

RESTRICTIONS ON POLITICAL ACTIVITY BY JUDGES IN JAPAN AND THE UNITED STATES: THE CASES OF JUDGE TERANISHI AND JUSTICE SANDERS

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In the late 1990s, similar dramas relating to political activity by judges were playing out on opposite sides of the Pacific Ocean. The cases involved a Japanese decision concerning an assistant judge of the Sendai District Court, Teranishi Kazushi, and an American decision relating to a newly sworn-in justice of the Supreme Court of the State of Washington, Richard Sanders. Both attended gatherings with distinctly political agendas. Both made brief remarks implying, but never directly stating, their support for the agendas presented. Both were censured for having engaged in impermissible political activity. Both appealed those censures, ultimately as far as the Grand Bench of the Supreme Court of Japan and the Washington State Supreme Court, respectively. The decisions examined nearly the same set of factors and followed similar reasoning.

The most salient difference between the two cases lies in their final outcomes. In a split, ten-to-five decision, the Japanese Supreme Court found that Teranishi had engaged in impermissible political activity and upheld the censure; however, the Washington State Supreme Court unanimously overturned Sanders' censure, finding that his actions had not overstepped the applicable legal boundary. Perhaps even more striking than the difference in outcomes, however, is the difference in procedure between the two cases. In Washington State, all but the initial stage of the process was conducted in the open, subject to broad scrutiny by the public. In Japan, in contrast, most of the process was conducted behind closed doors, away from public scrutiny. This difference, I would submit, reflects a difference in the underlying philosophy of the two judicial systems. In the United States, public knowledge of who judges are, what they think, and how the judicial system operates is viewed as important for maintaining public trust in the judiciary. In Japan, however, the fundamental ethos of the judiciary is one of uniformity and anonymity. People's trust in the impartiality and fairness of judges rests largely on the

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view that the identity of the judge does not matter, that procedures and outcomes will be the same no matter who the judges are. In keeping with this ethos, which I have labeled elsewhere as Japan's "nameless, faceless judiciary,"¹ differences in judges' personalities and views, and the workings of the judiciary, are submerged and hidden from public view.

This Essay begins by setting out the basic facts of the two cases. After briefly examining the respective outcomes and legal reasoning, the Essay proceeds to a comparative examination of the procedures and the basic stance of the two systems.

I. THE ACTIVITIES AT ISSUE

A. *Japan: The Teranishi Case*

The gathering at issue in *In re Teranishi*² ("Teranishi case") occurred in April 1998, but the genesis of the matter lay more than six months earlier. The underlying debate concerned the proposed Organized Crime Countermeasures Acts,³ and, in particular, provisions contained in one of the three proposed Acts allowing wiretaps under certain circumstances, if authorized in advance by a warrant issued by a judge.⁴ After the Legislative Council (*Hōsei Shingikai*, a deliberative council attached to the Ministry of Justice) sent an outline of the bill to the Minister of Justice, Teranishi, who at the time had served as an assistant judge for over five years, submitted a comment to the *Asahi Shinbun* newspaper (Japan's second largest newspaper, with a daily circulation of over eight million).⁵

1. See FOOTE, *supra* note *.

2. This description of the facts is based primarily on the account contained in the Supreme Court decision, *In re Teranishi*, 52 MINSHŪ 1761 (Sup. Ct., Dec. 1, 1998), as supplemented by additional materials from a book written by Teranishi, TERANISHI KAZUSHI, YUKAI NA SAIBANKAN [A CHEERFUL JUDGE] (2000); newspaper accounts; and a panel discussion of the case by Teranishi and others, held at Waseda University in Tokyo on October 31, 1998.

3. These Acts consisted of a set of three interrelated acts, which contained provisions on confiscation of proceeds and other penalties, as well as on interception of communications. All three acts were submitted to the Diet in March 1998 and were enacted in August 1999. The two principal acts were: (1) Hanzai sōsa no tame no tsūshin bōju ni kansuru hōritsu [Act Concerning the Interception of Communications for the Purpose of Criminal Investigation], Law No. 137 of 1999; and (2) Soshikiteki na hanzai no shobatsu oyobi hanzai shūeki no kisei tō ni kansuru hōritsu [Act Concerning Punishment of Organized Crimes and Regulation of Criminal Proceeds, Etc.], Law No. 136 of 1999. The third act contained a few conforming amendments to the Code of Criminal Procedure.

4. Until that time, Japanese law contained no express authorization for wiretaps, and controversy raged over whether wiretaps could ever be conducted lawfully.

5. *In re Teranishi*, 52 MINSHŪ at 1767.

After identifying himself as an assistant judge, Teranishi wrote, in part:

[In the proposed bill,] interception of communications is to be conducted on the basis of a warrant issued in advance by a judge. Some people say this means there is no fear of wiretap abuse. However, as one who has had the opportunity to come in contact to a certain extent with the real circumstances of review of warrant applications by judges, I find it impossible to believe that review of warrant applications by judges will constitute a bulwark protecting human rights. The reality is that warrants are issued almost entirely in accordance with the wishes of prosecutors and police. Some people say this is the result of the fact that prosecutors and police are undertaking warrant requests in an appropriate manner. However, under existing law no warrant exists that authorizes investigations by wiretap, and the overwhelming consensus of criminal procedure scholars is that investigations by wiretap are illegal. Nonetheless, permits for inspection by telephone wiretap have been issued, and multiple district court and high court judgments have condoned the constitutionality and legality of such permits. In light of this fact, I cannot believe [that the reason warrants are issued in accordance with the wishes of prosecutors and police lies in the fact that their requests are always proper]. Do you really think it is safe to entrust the consideration of wiretapping warrants, which relate to the important human rights of confidentiality of communications, privacy, and freedom of expression, to this sort of judge?⁶

This comment appeared under the title “Unreliable Review of Wiretap Warrants” in the *Asahi Shinbun* morning edition on October 2, 1997, in “Voices,” the readers’ comments section of the newspaper.⁷

Teranishi reportedly had submitted comments in the past on other topics related to the judiciary, but this time there was a reply.⁸ On October 8, the *Asahi Shinbun* ran a response, also in the “Voices” section, from Judge Tao Kenjirō, Deputy Chief Judge of the Tokyo District Court. Tao wrote, in part:

As one judge who has spent night and day considering warrant requests, I cannot ignore [Teranishi’s] remarks. . . . Not only are the

6. *Id.*

7. *Id.*

8. TERANISHI, *supra* note 2, at 162–63.

remarks far different from the reality of practices regarding warrants, they are nothing other than a grave insult to judges and other court personnel who are undertaking their duties seriously.⁹

In March 1998, the Cabinet submitted to the Diet the bills for the three Organized Crime Countermeasures Acts, including the bill for the Act Concerning Interception of Communications, which contained the provisions authorizing wiretaps pursuant to judicially issued warrants.¹⁰ Opposition to that bill was strong, and the debate became politically charged. Three organizations opposed to the bill decided to voice their opposition through a convention, which would include a symposium on “The Wiretapping Law and the Warrant Principle.”¹¹ Presumably in part because of his *Asahi Shinbun* comment, the organizers invited Teranishi to participate as a panelist in the symposium, and he accepted.

The convention coordinating committee prepared a leaflet concerning the symposium and other events associated with the convention, which bore the title *Crush the Wiretapping Act/Organized Crime Countermeasures Acts! Do Not Permit a Police State [keisatsu kanri shakai]! Convention April 18*. These leaflets were distributed to the general public, and were also posted widely in the vicinity of the Kokkai-gijidōmae Station of the Tokyo Metro (which adjoins the National Diet Building and is near the Supreme Court Building).¹² How the leaflet came to the attention of the chief judge of the Sendai District Court is not clear, but on April 9, 1998, the chief judge showed Teranishi a copy of the leaflet and asked him to explain it. According to the Supreme Court’s ruling, Teranishi admitted that he knew the convention opposed the bill and sought its defeat, and that he shared that view and planned to participate in the panel discussion. He said that, in his judgment, this did not constitute “actively engaging in political movements” (*sekkyokuteki ni seiji undō wo suru koto*)—conduct prohibited for judges under article 52(1) of the Courts Act;¹³ but he said that if the chief judge felt his participation in the panel discussion would violate that article, he wished to take some time to reconsider.¹⁴

The symposium took place as scheduled on April 18, 1998, with about five hundred people in attendance. Pursuant to his request, Teranishi’s

9. *Id.* at 163–64.

10. *In re Teranishi*, 52 MINSHŪ at 1767–68.

11. *Id.*

12. *Id.* at 1768–69.

13. Saibanshohō [Courts Act], Law No. 59 of 1947.

14. TERANISHI, *supra* note 2, at 179–82.

statement as a panelist was cancelled. Just before the panel discussion started, however, Teranishi spoke for a few minutes, from the general seating section of the hall.¹⁵ After making clear that he was an assistant judge at Sendai District Court, he made statements to the following effect,

Initially, it was my intention to participate as a panelist in this symposium on the topic of the wiretap act and the warrant principle. However, prior to this convention, I was warned by the chief judge that if I participated it might lead to disciplinary action, so I decided to cancel my participation as a panelist. As for myself, even if I were to speak from the standpoint of opposition to the bill, I do not think that it would constitute actively engaging in political movements as specified in the Courts Act, but I decline to speak as a panelist.¹⁶

Two weeks later, the Sendai District Court filed with the Sendai High Court a request for disciplinary action against Teranishi, on the ground that through his statement at the symposium, Teranishi had actively engaged in a political movement and thus had violated article 52(1) of the Courts Act. On July 24, 1998, the High Court issued a ruling on the request for discipline.¹⁷ It found that Teranishi “made a statement that manifested, by implication, his opposition to the bill, and thereby actively assisted a political movement aimed at defeat of the bill,” and issued a formal reprimand.¹⁸ Teranishi then appealed to the Supreme Court, where, as provided by the law governing cases of judicial discipline,¹⁹ the case was heard by the Grand Bench (all fifteen justices sitting en banc).²⁰

B. The United States: The Sanders Case

Shortly before the above events took place in Japan, a similar situation occurred in the United States, in the State of Washington. That case involved Richard Sanders, who was elected justice of the Washington State Supreme Court in November 1995.²¹ His swearing-in ceremony took place at the Supreme Court building in Olympia, Washington, the state

15. *In re Teranishi*, 52 MINSHŪ at 1769–70.

16. *Id.* at 1770.

17. *Id.* at 1815–16 (Sendai High Ct., July 24, 1998).

18. *Id.* at 1810–20.

19. Saibankan bungen hō [Judge Status Act], Law No. 127 of 1947, § 4.

20. The Supreme Court of Japan is divided into three so-called petty benches, each consisting of five justices, and the vast majority of cases are decided by the petty benches.

21. The following summary of the facts is based on the Washington State Supreme Court decision, *In re Disciplinary Proceeding Against Sanders* (*Sanders*), 955 P.2d 369 (Wash. 1998).

capitol, on January 26, 1996. On the same day, the anti-abortion organization Washington State March for Life (“March for Life”) held its annual rally in Olympia.²² The rally included a march, which took the group past the Supreme Court building to the steps of the Legislative Building, where various speakers addressed the crowd.²³

A few days earlier, Sanders had called a close friend, who was also the president of Human Life of Washington, another anti-abortion organization. Sanders told his friend that he would be attending the rally and that he would like to address the crowd.²⁴ As the Washington State Supreme Court explained in its later decision on the matter, “Justice Sanders knew at the time he sought an opportunity to speak at the rally that there was a ‘political aspect’ to the abortion issue as well as a ‘moral aspect.’”²⁵ When later asked whether he had taken any steps to determine whether the rally would be to support pro-life legislators and pro-life legislation, “Justice Sanders responded that he ‘didn’t do a great deal of research about this,’ but rather only read March for Life’s advertisement and spoke to [his friend].”²⁶ The advertisement had urged members of the public to join the rally and to “join and witness all life is sacred.” It further urged participants to carry a red rose, “the pro-life symbol.”²⁷

Following his swearing-in ceremony, Justice Sanders walked to the nearby rally, carrying a red rose.²⁸ Sanders said that he had worn the rose “because the sponsors had asked participants to carry one, in his estimation, ‘to identify themselves as a participant in the event.’”²⁹

When Justice Sanders arrived at the rally, the president of March for Life introduced him as a “Chief Justice.” Making light of the inaccurate introduction, he addressed the crowd:

Well, I’m not quite Chief Justice, but I am a Justice. That’s plenty good enough for me. I want to give all of you my best wishes in this celebration of human life. Nothing is, nor should be, more fundamental in our legal system than the preservation and protection of innocent human life. By coincidence, or perhaps by providence, my formal induction to the Washington State Supreme

22. *Id.* at 370.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

Court occurred about an hour ago. I owe my election to many of the people who are here today and I'm here to say thank you very much and good luck. Our mutual pursuit of justice requires a lifetime of dedication and courage. Keep up the good work.³⁰

Justice Sanders then immediately left the rally.

The Washington Commission on Judicial Conduct ("CJC"), the body charged with investigating complaints against judges and other cases in which there is "reason to believe" a judge should be investigated for possible misconduct,³¹ investigated Sanders' participation in the rally.³² After a confidential preliminary investigation, "[t]he CJC determined that probable cause existed to believe that Justice Sanders violated" five provisions of the Washington State Code of Judicial Conduct, including Canon 7(A),³³ relating to "Political Conduct in General," which states, in part, that judges "shall not . . . make speeches for a political organization" nor shall they "attend political functions sponsored by political organizations,"³⁴ and Canon 7(A)(5), which provides that "Judges should not engage in any other political activity except on behalf of measures to improve the law, the legal system or the administration of justice."³⁵ After a fact-finding hearing open to the public, the CJC found that Justice Sanders violated three canons, including Canon 7(A)(5), and "ordered that Sanders be reprimanded and required to complete a course in judicial ethics."³⁶ Justice Sanders appealed to the Washington State Supreme Court.³⁷

30. *Id.* at 371.

31. WASH. CONST. art. IV, § 31.

32. *Sanders*, 955 P.2d at 371.

33. *Id.*

34. *Id.* at 372.

35. *Id.*

36. *Id.* at 371.

37. The composition of the "supreme court" that considered Sanders' appeal is worthy of note. As one would expect, Sanders himself did not participate in the decision. None of the other sitting justices of the supreme court participated either. Out of concern over the tensions that might arise if the other eight justices had to decide on disciplinary matters relating to a colleague on the same court, a rule provides that, if a justice of the supreme court is the subject of a disciplinary proceeding, a substitute panel is constituted to hear the case. For that purpose, nine judges, selected from among the judges of the Washington State Court of Appeals (the chief judge of that court, plus eight other judges chosen by lot), are designated as supreme court justices *pro tempore*. Accordingly, in this anomalous case, the state "supreme court" in fact was composed entirely of judges from the court of appeals.

II. THE OUTCOMES: THE SUPREME COURT DECISIONS AND REASONING

Although the relevant standards in Washington are considerably more detailed than those in Japan, the main standards at issue in these two cases were similar: the prohibition on “actively engaging in political movements” contained in Article 52(1) of the Courts Act in Japan, and the prohibition on engaging in “political activity,” unless of a type subject to a specific exception, contained in the Code of Judicial Conduct in Washington. The decisions of the Supreme Court of Japan and the Washington State Supreme Court bear many similarities. Both courts found, for example, that judges enjoy the constitutional right to freedom of expression. Both courts also found, however, that this right must be balanced against the public interest in a fair and impartial judiciary.

Despite the similarities in their decisions, the courts weighed the balance rather differently. The Washington State Supreme Court placed great weight on judges’ right to free expression. It reiterated the importance of that right at several points in its opinion and held that the constitutionality of a restriction on that right must be subjected to a strict scrutiny test.³⁸ Accordingly, the court concluded, in order to overcome that right, “the state must establish a compelling interest and demonstrate that any restriction is narrowly tailored to serve that interest.”³⁹

In contrast, the Supreme Court of Japan placed great weight on the interest in a fair and impartial judiciary. While noting that “judges naturally enjoy freedom of expression as individual citizens,” the court emphasized that “this freedom is not absolute; it is subject to restriction based on other constitutional demands.”⁴⁰ While giving only limited mention to the values served by freedom of expression, at several points throughout the opinion the court recited in considerable detail the values promoted by restrictions on judges’ statements. The court, for example, expressed concern that politically-oriented conduct by judges “may erode the foundation on which the judiciary rests and may undermine the people’s trust in the impartiality and fairness of judges, and may also lead to improper interference and intrusion on the legislative and administrative powers.”⁴¹ The court later reiterated these concerns by stating, “the purposes of the prohibition are to protect the independence and the impartiality and fairness of judges, to maintain the trust of the people in

38. *Sanders*, 955 P.2d at 376.

39. *Id.* at 375.

40. *In re Teranishi*, 52 MINSHŪ 1761, 1776 (Sup. Ct., Dec. 1, 1998).

41. *Id.* at 1774.

the courts, and to regulate the relationships among the judicial, legislative, and administrative branches in the separation of powers.”⁴² Notably, the Japanese Supreme Court did not subject the restriction on freedom of expression to strict scrutiny. Although the opinion announced the governing standard to be whether “the restriction is reasonable and *limited to the least restrictive degree necessary*,”⁴³ the court had no trouble finding that the restriction was reasonable and did not even attempt to undertake an examination of whether other, less restrictive alternatives might have been available.⁴⁴

Thus, the Washington State Supreme Court tipped the balance in the direction of judges’ right to free expression, whereas the Japanese Supreme Court tipped the balance toward maintaining the image of a fair and impartial judiciary.

In a number of respects, Sanders’ conduct seems more problematic than Teranishi’s. If anything, the issue involved—abortion—is even more politically charged than wiretapping. Whereas Teranishi was invited to participate, Sanders initiated his participation himself, by calling the rally’s organizer and asking for the opportunity to address the gathering. Sanders indicated his support for the rally’s agenda not only by attending, but also by carrying a red rose symbolizing his solidarity with the cause. His remarks, including such phrases as, “[n]othing is, nor should be, more fundamental in our legal system,” and “[o]ur mutual pursuit of justice,”⁴⁵ could be seen as implying a commitment to use his judicial position to further the cause. The circumstances of his participation, on the steps of the state legislature, immediately after his swearing-in ceremony at the nearby supreme court, strengthen the impact of his actions. Sanders was, after all, a supreme court justice, whereas Teranishi was still an assistant judge. Notwithstanding all of these circumstances, the Washington State Supreme Court overturned Sanders’ censure, while the Japanese Supreme Court upheld Teranishi’s. Consequently, the single largest contrast between the two cases lies in their ultimate outcomes.

That said, these were not easy cases in either Japan or the United States. In Japan, five of the fifteen justices dissented, with five different dissenting opinions (four of which were joined by two of more justices) setting forth various grounds for disagreement with the majority. In

42. *Id.* at 1777.

43. *Id.* (emphasis added).

44. *Id.*

45. *In re Disciplinary Proceeding Against Sanders* (Sanders), 955 P.2d 369, 371 (Wash. 1998).

particular, the dissent by Justice Endō Mitsuo,⁴⁶ which argued that, given the vital importance of the freedom of expression, any restriction should be construed in as narrow a manner as possible,⁴⁷ bore deep similarities to the reasoning of the Washington State Supreme Court. Moreover, as the Japanese Supreme Court noted, while there are differences in degree, every nation imposes some limits on the political activities of judges.⁴⁸

The Washington State Supreme Court opinion was unanimous. That fact should not, however, suggest that it was a simple decision. The difficulty of the *Sanders* case is reflected by the fact that the CJC found that Sanders had violated three separate canons of the Code of Judicial Conduct and, in addition to imposing a reprimand, ordered him to complete a course in judicial ethics.⁴⁹ Notably, the CJC's reasoning, which rested largely on the conclusion that Sanders's participation in the rally "diminish[ed] public confidence in the judiciary,"⁵⁰ bore similarities to that of the Japanese Supreme Court in the *Teranishi* case. Furthermore, as the Washington State Supreme Court noted in its opinion, courts in prior cases both within Washington and elsewhere in the United States have grappled with the question of where to draw the line between freedom of expression and restrictions on judges' political activity.⁵¹ American legal scholars continue to debate that point, with some arguing for greater limits on judges' speech than the Washington State Supreme Court recognized.⁵²

Incidentally, as one of the grounds for challenging his reprimand, Teranishi pointed to the standards applicable in foreign nations, arguing that other nations are more tolerant of judicial speech.⁵³ In rejecting this argument, the majority observed that other nations have "different historical backgrounds and societal conditions from Japan."⁵⁴

In this context, one important systemic difference between Japan and Washington State bears note: the judicial selection process. Japanese judges are appointed. In the case of lower court judges, the Cabinet holds the authority to appoint judges from a list of candidates prepared by the Supreme Court's General Secretariat. In theory, placing the ultimate

46. *In re Teranishi*, 52 MINSHŪ at 1799–1806.

47. *Id.*

48. *Id.* at 1778.

49. *Sanders*, 955 P.2d at 371.

50. *Id.* at 372.

51. *Id.* at 373–75.

52. Compare, e.g., Steven Lubet, *Judicial Conduct: Speech and Consequences*, 4 LONG TERM VIEW 71 (1997), with Erwin Chemerinsky, *In Defense of Speech: Judges and the First Amendment*, 4 LONG TERM VIEW 78 (1997).

53. *In re Teranishi*, 52 MINSHŪ at 1778.

54. *Id.*

appointment authority in the Cabinet could lead to a highly politicized process, in which the Cabinet carefully screens candidates on that list and rejects those deemed unsuitable, for ideological or other reasons. In practice, however, that has not been the case; the Cabinet routinely follows the Supreme Court's recommendations.⁵⁵ Even for appointments to the Supreme Court (for which the Cabinet is also responsible), the appointment process in Japan follows clearly established patterns and is not highly politicized.⁵⁶

The judicial selection process is very different in Washington. There, at both the lower court and State Supreme Court levels, judges are elected by popular vote and must stand for reelection. (For supreme court justices and court of appeals judges, the term of office is six years; for superior court judges, the term of office is four years.) The elections are conducted on a "non-partisan" basis; in other words, judges do not identify their political affiliation and do not run for election as members of any given political party. Nonetheless, judicial candidates' political views constitute a relevant factor for the elections. In the *Sanders* case, the Washington State Supreme Court explicitly recognized this systemic aspect in setting forth the relevant factors to be considered in the balancing test. In addition to "the government's interest in a fair and impartial judiciary" and "a judge's interest in the right to express his or her views," which were, in essence, the two relevant interests balanced by the Japanese Supreme Court, the Washington court identified a third important interest: "the need for the free expression of those views in a system wherein members of the judiciary are elected to office by the vote of the people."⁵⁷

III. PROCEDURAL STANDARDS AND PUBLIC SCRUTINY: JAPAN'S NAMELESS, FACELESS JUDICIARY

In these cases and in the standards governing political activity by judges and the disciplinary process, one finds signs of a difference in philosophy regarding the very conception of the judiciary and of judges' roles. In the United States, judges have public personae; many judges are known to the public by name (and some are known by face), and their

55. See, e.g., John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in *LAW IN JAPAN: A TURNING POINT* 99, 103–04 (Daniel H. Foote ed., 2007). For an examination of recent reforms to the judicial appointment process in Japan, see Daniel H. Foote, *Recent Reforms to the Japanese Judiciary: Real Change or Mere Appearance?*, 66 *HŌSHAKAIGAKU* 128 (2007).

56. See, e.g., Haley, *supra* note 55, at 105–09.

57. *In re Disciplinary Proceeding Against Sanders* (Sanders), 955 P.2d 369, 374 (Wash. 1998).

personalities and views matter. On occasion, the public recognition backfires; some judges engage in conduct or make statements that bring the judiciary into disrepute. Yet, on the whole, public knowledge of who judges are and, to a certain extent, what they think, is viewed in the United States as helping to maintain public trust in the judiciary.

In contrast, for Japan's nameless, faceless judiciary, public recognition is not desired. People's trust in the impartiality and fairness of judges is viewed as resting in large part on the image of uniformity, and on the corresponding view that the identity of the judge does not matter. Procedures and outcomes are expected to be the same regardless of who the judge is; publicity about individual judges, or the workings of the judicial system, could undermine the image of uniformity and impair trust.

This image of uniformity is reflected in numerous aspects of the Japanese judicial system. For an American observer, one of the most striking reflections of this attitude lies in the fact that it is not unusual for judges to change midway through a trial. Judges are typically transferred every three years. With most trials held on a non-continuous basis, often with a month or more between hearing sessions, some trials take years to complete.⁵⁸ The combination of these two features means judges sometimes shift during the trial. Presumably because the identity of the judges is not supposed to matter, this change in judges is an accepted feature of the Japanese judicial system. Similarly, while the names of the judges involved in judgments are listed, below the Supreme Court level, even in the case of three-judge panels, opinions are unsigned and there are no dissents or concurring opinions.⁵⁹ The basic stance is that the judgment reflects the collective view of the court, and it is irrelevant which judge drafted the opinion. In keeping with this stance, efforts are made to achieve uniformity in opinion formats and writing style. Even courtroom design is highly standardized. Another very important aspect of the emphasis on uniformity is the fact that great weight is accorded to obedience to precedent. (In the words of former Supreme Court Justice, and Anglo-American law scholar, Itō Masami, "Legal stability is accorded the greatest weight [in Japan]. The feeling is strong that, if precedents are changed, it will impair legal stability and undermine trust in the law

58. As a formal matter, consent of the parties is required for a change in judges (formally, a "renovation" of proceedings). *See, e.g.*, Keiji soshō kisoku [Rules of Criminal Procedure], Supreme Court Rules No. 32 of 1948, art. 213-2. The parties routinely consent, however.

59. At the Supreme Court level, concurrences (or, technically, supplementary opinions) and dissents are reported and signed. Even at the Supreme Court level, however, judgments (which are the equivalent of majority opinions) are unsigned, leaving it unclear which justice bore primary responsibility for drafting the judgment.

itself.”⁶⁰ “[B]arring exceptional circumstances, lower courts follow Supreme Court precedent even if they are dissatisfied with the precedent.”⁶¹) Given the ethos that the identity of the judge is irrelevant, Japanese judges operate largely in anonymity, and the workings of the judicial system are largely hidden from public view.

Against the backdrop of these differences in institutional structure and conception of the judiciary, the differing stances of the Japanese Supreme Court in the *Teranishi* case and the Washington State Supreme Court in the *Sanders* case should come as little surprise. The difference in philosophy ties to what may be an even more striking contrast between the *Teranishi* and *Sanders* cases than the outcomes themselves: a broad set of procedural differences between the two cases, and, in particular, the relative openness of the proceedings.

In Japan, Teranishi fought to have the disciplinary proceedings against him open to the public, based on article 82 of the Constitution, which provides: “Trials shall be conducted and judgment declared publicly.”⁶² After a preliminary hearing focused primarily on that issue, the Sendai High Court rejected Teranishi’s request on the ground that “discipline of judges . . . constitutes an internal procedural matter,”⁶³ rather than a “trial” subject to article 82. Despite this ruling, on the date of the hearing on the merits, Teranishi showed up together with a defense team of about fifty members.⁶⁴

In its later ruling on the merits of the disciplinary matter, the Sendai High Court implied that Teranishi had abused the system in an effort to bring greater public scrutiny to the case. “[Teranishi] should have had sufficient knowledge and ability to handle [the case] himself,” stated the High Court. “That notwithstanding, he . . . appointed a huge number of representatives, even including someone who is not an attorney . . . but is said to be an exposé writer, and thereby engaged in activity that in effect rendered meaningless the determination that this was to be a closed hearing.”⁶⁵ On appeal, the Supreme Court affirmed the High Court’s decision to keep the hearing closed. The word “trial” in article 82, the Supreme Court ruled, “should be interpreted as referring only to trials in

60. ITŌ MASAMI, SAIBANKAN TO GAKUSHA NO AIDA [BETWEEN JUSTICE AND SCHOLAR] 49 (1993).

61. *Id.* at 45.

62. KENPŌ [CONST.], art. 82, para. 1.

63. *See In re Teranishi*, 52 MINSHŪ 1810, 1816 (Sendai High Ct., July 24, 1998).

64. As it previously indicated it would, the Sendai High Court limited the number permitted to attend the hearing to thirty-five. *Id.* at 1817–18.

65. *Id.* at 1819.

true litigation cases”; the *Teranishi* case, on the other hand, “in substance constituted an administrative disposition,” not subject to article 82.⁶⁶ Notably, these rulings rested primarily on a legal formality, the distinction between the concepts of a “trial” and an “administrative disposition,” and did not address the underlying question of the extent of the public’s right to know regarding judicial disciplinary matters.

In sum, in Japan, the disciplinary proceedings against Teranishi (as with disciplinary proceedings against other judges) were conducted entirely by the judiciary as an internal matter: the Sendai District Court initiated the proceedings, the Sendai High Court conducted the hearings and issued the decision on the merits, and the Supreme Court considered the appeal. Moreover, virtually all of the proceedings were carried on behind closed doors, shielded from direct public scrutiny.

The process in Washington State lies in sharp contrast to that in Japan. As noted earlier, in Washington, cases involving possible misconduct by judges are investigated by the CJC. That commission was established pursuant to a provision of the Washington State Constitution, passed by voters in 1980.⁶⁷ According to that provision, the CJC is “an independent agency of the judicial branch,”⁶⁸ consisting of eleven members. As specified in the Constitution, only three of those eleven members are judges (one each from the court of appeals, the superior court, and the district court level, selected by judges at each of those levels); the other eight members consist of two attorneys selected by the state bar association, and six non-attorney citizens appointed by the Governor.⁶⁹ In short, the relevant review body, while in form an “agency of the judicial branch,” in fact is a highly independent body, with a majority of the members coming not only from outside the judiciary, but also from outside the legal profession.

The Washington State Constitution also sets forth the procedural steps to be taken by the CJC. Here again, central themes are transparency and accountability to the public. When the CJC receives a complaint or otherwise has reason to believe an investigation is warranted, it first conducts a preliminary investigation, which is confidential.⁷⁰ If, based on the initial investigation, the CJC finds probable cause to believe a judge has violated a rule of judicial conduct, the Commission “shall conduct a

66. *In re Teranishi*, 52 MINSHŪ 1761, 1783–84 (Sup. Ct., Dec. 1, 1998).

67. WASH. CONST. art. IV, § 31.

68. *Id.* § 31(1).

69. *Id.*

70. *Id.* § 31(2).

public hearing or hearings and *shall make public all those records of the initial proceeding* that provide the basis for its conclusion.”⁷¹ “Upon the completion of the hearing or hearings, the Commission *in open session* shall either dismiss the case, or shall admonish, reprimand, or censure the judge”⁷² If the CJC takes disciplinary action, the judge is entitled to appeal that determination to the Washington State Supreme Court, where the hearing on the appeal again is open to the public.⁷³ In sum, once probable cause is found, the records supporting the finding of probable cause are to be made public, and all hearings thereafter are open to the public.

As these contrasting procedures reflect, the Japanese judiciary’s philosophy is one of internal discipline and confidentiality, whereas that of Washington State is one of openness. This philosophical difference extends more broadly. The Washington State Constitution provides, “Justice in all cases shall be administered openly.”⁷⁴ In a unanimous 2004 decision ordering records in a civil case to be opened to the public, the Washington State Supreme Court reaffirmed that principle in strong terms, stating: “The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public’s understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust.”⁷⁵ In contrast, while the guarantee of open trials contained in article 82 of the Japanese Constitution would seem to imply that trial records would also be open to the public, traditionally access to trial records in Japan has been sharply limited. Until a few years ago, there appeared to be a gradual relaxation of the restrictions on access to trial records. Yet recent emphasis on protection of “personal information” (*kojin jōhō*)⁷⁶ has to a great extent reversed that trend. Whereas the Washington State Supreme Court welcomes public scrutiny on the view that it fosters public trust, the Japanese judiciary, to a great extent, still seems to fear public scrutiny.

One other difference in the disciplinary process is relevant to this analysis. In Japan, the debate in the *Teranishi* case focused almost entirely on the interpretation of a single phrase: “actively engaging in political

71. *Id.* § 31(3) (emphasis added).

72. *Id.* § 31(4) (emphasis added).

73. *Id.* § 31(6).

74. *Id.* art. I, § 10.

75. *Dreiling v. Jain*, 93 P.3d 861, 864 (Wash. 2004).

76. *See, e.g.*, *Kojin jōhō no hogo ni kansuru hōritsu* [Act Concerning the Protection of Personal Information], Law No. 57 of 2003.

movements,” contained in article 52(1) of the Courts Act.⁷⁷ In Washington, on the other hand, the debate in the *Sanders* case extended to five Canons of the Code of Judicial Conduct. According to its Preamble, that Code “is intended to establish standards for ethical conduct of judges.”⁷⁸ It consists of seven broad Canons, over forty specific rules (sections and sub-sections set forth under each Canon), and numerous Comments that explain the purpose and meaning of the Canons and rules. In sum, the relevant ethical standards are much more developed and detailed in Washington than those in Japan.

In this respect (as is the case with respect to the limited public participation in the disciplinary process), the situation for the judiciary resembles that for the other two branches of the legal profession. Until recently, in Japan, discipline for attorneys, for judges, and for prosecutors has been left almost entirely to the bar associations, the judiciary, and the Ministry of Justice, respectively, and the relevant ethical standards have not been deeply developed. For various reasons (including the designation of “professional responsibility” as one of the required courses in new, graduate-level law schools, which began operations in 2004), the past few years have seen much greater attention to ethical standards for lawyers in Japan, but little public attention has yet been paid to ethical standards for judges and prosecutors. Moreover, even today, with respect to all three branches of the legal profession, discipline continues to be treated as a matter to be decided by that branch of the profession, and outside scrutiny remains very limited.

One specific aspect of the Washington State Code of Judicial Conduct is particularly relevant in this regard. In addition to negative provisions—i.e., provisions setting forth limits on activities by judges—the Code also includes positive provisions, setting forth types of activity that are permitted, and in some cases even encouraged. Thus, for example, Canon 4 announces the broad principle: “Judges may engage in activities to improve the law, the legal system and the administration of justice.”⁷⁹ A more specific rule under Canon 4 announces that “if in doing so they do not cast doubt on their capacity to decide impartially any issue that may come before them,” judges “may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.”⁸⁰ A Comment to Canon 4 adds:

77. Saibanshohō [Courts Act], Law No. 52(1) of 1947.

78. WASHINGTON STATE CODE OF JUDICIAL CONDUCT, pmbl. (1995).

79. WASHINGTON STATE CODE OF JUDICIAL CONDUCT, Canon 4 (1995).

80. *Id.*

As judicial officers and persons specially learned in the law, judges are in a unique position to contribute to the improvement of the law, the legal system and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that their time permits, they are *encouraged* to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.⁸¹

With this Canon in mind, let us reexamine the facts of the *Teranishi* case. If, as Teranishi asserted in his *Asahi Shinbun* comment, it really is true that judges routinely rubberstamp warrant requests, that fact would be very important to the debate over the extent to which the warrant provisions of the Interception of Communications Act afford meaningful protections against abuse of wiretaps. And, apart from retired judges and court clerks, no one outside the judiciary would be in a position to know that reality. Thus, while the venue for Teranishi's initially scheduled panel discussion—a rally opposed to a proposed bill—conceivably might raise concern over whether he had “cast doubt on [his] capacity to decide impartially any issue that may come before [him],” the content of his remarks as a panelist almost certainly would have focused on matters relating to “improv[ing] the law, the legal system and the administration of justice.”⁸² As such, in Washington, such remarks would seem to fall within the scope of activities protected, and even positively encouraged, by Canon 4.⁸³

In closing, one final similarity between the *Teranishi* and *Sanders* cases bears mention: both judges are still on the bench. Justice Sanders has been reelected twice; once in 1998, and again in 2004. Teranishi, at the

81. *Id.* cmt. (emphasis added).

82. *In re Teranishi*, 52 MINSHŪ 1761, 1779 (Sup. Ct., Dec. 1, 1998).

83. In this connection, the Japanese Supreme Court in the *Teranishi* case distinguished Teranishi's activities from various other legislation-related activities in which Japanese judges frequently participate, such as “the preparation of legislation as a member of an advisory council or in some other such capacity . . . at the request of the legislative branch or the administrative branch,” or “announcing opposition to a particular legislative move in an article, lecture, or the like, making clear one's status as a judge, . . . as one's personal opinion.” In contrast, said the Court, “when . . . one engages in conduct in active support of a partisan movement by organizations aimed at the defeat of a particular bill, that conduct is different in nature [from the foregoing sorts of permissible activities].” *Id.* at 1779.

conclusion of his ten-year term as an assistant judge, was appointed as a judge in 2003.⁸⁴ Both have continued to write and speak.⁸⁵

84. See NIHON MINSHU HÖRITSUKA KYÖKAI SHIHÖ SEIDO IINKAI [JAPAN DEMOCRATIC JURISTS ASS'N, JUSTICE SYS. COMM.], ZENSAIBANKAN KEIREKI SÖRAN [JUDGES ALMANAC] 261 (4th ed. 2004) (reference table of transfers).

85. In addition to the autobiographical YUKAI NA SAIBANKAN [A CHEERFUL JUDGE], *supra* note 2, Teranishi co-authored a book with the provocative title: SAIBANKAN WO SHINJIRU NA! [DON'T TRUST JUDGES!] (2001) (co-authored with Yanagihara Mika and Matsunaga Kensei). Justice Sanders maintains his own home page, <http://www.justicesanders.com/>, which contains a list of his writings and speeches. In a reflection of the greater visibility of judges in the United States, it bears note that Sanders is by no means the only American judge with his or her own webpage. As another striking example, Judge Richard A. Posner, well-known judge of the U.S. Court of Appeals for the Seventh Circuit, maintains, together with economist and Nobel laureate Gary S. Becker, an active blog that contains comments on many aspects of law, politics, and the economy, <http://www.becker-posner-blog.com/>.

As a final note, Sanders's actions off the bench have continued to attract attention. In 2005 the CJC again found that Sanders had violated the canons of judicial ethics, this time for visiting a state facility for sexually violent predators and engaging in conversation with inmates at that facility, some of whom were litigants or potential litigants in matters before the Washington Supreme Court. This time, the Washington Supreme Court (again composed entirely of judges from the Court of Appeals, serving in place of the regular justices) upheld the finding and penalty—an “admonishment,” the lowest level of punishment under the Washington state system. See *In re Disciplinary Proceeding Against Sanders*, 145 P.3d 1208 (Wash. 2006). Sanders made headlines again recently. In November 2008, when then-U.S. Attorney General Michael Mukasey defended the Bush administration's anti-terrorism policies in a speech at a Federalist Society dinner in Washington, D.C., Sanders stood and shouted, “Tyrant! You are a tyrant!” See, e.g., Ken Armstrong, *State Justice Confirms He Yelled “Tyrant!” at Mukasey Before AG Collapsed*, SEATTLE TIMES ONLINE, Nov. 25, 2008, http://seattletimes.nwsource.com/html/localnews/2008435605_websanders25m.html. In February 2009, Sanders explained his views on the Bush administration's attitude toward the rule of law in a guest column in the *Seattle Times*. Richard B. Sanders, *Attorney General Holder: Hold Bush Administration Accountable*, SEATTLE TIMES ONLINE, Feb. 2, 2009, http://seattletimes.nwsource.com/html/opinion/2008699563_opinb03sanders.html.