 of the Constitution. In their opinion, however many political attributes an act of the political branches of government may possess, such an act is within the purview of the judicial power so long as a judicial remedy is available. Both justices construed the provision of Article 81 of the Constitution in such a way that the protection of fundamental human rights of the individual will outweigh the doctrine of political question when they come into conflict. They believed, therefore, that inasmuch as the dissolution in the present case clearly affected the alleged rights of the appellant as a member of the House of Representatives, the constitutionality of such a dissolution should be and was capable of being judicially reviewed. Justices D. Kawamura and Ishizaka, who concurred with the majority in Sunakawa, joined the dissenting group in the present case denying the applicability of the political question doctrine.

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45 Id. at 1209.
46 Id. at 1209-10. For a bibliography for the commentaries of the Tomabechi case, see Saikō saibansho chūsakanshitsu, Saikō saibansho hanrei kaiyōsetsu: 1960 (Minji) 206-07 (1964).
47 14 Minshii at 1211-13.
48 Id. at 1214, 1218.
In keeping with the Sunakawa dicta, the majority held the dissolution a conditional act of state unless there be "clearly obvious unconstitutionality and invalidity" in the act of dissolving the House. However, the opinion does not disclose any preliminary review such as in Sunakawa. In spite of this difference, the opinions of the Court in the two cases agreed that the governmental act was "one of a highly political nature, closely related to the fundamentals of national policy. This distinction becomes even more significant when in subsequent cases the Court did not use political question language but rather held cases justiciable on the ground on "autonomous," "internal" or "discretionary" matters delegated specifically by the Constitution to either the Cabinet or the National Diet.

In Matsumoto v. Japan, three plaintiffs tried to establish the invalidity of the lease of land to the Japanese government for the use of the United States Air Force. Plaintiffs contended that because the objective of the lease, made during the occupation, was to provide the United States Air Force with an air base at Itazuke, such a lease was in contravention of Article 9 of the Constitution. The Fukuoka District Court (the trial court) gave judgment to plaintiffs despite an attempted political question defense. However, on March 5, 1960, the Fukuoka High Court (intermediate appellate court) set aside the judgment by the trial court on two accounts. First, the court held that the remedy sought by plaintiff, removal of the installation, was an abuse of their right inasmuch as the damage to be incurred by the government for such a removal would be conspicuously larger than that suffered by the property owners. The second ground, however, is more significant.

The court, subscribing to the political question doctrine, overruled the plaintiff's contention based on the alleged unconstitutionality of the Security Treaty. In so doing, the high court repeated the opinion of the Supreme Court in Sunakawa almost verbatim and added the following opinion of its own:

The organization, the function and the decisional procedure of the court are not suitable to collect, analyze and make an adequate judgment upon

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50 Id. at 339-52.
51 Id. at 349. The third Petty Bench of the Supreme Court (Justices Gokijyō, Ishizaka, Yokota, Kashiwabara, and Tanaka sitting) dismissed plaintiffs jōkoku appeal on March 9, 1965. The Court considered Sunakawa the applicable precedent and upheld the judgment of the intermediate appellate court on the political question issue. Id. 233-38. For a bibliography of commentaries of the Matsumoto case, see 38 Hōritsu Jihō (No. 2) 210 (1966).
the information concerning a highly political question like this. Not only that, such a political question often arises out of conflicting political forces (as is well known, both public and scholars' opinions have been sharply divided into two opposing groups over the issue of the unconstitutionality of the said Security Treaty and of the stationing of United States forces). The intervention by the court, against the very nature of the judiciary which is supposed to stay out of political issues, into political conflicts will result into the politicization of the judiciary by sanctioning one side against the other and also will endanger judicial neutrality in the long run. In short, the determination of unconstitutionality of the Security Treaty in question is beyond the judicial competence.

**Quasi-Political Questions:** The next group of cases do not, strictly speaking, invoke the political question language. However, they are worthy of close study because of the many integrally related issues. First, these cases were regarded by the Supreme Court not as cases of a highly political nature indivisibly tied to the very foundation of government, but rather as involving discretionary matters of the coordinate branches of government. The political question cases dealt with so far concern areas integral to the political functioning of the nation; the following group of cases were concerned with non-justiciable matters more firmly based on the principle of separation of powers.52

The first case in this group of "internal discretionary matters" was Koshiyama.63 In 1962, after an election for the House of Councillors, a voter in Tokyo brought a suit to the Tokyo High Court contending that the election held in Tokyo was invalid because the malapportionment in the districting created an inequality, thereby violating the constitutional provision for equal treatment. The trial court refused to accept plaintiff's contention.64 The Supreme Court, in dismissing the subsequent jōkoku-appeal, held that the question of the apportionment of the number of members of both Houses should be construed to have been left, in principle, "to the discretionary authority of... the National Diet." Only in cases of extreme inequality "in the enjoyment of the elector's election rights" would the Court interfere. The Court

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52 There is a traditional distinction which should be made between the "act of governing" (tōchi kōi) and the "autonomous right" (jiritsuken). Included within the latter category are the rights provided in Article 55 and Article 58(1), (2) of the Constitution and also the internal police and peace maintenance rights provided in articles 114 and 116 of the National Diet Law. See Yokota, Rippō no jiritsuken to shihoken (Autonomous right of legislative and judiciary), JURISUTO (No. 337) 24-38 (1966). H. WADA, ENSHŌ KEMPÔ (Seminars on Constitution) 229-238 (1966). Hara, Gimin no jiritsusei (Autonomous right of legislature), in 3 KEIZAI (S. Kiyomiya and I. Satō eds.) (1964).


54 Id. at 304.
stated: "Inequality, to the extent it exists today...is still only a problem of the propriety of legislative policy and we cannot recognize the emergence of a question of unconstitutionality."\(^5\)

The majority opinion in \textit{Koshiyama}, repeating the "clearly obvious" unconstitutionality dicta from \textit{Sunakawa}, added that in cases of extreme inequality, a problem of unconstitutionality might arise and that the Court might invalidate the apportionment schedule attached to the election law. Justice Saitō's opinion on this point implied that the Court should not pass any judgment even in cases of alleged extreme inequality of apportionment because of the confusion which might arise from discrepancies of discretion and judgment exercised by both the National Diet and the Court in determining the existence of such an extremely unequal apportionment. At the same time he expressed a strong doubt about the legality of pursuing any claim in a suit to void an election.\(^5\)

A second case in this category involved a potential conflict between the Cabinet and the judiciary. Giichirō Yoneuchiyama, a member of the prefectural assembly in Aomori Prefecture, was expelled in 1952, by the resolution of the assembly itself on the charge that his remarks at a general meeting violated the general rule of conduct for members of the assembly. He sought an injunction from the district court ordering the suspension of the expulsion. In granting the injunction, the court held that the resolution to expel the member of the local assembly was an administrative action, that the punishment was not a matter of unfettered discretion and that such a punishment went beyond the disciplinary power of the assembly.\(^5\) Prime Minister Yoshida made a formal objection to the injunction under a procedure provided by a special procedural law of administrative cases.\(^5\)

\(^5\) Id. at 273. The composition of the Court membership was quite different from that of the Court which decided both \textit{Sunakawa} and \textit{Tomabechi} cases. Out of the thirteen justices who participated in the decision in \textit{Koshiyama} only four of them (Justices Irie, Ishizaka, Okuno, Shimoiizaka) were present in the earlier two cases. Justice Okuno (who did not support the doctrine of political question in either \textit{Sunakawa} or \textit{Tomabechi}) and Justice Ishizaka (who did not regard \textit{Tomabechi} as a political question) joined the opinion of the court. The only supplementary opinion was written by a new justice, Sakuō Saitō, who disagreed with the majority opinion on a qualification attached to the nonjusticiability of cases involving the malapportionment of election districts.

\(^5\) Id. at 273-75.

\(^5\) See \textit{Yoneuchiyama v. Aomori Prefectural Assembly, 7 Minshū 43 (Aomori Dist. Ct., April 28, 1952)}.

\(^2\) \textit{Gyōsei jiken soshō tokureihō} (Law No. 81, 1948) art. 10(2) read that "in case of a suit brought based on article 2 of this law, the courts may, when they recognize it urgently necessary to avoid uncompensable damages arising from an execution, of dispositions, issue, upon a request by petition or on their own authority, an injunction
When the Aomori District Court dismissed the objection from the Premier on the ground that the contentions of the objection did not have the required legal specificity, the Aomori Prefectural Assembly made a special kōkoku appeal to the Supreme Court, contending in part that the district court, in its decision to dismiss the Premier’s objection, reviewed the question of adequacy and inadequacy of the objection despite the disclaimer of such a review.69

The local assembly claimed that they should be granted the same “self-autonomy pertaining to the internal matters of the National Assembly which the Supreme Court has granted to the National Diet.”66

The Supreme Court dismissed the appeal, holding that the statute required the Premier to lodge any objection prior to the court’s announcement of its injunction.61 Thus, the majority decided this case on statutory construction rather than constitutional grounds. Only five justices wrote separate opinions referring to the judicial power in its relation to the local assembly. Three justices, Tanaka, Kuriyama and Kobayashi, were of the opinion that the disciplinary measure of expelling members of local assembly was an internal matter of the legislative body. Chief Justice Tanaka elaborated on this point as follows:62

In essence, it will not be contrary to a generally accepted theory to recognize some areas of pure self-autonomy in relation to the National Diet and other assemblies, where judicial power is not allowed to intervene. The problem of discipline of their members as in the instant case should be considered to fall into this area....

With regard to the discipline at a local assembly, the assembly itself is, like the National Diet, the final arbitor. Even in a situation where the punishment was imposed despite the doubtful existence, as a matter of fact, of grounds for such a punishment or in which a relatively heavy penalty was inflicted for a minor misconduct, these problems are related, after all, to fact-findings and discretion and consequently the question of adequacy and inadequacy thereof is a political question and not a problem of illegality.

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69 In the form of kettei (decision) to stop the execution of disposition. But when it is deemed that such an injunction may bring about grave effect upon the public welfare and also when the prime minister makes an objection to such an injunction, the courts may not do so.” Presently the same procedural rule is retained in arts. 25(2), (3), 27(i) of Gyōsei jiken soshōhō (Law No. 139, 1962). But it is noteworthy that an express sentence is now added enabling the Premier to object even after the injunction. As to the details and criticism of this procedure, see Ogawa, Judicial Review of Administrative Actions in Japan, in this symposium p. 1075 infra.
66 7 Minshū at 40.
61 Id. at 41.
Likewise, Justice Kobayashi regarded the disciplinary measures imposed upon a member of a local assembly as a "political function which an assembly can decide on its own free will in accordance with the principle of majority rule." Both Tanaka and Kobayashi conceded that in a case where an assembly's disciplinary action is unconstitutional then the aggrieved representative can bring a suit in court. Justice Mano went even further in stating that article 10, section 2, of the special law was unconstitutional, and violated the principle of separation of powers to the extent that it conferred upon the Premier, the chief executive, the power to interfere with judicial decisions granting injunctions against administrative actions. On the question of the specific expulsion involved, he believed local assemblies to be basically administrative agencies, because "the assembly which makes ordinances and assembly regulations does not become a legislative organ in the sense of the Constitution any more than the Supreme Court which makes rules and regulations does." Furthermore, so long as the local assembly decided on matters like the expulsion of their members, their actions were administrative inasmuch as such an action had an immediate legal effect upon rights of injured members as individuals. Although the majority dismissed the appeal on the technical ground of the Premier's delayed objection, it assumed, like Mano, that the expulsion was subject to judicial review. Two justices, Tanaka and Kuriyama, dissented on this point. In addition Justice Kobayashi, while concurring with the majority's dismissal, agreed with Justices Tanaka and Kuriyama about the non-justiciable nature of the expulsion.

A third case demonstrates the restraint exercised by the Court as early as in 1949 when confronted with an "autonomous question of the National Diet." The case was the famous "Nishio" case in which Suehiro Nishio, the general secretary of the Katayama Cabinet, received 500,000 yen in 1947 as a political contribution from business firms. The Tokyo Prosecutors' Office charged him with failure to report it in compliance with a law regulating political contribution. The defendant contended that the contribution was made to him as an individual and as such was not subject to the law. This argument was
accepted by the Tokyo High Court. Upon the appeal by the Prosecutor’s Office, the Supreme Court affirmed the lower court decision on two grounds. Eleven out of the thirteen justices who participated in this case agreed with the finding of the Tokyo High Court concerning the nature of the political contribution made to the defendant. Alternatively, all of the thirteen justices held the case to be non-justiciable and in contravention of the provisions of articles 6 and 8 of the law concerning the oath and testimony by the witnesses before the National Diet. The opinion of the Court states in part that:

The examination of the process by which the law concerning the oath and testimony by the witnesses before the National Diet... was legislated indicates that the law is designed to provide internal procedures of the Assembly, enacted to meet the need for the investigation of national government at each House. And in light of the intention by which special provisions like the text and proviso of article 8 therein were specially inserted concerning the initiation of prosecuting those who commit the perjury and other crimes at the Assembly, the crime of such a perjury should be regarded as an autonomous problem of the Assembly and the initiation of the prosecution for such a crime should be construed to be a necessary condition, as required in those provisions. However, it is clear that the decision to prosecute the defendant, accused of perjury, stemmed neither from the House of Representatives nor from its committee, and consequently the public charge against the crime should be adjudged unlawful. Therefore, the judgment of the original court in the instant case, which accepted the public charge against the perjury and then undertook a substantive review and acquitted the defendant should be adjudged unlawful... and be quashed.

Another case involved the so-called “taxpayer’s suit.” A taxpayer, a resident of Osaka, sought an investigation of the additional budget for 1954, which would be required as a result of the police law passed by the National Diet in that year. In Shimizu v. Governor of Osaka Metropolis, the plaintiff contended that the police law was void because of an invalid resolution of the House of Representatives extending its session. The police law was subsequently passed during the allegedly invalid session. The police law was subsequently passed during the allegedly invalid session. In addition, plaintiff contended that the police law violated a provision of Article 92 of the Constitution deal-

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50 “Gin ni okuru shōnin no sensei oyobi shōgantō ni kansuru hōritsu (Law No. 225, 1947).
51 3 Keishū at 906.
ing with local self-government. Consequently, the additional budgetary appropriation by the Osaka Metropolitan Assembly was unlawful. The defense counsel in refutation stated that the courts do not have the power to decide the question of whether the resolution by the House to extend its own session was valid, or not, for the question is political in nature, pertaining to the internal matters of the National Diet.

The majority opinion of the Supreme Court made two things clear in connection with the political question doctrine. First, it held that the courts were not empowered to investigate the actual processes of legislative activities and to pass any judgment on the question of validity of the processes of passing a law. The Court states in part: 73

So long as the police law is deemed to have been passed by the resolution of both Houses and to have been in force in compliance with lawful procedure, the courts should respect the autonomy of the Houses and should not investigate any facts, as presented by the plaintiff, concerning the legislative procedure of the law, and should not pass any judgment upon the question of validity or invalidity thereof.

Thus while recognizing that the actual legislative process at the National Diet was an internal matter of the legislative branch of government and as such outside judicial power, the Court held that once a law is enacted, the content of such a law is subject to judicial review. Indeed, the majority of the Court reviewed substantively the police law and held it constitutional. 74 In addition, the majority held that the legality of the resolution presented a justiciable question and stated "that a resolution by an assembly does not make an unlawful expenditure a lawful one." 75 It follows that a taxpayer can challenge in court the resolution by a local public body approving the expenditure of public money. Although there were dissenting opinions as to whether a taxpayer in this case should be allowed to bring a suit or not, the Court was unanimous on the question of the actual legislative process at the National Diet.

B. Scholarly Opinion

In analyzing judicial opinions on the theory of political question, some attention must be given to the Japanese Court's reception of the opinions of both Western and Japanese scholars, as well as of judicial precedents in the Western countries. Justices Fujita and Irie, in their

73 16 Minshū at 450.
74 Id.
75 Id. at 449.
supplementary opinion in the Sunakawa case particularly demonstrate
this latter influence:76

Thus, in respect to the development and the theoretical basis of this
matter (i.e., the political question) and the scope of the acts involved,
there must be certain variations, but for many years there have been
precedents for them in the countries of Europe and America: “acte de
gouvernement” in France, “act of state” or “matter of state” in Great
Britain, or “political question” in the United States. In postwar West
Germany “Regierungsakt” and “Hoheitsakt” have been approved in
academic theory in relation to Article 19 of the Bonn Constitution. In
our own country, as is well known, since the coming into effect of the
Constitution of Japan, this has also come to be recognized by many
scholars of public law as included in the concept of act of government.

Justice Tarumi continued further in a separate opinion:77

I am not completely familiar with what is termed “acts of government,”
or “acts of high authority not subject to review by the courts,” or “po-
itical questions” in American and European constitutions, but in our
country although it may be difficult to define the concept of “acts of gov-
ernment” or to list them exhaustively, there is the academic theory that
there are some acts in both the National Diet and the government that
should not be subjected to the right of constitutional review by the
courts.

In view of the fact that the Supreme Court justices were obviously
aware of and probably used as their frame of reference, scholars’ opin-
ions78 and foreign experiences with the doctrine of political questions,
analysis of these theories, both supporting and denying the validity of
the concept of political question, will contribute to analysis of the
decision in Sunakawa and subsequent cases.

With the establishment of the principle of judicial supremacy under
the new Constitution, the doctrine of tochikōi (acts of government)
took on new meaning and significance among legal professionals and
jurists. Indeed the Japanese Academic Conference, at its fifteenth gen-
eral meeting held in May, 1955, included this subject as an item of
the agenda and gathered many participants to discuss theories and
practices in foreign countries such as the United States, Britain,
France and West Germany. Subsequently, many proponents have

76 13 Keishū at 3246-47.
77 Id. at 3256, English translation in MAKI at 329.
78 See note 1 supra. See also T. MIYAZAWA, KEMPO TO SAIBAN (Constitution and
Judicial decision) (1967). Note particularly sections on “France hanrei ni okeru
tochī kōi” (at 99) and “Gyōsei saiban to tochī sayō: France kō ni okeru tochī
kōi no gainen” (at 73).
sought to provide a theoretical rationale for the doctrine, with varying degrees of success.

According to one view,79 admittedly stemming more from political necessity than theoretical reasoning, the harm or evil which may result from judicial review and subsequent nullification of a political question is more dangerous than that which may arise as a result of judicial restraint and toleration of actions which would be illegal were they not “political questions.” In order to avoid this danger, legal questions indivisibly tied to a political question should be absorbed and subsumed into the political question and not be determined by the Court. A major theoretical shortcoming in this seemingly pragmatic approach is the fallacious assumption that political consequences resulting from judicial activism will be any worse than the legal consequences resulting from judicial restraint based on the political question. This assumption seems to underlie the opinion of the majority justices in the second Tomabecki case stating that an act political question should not be null and void because of the grave and undesirable consequences which will result from such a judgment. Proponents of this view believe the Court was indeed comparing and balancing the consequences resulting from the dissolution against the legal consequences of upholding the appellant’s claim for salary and house membership.

A second view, seeking a rationale for the political question doctrine in the principle of separation of powers,80 was presented by a Supreme Court Justice Irie, before the Sunakawa case came to the Court. Since the majority opinions of the Court in both Sunakawa and Tomabecki followed some of the reasoning of Justice Irie, an examination of Irie’s

79 See Yamada, Shūgūin no kaisan to tōchi kōi (The dissolution of parliament and political questions), 27 Hōritsu rōnō (No. 4) 35 (1954): Minshushugi shokoku ni okeru tōchi kōi (Political questions in democratic states) 27 Hōritsu rōnō (Nos. 5-6) 1 (1954). As examples of political questions specifically based on statutory laws, Yamada points out provisions of article 11 of the Special Procedural Law of the Administrative Cases which stipulates that the kōkoku-appeal lodged against administrative actions can be dismissed by a court when it judges the nullification or changes in such actions, which may be contravention of laws, to be detrimental to the public welfare. Note also the provision of article 205 of the Public Office Election Law which provides that when a suit is brought out challenging the result of an election, the court is not allowed to judge invalid the result of an election, even when a violation is committed unless there is a danger of affecting the result of the election.

80 Even those who support a different rationale for the political question doctrine recognize that the principle of separation of powers provides a basis for the doctrine. The opinion of Justice Irie has been singled out here for an examination because of its unique argument and exposition. For an argument for political question based on Anglo-American idea of separation of powers, see Yokota, Ikensinsaken to sankenbunritsu—America no hanrei ni sanken-shite (Judicial review of constitutionality and separation of powers—comparing with American cases), 15 Hōsō Jihō (No. 1) 1-14 (1963).
view may further clarify the position of the Court. He wrote that within the present system of separation of powers, there is some power which is not distributed to any one of the three branches of the government. Direct popular voting, popular initiatives and recalls are those powers which are specifically reserved for the people by the Constitution, but even in the absence of explicit legal provisions, Irie believes that there are some other powers which are reserved for the people. From the viewpoint of the judiciary, these reserved powers become the so-called political questions. In other words, judicial power, confronted with the political realm, recognizes some non-justiciable areas into which it does not go because of political necessity and feasibility. Thus, political questions should be settled, ideally, by the political judgment of the people themselves, and appropriate provisions should be made in the Constitution establishing an arrangement such as direct participation of the people in the judgment of alleged political questions or a special constitutional court. Without such an arrangement, the court has to let the judgment made by the political departments stand until the following election when the people will pass their judgment on the governmental action. It seems to follow from this line of argument that matters which clearly fall within the scope of authority of either the Cabinet or the National Diet would not be considered political questions. However, in the Koshiyama case Irie concurred in the opinion holding that the question of electoral apportionment in that case fell within the category of discretionary authority of the National Diet and as such was non-justiciable. Furthermore, the list of different types of political questions, published prior to the disposition of the Sunakawa case, also includes those matters which concern internal affairs of political departments of government, conferred upon them specifically by the Constitution. Thus, it does not seem that Irie is certain as to whether his conception of acts of state includes only those powers reserved to the people or it encom-

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81 This concept is similar to that of Justice Woodbury, in his dissenting opinion in Luther v. Borden, 48 U.S. (7 How.) 1 (1849), where he expressed the idea that political questions are not within the jurisdiction of the courts because their determination rests with the electorate. See generally C. Post The Supreme Court and Political Questions 12 (1936).

82 Justice Irie includes in the category of the act of government the following: 1) fundamental matters concerning the organization of Cabinet and National Diet (e.g., the appointment of the Premier, the appointment and dismissal of other ministers of state, the qualification examination of members of the Diet, the punishment thereof, and the selection of chairman, vice chairman and the chairman of standing committees); 2) fundamental matters concerning the operation of the Cabinet and the Diet (e.g., the structure, decisions, agenda and voting methods at cabinet meetings, advice and consent of the Cabinet, appointment by the Premier of acting ministers,
passes powers explicitly conferred upon each of political departments by the Constitution as well.

A third rationale\(^{83}\) propounded for the political question doctrine is based on the limitations inherent in the very nature of judicial power and proceedings. Proponents of this theory conceive of the constitutional principle of judicial supremacy as counteracted by equally important constitutional principles of popular sovereignty, of a responsible Cabinet and parliamentary system. Therefore, the act of state which is by its very nature highly political should not be determined by the judges who do not have the same kind of political responsibility as the other branches. Unlike the first view described above, the legal aspects of the alleged acts of state are not regarded as being basically of less significance in its consequences nor is it insisted that the legal aspects should be assimilated and absorbed by the political aspects of the problem. Rather the proponents maintain that regardless of the feasibility of reviewing the problem, the act of state should be left outside the purview of judicial power because of the very nature of such an act itself. Furthermore, according to this view, it is not so much a question of whether an act of state arises only from a constitutional problem or from a statutory problem as the nature of the act itself that makes a case an act of state. Thus this view is close to the second view previously described in that it views the political question as arising out of the limitation upon the principle of judicial supremacy. However, proponents of this view do not give satisfactory reasons for the alleged unsuitability of the adversary and evidentiary system as a means of solving political questions. The statement that political action is by its very nature "irrational" merely begs the question.

Finally, there is a theory\(^{84}\) which does not necessarily favor the
introduction of the notion of political question in Japan as it has been practiced in the West, although it would favor excluding some acts of government from judicial review. Even then, the proper grounds for such an exclusion of judicial review, it is argued, are not because of the political question per se but because of judicial incompetence to review certain parts of the case without stepping into discretionary areas. This method of logical construction was used by the Tokyo High Court in the second Tomabechi case, and by Justices Okuno and Takahashi, in the Sunakawa case. What this view implies is that the court first reviews the constitutionality of laws, orders and other actions of political departments both in a jurisdictional and substantive sense and then opts for non-justiciability whenever there are discretionary elements of the political branches of government involved.

Some scholars, relatively few in number, are opposed to any doctrine of political questions. Their reasons for opposition are almost the same as opinions expressed by the minority group in the Supreme Court, especially Justice Kotani in the Sunakawa case. The opponents of the doctrine regard the provisions of Article 81 of the Japanese Constitution as something unique and special, neither comparable with judicial power in Western countries nor with judicial power under the Meiji Constitution. Where the proponents of the doctrine seek its rationale partially in the de facto recognition of the doctrine in many Western countries, the opponents in refutation note that had the limitation of judicial power based on the doctrine of political questions been inherent in the concept of judicial power, the enactment of Article 81 specifically denies any such inherent limitation. Since Article 98 of the Constitution renders null and void all unconstitutional laws, orders or other governmental actions, some scholars argue that the judiciary should refrain from exercising this tremendous power to nullify governmental action. However, opponents of the political question doctrine note that when Article 98 and 81 are jointly analyzed, there is an obvious and express renunciation of any political question doctrine. Unlike those who emphasize the grave and uncontrollable consequences which may arise from a judicial restraint, the opponents support judicial intervention because of the very nature of the highly political action which is closely related to the basis of national policies, arguing that because the Cabinet and the National

marks at a panel discussion on kaisan nukō hanketsu no jukunmu mondai in Jurisuto (No. 46) at 4-8 (1953).

See note 28 supra and accompanying text.
Diet have more potential power to destroy the nation, the judicial review of their actions, particularly actions of a highly political nature, becomes all the more important. These commentators would allow only procedural and not political checks on the exercise of judicial power. In the end, it must be said that Japanese scholars disagree as strongly as Supreme Court justices over the proper role of the political question doctrine. Its further illumination must be awaited in the years to come.