RESERVED SEATS ON JAPAN'S SUPREME COURT

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INTRODUCTION

The first Supreme Court appointed under Japan's present Constitution took office in August 1947. This was during an early stage of the country's occupation by Allied military forces, just two years from the end of the Great War. The Court was appointed a few months after Japan adopted a revolutionary Constitution that transferred sovereignty from the Emperor to the Japanese people and began to implement numerous legal reforms crafted to conform to the new order.

As the final arbiter of disputes to arise under this Constitution and these laws, the Supreme Court would play a role of incalculable importance in Japan's evolution as a democratic society. Key features of the Court's structure were defined by the new Constitution and Courts Act, each of which took effect on May 3, 1947.

Foreign students of Japan's Supreme Court are inevitably drawn to a series of customs surrounding appointments to the Court that are *not* prescribed by the Constitution, the Courts Act, or any other formal law. The first is the custom of total secrecy that surrounds the process. The Japanese people learn little about the individuals selected to serve on the Court and learn the identities of new Justices only after appointments are finalized by Cabinet Order. Another custom is the general limitation of appointments to individuals of relatively advanced age. With few exceptions, appointees are at least sixty-four years old. Because the Courts Act requires that all Justices retire by the age of seventy, individual Justices tend to have relatively short terms of service.

But one might argue that the most distinctive custom is the practice of allocating a relatively fixed number of seats to candidates from different segments of the legal community. Foreign observers use terms like "vested right,"[1] "quota,"[2] and "well-established patterns of selection"[3] to describe

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1. HIROSHI ITOH, THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES 24 (1989).

2. David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1551 (2009).

3. John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust, in* LAW IN JAPAN: A TURNING POINT 103, 111 (Daniel H. Foote ed., 2007).

this closely followed custom by which court membership is apportioned among career judges, private attorneys, prosecutors, academics, and bureaucrats. Perhaps it is best described as a system of reserved seats.

The most remarkable aspect of this practice is its extraordinary continuity. The rigid adherence to an allocation formula has its roots in the selection of the first group of fifteen Supreme Court justices who took office in August 1947. There was a significant shift in the allocation during the period from 1969 through 1973, a turbulent era for Japan's judiciary and for society at large. But when this shift was complete, a new equilibrium appeared and the adjusted allocation would remain essentially unchanged at least until the present, a period of nearly four decades.

Part I of this Article describes the genesis of the allocation custom and the revolutionary nature of the decision to assign a significant number of seats to private attorneys and scholars, the only members of the Court who have spent a significant portion of their careers outside government service. Part II describes the reallocation of reserved seats engineered between 1969 and 1973, during the term of Chief Justice Ishida Kazuto. As described in greater detail below, the reallocation reduced the number of seats held by attorneys and scholars and institutionalized a new appointment pattern better designed to produce a Court that would enforce the agenda of conservative political leaders and limit the individual rights declared in Japan's Constitution.

I. THE FIRST ALLOCATION OF RESERVED SEATS ON JAPAN'S SUPREME COURT

A. An Independent Judiciary

The Potsdam Declaration provided overall direction for the comprehensive reforms to Japan's legal system that were adopted during the immediate postwar era. Key language required Japan's government to "remove all obstacles to the revival and strengthening of democratic tendencies" and declared that "[f]reedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established."[4]

Japan remained under the occupation of Allied military forces from their arrival in September 1945 until their withdrawal in 1952 with the conclusion of the San Francisco Peace Treaty. Occupation officials were

4. Proclamation Defining Terms for Japanese Surrender, U.S.-P.R.C.-U.K., July 26, 1945, *in* 13 DEP'T ST. BULL. 137 [hereinafter Potsdam Declaration] (setting forth the terms of Japan's surrender).

intimately involved in drafting Japan's Constitution and in the development and review of legal reforms, especially during the early years when the most fundamental changes were made. When they considered reforms to Japan's legal profession, Occupation officials found some obvious targets.

The first was establishing the independence of the judiciary. Prior to the 1947 Constitution, the judiciary was subject to the control of the executive branch of government. Alfred Oppler, who was charged with oversight of a broad range of legal reforms, explained this relationship as follows:[5]

> The courts were under the jurisdiction of the Minister of Justice who was responsible for their budget as well as for the appointment and promotion of judges. Obviously, this arrangement endangered genuine independence, inasmuch as ambitious and opportunistic judges were tempted to adjust their opinions to the presumptive wishes of the government.[6]

A related goal was to elevate the status of Japan's lawyers. For Oppler, the two objectives were closely linked: "It was clear to us from the beginning that the liberation from government control of the bar had to follow the creation of an independent judiciary."[7]

The foundation for an independent judiciary was built into the Constitution itself. Key provisions in the SCAP draft[8] clarified that the "whole judicial power" would be entrusted to the courts; that the Supreme Court would determine "the rules of procedure and practice, and of matters relating to attorneys, the internal discipline of the courts, and of the administration of judicial affairs;" that the Supreme Court itself would decide candidates for appointment as lower court judges; and that the

5. For a description of Oppler's extraordinary career and role in the Occupation-era legal reforms, see TAKEMAE EIJI, INSIDE GHQ: THE ALLIED OCCUPATION OF JAPAN AND ITS LEGACY 160–61 (2002).

6. Alfred C. Oppler, *The Reform of Japan's Legal and Judicial System Under Allied Occupation*, 24 WASH. L. REV. 290, 305 (1949). While recognizing ministry control over judicial administration, Professor Haley nonetheless stresses the tradition of judicial independence that had developed under the Meiji Constitution. Haley, *supra* note 3, at 115.

7. ALFRED C. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN—A PARTICIPANT LOOKS BACK 108 (1976).

8. "SCAP" stands for Supreme Commander of Allied Powers, the position held by General Douglas MacArthur until his removal in 1951. The first draft of Japan's 1947 Constitution was prepared in secret by a team of Occupation officials acting under MacArthur's orders. It was delivered to the Shidehara Cabinet in February 1946. *See, e.g.*, RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR 93–110 (2002).

compensation of judges would not be decreased during their terms of office. No judge could be removed from office "except by public impeachment unless judicially declared mentally or physically incompetent . . . ."[9] Together with this independence, Article 81 of the Japanese Constitution granted the Supreme Court real power—the unambiguous authority to declare acts of the administration or legislature unconstitutional.

These provisions were accepted unchanged by the Shidehara Cabinet and then by the Diet. In order to emphasize the new status of the Court, the Diet added language declaring that the Chief Justice would be ceremonially appointed by the Emperor, the only official other than the Prime Minister to enjoy this honor. This new judicial regime was included in the constitutional text promulgated by the Emperor on November 3, 1946, which took effect on May 3, 1947.

Although Oppler did not work on the draft Constitution, he became the central Occupation figure involved in shaping the Courts Act, which would provide additional protections for judicial independence. Despite the clear direction shown by the constitutional provisions, adoption of the Constitution did not end the battle for judicial independence; Ministry of Justice officials sought to retain control over the judiciary by maintaining authority over its budget and personnel matters.[10] Oppler and his colleagues sided with the judges. As a result, Articles 80 and 83 of the Courts Act specified that the judiciary would submit its own budget to the Diet and would maintain control over other administrative matters.

B. Elevating the Status of Attorneys

Meanwhile, the Occupation officials' desire to grant "liberation from government control of the bar" did not progress so smoothly. Throughout their relatively short history as a formally recognized element of Japan's legal profession, private attorneys had always occupied a position inferior to that of judges and prosecutors.[11] This inferior status was symbolized by the common term for private attorneys, *zaiya hoso*, which literally means

9. NIHONKOKU KENPO [KENPŌ] [CONSTITUTION], art. 78.

10. *See* Interview with Nemoto Matsuo, *in* 2 NOMURA JIRO, HOSO ANO KORO 205 (Nihon Hyoronsha, 1981).

11. The first statute providing recognition of private attorneys was adopted in 1893. For authoritative accounts of these issues in English, see Hattori Takaaki, *The Legal Profession in Japan: Its Historical Development and Present State*, *in* LAW IN JAPAN 111, 126–29 (Arthur Taylor von Mehren ed., 1963), and JOHN OWEN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 100–01 (1991).

"outside lawyers." This term distinguished them from the "inside," or government, lawyers, comprised of judges and prosecutors.

Occupation officials sought to raise that status to a level equivalent with other members of the legal profession.[12] The most direct objective in this regard was passage of a law that would guarantee the bar associations autonomy in determining their membership and in disciplining members. But institutional opposition was great. Although the Courts Act and a new prosecutors law were hammered out in time to coincide with enforcement of the new Constitution, passage of the Attorneys Act would be delayed for two more years due to opposition from the Supreme Court and the Ministry of Justice.[13]

During this interval, Occupation officials took other steps to improve the status of attorneys, regularly meeting senior officers of the bar associations and often according their opinions equivalent importance to those of senior judges and Ministry of Justice officials.[14] Regarding the Attorneys Act itself, Occupation officials made clear they would not approve any statute that did not provide for bar association autonomy.[15]

Of course, the single step with the greatest symbolic and potentially substantive importance was the appointment of attorneys to the newly created, newly independent Supreme Court. Prior to 1947, Japan's highest court, the Great Court of Cassation or *Dai-shin-in*, included only career judges and prosecutors. When the first Supreme Court ascended to the bench in August 1947, attorneys were not merely included; they were

12. This theme is present throughout Oppler's writings on reform of the legal profession. For example, commenting on qualifications for Supreme Court appointment, he wrote: "The recognition of long experience at the bar was especially gratifying, since it enhanced the prestige of the lawyers." OPPLER, *supra* note 7, at 97.

13. *See* Lawrence Repeta, *Japan's 1949 Attorneys Law—Private Lawyers Gain Autonomy, Foreign Lawyers Find a New Path to the Bar*, *in* LAW AND PRACTICE IN POSTWAR JAPAN: THE POSTWAR LEGAL REFORMS AND THEIR INFLUENCE 51 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1688039.

14. Describing conferences organized by SCAP officials that included representatives from all branches of the legal profession to discuss legislative reforms in 1947 and 1948, the authors of an official U.S. government report crowed, "the leading member of the bar association emphasized his satisfaction over the fact that for the first time in Japanese history, lawyers, serving as representatives of the legal profession, had been allowed to participate in the drafting and deliberation of a Cabinet bill." POLITICAL REORIENTATION OF JAPAN—SEPTEMBER 1945–SEPTEMBER 1948, at 199 [hereinafter REORIENTATION] (report of Government Section, Supreme Commander for the Allied Powers).

15. Thomas Blakemore used the term "triangular deadlock" to describe the stalemate over bar association autonomy. *See* Repeta, *supra* note 13, at 53. The deadlock was broken when the attorneys ultimately obtained Occupation approval for draft legislation and then pushed it through the Diet as a member's bill in the summer of 1949. Oppler was quite pleased: "Gratifyingly enough, it was finally settled among the Japanese, on the basis of the view of the bar association." Oppler, *supra* note 6, at 315.

awarded a number of seats nearly equal to the number allocated to career judges. This represented a radical change in status for the *zaiya hoso*.

The addition of attorneys, along with academic experts, to the Court was an important step in the overall plan of democratic legal reform. Occupation officials placed a very large bet on the role to be played by the Supreme Court in Japan's development as a democratic society. The Constitution proclaimed a long list of individual liberties; through exercise of judicial review, the courts, and ultimately the Supreme Court, would be the final line of defense to protect these liberties against potential abuse by government authority. In order for this scheme to work, the Court would have to be populated by judges who understood the significance of Japan's new "bill of rights" and who would be willing to stand up for individuals who sought to exercise these rights against government interference. Where could such judges be found?

Japan's legal profession had been created under the Meiji Constitution, in the service of a divine sovereign monarch, in a world of subjects rather than citizens. There was no postwar purge of the judiciary. Senior judges were individuals who had been elevated by the Ministry of Justice during the war years.[16] Even private lawyers had been trained under a constitutional order that denied the primacy of individual rights, and few of them had taken significant steps to oppose Japan's militarization and suppression of political speech during the prewar and wartime era. Nonetheless, it was a fair bet that private attorneys would show the most enthusiasm for the individual rights expressed in the Constitution.[17] Placing some of them on the Supreme Court would surely be a step toward the protection of those rights.

C. The Battle Over the Initial Supreme Court Appointments

Serious work on the process of selecting Supreme Court Justices began not long after the Shidehara Cabinet published the SCAP draft as its own in March 1946.[18] The Constitution unequivocally placed the power of appointment in the Cabinet. The Cabinet's discretion was limited only by language in the Courts Act that set a minimum age of forty and required that candidates have "broad vision and extensive knowledge of the law"

16. *Id.* at 305.

17. The attorneys who drafted the 1949 Attorneys Act left no doubt in this regard. The very first sentence of Article 1 of the Act reads, "A practicing attorney is entrusted with a mission to protect fundamental human rights and to realize social justice." Bengoshi Ho [Attorney's Act], Law No. 205 of 1949, art. 1.

18. *See, e.g.*, MOORE & ROBINSON, *supra* note 8, at 139–41.

and that ten of the fifteen justices meet minimum experience requirements.[19] This formulation was especially remarkable in two ways: (1) it explicitly recognized service as a private attorney on par with service as a judge or prosecutor, and (2) it opened the door to the appointment of individuals who had not worked in the legal profession at all.

Occupation officials were so concerned about appointments, however, that they insisted the Cabinet be advised by an expert committee.[20] The source of this idea was the American "Missouri Plan," which involves the use of nonpartisan committees to recommend qualified candidates to state governors.[21] Regarding the intended role of this body, Occupation officials would later explain that "the device was intended as a psychological check on the Cabinet because it was anticipated that the Committee would consist of outstanding figures of public life rather than political appointees."[22]

When a government emissary showed Oppler its first draft list of committee members, however, he rejected it on the spot.[23] The proposed committee would have been dominated by politicians. Of the nine members, four would be political leaders, including the Prime Minister, who would serve as chair; in addition, places would be reserved for the prosecutor general, the chief judges of the Great Court of Cassation and the administrative court, an attorney, and an academic.[24] The Occupation's

19. Saibanshohō [Courts Act], Law No. 59 of 1947, art. 41. There was a dispute over whether nonprofessionals should be allowed to qualify for appointment. Oppler and Blakemore favored allocating all Supreme Court positions to legal professionals, but a consensus on the appointment of nonprofessionals had formed in the Ministry of Justice as early as July 1946. When Minister of Justice Kimura did not back down, Oppler decided not to force the issue by ordering a change in the language prepared by the Ministry. A recent article by Professor Nishikawa provides a valuable summary of the events in this era. Nishikawa S hin'ichi, *Saikosai no Rutsu wo Saguru—Saibanshohoan Kiso kara Mibuchi Court Seiritsu Made* (*Uncovering the Roots of the Supreme Court—from Proposal of the Courts Bill Until Establishment of the Mibuchi Court*), 78 SEIKEI RONSO, nos. 1–2, Nov. 2009.

20. Oppler indicated his approval of the advisory committee at a joint meeting of Japanese and Occupation experts on December 2, 1946. Agreement to include text in the Courts Act implementing this idea was reached at such a joint meeting on March 3, 1947. Justice Hosono represented the Great Court of Cassation and Kimura represented the Justice Ministry in these meetings. Nishikawa, *supra* note 19, at 24–25. Materials considered by the Judicial System Reform Council (1998–2001) (JSRC) also specify that Occupation officials issued an order to establish the advisory committee in meetings with government officials in March 1947. Memorandum from the JSRC (Mar. 1947), *available at* http://www.kantei.go.jp/jp/singi/sihou/kentoukai/seido/dai11/11siryou3.pdf (cited by Foote, *infra* note 21); *see also* ITOH, *supra* note 1, at 16. Professor Itoh provides a detailed description of the appointment and operation of this committee in 1947 at pages 20–24. *See also* YAMAMOTO YUJI, SAIKOSAI MONOGATARI (THE SUPREME COURT STORY) 83 (Kodansha, 1979).

21. *See* Daniel H. Foote, *Recent Reforms to the Japanese Judiciary: Real Change or Mere Appearance?*, 66 HOSHAKAIGAKU [SOC. OF LAW] (2007).

22. REORIENTATION, *supra* note 14, at 201.

23. Nishikawa, *supra* note 19, at 43; 1 YAMAMOTO, *supra* note 20, at 83–84.

24. The list is reproduced at Nishikawa, *supra* note 19, at 34.

"psychological check" was intended to dilute political influence on appointments. Oppler judged that this committee would be dominated by politicians and would therefore fail in its central purpose. The Yoshida administration quickly revised its plan, expanding committee membership to eleven, this time to include four career judges, three attorneys, two academics, and only two politicians.[25] This formula was approved by Occupation authorities. By an order issued on April 16, 1947, the Yoshida Cabinet established the revised advisory committee.[26]

The new committee included Oppler's personal favorite for the role of Chief Justice, Hosono Nagayoshi, a unique figure in Japan's legal world with a reputation as an outspoken advocate for judicial independence. In a well-known incident from the war years, Hosono had openly opposed direct interference in judicial affairs by then-prime minister Tojo Hideki.[27] After war's end, Hosono was elevated to the position of president of the Great Court of Cassation, Japan's highest tribunal under the Meiji Constitution. He would be the last person to hold that office.

Despite his inclusion in the revised advisory committee, Hosono was isolated, surrounded by individuals who opposed his leadership. Ignoring his attempts to establish criteria for Supreme Court consideration, the committee pushed forward and quickly produced a list of thirty candidates. Committee members were themselves eligible for selection, but the list of thirty did not include Hosono.[28] When the Committee forwarded this list to the Prime Minister on April 22, it appended a statement requesting that the Supreme Court appointees include "three scholars and as many judges and lawyers as possible" (*gakkai-gawa yori wa san-mei*, *bengoshi-gawa, hanji-gawa yori wa narubeku tasu*).[29] The Yoshida administration was prepared to select fifteen individuals from this list and would be ready to appoint them in time to coincide with the Constitution taking force on May 3.

But national Diet elections were scheduled for April 25, and some questioned the advisability of allowing Supreme Court appointments by

25. *Id.* at 38–39.

26. *Id.* at 40.

27. Of course, Occupation officials were well aware of this history. *See* OPPLER, *supra* note 7, at 87.

28. Nishikawa provides a list of candidates with the vote total gathered by each. The names of six individuals appear at the top, with ten votes each. Hosono finished out of the running, tied for forty-first place with only two votes. Nishikawa, *supra* note 19, at 44.

29. *Id.* at 45. Professor Nishikawa writes that "the idea that the selection of Supreme Court justices should reflect career allocations (*shusshinwaku*) can already be seen at this point." Of course, this advice reflected the career histories of advisory committee members and committee membership that was shaped by Oppler's constant pressure.

the lame duck Cabinet.[30] Meanwhile, Hosono and his allies reported their dissatisfaction with Hosono's exclusion from the Court to Oppler.[31] Professor Itoh describes the result: "the proposed appointments were unexpectedly delayed by General MacArthur who instructed Prime Minister Yoshida Shigeru to postpone the appointments until the first elections for the Diet had been held under the new Constitution."[32] When informed that his selections had been blocked, Yoshida pleaded his case to MacArthur himself, to no effect.[33]

Yoshida then proceeded to lose the May Diet elections to a coalition led by Katayama Tetsu of the Socialist Party. On June 5, new Prime Minister Katayama released a public statement expounding on the importance of the Supreme Court and declaring that the selection process would be fair, transparent, and democratic (*iwayuru garasu-bari no naka de mottomo minshuteki).*[34] The Katayama Cabinet quickly issued a new order creating an advisory body of its own.[35] This committee would have fifteen members, with the Speaker of the House of Representatives serving as Chair. Among the fifteen, judges and attorneys would be accorded parity, with four seats allocated to each.[36] But, apparently carried away with democratic spirit, the Katayama order added another twist.

Rather than directly appoint all members of the advisory committee, the Katayama order provided that committee members from the legal profession would be chosen by elections, with all attorneys, judges, and prosecutors actually voting to select their representatives on the committee.[37] Voting for the four seats allocated to judges was held on July

30. *Id.* at 45–46.

31. Oppler was said to be "very dissatisfied" with the list of thirty Supreme Court candidates. *Id.* at 43; 1 YAMAMOTO, *supra* note 20, at 91. To slow down the process, he informed Japanese government officials that the individuals would have to be investigated by Occupation officials prior to appointment. 1 YAMAMOTO, *supra* note 20, at 91.

32. ITOH, *supra* note 1, at 20.

33. 1 YAMAMOTO, *supra* note 20, at 91–92. Nishikawa provides a quotation from MacArthur's letter instructing that the first Supreme Court should be appointed by a Cabinet selected under the procedures provided by the new Constitution. Nishikawa, *supra* note 19, at 46.

34. *Id.* at 48.

35. It is believed that both the Prime Minister's statement and the Cabinet regulation were drafted by the new Justice Minister Suzuki Yoshio. The latter was especially unusual in that the Justice Minister bypassed the ministry bureaucracy by drafting the order and presenting it to Occupation authorities for approval. *Id.* at 48–49.

36. One explanation for the decision to include four attorneys is that this would allow appointment of representatives of the three Tokyo bar associations and one to represent Kansai. *Id.* at 49.

37. ITOH, *supra* note 1, at 21–22. Among members from outside the legal profession and thus not subject to election, the Cabinet appointed the noted scholars Wagatsuma Sakae and Takigawa

10. When the votes were counted, it was discovered that Hosono and his allies failed again. This time, Hosono was the victim of a smear campaign apparently organized by anti-Hosono judges. The campaign included distribution of a counterfeit telegram sent to judges throughout the country falsely indicating that a key judicial candidate had declared that if elected, he would not join the committee.[38] This apparently redirected a critical number of votes in favor of anti-Hosono judges, who won all four advisory committee seats allocated to the judiciary.

After the election results were final, the Katayama advisory committee was empanelled and produced a new list of thirty candidates to the Cabinet. Oppler and others would be surprised to see that the transfer of power from Yoshida to Katayama and the procedural changes had not made a great difference in the results. Of the fifteen justices selected by the Katayama Cabinet, the names of no fewer than eleven had appeared on the lists submitted by both the Yoshida and the Katayama advisory committees. Moreover, committee members were not shy about placing their own names at the top of their lists. Of the fifteen selected for Supreme Court duty, six had themselves served as advisory committee members.[39] Oppler was no doubt displeased by this result, but decided that it would not be appropriate for Occupation officials to intervene again.[40]

The Katayama selections were sworn in as Japan's first Supreme Court on August 4, 1947. According to Professor Itoh's analysis, they included six career judges, five private attorneys, one prosecutor, one law professor, one judicial administrator, and one diplomat.[41]

After the series of fiascoes that attended the selection of Japan's first Supreme Court, Oppler's "Missouri Plan" committee quickly disappeared,

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Yukitoki, chairpersons of the faculties of law at the Universities of Tokyo and Kyoto, respectively. *Id.* at 22.

38. Details of the "false telegram incident" (*nise dempo jiken*) and other aspects of the smear campaign are reported at Nishikawa, *supra* note 19, at 53, and YAMAMOTO, *supra* note 20, vol.1, at 96–101. Nishikawa writes that 1250 judges were eligible to vote. Nishikawa, *supra* note 19, at 51.

39. Nishikawa provides a handy chart that reveals these connections. *Id.* at 55.

40. Details are provided in 1 YAMAMOTO, *supra* note 20, at 103, and in interviews with Nemoto Matsuo and Kawamura Kiyoshi in NOMURA , *supra* note 10.

41. ITOH, *supra* note 1, at 24. Itoh notes that there is a minor disagreement over this classification. *Id.* Nishikawa calculates the allocation as five judges, five attorneys, and five others. Nishikawa, *supra* note 19, at 56. Throughout the postwar era, there have been a few appointees with hybrid careers. Perhaps the most prominent example is that of Sonobe Itsuo, who worked extended periods as both a judge and a full-time academic before appointment to the Supreme Court in 1989. He was appointed to fill the seat reserved for academics at the relatively young age of sixty. He served for ten years. During this period, no other academic was appointed to the Court. Justice Sonobe's experience is rare. Due to the segmented nature of Japan's legal profession, nearly all Justices have spent their careers in a single branch of the legal profession.

eliminated by a revision to the Courts Act effective January 1, 1948. Although the idea of creating a new expert advisory body has been raised on several occasions since, there has been no action.[42] All subsequent Supreme Court appointments have been made by Cabinet authority without reference to the opinions of such a committee. Nonetheless, it was the Katayama Cabinet and its advisory committee that established the model for allocation of Supreme Court appointments that has prevailed ever since.

Oppler may not have gotten the specific personnel he had in mind, but he did have the satisfaction of seeing that attorneys comprised a significant portion of the Court and had even achieved a rough parity with career judges. In an essay published in 1988, Nomura Jiro, an Asahi news reporter who had covered Japan's courts for decades, provided the following interpretation of these events:

> From the beginning, the reason that the Supreme Court includes attorneys (*zaiya hoso*) and intellectuals (*gakushiki keikensha*) is that the Occupation authorities wanted to establish an American-style legal profession as a basic element of the democratization of Japan. Of course, whether elected or appointed, starting with the federal Supreme Court and including state court judges and prosecutors, (all American judges and prosecutors) have experienced work as private attorneys. In Japan this is called a unified legal profession (*hoso ichigen*).
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> The Americans tried to introduce this system to Japan. However, in the era immediately after the war's end, the power of the bureaucrats was still great; it was not possible to suddenly introduce such a system while there were defects in the structure of the legal world. This effort reflected good insight, but it was not realistic. Japan's judicial officials objected sharply; ultimately it ended with the Occupation (GHQ) achieving a portion of their plan for the Supreme Court. Therefore, allocation of seats on the Supreme Court can be called the GHQ's child of compromise.[43]

For Nomura, this compromise was significant. He envisioned a special role for the attorneys on the Court, because they are "closest to the people"

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42. Professor Foote provides a description of "Missouri Plan" systems in the United States and reports that the Judicial System Reform Council considered revival of such a committee as one option to inject greater transparency into the nominating process. *See* Foote, *supra* note 21.

43. Nomura Jiro, *Bengoshikai to Saikosai Hanji* [*Bar Associations and Supreme Court Justices*], 39 JIYU TO SEIGI, no. 2, 1988, at 41, 45.

and would have a "duty to express their views and opinions from a standpoint different from that of justices who spent their careers as bureaucrats (*kanryo shusshin*)."[44]

Whether or not one agrees with Nomura's assessment, there is no doubt that the inclusion of attorneys and others from outside the career judiciary was a radical break with the past. The highest court under the Meiji Constitution included only career judges and prosecutors. Actual experience has shown that attorneys and academics are typically less predictable than career government officials—especially career judges and prosecutors—appointed to the Court, and they are more willing to write separate and even dissenting opinions.[45]

Nomura's "child of compromise" would survive for the next two decades relatively unchanged. Then, in the late 1960s and early 1970s, when conservative governments faced widespread public dissent and liberal courts that sometimes ruled in favor of civil liberties and against government authority, they chose to intervene. The Sato and Tanaka administrations used the power of appointment to adjust the allocation of Supreme Court seats and shift Court ideology to the right. A critical tool in accomplishing this shift was a reallocation of "reserved seats." The reserved seat formula established in 1947 would be subject to a momentous revision.

II. REALLOCATING RESERVED SEATS

A. Fighting in the Streets—Demonstrators v. Police (1967–1968)

A significant reallocation in the reserved seat system occurred during the early 1970s, an era of great turbulence in society at large and one in which Japan's judiciary reached a bumpy crossroad that is commonly labeled the "judicial crisis" (*shiho no kiki*). The effect of this reallocation was to dilute the early postwar achievement of democratizing the Supreme Court by reducing the number of seats reserved for attorneys and scholars and increasing the number allocated to prosecutors and other career government officials.

This reallocation was executed by Japan's ruling conservative elite in response to a series of court decisions that upheld the rights of challengers to the political status quo, including antigovernment demonstrators and

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44. *Id.*

45. *See* J. Mark Ramseyer, *Predicting Court Outcomes Through Political Preferences: The Japanese Supreme Court and the Chaos of 1993*, 58 DUKE L.J. 1557, 1575–78 (2009).

labor leaders. It occurred at a time of widespread challenges to government legitimacy around the world, with massive antigovernment demonstrations leading to confrontations between police and demonstrators that often turned violent and sometimes threatened the political status quo.

Japan experienced a period of violent clashes between well-organized groups of radical students and massed bodies of riot police beginning in the late 1960s. Many of the largest and most heavily reported demonstrations protested the government's support for the American war in Vietnam. In the autumn of 1967, for example, thousands of students mobilized and attempted to block Prime Minister Sato's departures on trips to South Vietnam and the United States from Tokyo's Haneda Airport. Hundreds were arrested and dozens injured. A few months later, another mass of demonstrators appeared at Sasebo naval base in Kyushu to protest the arrival of the giant nuclear-powered American aircraft carrier, Enterprise. Images of police beating demonstrators, news reporters, and innocent bystanders were broadcast throughout Japan.[46] The radical student movement grew rapidly. Student anger and frustration were also directed at university administrations. By the end of 1968, groups had occupied dozens of university campuses, including the nation's most prestigious school, the University of Tokyo.

B. Fighting in the Courts—Political Reaction to Liberal Court Decisions of the 1960s (1966–1969)

Sometimes police who arrested demonstrators would be surprised to see that district court judges released their suspects from detention or acquitted them in subsequent prosecutions. These cases presented a classic confrontation between the demonstrators' rights to free speech and assembly against the government's duty to provide for public safety. Japan's local public safety ordinances require individuals to obtain permits as a condition to conducting parades and other demonstrations in roads and public spaces. By attaching conditions to these permits and threatening the arrest of demonstrators who might violate them, the police have an effective tool to limit and control public demonstrations.[47] Of

46. *See* William Marotti, *Japan 1968: The Performance of Violence and the Theater of Protest*, AM. HIST. REV., Feb. 2009, at 97.

47. For an overview of Japan's public safety ordinance scheme, see LAWRENCE WARD BEER, FREEDOM OF EXPRESSION IN JAPAN 166–68 (1984).

course, they also have the power to arrest and detain individuals they decide to remove from the scene.

In the late 1960s, the Tokyo District Court and a number of other trial courts granted acquittals to individuals prosecuted for violating these ordinances; some courts held that police application of the vaguely worded ordinances violated constitutional due process.[48] One panel of the Kyoto District Court even ruled a local public safety ordinance unconstitutional on its face.[49] These decisions drew heavy criticism from right-wing publications and conservative politicians who were outraged to see that judges were ruling in favor of demonstrators and against the police.[50] In August 1968, a Liberal Democratic Party (LDP) publication called for an attack against these "biased judgments" (*henkou hanketsu*).[51] Two months later, the Cabinet Minister charged with police oversight criticized the courts, declaring at a press conference that the rate of detention of protestors was too low.[52] As 1968 came to a close, it appeared that a battle line was being drawn between Japan's conservative ruling party and a cadre of liberal judges.

The Sato Cabinet would open the new year by appointing a new Chief Justice of the Supreme Court. The man selected, Ishida Kazuto, had served as an associate Justice for the preceding five-and-a-half years and had acquired a reputation as a hard-nosed guardian of law and order. Ishida was one of the Justices who dissented in the landmark 1966 *Tokyo Central Post Office* Grand Bench decision that had sharply limited criminal prosecutions of labor leaders (discussed below). As the Sato administration struggled to maintain law and order on the streets and to

48. The constitutional source of Japan's doctrine of due process is Article 31, which reads: "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 31. For descriptions of these cases in English, see BEER, *supra* note 47, at 183–86. *See also* Masahiro Usaki, *Restrictions on Political Campaigns in Japan*, 53 LAW & CONTEMP. PROBS. 133, 153 (1990). Professor Ramseyer investigates the subsequent careers of some of the judges that issued these decisions. *See* J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, JAPAN'S POLITICAL MARKETPLACE 172–75 (1993).

49. Kyoto Chihō Saibansho [Kyoto Dist. Ct.] Feb. 23, 1967, 480 HANREI JIHŌ [HANJI] 3.

50. Professor Ode Yoshitomo published a detailed recitation of the events of this period in a new book that appeared in 2009. He indentifies several of the publications that appeared in 1968. Ode Yoshitomo, *Dai Isshou Naganuma Sosho- Hiraga Shokan Mondai no Haikei* [*Chapter One: Background to the Naganuma Litigation and the Hiraga Letter Problem*], *in* NAGANUMA JIKEN HIRAGA SHOKAN—35 NENME NO SHOGEN—JIEITAI IKEN HANKETSU TO SHIHO NO KIKI [THE NAGANUMA CASE AND THE HIRATA MEMO, TESTIMONY AFTER 35 YEARS, JUDGMENT OF SELF-DEFENSE FORCE UNCONSTITUTIONALITY AND THE JUDICIARY CRISIS] (Fukushima Shigeo et al. eds., 2009) 141–42 [hereinafter Ode, *Background*].

51. *Id.* at 142.

52. *Id.*

manage LDP hawks calling for tougher measures against demonstrators, it had strong incentive to select a Chief Justice who could be relied upon to lead the Supreme Court in backing up its efforts.

Associate Justice Tanaka Jiro had been considered to be a leading candidate to replace retiring Chief Justice Yokota.[53] A highly respected scholar at the University of Tokyo and an intellectual leader of the Court's liberal wing in the 1960s, Tanaka was also said to be favored by Prime Minister Sato, who was himself a graduate of the University of Tokyo. But in the waning months of 1968, opinion within the Sato administration turned against Tanaka and became a strong consensus for Ishida.[5455] Some say it was a visit to the Prime Minister by the old conservative warhorse Kimura Tokutaro in December that made the difference.[56] In any case, Ishida was appointed Chief Justice on January 11. As he took up his duties, battles outside the courthouse doors continued. Just one week after his appointment, riot police moved onto the University of Tokyo campus and ejected radical student groups from their extended occupation of university buildings in another bloody confrontation.[57]

Meanwhile, calls within the LDP for a crackdown on liberal judges became more strident. At a press conference held on March 25, the Minister of Justice declared that something had to be done to reverse the trend of lower court decisions favoring political demonstrators and suggested that the Diet employ its control on the judicial budget to change

53. 1 YAMAMOTO, *supra* note 20, at 350–55; Ode, *Background*, *supra* note 50, at 147–50.

54. Fragmentary comments in the published diary of Prime Minister Sato provide some insight to his personal involvement in Supreme Court personnel matters. On January 8, 1969, he met with outgoing Chief Justice Yokota and on the following day with leading candidate Ishida. In one diary entry, the Prime Minister took care to note that Ishida had the support of the Prosecutors' Office and that he was a kendo master. Ode, *Background*, *supra* note 50, at 150.

55. *Id.*

56. Professor Miyazawa points out that Kimura "was the last justice minister right after the war prior to the separation of the judiciary and the prosecution." Setsuo Miyazawa, *Administrative Control of Japanese Judges*, 25 KOBE UNIV. L. REV. 45, 58 (1991). In this role, Kimura led the Ministry of Justice in negotiations over reforms concerning the legal profession during the period when the Ministry opposed autonomy for bar associations and sought to retain budgetary and personnel control over the judiciary. *See supra* notes 10–17 and accompanying text. Kimura and Ishida were very close associates. Kimura was known as a fierce anti-communist and leader of the conservative wing of the LDP. At the time of his visit to Prime Minister Sato in 1968, he was eighty-two years old. Ode tracks news reports concerning Tanaka's candidacy and Ishida's triumph. Ode, *Background*, *supra* note 50, at 147–50. He places Kimura's visit with the Prime Minister on December 19. *Id.* at 147. For Yamamoto's account of the visit, see 1 YAMAMOTO, *supra* note 20, at 350–51.

57. The 2009 volume provides a very useful chronology of the events of this era with specific dates and other relevant information. *See* NAGANUMA JIKEN HIRAGA SHOKAN—35 NENME NO SHOGEN—JIEITAI IKEN HANKETSU TO SHIHO NO KIKI [THE NAGANUMA CASE AND THE HIRATA MEMO, TESTIMONY AFTER 35 YEARS, JUDGMENT OF SELF-DEFENSE FORCE UNCONSTITUTIONALITY AND JUDICIARY CRISIS] (Fukushima Shigeo et al. eds., 2009) [hereinafter FUKUSHIMA CHRONOLOGY].

the judicial attitudes.[58] This statement was followed one week later by the Supreme Court Grand Bench decision in *Tokyo Teachers Union*, blocking criminal prosecution of striking public employees. Despite Ishida's appointment as Chief Justice, the liberals continued to hold a strong majority on the Court. Ishida dissented again, as he had in the 1966 *Tokyo Central Post Office* case. Supreme Court judgments in these cases were emblematic of the liberal trend that so severely disturbed Japan's political leaders. This line of cases commands our attention, for it traces the political transformation of Japan's Supreme Court.

C. A Liberal Supreme Court Blocks the Prosecution of Labor Leaders (1966–1969)

Article 28 of the Constitution and a series of labor laws passed in the immediate postwar era laid a new foundation for labor-management relations in Japan, featuring a robust labor union movement. These reforms did not fully extend to government workers, however, who were generally denied the right to strike and engage in other "dispute activities" (*sogi koi*) by a series of special statutes that applied to different categories of government employees.[59] Of greatest consequence to most workers charged with violating these statutes, they impose criminal penalties for violation, thus authorizing police to take action.

In a series of cases that arose in the late 1950s, the government arrested and prosecuted officers and members of several labor unions that represent government workers and charged them with violating provisions of the special statutes. These cases had big political significance because of the close alignment of organized labor with Japan's Socialist Party and other opposition parties. Defendants in these cases were charged with violating the law by inciting workers to participate in rallies related both to working conditions and to political issues, such as opposition to renewal of the U.S.-Japan Security Treaty.

When these cases began to reach the Supreme Court nearly a decade later, the Court was dominated by liberal justices who took the opportunity to reshape the law by reducing the scope of police enforcement. The epoch-making *Tokyo Central Post Office* case arose from the prosecution of several union officials for urging postal workers to leave work to attend a meeting. In a decision issued on October 26, 1966, the Supreme Court Grand Bench overturned guilty verdicts and imposed a significant

58. Ode, *Background*, *supra* note 50, at 143.
59. For the historical context, see TAKEMAE, *supra* note 5, at 324–27.

limitation on criminal prosecutions of workers charged with violating the Post Office Law. Stressing that the Constitution's Article 28 guarantee of the right of workers to organize and bargain collectively applies to both private-sector and government workers, the Court held that criminal sanctions provided in the Post Office Law should be applied only in extreme cases such as those involving violence or which cause severe harm to the public. The Court reversed the convictions of the petitioners and remanded to the Tokyo High Court for further proceedings. Under the new standard, that court held the defendants not guilty.[60]

Tokyo Central Post Office was followed two-and-a-half years later by two Grand Bench decisions issued on the same day that extended the Court's new doctrine by interpreting statutes governing employees of the national government and local governments in a similar manner that restricted criminal prosecutions to a limited range of cases. On April 2, 1969, the Grand Bench applied its restrictive interpretation to the National Public Employees Law in reviewing the prosecution of courthouse workers who participated in political meetings held during business hours to protest the 1960 extension of the U.S.-Japan Security Treaty. Under this new standard, the Court upheld convictions of some defendants and dismissed others.[61]

On the same day, by a vote of 11–4, the Grand Bench overturned the guilty verdicts of several officers of the Tokyo Teachers Union who had been charged with violating a provision of the Local Public Employees Law, which prohibits strikes and other dispute activities. In this case, the actions that led to arrests of union officials included circulating a directive to about 24,000 members calling on them to oppose implementation of a new work rating system and to join in a related gathering during work hours. Again showing deference to workers' rights declared in Article 28 of the Constitution, the Supreme Court applied its restrictive mode of analysis and explained that even if the defendants' acts did violate the statute, criminal prosecution was not appropriate. The cases were dismissed.[62]

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60. Saikō Saibansho [Sup. Ct.] Oct. 26, 1966, 20 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 901 (*Toyama v. Japan*). The case is discussed by BEER, *supra* note 47, at 232. A translation of the Supreme Court opinions appears in HIROSHI ITOH & LAWRENCE WARD BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN, SELECTED SUPREME COURT DECISIONS, 1961–70, at 85 (1978).

61. Saikō Saibansho [Sup. Ct.] Apr. 2, 1969, 23 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 685 (*Japan v. Sakane*). A translation of the Supreme Court opinions appears in ITOH & BEER, *supra* note 60, at 103. For commentary on this case, see BEER, *supra* note 47, at 232–33.

62. Saikō Saibansho [Sup. Ct.] Apr. 2, 1969, 23 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 305. For commentary on this case, see BEER, *supra* note 47, at 234–35.

D. The Effect of Liberal Court Decisions and the Conservative Political Response (1969–1971)

The Supreme Court judgments in *Tokyo Teachers Union* and similar cases held great significance not only for the defendants themselves, but also for labor leaders who might consider organizing activities, as well as other activists around the country who might consider openly challenging the government in public forums. The authority to arrest and detain is the most coercive lawful power ordinarily available to the police in modern democracies. In Japan, where customary practice allows detention of suspects on a single charge for up to twenty-three days prior to indictment and where courts ordinarily deny bail thereafter at the request of the prosecution, the fear of criminal prosecution has an especially powerful chilling effect on individuals who might otherwise speak out.[63] Moreover, as illustrated most recently in police action against critics of Japan's Iraq war policy, the public security police (*koan keisatsu*) are willing to arrest and detain political opponents on trivial charges.[64]

Under *Tokyo Central Post Office*, labor union leaders who broke the rules faced a significantly reduced form of punishment. They might be subject to fines or other administrative sanctions for most violations of statutes governing public employees, but not to arrest, detention, trial, and possible imprisonment.[65]

Meanwhile, in other cases, many lower courts were applying modes of analysis that accorded a similarly high level of respect for other

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63. The common use of extended detentions by Japan's police and prosecutors has been described in numerous English-language publications. *See, e.g.*, DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN (2002); THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002); Daniel H. Foote, *Policymaking by the Japanese Judiciary in the Criminal Justice Field*, 72 HOSHAKAIGAKU [SOC. OF LAW] (2010). For a report of a recent example of condemnation of these practices by an international human rights body, see Lawrence Repeta, *U.N. Committee Faults Japan Human Rights Performance, Demands Progress Report on Key Issues*, ASIA-PAC. J.: JAPAN FOCUS, May 17, 2009, http://www.japanfocus.org/-Lawrence-Repeta/3147.

64. *See* David McNeill, *Martyrs for Peace: Japanese Antiwar Activists Jailed for Trespassing in an SDF Compound Vow to Fight On*, ASIA-PAC. J.: JAPAN FOCUS, May 31, 2008, http://www.japanfocus.org/-David-McNeill/2766. The Supreme Court decision in this case (the *Tachikawa* case) was heavily reported in the news media. All Japanese daily newspapers carried accounts in the morning editions on April 12, 2008. The *Tachikawa* case was one of several similar prosecutions of individuals who distributed flyers criticizing government policy during this period, which coincided with the deployment of Japan Self-Defense Forces to Iraq.

65. Rather than hold the criminal provisions of these statutes unconstitutional, however, Grand Bench majorities in these cases interpreted them to allow criminal prosecutions only in a limited range of extreme cases involving incitement to violence or other high degrees of illegality. Regardless of the legal theory, for the defendants in these cases and for other labor activists, the result was the same.

constitutional rights, especially the rights of free speech and assembly. As the Supreme Court worked on the government employee cases, trial courts continued to process numerous criminal prosecutions that arose from street protests. Just a few days after the Supreme Court judgment in *Tokyo Teachers Union*, a trial court judgment was issued in a case involving one of the most heavily reported street confrontations of the protest era. On April 11, 1969, a panel of the Fukuoka District Court acquitted radical students who had been arrested in clashes with riot police as they protested arrival of the U.S. nuclear-powered aircraft carrier Enterprise the year before.[66] Japan's conservative political leadership had seen enough.

On April 22, the secretary general of the LDP announced that the party would formally establish a committee of inquiry to investigate the judges.[67] Alarmed at the repeated threats of retaliation by conservative politicians, the Supreme Court justices held an emergency meeting on the following day and issued a rare public statement in the name of the Justices Conference (*saibankan kaigi*, a conference of all fifteen Supreme Court Justices). Their statement declared that they did not know the intentions of the LDP committee of inquiry, but that any attempt to interfere in personnel matters or active cases would be a severe problem and that the Supreme Court was determined to defend its independence and fulfill its responsibilities under the Constitution.[68]

By pulling together in a united front, the conservative and liberal wings of the Court had staved off the threat of direct intervention, at least for the time being. But there would be more turbulence in the months to come. And though elected political leaders had no easy way to intervene in specific cases, they did enjoy the constitutional power to select Supreme Court Justices to their liking. The selection of Ishida Kazuto as Chief Justice was a harbinger of appointments to come.

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66. 1 YAMAMOTO, *supra* note 20, at 376–77.

67. The secretary general was Tanaka Kakuei, who would succeed Sato Eisaku as prime minister on July 7, 1972. That committee was appointed on May 13, under the leadership of a former Minister of Justice. *Id.* at 375; Ode, *Background*, *supra* note 50, at 143.

68. 1 YAMAMOTO, *supra* note 20, at 378.

E. The Naganuma Nike Missile *Case and Supreme Court Action Against the Specter of Leftist Judges (1969–1971)*

Organized protest was not limited to radical students. On July 7, Japan's Ministry of Agriculture and Forestry announced administrative action cancelling its designation of a protected forest area in Hokkaido.[69] The Ministry's intention was to make that land available for construction of a Japan Self-Defense Force missile base. On the same day, 173 residents of a nearby farming community joined to file suit in Sapporo District Court seeking a court order to reverse the Ministry's action and thereby protect the forest and block construction of the missile base. Their central argument was the apparently audacious charge that the missile base was unlawful because the existence of Japan's Self-Defense Forces itself violates Article 9 of Japan's Constitution. In 1969, many legal scholars and ordinary citizens shared this opinion.[70] Nonetheless, Japan's legal world would be jolted when the district court panel led by Judge Fukushima Shigeo issued a temporary order blocking construction on August 22, 1969.[71]

This case would lead to some severe tests for Japan's judiciary. Judge Fukushima had completed his draft judgment and submitted it to a court

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69. There are several accounts of the *Naganuma Nike Missile* case and the related YLA confrontation in English. Perhaps the most complete has been provided by Professor Ramseyer, in various publications. *See* RAMSEYER & ROSENBLUTH, *supra* note 48, at 161–81. For a recent account by Professor Haley, see Haley, *supra* note 3, at 121. *See also* Craig Martin, *Binding the Dogs of War: Japan and the Constitutionalizing of Jus ad Bellum*, 30 U. PA. J. INT'L L. 267, 337–41 (2008). For Yamamoto's detailed account of the YLA Incident, see 1 YAMAMOTO, *supra* note 20, at 79–116. Miyazawa's early account in English has long served as an invaluable resource to foreign students who examine this historic case. Miyazawa, *supra* note 56, at 58. Nearly all writing in English addresses the issue of administrative control of lower court judges rather than the sudden change in the ideological makeup of the Court that occurred in this period. The continuing significance of these events is underscored by the 2009 appearance of a new 370-page volume devoted solely to this case. FUKUSHIMA CHRONOLOGY, *supra* note 57.

70. For recent treatments of the issues raised by Article 9 of the Japanese Constitution, see Martin, *supra* note 69, at 316–27, and Hudson Hamilton, *Emergence of the Right to Live in Peace in Japan*, AUSTRALIAN J. OF ASIAN L. (forthcoming 2011), *available at* http://ssrn.com/abstract=1767652.

71. This injunction was quashed by the Sapporo High Court on January 23, 1970. The historic judgment of the Sapporo District Court finding the Self-Defense Forces unconstitutional would be issued on Sept. 7, 1973. Sapporo Chihō Saibansho [Sapporo Dist. Ct.] Sept. 7, 1973, 712 HANREI JIHŌ [HANJI] 24. It was later reversed by the Sapporo High Court on August 5, 1976. Sapporo Kōtō Saibansho [Sapporo High Ct.] Aug. 5, 1976, 27 GYŌSEI JIKEN SAIBAN REISHŪ [GYŌSAI REISHŪ] 1175. On appeal, the Supreme Court dismissed for lack of standing. Saikō Saibansho [Sup. Ct.] Sept. 9, 1982, 36 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1679. English translations of relevant decisions are available at LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990, 83–130 (1996).

clerk on August 8.[72] Two days later, he was called in for a meeting by Hiraga Kenta, the Chief Judge of the Sapporo District Court. Hiraga would be called away to Tokyo and the meeting postponed, but the Chief Judge left behind a letter to Fukushima in which he sought to persuade his young colleague to rule in favor of the government.[73]

The public disclosure of this letter and subsequent uproar would cause unprecedented embarrassment for the judiciary and raise public concern over improper pressures on judges within Japan's secretive judiciary.[74] An ad hoc conference of all Hokkaido judges was held on September 13. After debate that continued into the early morning hours of September 14, the conference adopted a resolution of "severe warning" (*genju chui*) against Chief Judge Hirata for interfering in a court proceeding.[75] The letter itself was released to the public by the Hokkaido judicial conference on September 15. Five days later, Hiraga was reassigned to Tokyo.[76]

The controversy moved to the Diet, which holds the authority to impeach judges. Throughout this era, the Diet was controlled by the conservative LDP. While the Party's internal committee charged with investigating the judiciary continued its work on one hand, now a Diet committee also controlled by the LDP commenced impeachment proceedings against a junior judge with the audacity to rule the nation's military unconstitutional and his senior colleague who intervened in an attempt to stop him. In the end, the Diet committee dismissed charges against the senior judge and issued a formal reprimand of the junior judge for disclosing the letter.[77]

In the second half of 1969, Japan's legal world was consumed in debates over the nature of judicial independence and the Diet's treatment of the two judges, not to mention the constitutionality of Japan's military. If this were not enough, as the year drew to a close, the judiciary faced yet another controversy. In late 1969, several publications carried reports suggesting that large numbers of Japan's judges were leftists or leftist sympathizers.[78] The center of the suspicious activity was said to be a group called the *Seinen Horitsuka Kyokai* ("*Seihokyo*," or Young Lawyers

72. FUKUSHIMA CHRONOLOGY, *supra* note 57, at 4.
73. See 2 YAMAMOTO, *supra* note 20, at 29–42 for a detailed account of the incident.
74. *Id.*
75. Ode, *Background*, *supra* note 50, at 136; *see also* FUKUSHIMA CHRONOLOGY, *supra* note 57, at 4.
76. FUKUSHIMA CHRONOLOGY, *supra* note 57, at 4.
77. Ode, *Background*, *supra* note 50, at 136.
78. FUKUSHIMA CHRONOLOGY, *supra* note 57, at 5.

Association (YLA)).[79] Even mainstream newspapers soon published editorials raising suspicions about the influence of the YLA.[80] Japan's conservative political leaders would readily surmise that YLA influence explained the rash of court judgments against the police. Moreover, Judge Fukushima himself was known to be a YLA member; who could doubt that other YLA judges might issue similar decisions that threatened the stability of Japan's political order?

As conservative politicians turned the focus of their anger toward the YLA, the judicial bureaucracy serving under Chief Justice Ishida considered an appropriate response. The natural place to begin an attack on the YLA was within the Supreme Court bureaucracy itself. It was discovered that, of fifteen assistant judges assigned to work in Supreme Court administration, no fewer than ten were YLA members. All of them resigned in January 1970 under pressure from senior judges.[81] Then, on April 1, 1970, the Supreme Court denied judicial appointments to three graduates of the Legal Research and Training Institute, including two YLA members.[82] One week later, the head of the Supreme Court secretariat issued a public statement declaring that judges should avoid membership in organizations with "political coloration."[83] (This individual, Kishi Morikazu, would be appointed to the Supreme Court one year later, on April 2, 1971.)

The YLA controversy continued into 1971. Political pressure to reign in the judges led to further calls for action at the annual meeting of the

79. Whether the YLA should be described as "leftist," "liberal," or by some other politicized term, is a matter of personal preference. The same conservative ruling elite that attacked the YLA during this period has also viewed Japan's democratic Constitution itself as unacceptable and has demanded revision, including dilution of individual rights, throughout the postwar era. As of this writing, the YLA continues to be a thriving organization of lawyers committed to preserving constitutional rights. *See* JAPAN YOUNG LAW. ASS'N ATT'Y & ACAD. SEC., http://www.seihokyo.jp/ (last visited May 9, 2011). Professor Miyazawa has described the organization as follows: "The organization was established in 1954 by approximately 280 young lawyers including some ten judges . . . . Its main purpose was the promotion of ideals expressed in the present Constitution. The YLA recruited new members from trainees at the Judicial Research and Training Institute. Eventually, a pattern emerged in which approximately one third of the new assistant judges joined the YLA every year." Miyazawa, *supra* note 56, at 55 (citation omitted). The founding members included many elite members of Japan's legal community including two scholars who would later be appointed presidents of the University of Tokyo.

80. Ode, *Background*, *supra* note 50, at 137.

81. *Id.* at 154.

82. FUKUSHIMA CHRONOLOGY, *supra* note 50, at 1–10.

83. Professor Miyazawa reports on the April 8, 1970, statement by Supreme Court secretariat chief Kishi. Miyazawa, *supra* note 56, at 55–56. The Chief Justice repeated the point in comments published three weeks later on Constitution Day (May 3). "Extreme nationalists, militarists, and anarchists, and clear communists are morally undesirable as judges." *Id.*

ruling LDP, held in January 1971.[84] Supreme Court administrators huddled to consider further measures. In March, the Court took the highly unusual step of denying a standard reappointment to an assistant judge named Miyamoto Yasuaki who had successfully completed his initial ten-year term of service. Miyamoto was a YLA member. The Court also rejected the applications for judicial appointments of seven graduates of the Legal Research and Training Institute who were identified as members or supporters of the YLA. This action and other pressure from judicial administrators resulted in the resignation of nearly all member judges from the organization.[85]

F. Reallocation of a Reserved Seat and a Sharp Change of Direction (1971)

Four weeks after the Court's action to deny Miyamoto's reappointment and initial judicial appointments to other YLA members, Justice Iimura Yoshimi, a former member of the Tokyo Bar Association, reached the Supreme Court retirement age of seventy. In the ordinary course, it was expected that he would be replaced by another career attorney. But this time was different. For his replacement, the Sato administration selected a career prosecutor named Amano Buichi, then serving as the Chief Prosecutor in the Osaka High Court. Amano took office on May 21, 1971. His appointment raised the number of career prosecutors on the Court to two and reduced the number of career attorneys to four. This was a significant shift in the reserved seat system.

Despite the formal allocation of appointment power to the Cabinet by the Constitution's Article 79, research by Professors Haley, Law, and others indicates that the Chief Justice and his subordinates in the Supreme Court secretariat typically play a central role in selecting candidates for most seats on the Court.[86] Observers have suggested that Chief Justice Ishida played an especially dominant role in appointments during his term. According to press accounts at the time, Ishida exercised so much influence that he was able to block appointments desired by the Sato Cabinet in favor of his own close associates.[87] In the highly politicized atmosphere of the early 1970s, conservative politicians demanded a

84. FUKUSHIMA CHRONOLOGY, *supra* note 57, at 7.
85. Miyazawa, *supra* note 56, at 56.
86. *See* Haley, *supra* note 3, at 107; Law, *supra* note 2, at 1550–51.
87. David J. Danelski, *The Political Impact of the Japanese Supreme Court*, 49 NOTRE DAME LAW. 955, 958–80 (1974).

Supreme Court that would take a hard line against political demonstrators and other foes of the government. This attitude was shared by the Chief Justice.[88] The selection of justices appointed in this era reflected this demand.

The Court's new conservative hue would be displayed most prominently in a number of Grand Bench decisions curtailing political speech by government employees and political demonstrators. The first of these was decided by a vote of 8–7 and effectively overruled several recent Grand Bench precedents, including one only four years old. The appointment of Amano and other conservatives during the term of Chief Justice Ishida made the difference.

G. The Zennorin *Decision (April 25, 1973)*

The case that would mark a turn of the tides arose out of mass protests against a bill submitted to the Diet in 1958 that would expand police powers to restrain demonstrators. Union leaders feared that passage of the law would lead to suppression of the union movement. The General Council of Trade Unions (*Sohyo*) led mass protests on November 5, 1958, joined by an estimated four million workers nationwide. In coordination with these demonstrations, the leadership of the All Japan Agriculture and Forestry Workers Union (*Zennorin*) issued a directive to members employed at the Ministry of Agriculture and Forestry, calling on them to attend an on-the-job rally from 10 a.m. to 11:40 a.m. and not to report to work until the afternoon. About 3000 members complied.[89]

On the following day, police teams arrested union president Tsuruzono Tetsuo and twenty other officers and members of *Zennorin*. After interrogation, most suspects were released without charge. Tsuruzono and four colleagues, however, were indicted for violation of Article 95(5) of the National Public Employees Law (NPEL).[90] The trial court found all defendants not guilty. After a government appeal, a panel of the Tokyo High Court found the defendants guilty and imposed fines of 50,000 yen

88. Professor Miyazawa provides a succinct description of the relationship between Chief Justice Ishida and his political sponsors: "I should note, however, that there was also an element within the judiciary that shared the perspective of conservative politicians and actively responded to their expectations. The case in point is Justice Ishida who headed the Supreme Court from 1969 to 1973, exactly when the judiciary was under the strongest pressure from conservative politicians." Miyazawa, *supra* note 56, at 57.

89. For a summary of the facts, see BEER & ITOH, *supra* note 71, at 244.

90. 2 YAMAMOTO, *supra* note 20, at 119.

each, with no prison time. This decision was appealed to the Supreme Court in October 1968.

Under *Tokyo Teachers Union* and the other recent Grand Bench precedents described above, the petitioners might have expected that criminal prosecution for their actions would be barred and the cases dismissed. But the Court had changed. In a Grand Bench decision issued by the remodeled Court on April 25, 1973, Chief Justice Ishida and his colleagues rejected the approach of *Tokyo Teachers Union* and other recent decisions.[91] The Court declared that activities prohibited by the NPEL could not be divided between acts of greater or lesser illegality or acts meriting or not meriting criminal punishment. Although the Court recognized that basic worker rights of public employees are protected by Article 28 of the Constitution, it approved prosecutions for even minor infractions accompanied by no threat of violence or disorder. The Court justified these prosecutions "from the standpoint of the collective interest of all the people" (*kokumin zentai no kyodo rieki*).[92] Under this abstract standard, the government was again free to arrest, detain, and prosecute union leaders for even minor infractions. The Tanaka Cabinet immediately issued a statement lauding the Court's action and warning leaders of public service unions that if they took any action violating the new standard, the government would take severe countermeasures ("*gensei na taido de taisho suru*").[93]

As summarized by the eminent constitutional scholar Ashibe Nobuyoshi, "In this decision we see a shift in the Court, with the minority opinion in the 1969 decision becoming the majority opinion in *Zennorin*. With much debate, this case drastically changed the course of constitutional law in Japan."[94]

H. Completion of the Post-Ishida Reserved Seat System (1973)

Although the Ishida Court had achieved its objective in the *Zennorin* case, the remodeling of the Court was not yet complete. By the time the

91. Saikō Saibansho [Sup. Ct.] Apr. 25, 1973, 27 SAIKŌ SAIBANSHO KEIJI HANREISHU [KEISHŪ] 547 (*Tsuruzono v. Japan*). An English translation of the court opinion appears in BEER & ITOH, *supra* note 71, at 244–86.

92. Professor Beer provides concise factual descriptions of the case. BEER, *supra* note 47, at 235–36.

93. 2 YAMAMOTO, *supra* note 20, at 142.

94. Ashibe Nobuyoshi et al., *Japan: The United States Constitution and Japan's Constitutional Law* (William B. Cleary trans.), *in* CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 224, 245–46 (Lawrence W. Beer ed., 1992).

Zennorin decision was released on April 25, 1973, two of the dissenters, Justices Irokawa Kotaro and Tanaka Jiro, were no longer on the Court. Irokawa had reached retirement age in January 1973. He was an Osaka lawyer who was generally recognized as a leader of the Court's liberal wing. When his replacement was announced, there was another surprise—this time the Tanaka Cabinet did follow reserved seat custom and select an attorney, but the man they chose was a big surprise. Established custom required that the Japan Federation of Bar Associations (JFBA) prepare and submit a short list of attorney candidates for the Court and that the Cabinet (in consultation with the Chief Justice) select one for appointment. This time, the Cabinet ignored the list of candidates recommended by the JFBA and appointed an attorney of its own choosing instead, a conservative named Otsuka Kiichiro. Otsuka ascended to Irokawa's place on the Court on April 2, 1973. The attorneys had retained this seat on the Court, but they lost their voice in selecting the person who would fill it.[95]

Meanwhile, apparently in disgust at the sharp turn of events, another leader of the Court's liberal wing, Justice Tanaka Jiro, resigned that spring at the age of sixty-seven, three years before his term would expire.[96] When appointed to the Court, Tanaka was an eminent scholar of administrative law at the University of Tokyo. As noted above, Tanaka had been considered a leading candidate to become Chief Justice. If he had been appointed, the development of constitutional protection for individual rights would likely have taken another course. After losing this contest to Ishida in 1969, Tanaka continued to soldier on as an associate justice. But when he saw the accomplishments of *Tokyo Teachers Union* and other cases overturned by the *Zennorin* decision, Tanaka chose to leave the Court.

With Tanaka's retirement, the reserved seat system was adjusted once more. He was replaced not by an academic like himself, but by a bureaucrat. The new justice was Takatsuji Masami, whose prior position was head of the Cabinet Legislation Bureau, an office charged with vetting government legislative proposals.[97] Now the restructuring of the Court was complete. When Ishida took office as Chief Justice in January 1969, Court membership included six judges, five lawyers, one prosecutor, two

95. According to Yamamoto, the JFBA submitted a list of nine candidates. The Tanaka Cabinet rejected all in order to appoint Ohtsuka. 2 YAMAMOTO, *supra* note 20, at 129–30.

96. *Id.* at 130–32.

97. Professor Kamiya Masako's Supreme Court Appointments chart provides an invaluable tool to track appointments. *See* Masako Kamiya, *"*Chōsakan*": Research Judges Toiling at the Stone Fortress*, 88 WASH. U. L. REV. 1601 (2011).

professors, and one bureaucrat, a lineup that was quite similar to the one appointed to the first Supreme Court in 1947. During his term as Chief Justice, eleven justices retired and were replaced. When Ishida retired in May 1973, the lineup was six judges, four attorneys, two prosecutors, one professor, and two bureaucrats. The attorneys and academics had lost two seats, and career government officials had gained two.

There is no doubt that the shift in seats away from attorneys and academics was a key element in a highly political decision calculated to change the ideological balance of the Court and to achieve specific outcomes in politically sensitive cases. Attorneys like Irokawa and academics like Tanaka Jiro were viewed as ideological foes by the LDP politicians of the time and by Supreme Court Justices like Ishida who shared the views of their political sponsors. Ishida and the LDP Cabinets in power during his term used the appointment power to ensure that individuals with liberal political beliefs like Irokawa and Tanaka would no longer have significant influence on the Court.[98]

I. The Sarufutsu *Decision and the End of Strict Scrutiny (November 6, 1974)*

The Court's hard turn to the right was exemplified by a Grand Bench decision issued a year after *Zennorin* in the so-called "*Sarufutsu*" case.[99] Against the dissents of four remaining liberal justices, the Court overturned lower court judgments in three separate cases that had acquitted government employees charged with violating the NPEL by exercising various forms of political speech. In all cases, the defendants were acting in support of political foes of the government. In one case, the defendant was prosecuted for acting as a master of ceremonies and delivering a speech at an election rally for a Communist candidate for the Diet. In another, four national government employees were arrested and charged for handing out leaflets listing local assembly candidates supported by their union. In the third, which arose in the village of Sarufutsu in Hokkaido, the defendant was indicted because he put up "six posters on a public bulletin board during off-duty hours and mailed the same flyer to some friends, asking them to post it in public."[100] Lower

98. Sato Eisaku was replaced as prime minister by another LDP politician, Tanaka Kakuei, on July 7, 1972.

99. Saikō Saibansho [Sup. Ct.] Nov. 6, 1974, 28 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 393 (*Japan v. Osawa*). An English translation of the court opinions appears in BEER & ITOH, *supra* note 71, at 522.

100. BEER, *supra* note 47, at 236.

courts in all three cases held that the defendants' activities were protected by the free speech provision of the Constitution and that therefore the prosecutions were unconstitutional.

The Court overturned all of these acquittals in judgments issued on November 6, 1974. In the *Sarufutsu* judgment, the Court held that, despite the free speech guarantee in the Constitution, prosecution of these individuals was appropriate because "the parliamentary system requires that public employees carry out policies passed into law by the Diet and that they maintain political neutrality in order to keep the trust of the people in the political impartiality of government administration." In order to "keep the trust of the people," the Court upheld a complete ban on political activities by all workers subject to the NPEL and universal prosecution not only for violation of the Law itself, but also for violation of administrative regulations issued thereunder.

Professor Ashibe explains that prior to the *Sarufutsu* decision, many lower courts had adopted a "strict scrutiny" doctrine requiring the state to show that it had used the "least restrictive alternative" (commonly referred to as the "LRA standard" in Japan) in restricting speech. The *Sarufutsu* decision, which "overturned the lower courts' decisions and held that a complete and uniform ban on political activities was constitutional,"[101] stopped this movement in its tracks.

Professor Ashibe's devastating critique labeled the Court's approach "formalistic and nominal balancing." By employing this technique, he explains, the Court need not consider such facts as the

> concrete circumstances of the employees, such as job classifications, the varied nature of their responsibilities and the difference between times on and off the job. . . . In this way of thinking, "the collective benefit of all the people gained by this ban" outweighs the benefits lost by the merely "indirect and incidental restraint on freedoms to express opinions." The former is "more important" than the latter in the balance of interests.[102]

Although the Court professes to accord special protection to free speech rights, "even if there is no concrete danger of and no actual occurrence of an infringement of the legislative purpose, sanctions against any rule violation are permissible simply due to an abstract danger."[103]

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101. Ashibe et al., *supra* note 94, at 255.
102. *Id.* at 254.
103. *Id.* at 254–55.

Professor Ashibe's assessment of the impact of the *Sarufutsu* decision is widely shared among Japan's constitutional law scholars. According to Professor Yasuhiro Okudaira, "[f]rom the time this decision was issued until the present, it (the *Sarufutsu* decision) continues to be regarded among constitutional scholars as one of the Court's worst judgments."[104] Ashibe summarizes the impact of *Sarufutsu* as follows: "This decision has had a major impact on the course of constitutional litigation dealing with rights and freedoms of the spirit of Japan. It is not an exaggeration to say that this case marked a turning point in the history of Japan's constitutional case law."[105]

With its 1973 *Zennorin* ruling, the Court succeeded in criminalizing a wide range of labor protest activities by millions of government workers. With its 1974 *Sarufutsu* ruling, it prohibited all national government workers from exercising any form of political speech at all, other than the act of voting itself.

In another Grand Bench judgment issued a year later, the Court continued to weave a tight web of restraints to bind the exercise of political speech in public forums. This time, the Court overruled judgments by the Tokushima District and Takamatsu High Courts in which those courts found a local ordinance that strictly regulated political demonstrations to be unconstitutional.

J. The Tokushima *Decision and the Regulation of Public Demonstrations (September 10, 1975)*

This case concerned a December 1968 antiwar demonstration involving about 300 individuals in the city of Tokushima on the island of Shikoku. According to facts recognized by the Court, "the lead group snake-danced in the street and engaged in activities contrary to the maintenance of traffic order. The defendant himself snake-danced and, from a position apart from the front line, raised both his arms, waved them back and forth, and blew a whistle he had in his possession."[106] By these actions, the courts concluded that the defendant had incited other marchers to snake-dance and thereby disrupt traffic.

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104. Okudaira Yasuhiro, Ima futatabi odokasareru hyogen no jiyu (Once again under threat—freedom of expression) 46 (Hogaku Seminar no. 615, March 2006).

105. Ashibe et al., *supra* note 94, at 254.

106. BEER & ITOH, *supra* note 71, at 550.

The defendant was arrested and indicted on charges of violating the Road Traffic Law, a national statute, and the Tokushima Public Safety Ordinance, a regulation adopted by the legislative assembly of Tokushima Prefecture. The relevant language of the Public Safety Ordinance empowered the police to impose restrictions against actions that might endanger "the maintenance of traffic order." Both the district court and high courts found the defendant not guilty of violating the Tokushima Public Safety Ordinance on the ground that the language of the ordinance was "general, abstract, and ambiguous." According to these courts, wording of the ordinance did not possess sufficient clarity to enable individuals to make reasonable judgments concerning what actions might constitute a crime punishable under the Ordinance.[107] Accordingly, they held that the Ordinance was unconstitutionally vague under the Constitution's Article 31 and found the defendant not guilty on this count.[108]

By a vote of 10–5, a Grand Bench judgment issued on September 10, 1975, overturned these judgments and found the defendant guilty.[109] The Supreme Court reasoning in this case presents an interesting puzzle. The Court appeared to agree with critical findings of the lower courts: first, the Grand Bench opinion recognized that the actions of the defendant in this case constitute the exercise of political speech protected by the Constitution; second, the opinion agreed that language in the Ordinance was vague. On the first point, the Court wrote that "as one form of expression, mass demonstrations possess elements worthy of constitutional protection," and "we must not deprive mass demonstrations of their essential meaning and value as expressions of ideas and thereby improperly restrain the freedom of expression guaranteed by the Constitution." On the second point, the Court recognized that the phrase "the maintenance of traffic order" as used in the Ordinance "is certainly open to the criticism that its language is abstract." Nonetheless, because "an average person of ordinary common sense" would be able to judge "whether his conduct will create an interference with public safety of the kind which accompanies mass demonstrations carried out in a calm and

107. *Id.* at 551.

108. *Id.* The Constitution's Article 31 provides that "[n]o person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 31.

109. Saikō Saibansho [Sup. Ct.] Sept. 10, 1975, 29 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 489 (*Japan v. Teramae*). An English translation of the court opinions appears at BEER & ITOH, *supra* note 71, at 547.

orderly manner, or will yield intentional interference with traffic order,"[110] the Court dismissed the claim of unconstitutional vagueness. By imposing the requirement that individuals respect an unwritten "reasonable man" standard or face prosecution, it appears that the Court does not require clear language in criminal statutes.

CONCLUSION

The landmark decisions in the *Zennorin*, *Sarufutsu*, and *Tokushima* cases all overturned fresh Supreme Court precedent or acquittals involving defendants engaged in political speech. It is difficult to imagine a more sudden and momentous shift against the interests of a large class of individuals who might seek to communicate their political beliefs to fellow citizens. Within the span of just a few years, the remodeled Supreme Court of Japan succeeded in overturning several critical lower court judgments that had upheld different aspects of the right to free speech. Under the leadership of Chief Justice Ishida and other Justices appointed during this era, the Court reversed the flow of constitutional doctrine in Japan.

The evidence clearly shows that the Sato and Tanaka administrations took advantage of their appointment power to change the ideological direction of the Supreme Court. Adjustment of the "reserved seat" system by increasing the seats allocated to career prosecutors and bureaucrats and decreasing the number allocated to attorneys and scholars was a critical feature. The formula established during this era—featuring six seats to career judges, two seats to career prosecutors, and two more to career bureaucrats—remains in effect today. This means that lifetime government employees hold a commanding ten-to-five majority on the Grand Bench, along with majorities on each of the three petty benches.

The political confrontations of the 1960s and 1970s led to demands for a tough response from Japan's conservative political leaders. The restructured Supreme Court delivered. Key precedents from this era, including *Zennorin*, *Sarufutsu*, and *Tokushima*, would be followed by courts throughout the country. They remain in effect today. Future majorities of the Supreme Court would stand for the new conservative order. The result is that today, three-and-a-half decades later, Japan's Supreme Court has yet to find a single instance in which an action of the police or any other government agency has ever infringed the right to free

110. *Id.* at 557–59.

speech or other "freedoms of the spirit" declared in Japan's Constitution.[111]

111. Professor Matsui's contribution to this issue provides an authoritative overview of Supreme Court judgments in cases involving "freedoms of the spirit." Shigenori Matsui, *Why is the Japanese Supreme Court So Conservative?*, 88 WASH. U. L. REV. 1375 (2011).