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THE SUPREME COURT AND THE PUSH FOR TRANSPARENCY IN LOWER COURT APPOINTMENTS IN JAPAN

DANIEL H. FOOTE*

The theme of this symposium issue is “Decision Making on the Japanese Supreme Court.” From that title, readers understandably might assume the focus is squarely on decisions in judicial *cases*. Yet, as Lawrence Repeta observes in his Article for this issue, the Japanese Supreme Court bears responsibility for another major category of decision making: judicial *administration*.¹ One vitally important aspect of judicial administration for which the Supreme Court bears primary responsibility is the selection of lower court judges, together with personnel management of judges (including decisions on promotions and transfers, which are a standard element of Japan’s career judiciary).² The Supreme Court’s role in the lower court appointment process, and recent reforms designed to heighten transparency in that process, are the topics of this essay.

The basic outline of the lower court appointment process is widely known. Yet the actual operation of that process has been shrouded in secrecy. Based largely on analysis of the structure and organization of the Japanese judiciary, coupled with anecdotal evidence, for many years critics have charged the Supreme Court with stifling judicial independence by utilizing its control of the appointment process and personnel management in a politically motivated fashion or to compel adherence to certain norms.³ The Supreme Court, however, steadfastly has refused to divulge specific reasons for decisions on appointments or personnel management. In the absence of any such concrete information, the debate

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1. Lawrence Repeta, *Reserved Seats on Japan’s Supreme Court*, 88 WASH. U. L. REV. 1713 (2011). For an examination of the Supreme Court’s role in judicial administration by a former Chief Justice, see Takaaki Hattori, *The Role of the Supreme Court of Japan in the Field of Judicial Administration*, 60 WASH. L. REV. 69 (1984).

2. John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in *LAW IN JAPAN: A TURNING POINT* 99, 102–05 (Daniel H. Foote ed., 2007).

3. See, e.g., MIYAMOTO YASUAKI, KIKI NI TATSU SHIHŌ [JUDICIARY IN CRISIS] (Chōbunsha, 1978) (account by former assistant judge who was denied reappointment); Masaki Abe, *The Internal Control of a Bureaucratic Judiciary: The Case of Japan*, 23 INT’L J. SOC. & LAW 303, 303–20 (1995); Setsuo Miyazawa, *Administrative Control of Japanese Judges*, in *LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY* 263 (Philip S.C. Lewis ed., 1994); David M. O’Brien & Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, in *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 37 (Peter H. Russell & David M. O’Brien eds., 2001).

over judicial independence seemed destined to proceed endlessly, with charges based heavily on anecdotal evidence met by virtually complete silence.

Then, by the early 1990s, J. Mark Ramseyer and Eric Rasmusen devised an ingenious strategy for testing the assertions statistically. They compiled an extensive database—initially for the cohort of all judges appointed during the decade of the 1960s—containing, among other matters: age, gender, university education and other demographic information; information on productivity and participation in reported judgments for various types of cases; and information on positions held throughout the course of their careers in the judiciary.⁴ Then, using regression analysis, they sought to identify which factors displayed statistically significant correlations with more successful and less successful careers (defined in accordance with pay scales and other widely accepted notions of what positions within the Japanese career judiciary are more or less desirable).⁵ Over the years, Ramseyer and his collaborators (usually Rasmusen and, at times, Frances Rosenbluth, with additional works by Ramseyer on his own) have expanded greatly the cohort of judges covered and types of data collected and examined, have refined their analysis, and, in a book⁶ and numerous articles in English and in Japanese, have investigated an ever-widening set of topics.⁷

Ramseyer's article in this issue, *Do School Cliques Dominate Japanese Bureaucracies?: Evidence from Supreme Court Appointments*, takes the analysis one step further, by examining whether school cliques and favoritism toward the graduates of elite universities—namely, the University of Tokyo and Kyoto University—explain why judges who graduated from those universities dominate in appointments to the Supreme Court. Having served as professor at the University of Tokyo for over ten years, I am gratified to see the results of this latest investigation.

4. J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN*, at xii, 26–47 (2003).

5. *Id.*

6. *Id.*

7. See, e.g., J. Mark Ramseyer, *Predicting Court Outcomes through Political Preferences: The Japanese Supreme Court and the Chaos of 1993*, 58 DUKE L.J. 1557 (2009); J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 271 (1994); J. Mark Ramseyer & Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan*, 13 J. LAW, ECON. & ORG. 259 (1997); J. Mark Ramseyer & Eric B. Rasmusen, *The Case for Managed Judges: Learning from Japan after the Political Upheaval of 1993*, 154 U. PA. L. REV. 1879 (2006); J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 AM. POL. SCI. REV. 331 (2001); J. Mark Ramseyer & Eric B. Rasmusen, *Why Is the Japanese Conviction Rate so High?*, 30 J. LEGAL STUD. 53 (2001); J. Mark Ramseyer & Eric B. Rasmusen, *Why the Japanese Taxpayer Always Loses*, 72 S. CAL. L.J. 571 (1999).

Most of my students, especially those who pass the bar exam at a young age, are intelligent, committed, and hard working. Of course, I would like to think the education the University of Tokyo provides has something to do with their success. But the top University of Tokyo students are blessed with natural ability and a strong level of dedication. So, while I have a number of caveats and concerns with regard to Ramseyer's analysis, I'm more than inclined to be persuaded by his conclusion: "[There is] no evidence of favoritism toward the graduates of the preeminent University of Tokyo. Elite university graduates do not dominate Supreme Court appointments because of their school backgrounds. They dominate because they produce."⁸ I'm happy to see him offer empirical confirmation for that conclusion.

Over the years, Ramseyer and his collaborators have expended vast amounts of time and energy compiling and analyzing data. Their work would be a valuable resource even if more concrete information were available regarding specific appointment and personnel decisions. Yet, if the Supreme Court had been more forthcoming with concrete information, it is hard to imagine they would have felt the need to invest so much time and energy in this project. In that sense, the very existence of their research serves as a reminder of the lack of transparency in the judicial appointment process.

Not surprisingly, the response of the Japanese Supreme Court to the work of Ramseyer and his collaborators has been essentially the same as its response to other critiques of the appointment and personnel management process for lower court judges: silence. While a few individual judges have expressed their views to Ramseyer in private,⁹ the Supreme Court has not commented publicly. To the contrary, the Supreme Court has maintained its steadfast policy of near total secrecy with regard to appointments and personnel matters.

As Repeta observed in his oral presentation at the symposium, however, "[I]n recent years, increased transparency has been a constant theme of reform demands for all aspects of government in Japan."¹⁰ The judicial appointment process is no exception. In 1999, the government of Japan established the Justice System Reform Council ("Reform Council"),

8. J. Mark Ramseyer, *Do School Cliques Dominate Japanese Bureaucracies?: Evidence from Supreme Court Appointments*, 88 WASH. U. L. REV. 1681 (2011).

9. E-mail from J. Mark Ramseyer, Mitsubishi Professor of Japanese Legal Studies, Harvard Law School (Dec. 29, 2010) (on file with author).

10. Lawrence Repeta, Address at the Washington University Law Review Symposium: Decision Making on the Japanese Supreme Court, September 10, 2010; *see also* Repeta, *supra* note 1.

a body of thirteen knowledgeable members from a wide range of fields, charged with “clarifying the role to be played by justice in Japanese society . . . and examining and deliberating fundamental measures necessary for the realization” of a justice system appropriate for the needs of Japanese society.¹¹ The Reform Council issued its final recommendations in June 2001.¹² A central theme of those recommendations was the need for greater transparency throughout the justice system. With reference to appointments to the Supreme Court, the Reform Council observed, in a bit of an understatement, that “the processes for nomination by the Cabinet and for appointment are not necessarily transparent.”¹³ The Reform Council stopped short of offering any concrete recommendations for reforming the Supreme Court appointment process, though, stating only that:

[F]rom the standpoint of strengthening the people’s confidence in the justices of the Supreme Court, studies should be made on appropriate mechanisms for the purpose of securing transparency and objectivity with regard to the appointment process, while paying due respect to the importance of the position [of Supreme Court justice].¹⁴

As discussed below, the Reform Council offered much more explicit recommendations with respect to reforming the appointment process for lower court judges, and the Supreme Court acted on those recommendations rather expeditiously. Before examining the reforms and evaluating their impact, however, a brief explanation is in order of the lower court judicial appointment process as it existed previously.

11. *Shihō seido kaikaku shingikai setchihō* [Justice System Reform Council Establishment Act], Law No. 68 of 1999, art. 2. For an overview of the Justice System Reform Council and its recommendations, see Daniel H. Foote, *Introduction and Overview: Japanese Law at a Turning Point*, in *LAW IN JAPAN: A TURNING POINT*, at xix (Daniel H. Foote ed., 2007).

12. SHIHŌ SEIDO KAIKAKU SHINGIKAI [JUSTICE SYSTEM REFORM COUNCIL], SHIHŌ SEIDO KAIKAKU SHINGIKAI IKENSHO—21 SEIKI NO NIHON O SASAERU SHIHŌ SEIDO [RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL—A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY] (2001), available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> [hereinafter REFORM COUNCIL RECOMMENDATIONS].

13. *Id.* at 77.

14. *Id.*

OVERVIEW OF THE APPOINTMENT PROCESS FOR LOWER COURT JUDGES¹⁵

In Japan's career judiciary, the vast majority of judges¹⁶ commence their judicial careers with appointment to ten-year terms as assistant judges, immediately upon completion of training at the Legal Training and Research Institute (LTRI).¹⁷ Each year, a new cohort of assistant judges is appointed. Between 1970 and 2002 (after which the reforms discussed below began), the number of newly appointed assistant judges ranged from a low of 57 to a high of 112.¹⁸ Under the Constitution of Japan, lower court judges must stand for reappointment every ten years.¹⁹ The great majority of judges seek reappointment, but some decline to do so or resign from the judiciary; and at least some of those who have left the judiciary evidently have done so after being advised they might face difficulty securing reappointment.²⁰ Until recently, however, virtually all those who

15. Almost certainly the most extensive examination to date of the Japanese judicial selection system is Ii Takayuki, *Saibankan sennin seido no saiteii: Nihon ni okeru meritto serekushon no keiju to hen'yō* [Repositioning the Judicial Selection System: Japan's Reception and Transformation of Merit Selection] (Mar. 2009) (unpublished Ph.D. dissertation, Waseda University School of Law) [hereinafter Ii, *Judicial Selection*]. Ii has summarized key aspects of his research and findings in a recent article in English. Takayuki Ii, *Japanese Way of Judicial Appointment and Its Impact on Judicial Review*, 5 NAT'L TAIWAN UNIV. L. REV. 73 (2010), available at <http://www.law.ntu.edu.tw/ntlalawreview/articles/5-2/03-Article-Takayuki%20Ii.pdf> [hereinafter Ii, *Japanese Way*]. Other noteworthy examinations of the lower court appointment process and judicial career system (in English) include: Abe, *supra* note 3; Miyazawa, *supra* note 3; O'Brien & Ohkoshi, *supra* note 3; RAMSEYER & RASMUSEN, *supra* note 6, at 7–15; and Haley, *supra* note 2, at 102–05.

16. Ever since its enactment in 1947, the Courts Act has authorized the appointment as judges of those possessing over ten years of experience as prosecutors, lawyers, or legal academics, Saibanshō [Courts Act], Law No. 59 of 1947, art. 42. Traditionally, it has been very rare for lawyers, not to mention prosecutors or academics, to enter the judiciary; and, despite recent efforts to invigorate the process for recruiting lawyers as judges, the number of lawyers entering the judiciary remains low. For a discussion of these efforts, see Daniel H. Foote, *Recent Reforms to the Japanese Judiciary: Real Change or Mere Appearance?*, 66 HŌSHAKAIGAKU 128, 134–40 (2007).

17. In Japan, those who have passed the bar exam must complete an additional legal training program, currently one year in duration, prior to entering the legal profession. The program includes two months of instruction at the LTRI, a body under the aegis of the Supreme Court, and ten months of “practical training” (*jūsumu shūshū*, frequently translated into English as “apprenticeship training”) in courts, prosecutors' offices, and law firms.

18. See Ii, *Japanese Way*, *supra* note 15, at 85–86.

19. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 80, sec. 1.

20. According to a summary of the judicial appointment system prepared by the Supreme Court for presentation to the Reform Council:

The great majority of assistant judges with ten years of experience . . . seek appointment as judges; and nearly all of them are appointed as judges. When an assistant judge seeks appointment as judge, but, based on his/her performance as assistant judge, health condition, or other factors the prospects for appointment as judge are low, it is customary to advise the candidate in advance; and it is rare for such a candidate to pursue appointment to the end, which would result in so-called denial of reappointment.

Saikōsaibansho [Supreme Court], Saibankan seido no kaikaku ni tsuite [On the Reform of the Judicial

elected to remain in the judiciary have been reappointed for successive ten-year terms, up until mandatory retirement at age 65.²¹

Pursuant to the Constitution of Japan, which was adopted in 1947, “[t]he judges of the inferior courts shall be appointed by the Cabinet *from a list of persons nominated by the Supreme Court.*”²² This provision was shaped by the Constitution drafting committee of the General Headquarters of the Supreme Commander for the Allied Powers (GHQ) and bore a strong U.S. influence.²³ The drafters evidently viewed this provision as ensuring judicial independence by granting to the Supreme Court primary authority to prepare the list of candidates, while at the same time ensuring political input into the selection process by entrusting ultimate authority for appointment to the Cabinet and by requiring lower court judges to stand for reappointment every ten years.²⁴

Prior drafts of the above provision would have ensured an even greater role for the Cabinet in selecting judges. According to one early draft, the government would choose judges from a list of at least four candidates for every vacancy, at least two of whom would be nominated by the Supreme Court and two more nominated in a manner designated by the Diet.²⁵ According to a somewhat later draft (the draft the GHQ initially submitted to the Japanese government), the Cabinet would choose judges from a list of at least two candidates for every vacancy, with those candidates to be nominated by the Supreme Court.²⁶ Thus, the GHQ evidently envisioned a procedure similar to the so-called Missouri Plan or merit selection plan in the United States, in which a nominating committee screens candidates for suitability and compiles a list containing the names of multiple candidates

System] 8 (Feb. 19, 2001) (unpublished paper presented at 48th meeting of Reform Council), [hereinafter Reform Council paper], available at <http://www.kantei.go.jp/jp/sihouseido/dai48/pdfs/48bessi3.pdf>. Similarly, the summary reports that, while “matters relating to personnel management have been treated as secret,” in the case of judges facing reappointment, “as a form of advice, it has not been uncommon to point out to judges issues with regard to their performance of duties or prospects for reappointment well in advance of the time for reappointment,” while acknowledging that “this has not always been done.” *Id.* at 14.

21. See *Ii, Japanese Way*, *supra* note 15, at 84–86. As Ramseyer explains in his article in this volume, a select few career judges cap off their judicial careers with appointment to the Supreme Court, for which the mandatory retirement age is 70. J. Mark Ramseyer, *Do School Cliques Dominate Japanese Bureaucracies?: Evidence From Supreme Court Appointments*, 86 WASH. U. L. REV. 1681 (2011).

22. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 80, sec. 1 (emphasis added).

23. *Ii*, Judicial Selection, *supra* note 15, at 78–82.

24. *Id.*; see also DANIEL H. FOOTE, NA MO NAI KAO MO NAI SHIHŌ: NIHON NO SAIBAN WA KAWARU NO KA [NAMELESS FACELESS JUSTICE: WILL JAPAN’S COURTS CHANGE?] 70–71, 90–91 (Masayuki Tamaruya trans., 2007).

25. *Ii*, Judicial Selection, *supra* note 15, at 81; see also FOOTE, *supra* note 24, at 90–91.

26. See *Ii, Japanese Way*, *supra* note 15, at 81, and sources cited therein.

for each vacancy, from which the responsible political authority (typically the governor or state legislature) selects one person for appointment as judge.²⁷

Apart from a brief period immediately after the Supreme Court was established in 1947,²⁸ actual practice has been far different from the envisioned approach. In a report prepared for the Reform Council, the Supreme Court explained actual nomination practice in the following manner:

With respect to designation of candidates for appointment as lower court judges, the Supreme Court, at the Judicial Conference, determines those persons who are suitable for appointment as judges, from among those who have attained the qualifications for appointment as specified in the Courts Act and who have indicated their desire to be appointed, and sends the list of their names to the Cabinet.

A separate list is prepared for each category of positions to be filled. As to the number of persons to be listed, there is no provision stipulating whether it is sufficient for the list to contain exactly the same number of names as the number of positions to be filled, or whether a greater number of names must be included on the list. In practice, in accordance with custom, . . . in the cases of appointment of High Court presidents, judges, and assistant judges, a list is prepared that contains one name more than the number of positions to be filled. Then, red circles are affixed next to the names of those candidates deemed suitable by the Supreme Court In the case of reappointment, apart from including a notation of the end of the period of appointment, the same procedure is followed.²⁹

Thus, for example, in a year in which sixty-five new assistant judges were to be appointed, the Supreme Court would have prepared and submitted to the Cabinet a list of sixty-six names, with red circles next to the names of the desired sixty-six.³⁰

27. *Id.*, Judicial Selection, *supra* note 15, at 80–81 (citing JOANNE MARTIN, MERIT SELECTION COMMISSIONS: WHAT DO THEY DO? HOW EFFECTIVE ARE THEY? 1–23 (1993); CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 125–45 (1997)); *see also* FOOTE, *supra* note 24, at 89–90 (citing Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176 (1980)).

28. *Id.*, *supra* note 15, at 86–87 & n.36.

29. Reform Council paper, *supra* note 20, at 8.

30. In Japan, a red circle is a sign of approval.

As the above summary notes, responsibility for compiling the list of candidates rests with the Judicial Conference—that is, the conference of all fifteen Supreme Court Justices.³¹ Review by the Judicial Conference evidently is not a complete formality. In recently published memoirs, former Justice Takii Shigeo, who served from 2002 to 2006, reported that during his tenure on the Court, “there were occasions on which [the Judicial Conference] spent time discussing such matters as judicial pay, the *saiban’in* (lay participation) system, and *initial appointments and reappointments of judges*.”³² As Takii made clear, though, such discussions were an unusual occurrence:

With respect to personnel [and other] matters, individual justices lack sufficient information to express an opinion regarding most proposals Of course, if justices have doubts regarding a certain matter, they are in a position to demand and receive an explanation. Yet, given the fact that proposals have gone through many stages of consideration before being scheduled for discussion, it would seem irresponsible to engage in seemingly spur-of-the-moment debate without reviewing all the developments to date, so justices often hesitate to speak.³³

Elsewhere, moreover, Takii reported, “The Supreme Court General Secretariat prepares proposals relating to personnel [and other] matters These proposals are discussed at the Judicial Conference, but the reality is that they are approved in nearly the same form as the proposal. I cannot recall an instance in which a proposal was revised at the Judicial Conference.”³⁴ Other accounts confirm the very limited role played by the Judicial Conference in the nomination process.³⁵ In practice, it is the Supreme Court General Secretariat that has conducted the screening and has prepared the lists of assistant judges and judges for nomination, and the Judicial Conference simply confirms those lists.³⁶

As to the criteria used in selecting candidates, in its report to the Reform Council, the Supreme Court provided the following explanation:

31. The Judicial Conference’s responsibility for matters of judicial administration is codified in Saibanshohō [Courts Act], Law No. 59 of 1947, art. 12.

32. TAKII SHIGEO, *SAIKŌSAIBANSHO WA KAWATTA KA—ICHI SAIBANKAN NO JIKO KENSHŌ* [HAS THE SUPREME COURT CHANGED?—SELF-EXAMINATION BY ONE JUSTICE] 37 (Iwanami Shoten, 2009) (emphasis added).

33. *Id.*

34. *Id.* at 17.

35. *E.g.*, II, *Japanese Way*, *supra* note 15, at 83–88, and sources cited therein.

36. *Ii*, *Judicial Selection*, *supra* note 15, at 84.

As attributes and abilities necessary for lower court judges, we might list, first of all, a high level of ability and judgment (*shikiken*) as a jurist (*hōritsuka*). It goes without saying that, for a judge, above all one must possess expert knowledge and ability of both a theoretical and practical nature necessary for determining facts, interpreting and applying law, and disposing of cases That said, one cannot say definitively the precise level of ability that is required; and when it comes to the matter of judgment, a very wide range of factors must be considered on a comprehensive basis, including breadth of vision resting on broad-based education, insight into human nature, and understanding of societal phenomena, for starters. In addition, with respect to character and personality, evaluation is undertaken from a broad range of perspectives relating to matters such as integrity, fairness, open-mindedness, patience, decisiveness, prudence, care, independent spirit, spiritual courage, cooperativeness, drive, etc It is by no means easy, however, to grasp as objectively as possible and assess comprehensively attributes and abilities involving many aspects of character. It is for reasons such as this that the Supreme Court has, up to now, taken the position that the standard for appointment of judges is whether, based on a comprehensive assessment of ability, character, etc., the person is deemed suitable to serve as a judge.³⁷

RECENT REFORMS TO THE APPOINTMENT PROCESS FOR LOWER COURT JUDGES

The Reform Council expressed reservations regarding the appointment process. In its final recommendations, the Council observed: “[t]he Cabinet appoints judges for the lower courts based on a list of persons nominated by the Supreme Court. . . . However, [under the existing system] the process by which the Supreme Court nominates candidates is not necessarily clear, and the views of the people cannot penetrate that process.”³⁸ To meet these concerns, the Council announced, as broad goals for reform, “reflecting public views . . . in the process of appointing judges and . . . secur[ing] transparency and objectivity of personnel evaluations.”³⁹ The Council then set out the following concrete

37. Reform Council paper, *supra* note 20, at 12.

38. REFORM COUNCIL RECOMMENDATIONS, *supra* note 11, at 95 (page number based on original Japanese text).

39. *Id.*

recommendations for achieving those goals: “[To] strengthen[] the [public] confidence of the people toward the judges, in order to reflect the views of the people in the [appointment process] . . . a body should be established in the Supreme Court, which, upon receiving consultations . . . selects appropriate candidates . . . and recommends the results . . . to the Supreme Court.”⁴⁰ Furthermore, “mechanisms should be established to assure that the process is transparent, including disclosing the selection standards, procedures, schedule and other matters.”⁴¹

Acting on these recommendations, in 2003, the Supreme Court established the Lower Court Judge Designation Consultation Commission (*Kakyūsaibansho saibankan shimei shimon iinkai*) (“Consultation Commission” or “Commission”), an eleven-member body situated within the Supreme Court.⁴² Members are appointed by the Supreme Court, but most come from outside the judiciary. Currently, the Commission consists of two judges, two lawyers, one prosecutor, and six “persons of learning and experience” from outside the legal profession (although one of those six, a legal academic, is former Supreme Court Justice Okuda Masamichi).⁴³ The Commission is charged with reviewing candidates for appointment as assistant judges or judges and candidates for reappointment as judges, based on lists of candidates prepared by the Supreme Court General Secretariat, and reporting its views to the Supreme Court.⁴⁴ The Commission is assisted by a general affairs section, staffed by members of the Supreme Court General Secretariat.⁴⁵ In addition, to assist the Commission in gathering information regarding the candidates, eight regional bodies also were established, one in each of the eight high court jurisdictions.⁴⁶

40. *Id.*

41. *Id.* The Reform Council recommended other reforms to the judiciary, including measures intended to broaden the perspectives of judges, both by recruiting more judges at the mid-career level from among the ranks of experienced lawyers and by ensuring that all judges would spend a significant period of time outside the judiciary. Those reforms lie beyond the scope of this essay. For a discussion of those reforms and their impact, see Foote, *supra* note 16.

42. *Kakyūsaibansho saibankan shimei shimon iinkai* [Lower Court Judge Designation Consultation Commission], SAIKŌSAIBANSHO [SUPREME COURT], <http://www.courts.go.jp/saikosai/about/iinkai/kakyusaibansyo/> (last visited May 8, 2011).

43. *Kakyūsaibansho saibankan shimei shimon iinkai meibo* [List of Members, Lower Court Judge Designation Consultation Commission], SAIKŌSAIBANSHO [SUPREME COURT], http://www.courts.go.jp/saikosai/about/iinkai/kakyusaibansyo/iinmeibo_kakyusaibansyo.html (last visited May 8, 2011).

44. *Kakyūsaibansho saibankan shimei shimon iinkai kisoku* [Lower Court Judge Designation Consultation Commission Rules], Sup. Ct. Rule No. 6 of 2003, art. 2, available at http://www.courts.go.jp/kisokusyū/sonota_kisoku/sonota_kisoku_03.html.

45. *Id.* art. 18.

46. *Id.* arts. 12–16.

Minutes of the Consultation Commission's meetings are published and available on the Internet, albeit in summarized form and without identifying the speakers by name.⁴⁷ Even so, by carefully perusing the minutes, one can learn a good deal about the procedures followed by the Commission. In terms of overall process, the General Secretariat prepares reports on the candidates, and a five-member subcommittee of the Commission then reviews the candidates and reports back to the full Commission, which deliberates before finalizing its evaluations.⁴⁸ For the appointment of new assistant judges, grades at the LTRI constitute a "major factor," along with reports prepared by judges who serve as instructors at the LTRI.⁴⁹ In the cases of promotion of assistant judges to judge status and reappointment of judges (which are treated together in the Commission proceedings and records, and hereinafter will be referred to collectively as "reappointment of judges" or simply "reappointments"), "the Commission first separates out," based primarily on reports prepared by the chief judges of the courts where the candidates have been stationed, "those candidates whose suitability is deemed to necessitate careful evaluation (priority review candidates) and then places special weight on the deliberations regarding those candidates."⁵⁰ In addition to the reports prepared by other judges, the pool of available information with respect to the priority review candidates includes information collected by the regional committees from attorneys and prosecutors in the districts where the candidates have been serving.

The summarized minutes also reveal the number of candidates that the Consultation Commission has judged to be suitable or unsuitable for appointment, as well as the number of those who have withdrawn their names from consideration. Over the first seven years since the Commission was instituted, it has found 770 of the applicants for new appointments as assistant judges to be suitable and 44 unsuitable, with

47. The summarized minutes and other materials are available at the Commission homepage, *Kakyūsaibansho saibankan shimei shimon iinkai* [Lower Court Judge Designation Consultation Commission], COURTS IN JAPAN, <http://www.courts.go.jp/saikosai/about/iinkai/kakyusaibansyo/index.html> (last visited May 17, 2011).

48. See *Kakyūsaibansho saibankan shimei shimon iinkai* [Lower Court Judge Designation Consultation Commission], *Shimei no tekihi ni tsuite shingi suru tejun/hōhō ni tsuite (kentōyō tatakidai)* [Regarding the Process and Methods for Deliberating with Respect to Suitability for Designation (Discussion Draft)], *Shingi shiryō* [Deliberation Materials] No. 4 for Meeting No. 2 (July 1, 2003) [hereinafter *Process and Methods*], and summarized minutes for Meeting No. 2 (July 1, 2003) [hereinafter *Summarized Minutes*], available at <http://www.courts.go.jp/saikosai/about/iinkai/kakyusaibansyo/index.html>.

49. *Process and Methods*, *supra* note 48.

50. *Id.*

another 33 candidates reported to have withdrawn.⁵¹ With respect to reappointments, over the same period, the Commission has found 1277 candidates suitable and 29 unsuitable, with another 8 reported as having withdrawn.⁵² While the Supreme Court is not legally bound to follow the views of the Commission in preparing the lists of candidates for appointment for submission to the Cabinet, it reportedly has done so in every case to date, with the exception of candidates who withdrew their names from consideration after Commission review.⁵³

The approval rates, nearly 95% in the case of new assistant judges and nearly 98% for reappointments, may seem high; but even so, the new system appears to be considerably stricter than in the past. In the fifteen years before the new system went into effect, only 9 out of over 1400 applicants for appointments as assistant judges were rejected, and between 1970 and 2002, only 3 judges who sought reappointment were rejected.⁵⁴ Just how much stricter is open to debate, however. Under the old system, only formal denials of appointment or reappointment were made public. If candidates withdrew their applications after being told privately that the Supreme Court could not support them, those cases never appeared in the public record. As the Supreme Court acknowledged in its summary to the Reform Council, in the past, the borderline candidates—the so-called priority review candidates under the new system—typically were informally advised not to seek reappointment, and thus would not have shown up in the denial statistics.⁵⁵

HAS TRANSPARENCY BEEN ACHIEVED?

Determining whether the standards have changed—and, if so, why—is virtually impossible. Doing so would require comparing the standards and the manner in which they were applied under the old system and under the

51. Numbers for assistant judge appointments compiled from the summarized minutes for Meetings: No. 5 (Oct. 6, 2003), No. 11 (Oct. 4, 2004), No. 18 (Oct. 3, 2005), No. 24 (Oct. 2, 2006), No. 29 (Sept. 7, 2007), No. 31 (Dec. 21, 2007), No. 34 (Sept. 5, 2008), No. 36 (Dec. 19, 2008), No. 39 (Sept. 8, 2009), and No. 41 (Dec. 19, 2009). Summarized Minutes, *supra* note 48.

52. Numbers for reappointments compiled from the summarized minutes for Meetings: No. 6 (Dec. 2, 2003), No. 13 (Dec. 3, 2004), No. 16 (June 10, 2005), No. 19 (Dec. 9, 2005), No. 22 (July 7, 2006), No. 25 (Dec. 8, 2006), No. 28 (June 29, 2007), No. 30 (Dec. 7, 2007), No. 35 (Dec. 5, 2008), and No. 40 (Dec. 1, 2009). *Id.*

53. Kimura Kiyoshi, *Kakyūsaibansho saibankan shimei shimon iinkai seido no genjō to kongo no tenbō* [The Current Status of the Lower Court Judge Designation Consultation Commission System and Prospects for the Future], 60 JIYŪ TO SEIGI, no. 10, at 22, 25 (2009).

54. Ii, *Japanese Way*, *supra* note 15, at 84–86.

55. *Id.*; see *supra* note 20 and accompanying text.

new system. As we have seen, under the old system, those matters were shrouded in secrecy. They still are.

Shortly after it was established, the Commission released a “discussion draft,” labeled as a “rough policy” (*ichiō no hōshin*), of the standards to be used for determining suitability for appointment.⁵⁶ Although somewhat longer than the Supreme Court’s summary to the Reform Council of the criteria for selection of judges,⁵⁷ the standards announced by the Commission closely parallel those criteria.⁵⁸ As with the earlier explanation, the standards remain at a rather high level of abstraction and list a very wide range of attributes, some of which, such as “decisiveness” and “cautiousness,” contrast sharply in meaning. This may be inevitable because the range of attributes relevant for selecting judges is broad and, depending on the context, some of those attributes may sound like near opposites. Yet, without further explanation or concrete examples, the standards announced by the Commission provide only a very generalized picture. And the Commission and Supreme Court have continued steadfastly to refuse to provide any further guidance regarding the standards applied.

When it comes to the concrete application of the selection standards, the summarized minutes are totally pro forma in nature. In reporting the results of deliberations, the minutes routinely utilize the exact same formulaic language: “A report was made on the results of consideration by the subcommittee. Based on [those results], deliberations were held on the suitability of candidates As a result, of the [X] candidates, [Y] were deemed suitable, [Z] were deemed unsuitable, and the determination on [W] candidates was deferred.”⁵⁹ No indication is given of how many candidates were designated as priority-review candidates, much less their names. Nor does the Commission ever disclose the grounds for determinations of unsuitability. From the summarized minutes, one cannot even tell how long either the subcommittee or the full Commission spent on the review and deliberations. Upon formal appointment by the Cabinet,

56. Kakyū saibansho saibankan shimei shimon iinkai [Lower Court Judge Designation Consultation Commission], Shimei shimon iinkai ni oite shimei no tekihi ni tsuite handan suru kijun ni tsuite (kentōyō tatakidai) [Regarding the Standards for Determining Suitability for Designation, for the Designation Consultation Commission (Discussion Draft)], Shingi shiryō [Deliberation Materials] No. 6 for Meeting No. 3 (July 14, 2003) [hereinafter Standards], available at <http://www.courts.go.jp/saikosai/about/iinkai/kakyusaibansyo/index.html>.

57. See *supra* text accompanying note 37.

58. For a more detailed discussion of the standards announced by the Commission, see Foote, *supra* note 16, at 144–46.

59. See, e.g., Summarized Minutes, *supra* note 48 (Meeting No. 5 (Oct. 6, 2003)).

the names of the appointees are announced.⁶⁰ The Commission itself does not release the names of the candidates it has judged suitable, however, nor does the Commission ever announce the names of candidates judged unsuitable or those who have withdrawn from consideration.

As the following examples reflect, on several occasions, the Consultation Commission and members of the Commission's general affairs section (from the Supreme Court General Secretariat) have resisted efforts to obtain more detailed explanations regarding the standards applied and have expressed deep concern over revelations of even relatively limited information regarding concrete cases and over attempts to identify specific criteria for determinations of unsuitability.

In 2003, a leak occurred, presumably at the regional committee level, through which a local bar association learned the *number*, but not the identity, of the "priority review candidates" in that region.⁶¹ At a meeting in early 2004, a member of the general affairs section reported this matter to the Commission as a serious confidentiality concern and took the occasion to remind the Commission members of their sworn duty of confidentiality under the National Public Servants Act.⁶²

In that same meeting, the Consultation Commission considered a request, submitted in writing to the Commission chair by fourteen former trainees at the LTRI, seeking the disclosure of "more concrete standards for suitability for appointment as assistant judges," because, the former trainees stated, "from the . . . policies disclosed heretofore in the summaries of the Commission's proceedings, the standards for . . . suitability for appointment . . . are not clear."⁶³ At least two Commission members voiced support for greater disclosure.⁶⁴ Officials from the Supreme Court, however, opposed further disclosure.⁶⁵ A member of the Commission's general affairs section expressed concern over the possibility that Commission members might agree on the conclusion with regard to a given candidate but differ in their reasons, and reminded the Commission that in the past the Supreme Court's standard approach "has been to explain that the result reflects an assessment of the entire

60. *Id.*, *supra* note 15, at 100. To this author's knowledge, as of this writing in March 2011, no case has been reported in which the Supreme Court has failed to abide by the Commission's recommendation.

61. Summarized Minutes, *supra* note 48 (Meeting No. 8 (March 29, 2004)).

62. *Id.*

63. *Id.*

64. Since the summarized minutes do not identify the speakers, one cannot tell their backgrounds.

65. Summarized Minutes, *supra* note 48 (Meeting No. 8 (March 29, 2004)).

person.”⁶⁶ Presumably with the Reform Council’s call for “mechanisms to assure the process is transparent” in mind, he or she added, “Does not the very fact this Commission was established constitute a response, in the sense that including knowledgeable persons from outside, in a process that previously had been handled as an internal judicial matter, has improved transparency?”⁶⁷

A witness, an official from the Personnel Division of the Supreme Court General Secretariat,⁶⁸ reiterated opposition to greater disclosure, stating:

Grades are an important reflection of attributes and abilities. But it is extremely difficult to fix any absolute standard, even as a minimum cutoff. It would cause trouble if people get the sense it’s enough to satisfy that standard. Personal character is an extremely important factor, and this Commission cannot help but to evaluate character comprehensively, taking into account reports by LTRI instructors et al.⁶⁹

The chair, former Justice Okuda, concluded discussion of the topic by stating:

The number of LTRI trainees will be shifting in the future, and disclosing standards to trainees seeking judicial appointments might tie our hands and reduce our ability to adapt. *Wouldn’t it be wise to wait for a little while (mō sukoshi) to see how things develop?* Disclosure of standards is a difficult issue, and so is disclosure of reasons [for determinations of unsuitability]. When a candidate’s health is such that he/she simply could not perform the duties, we can clearly state the reason is health-related. But when the reason rests on a combination of multiple factors, it is in a sense inevitable that any explanation turns into an abstract reference to attributes and abilities.⁷⁰

Okuda closed his comments by echoing the Supreme Court official’s interpretation of the concept of “transparency,” stating, “All we can do is

66. *Id.*

67. *Id.*

68. The list of attendees at Meeting No. 8, item 3 of the summarized minutes for that meeting, includes the witnesses who appeared at the meeting. According to that list, the only two witnesses who participated in that meeting were the head of the Personnel Division and a section head from the Personnel Division. *Id.*

69. *Id.*

70. *Id.* (emphasis added).

seek understanding that the establishment of this Commission serves as a systematic measure to assure transparency.”⁷¹

Notwithstanding Okuda’s reference to waiting “a little while to see how things develop,” the passage of over five additional years evidently did not weaken the resistance of the Commission and Supreme Court to disclosure of more concrete information regarding the relevant standards or reasons for determinations of unsuitability. The October 2009 issue of the official journal of the Japan Federation of Bar Associations (JFBA), *Jiyū to seigi (Liberty and Justice)*, contained a special feature on the Consultation Commission and lower court appointments.⁷² One of the articles undertook a categorization of the reasons for findings of unsuitability, based on an “analysis and review of such cases.”⁷³ The reaction of the Commission and Supreme Court to publication of the article bordered on outrage.⁷⁴

At the Commission’s next meeting, a member of the general affairs section stated:

On behalf of the general affairs section for this Commission, we gave notice to the JFBA that this report was written in such a way as to give rise to the mistaken impression that the internal deliberations and materials of this Commission had been obtained and analyzed. We expressed the view that this may cause candidates unnecessary concern and distress and may undermine trust in this Commission.⁷⁵

In response, the general affairs section continued, the JFBA said the article was based on “comprehensive, rational conjectures and assessments based on general guidelines for case disposition, etc., information from lawyers, and the like, and there was no breach of confidentiality by any Commission member,” and pledged that, in the future, the JFBA would exercise care to avoid any concern over breach of confidentiality or giving mistaken impressions to judges.⁷⁶ Notwithstanding this explanation, the summarized minutes report:

The chair stated that he found it deplorable that [actions of this sort] should give rise to suspicions regarding breaches of confidentiality

71. *Id.*

72. 60 *JİYŪ TO SEIGI*, no. 10 (2009).

73. Kimura, *supra* note 53.

74. Summarized Minutes, *supra* note 48 (Meeting No. 40 (Dec. 1, 2009)).

75. *Id.*

76. *Id.*

and should lead to a loss of faith in the Commission. The members of the Commission all joined in expressing the view that this constitutes a decisively important matter for securing trust in this Commission by candidates and those who provide information to us, and reconfirmed the need for prudence and caution to avoid any suspicions in this regard.⁷⁷

What, one might ask, was the content of the article that caused so much consternation? The article did not refer to any concrete cases. Nor did it seek to specify the level of attainment candidates were expected to meet with regard to any of the factors identified, although the author did state, “While it depends on the case, it seems candidates who are deficient in multiple respects or are seriously deficient in one relevant respect are being deemed unsuitable.”⁷⁸ Otherwise, the section of the article in question consisted solely of lists of factors that “had been identified” as reasons for findings of unsuitability. With respect to candidates for initial appointment as assistant judges, the entire list is as follows:

- (1) Bad grades at the LTRI: Below average
- (2) Problems regarding character/judgment: Poor attitude in training period
- (3) Problems with regard to suitability as judges.⁷⁹

With respect to reappointments, the entire list is as follows:

- (1) Insufficient ability: case backlog, practical ability below norm
- (2) Lack of capacity: arrogance toward parties, inappropriate statements; dictatorial case management; neglect of duties, lack of motivation; indecisiveness; lack of personal objectivity, lack of cooperativeness
- (3) Misconduct: commingling of public and private
- (4) Absence of prospects for improvement with respect to the preceding three items
- (5) Health problems: mental trouble; grave illness.⁸⁰

77. *Id.*

78. Kimura, *supra* note 53, at 23.

79. *Id.* at 24.

80. *Id.* at 23–24. The article also included a list of factors implicated in findings of unsuitability for lawyers seeking appointment to the judiciary. That topic lies beyond the scope of this essay.

One can understand why the judiciary might be sensitive about some of the items on these lists. The reference to health problems and mental trouble, for example, might give rise to questions about stress or whether the judiciary is doing enough to provide care and accommodation for judges with health concerns. Yet the Commission's own generalized statement of standards lists health problems as a relevant factor for determinations of suitability, and, as mentioned above, in an earlier meeting, the chair himself mentioned health as the type of clear-cut factor that could be disclosed without concern.⁸¹ One can also imagine the judiciary would not be pleased with the revelations, unsurprising as they may be, that some judges are arrogant toward parties or dictatorial in how they handle cases. From the standpoint of the general public, though, it surely would come as welcome news to learn the Commission is paying due heed to issues of this sort. And, depending on the degree, "commingling of public and private" raises such serious concerns that the Japanese public presumably would not want such conduct to be kept hidden behind closed doors.

The objections of the Commission and Supreme Court to the article do not seem to relate to any specific items on the lists. Rather, those bodies seem opposed to the very notion of revealing any concrete reasons for determinations of unsuitability, beyond the generalized statement of standards and the platitudinous phrase "comprehensive" "assessment of the entire person."⁸² Moreover, they seem aghast at the thought that anyone might suspect the Commission or Supreme Court staff of having revealed any specifics of the Commission's deliberations and reasoning. They also seem firmly convinced that the only way someone could compose a list of reasons for determinations of unsuitability would be by gaining access to information regarding the Commission's internal workings. In sum, just as in 2004, the Commission's and Supreme Court's understanding even today appears to be that the calls for transparency regarding the selection standards are satisfied by the existence of a body—the Commission itself—for which all the members are sworn to absolute secrecy.

81. *See supra* text accompanying note 70.

82. *See supra* text accompanying notes 71, 74.

CONCLUDING REMARKS

In prior works, I have characterized Japan's judiciary as a "nameless, faceless" judiciary.⁸³ That is not literally true, of course. Judges' names are a matter of public record, and news coverage of cases typically includes the name of the presiding judge. Moreover, for a few minutes prior to the start of courtroom proceedings, the judiciary routinely permits photographers from accredited news organizations to shoot still photos and videos of the judge or judges sitting silently on the bench; and the print media and television frequently use those photos or videos in reporting on major cases. Even so, Japanese judges operate in near anonymity. Their names may be a matter of public record, but their backgrounds and personalities are almost completely unknown to the general public. In Japan's career judiciary, judges typically are transferred every three years, so even in relatively close-knit rural regions, judges are likely to move by the time residents begin to know who they are.⁸⁴

This relative anonymity, I have argued, is consistent with the dominant ethos of the Japanese judiciary, an ethos of uniformity. People's trust in the judiciary is seen as resting largely on the view (or mythology) that the identity of judges does not matter, since procedures and outcomes will be the same no matter who the judges are. Within the judiciary, great weight is placed on respect for precedent, thereby helping ensure uniformity in outcomes. Efforts are also made to standardize matters ranging from size of awards and length of sentences to opinion format, writing style, and even courtroom design.⁸⁵ In accordance with the view that the identity of the judge does not matter, it is even accepted that judges may change midway through trials (which often last one or two years or longer, since hearings usually are held on a piecemeal basis, with a month or more between sessions).⁸⁶ In keeping with the ethos of uniformity, individual differences among judges are downplayed and kept out of public view. The appointment process comports with this fundamental philosophy, and the recent reforms have done little to change the situation. Despite the push for transparency, concrete selection standards remain a matter of conjecture, and judges still are nearly anonymous.

83. FOOTE, *supra* note 24. Aspects of the thesis are discussed in Daniel H. Foote, *Restrictions on Political Activity by Judges in Japan and the United States: The Cases of Judge Teranishi and Justice Sanders*, 8 WASH. U. GLOB. STUD. L. REV. 285 (2009).

84. Haley, *supra* note 1, at 102–05.

85. See, e.g., FOOTE, *supra* note 24, at 14–15.

86. *Id.* at 16–17.