

The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust*

John O. Haley
Wiley B. Rutledge Professor of Law
Washington University in St. Louis

Japanese judges are among the most honest, politically independent and professionally competent in the world today. Organized as an autonomous national bureaucracy, the judiciary comprises a small, largely self-regulating cadre of elite legal professionals who enjoy with reason an extraordinarily high level of public trust. The vast majority of judges begin their careers in their mid to late 20s upon graduation from the court-administered Legal Training and Research Institute (LTRI).¹ Most spend a professional life of 30 to 40 years within the nation-wide structure of courts that they themselves administer. Assignments and promotions are determined by a central personnel office staffed by peers. (This feature of the judiciary is shared by nearly all public and private organizations of appreciable size in Japan—including all major business enterprises as well as the national ministries and the procuracy). Coupled with a jurisprudential approach that favors certainty and consistency, the Japanese judiciary is by nearly all accounts cautiously conservative. Yet paradoxically, judges play an activist role in the development of legal norms, filling lacunae left by legislative and administrative inaction.² With less irony than may appear at first glance, they have also become a target of criticism for failure to participate more fully in Japanese governance through progressive judicial policy making.

My aim in this essay is first to describe the judiciary and its exemplary features. I begin with the structure and organization of the courts and the career paths of regular judges. An examination of the Supreme Court, focusing on its dual roles at the apex of the judicial

* This paper was originally presented at a symposium held at Seattle, Washington, August 22-24, 2002, honoring the late Dan Fenno Henderson. Entitled "Law in Japan: At the Turning Point," the symposium was sponsored by the Tokyo law firm of Nagashima, Ohno & Tsunematsu and the University of Washington Asian Law Center. It revises two previously published studies by the author on the Japanese judiciary—"Judicial Independence in Japan Revisited," 25 *Law in Japan: An Annual* 1 (1995) and Chapter 5, "Law's Actors II" in John Owen Haley, *The Spirit of Japanese Law* (Athens, GA: University of Georgia Press, 1998), pp. 90-122.

¹ Official English translation for *Shihō Kenshu Sho*, sometimes also unofficially but with respect to the order of Chinese characters more literally translated into English as Legal Research and Training Institute (LRTI).

² The activist but predominantly conservative role of judges in Japan has been well documented. See, e.g., Frank K. Upham, *Law and Social Change in Postwar Japan* (Cambridge, MA: Harvard University Press, 1987), especially chapters 2-4; Michael K. Young, "Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan," 84 *Col. L. Rev.* 923 (1984); Daniel H. Foote, "Judicial Creation of Norms in Japanese labor Law: Activism in the Service of--Stability?" *UCLA L. Rev.* 43 (1996); and most recently, Andrew M. Pardieck, "The Formation and Transformation of Securities Law in Japan: From the Bubble to the Big Bang," *UCLA Pacific Basin L.J.* 1 (2001).

hierarchy as a constitutional court as well as the court of last resort for all appeals follows. The core of this essay, however, is an evaluation of two of the most significant features of the Japanese judiciary—its extraordinary record of integrity and its equally remarkable record of political independence. I should emphasize at the outset that judicial independence as defined in Japan does not mean the freedom of individual judges from internal control or influence within the judiciary except through formal processes for judicial review. This sort of "judicial autonomy" cannot exist in Japan. Career judges are, as detailed below, members of a largely self-governing elite bureaucracy in which all are mentored and monitored by seniors and peers.

Structure and Organization of the Courts

Japan has a unitary judicial system. At the first of the four tiers of courts are the 438 summary courts (*kan'i saibansho*), staffed by 806 summary court judges. Summary court judges are not career judges. Qualification as a regular judge is not required. Instead, summary court judges are formally nominated for pro forma cabinet appointment by a special selection committee formally comprising all Supreme Court justices, the president (*chōkan*) of the Tokyo High Court, the deputy procurator general, representatives of the bar, and others "with special knowledge and experience."³ Most summary court judges are in fact well known to the judiciary. The majority are individuals who have served previously as administrative secretaries or clerks within the court system or as career judges or prosecutors who have reached their respective mandatory retirement ages (65 for judges; 63 for prosecutors) and seek to add several more years of judicial service. The mandatory retirement age for summary court judges is 70. Summary courts handle civil involving claims of 900,000 yen (approximately 8,000 U.S. dollars) or less and minor criminal offenses for which the penalty is limited to a fine or brief imprisonment (in the case of minor theft), including the summary proceedings described previously. Summary court adjudication requires only a single judge.

At the second tier are the district courts (*chihō saibansho*), the principal courts of first instance. There are 50 district courts with additional 203 branches. Except for minor cases, which account for 70 to 80 percent of all adjudicated cases, trials require a three judge panel. There is no civil or criminal jury. Sitting alone or as a panel, judges decide all issues of fact and law, and must in all judgments write a full statement of findings of fact and the application of law. The district courts also have an appellate function with respect to civil judgments and rulings from summary courts. Criminal judgments are appealed directly to a high court. Because the first or *kōso* appeal under Japanese procedure can involve a *de novo* trial of the facts, the district courts are in effect trial courts in all cases.

Paralleling the district courts are an equal number of family courts (*katei saibansho*) with jurisdiction over domestic relations, succession, and juvenile offenses. Unlike other courts in Japan, the principal actors of the family courts are not judges or other legal professionals but rather lay conciliators (*chōtei'in*) appointed by the Supreme Court

³ *Kan'i saibansho hanji senkō kisoku* (Rules on selection of summary court judges), Supreme Court Rule No. 2, 1947.

secretariat. Most are socially prominent members of the community. Many are women. Some are law graduates. A few are distinguished scholars. They generally serve for many years, much longer than any of the career judges assigned to the court. Except for more serious juvenile offenses and contested issues in domestic relations and succession cases, family court proceedings are in effect discussions between the conciliators and the parties intended to produce settlement.

Above the district courts are Japan's eight high courts (*kōtō saibansho*), located from northeast to southwest in Sapporo, Sendai, Tokyo, Nagoya, Osaka, Takamatsu, Hiroshima, and Fukuoka, with six branches, in Akita, Kanazawa, Okayama, Matsue, Miyazaki, and Naha. The high courts are appellate courts for either *kōso* appeals from district court judgments, criminal judgements from summary courts, or, in civil cases tried initially in summary courts, second (*jōkoku*) appeals limited to issues of law.

With 953 separate summary, district, family, and high courts including branch courts, in addition to the hundred and twenty plus judges assigned each year to the administrative offices of the Supreme Court in Tokyo⁴, Japan's 1,393 career judges and 621 assistant judges are spread very thinly throughout the nation. Some of the branch court positions are not filled, but no district court has fewer than 7 judges. The number assigned to each court varies in relationship to the district caseload. Not surprisingly, the Tokyo District Court is the largest. A third of the Tokyo District Court judges are assigned to the criminal division and two-thirds to the civil division. With less than half the number of judges, the Osaka District Court is still Japan's second largest court. The two courts handle more than half of all civil and criminal cases. However, neither Tokyo nor Osaka has the highest rate of litigation per capita. That honor goes to the Oita District Court in Kyushu, along with Tottori in the southwestern part of Honshu. These two regions have long had the highest litigation rates in Japan and have as a consequence nearly twice the number of judges relative to the districts' population as courts in districts with significantly less litigation per capita, particularly the Tohoku region in northeastern Honshu. For example, in 1990 the Oita District Court had fourteen judges in a district of 1.24 million persons. The Sendai District Court in comparison had nineteen judges in a district of 2.25 million persons. The Tottori District Court had seven judges in a district of 616,000 persons, while the Fukushima District Court also had seven judges for a district of 2.1 million persons. Similarly, the number of judges assigned to branch district courts varies from 23 for the Hachioji branch of the Tokyo District Court to the 35 branch district courts without a permanently assigned judge and the 77 branches with only one judge. Eight years later in 1998 the numbers were essentially the same.⁵

⁴ As of 1998, 126 judges were assigned to the following administrative, instructional, and research offices of the Supreme Court: General Affairs Bureau (51), Legal Training and Research Institute (29), Office of Court Clerks (11), Family Court Research Bureau (3), Supreme Court Library (1), Research Judges (31). Nihon Minshū Hōritsuka Kyōkai & Shihō Seido I'inkai [Japan Democratic Jurists Association and Legal System Committee], eds., *Zensaibankan keireki soka: Kaitei shinpan* [hereinafter 1998 *Judges Almanac*] [3rd edition] 2 vols. (Tokyo: Nihon Minshū Hōritsu Kyōkai, 1998), vol. 1, p. 256.

⁵Nihon Minshū Hōritsuka Kyōkai & Shihō Seido I'inkai [Japan Democratic Jurists Association and Legal System Committee], eds., *Zensaibankan keireki soka: Kaitei shinpan* [1990 *Judges almanac*: 2nd edition] (Tokyo: Nihon Minshū Hōritsuka Kyōkai, 1990), pp. 452-457. 1998 *Judges Almanac*, vol. 1, pp. 256-261.

At the apex of the judicial hierarchy is the fifteen justice Supreme Court (*Saikō saibansho*). As described in greater detail below, no regular career judge as such sits on the court, but by convention from five to six of the justices are former career judges who have retired or reached retirement age.

The caseload for lower court judges is enormous. On average Japanese district court judges (including assistant judges) decide over 1100 civil, administrative, and criminal cases per judge per year.⁶ Three-quarters of all cases are civil suits adjudicated by three judge panels thus judges assigned to civil cases actually deal with an even greater caseload. No summary judgment procedures exist. Furthermore all lawsuits filed are either settled or pursued through trial to judgment. All judgments must include both the judges' findings of fact and application of law. Under such circumstances, judicial management and the efficient disposition of cases are given considerable priority over other matters, including the appropriate direction of a particular legal doctrine or nationwide uniformity of judgments in like cases. Such issues, along with the social consequences of the courts interpretation of particular legal rules and principles, are of course considered by judges, but these are rarely more than minor concerns.

Career Paths

A judicial career begins with entry to the LTRI on the basis of Japan's highly competitive national judicial examination (*shihō shiken*). The two-year program includes assignment to both the criminal and civil divisions of a district court, a district court prosecutors office, and law firm in addition to two extended periods at the Institute in Tokyo of classroom lectures and exercises. Recruitment of new judges begins at the Institute by career judges who participate in the program as instructors or mentors to the apprentices. Upon graduation those interested in a judicial career apply to the Supreme Court for appointment as assistant judges. Although appointment is formally made by the cabinet from a list of nominees presented by the Supreme Court,⁷ selection is actually made by the central personnel bureau of the Court's secretariat, which prepares the list. Assistant judges are appointed to ten-year terms. At the end of ten years, they are eligible for appointment as full judges, again for another ten-year term. Reappointment is routine. The vast majority continue to serve until they reach retirement age at 65. (Mandatory retirement for both Supreme Court justices and summary court judges is at age 70.) Of the 71 judges appointed in 1970 (the 22nd class of the LTRI), 53 (74.6%) were on the bench twenty six years later in 1996, three serving as a research judge or in a non-judicial

⁶ See Saikō Saibansho Jimu Sōkyoku [Supreme Court General Secretariat], *Shihō tōkei nenpo*, [Annual Report of judicial statistics] (Tokyo:), vol. 1, (Civil Cases); vol. 2 (Criminal Cases).

⁷ For the best account in any language of the formal processes for the selection of judges, see Takaaki Hattori, "The Role of the Supreme Court of Japan in the Field of Judicial Administration," 60 *Washington Law Review* 69 (1984). Takaaki Hattori was a Chief Justice who had spent much of his career as judge in the administration of the judiciary.

administrative post and one as a summary court judge after having reached mandatory retirement age for a regular judge. Two judges serving in 1996 had become judges after twenty plus years of active practice as an attorney. Another career judge had reached mandatory retirement age but had not continued to work as a lawyer or summary court judge. One was deceased. All of the remaining career judges who had left the bench before mandatory retirement age, had gone into private practice, five having served from one to ten years, five, eleven to twenty years, and four, over twenty years.⁸

Only two judges have ever been denied reappointment, although a few others may have resigned in anticipation that they would be terminated if they did not. The best known case involved Assistant Judge Yasuaki Miyamoto, about whom we will have more to say below. The other was a judge who refused for family reasons to accept a routine transfer.⁹ In no case did the cabinet make this decision. In each instance senior judges assigned to the Supreme Court's General Secretariat decided not include the judge on the list presented to the cabinet for reappointment.

Japan's career judges staff all of Japan's district and high courts as well as the principal administrative offices necessary for the management of the entire judicial branch, including the senior administrative positions in the General Secretariat. In addition, about thirty research judges (*chōsakan*) are appointed from the senior ranks of the career judiciary to assist the Supreme Court. All career judges are subject to assignment to courts nationwide usually for a period of three years for each post. As a newly appointed assistant judge, most serve initially in a family court in the Tokyo or Osaka environs. Nearly all are then assigned to either the Tokyo or Osaka District Court or a district court in another large metropolitan area, such as Nagoya, Fukuoka or Sapporo. As a regular judge the three-year assignments continue to various courts initially throughout the country but often later within a particular region, such as the Kanto region around Tokyo or Kansai and western Japan. A career judge will typically serve two or three times on a major district court, one or more family courts, perhaps a rural branch court, as well as a high court. Many will also spend time in Tokyo at the Supreme Court, with an administrative or research assignment, returning as a senior judge to a family or district court or both as presiding judge for the court. The position of *chōkan* (chief judge or president) of a high court is the highest post a career judge can hold during a regular judicial career. As noted below, a handful of retired career judges will be appointed to the Supreme Court, nearly of whom will have been *chōkan* of either the Tokyo or Osaka High Court at the time of their retirement from the regular judiciary,

The career paths of Japanese judges follow equally stable patterns. As noted above, Japanese judges do not simply move upwards in a hierarchy of courts. Rather, they spiral upwards in terms of positions but they serve repeatedly in courts at all levels from junior positions at the district level upward. At mid career a judge may have already served not only several times in district and family courts but also on a high court, in an administrative

⁸ 1998 *Judges Almanac*, vol. 1, pp. 150-154.

⁹ See J. Mark Ramseyer and Eric B. Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (New York and London, University of Chicago Press, 2003), p.8.

post in Tokyo or in a research position as *chōsakan* at the Supreme Court. Assigned to an administrative post in the General Secretariat, three years later he or she could be assigned back to the district level as head of a civil or criminal division and, following that, perhaps to the position of presiding judge. A favorable career path for an ambitious young judge would include multiple assignments in Tokyo in the General Secretariat. A presiding judgeship toward the end of a career in a more remote family court, followed by a presiding judgeship with a less remote district court evidence a normal but still favorable progression of advancement. For example, nearly all of the class of judges who graduated from the LTRI in 1970 (the 22nd Class) began as assistant judges with a district court followed by a three year assignment to a family court, a standard pattern until 1965. After 1965 as a rule assistant judges served their first three-year term in a family court and then assigned three years later to a district court.¹⁰ Twenty-five years in 1995 later nearly half of the judges who remained active were the presiding judge of a family court (9) or presided over or headed a division of a district court (14). A year later seven more members of the 22nd Class had been appointed to a similar position. This pattern of spiraling assignments ensures the continuous and pervasive influence of senior judges as monitors and mentors throughout the judicial system.

The combination of a central personnel office responsible for recruiting, mentoring, assigning, and promoting all career judges with this system of periodic spiraling assignments to courts throughout the country appears to be unique to Japan and South Korea.¹¹ No judicial system in Europe or North America, not even Japan's closest model, the German,¹² shares either of these two features. In Japan, this organizational structure is typical. The judiciary is by no means exceptional. Nearly all private and public organizations share these organizational features in common. In the United States, at least, the closest equivalent are the military services. Only within such a structure, however, could the autonomy and coherence of Japan's courts be achieved.

The Supreme Court

The Supreme Court functions as do supreme courts in the United States as both a constitutional court and court of last resort for ordinary appeals. Unlike the United States Supreme Court and most state supreme courts in the United States, however, the Supreme Court of Japan does not exercise any significant discretion over its docket. The losing parties' right to a second *jōkoku* appeal extends to all cases. Thus the right of appeal to the Supreme Court applies in all cases except those that commenced in a summary court for

¹⁰ See *1998 Judges Almanac*, vol. 2.

¹¹ See, e.g., Peter H. Russell and David M. O'Brien, eds., *Judicial Independence in the Age of Democracy* (Charlottesville and London, University of Virginia Press, 2001); Mary L. Volcansek (with Maria Elisabetta de Franciscis and Jaqueline Lucienne Lafon), *Judicial Misconduct: A Cross-National Comparison* (Gainesville, FL: University of Florida Press, 1996); (Jerold L. Waltman and Kenneth M. Holland, eds., *The Political Role of Law Courts in Modern Democracies* (Houndsmill, Hampshire and London: Macmillan, 1988); Shimon Shetreet and Jules Deschênes, eds., *Judicial Independence: The Contemporary Debate* (Dordrecht and Boston: M. Nijhoff, 1985).

¹² See Donald P. Kommers, "Autonomy versus Accountability: The German Judiciary," in Russell and O'Brien, eds., *Judicial Independence*, pp. 131-154.

which a high court would adjudicate a second appeal. The new Code of Civil Procedure, which became effective in 1998, does allow the Court as well as high courts adjudicating *jōkoku* appeals to dismiss cases without a full hearing where from the record an appeal is determined to be unfounded. As a result the Supreme Court can be forced at least to utter a last word in all cases and most issues of law.

Despite procedures for summary disposition the lack of any discretionary control over appeals results in a staggering caseload. Japan's justices receive and decide over 4000 civil, administrative, and criminal cases each year. Except for constitutional cases the Court rarely decides cases *en banc*. Most are decided by one of the three petty benches, each with five justices, into which the court is divided and to which cases are assigned in sequence.¹³ This means that each justice is generally responsible for reviewing about 1,300 cases annually. The number of appeals the Court must decide remains a major problem that reduces the quality of its decisions.

The Supreme Court is today among the most autonomous constitutional or highest regular courts in the industrial world despite the enormous potential for at least indirect political or electorate influence. Appointments to the court are formally among Japan's most politically significant. The chief justice is ostensibly nominated by the cabinet with ceremonial appointment by the Emperor and is accorded the same rank and salary as the prime minister. The other fourteen justices have equal rank and salary as ministers of state and are appointed by the cabinet. The statutory requirements for Supreme Court justices are broadly worded. Article 41 of the 1947 Court Organization Law¹⁴ provides:

Justices of the Supreme Court shall be appointed from among persons of broad vision and extensive knowledge of law, who are not less than forty years of age. At least ten of them shall be persons who have held one or two of the positions mentioned in item (i) or (ii) for not less than ten years, or one or more positions mentioned in the following items for a total period of twenty years or more:

- (i) President (*chōkan*) of a high court
- (ii) Judge
- (iii) Summary court judge
- (iv) Public prosecutor
- (v) Lawyer
- (vi) Professor or assistant professor (*jokyōju*) in law in universities as determined separately by statute.

The pool of qualified persons as defined by statute is extraordinarily large. Hence the potential for political appointments is equally great. Yet, not since the first justices were selected have party or cabinet level political considerations influenced even the appointment

¹³ See Lawrence W. Beer and Hiroshi Itoh, *The Constitutional Case Law of Japan, 1970 through 1990* (Seattle: University of Washington Press, 1996), p. 66.

¹⁴ *Saibansho hō* (Law No. 59, 1947).

of the chief justice. Rather, just as senior procurators and bar leaders determine who among their respective cohorts will be eligible to be nominated, so too senior career judges who administer the judiciary largely determine who among soon to retire career judges will become a Supreme Court justice or which sitting justice, the chief.

Illustrative is the *Mainichi Shinbun* Social Affairs Bureau account of the appointment of Ryōhachi Kusaba as Japan's twelfth Chief Justice in February 1990.¹⁵ Two months before the appointment, soon-to-retire Chief Justice Kyōichi Yaguchi visited the official residence of then Prime Minister Kaifu. The purpose was to inform the prime minister of the judiciary's choice for his replacement; a choice made with the participation of the principal administrators of the judicial branch--all career judges themselves. Kaifu did not object. As one official is quoted to have said (translated into idiomatic English): "We wouldn't have the vaguest idea who anyone they might suggest was, and we wouldn't have any way of finding out whether they would be suitable. The Supreme Court people have researched this. We trust their judgment."¹⁶ A similar procedure has been followed in the appointment of every Chief Justice since 1962.

All but four of Japan's fifteen chief justices were themselves career judges.¹⁷ All chief justices since 1978 were career judges. Only one lawyer, (Fujibayashi), appointed in 1976 followed the next year by the one prosecutor (Okahara), have held the office. Two University of Tokyo law professors (Kotarō Tanaka and Kisaburō Yokota) were appointed back to back as the second and third Chief Justices in 1950 and 1960. The remaining eleven have all been career judges. Moreover all had held high level administrative posts within the General Secretariat. Two of the past five chief justices previously held the judiciary's highest administrative post, the position of Secretary General (*Saikōsai jimu socho*).¹⁸ One of the three most recently appointed justices, Tokuji Izumi, served as Secretary General for four years (1996-2000). In 2000 he was appointed president of the Tokyo High Court, a post in which he served until his appointment to the Supreme Court two years later in autumn 2002 at age 63. Izumi would thus be the most likely justice to succeed Chief Justice Machida when he retires.

By convention, at least a third of all Supreme Court justices are appointed from the career judiciary with another third from the practicing bar and up to five of the fifteen justices other persons of "attainment in their profession with knowledge of law." Of the thirty-nine lawyers who have served on the Court, nineteen were former bar association

15. Mainichi Shinbun Shakaibu [Mainichi newspaper social affairs bureau], ed., *Kenshō-Saikō saibansho: Hōfuku no mukō de* [Verification-Supreme Court: Putting on the judicial robes] (Tokyo: Mainichi Shinbunsha, 1991), pp. 263-265.

16. *Id.*, p. 266.

¹⁷ The official website for the Supreme Court of Japan [<http://courts.go.jp>] provides biographical profiles of all justices currently on the Court. The information on the background of Supreme Court justices in the following pages is based on information from these profiles as well as the 1990 and 1998 *Judges Almanac*.

18. *Id.*, at pp. 265.

presidents or vice presidents. All of the thirteen prosecutors appointed to the Court were serving at the time of their appointment as the chief or superintending prosecutor for a high court (9) or the deputy chief prosecutor for the Supreme Court (3). The most recent procurator appointed as justice, Tatsuo Kainaka, was appointed Deputy Procurator General in 2001, a year later in autumn 2002 he was appointed justice after what can only be considered a qualifying appointment as Superintending Prosecutor for the Tokyo High Court. Five of the twelve career government officials appointed were former diplomats. Five held the post of chief of the Cabinet Legislation Bureau (*Naikaku hōseikyoku*) or similar agency attached to one of the houses of the Diet at the time of their appointment. The remaining two former government officials are both women. The first woman to serve on the Court was Hisako Takahashi, a career Ministry of Labor official. The second was Kazuko Yokoo, a career Health and Welfare Ministry official. Justice Yokoo is the only justice without a law degree. She is a 1964 graduate of the International Christian University, an American-styled liberal arts college without a law faculty or law major. For those justices who were not career judges, the recommendations to the prime minister have been based on consultations with the leaders of the major bar associations and senior levels of the procuracy and other government bureaucracies. There is no evidence of any partisan party consideration, however negligible. Instead, internal competition within each of these separate career organizations has determined the appointment. No evidence exists of any direct political lobbying even with respect to the scholars who have been appointed to the Court. Their prior careers have been almost as predictable as the other justices. They were all members of Japan's academic elite. All but two had spent their academic careers as members of the law faculty of either the University of Tokyo (Shigeo Hozumi, Kōtatō Tanaka, Kisaburō Yokota, Shigemitsu Dandō and Masami Itō) or Kyoto University (Kenichirō Ōsumi and Masamichi Okuda). The two exceptions were Kyushu University Professor Matasuke Kawamura, one of the initial appointments to the Court in 1947, and Tohoku University Law Professor Tokiyasu Fujita, appointed in autumn 2002. Itsuo Sonobe, who served on the Court from 1989 to April 1997, could also be included in the list of Kyoto University faculty appointments. Sonobe is one of the most interesting and exceptional appointments. He was a member of the Kyoto University Law Faculty for fourteen years. In 1970 he resigned his teaching post to become a judge. He was appointed to the Tokyo District Court. Two years later he was transferred to the Tokyo High Court. In 1975 he was assigned to the Maebashi Family Court where he became a division head in 1977. In 1978, he was appointed research judge (*chōsakan*) at the Supreme Court, after which he was transferred back to the Tokyo District Court as head of a division. In 1985 he returned to teaching. He was a Professor of Law at Seiki University at the time of his appointment to the Court.

As noted, at any point in time at least a third of the justice--five of the fifteen--have spent most if not all of their professional lives, usually from their mid twenties, as a career judge. Between 1947 and July 2003, for example, 123 persons had served as a justice. Excluding the first appointments in 1947, which included three former Great Court of Cassation justices and one former Councilor of the Administrative Court, of these 41 held the highest possible judicial post in the career judiciary at the time of their appointment. All but one of whom (Sonobe) had been judges throughout their careers.. In addition five other

justices began their professional careers as judges but made an early career change, in most instances to become a prosecutor.

Equally significant are the career paths of the justices selected from the judiciary. Between 1947 and 2002, of the 48 career judges who were appointed to the Supreme Court, 43 were serving as president of a high court at the time of appointment, 20 from the Tokyo High Court, 15 from the Osaka High Court, 4 from the Nagoya High Court, and 4 from the Fukuoka High Court. Except for the first justices appointed to the Supreme Court in 1947, who included two judges and the president of the Great Court of Cessation and the President of the Administrative Court, only three career judges have ever been appointed to the Court who were not serving at the time of appointment as the president of one of the four principal high courts. Several in fact were transferred from the presidency of one of the apparently lesser high courts--Hiroshima, Sapporo, Sendai and Takamatsu--to the Tokyo or Osaka High Court immediately before appointment to the Supreme Court. For example, former Chief Justice Toru Miyoshi was appointed the President of the Sapporo High Court in May 1991. He was briefly made *chōkan* of the Tokyo High Court just before his appointment to the Supreme Court in 1992. So too were two of the three most recent judicial appointments to the Court, Justice Toyozo Ueda was appointed in 2000 first as president of the Hiroshima High Court and then later that year as president of the Tokyo High Court. He became a justice in 2002. In 2001 Justice Niro Shimada was appointed president of the Sendai High Court. A year later he was transferred to Tokyo to serve briefly as the president of the Osaka High Court and then in the autumn of 2002 was appointed to the Court. As noted previously, the presidency of a high court is the highest position a career judge can attain within the regular judiciary. From start to finish—including appointment to the Supreme Court--a judge's career advancement is determined initially by senior judges and at the end by judicial peers, not agencies, political or otherwise, outside of the courts.

The non-career judge appointees also indicate the lack of partisan or other political influence on Supreme Court appointments. As mentioned previously, the appointments of lawyers, prosecutors, diplomats and even scholars and the handful of career administrative officials have followed predictable patterns. Most have achieved elite status within their respective career or professional organizations. Only a couple have had any career mobility. Itsuo Sonobe, as noted, was exceptional. Another exception was Shunzō Kobayashi, who, although serving as president of the Tokyo High Court at the time of his appointment, had spent most of his professional life as a practicing attorney. He also served as president of the Second Tokyo Bar Association. The predominance of former bar officials exemplifies the influence of the bar itself rather than political leaders on which attorneys are selected to become a justice. One of the legal scholars and two of the former administrative officials were also former judges, and one of the legal scholars was a former attorney. Moreover, all but two former administrative officials appointed to serve on the Court were at the time of their appointment serving in one of Japan's most politically neutral and prestigious administrative posts as head of the Cabinet Legislation Bureau or its Diet equivalent. Even the two exceptions adhere to a pattern. Both were women. In the case of the four diplomats appointed to the Supreme Court, all were former ambassadors, who rose through the ranks of the Foreign Affairs Ministry and had held influential and prestigious administrative posts within the ministry. Even these appointments from the civil and diplomatic bureaucracies,

among the most political in any other country, in Japan political considerations appear to have been secondary to a purely bureaucratic concern to award those who have served the institution and themselves well

Nor has political change significantly affected the Court and these pattern of appointment. Nine justices were appointed between the 1993 and 1995 following the political upheaval that ended nearly four decades of single party rule in Japan. The Hosokawa Cabinet (August 1993-April 1994) appointed four—Hideo Chikusa, Shigeharu Negishi, Hisako Takahashi, and Yukinobu Ozaki. The Murayama Cabinet (June 1994-January 1996), the LDP-Social Democratic Party (former Socialist Party) coalition, appointed five—Shin'ichi Kawai, Muitsuo Endō, Kazutomo Ijima, Hiroshi Fukuda, and Misao Fujii. Of the two career judges, one, Chikusa, had been General Secretary of the Supreme Court; the other, Fujii, the president of the Osaka High Court. One of the two prosecutors, Negishi, was superintending prosecutor for the Tokyo High Court at the time of his appointment. The other, Ijima, was Deputy Procurator-General. All three of the practicing attorneys appointed, Ozaki, Kawai and Endō, had been the president or vice president of their respective bar associations in Tokyo or Osaka as well as directors of the Japan Federation of Bar Associations. Fukuda, a diplomat, had held, as noted below, a series of influential administrative posts within the Ministry of Foreign Affairs. The only apparent change in the composition of the court and pattern of appointments was the appointment, as noted, of Japan's first woman justice--Hisako Takahashi. Socialist prime ministers too, it appears, appoint those recommended by senior judges and the legal and bureaucratic establishments.

The age of the justices and thus their brief tenure on the Court is another striking feature of the composition of the Court. The youngest justice, Kazuko Yokoo, was born in 1941. All of the other justices are 63 years of age or older. Since 1952 only two persons under sixty years of age have ever been appointed to the court, Jirō Tanaka and Ken'ichi Okuno, both were 58. Only two were sixty. Thus only four of the 123 postwar justices will have served ten or more years. No one has served more than a dozen years, and no person born after December 7, 1941 has ever been a member of Japan's highest court. Nor until 1990 was anyone appointed who received their legal education in postwar Japan. Among the fifteen justices on the Court today (June 2003) only one, Hiroshi Fukuda, was on the Court before 1997. He was appointed by the Murayama Cabinet in 1995 at age 60. At the end of 2002 five justices reached 70 and were required to retire. They included Osaka lawyer Shinichi Kawai, appointed by the Murayama Cabinet, who retired in March 2002., and Masamichi Okuda, the former Kyoto University civil law scholar. Chief Justice Shigeru Yamaguchi, who was initially appointed justice by the Hashimoto Cabinet in 1997 and who replaced Tōru Miyoshi as Chief Justice the same year, also reached mandatory retirement age, retired and was replaced in autumn 2002. Thus a turnover of over a third of the Court occurred within nine months from March to November 200. On the Court today only Justice Fukuda has served longer than six years.

Predictability in the pattern of Court appointments is also furthered by another pattern. A balance between the two leading national law faculties is attempted albeit not

always perfectly maintained. In 2002 six justices (Chief Justice Yamaguchi and Justices Kawai, Ijima, Fijii, Kanatani, and Okuda) were law graduates of Kyoto University and six (Justices Fukuda, Kameyama, Kajitani, Machida, Hamada, and Ueda) were University of Tokyo law graduates. One (Justice Fukuzawa) was a Chuo law graduate, and one (Justice Kitagawa), a Nagoya University law graduate. As noted, Justice Yokoo is an ICU liberal arts college graduate. A year later five justices had retired. All were Kyoto graduates. They were replaced by two Kyoto graduates (Takii and Izumi), two Tokyo graduates (Fujita and Shimada) and one Chuo graduate (Kainaka)--still a perfect balance in appointments although regrettably not outcome.

Another pattern, one even more rigidly maintained, is service as president of one of four high courts at the time of appointment and in judicial administration. Of the six career judges currently (June 2003) serving on the Court, at the time of their appointment three were president of the Tokyo High Court (Chief Justice Machida and Justices Kanatani and Izumi), two as president of the Osaka High Court (Justices Ueda and Shimada), and one as president of the Fukuoka High Court (Justice Kitagawa). All but one had also held major administrative posts within the Court's General Secretariat. Justice Izumi was Secretary General and before that director of the Personnel Affairs Bureau, the two most influential positions in the career judiciary. Justice Kanatani and Justice Ueda had previously headed the General Affairs Bureau. Chief Justice Machida had served as Director of the Court's Financial Affairs Bureau. Justice Kitagawa spent the bulk of his career at the Court, serving in various administrative posts as well as the Chief Judicial Research Official. Justice Shimada had served in various administrative posts in the General Secretariat, including five years as Director of the Criminal Affairs Bureau and Chief Librarian. He served briefly as president of the LTRI before his appointment to the presidency of the Sendai High Court.

Of the two former prosecutors on the Court, one (Justice Kainaka), as noted, was at the time of his appointment superintending prosecutor for the Tokyo High Court, but he like his immediate predecessor, Justice Ijima, has also served as deputy procurator general. The other former prosecutor (Justice Kameyama) had retired to enter practice as lawyer. He was a member of the Tokai University law faculty at the time of his appointment. Justice Kameyama's last career post was superintending prosecutor of the Nagoya High Court Prosecutors Office.

All four of the attorneys on the Court had held elite bar association posts. Justices Kajitani and Fukuzawa were former presidents of their respective bar associations in Tokyo and had served directors of the Japan Federation of Bar Associations. Justice Kawai had been vice president of the Osaka Bar Association and managing director of the Japan Federation of Bar Associations. He was replaced in April 2002 by Shigeo Takii, also a Kyoto University graduate and an officer of the Osaka Bar Association (president) as well as the Japan Federation of Bar Associations (vice president). Justice Hamada was also a director of the Japanese Federation of Bar Associations. Two (Justices Kajitani and Hamada) had studied at the Harvard Law School. Justice Kajitani had also studied at the University of Michigan.

Justice Fukuda, the single career diplomat and longest serving justice on the Court in 2003, has an LL.M. degree from the Yale Law School (1962). His professional career was typical of those appointed to the Court. He was appointed counsellor of the Japanese Embassy in Washington, D.C. in 1980 but had only one ambassadorial post (Malaysia in 1990). He had instead served in series of prestigious posts in the secretariat of Ministry of Foreign Affairs, including the head of the ministry's influential personnel bureau.

The persistent adherence to well-established patterns of selection in which leadership--especially an influential administrative post--in one of five or six career organizations has become in effect a customary prerequisite. As such it evidences an extraordinary degree of insulation from partisan political influence. Senior judges, senior prosecutors, bar association leaders as officials and leading administrators in their respective professional organizations, not politicians--determine who from their respective organizations will become eligible for appointment. One can predict with remarkable certainty the composition of the tiny pool of potential nominees: judges will replace judges and thus of a former career judge on the Court retires, his or her most likely replacement will be a recently appointed president to the Tokyo and Osaka high courts. If the retiring justice was a practicing attorney when appointed, look to the officers of the Japan Federation of Bar Associations for his or her replacement. and, if the retiring justice was from Osaka, then bet on the president or vice president of the Osaka Bar Association, or if from Tokyo, then an officer in one of the three Tokyo bar associations.

One recent study¹⁹ emphasizes the influence of the chief justice and Court's secretary general. Neither the chief justice nor the Secretary General have any voice, however, in the careers of prosecutors, attorneys, civil bureaucrats, as legal scholars or diplomats. Although those who hold these posts may as O'Brien and Ohkoshi argue, determine who among retiring career judges will be appointed their influence on the total composition of the Court is more limited. The number of retired career judges on the fifteen justice Court at one time has never exceeded six. Their role could be significant in the appointments of lawyers from the practicing bar. The number of contending candidates is larger, the bar does not have the organizational cohesion of either the procuracy or the judiciary, and thus there is greater room for choice in the selection of the candidates proposed by the bar. Moreover, given the fact that the Japanese bar has a long history of progressive political activity, the potential for politically motivated appointments to prevent progressive ideological influence is quite great. As O'Brien and Okoshi note,²⁰ a third (32.2% between 1947 and 1995) of the members of the Court were appointed from the bar. Only the number and percentage of former career judges were larger.

Nevertheless, in these, potentially the most politically charged of all cabinet appointments, politics appear to have had no place. No politician or political leader has ever been appointed to the Court. Indeed no evidence of any partisan political consideration

¹⁹ David M. O'Brien and Yasuo Ohkoshi, "Stifling Judicial Independence from Within: The Japanese Judiciary," in Russell and O'Brien, *Judicial Independence*, p.39.

²⁰ Id. at 53.

seems to exist. Party simply does not seem to matter. Former Chief Justice Tōru Miyoshi, initially appointed to the Court under an allegedly conservative LDP Cabinet, was nominated for the office three and a half years later by Japan's first Socialist prime minister in a half century. This lack active involvement by politicians in the appointment process may have no parallel. At least, as in the case of career judges, the Japanese pattern of appointments to its highest court appears to be unique in comparison with every other in the world.²¹

Integrity

Japanese courts are unique in other respects as well. Judicial corruption is virtually unknown. Judges do not take bribes. A combination of factors helps to explain this extraordinary integrity. Even what might be considered relatively minor infractions in other highly respected legal systems including the United States can be and are swiftly and severely punished. Both formal process and informal means apply.

A rather elaborate formal structure for discipline and removal of judges exists. Separate statutes provide for disciplinary action and removal by impeachment and conviction of judges.²² The judiciary administers disciplinary proceedings to preserve judicial independence from the political branches of government.²³ However, for impeachment and removal, by statute a special Impeachment Committee and Removal Court comprising members of the Diet have been established. Disciplinary actions commence with a charge brought by motion of the court with supervisory authority over the judge accused of the infraction. A five-judge bench of the high court for the relevant district hears disciplinary actions against district, family, and summary court judges; the Supreme Court, sitting *en banc*, adjudicates cases against a high court judge or justice charged. In the case of impeachment and removal proceedings, a special Judges Indictment Committee (*Saibankan Sotsui I'inkai*) comprising members of both houses of the Diet initiates the proceeding by impeachment. Any person may file a charge and thereby initiate a proceeding. The committee also has authority to commence an investigation on its own. In addition, the chief justice is required by law to initiate a proceeding if he determines that there is cause for impeachment and removal. Upon either request or on its own authority, the committee investigates the grounds for impeachment. Impeachment—as an indictment for removal—requires a two-thirds vote of the committee. Upon which a special Judges Impeachment Court (*Saibankan Dangai Saibansho*), comprising seven member of each house of the Diet, is convened to adjudicate the case. A two-thirds majority is also needed for conviction and removal. The two grounds for removal are (1) conduct in grave

²¹ See studies cited at fn 11.

²² *Saibankan bungen hō* [Judges disciplinary law] (Law No. 127, 1947); *Saibankan dangai hō* [Judges impeachment law] (Law No. 137, 1947).

²³ Dan F. Henderson and Takaaki Hattori, *Civil Procedure in Japan* §3.02[7], 3-36 (New York: Matthew Bender, 1983).

contravention of official duties, and (2) other misconduct impeaching the integrity of the judge.

The number of petitions for investigation filed with the Indictment Committee each year is surprisingly high. In 2000, for example, the committee reviewed 493 complaints. Between 1948 and 2002 the number of cases totaled 8,928. However, in only 12 cases did the Committee find any grounds for impeachment. Most petitions are filed, it appears, against trial judges by a losing party, in many cases involving protracted or politically charged litigation. Rarely if every is the personal integrity of the judge challenged. Since 1948 only four judges have been impeached and removed in connection with a criminal conviction. Two of the cases—one in 182 and the other in 2001 involved sexual scandals, the first involving a prostitute and the second sexual relations with a minor. A judge was removed in 1978 for having made a telephone call to the prime minister impersonating the procurator general. (He was convicted in 1983 for the misconduct as an offense under the Public Employees Law.) Only case involved conviction of a judge for receiving unlawful pecuniary benefit in return for an official favor—a case in which a judge had been treated to a golf game by a lawyer who was subsequently appointed a trustee in bankruptcy.

The number of judges removed after criminal conviction does not of course determine the number of judges who may actually be disciplined for misconduct. At least with respect to core personnel, most private enterprises and public agencies in Japan closely knit, cohesive organizations. Nearly all hire core personnel only at the entry level and have a centralized personnel office--staffed by core personnel themselves subject to routine periodic reassignment--responsible for hiring, assigning, promoting and generally administering nearly all career employees. These offices enable pervasive mentoring and monitoring throughout the organization. Misconduct—even criminal misconduct--can be and commonly is dealt with internally without resort to formal proceedings. Thus in most organizations, including the judiciary, less formal means of discipline are available. Compared to an enterprise or agency with many thousand employees, monitoring judicial behavior is quite easy. With less than 300 judges and a system of regularly scheduled nationwide transfers to courts at all levels, in monitoring the behavior of their peers, the senior judges assigned to the judiciary's personnel office have a much easier task. As members of a closely knit elite bureaucracy, career judges are subject to an institutional system of formal and informal peer control familiar only to the military in the United States. Any judge guilty of misconduct is readily subject to various peer and institutional sanctions, and usually can be effectively encouraged to resign. Whatever the cause, by all accounts, judicial corruption is simply unheard of in Japan.

Judicial Autonomy and the Public Trust

As indicated, individual judges in Japan do not share the breadth of individual autonomy taken for granted by judges in the United States and many other legal systems. They do, however, enjoy a greater degree of independence from political intrusion both with respect to individual cases as well as the composition of the judiciary, even, as discussed

above, at the level of the highest and most politically significant court, of any industrial democracy.

Popular belief and scholarly claims to the contrary notwithstanding, judicial independence has in fact long been an established norm of Japanese governance. In terms of separation of powers, freedom from intervention in the adjudication of particular cases, and the personal security of judges, judicial independence was secured in the late 19th century by constitution and statute. Judicial independence from the political branches was emphatically established as a fundamental principle of governance in article 57 of the 1889 Constitution. Of all branches of government only the courts exercised authority "in the name of the emperor" (*tennō no na ni oite*). This exclusive reservation of authority to act in the emperor's name exceeded even the military's prewar claim that the "supreme command" of the emperor precluded legislative or executive civilian control. It thereby insulated the courts from any direct political intervention in the adjudication of cases by either legislative or administrative organs. Placed prominently in all courtrooms was the inscription "in the name of the emperor" as a meaningful reminder to imperial officials and subjects alike that the emperor's judges were not subject to political control or direction.

Express provisions of Japan's first comprehensive court law,²⁴ also guaranteed the security of judges. Under article 58 judges were to be appointed by the emperor with life tenure. Unless physically or mentally unable to carry out their duties or by virtue of a criminal conviction or disciplinary sanction, no judges could against their will be removed to a different office or court, nor could they be suspended or dismissed or have their salary reduced.²⁵ The statute did delegate authority over judicial appointments, promotion and assignments to the Minister of Justice and judges were made subject to mandatory retirement from active judicial service at age.²⁶ Nevertheless judges did enjoy a significant degree of formal security.

Nor in practice does the independence of Japan's prewar judiciary from direct political control appear to be in doubt.²⁷ Institutionally judicial independence from political intervention was secured by means of the construction of the judiciary and the procuracy as elite professional bureaucracies. By the end of the 19th century all judges and procurators in Japan were selected by examination. The 1890 Court Organization Law provided that judges and prosecutors had to pass two successive tests. Between the two tests, a three year period of practical training in the courts was required.²⁸ Graduates of an imperial university

24. *Saibansho kōsei hō* [Court organization law] (Law No. 6, 1890).

25. Court Organization Law (1890), arts. 73 and 74.

26. Court Organization Law, art. 74-2 (added by amendment, Law No. 101, 1921).

27. For an eloquent argument to the contrary, see J. Mark Ramseyer and Frances M. Rosenbluth, *The Politics of Oligarchy* (Cambridge, Cambridge University Press, 1996), restated but even more abstracted from historical context in *Measuring Judicial Independence*, pp. 132-139.

28. Court Organization Law (1890), art. 58.

were exempted from the first but not the second examination.²⁹ Imperial university professors were eligible after three years without examination.³⁰ By 1900 Japan's judiciary comprised 1244 career judges, nearly all of whom had been selected through this process. Initially, it appears, a significant degree of mobility between the judiciary and procuracy existed. Japanese procurators had acquired the functions of the French *juge d'instruction* in preliminary criminal proceedings prior to trial. Several of Japan's leading prewar procurators—including Kiichirō Hiranuma and his protégé, Kisaburō Suzuki, had begun their careers at the turn of the century in the Ministry of Justice as judges. By the 1930s, however, the two career paths diverged as two separate bureaucracies developed within the Ministry of Justice.

The separation of judges from procurators as separate career organizations with different privileges and legal protections was evident in the budgetary crisis sparked by the Great Depression. The Depression had reached its peak in Japan between 1930 and 1933. By 1934 the country had begun to recover. In the early 1930s, however, governments under both political parties--the *Minseitō* Hamaguchi (1929-31) and Watatsuki (1931) Cabinets and the *Seiyūkai* Inukai (1931-1932) Cabinet--were embroiled in a prolonged controversy over the effect on the judiciary of measures designed to reduce costs generally.³¹ Because the tenure and salary of judges but not procurators was secured under the 1890 Court Organization Law, judges' salaries could not be reduced without amending the statute. Prosecutors, who like other officials, were required to take a cut, objected to what they

29. Court Organization Law (1890), art. 65.

30. Id.

23. See *Tōkyō Asahi shinbun*, November 2, 1930, p. 1 (Ministry of Justice unable to reduce budget by 2.1 million yen [1.5 million U.S. dollars] as requested by government); November 5, 1930, p. 2 (Judges and procurators oppose reductions in salaries); November 6, 1930, p. 1 (20 judges and 10 prosecutors will have to be let go to meet budget); January 1, 1931, p. 2 (Eleven upper level employees of the Justice Ministry to retire during year); March 10, 1931, p. 2 (Seiyūkai protests government order for "cessation of work" (*jimu teishi*) at 62 courts as economizing measure, charging measure amounts to discontinuation of courts in violation of 1890 Court Organization Law); March 31, 1931, p. 3 (Editorial criticizes Hamaguchi Cabinet action as improper means of economizing); May 10, 1931, p. 2, (Judges and procurators strongly oppose proposed salary reductions); May 22, 1931, p. 2, (Ministry of Justice considers reductions of judges' salaries by imperial ordinance illegal under Court Organization Law); May 28, 1931, p. 1 (Judges' salaries exempt; procurators protest discriminatory treatment; judges unenthusiastic "voluntarily" accepting cuts); June 1, 1931, p. 1, (Salary reductions for all government officials except judges go into effect); June 10, 1931, p. 1 (Justice Ministry cuts 700,000 yen [approximately 350,000 U.S. dollars] from budget); July 4, 1931, p. 1 (Ministry of Finance announces further reductions in government expenditures necessary because of revenue shortfall); August 8, 1931, p. 1 (Government must reduce expenditures by 30 million yen [15 million U.S. dollars] for year; Ministry of Justice considers cuts in sum allocated for jury system to save 1.42 million yen [710,00 U.S. dollars]); October 1, 1931, p. 1 (Ministry of Finance plans to reduce national budget by 2.2 million yen [1.1 million U.S. dollars]); October 4, 1931, p. 1 (Ministry of Justice to have difficulty meeting budget); October 28, 1931, p. 2 (Amendment to be introduced in Diet to permit lay off of judges and procurators); November 3, p. 2 (Ministry of Justice agrees to layoff employees if other agencies agree to do same; refuses to agree to more layoffs of judges and prosecutors); December 9, 1931 (Last hold out among judges agrees to voluntary reduction in salary, in response Government will not introduce legislation or issue imperial ordinance).

argued was unfair, discriminatory treatment favoring judges. In the end, the judges were pressured to take "voluntary" pay cuts.

Judicial independence also required that judges refrain from public political activity. Political neutrality and professional integrity were considered fundamental to judicial independence. Judges were not allowed to participate any public political activity. Needless to say they could not join or be affiliated with any political party. The 1890 Court Organization Law prohibited judges "on the active list of the judicial service" "to interest themselves in any public involvement in political affairs" or "to become members of any political party or association or of any local, municipal, or district assembly."

The preservation of judicial independence underwent the greatest strains in prewar Japan from the late 1920s and 1930s. During these years judges were like other government officials subject to increasingly strident ideological forces of all extremes. Some judges held moderate to extreme progressive views. A few were prosecuted under the Peace Preservation Law or induced to resign because of suspected communist views.³² Others shared prevailing conservative nationalist views.³³ Most presumably kept their ideological beliefs private and avoided both extremes.

The prewar concern over judicial independence did not center on either political intervention in the judiciary or political activity by judges but the independence of judges from the procuracy and administrative oversight of the judiciary. The Japanese bar was especially critical of the Ministry of Justice's supervision over both judges and procurators.³⁴ The bar's concern was not any potential political intervention but the close identification of judges with the procuracy. Criminal defense attorneys were especially critical. They considered this identification especially inappropriate. They and other lawyers, all members of the trial bar, also resented their inferior status relative to both procurator and judge.³⁵

For judges as well Ministry of Justice control involved concern over status, lack of full autonomy, and career separation of judicial and prosecutorial offices. The judges of Great Court of Cassation, including the chief justice, were ranked inferior in status to the

32. See, e.g., *Tōkyō Asahi shinbun*, February 10, 1929, p. 11 (Prosecutor seeks 10 years imprisonment in Peace Preservation Law trial of "Red Judge" Ozaki; asks for 3 year terms for 3 other judges on trial); February 11, 1931 (Ozaki sentenced to 8 years); May 11, 1931, p. 2 (Prosecutor reigns, seen in company of cafe hostess identified as a communist and mistakenly identified as brother-in-law politician, under attack for communist sympathies).

33. For an example of the attitude of judges in the late 1930s toward stricter penalties for violations of the 1925 Peace Preservation Law (*Chian iji hō*), see Richard H. Mitchell, *Janus-Faced Justice: Political Criminals in Imperial Japan* (Honolulu: University of Hawai'i Press 1992), p. 99.

34. See Nihon Bengōshi Rengōkai [Japan Federation of Bar Associations], ed., *Nihon bengōshi enkakushi* [History of the development of the Japanese legal profession] (Tokyo, 1959), p.183-197.

35. Id.. See also A. Satō, "Shihō kanryō to hōsei kanryō," [Judicial administration and legal affairs administration], in *Gendai no hōritsuka* [Contemporary jurists], *Gendai hō* [Contemporary law], vol. 6 (Tokyo, 1966), pp. 44-60. On activities by bar to seek reform.

Minister of Justice.³⁶ The administrative authority of the Ministry of Justice also meant that the procuracy had an often determinative voice in the assignment of judges, including appointment of Chief Justice of Japan's highest court³⁷ and also could and did claim equality of status.³⁸ Since judges were equals within the ministry bureaucracy, it should be emphasized, they did exercise a significant degree of influence over the administration of justice in general and predominant influence over the administration of the courts. Nonetheless, conflicts were bound to occur and when they did the potential for prosecutorial influence was unavoidable. Thus it is not surprising that among the postwar reforms desired by the judiciary itself was to gain as much institutional autonomy as possible.

The prewar record contains nothing to suggest, however, that political intervention in the judicial affairs was a matter of concern. The emphasis in the later 1920 and 1930s on the insulation of administrative officials from the vices of party politics. As exemplified by the careers of both Hiranuma and Suzuki, the problem was the converse--entry into politics after retirement by justice officials at the highest level and their sustained effort to reduce the influence of democratic political forces in Japanese governance.

These concerns found expression within the small group of Japan specialists assembled in the United States Department of State in the early war years as preparations for a military occupation of a defeated Japan were prepared.³⁹ Judicial reforms were hardly their first priority, but proposals to transfer administrative control over the judiciary from the Ministry of Justice appear in early planning documents. It was in fact one of the first and most concrete reforms of the legal system suggested in the course of presurrender planning. The first mention of any need for judicial reforms in available presurrender planning documents appears to be a May 9, 1944 revision of a preliminary memo on "Japan: Abolition of Militarism and Strengthening Democratic Processes," dated five days earlier and drafted by Hugh Borton. The revised version recommended change in the process for appointing judges by the Ministry of Justice.⁴⁰ In July 1944 the planning group had prepared

36. See comment by former Chief Justice of the Supreme Court Kisaburō Yokota in Kisaburō Yokota, *Saiban no hanashi* (Speaking about the courts) (Tokyo, 1967), p. 41.

37. In 1935, for example, procurator Raisaburō Hayashi was appointed Chief Justice of the Great Court of Cassation over objections by career judges who favored Judge Torajirō Ikeda. *Tōkyō Asahi shinbun*, April 22, 1935, p. 2; May 8, 1935, p. 2. A year later however, Hayashi became Justice Minister and was replaced as Chief Justice by Ikeda. *Tōkyō Asahi shinbun*, March 13, 1936, p. 1. Hayashi, it might be noted, was a relatively liberal reformist Justice Minister.

38. See Masayasu Hasegawa, *Shihōken no dokuritsu* [Independence of judicial authority] (Tokyo, 1971), p. 85.

39. For a general description in English on pre-surrender planning for a military occupation of Japan, see Makoto Iokibe, *Beikoku no Nihon seisaku* [America's Japan policy], (Tokyo; Chūō Kōronsha, 1985), 2 vols; Marlene Mayo, "American Wartime Planning for Occupied Japan," in R. Wolfe, ed., *Americans as Proconsuls: United States Military Government in Germany and Japan, 1944-1952* (Carbondale and Edwardsville, 1984), pp 2-51; Robert E. Ward, "Presurrender Planning: Treatment of the Emperor and Constitutional Changes," in R. Ward and Y. Sakamoto, eds., *Democratizing Japan: The Allied Occupation* (Honolulu, 1987), pp. 1-41.

a separate memo on the judicial reforms. Entitled "Japan: Treatment of Courts in Japan during Military Government," the document commended the high professional standards of Japanese judges who received appointment, in the words of the memo, "after rigorous qualifying examinations."⁴¹ The memo suggested no reforms in the existing system except the elimination of the Administrative Court and some provision to ensure the "independence of judges" from the Ministry of Justice.⁴²

One of these recommended reforms was also included in Japanese proposals for amendment of the Meiji Constitution during the first months of the Allied Occupation.⁴³ The constitutional revisions proposed initially by the committee headed by Minister of State Jōji Matsumoto (1877-1954), which the Supreme Commander for the Allied Powers (SCAP) rejected outright, included the abolition of the Administrative Court and transfer to the regular judiciary of competence to adjudicate direct appeals from administrative decisions. The transfer of administrative jurisdiction over the judiciary from the Ministry of Justice to a separate judicial administrative organ would have undoubtedly been high on the list of reforms proposed by postwar Japanese officials as a revision of the Court Organizations Law.

The transfer of administrative authority to administrative organs of the proposed Supreme Court became a point of contention within the SCAP committee chaired by Col. Charles L. Kades, the Deputy Chief of Government Section and a lawyer, appointed in February 1946 to draft a model constitution for postwar Japan was. The views of the majority coincided with concerns of postwar Japanese progressives who urged the removal of jurisdiction over judicial administration from the Ministry of Justice.⁴⁴ Kades repeatedly questioned the powers the committee on the judiciary had proposed for the courts, arguing with perceptive foresight that the "kind of Supreme Court established in this draft might develop into a judicial oligarchy."⁴⁵ The solution, which did not fully satisfy Kades,⁴⁶ was to provide for cabinet appointment of all judges and electoral review with potential dismissal of Supreme Court justices.⁴⁷ By these means some assurance of political

40. National Archives, Diplomatic Section, Notter Files, T-1221 reel 3, CAC 185/185a.

41. Notter Files, T-1221 reel 4, CAC 249, July 7, 1944.

42. *Id.*, at p. 2.

43 Dale M. Hellegers, *We the Japanese People: World War II and the Origins of the Japanese Constitution* (Stanford: Stanford University Press, 2002), vol.2, 478, 645.

44. See, e.g., Memorandum of Robert A. Fearey, Jr., "Comparative Analysis of the Published Constitutional Revision Plans of the Japanese Progressive, Liberal, Socialist and Communist Parties, Two Private Study Groups [including the Federation of Bar Associations], and Dr. Takano Iwasaburo," in 8 *Foreign Relations of the United States* (1946), p. 170.

45. Kenzō Takayanagi, Ichirō Omoto, and Hideo Tanaka, *Nihon kempō seitei no katei* [Process of drafting the constitution of Japan] (Tokyo, 3rd ed. 1984), pp. 186, 256.

46. *Id.*, p. 256.

accountability would balance the implicit powers of judicial review. Japan's postwar constitution, as revised by a joint American and Japanese effort and later during deliberations in the Diet, includes nearly all of the provisions and much of the language related to the judiciary of the original SCAP model.⁴⁸ The provisions for judicial independence were almost identical. The Constitution of Japan provides:

Article 76.

....

All judges shall be independent in the exercise of their conscience and shall be bound only by this constitution and the laws.⁴⁹

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

The judges of inferior courts shall receive, at regular fixed intervals, adequate compensation, which shall not be decreased during their terms of office.

Despite the attempt to assure a degree of political accountability, Japan's new constitutional structure has operated in fact to ensure greater not less judicial autonomy and political insulation. The first and only attempt by one of the political branches to the Japanese government to openly influence the courts came in 1948. On May 6th, the House of Councilors Judiciary Committee announced that it was opening an investigation of district court decisions in a half dozen criminal cases, in which the courts had denied detention or otherwise had been too lenient, in the view of the committee, in not applying the full rigor of the law. The Supreme Court protested, charging that the inquiry infringed the constitutionally protected independence of the judiciary. The Legal Affairs Committee responded by formally deciding on October 17th to widen the investigation to include the operations of the procuracy as well as the courts. The *Urawa* case became the focal point. The Supreme Court responded with a strongly worded formal denunciation of the Committee's actions:

The investigatory authority set out in article 62 of the Constitution is merely a supplementary authority for collecting information required for the exercise of the legislative powers, consideration of the budget, and others powers vested in the Diet and each house by the Constitution....

47. Constitution, art. 79(2) and (3).

48. See Constitution, chapter VI, arts. 76-82.

49. A more accurate translation of this provision would read "judges shall exercise their authority [or function] independently in accordance with their conscience and shall be bound by this constitution and the laws."

The judicial power, however, belongs exclusively under the Constitution to the courts; other state organs are absolutely unauthorized under the Constitution to interfere in any way with its exercise. In this sense... actions of the Committee in reviewing and criticizing findings of fact or sentencing can only be viewed as violating judicial independence and exceeding the scope of investigatory authority for national administration entrusted the Diet by the Constitution.⁵⁰

The protest was effective. The affair ended. There has been no repetition. The judiciary effectively established its autonomy from legislative oversight or even formal critique of pending cases. The Supreme Court's unchallenged action also implied an assertion of the judiciary's right to define the limits of the Diet's legislative authority at least as it pertains to the courts.

Formal and structural barriers coupled with a notable emphasis shared by most Japanese organizations on institutional autonomy also work to prevent political intervention and manipulation of the courts, including even the composition of the Supreme Court. Despite cabinet appointment of Supreme Court justices and, at ten-year intervals, all career judges who staff all but one lower court, as detailed below, the judiciary has remained virtually free of any direct political intervention or manipulation. To this extent, Kades' fears of a judicial oligarchy have been realized. Japanese judges do not wield the sort of coercive power that would have given such concerns cause.

Political checks remain and do influence judicial administration. Those who administer the career judiciary mindful that their autonomy depends on the trust of the public generally and more immediately those who exercise political leadership who must themselves comply with public demands. The cabinet's constitutional authority to appoint judges provides the continuous potential for political intervention. This ever-present possibility of active political oversight has been argued on one extreme to provide a catalyst for self-policing as a form of silent, indirect but quite effective political manipulation and control.⁵¹ As discussed in detail below, the data offered in support suggests a more plausible effect. The potential for partisan or other political intervention motivates the judges assigned to judicial administration to be more vigilant than perhaps they might otherwise be to ensure that the judiciary enjoys the highest levels of public trust. Thus acceptability of judges to politicians has to be viewed in relation to the similar accountability of politicians to the public. Political intervention and control are precluded by that trust. Given the extraordinary degree of public confidence the courts enjoy, the voters do not appear to want it. The equally extreme low levels of trust politicians engender suggest, moreover, that they would not allow it. The result is a set of well-established patterns for appointments and promotion that effectively insulates the selection of judges and justices from any direct political influence.

50. Materials on House of Councilors Judiciary Committee, *Saikō Saibansho no ikkensho* [Supreme Court opinion letter], May 20, 1949, 1 *Hōsō jihō* (No. 5) (1949), pp. 71-72. See also N. Kumamoto, "Contemporary Reflections on Judicial Independence in Japan," in S. Shetreet and J. Deschênes, eds., *Judicial Independence: The Contemporary Debate* (Dordrecht, 1985), p. 239.

⁵¹ See Ramseyer and Rasmusen, *Measuring Judicial Independence*.

These established conventions also operate within an equally well-established system of judicial oversight with intensive mentoring and monitoring of individual judges to ensure that the judiciary itself maintains a corps of honest, competent judges who adjudicate cases within predictable and generally accepted legal parameters. Individual judges thus function within the shadow of potential political intrusion. In deciding cases they cannot help but be aware that in adjudicating highly publicized, politically sensitive cases, they can be held professionally accountable for their decisions. Judges themselves, however, exercise the oversight, not politicians directly or indirectly.

Some disagree. A series of incidents took place in the 1970s, reflecting the tensions produced by the small group of young judges who, many active in the radical student movement, had entered the judiciary in the 1960s. As senior judges in the General Secretariat became increasingly fearful of their influence, they began to weed the judicial garden. The story of Assistant Judge Yasuaki Miyamoto has been often told.

Purposefully omitted from the 1971 Supreme Court's list of assistant judges who had served for ten years recommended to the cabinet for reappointment and promotion to full judge was the name of Yasuaki Miyamoto. Miyamoto was a member of the Young Jurists League (*Seihyōkyō*). Formed in the early 1950s, the League's members included lawyers, legal scholars and judges whose ideological leanings ranged from progressive to radical left. The League is described as a Communist Party affiliate.⁵² By 1971 an estimated 230 younger judges had joined the League, many in the late 1960s at the peak of radical student activity in Japan. The cabinet as usual affirmed all of the recommendations. Every assistant judge on the list was promoted. Having not been recommended Miyamoto was not reappointed and thus, as of April 1972, was no longer a judge. No reason was given, nor was one required. Past and present practice gave the judiciary the determinative voice in deciding who would be promoted. No one questions that senior judges themselves feared their influence and had decided to act. Other judges associated with the League were dealt with less directly but perhaps no less harshly. They simply did not advance professionally. Some, facing remotely located, less significant assignments, often replacing advancing younger judges, quietly resigned. The purge was thus completed.

The Miyamoto and related incidents confirm for some the extent of control over individual judges exercised by their politically conservative seniors assigned to the Supreme Court's secretariat and personnel bureau.⁵³ They are the ones who exercise control and impose penalties on nonconforming judges. For others the Miyamoto affair together with other incidents suggest instead the pernicious influence of politicians on the judiciary. They go well beyond the view that the potential for political intervention in judicial appointments functions to keep judges mindful of the need to maintain public trust in their integrity, competence and political neutrality and to ensure conscientious self-governance by the

⁵² Id., p. 19; Yasuhei Taniguchi, "Japan," in S. Shetreet and J. Deschênes, eds., *Judicial Independence: The Contemporary Debate* (Dordrecht, 1985), p. 210.

⁵³ Setsuo Miyazawa, "Administrative Control of Japanese Judges," Joint Annual Meeting of the Law and Society Association and the ISA Research Committee on the Sociology of Law, June 25-29, Amsterdam, The Netherlands, 1991; O'Brien and Ohkoshi, "Stifling Independence"

judiciary itself. Three highly respected scholars claim instead that political actors in fact aggressively manipulate and control judges in order to direct the development of the law.

Harvard Law School Professor J. Mark Ramseyer, joined by his Yale colleague in political science, Frances McCall Rosenbluth, initially made the charge in 1993.⁵⁴ Subsequently, over the course of a decade, now joined by Professor Eric B. Rasmusen of Indiana University, Ramseyer co-authored a half dozen articles published in a variety of scholarly and professional journals in which he continued to assert that politicians control the judges. They have now bundled these articles into a single volume entitled *Measuring Judicial Independence: The Political Economy of Judging in Japan*.⁵⁵ Ramseyer and Rasmusen analyze data detailing the career paths of nearly every one of the 793 persons appointed a career judge between 1959 and 1968.⁵⁶ They have tracked judicial posts held by each in relation educational background, judicial decisions in several potentially "politically charged" categories of cases, and membership in the Young Jurists League.

Their case for political control is barely plausible. As suggested above, one might well be made and evidence found could the selection of members of the practicing bar to serve on the Supreme Court examined in detail and depth. But this is not what Ramseyer, Rosenbluth and Rasmusen are about. They seek to show political control over the career judiciary. Yet, they find or at least do not offer any evidence of direct or indirect intervention by any politician in any decision made by senior judges assigned to the General Secretariat in appointing, assigning or promoting any judge during the entire thirty year period they studied (1959-1989). They excuse this lack of proof as unnecessary. Instead they rely on a theory that is almost impossible to prove or disprove, nearly tautological in effect. Because, they argue, the uninterrupted period of Liberal Democratic Party rule between 1955 to July 1993, senior judges assigned to the General Secretariat of the Supreme Court, could discern (as "agents") without any instruction--like, they say, an accomplished English butler --just what their political masters wanted. Hence no evidence of actual intervention--direct or indirect--is necessary.

Ramseyer and Rasmusen do not attempt the task of identifying and isolating cases in which LDP politicians had a distinctive interest or preference in the outcome that would have been clearly distinguishable either from the preferences of senior judges making the decisions or from those of the electorate as a whole. Nor do they even consider more narrowly defined personal or partisan interests--such as, the appointment of friends, cronies, political supporters--in the mix. Unless this is done, however, we cannot know for sure without entering the minds of the judges themselves whose preferences mattered. In the selection of decisions and the assumptions regarding LDP preferences, Ramseyer and Rasmusen in effect conflate the policy preferences LDP

⁵⁴ Frances McCall Rosenbluth and J. Mark Ramseyer, *Japan's Political Marketplace* (Cambridge, MA, Harvard University Press, 1993).

⁵⁵ Cited at fn 8. See also Book Review (by author) in *Journal of Japanese Studies*, vol. 30, No. 1 (Winter 2004).

⁵⁶ *Id.* p. 177.

politicians with those of Japan's senior judges and by all accounts the majority of Japanese voters. They do not ask whether the preferences they identify were in fact peculiar to the LDP. For example, they identify judicial decisions holding unconstitutional statutory prohibition of door-to-door campaigning as "politically charged" and "anti-government" inasmuch as such restrictions would presumably favor better known incumbent LDP politicians. However, one can reasonably surmise that the vast majority of Japanese voters, not wanting to be bothered at home by eager politicians and their advocates, also favored the ban. Moreover, the Supreme Court had repeatedly upheld the prohibition. Thus the judges who held the ban to be invalid were flouting voter opinion and the courts at least as much as LDP politicians.

The best cases they offer in support of their claim are lower court decisions on the constitutionality of Japanese defense policies under article 9 of the postwar constitution. No postwar judicial decisions better reflected the views of the League's membership or that of the radical left. If any decisions "flouted" government policy, these were they. There were only two. The first was the 1959 Tokyo District Court decision in the *Sunakawa* case by Judge Akio Date and his two colleagues, Judges Shunzō Shimizu and Ichirō Miyamoto. They held unconstitutional the 1951 U.S.-Japan Security Treaty.⁵⁷ The second decision was handed down fourteen years later by the 1973 Sapporo District Court decision in the *Naganuma* case.⁵⁸ In that decision Judge Shigeo Fukushima joined by Judges Takao Inamori and Tatsuki Inada held that the Self-Defense Forces (SDF) were unconstitutional. The Supreme Court subsequently reversed both,⁵⁹ Neither decision flatly contradicted Supreme Court precedent. The first case in fact produced the Supreme Court's landmark unanimous *en banc* decision in the *Sunakawa* case, which authoritatively construed article 9 to allow Japan to pursue military policies for purposes of self-defense. Although distinguishable, the *Naganuma* decision, however, was certainly inconsistent with the reasoning of the opinions expressed by all fifteen justices in the *Sunakawa* case, and few would argue that the district court judges in either case reasonably believed that the Supreme Court would affirm their decisions.

⁵⁷ *Japan v. Sakata*, *Hanrei jihō* (No. 180) 2 (Tokyo Dist. Ct., Mar. 30, 1959). The case was brought by the Tokyo District Court Prosecutors Office in 1957 charging the defendant Sakata and six others with illegal entry onto an American military base. The case arose out of protests by local residents, landowners and their supporters protesting the extension of a runway at the Tachikawa Air Base outside of Tokyo.

⁵⁸ *Itō v. Minister of Agriculture and Forestry*, *Hanrei jihō* (No. 298) 140 (1973). Filed in 1968 the case was brought by residents of the village of Naganuma in the northern-most island of Hokkaido to block the building of an SDF Nike missile base. In a presage to what was to come, in 1969 Judge Fukushima granted in injunction against construction of the base, a decision that was immediately appealed to the Sapporo High Court and reversed. See discussion of these cases in "Recent Developments," *6 Law in Japan: An Annual* 175 (1973).

⁵⁹ To be precise in the *Sunakawa* case the Supreme Court on expedited appeal unanimously reversed the Tokyo District Court decision. *Japan v. Sakata*, 13 Keishū 3225 (Sup. Ct., G.B., Dec. 16, 1959). In the *Naganuma* case the Court affirmed the Sapporo High Court reversal of the district court decision. *Ministry of Agriculture and Forestry v. Itō*, 36 Minshū 1679 (Sup. Ct., 1st P.B., Sept. 9, 1982).

Six judges participated in these cases. A panel of three judges adjudicated each. All continued on the bench. Not one judge was terminated. In each instance, each judge whose ten year term had expired before he retired or reached retirement age was reappointed by the cabinet, his name having been included on the list for renewal submitted by the General Secretariat. Four of the six judges had joined the judiciary after 1947. Thus their careers can easily be tracked using the data Ramseyer and Rasmusen rely on from the *Judges Almanac*.⁶⁰ Assistant Judge Ichirō Miyamoto (not to be confused with Assistant Judge Yasuaki Miyamoto), only three years out of the LRTI at the time of his participation in the *Sunakawa* case, may have fared the worse. He resigned three years later in 1962 and entered private practice. Whether he agreed with Judge Date is not certain. Nor it is clear that he resigned under pressure. Nonetheless, his vote as one of the three judges *could* have made the difference and he *could* have been encouraged to resign by senior judges who *could* have been critical of his role in the decision. Judge Fukushima and the judge or judges who joined him in the *Naganuma* decision, however, were neither terminated nor forced to resign. All three continued to serve for more than a decade and a half afterwards. As Ramseyer and Rasmusen note,⁶¹ Judge Fukushima retired in 1989, at 59 years of age. Judge Inamori reached compulsory retirement age and retired in 1996. He appears to have had good to average postings since 1973. At age 57 Judge Inada is still on the bench. He too appears to have had reasonably decent judicial assignments.

The claim made by Ramseyer and his co-authors would not be contested were they to substitute "senior judges and most Japanese" for the LDP. The subsequent reversals by unanimous opinion by the Supreme Court and the Sapporo High Court suggest at least some hostility toward the views expressed by Judges Date and Fukushima and whomever of their colleagues who joined them. Moreover, as the most ardent critics of Japan postwar defense policies themselves admit,⁶² the Japan public accepts the legitimacy of the SDF but also overwhelmingly rejects attempts to revise Article 9, a seemingly contradictory viewpoint that the Supreme Court's approach in the *Sunakawa* and *Naganuma* cases allows to prevail. One would thus expect that the careers of judges who were perceived not only to adhere to leftist views but also to be willing to act on those views, deciding cases at variance with judicial precedents as well as widely held public preferences, did indeed suffer.

But this has long as well established as it has been well known. No one questions the basic proposition that Japan's senior judges reacted in the 1970s to what they perceived to be a serious threat from the left by attempting to cull actively "radical" judges from the career judiciary. Their fear intensified as they witnessed far left student activists of the late 1950s and mid 1960s entering the legal profession and other mainstream occupations. Nor does anyone doubt that conservative politicians shared these concerns.

⁶⁰ See *supra* note 4.

⁶¹ Ramseyer and Rasmusen, *Measuring Judicial Independence*, p. 20.

⁶² See, e.g., Glen D. Hook and Gavan McCormack, *Japan's Contested Constitution: Documents and Analysis* (London and New York: Routledge, 2001), p. 14.

What is remarkable is that so many of the 140 judges whom Ramseyer and Rasmusen identified as League members did so well. Presumably because League members were among the "best and brightest" on average they had better assignments better positions and in the end better pay than their peers.⁶³ The data show that of these only a handful---no more than 50--did not fare as well or better than the average judge. In each instance the judge who did not advance as fast or as far as his or her peers had decided cases and authored decisions at variance with well-established Supreme Court precedents and widely accepted norms of judicial restraint. Judges who defied these precedents were more apt subsequently to be denied plum assignments. The Ramseyer, Rosenbluth and Rasmusen claim rests essentially on the finding that judges who refused to adhere to Supreme Court precedents on malapportionment or on the constitutionality and reviewability of Japan's defense policies or judicial construction of legislative constraints on injunctions against government offices and officials tended less to receive less prestigious assignments and positions.⁶⁴

Treat the Ramseyer, Rosenbluth and Rasmusen claim as a playful overstatement by three gifted scholars overly enamoured with a theory, and the result is a convincing case for the institutional autonomy of the Japanese judiciary. They give us a glimpse of how competently and conscientiously albeit conservatively and cautiously Japan's judges govern themselves. They note that in nearly all of the categories of cases they studied--including taxpayer suits--the judges who received the best assignments, the earliest promotions and the best pay were in fact the most talented, hardest working and most competent.⁶⁵ They even found that high rates of conviction appear are equally related to competence, not political policing and control. Their data thus confirm the conclusions the most comprehensive study of Japanese prosecutors.⁶⁶ High conviction rates are the result of the reluctance of prosecutors to indict defendants where they harbor any doubts concerning guilt or whose guilt they are not certain they can prove. Prosecutors who lose cases tend to suffer. Like judges prosecutors are rewarded for honesty, hard work and talent. In the end *Measuring Judicial Independence*, the most thoroughly researched study on judicial independence in Japan to date shows how conscientious and competent as well as cautious and conservative the senior judges who choose as they were themselves chosen the judges who administer the judiciary really are. No do they act alone. They must take into account the views and preferences of their peers, the opinions and preferences of the judiciary as a whole.

⁶³ Ramseyer and Rasmusen, *Measuring Judicial Independence*, p. 25.

⁶⁴ *Id.*, pp. .67, 70-72, 75-76.

⁶⁵ *Id.* p. 95.

⁶⁶ See David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (London and New York, Oxford University Press, 2002), pp. 214-242.

Missing in almost all accounts are the consequences of the Miyamoto affair. The protests from Japan's judges were immediate and widespread. Over a third openly protested in one form or another, and many others quietly made their objections known. The judiciary became the center of a political storm. Miyamoto received nationwide media attention. Articles and books condemning the action poured forth. Since the Miyamoto incident, no judge has been denied reappointment. Denial of tenure was no longer a viable sanction. Instead, the career judges who persisted in continuing their membership and acted on their ideological convictions as judges became subject to discriminatory treatment in court assignments and promotions. Control in this form, however, has not provoked public outcry.

Miyamoto's dismissal by senior judges did represent an unusually strong public statement that the Japanese judiciary would not tolerate any significant departure from an essentially moderate to conservative approach to legal change and judge-driven social reform. Ramseyer, Rosenbluth and Rasmusen would thus be quite correct were they to claim that as a result of the Secretariat's actions, Japan conservative political establishment--and electorate--could continue to place their confidence and trust in an autonomous judiciary. Those who sought a more active and socially responsive judiciary were naturally dismayed. Those who feared a subversive, radical element in the judiciary were relieved. Overlooked--or ignored--by the trio is the trajectory of subsequent landmark decisions in the 1970s by courts at all levels. These were the years of significant judicial activism. Judges determined policy in the pollution cases and revised established precedents in the parricide, malapportionment, and economic freedom cases.⁶⁷ The courts in these decisions were not acting as tools for LDP politicians. To the contrary these decisions overturned well-established government policies. One might ask whether the courts could have proceeded as freely without political intervention as they did had the Secretariat not affirmed by means of the Miyamoto affairs public confidence that the judiciary was free from partisan and ideological control.

The judiciary emerged from the Miyamoto affair by all accounts an even more autonomously governed bureaucracy for which there are few if any parallels. In a perceptive essay written as the events unfolded, Kazuhiko Tokoro analyzed the Japanese judiciary as an amalgam of three separate models--political, professional, and bureaucratic--from each of which separate elements could be detected. Characteristic, however, was the minimal level of popular participation or control. The Japanese judiciary relies less, Tokoro concluded, on legal rules made within administrative bureaucracies with some popular participation as in "bureaucratic" models, or on outside experts, such lawyers and other legal specialists, as in "professional" systems, or upon the personal values of individual judges, who, if not acceptable to their political principals, can be replaced. Rather the Japanese judiciary is more insulated from popular control in any of these forms than the courts of almost all other industrial democracies.⁶⁸ In other words, the judiciary itself not any political branch of government determines the parameters of responsible judicial behavior.

⁶⁷ See Symposium: The Constitution of Japan: The Fifth Decade, 53 *Law and Contemporary Problems* (Nos 1 & 2) (1990)

⁶⁸ Kazuhiko Tokoro, "Saiban no minshō-teki tōsei to dokuritsu," [Democratic control and independence of the courts], *Hōshakai gakkai, Saibankanron* [Study of judges] (Hōshakaigaku, No. 26) (Tokyo, 1973).

Japan's judges depend for their autonomy on the public's trust. Trust is the judiciary's most significant attribute. It gives judge's status and legitimacy. It also operates to contain any threat of intrusive political meddling, or the sort of political control that Ramseyer, Rosenbluth and Rasmusen claim to exist. Trust rests, however, on confidence that resort to court will not result in arbitrary outcomes, a confidence based in turn on the integrity of individual judges and their independence from outside influence. Thus to maintain autonomy the judiciary must also maintain public confidence that the institution is indeed trustworthy.

In this respect the judiciary's success is not disputed. Japan's judges are among the most trusted. Public opinion polls routinely reveal judges along with the police and prosecutors to enjoy the highest levels of public trust. The degree of public confidence in the courts in Japan is especially notable in comparison with other civic and government institutions, and other countries, including the United States. Newspaper polls, for example, routinely show that trust of the courts in Japan is second only to the procuracy and police. In one relatively recent Yomiuri Newspaper poll trust in the judiciary was three times as great as trust in religious institutions or the self-defense forces, and five times greater than for the Diet, more than seven times greater than for offices of the national government. The Prime Minister ranked last. Trust in the courts in the United States, however, was less than half the Japanese level and ranked below all religious institutions and all political branches except national government offices.⁶⁹

To achieve and maintain public trust the judges assigned the task of administering Japan's judicial bureaucracy must themselves share a deeply felt responsibility to maintain judicial integrity and competence. They cannot but also share concern that the judiciary itself would suffer were the public ever to perceive that judges were freely deciding cases out of partisan preference or any extreme personal ideological bias at odds with what they would themselves consider the "sense of society." For them little if any threat exists to judicial independence in Japan so long as they control the process for appointment and promotion of career judges. They may be correct, but, one would like to add, only insofar as they have themselves internalized the values of integrity, autonomy, and competence. One lesson of the Miyamoto incident was the necessity of their listening to the voices--expressed and unexpressed--of their colleagues on the bench and the public. By doing so they seemed to have ensured for a generation that, unlike career judiciaries in other industrial democracies in the wake of the worldwide rebellions of the 1960s,⁷⁰ the Japanese judiciary would remain obdurately apolitical. The political independence of Japan's judges and, at least as important for the judges themselves, their tenure were secured. Under these

⁶⁹ Yomiuri Newspaper Poll, National Perceptions, April/May 1995, *World Surveys* 651, 1995, cited in John O. Haley, "Litigation in Japan: A New Look at Old Problems," 10 *Willamette Journal of International Law and Dispute Resolution* 121 (2002).

⁷⁰ See, e.g., observations on the Italian experience in Frederic Spotts and Theodor Wieser, *Italy: A Difficult Democracy* (Cambridge, 1986), pp. 158-161, quoted in J.H. Merryman, D. Clark, and J. Haley, eds., *The Civil Law Tradition: Europe, Latin America, and East Asia* (Charlottesville: Michie, 1995), pp. 578-581.

conditions the trustworthiness and autonomy of the Japanese judiciary should be secured for many years to come.