Recent Reforms to the Japanese Judiciary: 
Real Change or Mere Appearance?*

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I Introduction

In June 2001, the Justice System Reform Council ("Reform Council" or "Council") issued its final report.1) The Council's recommendations included several proposed reforms to the judiciary, intended to insure the judiciary would "meet the expectations of the people."2) This essay examines a number of those recommendations and the resulting reforms.

The single reform to the judiciary that has received the most publicity is the introduction of the saiban'in system through which ordinary citizens will participate directly in judging serious criminal cases and thus will have the opportunity to express their views directly in the deliberation of those cases. That system, which is scheduled to commence operation in 2009, lies beyond the scope of this essay.

This essay instead focuses on several other reforms to the judicial selection and review process recommended by the Reform Council. Most of these reforms already have been implemented. Over time, they have the potential to alter the composition and even the internal culture of the judiciary. Consequently, the potential impact of these reforms extends beyond criminal cases to the entire range of cases handled by the courts and, indeed, to the nature of the Japanese judiciary itself. Will they have a major impact, though, or will they end up more appearance than reality?

II Supreme Court Reforms

The Reform Council considered the process by which Supreme Court justices are
selected and appointed, as well as the popular review process for Supreme Court justices. Although it identified several concerns, the Council's recommendations relating to the Supreme Court were modest.

With regard to the appointment process, the Council observed that the process is "not necessarily transparent." As a more concrete concern, the Council pointed to "the entrenchment of fixed proportions for the numbers of justices who come from each field." This concern relates to the pattern of appointments that has long prevailed in Japan. The Constitution provides that the Emperor appoints the chief justice of the Supreme Court based on the designation by the Cabinet, and the Cabinet appoints the fourteen associate justices. The Courts Act further provides that all justices shall possess "high insight" and "legal knowledge," and that at least ten of the fifteen justices must have at least ten years of experience as judge, attorney, or prosecutor. Otherwise, however, neither the Constitution nor the Courts Act stipulates any fixed proportions for composition of the Supreme Court.

Soon after the Supreme Court was established, however, a standardized pattern developed in which approximately one-third of the seats (five or six) are allocated to appointees from the career judiciary, another third to appointees from among career attorneys, and, at any given time, typically one or two seats to career prosecutors, one or two to former government officials (typically former diplomats or former heads of the Cabinet Legislation Bureau), and one to a scholar. Not only is the composition of the Court similar at any given time, a pattern has taken root in which career judges replace career judges, lawyers replace lawyers, prosecutors replace prosecutors, and scholars typically replace scholars. In sum, these seats have come to be regarded as almost a vested right of the respective occupations. It appears, moreover, that to a great extent, at least for the three branches of the legal profession, the decisions on nominees are largely left to the respective organizations, with the Supreme Court, senior prosecutors, and leaders of the bar, respectively, determining the most appropriate candidates from the judiciary, the procuracy, and the practicing bar.

As the Reform Council observed, from time to time concerns have been raised about the entrenched nature and lack of transparency regarding the appointment
process. In its examination of this issue, the Council considered the approach originally followed for Supreme Court appointments: use of a nominating committee.

Such a committee (the Saibankan ninmei shimon iinkai, or Justice Appointment Consultation Commission) was used in 1947, in connection with the appointment of the first group of fifteen justices. At that time, the nominating committee, along with other aspects of the Supreme Court appointment process, reflected the influence of Occupation authorities. As possible alternatives for selecting Supreme Court justices, the Occupation authorities considered both direct election of justices and approval of justices by the Diet. Instead, however, they opted for a model then in vogue in the United States, the so-called “Missouri plan.” This approach, which traces its origins to a proposal from the early 20th century and was first adopted by the State of Missouri in 1940, sought to achieve merit-based selection of judges while incorporating mechanisms for political and popular accountability. Today several variations of this approach exist in the United States, but they share the following features: a permanent, nonpartisan commission, composed of both lawyers and non-lawyers, recruits and screens judicial candidates; that commission forwards a list (typically of between three and five candidates for each opening) to the governor (or other appointing authority); the governor then chooses one candidate from the list; after the judge has served for a time (typically one or two years), the judge’s name is placed before the voters on a so-called “retention ballot” (asking whether the judge “should be retained in office?”); and the judge must win a majority of the vote in that initial retention election in order to continue in office for a full term (and typically must pass subsequent retention elections at the end of each term). The basic conception of the plan was that the nominating commission would ensure the high quality of the judiciary, the governor’s selection from a slate of several names would ensure political accountability in the selection phase, and retention elections would ensure popular accountability.

The first set of Supreme Court appointments in Japan was structured along similar lines. A fifteen-member nominating committee, which included legal and non-legal scholars and leading politicians, as well as judges, attorneys, and a
prosecutor, compiled a list of thirty candidates, which it forwarded to the Cabinet for the final selection of the fifteen justices. In another similarity to the Missouri plan, the justices were subject to subsequent review by the people; as with the retention elections in the United States, under the popular review (kokumin shinsa) system, which remains in effect today, Japanese Supreme Court justices must go before the voters in the first general lower house election following their appointment, and in elections every ten years thereafter. Thus, as in the Missouri plan, the original system for selecting Supreme Court justices incorporated both a merit review process and a political element in the initial appointment stage and direct popular review in the retention stage.

As it turned out, though, the nominating committee was abolished after the initial set of appointments. In explaining the reasons for abolishing the committee, then–Minister of Justice SUZUKI Yoshio stated: “Judging from the results of [the initial appointments], it is regrettable but this process appears to have proved formalistic and could not achieve the anticipated effect, and at the same time the process creates the danger of obscuring where the responsibility for appointments lies. Accordingly, the provision relating to the Justice Appointment Consultation Commission has been abolished, and the Cabinet is given full discretion with respect to whether to consult with regard to [appointments] and, if it chooses to consult, with whom. In return, the Cabinet bears complete responsibility for the [appointments].” The Occupation authorities evidently agreed with this assessment. According to Alfred OPPLER, who served as the Chief of the Legislation and Justice Division of the Legal Section of SCAP and was heavily involved in the judiciary reforms, “due to the reluctance of the Japanese to reject suggestions coming from outstanding figures of public life, … this device [the nominating committee] virtually had the effect that the power of appointment shifted from the Cabinet, where it belonged constitutionally, to the committee.”

Although reinstitution of a nominating committee was proposed in 1959 and again in 1975, such a committee has never been utilized since the first set of appointments. In its recent deliberations, the Reform Council again considered that approach as one possible option. While describing the nominating committee system as being “of reference,” the Council stopped short of recommending that
approach or any other concrete reforms to the Supreme Court selection process. Instead, the Council stated only, "from the standpoint of strengthening the people's confidence in the justices of the Supreme Court, studies should be made on appropriate mechanisms for the purpose of securing transparency and objectivity with regard to the appointment process." \(^{15}\)

With regard to the popular review process, the Reform Council observed that that system "has become a dead letter." (In the nearly sixty-year history of that process, no justice has ever come anywhere near being disapproved. The highest non-approval vote ever was 15.17%, for Justice SHIMODA Takesō in 1972. And public consciousness of the popular review system is low.) Here again, though, rather than recommending any concrete changes, the Council stated only, "The current situation should be reexamined and ... studies should be made on measures to increase the effectiveness of the system for popular review of Supreme Court justices, such as by making efforts to reinforce the disclosure of information related to each individual justice subject to review so as to make it possible for the people to make meaningful judgments." \(^{16}\) Even if extra efforts are undertaken in this regard, however, two structural features limit the range of information available for disclosure. The first such structural feature is the short tenure of Japanese justices. On average, justices are appointed between the ages of 63 and 65. With a mandatory retirement age of 70, this means that, on average, justices serve for only about six years. (In fact, the last justice to serve for over ten years was Justice IRIE Toshirō, who retired in 1971.) The second structural feature is the fact that only dissenting and supplemental opinions are signed. Majority opinions (or, more precisely, judgments of the Court) are not signed. Thus, one cannot identify what judgments a given justice was responsible for drafting. Even if much greater efforts at disclosure are undertaken, these two features taken together mean relatively little information is available about justices' performance at the Supreme Court.

In sum, while the Reform Council deliberated the selection and review processes for Supreme Court justices and identified a number of concerns, it offered little in the way of concrete proposals for reform.
III Lower Court Reforms

The reforms at the lower court level have been considerably more sweeping than those at the Supreme Court level. Three sets of reforms bear especial note: the invigoration of the system via which practicing lawyers are appointed as judges at the mid-career level (the bengoshi ninkan system); the introduction of a system for having assistant judges attain experience in law firms or other positions outside the judiciary; and the establishment of a body to review candidates for appointment as assistant judges and judges. The first two of these reforms are aimed at "diversify [ing] the sources of supply" for judges and diversifying the experience of judges;17) the third is aimed at "reflecting public views ... in the process of appointing judges and ... secur [ing] transparency and objectivity of personnel evaluations."18) The Reform Council issued its recommendations in June 2001; the judiciary moved promptly (in one case, even before the Council issued its final report) to implement all three of these reforms.19)

1 Diversification of the Judiciary

The Japanese judiciary traditionally has been a career judiciary. Although article 42 of the Courts Act contemplates the possibility that practicing lawyers, prosecutors, and legal academics may be appointed as judges,20) in the past nearly all judges have entered the judiciary promptly upon completion of their legal training at the Legal Training and Research Institute ("LTRI"), typically when they are in their mid- to late twenties. After ten-year terms as assistant judges, the great majority is appointed as judges and most continue to serve in the judiciary (with reappointments every ten years thereafter) until reaching the mandatory retirement age of 65 (or 70, for the handful who are appointed as Supreme Court justices).

From time to time the Japanese judiciary has been criticized as being unduly insulated or even out of step with the views of the Japanese people, with the career system taking much of the blame. The Japanese bar, moreover, has long advocated the achievement of hōsō ichigen ("a unified legal profession"), a term which has taken on the connotation of appointing judges from the ranks of experienced lawyers, as in the United States, rather than channeling judges and lawyers into separate career tracks immediately upon completion of the LTRI.
The Reform Council did not opt for across-the-board adoption of a system in which judges would be appointed from the ranks of experienced attorneys. To the contrary, the Council expressly recognized that appointment of assistant judges directly upon completion of the LTRI would continue to constitute a major route for entry into the judiciary. Nor did the Council expressly voice the opinion that the judiciary was unduly insulated or out of touch with the views of the people. Nonetheless, the Council's final report implicitly suggested concerns of that sort, through its use of phrases such as "form [ing] and nurtur [ing] a justice system that can genuinely meet the public's expectations and trust" and repeated references to the importance of securing judges "with abundant, diversified knowledge and experience." The following two reforms are aimed at this goal.

(1) Appointment of Practicing Lawyers

The first major set of reforms concerns the invigoration of the system for appointing judges from among experienced attorneys. As one step in achieving this goal, the Reform Council concluded:

In order to realize the import of article 42 of the Courts Act, which anticipates that judges will be drawn from a variety of sources, and to respond to the substantial increases in the number of judges needed ..., it is necessary to promote strongly the appointment of lawyers as judges, which has long been overdue. For this it is indispensable that the Supreme Court and the Japan Federation of Bar Associations build a constant and close cooperative framework.

As the Council noted, the concept of appointing practicing lawyers as judges was not new. Article 42 of the Courts Act, which contemplates the appointment of mid-career practicing lawyers, prosecutors, and legal academics as judges, dates to 1947, when that law was enacted; and in 1964, the Provisional Justice System Investigation Committee, a twenty-member committee chaired by WAGA-TSUMA Sakae, urged the three branches of the legal profession (the courts, the prosecutors, and the practicing bar) "to cooperate so that as many suitable lawyers, prosecutors, etc., as possible may be appointed as judges." Despite this encouragement, until the late 1980s it remained very rare for a practicing lawyer to enter...
the judiciary. In 1988, however, five lawyers were appointed as judges; and, in 1991, the Supreme Court and the Japan Federation of Bar Associations (JFBA) entered into an agreement to promote appointment of lawyers as judges. Nonetheless, the system languished. In the eleven years from 1992 through 2002, only 39 judges and 10 assistant judges were appointed from among practicing lawyers. Accordingly, what the Reform Council recommended was not the establishment of a new system, but rather the invigoration of an existing system.

The JFBA, which had long advocated *hōsō ichigen* as one of its core objectives, promptly embraced the above recommendation. The JFBA and many individual bar associations established committees to promote the appointment of lawyers as judges. Major bar associations in the Kantō, Kinki and other regions undertook efforts to recruit attorneys willing to serve as judges and established committees to review candidates. The JFBA even went so far as to produce a promotional video, aimed at attorneys, extolling the virtues of becoming a judge.

The Supreme Court also embraced the proposal to invigorate the system for appointing lawyers as judges. Even before the Reform Council issued its final recommendations, the Supreme Court entered into a new agreement with the JFBA to cooperate in promoting the appointment of lawyers. To facilitate those efforts, the Supreme Court has taken steps to provide assurances to prospective judges that they will be able to spend at least the first stage of their careers in locations convenient to their homes, if they so desire; and the Supreme Court also has instituted the so-called part-time judge system, through which attorneys, while retaining their status as attorneys, serve as judges one day per week, handling conciliation matters at district, summary, and family courts. Through this experience, attorneys, without making a total commitment, are able to experience life as judges; and it is hoped that, through this experience, a substantial number of the part-time judges will elect to pursue appointment as full-time judges.

The part-time judge system has been relatively successful. The first cycle of appointments occurred in January 2004; and 30 people were appointed. In October of that year, another 28 were appointed, with 32 more in October 2005; and in 2006, some 50 or more candidates applied. In contrast, despite the efforts of both the
JFBA and the Supreme Court, the system for appointing lawyers as full-time judges has continued to languish. In the first year after the renewed commitment took effect, from April 2003 through March 2004, ten attorneys were appointed as full-time judges. The following year the number dropped to just eight nationwide.29) In the year from April 2005 through March 2006, the number plummeted, with only four attorneys entering the judiciary on a full-time basis.30) And for the October 2006 appointment cycle, only three attorneys formally applied, and only one of those three was deemed suitable for appointment by the screening committee.31)

Why is it so difficult to attract attorneys to the judiciary? Many reasons exist, including the stress and uncertainty involved in the appointment process, the difficulty in winding up practice and arranging other attorneys to handle pending cases, and, at least for attorneys with thriving practices, the resulting drop in pay.

In each of these respects, the situation in Japan is not so different from that in the United States. Attorneys at large firms in the United States may not have so much difficulty in arranging other attorneys to handle pending cases, but attorneys at smaller firms face the same problem as Japanese attorneys. And, if anything, the other two factors are far more severe in the United States than in Japan. Whether selection is via appointment, election, or merit selection, the public scrutiny involved in the selection process in the United States is intense. At least in the case of the federal judiciary and state supreme courts, candidates must anticipate that their entire lives will be subject to examination, with the risk that any unfavorable information will become the subject of front-page newspaper stories. And the drop in pay is often dramatic. It has been reported, for example, that John Roberts earned over $1 million in his last year as a lawyer, 2003; when he left the law firm to become a judge on the Court of Appeals, his salary dropped by over 80%, to about $170,000.32) (Following his appointment as Chief Justice in 2005, his salary now stands at slightly over $200,000 per year.)

Despite these hurdles, however, the judiciary in the United States has no trouble attracting large numbers of strong candidates. To the contrary, the judiciary remains a cherished dream for many top lawyers and legal academics.

What accounts for the dramatic difference between Japan and the United
States? Part of the explanation lies in notions of prestige. In both nations, the judiciary is a highly respected occupation. In Japan, though, the judiciary is respected but largely invisible. In contrast, in the United States the judiciary is both respected and visible. Whereas Japanese judges are expected to and do maintain a low profile, the judiciary in the United States is a rather high-profile occupation. In my view, this visibility, together with the public recognition that accompanies it, renders the prestige accorded to judges in the United States much more tangible than is the case in Japan.

To my mind, though, two much more important factors are personal autonomy and the transfer system. Turning first to personal autonomy, in both nations there are two sides to the equation: life as a practicing lawyer and life as a judge. At large law firms (as of early 2006, nearly 200 US law firms had more than 200 attorneys, including twelve firms with over 1000 attorneys) and even many middle-sized law firms in the United States, an attorney is one cog in a large machine. The attorney may have great autonomy in how s/he handles cases for clients, but many other aspects of the attorney’s life are subject to seemingly constant scrutiny—by the managing partner, management committee, and other lawyers. The largest object of scrutiny is billable hours. On a monthly or even weekly basis, attorneys receive tallies of their billable hours, often accompanied by comparisons to law firm goals or norms. But the scrutiny extends to many other aspects, including client development, work habits, and in some cases even dress; and attorneys typically are evaluated on an annual basis. Attorneys are not likely to be transferred to more or less desirable locations on the basis of the evaluations (although large firms with multiple offices on occasion encourage or pressure attorneys to move), but salary determinations and job assignments often depend on the results. Moreover, for associates and, increasingly, even partners, adverse evaluations may result in the termination of employment. In short, many US attorneys feel little personal autonomy; they are under constant scrutiny and subject to a wide range of pressures from the organization they serve.

Turning to the situation for judges in the United States, the selection process and, in the case of state courts, the reappointment or reelection process, place them under considerable pressure. Once in office, however, judges have great personal
autonomy. To a great extent, each judge is his or her own boss. Judges may work just as hard, or even harder, than they did at law firms, but they enjoy considerable freedom to set their schedules for themselves; they are not subject to the specter of weekly or monthly tallies of billable hours. Judges have wide autonomy not just in how they decide cases, but in how they run their own chambers and how they manage their own courtrooms. The chief judge of a court typically may utilize a few modest incentive mechanisms to reward or punish judges, such as case assignments or committee assignments. Stronger incentive mechanisms, such as pay, transfers, or promotions/demotions, are not available, however. In the federal system and every state, judicial salaries typically are fixed (normally by the legislature) for all judges at the same level, regardless of age or experience: all district court judges, for example, or all superior court judges, or all supreme court justices (with somewhat higher pay for the chief judge or chief justice). Accordingly, personnel evaluations make no difference with regard to salary. An even greater contrast to the situation in Japan relates to job location and the transfer system (or, rather, the lack of a transfer system). Judges in the United States are selected for a specific judgeship in a specific court. Except in the relatively rare case of a new selection process, they serve in that same judgeship throughout their judicial career, with no system for transfers. The institutional structure thus reinforces the high level of personal autonomy enjoyed by judges in the United States, which many attorneys find very attractive.

The situation, I would submit, is reversed in Japan, on both sides of the equation. Although law firms have been increasing in size in Japan over the past decade or so, most Japanese attorneys still have great personal autonomy. To a large extent, they remain their own bosses, not cogs in large machines. On the other hand, judges in Japan are members of a large organization. Judges may have great autonomy in how they decide specific cases; but even a relatively abstract summary of the standards for evaluation of judges makes clear that other aspects of their work, including their legal reasoning, their handling of cases, their management of the courtroom, their processing of cases “within a reasonable time frame,” and other aspects of their work habits, are subject to scrutiny by the chief judge of the court in which they serve and, ultimately, by the Personnel Division of the
Supreme Court General Secretariat. Moreover, the annual evaluations of judges play an important role not only in the reappointment process, but in decisions on pay scale, assignments, transfers, and promotions/demotions. Accordingly, in comparison with judges in the United States, the personal autonomy of Japanese judges is relatively circumscribed. Of far greater relevance with regard to the difficulty in attracting lawyers to the judiciary, the personal autonomy of Japanese judges is relatively circumscribed in comparison with Japanese lawyers. Many US attorneys find the judiciary attractive in part because of the greater personal autonomy it promises; the opposite situation, I would submit, exists in Japan.

A second major factor impeding the Japanese judiciary’s ability to attract lawyers is the policy of rotating judges to new positions, and often to new locations, every three or four years. Of course, the judiciary’s personnel policy is far from unique in Japan. Quite the contrary, regular rotations and transfers have been the standard practice at nearly all major Japanese corporations and organizations. Notably, however, such transfers are not standard practice at law firms. At the start of their careers, attorneys have great freedom to choose where they wish to live and practice, and they can plan to settle down in that location for their entire lives. Attorneys in the first few years of practice might be able to move relatively easily; but mid-career attorneys with at least ten years of practice experience, which is the desired standard for attorneys contemplating a move to the judiciary, are likely to have established roots in the community and to find it difficult to move. By providing assurances to prospective judges from the mid-career level that they will be able to spend at least the first stage of their judicial careers in locations convenient to their homes, the Supreme Court has to some extent ameliorated the impact of the transfer system. Still, for attorneys contemplating a lifelong move to the judiciary, the transfer system continues to serve as a significant deterrent.

Notwithstanding these barriers, there is some reason for hope that the system for appointing lawyers as judges will not wither, but instead will expand. As mentioned above, the part-time judge system has been quite successful; and that system holds considerable potential to serve as a steppingstone to appointment as full-time judges. From the first group of thirty part-time judges, who began
service in 2004, three elected to pursue full-time appointments from 2006. Word of mouth reports by judges who have entered the judiciary through the lawyer-appointment system may help reassure potential applicants. And the Supreme Court and the JFBA continue efforts to promote the system and facilitate entry into the judiciary. Given the many hurdles that continue to exist, however, it seems likely to take quite some time for the system to take firm root.

(2) Practice Experience for Assistant Judges

Presumably reflecting the realization that the system for appointing practicing lawyers as judges would not expand overnight, the Reform Council devised another ingenious mechanism to ensure that judges gain broader exposure outside the judiciary: a system for sending assistant judges outside the judiciary, so that they will attain other types of experiences early in their careers. In the words of the Reform Council, "In order to secure judges with abundant, diversified knowledge and experience, mechanisms should be established to ensure as a system that, in principle, all assistant judges gather diversified experience as legal professionals in positions other than the judiciary." The Council further explained: "The basis [of this system] should be for assistant judges to leave their status as judges and gather experience in other legal professions such as lawyer or public prosecutor." Furthermore, "the period of experience shall be a reasonably long period suited to obtaining meaningful experience."

The Supreme Court expressed its support for this proposal. While noting the need to overcome hurdles such as securing the necessary number of appropriate settings to receive the assistant judges, handling the additional workload created by their absence, and working out details on such matters as compensation and benefits, the Supreme Court announced that, following an initial implementation stage, in principle, all assistant judges would have the opportunity to spend two years gaining experience outside the judiciary. The Diet passed enabling legislation in 2004. Shortly thereafter the Supreme Court and the JFBA entered into an agreement to cooperate in arranging appropriate placements and other aspects of the new system; and the first placements began in April 2005.

In the first two years of the program, however, each year only ten assistant judges were placed in law firms. Presumably, the system is still in "the initial
implementation stage," and it would be unrealistic to expect 100% placement at this point. Still, with over one hundred new assistant judges now joining the judiciary each year, the system remains far short of the goal of placing "in principle, all assistant judges" in such positions. The difficulty in arranging appropriate placements, as well as the need to work out appropriate mechanisms for handling the additional workload, undoubtedly represent major reasons the figures remain so low. I cannot escape the feeling, however, that, despite the public vows of support for the program, many members of the judiciary are reluctant to see the program fully implemented—in part out of a skepticism over the need, and in part out of a fear that talented assistant judges may be lured away by private practice.

If that is indeed the case, the fear is not entirely unfounded. This system may well result in some attrition for the judiciary: once assistant judges have the opportunity to experience private practice in a law firm, some will not only find the material benefits attractive, but will find representing clients to be highly satisfying and will elect not to return to the judiciary. In my view, however, the fear of attrition should not deter the judiciary from proceeding with full-scale implementation of the new system. Even if the judiciary does lose a few capable assistant judges in the process, the broadened experience attained by the vast majority who return to the judiciary will more than make up for any losses. And the interaction between the assistant judges and attorneys at the law firms where they are placed may, in the long run, result in greater interest among attorneys in entering the judiciary, as well. In sum, in my view, this system represents a brilliant accommodation to the realities of the Japanese career system.

Incidentally, the newly established Nihon Shihō Shien Sentā (Japan Justice Support Centers, or Japan Legal Aid Centers) have been mentioned as a possible placement setting for assistant judges. Those Centers, popularly known as Hō Terasu (Law Terrace), commenced operation in October 2006 at fifty locations throughout Japan, providing general consultation on legal matters and a broad range of legal aid for civil and criminal matters. Members of the practicing bar reportedly are lukewarm about having assistant judges seconded to the Support Centers, in part evidently out of concern regarding state control over the Centers.
Yet if the goal of having assistant judges work at law firms and in other positions outside the judiciary truly is to sensitize them to the concerns of ordinary people, the Centers would appear to offer an admirable solution to the difficulties in securing appropriate placements. The Centers are in great need of capable legal staff and there is very little likelihood assistant judges will choose to remain in those Centers rather than returning to the judiciary. Above all, it is hard to imagine a better setting than a legal aid center for an assistant judge to experience the needs and concerns of ordinary Japanese.

2 Lower Court Judge Designation Consultation Commission

Since the 1960s, many liberal commentators within Japan have criticized the Japanese judiciary for a supposed lack of judicial independence, based largely on anecdotal evidence. Since the early 1990s, those claims have been bolstered by statistical studies undertaken by American scholars J. Mark Ramseyer and Eric Rasmusen. In this connection, the primary charges relate to the judiciary's internal personnel system.

As noted earlier, historically Japan's judiciary has been a career system. Typically, new entrants to the judiciary are appointed for ten-year terms as assistant judges immediately upon completion of the LTRI, then appointed for ten-year terms as judges, followed by reappointments as judges for successive ten-year terms until retirement. In theory and in form, the Cabinet is responsible for all lower court appointments; in practice, however, the Supreme Court General Secretariat, in particular its Personnel Division, has had the say over appointments, as well as transfers (which typically are undertaken every three or four years) and other aspects of personnel policy. Given the dominant role of the General Secretariat, one set of charges is that the General Secretariat has denied some initial appointments and, on rare occasion, denied reappointments based on the political beliefs of the candidates. A broader set of charges is that the General Secretariat has utilized the career system, including pay raises, promotions, and transfers, to reward some judges and punish others, thereby inducing them to comply with certain policy preferences—or, for those who refuse to comply, relegating them to positions where they will have very limited spheres of influence, in some cases to the point effectively of coercing judges to quit. The Supreme
Court steadfastly has refused to respond to these charges or to disclose in any way what the reasons have been for decisions on appointments, promotions, transfers or other matters of personnel policy. In turn, the absence of concrete information has given continued life to the charges.

The Reform Council did not endorse the above charges, although it did refer to them, by stating, "as it has long since been observed, due care should be paid in order that whether or not one receives a promotion, or the speed of promotions, will not influence his or her independence ...". In its final report, moreover, the Council called for a reexamination of the procedures for appointing lower court judges and greater openness in that process. In the words of the Council, "The process by which the Supreme Court nominates candidates [for lower court appointments] is not necessarily clear, and the views of the people cannot penetrate that process. ... [F] rom the standpoint of strengthening the confidence of the people toward the judges, in order to reflect the views of the people in the [appointment] process, a body should be established ..., which, upon receiving consultations from the Supreme Court, selects appropriate candidates and [makes recommendations] to the Supreme Court." The Council added, " [M] echanisms should be established to assure that the process is transparent, including disclosing the selection standards, procedures, schedule and other matters." Furthermore, for personnel matters other than appointments, the Council recommended that "appropriate mechanisms be established for the purpose of securing transparency and objectivity as much as possible."48

In 2003, the Supreme Court responded to the recommendations regarding appointments by establishing the Lower Court Judge Designation Consultation Commission (Kakyū saibansho saibankan shimei shimon iinkai), and at the same time establishing subsidiary local committees in the districts of each of the eight High Courts, responsible for collecting information with regard to candidates for appointment or reappointment and reporting to the Commission. The Commission consists of eleven members, selected by the Supreme Court. As of this writing in 2006, five of the members are from the legal profession (two judges, two attorneys, one prosecutor), the other six are "persons of learning and experience" (gakushiki keikensha) from outside the legal profession. (It bears note, however, that one of the
six—the Commission chair, OKUDA Masamichi—spent most of his career as a legal academic and is currently a law school professor, but served as a Supreme Court justice for three years.) The Commission is charged with reviewing candidates for lower court judgeships (including initial appointments as assistant judges, promotion of assistant judges to judge status [or, technically, “appointment” of assistant judges as judges], and reappointment of judges), considering the suitability of the candidates, and reporting the results of that consideration to the Supreme Court. The Commission held its first meeting in June 2003 and, as of this writing in late 2006, has held a total of 25 meetings over the past three and a half years.

Taking the objectives set forth by the Reform Council—namely, to ensure transparency and objectivity in the judicial appointment process, and to ensure that the views of the public are reflected in that process—has the Commission been successful? To the extent six “persons of learning and experience” from the elite of society can adequately represent the Japanese public, one can hope that the Commission is helping to ensure that the views of the public are reflected. One also can hope that the involvement of outsiders is helping to ensure objectivity in the appointment. Yet, because the third objective, transparency, has hardly been achieved, there is little way of knowing for certain whether the other objectives have been achieved; one can only hope they have been.

The new system has not been a complete failure with regard to transparency, to be sure. The prior system was a virtual black box, with hardly any information regarding the process, standards or results publicly available. Under the new system, an outline of the process, the names of the Commission members, and the minutes of the Commission meetings are available to the public and are available over the Internet.\(^{49}\) Attachments to the minutes contain various materials concerning the appointment process, including copies of forms used,\(^{50}\) as well as a relatively general statement of the standards for determining suitability for appointment.\(^{51}\)

The standards, which constitute “a rough policy” (ichiō no hōshin), begin by emphasizing that the evaluation should be based on an overall assessment of whether the candidate is suitable to serve as a judge, taking into account the items listed below, as well as other relevant factors (including the candidate's health). The
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standards then go on to identify three major items for review: (1) “Ability to manage cases …”, (2) “Ability to manage judicial units in an appropriate manner …,” and (3) “General aptitude and ability necessary for handling duties as a judge (judgment, character/personality).” As an “image,” the standards then list a number of more specific matters on which attention might be focused in examining each of the above items.

For item 1, the ability to manage cases, the more detailed “image” consists of the following:

A. With regard to legal reasoning ability …: For example, accuracy and sufficiency of legal knowledge; understanding, analytical ability, ability to organize, and ability to apply [knowledge] to legal issues; ability to evaluate evidence in an appropriate manner; ability to express legal reasoning in an appropriate manner; ability to carry out investigations, etc., and compose decisions within a reasonable time frame; etc.

B. With regard to ability to apply procedures …: For example, ability to supervise trials; ability to communicate with the parties; ability to move forward smoothly with one’s overall caseload; etc.

For item 2 (ability to manage judicial units), the “image” states: “For example, ability to manage a unit or the judicial organization as a whole smoothly; ability to supervise staff; ability to deal in an appropriate manner with staff and other judges; etc.”

Finally, for item 3 (general aptitude and ability), the “image” states:

A. With regard to judgment: For example: breadth of vision based on broad knowledge; insight into human nature; understanding of societal phenomena; etc.

B. With regard to character and personality: For example, integrity, fairness, open-mindedness, diligence, patience, self-control, decisiveness, prudence, carefulness/cautiousness (shinchōsa), flexibility in thinking, independent spirit, spiritual courage, sense of responsibility, cooperativeness, drive, etc.

To be sure, all of the above factors are relevant; and determinations inevitably must be made in a comprehensive fashion, based on a case-by-case evaluation of
all factors. It is also unavoidable that the list is non-exclusive; in individual cases, matters other than those specifically listed may prove decisive. Nonetheless, the above standards are at such a level of abstraction, and embrace such a wide range of qualities (some of which, such as “decisiveness” and “cautiousness,” seem nearly opposite in meaning), that, without further explanation or concrete examples, they provide only a very generalized picture.

Let us now turn to the Commission’s deliberations. The minutes identify the speakers only by status (e.g., Commission chair, Commission member, member of the Commission’s secretariat, or witness), not by name. But the minutes for several sessions, particularly those relating to procedural matters, contain relatively detailed accounts of the deliberations. If one reads those minutes closely, one can glean considerable information regarding the selection and reappointment process. From these minutes, we learn, for example, that, in the case of initial appointments of assistant judges, grades at the LTRI are “a major factor,” and that the judges who serve as instructors at the LTRI prepare reports on all candidates for the judiciary but the prosecutors and lawyers who serve as instructors at the LTRI do not (although reports on apprenticeship training [jitsumu shushū] prepared by prosecutors and attorneys, as well as judges, may be submitted to the Commission).52) We also discover that there has been extensive discussion, on numerous occasions, regarding how best to assemble relevant information regarding attorneys seeking appointment to the judiciary through the bengoshi ninkan system discussed earlier, and how to assess that information.53)

In the case of promotion of assistant judges to judge status and reappointment of judges, we learn that, based primarily on reports on candidates prepared by the chief judges of the courts where they have been stationed, “the Commission first separates out those candidates whose suitability is deemed to necessitate careful evaluation (priority review candidates) and then places especial weight on the deliberations regarding those candidates.”54) We learn that this screening (as with the screening of candidates for appointment as assistant judges and of attorneys seeking appointment as judges) is conducted not by the full Commission, but by a subcommittee, the working subcommittee (sagyō bukai). (An intriguing detail from the minutes is that, as initially proposed, the working subcommittee would have consisted of just four
members, with one member from each branch of the legal profession plus one "person of learning and experience." After three Commission members argued for greater representation by those from outside the legal profession, the subcommittee was expanded to five members, with two from outside the profession. We also learn that the pool of available information has been expanded, by having the regional committees collect information on candidates from attorneys and prosecutors in the districts where the candidates have been serving.

The minutes further reveal that there has been considerable debate over the role of local bar associations in collecting information on candidates. The Supreme Court's initial assumption, evidently, was that the regional committees would send the list of candidates to the local prosecutors office and local bar association, have those bodies convey the list to individual prosecutors and individual attorneys practicing in the district, and then ask individual prosecutors and attorneys to send any relevant information directly to the regional committee. Some local bar associations, it turned out, began to play a more active role in collecting information, by, for example, preparing and distributing to local attorneys a questionnaire relating to the candidates, then collecting and tabulating the results, using a rating system. The Supreme Court and some members of the Commission seem to have been unhappy with this practice. Objections were voiced with regard both to the use of a rating system and to the involvement of bar associations in collecting and tabulating results.

Beyond the objections to the specific manner in which information is collected, some statements implied doubts about the value of collecting information from attorneys in the first place. Thus, for example, at the 7th Meeting a member of the Commission's secretariat (assigned from the Supreme Court General Secretariat) stated: "For judges, ten years' worth of evaluations have been accumulated, and that should be kept in mind in considering how information should be collected." A Commission member quickly seconded this view, stating: "I do not believe good information can be assembled by asking attorneys. An important point is how to evaluate what has been accumulated from ten years of service as judge." That member seemed to believe the Commission need not go beyond the evaluations prepared by the judiciary, stating: "Since this Commission, which includes persons..."
of learning from outside, is undertaking consideration, doesn’t that meet the reasons this Commission was established?” Other members sharply disagreed, however. One member stated, “Since one of the reasons this Commission was established was [to consider candidates] separately from the Supreme Court, even if ten years’ worth of personnel evaluations might exist in the Supreme Court, isn’t it important for us to think about how we, as a Commission, should collect information?” Another member offered the following revealing nugget of information: “One can talk about ten years’ worth of accumulated reports, but even in the case of materials relating to priority review candidates, ten years’ worth comes to only about ten pages.”

These and other sections of the minutes suggest that, while there are significant differences of opinion among members as to how much information is needed and how that information should be collected and evaluated, the Commission takes its responsibilities seriously. Of course, unlike the nominating committee in the State of Missouri, the Commission has no mechanism for identifying and recruiting potential candidates on its own; it is charged only with reviewing the candidates that come before it, and cannot evaluate whether the Supreme Court or bar associations improperly excluded potential candidates in the first place. The heated give-and-take over the above and other procedural matters, though, would lead one to believe that the Commission engages in a serious review of the candidates that do come before it (at least borderline candidates and any candidates about whom questions have been raised—the so-called “priority review candidates”), and does not simply rubberstamp the determinations that have been made by the Supreme Court General Secretariat.

Unfortunately, there is virtually no concrete evidence on which to base such a rosy assessment, for, when it comes to matters of substantive review, the minutes suddenly become strictly pro forma in nature. Thus, for example, at the 5th Meeting, held on October 6, 2003, the Commission reviewed 109 candidates for appointment as assistant judges. The minutes for that meeting inform us that the working subcommittee had met previously, on October 3, in a meeting that started at 5:30 pm—but with no indication of the ending time for that meeting, and thus no means for assessing how long the working subcommittee deliberated. As for the
full Commission deliberations on those candidates, the minutes simply state, “A report was made on the results of consideration by the working subcommittee. Based on [those results], deliberations were held on the suitability of designating candidates for appointment as assistant judges. As a result, of the 109 candidates, 100 were deemed suitable for designation and 8 were deemed unsuitable. In the case of one additional candidate, the determination of suitability was deferred.” The total time spent in deliberations on the 109 candidates is not disclosed; but the record does reveal that two other matters were discussed on that day, with the entire meeting lasting under three hours.

Similarly, at its next meeting (the 6th Meeting), on December 2, 2003, the Commission considered 181 candidates for promotion from assistant judge to judge status or reappointment as judge, and twelve other candidates for appointment as judges (of whom eleven were attorneys seeking appointment). The minutes reveal that the working subcommittee met over a two-day period, but again give no indication of how long those meetings lasted. This time, the full Commission meeting lasted over four and a half hours. While the minutes include fairly lengthy discussions of procedural issues relating to collection of information, when it comes to the evaluation of the candidates, they simply report: “Based on the results of consideration by the working subcommittee, deliberations were held on the suitability of designating candidates for appointment as judges. As a result, apart from one candidate who withdrew his/her request, of 181 candidates, 175 were deemed suitable for designation and 6 were deemed unsuitable,” and “Based on the results of consideration by the working subcommittee, deliberations were held on the suitability of designating candidates for appointment as judges. Of the 12 candidates for designation (one of whom was not an attorney, but was considered together), 7 were deemed suitable for appointment and 5 (of whom 4 were attorneys seeking appointment as judges) were deemed unsuitable.” No indication is given of how many of the candidates were designated as priority review candidates, much less their names. (Indeed, at a later meeting, a member of the Commission secretariat reported, as a very troubling matter regarding confidentiality, that there had been a leak at a regional committee through which the local bar association learned the number [but not the names] of priority review candidates.97) And no indication is given whatso-
ever of what the grounds were for the recommendations of non-suitability or even the types of factors that were considered in the deliberations.

In the Japanese setting, one never would have expected individualized public reports on each of the candidates, as one might find in Missouri or elsewhere in the United States. But one might have hoped for a general explanation of the factors considered, with some discussion of the types of concerns deemed relevant in recommending that candidates not be appointed. That level of generalized disclosure would help clarify the relevant standards in a concrete manner, and thus would promote the "transparency" called for by the Reform Council.

In fact, the minutes for the 8th Meeting reveal that "Fourteen ... former trainees at the Legal Training and Research Institute [sent a document to the chair of the Commission], stating that, from the ... policies disclosed heretofore in the summaries of the Commission's proceedings, the standards for ... suitability for appointment as assistant judges ... were not clear, and requesting that more concrete standards be disclosed." At that meeting, at least two members of the Commission voiced their support for greater disclosure of the relevant standards. One member, for example, expressed the following view: "While there may be a limit to [what we can disclose regarding] the concrete reasons, isn't it essential, from the standpoint of foreseeability, to disclose to some extent how high the hurdle is, especially with respect to first-time appointments?" Officials from the Supreme Court (a member of the Commission secretariat, presumably from the General Affairs Division, and one or more witnesses from the Personnel Division) opposed any expansion in disclosure, however. A rather convoluted comment by a member of the secretariat included the following statement: "Our usual practice has been to explain that the result reflects an assessment at the Supreme Court of the entire person." He or she went on to express concern over the possibility that Commission members might agree with the conclusion with regard to a given candidate, but differ in their reasons. And a witness from the Personnel Division expressed the view that personnel decisions represent an overall assessment, and that focusing on any specific aspect might result in misunderstandings.

Moreover, in very similar language, both a member of the Commission secretariat and the Commission's chair (presumably Okuda) appeared to take the position
that the very existence of the Commission had satisfied the Reform Council's call for transparency. The secretariat member stated: "Does not the very fact that this Commission was established constitute a response [to the request for greater disclosure], in the sense that including knowledgeable persons from outside, in a process that previously had been handled as an internal judicial matter, has improved transparency?" Soon thereafter the chair repeated this sentiment, stating: "All we can do is seek understanding that the establishment of this Commission serves as a systematic measure to assure transparency."

As though to send the message that no individual Commission member should even think about revealing any concrete information about the manner in which the standards were applied, immediately after the above statement by the chair, the Commission turned to a discussion of the duty of confidentiality. In that context, a member of the secretariat reminded the Commission members, "As explained at the first meeting of this Commission, the members of this Commission and the members of the regional committees are part-time members of the staff of the judiciary, and as such are subject to the duty of confidentiality under the National Public Servants Act."

As mentioned earlier, one important rationale underlying the Reform Council's call for establishment of the Commission was "to strengthen the confidence of the people toward judges." To what extent confidence really was lacking in the first place is open to question. While a survey of parties to civil litigation commissioned by the Reform Council, and the public hearings conducted by the Council, revealed various complaints about the judiciary, opinion polls of the Japanese public have consistently recorded rather high levels of respect for the judiciary. To the extent the Council was correct in concluding that the people's confidence in the judiciary needs heightening, however, it is difficult to see how the new system makes much difference. The system is only slightly more transparent today than it was before. While a few elite outsiders are now involved in the review process, and the range of information available regarding candidates appears to have expanded somewhat, the dominant message remains: Trust us, and do not expect any concrete information about how the relevant standards are applied, much less specific candidates.
Rather than asking how the new system is perceived by the general public, however, a more pertinent question may be how it is perceived by three specific audiences: trainees at the LTRI contemplating entering the judiciary as assistant judges; current judges and assistant judges; and attorneys contemplating entering the judiciary through the bengoshi ninkan system. As noted earlier, a number of former trainees tried—and failed—to obtain more concrete information regarding the selection standards, presumably in part out of a wish to be able to evaluate prospects for a judicial career more accurately. Those who have already entered the judiciary—current judges and assistant judges—undoubtedly have considerable interest in the standards for reappointment. For attorneys contemplating a move to the judiciary, the interest may be especially acute. To prepare for the shift, attorneys must begin the process of winding up law practice (including informing clients and other lawyers) well before the Commission decision is made; and a Commission finding of unsuitability may result in a serious loss of face.

With those three audiences in mind, let us consider the results of the screening process since the new system has gone into effect. From calculations based on the Commission minutes, in the four annual cycles of new assistant judge appointments under this system, 447 candidates have been deemed suitable for appointment (from a low of 100 to a high of 124), 32 have been deemed unsuitable (between seven and nine in each cycle), 22 have withdrawn their applications, and decisions on two candidates were deferred. In the three annual cycles to date for appointment of assistant judges as judges and reappointment of judges, 535 candidates have been deemed suitable (between 175 and 185 in each cycle), fourteen have been deemed unsuitable (between four and six), and four have withdrawn their applications. For appointment of attorneys, eighteen have been deemed suitable (including three for appointment at the assistant judge level), six have been deemed unsuitable, and decisions on three candidates were deferred (with all three subsequently withdrawing their applications). As these figures reflect, the Commission has found the great majority of candidates suitable for appointment/reappointment, but has deemed a number of candidates in each category unsuitable. And, in forwarding the final list of candidates to the Cabinet, the Supreme Court reportedly has followed the Commission's recommendations.
How do these figures compare with the past? I am not aware of comparable figures regarding appointment of attorneys. Looking at the situation for initial appointments of assistant judges, though, 32 candidates have been deemed unsuitable for appointment as assistant judges in just the first four years under the new system, whereas only ten candidates in total were denied appointment in the fifteen years before the new system went into operation. And, in the first three annual cycles of the new system for appointment/reappointment of judges and assistant judges, fourteen have been deemed unsuitable for continued appointment, whereas only two in total were denied reappointment in the entire prior history of Japan's postwar judicial system, a period of over fifty years.60) This comparison suggests that the Commission is considerably stricter in its screening than the General Secretariat had been in the past. Another, more cynical, assessment is that the establishment of the Commission has provided the General Secretariat with greater freedom to reject applicants than it enjoyed previously. According to this view, in the past, precisely because the appointment process was a complete black box, with no outside review and no opportunity for the General Secretariat to justify its determinations, the General Secretariat had been reluctant to take too strict a stance; it knew that if it rejected appointment (or denied reappointment), it would be subject to sharp criticism, regardless of the merits. Now, according to this view, because the decisions are being made by a separate body, the General Secretariat feels it has greater discretion to recommend denials.

Because so little information regarding the prior system was ever made public, it is possible that neither of the above interpretations is accurate. The new system in fact may not be much stricter than the old. Even under the new system, the number of candidates formally denied appointment/reappointment is much lower than the number deemed unsuitable by the Commission. All of the others presumably have withdrawn their requests.61) In the past, we never would have learned about the others. Under the old system, only formal denials of appointment or reappointment were ever made public; if candidates withdrew their applications after being told privately that the Supreme Court could not support them, those cases never appeared in the public record. It seems entirely possible that in the past the borderline candidates—the so-called “priority review candidates” under the
current system—were informally advised not to seek reappointment, and thus did not show up in the denial statistics. In sum, the modest increase in transparency may make the new system appear stricter, but the reality may not be so different from the past.

Even under the new system, the vast majority of judges and assistant judges have been approved for continued appointments. Over the first three review cycles, the non-suitable and withdrawal categories together constituted just over three percent of the judges and assistant judges reviewed; the remaining nearly 97% were approved. Thus, for current judges and assistant judges, pay raises, transfers, promotions/demotions and other such personnel matters likely have much greater practical significance than the ten-year reappointment reviews. Those other personnel matters lie beyond the scope of the Consultation Commission’s review. In line with the Reform Council’s recommendation, however, the Supreme Court did establish a seven-member study group (composed of two judges, three attorneys—one of whom was a former Supreme Court justice and another a former prosecutor, and two members from outside the legal profession) to consider basic policies with regard to such other personnel matters. In its final report, issued in July 2002, the study group set forth a wide range of recommendations—numerous aspects of which reportedly were new—with regard both to substantive standards and procedures. The recommended substantive standards are similar to those of the Consultation Commission introduced earlier, albeit somewhat more detailed. The procedural recommendations call for annual evaluations, by the chief judge of the relevant district or family court or the president of the relevant high court, for judges and assistant judges serving at those courts, based primarily on information from supervising judges, judicial colleagues, and court staff. The study group also recommended that each person under review be given the opportunity to submit a written self-evaluation and be interviewed, and called for establishment of a system whereby those under review can demand disclosure of the contents of the evaluation and, if dissatisfied, can appeal. With respect to both substantive standards and procedures, the report provides considerably more detail than was previously available, together with thoughtful commentary regarding the pros and cons of various approaches. And, by providing the person under review with an
interview and with the opportunity to demand disclosure of his/her own evaluation, the new system is more transparent than in the past vis-à-vis the person being evaluated. The evaluation process itself, however, remains purely internal to the judiciary; and the increased transparency does not extend beyond the person under review.

IV Conclusion

Each of the above reforms potentially could have a significant impact on the Japanese judiciary. And, over time, it is still possible that one or more of the reforms will indeed have such an impact. For the time being, however, the impact remains limited.

In the first few years since the push to invigorate the bengoshi ninkan system was launched, the number of attorneys applying to enter the judiciary on a full-time basis started out low, and dwindled thereafter. Yet there are some reasons to hope the number may rise in the future. In contrast to the meager interest in full-time positions, a relatively large number of attorneys have participated in the part-time judge system, and the number of applicants for that system has continued to rise. If a pattern develops in which attorneys first experience the judiciary through the part-time judge system and then opt to enter the judiciary full time, the bengoshi ninkan system may yet take firm root. Another possibility is that, as Japanese law firms become larger and more impersonal, the judiciary may become relatively more attractive to lawyers at those firms. And the very fact that the size of Japan's legal profession is increasing rather rapidly may lead to a greater flow of attorneys into the judiciary. If, for these or other reasons, the flow of experienced attorneys into the judiciary expands considerably, the perspectives and approaches they bring, and their views and attitudes, could have a substantial impact on the judiciary as a whole.

To date, the number of assistant judges sent to law firms or other positions outside the judiciary remains modest. Assuming the "initial implementation stage" for the new system does not prove to be semi-permanent, that number should rise greatly over the next few years. If it does, and all or nearly all assistant judges in fact do begin to spend at least two years in law firms or other positions outside the
judiciary, their experiences could have a significant (albeit nearly impossible to measure) impact on their thinking patterns and attitudes. At the same time, as noted earlier, their interactions with colleagues at the law firm could help to spur greater interest in the bengoshi ninkan system.

Finally, if the screening system for appointments or the review process for other personnel decisions becomes more transparent, the Japanese people might attain greater understanding of the judiciary and might begin to pay greater attention to the qualifications of specific candidates or judges. Even without greater transparency, if the standards actually being applied are indeed stricter than in the past or are different in certain respects from those followed in the past (or, even more importantly, if they are perceived as being stricter or different by current judges and assistant judges or by potential applicants to the judiciary), they are likely to result in changes in judges’ behavior. If that is the case, whether the resulting changes in behavior will be for the better or for the worse undoubtedly will depend on one’s viewpoint as to what is desired for the judiciary (as well, of course, as to how the standards are perceived). Without greater transparency, however, tracking changes in behavior likely will require elaborate statistical analysis, of the sort undertaken in the past by Ramseyer and Rasmusen.

In sum, in the long run, these reforms may yet have a major impact on Japan’s judiciary. At present, though, the impact remains small; for now, the change is more apparent than real.

* This essay is based on a chapter of a book scheduled for publication in Japanese in 2007 by NTT Shuppan. The book, in essence a companion volume to Foote (2006), will focus on a comparative examination of structural aspects of the Japanese judiciary. This essay appears with the permission of NTT Shuppan.


2) Id. at 9.

3) Id. at 99.
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4) Id.

5) Kenpō [Constitution], arts. 6 (2), 79 (1).

6) Saibanshohō [Courts Act], Law No. 59 of 1947, art. 41 (1).

7) For a more detailed examination of Supreme Court composition and appointment patterns, see Haley (2007).


10) See Berkson (1980).


12) Kenpō, art. 79 (2).


15) Recommendations, supra note 1, at 99.

16) Id.

17) Id. at 11.

18) Id. at 11-12.

19) The judiciary also moved promptly to implement a fourth reform recommended by the Reform Council: the establishment of District Court councils, which should include as members “persons of knowledge and experience from outside the legal profession,” so as to “reflect the sound common sense of the people in court management.” Id. at 98. See Chihō saibansho inkai kisoku [District Court Council Rule], Supreme Court Rule No. 9, April 2, 2003 (establishing district court councils composed of attorneys, prosecutors, and summary court judges, as well as other persons of knowledge and experience, from the respective districts).

20) Saibanshohō, supra note 6, art. 42.

21) Recommendations, supra note 1, at 56.

22) Id. at 92.

23) Id. at 93-94.


26) The video is entitled “The People Are Waiting for You to Become a Judge” (Shimin wa anata no saibankan ninkan o matteimasu).
27) See Supreme Court General Secretariat and Japan Federation of Bar Associations, “Bengoshi ninkan o suishin suru tame no gutaiteki sochi no teian ni tsuite” [Regarding the Proposal for Concrete Steps to Promote the Appointment of Lawyers as Judges], May 8, 2001.

28) Source: “Bengoshi ninkansha (hijókin) sōsū oyobi kibetsu, chōbetsu uchiwakesū (2006nen 2gatsu genzai)” [The Total Number and Numbers Broken Down by Term and Jurisdiction, for Attorneys Appointed as Judges (Part-time) (as of February 2006)], compiled by the Japan Federation of Bar Associations. The Lower Court Judge Designation Consultation Commission [Kakyū saibansho saibankan shimei shimon iinkai] was scheduled to consider the suitability of the 2006 candidates at its 25th meeting on December 8, 2006. Results were not available in time for this essay.

29) Source: “Bengoshi ninkansha (jókin) sōsū oyobi burokkubetsu, nendobetsu uchiwakesū (2006nen 2gatsu genzai)” [The Total Number and Numbers Broken Down by Block and Year, for Attorneys Appointed as Judges (Full-time) (as of February 2006)], compiled by the Japan Federation of Bar Associations.

30) Based on information provided by the Secretariat of the Japan Federation of Bar Associations.

31) See Minutes of 22nd Meeting (July 7, 2006) and 23rd Meeting (Sept. 6, 2006) of Lower Court Judge Designation Consultation Commission, available through links at the homepage of that Commission: <http://www.courts.go.jp/saikosaishi/about/iinkai/kakyusaibansyo/index.html>. Of the three attorneys who applied for the October 2006 cycle, the Commission found one suitable, one unsuitable, and deferred the decision on the third pending an interview by the Commission. Prior to that interview, the third candidate withdrew his/her application.

32) See, e. g., Mauro (2005). The $1 million from the law firm included a payout for his partnership interest, as well as his salary.


34) See Kakyū saibansho saibankan shimei shimon iinkai [Lower Court Judge Designation Consultation Commission], “Shimei shimon iinkai ni oite shimei no tekishi ni tsuite handan suru kijun ni tsuite (kentōyō tatakaidai)” [Regarding the Standards for Determining Suitability for Designation, for the Designation Consultation Commission (Discussion Draft)] (hereinafter, “Standards for Suitability”), Shingi shiryō [Deliberation Materials] No. 6 for Meeting No. 3, July 14, 2003 (available through links at the homepage for the Commission, supra note 31). These standards are discussed below at text accompanying note 51.

35) Attachment 1, “Ninkan suisen kijun oyobi suisen tetsuzuki” [Standards for Recommending Appointment and Procedures for Recommendation], to Supreme Court and Japan Federation of Bar Associations, “Bengoshi ninkan tō ni kansuru kyōgi no torimatome” [Compilation of Discussions Regarding Appointment of Attorneys as Judges, etc.] (Dec. 7,
states: “Appointment as judges of attorneys with over ten years of experience is desirable but, for the time being, appointment as assistant judges of attorneys with over three years of experience is also possible.”


37) Recommendations, supra note 1, at 92.

38) Id. at 92-93.


40) Hanjihō oyobi kenji no bengoshi shokumu keiken ni kansuru hōritsu [Act relating to Experience in Work as Lawyers for Assistant Judges and Prosecutors], Law No. 121 of 2004.

41) Supreme Court and Japan Federation of Bar Associations, “Hanjihō no bengoshi shokumu keiken seido ni kansuru torimatome” [Arrangement of Matters relating to the System for Experience in Work as Lawyers for Assistant Judges] (June 23, 2004).

42) At its meeting on October 2, 2006 (the 24th Meeting) (minutes available through Commission homepage, supra note 31), the Lower Court Judge Designation Consultation Commission approved 115 candidates as suitable for appointment as assistant judges.

43) Information on the system is available through the Center’s homepage: <http://www.houterasu.or.jp/index.html>.

44) See, e.g., Ramseyer and Rasmusen (2003).

45) Recommendations, supra note 1, at 97.

46) Id. at 95.

47) Id.

48) Id. at 97.

49) The materials and minutes referred to herein may be accessed through links from the homepage for the Commission, supra note 31.

50) See Kakyū saibansho saibankan shime i shimonialsinkai [Lower Court Judge Designation Consultation Commission], “Genzai no saibankan shime i tetsuzuki no jitsujō ni kansuru shiryo” [Materials Relating to the Actual Situation of Current Procedures for Designation of Judges], Sankō shiryo [Reference Materials] No. 12 for Meeting No. 1, June 9, 2003. (For an overview of the existing legal training system and the newly introduced legal training system, including an explanation of training at the LTRI and
apprenticeship training, see Foote 2005).

53) See, e.g., Minutes of 3rd Meeting (July 14, 2003), 6th Meeting (Dec. 2, 2003), 7th Meeting (Feb. 9, 2004), 8th Meeting (March 29, 2004), and 10th Meeting (Sept. 9, 2004).

54) See “Process and Methods,” supra note 52.

55) See Minutes of 2nd Meeting (July 1, 2003).

56) See, e.g., Minutes of 7th Meeting (Feb. 9, 2004) and 8th Meeting (March 29, 2004).

57) Minutes of 8th Meeting (March 29, 2004).


60) Figures from Ii (2006).

61) Indeed, this was true even for the judge involved in the most visible case of denial of reappointment under the new system, INOUE Kaoru. Inoue had criticized the excessive length of opinions and other aspects of the judiciary in Inoue (2005) and other works and speeches, and a number of his own—at times very short—decisions had received public attention. In December 2005, after the Consultation Commission deemed Inoue unsuitable for reappointment, Inoue vowed publicly to challenge that determination. Ultimately, however, even he elected to withdraw his request for reappointment.


63) For a discussion of the increase in Japan’s legal profession, see, e.g., Foote (2005).

REFERENCES


Chūō Chōsasha [Central Research Services, Inc.] (2004), “‘Gin, kanryō, daikigyō, keisatsutō no shinraikan’ chōsa” [Survey of “Trust in Diet Members, Bureaucrats, Large Businesses, Police, etc.”] (June 30).


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Inoue, Kaoru (2005), Shihō no shaberisugi [Justice Talking Too Much], Shinchō Shinsho.


Wada, Hideo (1971), Saikōsaihanshoron [Discourse on the Supreme Court], Nihon Hyōronsha.

(Professor, University of Tokyo)