

# Making China's Apex Court (1928-1948): Legal History as viewed from Newly Opened Diaries

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**Abstract:** This article aimed to contribute to the global conversation on consequential courts by examining the history of the Judicial Yuan, China's apex court from the 1920s to the 1940s, in terms of how it was viewed in diary entries by Chiang Kai-shek, the predominant political leader, by Ju Zheng, the President of the Judicial Yuan, and by Xie Guansheng, the Minister of Judicial Administration. This article is the first to engage with the diaries of these political and judicial leaders at the highest level to explore key aspects of the legal history of the Republic of China. This article focused on the structural and functional evolution of the Judicial Yuan that resulted from the informal daily interactions between the judicial leaders and the leading political figure in China between 1928 and 1948. It is contended that these interactions not only affected the development path but also substantively reshaped the structure and power of the Judicial Yuan. Chiang's personal deference to the President of Judicial Yuan's legal expertise in constitutional designing helped smooth the integration of a bigger national apex court into the newly formed central government system. The later more dramatic interactions between Ju Zheng and Chiang created one driving force for the China's national apex court to survive through the extremely turbulent times during the 1930s and the 1940s. As a result, these two decades of changes in China's apex court brought about a degree of creative institutionalization that laid a further basis for Chinese legal exceptionalism.

**Keywords:** Judicial Yuan; Chiang Kai-shek diaries; Ju Zheng diaries; Xie Guansheng diaries

## 1 Introduction

The latest trend in exploring the global development of courts has focused on applying consequential court theory.<sup>[1]</sup> The central tenet of this theory concerns the functional, substantive roles that judges and courts play in politics and government policies, with the courts considered as “politically consequential actors in the life of a nation.”<sup>[2]</sup> Moreover, this theory expressly calls for new conversations in the field of comparative judicial politics. From the early twentieth century onwards, China has undergone a novel process of legal development.<sup>[3]</sup> The traditional legal system has been completely reorganized. Formal legal professionals, such as lawyers, who had no place in the system prior to the twentieth century, have come to the fore. Despite certain judicial capacity deficiencies, formalized courts and professional judges have been functioning together as key players in Chinese society and politics for more than a century. Therefore, the role of a “consequential court,” meaning a court that operates as a partner and consequential participant in national or international politics, is a worthwhile research

topic for scholars who are interested in China's historical and current judicial reforms.

It appears that two key concepts are involved in consequential court theory. The first concerns the concept of judicial capacity, which may be understood at two levels. At the constitutional law level, judicial capacity may refer to how a national apex court has been driven to develop despite perhaps limited capacity, how it has deferred to the political process, and has established its own norms to tackle the counter-majoritarian difficulty.<sup>[4]</sup> At the structural level, judicial capacity is closely connected to access to justice, which demands at the minimum a well-functioning judicial structural system. However, as Erik Jensen has noted in his caveat concerning “court-centric strategies,”<sup>[5]</sup> a well-functioning judicial system is not easy to achieve. This is especially true for countries with issues related to weak state authority.<sup>[6]</sup> Because of judicial capacity deficiencies and dilemmas, the path towards an effective consequential court will inevitably feature problematic detours.

The second concept concerns judicial leadership. Judges can be either “oracles of law”<sup>[7]</sup> or “positive

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legislators”<sup>[8]</sup> based on the extent of their active participation in national politics. To cite Martin Shapiro, a consequential court touches “in one way or another on the strategic sense or leadership skills.”<sup>[9]</sup> Through its leadership, claims Robert Kagan, “the court was in itself a consequential participant in legal change and national governance.”<sup>[10]</sup> Furthermore, it has been asserted that “strong court leadership implies the promotion of the external orientation of courts, a proactive and professional management culture, accountability and openness, an eye for innovation and a proactive response to changes in society.”<sup>[11]</sup> As examples from the United States, Lawrence Friedman in his classic legal history textbook cited John Marshall: “he personally transformed the function and meaning of the Supreme Court,”<sup>[12]</sup> and Chief Justice Warren E. Burger viewed Marshall as “a man with the foresight, the wit, and the courage to make the most of his chances.”<sup>[13]</sup> Like Marshall, Earl Warren has also been commended “as the super chief”<sup>[14]</sup> for “his robust, healthy good humor, goodwill and good sense,”<sup>[15]</sup> having “provided leadership in a Supreme Court that has brought on a revolution in the field of human rights.”<sup>[16]</sup>

Therefore, viewed in terms of consequential court theory, judicial leadership with an emphasis on big personalities, great cases and statesmanship has fostered the development of a national apex court (the supreme court or a constitutional reviewing court) as one consequential partner both in national politics and in society generally. In the United States, super chiefs, landmark decisions and grand narratives have been among the most salient features for the development of a consequential court in the twentieth century.<sup>[17]</sup> This article considers that China’s experience with a consequential court in the twentieth century indicates a different development pattern. China did have “super chiefs,” but smaller cases, less consistent behavior, and unexpected encounters also affected the development of a consequential court. This consideration appears to echo Tom Ginsburg’s recent observation of judicial politics in the Chinese context, that crucial decisions “were not taken in courtrooms. Rather, they were taken in backroom discussions.”<sup>[18]</sup> However, this article considers that

various informal daily interactions among key individuals that provoked crucial developments were much broader in implication and context than what backroom discussions could convey.

Unlike the conventional approach to studying consequential courts through centering on either landmark court decisions or constitutional interpretations, this study proposed the use of judicial leadership as an unbiased and ideology-neutral comparative perspective to view the effect of judicial roles in Chinese society and politics.<sup>[19]</sup> This article engaged with the scholarly conversation over consequential courts in examining the history of the Judicial Yuan, China’s apex court during the 1920s, 1930s and 1940s, by using and interpreting diary entries of Chiang Kai-shek (henceforth interchangeably referred to as Chiang), the President of Judicial Yuan, Ju Zheng (henceforth referred to as Ju) and the Minister of Judicial Administration, Xie Guansheng (henceforth referred to as Xie). This article is the first to use these diary entries of political and judicial leaders at the highest level in relation to understanding the legal history of the Republic of China. Any modest contribution of the article to the comparative literature on China’s apex court is due to the availability of these diaries, especially the unpublished Xie diaries. This article focused on the structural and functional evolution of the Judicial Yuan resulting from regular interactions between the judicial leaders and the leading political leader in China between 1928 and 1948. It is contended that the Judicial Yuan during this time was shaped and reshaped through processes and for reasons that are revealed in these regular interactions and that these two decades in the history of China’s apex court development eventually brought about a degree of creative institutionalization that laid a further basis for Chinese legal exceptionalism. During these two decades, regular interactions between the judicial leadership and Chiang helped embed a consequential court into Chinese society, but in a largely unexpected way. This specific outcome, therefore, is likely to enhance appreciation of how a consequential court may develop and facilitate more informative conversations in relation to China and countries with differing legal systems such

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as those of Western countries.

This article comprises the following five sections. In section one, the diaries are introduced as a new perspective with which to view legal developments in China in the twentieth century. In three subsequent sections, it is demonstrated how regular interactions between Chiang and leading figures of the Judicial Yuan have not only affected the path of development but also substantively reshaped the structure and power of the Judicial Yuan. Furthermore, these interactions and their effects on the Judicial Yuan led to direct changes in relation to envisaging and institutionalizing a constitutional government following the conclusion of World War II within the Chinese political and social context. This article concludes with a call for a more diversified history concerning legal and judicial developments in China.

## 2 The Diaries: A Personal Perspective

From the 1920s onwards, Chiang embarked on advancing Chinese state integration. He secured his leading role in national politics by unifying the country, which involved various wars and political reshuffling in the late 1920s and early 1930s. The resulting fruit of his leadership in social and economic development was overshadowed by the steadily increasing pressure of Japanese invasion before 1937. However, the following eight years of resistance against Japan and ultimate victory secured Chiang sufficient authority to become the President of the Republic of China. Chiang's diaries, therefore, encapsulate a substantial history of China in the twentieth century. The Hoover Institute holds the original copies of the diaries, which are strictly protected and not available for publication and photocopies. Chiang's diary begins in 1917 and stops in the summer of 1972. It consists of an unusually large number of diary journals, and overall is of extraordinary length, comprising several million Chinese words. These extremely voluminous diaries provide a unique forum to facilitate potential interdisciplinary conversations.<sup>[20]</sup>

In addition, the recent availability of diaries from leading figures of the Judicial Yuan have opened up a rare opportunity to examine Chiang's personal interactions

with the judicial leadership and explore any subsequent effects on the development of law in China. Furthermore, these diaries are likely to be valuable in at least two other important respects. They reveal some of the key issues occurring behind the scenes and shed light on the primary reasons for decision-making in Chinese politics and society. These personal and private writings also provide insightful hints concerning Chinese legal history that require teasing out, but which encapsulate aspects of legal history previously missing or unavailable in broader research concerning Chinese courts. No scholars of legal history have as yet engaged with this array of rare resources to generate debate on Chinese legal history in general, or court history in particular. This study is intended to address this gap.

Concerning the judiciary, Ju Zheng, President of the Judicial Yuan<sup>[21]</sup> between 1932 and 1948, left behind a large number of diary journals. These diaries cover only a short time period between 1945 and 1951, but he also left an informative memoir that occasionally highlights his interactions with Chiang in the matter of judicial developments.<sup>[22]</sup> A much larger range and scale of diaries are available from the Minister of Judicial Administration from 1938 to 1948, Xie Guansheng. Xie began to write a diary at the age of twelve and stopped a month before his death in December 1971. His diary entries comprise three hand-written journals, which are accessible with permission from his youngest son in Los Angeles.<sup>[23]</sup> Xie's diary provides a rich source of information on judicial interactions in relation to politics and society. This overlap in time between the diaries of Chiang, Xie and Ju provides an opportunity for an even more fruitful exploration of the development of the Judicial Yuan than regular case and institutional studies, with the diaries of Ju and Xie likely to be especially informative. In the fifteen years before Chiang established his authority, there were approximately twenty-five republican individual judicial leaders of some significance. In the two decades that Chiang exercised authority, there were only three – Ju Zheng, Xie Guansheng, and Wang Chonghui (President of the Judicial Yuan from 1928 to 1931 and 1948 to 1958, who did not keep diaries). Therefore, the diaries of Ju and

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Xie are a key resource in helping to understand the history of China's national apex court in the first half of the 20th century.

In summary, these diaries of the leading political figure and of two key judicial figures enable an informative investigation of the development of a fundamental consequential court in China through historical analysis of legal and personal perspectives as revealed in those diaries. This study examined these diaries with a focus on major events that had legal significance in the time between 1928 and 1948, specifically in terms of political interventions and subsequent judicial responses. It is anticipated that this examination will help foster an appreciation of the process of configuration and reconfiguration of the China's apex court in the historical context. Apart from offering an interpretation of the diaries, this study also engaged with a wide range of textual and archival resources to contextualize this study within broader historical debate.

In the following sections, this study sought to place the diaries within the Chinese legal and historical matrix, tease out the relevant interactions between Chiang and leading judicial figures, and discuss certain resulting perspectives that may shed light on the development of a consequential court in China. Interpretation is based on relevant diary references, as summarized in the figures. This study aimed to show how Chiang affected the development of the Judicial Yuan through examining the interpersonal tensions between him and leading judicial figures connected to the Judicial Yuan and how major changes to the Judicial Yuan during these years occurred because of what were often mundane events and everyday decisions that had significant consequences for a consequential court in China.

### **3 Making a Bigger Court: The Indeterminate Structure of the Judicial Yuan**

#### **3.1 The Structural Issue: A Quick History**

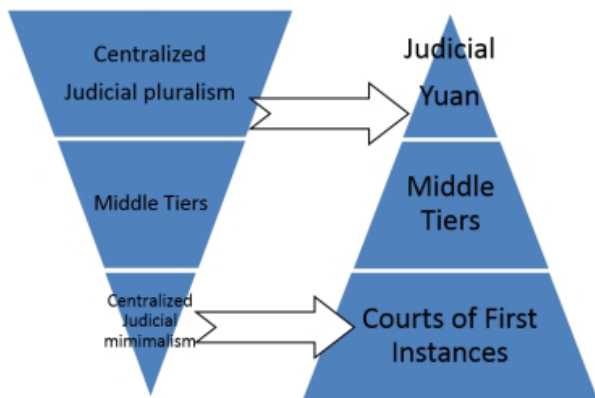
The traditional judicial system in China was based on a model that had been in force for approximately two millennia. This model did not allow professional lawyers

into the courts for trials, with magistrates taking full responsibility for trials in courts of first instance. Trials were purely inquisitorial, but decisions could be appealed up to the highest authority.<sup>[24]</sup> Judges in the modern sense did not exist in local communities. Judgeship referred to the exclusive privileges and prestige enjoyed by the highly professionalized bureaucrats in the central government. However, no single institution was vested with supreme judicial powers.<sup>[25]</sup> For the system to “judge,” judicial officials, who included both judges and prosecutors and other officials were required to independently or jointly adjudicate cases. China's traditional system of six ministries<sup>[26]</sup> can be viewed as an approximate informal judicial system, since each ministry had considerable adjudicatory power within its respective ambit. In addition to this informal system, the central government also operated a highly professionalized judicial system, which combined the Ministry of Penal Punishments, the Censorate, and the Grand Court of Revision.<sup>[27]</sup> Prior to the westernization reforms at the turn of twentieth century, these three components jointly represented the highest judicial power in the country.

This Chinese judicial model gave birth to a centralized judicial pluralism at the top<sup>[28]</sup> and a “centralized minimalism” at the bottom<sup>[29]</sup> (for a brief overview, see Fig. 1 below). This ancient model continued to affect China's judicial reforms in the twentieth century,<sup>[30]</sup> with judicial reform in the new Republic of China involving a reshuffling and reshaping of this ancient pluralistic judicial system. The traditional structure of the Chinese judicial system closely resembled an inverted pyramid. A combination of both the informal and formal adjudicative systems could be found at the top of the structure, whereas at the bottom, magistrate courts could be found, which excluded the application of most formal legal procedures as well as lawyers. In the middle tiers of the structure, there was a mixture of informal and formal adjudicative systems that had original and appellate jurisdictions over civil and criminal cases. The first and foremost goal of the republican reform of the judicial system, therefore, was to formalize and professionalize the adjudicative system, which involved merging the pluralistic structure into one

unified formal authority at the top level and expanding the number of judgeships and courts and improving access to justice at the middle and bottom levels. In brief, the goal of the republican reform was to reverse the ancient inverted-pyramid structure of the judicial system. Since this reversion process involved multiple entrenched interests in diverse entities and institutions, the establishment of the Judicial Yuan as the sole authority and institution at the top of the legal system proved deeply

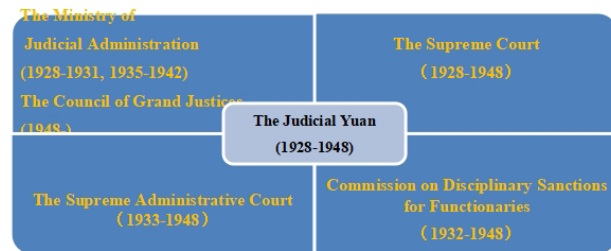
Fig. 1



The first constitutions during the 1910s and 1920s all emphasized judicial professionalism and independence. For example, the Provisional Constitution of 1912 simply copied Article III of the US Constitution in this regard.<sup>[32]</sup> However, it was never determined what exactly was to be understood by the terms “judge” and “court.” The emerging legal professionals and the fledgling legal elites who had received legal education both abroad and domestically opted for the traditional notion of a “judicial official” as the guiding principle in navigating the new judgeship reforms. The goal of judicial reform was intended to improve both the judicial administrative power and the adjudicative power simultaneously. As a result, aspects of judicial administration and of a supreme court were combined in making the Judicial Yuan. Because of widely shared views among the legal elites as to the necessity of reform along these lines, a process of often onerous reform was launched. In the name of judgeship reform, a large share of the national budget was allocated to build and run the new prosecutorial system, which, in combination with adjudicative reforms, created

a complicated structural system. The Judicial Yuan was established in 1928 within this complex pluralistic system (see Fig.2 for a depiction of the structural evolution of the

Fig.2



### 3.2 Structural Aspects of the Judicial Yuan

During the first decade of Chiang’s government at Nanjing, the President of the Judicial Yuan Wang Chonghui frequently interacted with Chiang. However, many of those references have no significance in respect of judicial history. Wang left the Judicial Yuan in the spring of 1931 and did not return to the Judicial Yuan until 1948. Their later interactions barely touched on the judicial system. Chiang mentioned Wang in his diaries 17 times during the brief but interesting period from 1927 to 1931 when Wang was the leading authority in the judicial system. Wang, a highly respected jurist, wanted to establish the Judicial Yuan based on his legal expertise and past experience in leading judicial reforms. However, Wang at that time was not politically affiliated with Chiang and they were clearly not good friends. During this founding era of nationalist government, Chiang was deeply involved in fierce factional struggles, which, before 1932, concerned warfare against various warlords, and political and ideological disputes with other party leaders. Although Wang helped Chiang draft the first constitution to apply under Chiang’s authority, Wang was more closely aligned with those opposing Chiang and the constitution Chiang was promoting.

Regardless of their obvious differences, Wang became the first President of the Judicial Yuan following nomination and appointment by Chiang. Chiang genuinely admired Wang’s legal expertise.<sup>[33]</sup> During the fifteen years before Chiang came to power, Wang had been the leader of the judiciary and the mastermind of judicial reform.



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At that time, no man was better qualified than Wang to become the leader of the judiciary.

As a leading expert in both constitutional law and judicial reforms, Wang was clearly aware of the risks of a weak Judicial Yuan. Merging the Ministry of Justice and the Supreme Court into the newly founded Judicial Yuan was thus most desirable for him. The 1928 Organic Law of the Judicial Yuan formalized this preference. In Article I, the Judicial Yuan was to comprise the highest levels of judicial administration, adjudication (involving a new Supreme Court), administrative adjudication, and the Disciplinary Council. Combining these legal functions was recognized as expressing official ideology regarding the structure of the Judicial Yuan, as can be seen in the Rationales for Revision of the Organic Law of the Court, “Reason No.1: Judicial power is one of the five powers enshrined in the Founding Principles. Judicial powers are to be vested in the Judicial Yuan. The Ministry of Justice is not listed as one executive agency. Given this, judicial administration should be integrated as a part of the Judicial Yuan. Therefore, the framers of this organic law did not hesitate to include the power of judicial administration into the central court (the Judicial Yuan).”<sup>[34]</sup> The Organic Law of the Nationalist Government in 1928 was enacted based on this rationale, as evidenced in Article 33 of Section Four: “The Judicial Yuan is the supreme judicial institution of the national government. It is vested with the power of adjudication, disciplinary sanctions over judges and public servants, and adjudication power in administrative litigation.” Along with Supreme Court direction, the Judicial Yuan also acquired authority in relation to exercising power to ensure a uniform interpretation of national laws and in determining guiding cases.

This structure created in principle a powerful Judicial Yuan. Not only did it encompass all the courts in its structure but, even more importantly, it took over the nomination and appointment power of Supreme Court judges, which used to be strictly controlled by the president of the central government. This outcome was a significant enhancement of power for the President of the Judicial Yuan. Structurally speaking, the Judicial Yuan had

been empowered to operate as a consequential court.

### 3.3 One Consequential Change

This broad structure of the Judicial Yuan and its expanded power had political legitimacy, especially from the perspective of the Nationalists’ five-power constitution theories.<sup>[35]</sup> According to such theories, the Judicial Yuan would be irrelevant if it did not incorporate within itself both the Ministry of Judicial Administration and the Supreme Court. If it were to be merely a Ministry of Judicial Administration or a Supreme Court, it would be fatally weakened; hence the creation of a strong Judicial Yuan was considered necessary for effective reform.

On April 22, 1931,<sup>[36]</sup> Wang left China for Europe in the wake of a failed factional struggle.<sup>[37]</sup> On April 28, Chiang wrote in his diary that Wang “was misled to aim for a new government to replace the central government.” Rather than seek a new candidate to preside over the Judicial Yuan, Chiang began to consider changing the Judicial Yuan. On May 22, Chiang wrote in his diary: “From now on, the Executive Yuan<sup>[38]</sup> is to be fully restructured and enhanced. Therefore, the Ministry of Judicial Administration is to be incorporated into the Executive Yuan. All else shall remain unchanged.” A few months later, the revised Organic Law of the National Government removed the Ministry of Judicial Administration from the Judicial Yuan.<sup>[39]</sup> In the new organic law, it was declared that “The Judicial Yuan is the national supreme adjudication institution” and that “The President of the Judicial Yuan is also the Chief Justice of the Supreme Court.”

This new law changed both the nature and the structure of the Judicial Yuan. Before April 1932 when the Commission on Disciplinary Sanctions for Functionaries was incorporated into the Judicial Yuan, the early Judicial Yuan only had the Supreme Court within its structure, raising questions as to whether it might be structurally redundant or even whether it had structural legitimacy. Considering that appellate adjudication, interpretation of laws, and establishing guiding cases could all be done by the Supreme Court, and the President of the Judicial Yuan was himself the Chief Justice of the Supreme Court, the Judicial Yuan appeared to have become a superfluous

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“national supreme adjudication institution.”<sup>[40]</sup>

This change in the Judicial Yuan was not something planned by either Chiang or Wang. It is likely that if Wang had not left, Chiang would never have considered altering the structure of the Judicial Yuan. At that time, the state building process had just started and there were no compelling reasons to enhance executive power by substantially retrenching judicial power. Even after Wang’s departure, Chiang’s respect for and deference to Wang’s judicial leadership remained unchanged. In 1934 when Wang decided to return to China and requested that the Ministry of Judicial Administration be reincorporated into the Judicial Yuan,<sup>[41]</sup> Chiang Kai-shek agreed without much hesitation.<sup>[42]</sup> However, after his first intervention into the judicial reform process, Chiang found intervention to be a useful means to instigate judicial reform. During wartime in 1943, for instance, Chiang moved the Ministry of Judicial Administration again under the Executive Yuan,<sup>[43]</sup> which later became a major issue especially for Taiwan before 1980.<sup>[44]</sup>

Chiang’s decision in changing the structure of the Judicial Yuan was made within twenty-five days following Wang’s departure from the government. However, Chiang’s improvised intervention produced profound effects on the judicial reform process,<sup>[45]</sup> generating a major challenge to an ideal structure of the Judicial Yuan that would have embodied the legal elites’ aspirations for a powerful apex court China. Chiang’s intervention began a long era in which the structure of the Judicial Yuan remained indeterminate in the face of potential and actual changes, with effects that continue to mark Taiwan’s current judicial system. Wang’s political engagement at that time and the political decisions he made were to have significant consequential effects on the structure of the Judicial Yuan, given Wang was also the leading judicial authority.

In summary, an investigation of personal interactions between Chiang and the President of the Judicial Yuan, Wang, revealed why there was a dramatic change in the structure of the Judicial Yuan. That change led to structural uncertainty and indeterminacy within the Judicial Yuan, which later significantly affected both the

power of the Judicial Yuan and of its president.

## **4 The Presidential Power exercised in the Judicial Yuan**

During the sixteen years when Ju Zheng had oversight over the judicial system (1932-1948), Chiang’s interactions with this more defiant President of the Judicial Yuan were of even greater significance. In Chiang’s diaries, he expressed his strong dislike of Ju, noting in June 1932 that: “A senile old party member like Ju is unexpectedly oblivious of his past history and intentionally makes trouble.”<sup>[46]</sup> Probably due to his deep distrust of Ju, Chiang was more inclined to keep a close eye on the judicial reform process. As recorded in Ju’s memoir and diaries, in addition to continued interest in curbing the power of the Judicial Yuan, Chiang took issue with various operational matters within the Judicial Yuan.

### **4.1 Challenging Capacity Issue**

As noted, a well-structured judicial system is one prerequisite for judicial capacity, with a minimum number of courts and judges required for the system to function. In practice, ensuring this minimum requirement was not easy to achieve in China in the early twentieth century. China’s first judicial reform plan in 1912 set out a judicial capacity goal of two thousand courts and forty thousand judges.<sup>[47]</sup> However, through the first half of the twentieth century, China only established a maximum of up to nine hundred courts, with most concentrated in the cities and in coastal regions. People in substantial communities outside the main service areas were deprived of access to the formal court system. At the same time, the national educational and judicial training programs provided only one hundred judges on average each year. These results fell far short in meeting the required threshold for a well-functioning modern inquisitorial judicial system. For this reason, judicial capacity was a critical issue in China.<sup>[48]</sup>

The challenges in strictly implementing an inquisitorial system in a country such as China with a population during that time of approximately four hundred million were immense. Given the number of trained judges involved, the caseload of each judge would have required

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the exercise of discretion in choosing cases to hear and considerable likelihood of corruption. Additionally, there were periods of political instability, economic uncertainty, and wars, which further compounded these challenges. Attaining the requisite judicial capacity from a consequential court perspective was thus impossible in China. Therefore, the Ministry of Judicial Administration, the sole institution directly responsible for establishing a coherent effective legal system, was tasked with delivering a virtually unrealizable ideal within a multitude of overwhelming challenges. Despite ongoing political volatility in terms of what authority it might exercise and where, the Ministry of Judicial Administration remained powerful since it had exclusive power in authorizing courts and selecting judges at all levels of courts except for the Supreme Court. This situation provided an incentive for Chiang to interfere in the business of judicial administration, and even more so given that Ju, whom he did not hold in high regard, headed the Judicial Yuan.

#### **4.2 The Most Powerful President of the Judicial Yuan**

Chiang had not expected that Ju would become President of the Judicial Yuan. The political compromise in late 1931 among the different Nationalist factions obliged Chiang to defer to the appointment.<sup>[49]</sup> At that moment, Chiang did not try to remove him from the presidency, since the power that could be exercised by the President of the Judicial Yuan had already been minimized due to structural changes to that institution. Chiang did not consider the Judicial Yuan under Ju's leadership as threatening until 1934 when Chiang returned the Ministry of Judicial Administration to the authority of the Judicial Yuan. From 1934, the structure of the Judicial Yuan underwent substantial expansion, and included four "supreme" judicial authorities, namely: the Ministry of Judicial Administration, the highest national authority in judicial capacity building; the Supreme Court, the highest adjudicative authority; the Commission on Disciplinary Sanctions for Functionaries, which had started in 1932 to investigate allegations of misdemeanors nation-wide across all hierarchical levels of the bureaucracy, and; the Supreme Administrative Court that had been inaugurated

in 1933. This expanded structure and power of the Judicial Yuan suggested that a consequential court of some weight had arrived within the political arena in China.

The nature of judicial leadership changed with the greater power of the Judicial Yuan. Ju was simultaneously the President of Judicial Yuan and the Chief Justice of the Supreme Court, as allowed by the organic law. For reasons that were apparently acceptable to Chiang, Ju also became the Minister of Judicial Administration.<sup>[50]</sup> Ju suddenly became the most powerful President of the Judicial Yuan, which provided a very favorable situation to promote capacity development through the Judicial Yuan. As the President of the Judicial Yuan, Ju took an active part in national politics. When working inside the Judicial Yuan, he oversaw decisions made by the Supreme Court and ran operations to foster nation-wide judicial capacity building. Given enough time, the Judicial Yuan appeared likely to grow into a significant participant in national politics.

Ju was also actively pursuing an expansion of the Judicial Yuan. Ju even physically assaulted the Minister of Education when the latter refused to support Ju's judicial capacity improvement plan. This event was recorded in that Minister's diaries. On May 5, 1937, Ju publicly attacked the Ministry of Education's constraining policies on law school admissions. On May 11, Chiang told the Minister of Education that, "to ban the private (law) schools and reduce the admission numbers of law students are consistent with his personal agenda this year."<sup>[51]</sup> As a matter of fact, the number of courts and judges was growing too slowly, which led to serious capacity deficiencies. The ban on law schools to admit more students was simply unacceptable from judicial capacity considerations.

President Ju reacted dramatically. The Minister of Education wrote in his diary that at one meeting, "Ju Zheng lashed out at me by calling me a 'shameless sycophant who has misled (Chiang)'. Right after I had rejected those allegations, he rose up from his seat, accosted me over the table, and punched me. He is the highest official in the judicial system, but blatantly violated the criminal law (by punching me). It is painful and shocking to see how perverse he is." On October 4,



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the Minister filed a written complaint to Chiang, accusing Ju of breaking the law by assaulting him. On October 5, Chiang responded in writing with a stern reproof of Ju. Although this incident passed quickly, it inevitably worsened Chiang's impression of this apparently volatile President of the Judicial Yuan.

### 4.3 The Unruly Judicial Yuan

Chiang quickly moved to roll back the presidential powers of the Judicial Yuan. In Chiang's diaries, there are hints of his reaction to the concentrated power of the President of Judicial Yuan. On one occasion, Chiang mentioned in passing: "Attention: the case concerning the Ministry of Judicial Administration."<sup>[52]</sup> More detail was registered, however, in Ju's memoir.<sup>[53]</sup>

Soon after Ju became the Minister of Judicial Administration, Chiang made his opposition known. Ju initially submitted a request for a meeting with Chiang: "It is my great honor to take the Minister's office. I however have been overwhelmed. I wish to discuss this with you in person." Chiang replied with a compliment: "The Ministry of Judicial Administration with which crucial governmental reforms rest is so important. I celebrate for the country to have you in the office."<sup>[54]</sup>

However, as Ju recalled, he was called to Chiang's office. For reasons that Ju considered of no great weight,<sup>[55]</sup> Chiang was extremely angry when he saw Ju. Chiang strongly rebuked Ju for accepting to be both the President of the Judicial Yuan and the Minister of Judicial Administration. Chiang emphasized that the President of the Judicial Yuan should not be the Minister of Judicial Administration at the same time. During the same meeting, Chiang nominated a new Minister. Accordingly, the presidential power of the Judicial Yuan changed the day after.

The fact that Ju was also the Chief Justice of the Supreme Court did not seem to be an issue for Chiang. Ju's later unexpected departure from the Chief Justice role was connected to an unusual guiding case in 1940. To quote a summary of it: "Guiding case No. 1340, appellation, 1940."<sup>[56]</sup>

*The appellants took over all their father's properties, disregarding their sister's right to inherit, and profited*

*from using the properties. The appellants kept the whole inheritable property undivided. This constitutes injury to their sister's right to inherit. The appellants claimed their right to habitual joint management of eight real estate properties their parent had bequeathed and separated the gains evenly between the appellants. The appellants produced one written document as evidence to claim that the appellee had waived her right to reclaim her share because the period in which she had a right to do this had passed. (The Supreme Court) should take the case and adjudicate.*

*.....A married woman's right to inherit, if intentionally violated, was protected over an extended period.*

This was an appellate case in the Supreme Court docket concerning a woman's right to inherit. Plaintiff X came from a wealthy merchant family. Defendant H's family was relatively poorer. The daughter in X's family married H. She gave birth to two sons. However, she died before her rich father's death. Her sons wanted to take their mother's share, which X rejected firmly. Their dispute finally went to court. The court of first instance and the appellate court both decided in favor of H. The case went to the Supreme Court for a third trial. The Court made a decision in favor of X and overruled the previous decisions. Ju by chance came across this case and considered the decision to be questionable. He therefore ordered the Court to revoke its decision. He then convoked the committee dealing with uniform interpretation of the laws to modify the current controlling guiding case. Two guiding cases were subsequently set in place of the previous one. The case was remanded for retrial to a lower court. X's family managed to bring this case to Chiang's attention. Chiang ordered an investigation concerning the President of the Judicial Yuan's intervention. Chiang simply mentioned this in passing in his diaries: "remind Ju to reform the Supreme Court."<sup>[57]</sup> However, although found not guilty of any inappropriate conduct, Ju was forced to resign from his role as Chief Justice.

After resigning from the Supreme Court, Ju proposed changes in the qualifications in relation to becoming a Chief Justice. In the Organic Law of the Court of 1928, at

least one of three qualifications to be a Chief Justice was required, namely: that being the President of the Judicial Yuan was itself a sufficient qualification to be the Chief Justice; otherwise, it was necessary to have been: a judge or prosecutor of the highest rank for a minimum of five years; or a judge or prosecutor of the highest rank for three more years, with five further years of experience as an executive official at the same rank. Ju proposed an addition to the list, namely that a potential candidate have been: "A member of the Legislative Yuan for a minimum of five years and have made a special contribution to the development of the judicial system."<sup>[58]</sup> After this change to the organic law was adopted, Ju nominated a legislator to be the Chief Justice. This new Chief Justice had no experience with the judicial system but was a committed party member and a good friend of Ju's.

Nevertheless, Chiang confirmed Ju's nomination. By this time, the President of the Judicial Yuan had abandoned efforts to regain the position of Chief Justice and no longer concurrently ran the Ministry of Judicial Administration. The presidential power of the Judicial Yuan had already been extensively reduced so that it was unnecessary for Chiang to obstruct the President of the Judicial Yuan's nomination for Chief Justice of the Supreme Court. However, for reasons quite unanticipated by Ju, the new Chief Justice provided another good reason for Chiang to intervene and reduce even further the presidential power of the Judicial Yuan.

One day in late 1940, the Chief Justice was sued by a law clerk in a local court. The Chief Justice was charged with abuse of power for imposing corporeal punishment. The law clerk had received thirty lashes of bamboo<sup>[59]</sup> for a trivial dispute between him and some unknown court staff. The local newspaper did not even care to identify what the dispute was about. However, the fact that the Chief Justice was to stand trial in a local court became a major news story. As Ju recalled in his memoir, "Chiang was outraged at the news and ordered me to dismiss the Chief Justice immediately."<sup>[60]</sup> Chiang wrote a letter to Ju: "The lawsuit seemed outrageous to me. Yitang (the Chief Justice) was originally not eligible to be Chief Justice because of his limited abilities and skills. It is really

an egregious shame for our party that we do not have qualified candidates for the chief justiceship. Speaking and thinking about this makes me aware of the crisis for our party. Therefore, in this case, please do not hesitate because he is a longstanding party member. Otherwise, it will undermine our party-state. What do you think of this?"<sup>[61]</sup> Very soon afterwards, the Chief Justice resigned. Ju nominated the general secretary of the Judicial Yuan as his first choice to fill the role of Chief Justice. Chiang, however, picked a senior Supreme Court judge and appointed him as the new Chief Justice.<sup>[62]</sup>

Associated with the removal of the Chief Justice, the presidential power of the Judicial Yuan became more of a concern for Chiang. In 1942, Chiang "thought to reinstate the Ministry of Judicial Administration into the Executive Yuan."<sup>[63]</sup> Ju was ridiculed as "the President of Judicial Yuan for ten years but who had made no progress in improving the judicial system. The Supreme Court especially disappointed people from all legal professions."<sup>[64]</sup> On becoming aware of Chiang's proposal to reintegrate the Ministry of Judicial Administration into the Executive Yuan, Ju considered resigning to express his objection. Chiang first sent his most trusted associate to persuade Ju, then Chiang talked in person with Ju and persuaded Ju to accept the decision.<sup>[65]</sup> In 1943, the Ministry of Judicial Administration became part of the Executive Yuan. The structure of the Judicial Yuan had altered substantially, and the presidential power of the Judicial Yuan was now significantly constrained.

#### **4.4 The National Presidential Election: Ju vs. Chiang**

On May 21, 1936, Chiang wrote, "when I was introduced to the notion of the American President being a president of the people, I was not surprised at all."<sup>[66]</sup> However, he was later to become a people's president in China. Probably because he was clearly aware of both the privileges and challenges of being such a president, Chiang appeared not to find the prospect of the role appealing, reflected in the frequent use of the word "resignation" in his diaries.<sup>[67]</sup>

Chiang's diaries in 1948 provide political and psychological context for the presidential election of

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that year. In a reflection in the week prior to the election in March, for example, he wrote: “The meeting date of the National Assembly is approaching, while issues with the representative elections for the National Assembly have become increasingly complicated. I am determined to abide by the law and justice as the guiding principles to arrive at final solutions. The dignity of the National Constitution must trump partisan doctrines.”<sup>[68]</sup>

On March 30, he wrote: “At the first opening session of the National Assembly, the ceremony was imposingly solemn, and all representatives were uniformly sincere and serious. This has never happened before. Their genuine and heartfelt respect for me enables me to be more at ease. My wife told me that my look, attitude, and solemnly delivered speech won over the thousands of representatives in the assembly.” By this time, Chiang was determined to assure the successful election of a president genuinely representative of the people in China. Judging by his diary entries, Chiang was serious and sincere concerning the election.

In March 1948,<sup>[69]</sup> Ju responded with a joke when someone randomly suggested that he run for vice-president during a private gathering of friends. Eight days later at a similar gathering, Ju joked with friends that he would rather run for president. During April, Ju wrote detailed diary entries concerning his experience with the presidential election. In general, his participation in the presidential election was, above all, an expression of his personal aversion to Chiang’s decision to allow many candidates to run for the vice-presidency but for there to be only one presidential candidate for the presidency. Furthermore, during the intense electioneering for the vice-presidency, Ju favored a candidate not supported by Chiang. Ju was criticized by his friends and enemies alike. As a result, he quitted the campaign. However, after quitting, Ju was nominated by the National Assembly to be a further presidential candidate apart from Chiang, as Chiang’s advisors had come to accept that not only should there be candidates contesting for the vice-presidency but that elections for the presidency should also involve more than one candidate. Chiang was subsequently elected President.

Chiang made no mention in his diaries concerning Ju and his campaign for presidential election. It is not clear why this was the case, although it is possible that, given his anxiety about the role of president, he avoided the subject, including any mention of Ju’s participation even though it was a major event in China that Ju as the President of the Judicial Yuan had campaigned against Chiang for the presidency. His previously noted dislike of Ju was also likely to have been a factor in not mentioning Ju.

#### **4.5 A Note on Ju Zheng’s Diaries**

In Ju’s diaries (1945–1948), Chiang is frequently referred to during the crucial years of judicial reconstruction following World War II, with a vivid portrayal of their interactions. As judicial reconstruction had become a central focus for Chiang and other policy makers, and expansion of judicial capacity was closely aligned with the policy goals (including constitutionalism) that Chiang’s regime was seeking to promote in Chinese society, the processes of constitution-making and reconfiguration of the Judicial Yuan went hand in hand. This context provided more opportunities for the President of the Judicial Yuan to interact with Chiang as the key political leader.

A sizable part of Ju’s diary entries include how this independently minded President of the Judicial Yuan reflected on his meetings and communications with Chiang and his comments on Chiang’s policy decisions relevant to law and the courts. From early March 1945 onwards,<sup>[70]</sup> Ju considered resigning from the presidency of the Judicial Yuan on several occasions. In March 1948, after discussion with the Chief Justice, Ju’s determination to resign was reinforced. He noted, “The Supreme Court was harshly questioned in a letter sent from Chiang’s office [...] the Judicial Yuan should rebut one by one all these baseless charges. Intervention from the head of state into the judicial system was not permissible in law, nor allowable in the political system. Feeling frustrated, we all wanted to resign. My determination is especially reinforced.”<sup>[71]</sup>

One principal reason behind Ju’s desire to resign was his personal disagreement with Chiang’s increasing

concentration of power. He noted to himself: "Now that power has been increasingly concentrated in one person, it will be extremely difficult to make any useful changes. Without the complete replacement of the brain and the heart, nothing can bring about necessary changes."<sup>[72]</sup> Here is revealed a President of the Judicial Yuan pitted squarely against the personal power of the political leader. As the prospect of retirement beckoned, Ju became increasingly critical of Chiang's political policies in general, and judicial policies in particular. In his diary entry of May 25, 1947, Ju wrote: "I think so many government measures are neither reasonable nor concerned with the welfare of the people, and have caused considerable confusion. Twenty years ago, I had already perceived this tendency. Nowadays, nothing has changed."

On February 10, 1946, Ju was called to Chiang's office. Chiang was outraged at the draft constitutional compact devised by a post-war multiparty convention. When Chiang asked the President of the Judicial Yuan to oversee the constitution-making progress, Ju declined.<sup>[73]</sup> In 1948, Ju frequently commented in his diaries on the new draft constitution. He was especially disappointed with the organization of the Judicial Yuan under the new constitution. He thought the new structure of the Judicial Yuan "has nothing new but has clear discrepancies with the text of the constitution."<sup>[74]</sup> Ju later held discussions with his General Secretariat concerning the new organic law of the Judicial Yuan,<sup>[75]</sup> which had been drafted by the subsequent President of the Judicial Yuan, Wang Chonghui. In late March 1948, the legislature passed an act confirming the Executive Yuan's power over the Minister of the Judicial Administration, which permanently separated this ministry from the Judicial Yuan. While both Wang and Ju were clearly aware of the effects of this structural change to the Judicial Yuan, they did nothing to stop it from happening nor was it likely they could have done anything even if they had been inclined. With the enforcement of the new organic law, the possibility of an ideal version of China's national apex court, combining multiple administrative entities and judicial powers at the highest level, had been sidelined.<sup>[76]</sup>

Furthermore, Chiang decided to reduce the

presidential power of the Judicial Yuan even further. During the last month of Ju's presidency of the Judicial Yuan, Chiang ignored almost all proposals from Ju and did not consult him on legal issues. On May 19, 1948, Ju resigned. He felt released, as revealed in his diary: "What a blessing it is to unload the judicial responsibility. I finally don't need to work for him any longer." When Ju proposed a candidate to head the Judicial Yuan, Chiang did not consider the proposal nor did Chiang consider a list of candidates Ju proposed for the Council of Grand Justices. Chiang did not nominate any of Ju's proposed candidates, even in one instance where he had appeared to give initial approval to one proposed Grand Justice candidate,<sup>[77]</sup> Chiang also did not retain the Chief Justice of the Supreme Court. After Ju resigned, "Chiang was determined to remove the Chief Justice of the Supreme Court."<sup>[78]</sup> Following Ju's resignation, Chiang moved quickly to overhaul the Judicial Yuan. Chiang appointed Wang as the new President of the Judicial Yuan, while Wang recruited Xie to serve as head of the General Secretariat in late 1948 and soon afterwards had him reappointed as the Vice-President of the Judicial Yuan.

In summary, Ju maintained an independent voice in his role as the President of the Judicial Yuan throughout his tenure. His critical interventions serve to challenge conventional wisdom concerning the likelihood of a submissive and instrumentalist judiciary in the face of demands from political leaders in an authoritarian regime. Understanding the evolution of China's apex court under Ju's leadership provides a broader and more informed picture concerning the tensions between politics and the courts in Chinese society. In terms of what Chiang hoped to achieve, an overly submissive President of the Judicial Yuan would likely have been harmful within the context of an otherwise highly centralized national politics. For Chinese society, Ju's Judicial Yuan had created substantial imaginative room for people to associate the national apex court with the promotion of the rule of law and independent judicial power in China.

However, Chiang removed judicial administration responsibilities from the Judicial Yuan and acquired the power himself to nominate candidates for the Council of

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Grand Justices in 1948. Since the President of the Judicial Yuan no longer needed to be a grand justice or a judge, the President became primarily an administrative official at the top of the judicial system, but not permitted to share responsibility with the Minister of Judicial Administration in judicial capacity building. These structural changes and reduced authority fundamentally reshaped China's apex court.

## 5 A Judicial Yuan Made Anew

Chinese legal processes and debate in the first half of twentieth century centered on constitution making.<sup>[79]</sup> This assessment is supported by the relatively frequent mention of this matter in Chiang's diaries between 1927 and 1936, with more than half of Chiang's references to legal matters (87/148) concerning the constitution and constitutionalism. After 1945, his references become even more frequent.<sup>[80]</sup>

### 5.1 The Various Constitutions

Three formal constitutional texts were proposed during Chiang's regime. The first text was the Provisional Constitution for Political Tutelage, which was drafted by Xie, and finalized by Wang before its enactment in 1931.<sup>[81]</sup> Chiang made up to thirty diary references to this provisional constitution from 1930 to 1931. The second text was the 1936 draft Constitution of the Republic of China; its formal enactment was interrupted by the war. The third text, which became law in 1946, remains valid in Taiwan. Chiang himself was actively involved in the constitution-making process and made significant contributions. Furthermore, his references to constitution making in his diaries included all three constitution-making processes.

In his diaries of February 1931, Chiang Kai-shek took the pages normally used for four days of diary entries to justify his decision to enact a provisional constitution.<sup>[82]</sup> In summary, Chiang argued that: (1) without this constitution, it would be impossible to unify China and undertake subsequent re-construction; (2) making a new provisional constitution had been the lifelong goal of the founding father (Sun Yat-sen), and; (3) a provisional constitution would safeguard the people's liberty, property

and safety, ensure permanent unification and peace, and the realization of three key political principles (democracy, nationalism, and protecting people's livelihoods). Despite his own commitment, he was concerned that certain politicians would pursue their own self-interest and challenge the legitimacy of any new constitution regardless of the enormous sacrifices from the people. What these politicians were doing would cause endless risks and disasters for the country in his view.

On June 1, 1931, after the official ceremony for the publication of the provisional constitution, Chiang publicly declared his commitment to a new constitution and justified its necessity. Furthermore, on different occasions, he declared that he "would not become president of China for life, and would sacrifice all personal opportunities and benefits for the country's unification and peace."<sup>[83]</sup> On the day he reviewed and finalized the draft for the provisional constitution, he noted in his diary: "Publicizing my decision not to be president will make a huge difference. Otherwise, my closest friends will suspect that I would be a hypocrite."<sup>[84]</sup> Subsequently, Chiang was to change his mind, becoming president in 1948 and remaining in that position until his death in Taiwan.

Because of Chiang's explicit rejection of the presidency, the provisional constitution made no reference to the "President" but rather to a vaguely defined "National Government". The section on fundamental rights comprised the most significant section, totaling more than a fifth (19/89) of the articles in the constitution. Chiang's view of the constitution and his belief in its protective role help provide understanding of Chiang's initially more nonchalant attitude toward the Judicial Yuan, as he considered that the Judicial Yuan did not pose a political threat.

By late 1932, Chiang had started to think of replacing the provisional constitution with a new constitution. He noted in a diary entry: "Most are unwilling to support making a new constitution and they are even more opposed to a definite publication time for the new constitution. I vehemently rebutted them. No nation in this world can survive without a constitution. Therefore, I am determined to push for the early publication of the



constitution.”<sup>[85]</sup> With Chiang’s decision, a new round of constitution-making took place over the following three years. This time, creating a powerful national presidency became the priority in his constitution-making agenda: “to centralize political power, a presidential system is necessary.”<sup>[86]</sup> As a result, nineteen articles in the new constitution related to presidential powers.

The underlying reason for Chiang’s initiative to promote a new constitution can be found in his diary, namely: “To mobilize everyone to defend the country, we shall first bring together talented people from throughout the nation, involve all the people in the political process and engage everyone in tackling the national emergency. Therefore, the constitution should be enacted and declared as early as possible. The National Assembly is to be convened to decide national affairs. Given the aspiration for unified nation-wide political decision making, the old feudal power separation must be dismantled. People have to be awakened to jointly determine what needs to be done politically.”<sup>[87]</sup> Chiang’s philosophy in relation to constitution making suggested a preference for a presidential democracy. It was reasonable, therefore, for Chiang to seek “expanded presidential power, which includes the right to dismiss the congress and the right to issue emergency decrees.”<sup>[88]</sup> This approach set the tone for the new constitution and for interactions between Chiang and the President of the Judicial Yuan. Chiang’s direct intervention in the regular business of the Judicial Yuan and his seizing of opportunities to reduce the presidential power of the Judicial Yuan can be seen as resulting from Chiang’s willingness to accept a more important role for the presidency in national politics.

However, the draft constitution was aborted because of the Japanese invasion. Immediately after the war had ended in 1945, Chiang decided to reactivate the constitution-making process. With political and social dynamics having now changed significantly, Chiang’s diary entries show an emphasis on connecting the new constitution with the rule of law, party politics and democracy. Early in 1946, a political consultative conference was convened where multiple interested parties gathered to discuss the ways and steps needed to

organize a joint government. Chiang noted in one diary entry that, “politics needs competition and thus makes progress,”<sup>[89]</sup> and that: “The foundation of the state and the blueprint for state-building are largely available after twenty-five years of struggle. There is no reason to worry about its failure.”<sup>[90]</sup>

After reviewing the new draft constitution, however, Chiang was extremely “shocked” by the proposed organization of the National Assembly and the draft constitutional principles. Chiang noted in a diary entry: “The result is so unexpected. All the guiding principles of the Nationalist Party and the previous draft constitution have been utterly turned upside down. What the new draft constitution has put in place are the outrageous results of hearsay. This drives me crazy. Sigh!”<sup>[91]</sup>

In December, 1946, he further commented in a diary issue on the same issue: “To look back, if the previous draft constitution had not been amended, the constitution would not only have been excoriated by the communist party, but other countries would have mistakenly believed our national government was seeking to enact a fascist constitution. That would have caused suspicion in the world and the consequences would have been unprecedentedly significant.”<sup>[92]</sup> Chiang was deeply sensitive to charges that he was promoting a “one-party autocracy.” His uneasiness concerning such accusations gave other parties greater opportunities to negotiate. In his diary, for example, he noted that he was irked by one party leader’s threat not to continue participation in the central government, since he tried his best to avoid “the international suspicion of an autocratic government in China.”<sup>[93]</sup>

Chiang’s general fears were specifically highlighted when he orchestrated the presidential and vice-presidential elections. If the President of Judicial Yuan Ju Zheng had not entered the presidential election, there would have been six candidates running for vice-president, with Chiang as the only candidate for president. Moreover, while the intensely fought vice-presidential election took seven days to produce a result, the votes for the president were cast and counted in only a few hours in one morning.

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Amidst the drama of constitution making, the Judicial Yuan was quietly transformed. Since Chiang cared deeply about the constitution, a Council of Grand Justices was created to act as the guardian of the constitution, and this Council was subsequently integrated into the structure of the Judicial Yuan.<sup>[95]</sup> In emerging with a new constitution emphasizing liberty and democracy in addition to a formal institution vested with the power to interpret the constitution, China under Chiang's rule provided an example of how one major political leader was significantly responsible for the construction of a constitutional court and of a judicialization of politics in the early years following World War II.<sup>[96]</sup>

## **5.2 Xie Guansheng: The Framer of the 1948 Constitution**

In 1930, Wang as President of the Judicial Yuan appointed Xie to head his General Secretariat. That year, Wang also privately entrusted Xie with the task of drafting a constitution to legitimate Chiang's rule in China. On March 1, 1931, with a few minor linguistic and rhetoric modifications added by Wang, Xie's draft constitution was put into effect. The following month, Wang went to the Hague to become a judge at the Permanent Court of International Justice. Xie then oversaw the work of the Judicial Yuan for eight months before Ju became the new President of the Judicial Yuan. During this period, Xie declined Chiang's invitation to work for him as a personal secretary.<sup>[97]</sup> He instead accepted Ju's invitation to continue working in the Judicial Yuan. He noted in his diary: "This was when we first came to know each other. Mr. President Ju was as warm as an old friend. So, I decided to stay in the Judicial Yuan."<sup>[98]</sup> Xie was to work in the Judicial Yuan for forty years. Without doubt, Xie was a key figure in the judicial system throughout the years of Chiang's rule of mainland China and later of Taiwan.

Working behind the scenes and as the person primarily responsible for framing the constitution, Xie knew all the technical and normative intricacies of the text. Following the promulgation of the new constitution in 1948, Wang and Xie, as the two constitutional experts most knowledgeable of the constitution, were aware of the

weaknesses and flaws within both the constitutional text and the constitutional structures. They also knew how to address issues arising using constitutional interpretations. In summary, China after World War II was in a very good position to promote constitutionalism. There was a democratic constitutional text, a formal constitutional court, and well-established authoritative constitutional interpreters.

In addition, Chiang deferred to the judicial leadership. Chiang's respect for Wang remained constant, and he also seemed to like Xie. On July 12, 1942, Chiang called a meeting with Xie to discuss reforming the Ministry of Judicial Administration; he then informed Xie in person of his decision to appoint Xie as the Minister of Judicial Administration. On December 11, 1942, the organic law of the nationalist government changed, and the Ministry of Judicial Administration was subsequently reintegrated into the Executive Yuan. Xie was then able to become familiar with the workings of the Executive Yuan. After December 1948, when he had returned to the Judicial Yuan, first as head of the General Secretariat and then as the Vice-President of then Judicial Yuan, he could use his knowledge of the Executive Yuan to negotiate on issues relevant to the judicial structure and related powers.

On January 30, 1946, the post-war multiparty convention laid down fundamental principles with respect to the judicial system in the new state, as follows: "An independent and uniform judicial power must be safeguarded against political interventions. The government shall take all measures to improve the legal system through: increasing the number of judicial personnel, improving salaries, and acknowledging the socially important role of those working within the legal system; simplifying the litigation procedure, and; reforming the prison system."<sup>[99]</sup> On March 26, 1947, Chiang met with Xie to discuss the unclear status of the Ministry of Judicial Administration. Because Xie was the minister and was known and trusted by all parties involved, the various parties were assured, such that controversy concerning the role and place of the Ministry of Judicial Administration did not lead to serious political dissension. Xie's reputation also helps explain why Ju was

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less concerned about potential encroachment in judicial matters after the Ministry of Judicial Administration was removed from the Judicial Yuan.

### **5.3 Roscoe Pound: A Justification for Chinese Legal Exceptionalism**

Xie's prominent contribution to the post-war judicial reconstruction was reinforced and confirmed following the visit of Roscoe Pound, the former Dean of Harvard Law School.<sup>[100]</sup> Indeed, Xie has been remembered in China by later generations for his decision to hire Pound to advise on the reconstruction process of the Chinese judicial system. As a well-trained comparative lawyer and a Chinese legal historian, Xie knew how to operationalize Pound's visit to legitimize his nationalistic legal reconstruction agenda. It is apparent in hindsight that Pound, a "fervent believer in American legal exceptionalism" and a "beacon concerning the export of American Law,"<sup>[101]</sup> had in fact reinforced a sense of Chinese legal exceptionalism that was already becoming increasingly embedded within the post-war Chinese legal mindset. Quite unlike the growing critique of American adversarial legalism as simply an "invention of American legal exceptionalism" in the 19th century,<sup>[102]</sup> there were few in China, especially during the 1930s and 1940s, who doubted the inherent exceptionalism of the Chinese legal system. Throughout the 16 years that Ju headed the Judicial Yuan, Chinese legal academics and professionals embraced Chinese legal history and worked to reconfirm what they saw as the spirit of Chinese law according to their national-reconstruction agenda. Through emphasizing a China-centered legal system with past and future significance, legal nationalists under the leadership of Ju sought to generate a nationalistic movement to reclaim the genius and glory of the Chinese legal tradition. For them, Chinese legal exceptionalism was simply a social and historical fact, the result of an unparalleled and consistent Chinese cultural evolution.<sup>[103]</sup> The development of a bigger national apex court could, therefore, be readily explained as one typical example of Chinese legal exceptionalism.

Pound was described by Ju and Xie as a "fervent believer" in Chinese legal exceptionalism, due to his

adamant attempts to discourage China from importing American law and his extolling of China's specific legal processes and achievements, which Pound considered should form the basis for judicial reconstruction. Most importantly, Pound's Chinese legal exceptionalism thesis was fully accepted by both Chiang and Ju, and influenced the newly emerged dynamics concerning post-war judicial structural reconfiguration in China.

From July 1, 1946, Pound began visits to China, coming to Nanjing initially to serve as an advisor to the Ministry of Judicial Administration. On August 29, 1946, Xie accompanied Pound on a visit to Chiang at his military headquarters. They stayed there for five days. On August 30, Chiang invited "the American legal advisor Roscoe Pound and his wife to dinner." Chiang wrote: "We have enjoyed a very delightful time. I am deeply impressed by the Americans who, regardless of the difference in their ages, all undertook their professional responsibilities with due diligence. This is one crucial factor for their nation-building."<sup>[104]</sup> During the five days that Pound visited Chiang, it is likely that he would have had numerous occasions on which to expound his Chinese exceptionalism thesis to Chiang, which may have given Chiang greater confidence to strategize judicial reform as part of his political agenda. However, Chiang made few diary entries concerning this visit.

Meetings between Pound and Ju, the President of the Judicial Yuan, were more frequently recorded in Ju's diaries. On September 9, 1946, Xie invited Pound and Ju for dinner. That was Ju's first meeting with Pound.<sup>[105]</sup> Three days later, the President of the Judicial Yuan and the Chief Justice of the Supreme Court co-hosted a dinner with Pound. The dinner was very simple, "Pound does not have teeth, so on the dinner table were merely several pots of stews." The next day, Ju dined with Pound again. On December 7, Ju read Pound's report on legal education and was deeply impressed by Pound's insights. Pound suggested in his report that China should build a legal system based on China's own history and pointed out the unsuitability of transplanting American law into China. Ju apparently liked Pound's comments on the Chinese legal system. He noted in his diary that, after careful review

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of Pound's report, Pound had "brought forth an array of precedents to expatiate on the unsuitability of introducing Anglo-American law to China. They were very insightful. Pound would be surprised by any Chinese aspiration to transplant Anglo-American law into China and to utterly disregard China's own history and tradition."<sup>[106]</sup>

The same impression was shared by Xie. For example, on September 4, 1946, Xie noted: "Advisor Pound will give public lectures for the next three days at Nanking. Today's topic was about law and legal analysis. The venue was the Hall of the National Assembly, which was completely filled with audience... To summarize his lecture, he argued that there was a deep-rooted conservative tradition in the Anglo-American legal system, with considerable absurdities which made it unworthy as a pattern for other nations to follow. China has adopted the established Continental legal normative system. It suits China's contemporary condition. What's more, in the Chinese legal community, there is a rich pool of capable legal talent. China should be confident in moving ahead with her reforms."<sup>[107]</sup> Among other changes, the establishment in 1948 of the Council of Grand Justices in post-war Chinese society could be seen as a sign of the confidence and creativity that emerged alongside Pound's encouraging message for China. With its newly gained power to interpret the constitution, the Judicial Yuan had quickly adjusted to become a leader in a second global wave of judicial reconstruction.<sup>[108]</sup> The Judicial Yuan was made anew.

## 6 Conclusion

After analyzing the diaries in relation to the Judicial Yuan, some concluding comments are in order. First, it appears that the informal daily interactions between Chiang and leading figures of the Judicial Yuan not only affected the route of development but also were influential in substantively reshaping the structure and power of the Judicial Yuan. Chiang's personal deference to Wang's legal expertise in constitution design helped smooth the integration of a bigger national apex court into the newly formed central government system in the 1930s. The later more dramatic interactions between Ju as the President

of the Judicial Yuan and Chiang as the most prominent political leader nonetheless helped develop the social and political awareness of the otherwise vulnerable judicial system. Despite the power and the structure of the Judicial Yuan being significantly modified and retrenched, the Judicial Yuan as China's national apex court survived through the extremely turbulent times during the 1930s and the 1940s. When Pound came to advise on China's post-World War II reconstruction of its legal system, the Judicial Yuan under the leadership of Wang and Xie had regained its power to become the guardian of the constitution due to the acknowledged constitutional expertise of these two judicial leaders, leading to a renewed Judicial Yuan. After decades of development, the Judicial Yuan had not only continued as an example of Chinese legal exceptionalism but had also evolved further to become a consequential court in Chinese society and political life. Current leading constitutional theorists (Tom Ginsburg for example)<sup>[109]</sup> on the Judicial Yuan have not apparently been aware of certain key transforming dynamics that are revealed through perspectives expressed in the diaries examined in this article. Such unawareness can lead to a misunderstanding of the historic role of the Judicial Yuan in Chinese society, especially a nonchalant mischaracterization of the Judicial Yuan as an instrument of authoritarianism.<sup>[110]</sup>

Second, examination of these diaries affords a more diversified perspective on comparative law. The current English language literature on Chinese legal developments, regardless of its breadth and depth in insights and methodologies, has tended to paint a bleak picture concerning the courts in China in the past. With a too ready acceptance that nothing is to be learned from Chinese legal experience, there is likely to be little incentive or academic interest in exploring relevant actors (such as judges) and their ideas. To combat such perceptions, this article attempted to highlight the importance of developments in Chinese courts as useful in advancing consequential court theorizing and to help deconstruct and reframe the current discourse and literature concerning Chinese law and the courts. The diaries of Chang, Ju and Xie provide insightful source material to

help with reassessing and rewriting Chinese legal history, through providing a more diverse range of relevant voices and further contextualizing a knowledge of Chinese law and Chinese legal history within comparative law. With these diaries, a more dynamic picture of the development of China's apex court in the twentieth century can emerge.

## Reference

- [1] See Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan, *Consequential Courts: Judicial Roles in Global Perspective*, Cambridge University Press (Cambridge), (2013). For related material, please also see Erin F. Delaney & Rosalind Dixon eds. *Comparative Judicial Review*, Edward Elgar Publishing (Cheltenham; Northampton), (2018).
- [2] See *Consequential Courts*, at 2,36–37.
- [3] The reformation of the judgeship and court system by the late Qing government has been widely accepted as the start pointing of China's new legal history.
- [4] See the view of judicial capacity development that Professor Andrew B. Coan has promoted and elaborated in his articles, for example, *Judicial Capacity and the Substance of Constitutional Law* 122(2) *Yale Law Journal*, 422–458 (2012), and *Judicial Capacity and the Executive Power* (co-authored with Nicholas Bullard 102(3) *Virginia Law Review*, 765–831 (2016).)
- [5] See Erik Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses*, in Erik Jensen and Thomas Heller eds. *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, Stanford University Press (Palo Alto), at 338–381 (2003).
- [6] See Francis Fukuyama, *State-Building: Governance and World Order in the 21 Century*, Cornell University Press (Ithaca), (2004).
- [7] See John P Dawson. *The Oracles of the Law*, William S Hein & Co, 1986.
- [8] See Allan R. Brewer-Carias, *Constitutional Courts as Positive Legislators: A Comparative Law Study*. Cambridge University Press (Cambridge), (2011).
- [9] See Martin Shapiro, *The Mighty Problem Continues*, in *Consequential Courts*, at 389.
- [10] See Robert Kagan, *A Consequential Court: The U.S. Supreme Court in the Twentieth Century*, in *Consequential Courts*, at 226–227.
- [11] See *The International Framework For Court Excellence* (2nd Edition), March 2013, P7, available at <http://www.courtexcellence.com/~media/Microsites/Files/ICCE/The%20International%20Framework%20E%202014%20V3.ashx> (last visited Dec. 19, 2019).
- [12] See Lawrence M. Friedman, *A History of American Law*, Simon & Schuster (New York), at 86 (2005).
- [13] See David M. O'Brien ed. *Judges on Judging: Views from the Bench*, DC: CQ Press (Washington), at 26 (2013).
- [14] See Bernard Schwartz, *Super Chief, Earl Warren & His Supreme Court, A Judicial Biography*, New York University Press (New York), at 771 (1983).
- [15] See John D. Weaver, *Warren, the Man, the Court, the Era*, Little Brown (Boston), at 5 (1967).
- [16] See *Id.* at 5.
- [17] See Robert A. Kagan, *A Consequential Court*, in *Consequential Courts*, at 199–232.
- [18] See Tom Ginsburg, *The Politics of Courts in Democratization: Four Junctures in Asia*, in *Consequential Courts*, at 55–56.
- [19] See my chapter *Consequential Court and Judicial Leadership: The Unwritten Republican Judicial Tradition in China*, in Yun Zhao and Michael Ng eds. *Chinese Legal Reform and the Global Legal Order: Adoption and Adaptation*, Cambridge University Press (Cambridge), at 278–298 (2018).
- [20] Since the Hoover Institute opened the Chiang Kai-shek diaries to the public in 2007, the diaries have aroused unabated academic interest. A stream of new publications, workshops and conferences featuring Chiang's role in the twentieth century have cropped up. For a quick view of this trend, please see LÜ Fangshang, *Chiang Kai-shek's Diaries and the Study of Republican Chinese History*, Shijie Datong Press (Taipei), (2011).
- [21] The President of the Judicial Yuan is not equivalent to the Chief Justice in the U.S. The two have distinct jurisdictional powers. The President of the Judicial Yuan in the five-power government had much broader political and administrative



power than a Chief Justice in most other jurisdictions.

[22] See JU Zheng, *Autobiography*, (self-published, 1949).

[23] In October 2016, I visited the youngest son of Xie at his home in Los Angeles for the first time and read the excerpts. I have subsequently made numerous visits to his home. To date, I am the only scholar who has been honored to read both Xie's diaries at Taipei and the diary excerpts and other personal documents at Los Angeles.

[24] For example, see Jonathan Ocko, *I'll Take it All the Way to Beijing: Capital Appeals in the Qing*, 47 *Journal of Asian Studies*, 291–315 (1988).

[25] There were three parallel institutions which, in principle, shared the final authority in deciding cases. The separation of powers principle was observed through dealing with adjudication, review, and impeachment separately in each institution. All three institutions would, however, send members to constitute panels to hear hard cases.

[26] The six ministries were the Ministries of Personnel, Revenue, Rites, War, Penal Punishments, and Works.

[27] In the 19th century, the Ministry of Penal Punishments was close to a Supreme Court but with jurisdiction limited to criminal matters. The Grand Court of Revision took responsibility for reviewing decisions in criminal law cases. The Censorate played a role as a government prosecutor, as well as a role in overseeing adjudicative procedures and bringing impeachment charges against any suspect concerning law-breaking behavior.

[28] See YANG Yifan, *New Understanding of Chinese Legal History*, Social Science Academic Press (Beijing), at 3–18 (2013).

[29] See Philip Huang, *Centralized Minimalism: Semiformal Governance by Quasi Officials and Dispute Resolution in China*, 34 *Modern China*, 9–35 (2008).

[30] This ancient structure of the judicial system made its first appearance in the new Chinese republican constitution of 1912. In section six of the Provisional Constitution of the Republic of China, the first article stated: "Courts are to be comprised of judges who are appointed respectively by the President and the Minister of Justice." The Presidents appointed judges who had been assigned to work for the three courts based in the capital city, the Supreme Court, the High Court and the Court of First Trial of the Capital City.

Those judges appointed by the Minister of Justice were sent to different localities across the country.

[31] This prototypical pattern of the Judicial Yuan originating from Chinese judicial tradition has had conflicting influences on the current judicial system in Taiwan. See TE-CHUNG Tang Dennis, HUANG Kuo-Chang eds. *The Tenth Anniversary of the National Conference on Judicial Reform: Retrospect and Prospect*, Academia Sinica (Taipei), section I, II *The Functions of the Judicial Yuan* (2010).

[32] In Section six, for example, Article 52 was almost the literal Chinese translation for "The judges shall hold their offices under good behavior, and shall receive for their services, a compensation, which shall not be diminished during their continuance in office."

[33] Chiang's diary entries on May 13, 1927; September 19, 1928.

[34] *Rationales for Revision of the Organic Law of the Court*, 1 *Journal of the Disciplinary Committee of Judges*, 12 (1928).

[35] The five powers were the executive power, the legislative power, the judicial power, the examination power (the authority to administer all national exams in selecting public servants), and the control power (the censorial and impeachment power).

[36] See Xie's diary entry on April 22, 1931.

[37] This was not the first time Wang had left China for political reasons after he became President of the Judicial Yuan. On June 7, 1929, Wang was recorded in his friend's diary entry as follows: "This time, Wang is going abroad to join the Permanent Court of International Justice. In cases of political change, he would often leave China using this same pretext. Today, I figure he is about to do the same." HU Yang ed. *Zhang Yaozeng Diaries*, The Law Press (Beijing), at 271 (2004).

[38] The Executive Yuan was the executive branch of the government.

[39] See *Legal News*, 9 (445/446) *Law Review*, 27 (1932).

[40] Aspects of current controversies in reforming the structure of the Judicial Yuan in Taiwan can be traced to issues arising from Chiang's first intervention concerning the structure of the Judicial Yuan.

[41] There is also evidence concerning this from a diary entry of a good friend of Wang's: "The return of the Ministry of

- Judicial Administration to the Judicial Yuan was initiated by Wang Chonghui.” See Zhang Yaozeng Diaries, at 389–390.
- [42] On December 10, 1934, Chiang made an emphatical diary note concerning this Ministry of Administration issue.
- [43] Chiang’s decision was made as early as mid-November 1942. This anecdote had been recorded in another set of diaries. See LIN Meili ed. Wang Shijie Diaries, Institute of Modern History, Academia Sinica (Taipei), at 468–469 (2012).
- [44] The Ministry of Judicial Administration was endowed with the power to appoint and oversee all the prosecutors nationwide and the judges in all courts apart from the Supreme Court. The Ministry of Judicial Administration thus became a locus of power struggles between the Judicial Yuan and the Executive Yuan. The struggle ended in 1980 when the Ministry of Judicial Administration was transformed into the Ministry of Justice in the Executive Yuan, while the power to appoint and oversee the judges was granted to the Judicial Yuan. This structural change has brought about profound change within the current judicial system in Taiwan.
- [45] For a similar view, please see ZHANG Renshan, The Unlimited Expansion of Judicial Administration Power and the Relative Decrease of Judicial Power, in 4 Journal of Republic of China Archives, (2002).
- [46] See Chiang’s diary entry on June 30, 1932.
- [47] See XU Shiyong, Minister Xu’s Judicial Reform Plan, 3 The Judicial Gazette, Dec.15, at 1–16 (1912).
- [48] For the data, please see WANG Jibao, Judicial History of the Republic of China Zhengzhong Shuju (Taipei), at 5-11,14-15 (1954) ; YUAN Yicheng, Judicial Official and Bar Examinations after the Government Moved to Taiwan, in his book Collected Writings of Law, Taiwan Commercial Press (Taipei), at 515–516 (1980).
- [49] The decision was taken at the fourth plenary conference of the Central Committee of the Nationalist Party in December 1931. Prior to the conference, Chiang was forced to temporarily resign from the party’s Chairmanship.
- [50] The reasoning behind Ju Zheng’s decision to become minister concurrently with his other responsibilities was noted in a particular diary entry: “Ju was thinking to appoint Xie Guansheng as minister. However, with so many senior party members angling for this position, Ju was forced to become minister himself and appointed Xie as vice-minister.” See Institute of Modern History ed. Wang Zizhuang Diaries, Academia Sinica (Taipei), Book 2, at 150–151 (2001).
- [51] See WANG Shijie, Wang Shijie Diaries, The Institute of Modern History (Taipei), at 13, 49–50 (2012).
- [52] See Chiang’s diary entry on December 10, 1934.
- [53] See JU Zheng, Autobiography, (self-published, 1949), at 38–39. Part of his autobiography is based on his diaries. For example, on Feb. 23, 1946, he wrote that he had “gathered his diaries together in 1944 and included them as part of the autobiography.”
- [54] See YANG Yongtai, Memos of Telegrams from the Military Committee of the Nationalist Government-Nanchang, Oct. 23, 1934, in The President Chiang Kai-shek Special Archives (Taipei, Academia Historica).
- [55] Ju appointed Xie as vice-minister. Ju’s decision became questionable in Chiang’s eyes, ironically, because of Xie’s close connection to Wang Chonghui. See Ju Zheng’s memoir for 1934 and 1935, in Meichuan Puji, at 37–39.
- [56] See Supreme Court Guiding Case Briefs (1927-1951) (Supreme Court, 1954), at 234.
- [57] See Chiang’s diary entry on August 5, 1935.
- [58] See Legal News, 12 (38) Law Review, at 14 (1932).
- [59] See The Semi-Monthly Newspaper for the Farmers, 7(18), at 4 (1940).
- [60] See Ju Zheng’s Autobiography Meichuan Puji, at 45.
- [61] China Modern History Museum ed. Collection of Ju Zheng’s Belongings and Writings, Nanjing Press (Nanjing), at 86–87 (2017).
- [62] Id. at 88–89.
- [63] Wang Shijie Diaries, November 17, at 468 (1942).
- [64] Wang Shijie Diaries, November 17, at 468–469 (1942).
- [65] See RUAN Yicheng, An Explanation on the Court System Reform, in Fayu, Commercial Press (Taipei), at 438 (1980).
- [66] See Chiang’s diary entries on May 21, 1936.
- [67] For example, see Chiang diary entries. On May 20, 1948 Chiang wrote: “Today I was sworn in as the President. I feel depressed, frustrated and saddened. I feel surrounded by darkness. I feel extremely sorrowful and helpless today. Since the day I was elected, I have been thinking of quitting. This thought became most intense today.” On May 22,

Chiang invited Wang Chonghui twice on the same day to discuss the feasibility of resignation. Wang did not accept Chiang's suggestion of resignation since he believed it would be worse if Chiang resigned.

- [68] See Chiang's weekly reflection on March 20, 1948.
- [69] See Ju's diary entry on March 20, 1948.
- [70] See Ju's diary entries on Mar. 12, 1945; Jan. 30, Sept. 2, 23, 1946; Mar. 31, Jun. 27, 1947; May 19, 25, 1948.
- [71] See Ju's diary entry on March 25, 1948.
- [72] See XIE Youtian ed. *Ju Zheng's Unpublished Letters and Diaries*, Guangxi Normal University Press (Guilin), at 209 (2004).
- [73] See Ju's diary entry on February 10, 1946.
- [74] See Ju's diary entry on February 29, 1948.
- [75] See Ju's dairy entries on March 13, 28, 1948.
- [76] In a further weakening of its authority, the Ministry of Judicial Administration took away a substantial part of the judicial structure and power of the Judicial Yuan when it was reincorporated into the Executive Yuan. As one consequence, the Judicial Yuan was essentially reduced to an apex court at the top of a structural pyramid but having no authority to oversee the local courts beneath it.
- [77] See Ju's diary entry on June 16, 1948.
- [78] See Ju's diary entry on July 8, 1948.
- [79] For quick sketch of the constitutional history, see Chiu Hungdah, *Constitutional Development and Reform in the Republic of China on Taiwan*, (1993), available at: <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1114&context=mscas>. (last visited Dec. 17, 2019).
- [80] From 1946 to 1948, constitution-making, the national assembly and presidential elections were three interlocking major themes that Chiang grappled with daily. Chiang's diary entries concerning the constitution-making process and the constitutional text are not only frequent during these years, but also of considerable length. On several occasions, Chiang even used multiple pages in his diary to outline his constitution-making guidelines and constitutional principles.
- [81] See Xie's diary entry on March 1, 1931.
- [82] See Chiang's diary entries on February 25–28, 1931.
- [83] See Chiang's diary entry on March 18, 1931.
- [84] See Chiang's diary entry on March 23, 1931.
- [85] See Chiang's diary entry on December 20, 1932.
- [86] See Chiang's diary entry on August 5, 1932.
- [87] See Chiang's diary entry on March 20, 1933.
- [88] See Chiang's diary entries on April 9, 11, 1934; August 29, 1935.
- [89] See Chiang's diary entry on January 4, 1946.
- [90] See Chiang's notes on "last week retrospection" after January 12, 1946.
- [91] See Chiang's diary entries on January 31, February 1, 1946.
- [92] See Chiang's notes on "last week retrospection" after December 21, 1946.
- [93] See Chiang's diary entry on May 11, 1948.
- [94] See TAO Jinsheng ed. *Tao Xisheng Diaries*, Linking Publishing Company (Taipei), at 127–128 (2014).
- [95] For one view concerning the institutionalization process of the Council of Grand Justices, please see LÜ Tailang, *Review of Taiwan's Precedent System and Brief Discussion of Mainland China's Case Guidance System*, Section III, 2, (2016), available <https://cgc.law.stanford.edu/commentaries/16-lv-tailang/>. (last visited Dec. 17, 2019).
- [96] This gave China a unique place in the second wave of global expansion of judicial power. See Tom Ginsburg, *The Global Spread of Constitutional Review*, in Keith Whittington, Daniel Keleman & Gregory Caldeira eds. *Oxford Handbook of Law and Politics* (Oxford), at 81–98 (2008).
- [97] See Xie's diary entry on June 15, 1931.
- [98] See Xie's introductory note for the year 1932 in his diary excerpt.
- [99] See Xie's diary entry on January 30, 1946.
- [100] Xie kept detailed itineraries in his diaries concerning Roscoe Pound's visits to China (Jul. 1–Sept. 18, 1946; Sept. 25, 1947–Dec. 21, 1948.). This part of the diaries was picked out by Xie and included in *Collected Writings of Xie Guangsheng*, Commercial Press (Taipei), at 129–135 (1973).
- [101] See Jedidiah Kroncke, *Roscoe Pound in China: A Lost Precedent for the Liabilities of American Legal Exceptionalism*, 38(1) *Brooklyn Journal of International Law*, 79, 81 (2012).
- [102] See Amalia Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877*, Yale University Press (New Haven), (2017). For related material also see Robert A. Kagan, *Adversarial*

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Legalism: The American Way of Law, Harvard University Press (Cambridge MA), (2002).

[103] For more information concerning the Chinese legal exceptionalism movement, please see chapter four of my book *China's Law "Cannot See China": A Study of Ju Zheng's Judicial Era (1932-1948)*, Qinghua University Press (Beijing), (2010).

[104] See Chiang Kai-shek's diary entry on August 30, 1946.

[105] When Roscoe Pound made his second visit to China in December 1947, they apparently became friends.

[106] See Ju's diary entry on December 7, 1946.

[107] See Xie's diary entry on September 4, 1946, in *Collected Writings of Xie Guangsheng*, at 131.

[108] For the untold story of the Judicial Yuan as a leading exponent of judicial review in the mid-20th century, please refer to chapter three of my SJD thesis (manuscript in progress) titled "China's Constitutional Court: The Untold Leader of Judicial Review".

[109] Confucian constitutionalism is one salient consideration

that Ginsburg has highlighted in explaining the constitutional development centered around the Judicial Yuan's role in Taiwan. Although he is right in emphasizing the role of the Presidents of the Judicial Yuan and the Grand Justices in Chinese society and politics, Ginsburg was not apparently aware of the historically more dynamic development of the Judicial Yuan from a *longue duree* perspective. See Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press (New York), (2003).

[110] See FU Hualing, Symposium Commentary: Building Judicial Integrity in China, 39 *Hastings International & Comparative Law Review*, (2016); Yeh Jiunn & Chang Wen-Chen, *Asian Courts in Contexts*, Cambridge, (2015); Pierre Landry, The Institutional Diffusion of Courts in China: Evidence from Survey Data, in Tom Ginsburg & Tamir Moustafa eds. *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press (New York), (2008).