

# The Anatomy of a Conservative Court: Judicial Review in Japan

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*The Supreme Court of Japan is widely and justifiably considered the most conservative constitutional court in the world. Drawing on interviews conducted in Japan with a variety of judges, officials, and scholars—including seven current and former members of the Supreme Court itself—this Article offers a political and institutional account of why the Court has failed to take an active role in the enforcement of Japan’s postwar constitution. This account yields a number of insights into the relationship between judicial politics and electoral politics, and the role of institutional design in mediating between the two.*

*The fact that the Court is conservative is perhaps only to be expected given its longtime immersion in a conservative political environment: the center-right Liberal Democratic Party (LDP) has held power almost without interruption for half a century. Much of the LDP’s influence over the Court is disguised, however, by the institutional design of the judiciary, which appears to enjoy a considerable degree of autonomy to manage its own affairs and even to decide who will serve on the Supreme Court. What the LDP has done is, in effect, to delegate political control of the judiciary to ideologically reliable agents within*

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*the judiciary itself—namely, the enormously powerful Chief Justice and his aides in the Court’s administrative arm, the General Secretariat. Like the Chief Justice, the leaders of the General Secretariat are reliably orthodox jurists who have reached positions of power via a lifelong process of ideological vetting that all career judges must undergo. This group of judicial bureaucrats performs a wide range of sensitive activities ranging from the training and screening of new judges to the selection of the Court’s law clerks, who are themselves elite career judges with both the ability and the inclination to oppose any liberal escapades on the part of the justices.*

*The Japanese experience holds valuable lessons for students of judicial politics and institutional design. There is no plausible way of designing or structuring a court so as to insulate it entirely from political influence. The institutional characteristics of the court can, however, determine how responsive it will be to its political environment. An obviously relevant characteristic is the frequency with which political actors have the opportunity to shape the composition of the court. A less obvious, but no less relevant, characteristic is the extent to which power within the court is centralized or diffuse. The Supreme Court of Japan illustrates the importance of these characteristics: its organization and structure render it highly unlikely to depart from the wishes of the government for any meaningful period of time. The sheer number of seats on the Court, combined with a deliberate strategy of appointing justices close to mandatory retirement age, ensures a high degree of turnover that gives the government opportunities to adjust and correct the ideological direction of the Court on an ongoing basis. Similarly, the concentration of power in the hands of a single individual who is subject to replacement at relatively frequent intervals—namely, the Chief Justice—obviates sustained and repeated efforts by the government to influence the direction of the Court.*

## I. Introduction

The Supreme Court of Japan (SCJ) has been described as the most conservative constitutional court in the world, and for good reason.<sup>1</sup> One might characterize it as “conservative” in the sense of being so passive or cautious that it almost never challenges the government.<sup>2</sup> Alternatively, or in

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1. See, e.g., DAVID M. BEATTY, CONSTITUTIONAL LAW IN THEORY AND PRACTICE 121 (1995) (“Among comparativists, constitutional review in Japan is regarded as the most conservative and cautious in the world.”).

2. See, e.g., RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 144, 143–45 (2006) (attributing the Court’s unwillingness to strike down legislation to “the Court’s view of its proper institutional role” and a “lack of comfort with interposing the judiciary’s will over that of elected officials”); John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in LAW IN JAPAN: A TURNING POINT 99, 99 (Daniel H. Foote ed., 2007); Norihiro Urabe, *Rule of Law and Due Process: A Comparative View of the United States and Japan*, in JAPANESE CONSTITUTIONAL LAW 173, 182 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993) (condemning the Japanese Supreme Court as “a court so subdued as to deprive judicial review of all its significance”).

addition, one might characterize it as “conservative” in the sense that it happens to share the ideological views and preferences of Japan’s long-ruling conservative party, the Liberal Democratic Party (LDP).<sup>3</sup> What is clear, however, is that the label fits.

Since its creation in 1947, the court known in Japanese as the *Saikō Saibansho* has struck down only eight statutes on constitutional grounds.<sup>4</sup> By way of comparison, Germany’s constitutional court, which was established several years later, has struck down over 600 laws.<sup>5</sup> The majority of the Japanese Supreme Court’s rulings of unconstitutionality have, moreover, been less than momentous. Among the rare and often obscure legislative provisions that the Court has struck down are a law punishing patricide more severely than other forms of homicide,<sup>6</sup> a law restricting the ability of pharmacies to operate within close physical proximity of one another,<sup>7</sup> a rule limiting the liability of the postal service for the loss of registered mail,<sup>8</sup> a law restricting the ability of co-owners of forest land to subdivide their property,<sup>9</sup> and, most recently, a statutory provision that distinguished for purposes of citizenship eligibility between illegitimate children of Japanese fathers who acknowledged paternity prior to birth and those whose fathers acknowledged paternity only subsequent to birth.<sup>10</sup> The high point of over fifty years of judicial review in Japan is probably a 1976 decision rejecting a legislative apportionment scheme that weighted the votes of rural voters five times as heavily as those of urban voters, yet the Court refrained in that case

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3. J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN 9–10 (2003) [hereinafter RAMSEYER & RASMUSEN, MEASURING JUDICIAL INDEPENDENCE]; J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, JAPAN’S POLITICAL MARKETPLACE 178–79 (rev. ed. 1997); see also Percy R. Luney, Jr., *The Judiciary: Its Organization and Status in the Parliamentary System*, in JAPANESE CONSTITUTIONAL LAW, *supra* note 2, at 123, 145 (arguing that the justices, having been appointed by the leadership of the LDP, tend to “reflect the social, economic, cultural, and political values of the party membership”). The LDP has governed Japan for nearly all of the last fifty years. It briefly lost power for an eight-month period beginning in August 1993, after which time it returned to power in a short-lived coalition with the Socialist Party. GERALD CURTIS, THE LOGIC OF JAPANESE POLITICS: LEADERS, INSTITUTIONS, AND THE LIMITS OF CHANGE 69, 188–93 (1999); J. Mark Ramseyer & Eric B. Rasmusen, *The Case for Managed Judges: Learning from Japan After the Political Upheaval of 1993*, 154 U. PA. L. REV. 1879, 1892–93 (2006) [hereinafter Ramseyer & Rasmusen, *Managed Judges*].

4. See Jun-ichi Satoh, *Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court’s Constitutional Oversight*, 41 LOY. L.A. L. REV. 603, 609 (2008) (noting that the Japanese Supreme Court has exercised the power of judicial review on only eight occasions).

5. See *Judgment Days: Germany’s Constitutional Court*, ECONOMIST, Mar. 28, 2009, at 59 (reporting that, since its creation in 1951, the German *Bundesverfassungsgericht* has struck down 611 laws).

6. *Aizawa v. Japan*, 27 KEISHŪ 265 (Sup. Ct., Apr. 4, 1973).

7. *Sumiyoshi K.K. v. Governor, Hiroshima-ken*, 29 MINSHŪ 572 (Sup. Ct., Apr. 30, 1975).

8. *Shichifuku Sangyō K.K. v. Japan*, 56 MINSHŪ 1439 (Sup. Ct., Sept. 11, 2002).

9. *Hiraguchi v. Hiraguchi*, 41 MINSHŪ 408 (Sup. Ct., Apr. 22, 1987).

10. *Jane Doe v. Japan*, 62 MINSHŪ 1367 (Sup. Ct., June 4, 2008).

from ordering any remedy.<sup>11</sup> And on the constitutional question that is perhaps of greatest importance to the LDP, the SCJ has simply refused to act: it has steadfastly avoided ruling upon the merits of constitutional challenges to Japan's military activities and security arrangements under Article 9 of the *Kenpō*, the postwar constitution, which explicitly prohibits the maintenance of armed forces or other "war potential."<sup>12</sup>

Why is the SCJ so conservative? Drawing on interviews conducted in Japan with a variety of judges, officials, and scholars—including seven current and former members of the Japanese Supreme Court itself<sup>13</sup>—this Article offers an in-depth account of why the Court has failed to take an active role in enforcement of the postwar constitution. It describes the formal and informal institutions and practices that have stacked the deck heavily against liberal constitutional decision making by the SCJ. These include the education, recruitment, and promotion of Japan's career judges; the screening and selection of Supreme Court justices; the resource limitations and practical constraints faced by a sitting justice; and the influence of the Chief Justice and select administrators within the judiciary over the behavior of the lower courts and the composition of the SCJ.

What these institutional structures have created, however, is not a judiciary that is *necessarily* or *inherently* conservative in ideology or

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11. *Kurokawa v. Chiba Prefecture Election Control Comm'n*, 30 MINSHŪ 223 (Sup. Ct., Apr. 14, 1976); Shigenori Matsui, *The Reapportionment Cases in Japan: Constitutional Law, Politics, and the Japanese Supreme Court*, 33 OSAKA U. L. REV. 17, 30–36, 41–42 (1986). The Japanese Diet has repeatedly failed to keep malapportionment of the House of Representatives within the limits set forth in *Kurokawa*. The SCJ has responded by ruling repeatedly that the apportionment scheme remains unconstitutional, but it has consistently declined to order a remedy. See William Somers Bailey, *Reducing Malapportionment in Japan's Electoral Districts: The Supreme Court Must Act*, 6 PAC. RIM L. & POL'Y J. 169, 178–81, 184 (1997) (discussing both the Court's malapportionment decisions subsequent to *Kurokawa*, including *Kanao v. Hiroshima Election Mgmt. Comm'n*, 39 MINSHŪ 1100 (Sup. Ct., July 17, 1985), and the ongoing inadequacy of the Diet's response); Matsui, *supra*, at 40, 34–35 (noting the "deep frustration" of many judges and commentators at the "continued failure of the Diet" to comply with the Court's legislative apportionment rulings).

12. See KENPŌ [Constitution] art. 9 ("[L]and, sea, and air forces, as well as other war potential, will never be maintained."); John O. Haley, *Waging War: Japan's Constitutional Constraints*, CONST. F., 2005 (Issue 2), at 18, 24–27; Richard J. Samuels, *Politics, Security Policy, and Japan's Cabinet Legislation Bureau: Who Elected These Guys, Anyway?* text accompanying nn.15–17 (Japan Policy Research Inst., Working Paper No. 99, 2004), available at <http://www.jpri.org/publications/workingpapers/wp99.html> (both describing the Court's use of the political question doctrine to render cases involving Article 9 nonjusticiable); see also *id.* at text accompanying n.15 (noting that "no portion of the Constitution has been more hotly contested" than Article 9 and that "no issue has been more 'political' than the constitutionality of the Self-Defense Forces").

13. In addition to the seven justices, I also interviewed two of the Supreme Court's law clerks (who, as discussed below, are themselves successful career judges on temporary assignment to the Supreme Court, see *infra* subpart III(C)); five other current and former judges, including Yasuaki Miyamoto and Haruhiko Abe, both known for their membership in the organization known as *Seihōkyō* (which is discussed below, see *infra* notes 79–92 and accompanying text); a prosecutor; and a variety of Japanese academics as acknowledged in the star footnote. For various compelling reasons, many of the interviewees must remain anonymous.

disposition but rather one that is highly responsive to the sensibilities of its internal leadership and capable of adapting quickly to a change in said leadership. In practice, the judiciary is run by a cadre of elite senior judges who hold key administrative posts, including that of Chief Justice, and wield an impressive array of powers that enable them to enforce their preferred views throughout the institution and over time. The bureaucratic mechanisms at their disposal for achieving uniformity and continuity have, over time, faithfully translated conservative political rule into conservative judicial behavior. Yet Japan's nearly unbroken postwar history of one-party conservative rule has obscured the judiciary's latent institutional capacity for a relatively rapid shift in ideological course. The concentration of power in the hands of a select few judges means that a change in leadership can have a rapid and profound impact on the behavior of the entire judiciary.

Parts II and III of this Article discuss the two basic reasons why the Japanese Supreme Court is so conservative. The first, per Part II, is that it is difficult for someone who is truly liberal to be appointed to the Court. The second, per Part III, is that it is difficult for someone who is already on the Court to behave in a truly liberal way. The reasons for the Court's conservatism, it will be argued, are both political and institutional in nature. The Conclusion draws several lessons from the Japanese experience about the relationship between judicial politics and electoral politics, and the mediating role of institutional structure. It is impossible to wholly insulate a court from the influence of its political environment. Institutional design can, however, reconcile the formal requirements of judicial independence with the practical necessity of political responsiveness. In Japan, there exists a sophisticated apparatus for ensuring that the judiciary remains in sync with the wishes of the government. This apparatus is to be found not in the government, however, but within the judiciary itself. The result is a judiciary that combines a high degree of judicial independence, in the form of bureaucratic autonomy, with a high level of sensitivity to the wishes of relevant political actors.

## II. The Screening of Japanese Supreme Court Justices

### A. *The Secretive Appointment Process*

Imagine a left-leaning law student who dreams of changing the world. He dreams of upholding and advancing the causes of justice, equality, the rights of the individual, constitutionalism, and the nation's commitment to peace and democracy. Let us call him Hidari, and let us suppose further that he is the rare and extraordinary individual who possesses both the raw desire and intellectual ability to reshape Japanese constitutional law. There are two ways in which Hidari might attempt to steer the SCJ in a more active and liberal direction. The first would be to reach the Supreme Court himself, to vote in a liberal direction, and to influence his colleagues to do likewise. The second would be to influence the selection of Supreme Court justices. These

two approaches are by no means mutually exclusive: if he can attain the position of Chief Justice, he will enjoy influence over both the behavior and the composition of the Court.

The scope of the Chief Justice's influence over the appointment of justices—and, indeed, the entire appointment process—is shrouded in a good deal of obscurity and secrecy.<sup>14</sup> The truth lies buried beneath several layers of *tatema*, or superficial appearance, that must be peeled back one after another, like the skin of an onion. As a formal matter, the *Kenpō* provides that the Emperor is to appoint the Chief Justice “as designated by the Cabinet,”<sup>15</sup> while the power to appoint the other members of the Court is vested directly in the Cabinet,<sup>16</sup> which in a parliamentary system is shorthand for the Prime Minister. In practice, however, not only is the Emperor's role a strictly formal one, but the Prime Minister's role is not always as extensive as the bare text of the *Kenpō* would suggest. For each vacancy that arises on the Court, the Chief Justice submits to the Prime Minister a list of candidates containing from one to three names.<sup>17</sup> No Prime Minister in recent memory is known to have rejected the Chief Justice's recommendations outright.<sup>18</sup>

It is tempting to infer from this fact, as some scholars have done, that the selection of Supreme Court justices is in reality left to the judiciary itself.<sup>19</sup> But the Chief Justice's role, no less than those of the Emperor and Prime Minister, also entails a degree of *tatema*. First, as discussed further below, the Chief Justice has little or no say in how certain seats on the Court are to be filled.<sup>20</sup> Second, the Chief Justice's recommendations to the Prime Minister are merely the last stage of a process in which potential nominees

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14. See HIROSHI ITOH, *THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES* 24 (1989) (observing that “the process of nominating and appointing justices . . . remains unclear, [but] it appears that a Prime Minister and a handful of advisors, including an incumbent Chief Justice of the Court, are directly responsible for the selection of final candidates”); Interview with Justice G, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed) (indicating that the Secretary General's input “plays a role”).

15. *KENPŌ* art. 6, para. 2.

16. *Id.* art. 79, para. 1.

17. See Haley, *supra* note 2, at 107; David M. O'Brien & Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, in *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 37, 51 (Peter H. Russell & David M. O'Brien eds., 2001) (both describing the role of retiring chief justices in choosing their replacements); see also Interview with Justice A, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed) (indicating that the Chief Justice submits two or three names to the Prime Minister); Interview with Justice B, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed) (indicating that the Chief Justice submits one or two names); Interview with Justice G, *supra* note 14 (indicating that the Chief Justice submits “several” names).

18. According to one of the justices I interviewed, the Cabinet (meaning the Prime Minister) did on occasion reject the Chief Justice's recommendations in the years immediately following World War II, but such rejections no longer occur. Interview with Justice A, *supra* note 17.

19. See Haley, *supra* note 2, at 100 (reaching precisely this conclusion); O'Brien & Ohkoshi, *supra* note 17, at 46 (same).

20. See *infra* subpart II(D).

have already been vetted by the Prime Minister's office *before* the Chief Justice makes his recommendations. My research revealed that the Cabinet Secretary, or *Kanbōchōkan*, engages in “negotiations” over potential candidates with the Secretary General, or *Jimusocho*, who is appointed by and works closely with the Chief Justice.<sup>21</sup> The Secretary General heads the General Secretariat of the Supreme Court, or *Jimusōkyoku*, which is the exceptionally powerful administrative arm of the judiciary.<sup>22</sup> Only after these key aides to the Prime Minister and Chief Justice have *already* arrived at a mutually satisfactory conclusion does the Chief Justice convey his (pre-approved) recommendations to the Prime Minister.<sup>23</sup> Thus, the Prime Minister, acting through the Cabinet Secretary, has ample opportunity to informally veto any nominee whom the Chief Justice might recommend before the Chief Justice even speaks to the Prime Minister.

Even if he does not wield unchecked power, however, it is clear that the Chief Justice enjoys considerable influence, both direct and indirect, over the appointment and promotion of judges in general and the selection of Supreme Court justices in particular. Accordingly, because Hidari wishes to maximize his influence over the direction of the SCJ, he will want to set his sights upon becoming not simply a member of the SCJ, but its titular head. But it will not take long for him to discover that, for an idealistic young law student with dreams of becoming Japan's answer to Earl Warren or William Brennan, the path to the SCJ is strewn with a fantastic array of obstacles that have proven all but insurmountable for over half a century.

#### B. *The Initial Judicial Hiring Process*

If Hidari wishes to maximize his chances of reaching the Supreme Court, and indeed of becoming Chief Justice, he will want to consider a career in the judiciary, and he will want to start young. As will be discussed below, the fifteen seats on the Court are allocated on the basis of informal quotas to different segments of the legal community and bureaucracy.<sup>24</sup> The largest allocation belongs to the judiciary: six of the Court's members are career judges, and the Chief Justice, in particular, has almost invariably risen to the post through the ranks of the career judiciary.<sup>25</sup> Moreover, elevation to

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21. Interview with Justice G, *supra* note 14.

22. See ITOH, *supra* note 14, at 251–52; Masaki Abe, *The Internal Control of a Bureaucratic Judiciary: The Case of Japan*, 23 INT'L J. SOC. L. 303, 311–12 (1995); Setsuo Miyazawa, *Administrative Control of Japanese Judges*, 25 KOBE U. L. REV. 45, 48 (1991) (all discussing the leadership structure and organization of the General Secretariat); *infra* subparts II(B)–(C) (discussing the power of the General Secretariat over the training, hiring, promotion, and assignment of judges).

23. Interview with Justice G, *supra* note 14.

24. See *infra* notes 138–43 and accompanying text.

25. See DAVID M. O'BRIEN WITH YASUO OHKOSHI, *TO DREAM OF DREAMS: RELIGIOUS FREEDOM AND CONSTITUTIONAL POLITICS IN POSTWAR JAPAN* 77 (1996) (noting that every Chief Justice in the 1980s and 1990s rose through the ranks of the judiciary and, in particular, the General

Japan's highest court, should it happen, is the culmination of a successful lifelong career in the judiciary that occurs with precious few years to spare before mandatory retirement age.<sup>26</sup> Hidari's first step, therefore, should be to join the judiciary as soon as he can.

To do so, he must first study law and pass the bar exam. In the past, Hidari would not have been required to attend law school in order to pursue his ambitions of becoming a judge. After obtaining an undergraduate degree—probably, but not necessarily, in law—he would have proceeded to take the bar exam, which in Japan has historically had a staggeringly low passage rate of two to three percent.<sup>27</sup> Had he found himself among the gifted few capable of surmounting that obstacle, he would then have been required to attend two years of training at the *Shiho Kensyujō*, or Legal Training and Research Institute (LTRI), which is operated by the judiciary at government expense.<sup>28</sup> Law schools in the form of graduate professional schools were only introduced in 2004, and the length of mandatory LTRI training has since been curtailed to one year.<sup>29</sup> What has not changed, however, is the basic requirement that everyone who has passed the bar and wishes to practice law—whether as a private attorney, a prosecutor, or a judge—must undergo training at the LTRI.<sup>30</sup>

The “systematic purge” of ideologically unsuitable judges, as one observer aptly describes it, begins with the first day of LTRI training.<sup>31</sup> Each LTRI class has five instructors, one each in the areas of civil adjudication,

Secretariat); Haley, *supra* note 2, at 107 (noting that all but four of Japan's chief justices have been career judges); Miyazawa, *supra* note 22, at 47 (deeming it an “established custom” for five or six justices to be selected from the career judiciary, the Chief Justice among them); Ramseyer & Rasmusen, *Managed Judges*, *supra* note 3, at 1884, 1883–84 tbl.2 (listing the professional background of every appointee to the Court from 1983 through 2005 and noting that, since 1973, every Chief Justice has been a former lower-court judge).

26. By statute, lower-court judges must retire at age sixty-five and members of the SCJ at age seventy. Saibansho ho [Court Act], Law No. 59 of 1947, art. 50, *translated in* 2 EHS LAW BULL. SER. no. 2010 (2005); *see also infra* subpart III(A) (discussing the deliberate appointment of justices near retirement age).

27. *See* Setsuo Miyazawa, *Law Reform, Lawyers, and Access to Justice*, in *JAPANESE BUSINESS LAW* 39, 46 (Gerald Paul McAlinn ed., 2007) (discussing the low Japanese bar-passage rate prior to 1990).

28. RAMSEYER & RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE*, *supra* note 3, at 8; Abe, *supra* note 22, at 306.

29. The reduced one-year training period applies to graduates of the newly created law schools. Others must attend an additional four to six months of classroom training at the LTRI. E-mail from Setsuo Miyazawa, Professor, Aoyama Gakuin Law School, to David S. Law, Professor, Washington University in St. Louis (Mar. 1, 2009, 14:29:30 CST) (on file with author); E-mail from Norimitsu Shirai, 2008 Keio Law School Graduate, to David S. Law, Professor, Washington University in St. Louis (Mar. 1, 2009, 19:57:39 CST) (on file with author).

30. Supreme Court of Japan, The Legal Training and Research Institute of Japan, <http://www.courts.go.jp/english/institute/institute.html>.

31. Interview with Lawrence Repeta, Professor, Omiya Law School, in Tokyo, Japan (July 4, 2008).

criminal adjudication, prosecution, civil advocacy, and criminal defense.<sup>32</sup> The civil adjudication and criminal adjudication instructors are selected by the General Secretariat from the ranks of the career judiciary, and by all accounts, the General Secretariat takes care to select jurists who are both capable teachers and experts in their fields.<sup>33</sup> Service as an LTRI instructor is an elite credential on a judge's résumé; indeed, it is common for former judges on the Supreme Court to have spent time teaching at the LTRI.<sup>34</sup> These instructors perform crucial functions apart from teaching, however, that require the General Secretariat to pay close attention not only to their legal expertise and classroom abilities, but also to their ideological soundness, diplomatic skills, and powers of observation.

One function that they perform, it has been suggested, is indoctrination. Setsuo Miyazawa characterizes the LTRI adjudication instructors as "carefully selected mainstream judges who teach only orthodox legal doctrines and practice skills acceptable to them."<sup>35</sup> The judiciary's preference for hiring younger judges immediately after training is, argues Miyazawa, no mere coincidence: the indoctrination of judges at an impressionable young age, combined with the various mechanisms available to the judiciary for controlling the behavior of those already on the bench, explains the extreme "passivity of most judges in Japan."<sup>36</sup> Whether LTRI instruction amounts not merely to education but also to indoctrination, lies to a considerable extent in the eye of the beholder. Miyazawa is surely correct, however, that it would be surprising if the General Secretariat were to select instructors who did not reflect and embody its own conservative sensibilities.

Another sensitive function that the LTRI adjudication instructors perform is the screening and recruitment of new judges. Several justices with experience in personnel matters observed that the recruitment of suitable candidates in adequate numbers is a pressing challenge, and that mandatory LTRI training gives the judiciary a prime opportunity to recruit by showcasing its talent.<sup>37</sup> When asked why they chose to join the judiciary,

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32. Interview with Judge 5, in Location Concealed (Date Concealed); Supreme Court of Japan, *supra* note 30.

33. See Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, ASIAN-PAC. L. & POL'Y J. (SPECIAL ISSUE), Spring 2001, at 89, 112 (noting the careful selection of judges to be LTRI instructors); Interview with Judge 4, in Location Concealed (Date Concealed). The selection of LTRI instructors is formally the responsibility of the justices' conference, or *saibankan kaigi*, but is performed in practice by the General Secretariat. Abe, *supra* note 22, at 306; see also *infra* notes 107, 278 and accompanying text (noting the discrepancy between the formal powers and the actual work of the *saibankan kaigi*).

34. Miyazawa, *supra* note 22, at 112.

35. *Id.*; see also Interview with Judge 5, *supra* note 32 (confirming the existence of the hiring preference for younger judges).

36. Miyazawa, *supra* note 22, at 112.

37. Interview with Judge 3, in Location Concealed (Date Concealed); Interview with Judge 4, *supra* note 33; Interview with Judge 5, *supra* note 32; see also Toshihiro Kanatani, *Yonjū-go Nenkan no Saibankan Seikatsu wo Furikaette* [Forty-five Years of Judge's Work in Retrospect], 45 KINKI U. L. REV. 101, 108 (2006) (noting autobiographically that the example set by the author's

several of the judges I interviewed mentioned specifically that they were favorably impressed by the judges who taught them at the LTRI.<sup>38</sup> But the judiciary is, of course, selective in its recruitment efforts. The fact that the judiciary hires a high proportion of those LTRI graduates who formally apply for assistant judgeships does not reflect a willingness to take all comers. Rather, it falls upon the LTRI adjudication instructors to identify those who are suitable for judgeships and to dissuade those who are unsuitable from even applying for a position. These instructors are responsible for preparing secret evaluations of all trainees and thus must observe the entire class closely from the outset.<sup>39</sup>

The judiciary's reliance upon the information-gathering, recruitment, and screening functions of its instructors at the LTRI is born partly of necessity: because judges are hired directly out of the LTRI rather than on the basis of past professional accomplishment, it is both necessary and wise for the judiciary to rely upon the information that it gathers from a candidate's performance at the LTRI under the watchful eye of its own judges.<sup>40</sup> By no means, however, are these instructors focused upon raw legal talent alone. One justice with extensive experience as an LTRI instructor and in judicial personnel matters emphasized that the LTRI instructors are on the lookout for candidates with the right "temperament," "balance," and sense of "fairness."<sup>41</sup> Those who do not possess such qualities may have lofty test scores, but they are encouraged, subtly or otherwise, to pursue careers as lawyers or prosecutors instead.<sup>42</sup> In the words of this source, LTRI instructors try hard to encourage such people to become prosecutors or lawyers, rather than to discourage them from becoming judges.<sup>43</sup> This justice further offered that those LTRI graduates who had formally been refused judgeships, allegedly for political reasons, had studied improperly, possessed idiosyncratic views, or were otherwise not suitable to become judges.<sup>44</sup> Certain personality types are, in his words, "dangerous" for judges to have.<sup>45</sup>

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LTRI civil- and criminal-adjudication instructors fostered the author's interest in a judicial career, which led ultimately to his appointment to the SCJ).

38. Interview with Judge 3, *supra* note 37; Interview with Judge 4, *supra* note 33; Interview with Judge 5, *supra* note 32.

39. Daniel H. Foote, *Recent Reforms to the Japanese Judiciary: Real Change or Mere Appearance?*, 66 HŌ-SHAKAIGAKU [SOCIOLOGY L.] 128, 146 (2007); Interview with Justice A, *supra* note 17.

40. Interview with Justice A, *supra* note 17.

41. *Id.*

42. *Id.*; see also Abe, *supra* note 22, at 307 (reporting that the instructors usually succeed at dissuading trainees they deem "not suitable" from applying for judgeships).

43. Interview with Justice A, *supra* note 17.

44. *Id.*

45. *Id.*

Not surprisingly, the judicial hiring process has been criticized for its lack of transparency.<sup>46</sup> Partly in response to such criticisms, which have emanated with particular force from the bar, recent judicial reforms established an advisory committee on appointments with responsibility for making recommendations to the Supreme Court as to both the initial appointment and subsequent reappointment of judges.<sup>47</sup> The committee is composed of representatives from different elements of the Japanese legal community: it includes two lawyers selected by the Japanese Federation of Bar Associations, two judges, two legal academics, two prosecutors, and three lay members, which in practice includes at least one representative of the business community.<sup>48</sup> Speaking on condition of anonymity, one source with intimate knowledge of the committee's workings opined that the judiciary supported its creation as a means of making it easier to remove underperforming or incompetent judges, while at the same time enabling the judiciary itself to avoid responsibility or blame for their ouster.<sup>49</sup>

Creation of the judicial appointments review committee has not, however, remedied the lack of transparency surrounding the appointments process. First, the committee has rebuffed demands from LTRI trainees, and even from some of its own members, that it explain its selection criteria.<sup>50</sup> Second, although the minutes of its meetings are in theory publicly available, they do not reveal who said what, much less the actual contents of the committee's discussions.<sup>51</sup> What the minutes *do* reveal is that the chair of the committee has emphasized to the members of the committee that they are working for the government and legally bound to respect the confidentiality of its deliberations.<sup>52</sup> According to this source, the committee members

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46. See, e.g., Foote, *supra* note 39, at 143 (noting that the government's own Justice System Reform Council has called for greater transparency in the hiring process for lower-court judges); see also Interview with Takao Tanase, Professor, Chuo Law School, in Tokyo, Japan (June 26, 2008) (arguing in favor of greater openness in the judicial hiring process); Interview with Masako Kamiya & Hidenori Tomatsu, Professors, Gakushuin University Law School, in Tokyo, Japan (June 27, 2008) (same); Interview with Yoshitomo Ode, Professor, Tokyo Keizai University & Former Chair, Seihōkyō, in Tokyo, Japan (Aug. 6, 2008) (criticizing the lack of transparency and speculating about its causes).

47. Foote, *supra* note 39, at 143 (discussing the creation and activities of the *Kakyū saibansho saibankan shimei shimon iinkai*, or "Lower Court Judge Designation Consultation Commission"); Miyazawa, *supra* note 27, at 86–87 (discussing the same body but translating its name as the "Advisory Committee on the Nomination of Lower Court Judges"). Japanese judges are initially hired for a ten-year term at the rank of assistant judge, after which they are, almost without exception, either reappointed as full judges or persuaded not to seek reappointment. Reappointment occurs at ten-year intervals thereafter until the mandatory retirement age established by statute, which is sixty-five for lower-court judges and seventy for members of the Supreme Court. Saibansho Ho [Court Act], Law No. 59 of 1947, art. 50; O'Brien & Ohkoshi, *supra* note 17, at 46; Interview with Judge 5, *supra* note 32.

48. Interview with Committee Source, in Tokyo, Japan (June 27, 2008).

49. *Id.*

50. Foote, *supra* note 39, at 150–51; Interview with Committee Source, *supra* note 48.

51. Foote, *supra* note 39, at 146–50.

52. *Id.* at 151; Interview with Committee Source, *supra* note 48.

selected by the bar have proven troublesome for the committee.<sup>53</sup> They have acted as strong advocates for the appointment and retention of former lawyers, whom they feel are disproportionately singled out for denial of appointment or reappointment.<sup>54</sup> The fact that the committee makes decisions on a unanimous-consent basis has on occasion enabled the attorney members of the committee to slow down the committee's proceedings.<sup>55</sup> Given that the bar is widely known for being well to the left of the judiciary,<sup>56</sup> judicial resistance to the appointment of former lawyers to the bench is likely to have consequences for the ideological balance of the bench.

### C. *Advancement Within the Judiciary*

In the event that Hidari survives the initial screening process at the hiring level, he will proceed to face a much more arduous screening process lasting decades in the form of a career in the bureaucracy. Bureaucracy is the right word for the Japanese judiciary in more ways than one. Approximately one thousand people work in the monumental four-building Supreme Court complex, of whom over three-quarters belong to the General Secretariat.<sup>57</sup> These administrators, in turn, oversee the lives of another 3,200 judges dispersed across over 250 towns and cities throughout Japan.<sup>58</sup> It is no secret that this bureaucracy shapes the behavior and thinking of its members. In the words of one justice: "Bureaucracy . . . is the way we cultivate young men into something. That's the same thing as in [Japanese] corporations."<sup>59</sup> The judiciary, he emphasized, is no exception.<sup>60</sup>

By any standard, the Japanese judiciary exercises an extraordinary degree of control over the lives of its members.<sup>61</sup> The General Secretariat determines not only raises and promotions but also what kinds of cases a judge will handle and even where he or she will live at any given time.<sup>62</sup> A career judge is expected to accept reassignment approximately every three years, often to undesirable locations, much like a diplomat or member of the armed forces: a Tokyo native with a preference for criminal law cases, for

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53. Interview with Committee Source, *supra* note 48.

54. *Id.*

55. *Id.*

56. See *infra* notes 125–28 and accompanying text.

57. Interview with Secretary to Justice F, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

58. Interview with Justice F, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

59. Interview with Justice D, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

60. *Id.*

61. See Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 LAW & SOC. INQUIRY 421, 453 (2005) ("[E]ven readers more familiar with the bureaucratic judiciaries of the civil law world will be surprised by the personnel manipulation and unrelenting supervision of the Japanese judicial system.").

62. RAMSEYER & RASMUSEN, MEASURING JUDICIAL INDEPENDENCE, *supra* note 3, at 10–12.

example, may be assigned to a family court in a rural area.<sup>63</sup> It is common for judges to live in government housing, which in remote locales may take the form of dormitory-style housing provided by the judiciary.<sup>64</sup> Upon their arrival in a new location, they may even be given a list of bars and other establishments to avoid.<sup>65</sup>

At any given time, it will be possible to determine from Hidari's career to date whether he is a viable candidate for the Supreme Court. If he is in serious contention, he will have been groomed, or rewarded, with a series of assignments that place him firmly upon an elite career trajectory that would include many, if not most, of the following professional highlights. After compiling a distinguished academic career at the University of Tokyo (Todai) or Kyoto University (Kyodai), or possibly Chuo University, and achieving one of the top scores on the bar exam, he attends the LTRI and is then posted immediately or very soon thereafter to the Tokyo District Court.<sup>66</sup> He will develop expertise in a particular area of law, be it civil, criminal, or administrative, and will at some point be tapped to serve as a law clerk, or *chōsakan*, at the Supreme Court.<sup>67</sup> After an assignment or two elsewhere, he may even return to the SCJ as a *shuseki chōsakan* or *kyōseki chōsakan* with responsibility for supervising other law clerks.<sup>68</sup> It would not be surprising if, additionally or in the alternative, he were to find himself

63. See Ramseyer & Rasmusen, *Managed Judges*, *supra* note 3, at 1887 (noting that the moves expected of Japanese judges “can be, and often are, from one end of Japan to the other,” as well as between different types of courts); Interview with Haruhiko Abe, Attorney & Retired Judge, in Tokyo, Japan (July 16, 2008) (describing how the General Secretariat, displeased by his rulings in politically sensitive cases, responded to his preference for criminal cases by assigning him repeatedly to family courts); see also Takuya Asakura, *A Judiciary Ruled by Conscience or Politics?*, JAPAN TIMES ONLINE, June 22, 2002, <http://search.japantimes.co.jp/cgi-bin/nn20020622-a9.html> (noting that, even as a family court judge, Haruhiko Abe was denied the opportunity to handle juvenile crime cases). Technically speaking, the law provides that a judge may refuse to be transferred against his own will, Saibansho Ho [Court Act], Law No. 59 of 1947, art. 48, but as a practical matter, judges have little choice but to either comply or resign. See RAMSEYER & RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE*, *supra* note 3, at 10–11 (noting that a judge refuses a transfer “at his peril” and risks denial of reappointment by doing so); Miyazawa, *supra* note 22, at 48 (explaining why the formal statutory protection against involuntary transfers is not as effective as it might appear).

64. Interview with Judge 2, in Location Concealed (Date Concealed); Interview with Judge 3, *supra* note 37.

65. Colin P.A. Jones, *Japan's Crazy Judges*, 25 J. JAPANESE L. 269, 271 (2008) (book review); Interview with Justice G, *supra* note 14.

66. The hypothetical elite career track described here is an amalgam of the biographies of various justices and the accounts given by other scholars, all of which are consistent with one another. See, e.g., JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* 118–21 (1998); ITOH, *supra* note 14, at 254–55; O'BRIEN WITH OHKOSHI, *supra* note 25, at 71–75; Setsuo Miyazawa & Hiroshi Otsuka, *Legal Education and the Reproduction of the Elite in Japan*, ASIAN-PAC. L. & POL'Y J., June 2000, at 2:1, 2:22–24, tbl.27; Ramseyer & Rasmusen, *Managed Judges*, *supra* note 3, at 1887–89, 1901, 1905–06.

67. See ITOH, *supra* note 14, at 79 (observing that *chōsakan* tend to be among the most able and influential judges of their cohort).

68. See *infra* subpart III(C) (discussing the responsibilities of the *shuseki* and *kyōseki chōsakan*).

teaching at the LTRI or on loan to the Cabinet Legislation Bureau, the elite body responsible for reviewing government legislation and advising the Cabinet on legal issues.<sup>69</sup> The government might bear the expense of sending him abroad to obtain an LLM, perhaps in the United States or Germany. In his middle-to-late career, he will hopefully serve as chief judge of a district court within the jurisdiction of the Tokyo High Court, such as Shizuoka, Chiba, or Yokohama; on one of Japan's leading high courts, which would mean Tokyo, Osaka, or perhaps Nagoya; or, better still, as chief judge of a high court, especially one of the three just named.

Even an elite judge will, of course, spend some time in hardship postings away from the major cities of Tokyo, Osaka, and Nagoya. By the same token, judges who are not on the elite track stand a very good chance of spending at least some time on the Tokyo District Court or one of the major high courts. The fact that disfavored judges will on occasion enjoy desirable postings is effectively guaranteed by the General Secretariat's policy of immediately following an assignment in a remote area with a compensating assignment in the Tokyo area.<sup>70</sup> Relatively speaking, however, elite judges will spend systematically more time on prestigious courts in desirable locations and less time on family or branch courts in remote locations than their peers.<sup>71</sup>

Above all, a judge on the elite track will spend a disproportionate amount of time as an administrator in the General Secretariat.<sup>72</sup> Within the General Secretariat, in turn, the most influential and well-positioned judges are most likely to be in the Personnel Affairs Bureau (PAB), where they will manage the careers of their fellow judges.<sup>73</sup> It is a mark of rare success if a judge manages to become Director of the PAB. And if the Chief Justice selects him to be Secretary General, he stands an even better chance of being appointed to the Supreme Court.<sup>74</sup>

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69. See Samuels, *supra* note 12 (describing the responsibilities, influence, and prestige of the Cabinet Legislation Bureau).

70. See RAMSEYER & RASMUSEN, MEASURING JUDICIAL INDEPENDENCE, *supra* note 3, at 20 ("The Secretariat maintains a long-standing rule that judges stationed to either Hokkaido or Okinawa (the two points farthest from Tokyo) will spend their next post in Tokyo.").

71. See ITOH, *supra* note 14, at 254–55 (discussing the career patterns of "elite" judges); RAMSEYER & RASMUSEN, MEASURING JUDICIAL INDEPENDENCE, *supra* note 3, at 13 (summarizing the favorable treatment given to "fast-track judges").

72. ITOH, *supra* note 14, at 254; Miyazawa, *supra* note 22, at 49; Ramseyer & Rasmusen, *Managed Judges*, *supra* note 3, at 1905–10, 1912–13.

73. See, e.g., ITOH, *supra* note 14, at 254–55; Haley, *supra* note 2, at 102–05; Miyazawa, *supra* note 27, at 48–49 (all discussing the power and prestige that attach to administrative positions in the General Secretariat, particularly those pertaining to personnel matters).

74. See ITOH, *supra* note 14, at 26 (observing that serving as Secretary General, then as chief judge of a major high court, seems almost to ensure subsequent appointment to the Supreme Court); Ramseyer & Rasmusen, *Managed Judges*, *supra* note 3, at 1884–85 (noting that a disproportionate number of justices appointed from the lower courts have worked in the General Secretariat or served as Secretary General); see also O'BRIEN WITH OHKOSHI, *supra* note 25, at 77 (noting that

Regardless of how well his career progresses, a judge who hopes to join the Court must possess one last credential—namely, the right birthday. Timing is crucial. One of the six seats on the Court informally allocated to career judges must open when he is in his early to mid-sixties, such that he can spend at least a few years on the Court before the mandatory retirement age of seventy that is set by statute.<sup>75</sup> At the same time, he cannot be too young at the time the opening occurs, for the government does not wish to risk being stuck for an extended period of time with a justice who behaves in an ideologically surprising or undesirable way once he or she is safely ensconced on the SCJ, beyond the reach of the judiciary's ordinary internal control mechanisms.<sup>76</sup> Almost no justice in recent history has served longer than ten years before reaching mandatory retirement.<sup>77</sup>

Let us suppose that Hidari, liberal that he is, makes a habit of issuing rulings in favor of constitutional plaintiffs that tweak the government. The good news for him is that he is very unlikely to be fired for doing so, at least if history is any guide. It is highly unusual for judges to lose their jobs.<sup>78</sup> The only undisputed example of a firing that occurred for political or ideological reasons is that of Yasuaki Miyamoto, who was denied reappointment to the bench as a full judge after his initial ten-year term as an assistant judge for reasons that are widely acknowledged to have included his organizing activities for a left-of-center group known as *Seihōkyō*.<sup>79</sup> That is not to say that the judiciary does not strongly encourage certain judges not to seek reappointment, to retire early, or to resign voluntarily: it does so, and there may be no more effective way to induce a judge to resign than to tell

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every person to be appointed chief justice in the 1980s and 1990s had previously served as chief of one or more bureaus of the General Secretariat, if not as Secretary General).

75. See Ramseyer & Rasmusen, *Managed Judges*, *supra* note 3, at 1883–84 tbl.2 (listing the age of every justice appointed from 1983 through 2005); *supra* note 26 (discussing the mandatory retirement age).

76. See RAMSEYER & RASMUSEN, MEASURING JUDICIAL INDEPENDENCE, *supra* note 3, at 15 (suggesting that prime ministers deliberately appoint older justices to avoid the “Harry Blackmun problem”); O’Brien & Ohkoshi, *supra* note 17, at 53–55 (noting empirical evidence of a bias against younger candidates and positing that this bias may have the effect of curtailing independent behavior on the bench); *infra* text accompanying notes 175–90 (discussing the deliberate preference for appointing law professors who are already close to retirement age).

77. See O’Brien & Ohkoshi, *supra* note 17, at 53–55, 54 tbl.3.2 (indicating that, since the 1940s, Supreme Court justices have served an average of 6.31 years).

78. In recent years, on the advice of its judicial appointments review committee, see *supra* notes 47–52 and accompanying text, the SCJ has declined to recommend a small number of judges, on the order of perhaps three to five per year, for reappointment by the Cabinet. Interview with Judge 5, *supra* note 32; Interview with Committee Source, *supra* note 48; see also Foote, *supra* note 39, at 152–53 (noting that, in its first three years of operation, the committee deemed a total of fourteen judges unsuitable for reappointment). Prior to the creation of the committee in 2003, only two judges had ever been denied reappointment. Foote, *supra* note 39, at 153.

79. See Miyazawa, *supra* note 22, at 48 (noting the Supreme Court's admission that Miyamoto's membership in *Seihōkyō* played a role in his dismissal); *infra* notes 85–93 and accompanying text.

him that he will otherwise be fired.<sup>80</sup> One might also reasonably question whether it is necessary to fire more than one judge in order for all the other judges to get the message.<sup>81</sup> Nevertheless, it remains the case that the judiciary will be keen not to formally deny Hidari reappointment as full judge following the completion of his initial ten-year term as an assistant judge. Miyamoto's dismissal attracted stinging criticism that the judiciary would undoubtedly prefer not to have repeated.<sup>82</sup>

The bad news for Hidari is that it is unnecessary for the judiciary to threaten him with actual firing in order to discourage him from issuing liberal rulings or to ensure that he has little impact on Japanese constitutional law. Those who do not behave to the liking of the PAB are not given the same opportunities, and do not enjoy the same kind of career trajectory, as those who play along.<sup>83</sup> The plight of judges who belong to *Seihōkyō* illustrates the judiciary's stiff approach to leftists and other ideological deviants. The travails of this group, and in particular the judges who belonged to it, have been documented to a considerable extent by other scholars.<sup>84</sup> *Seihōkyō* is short for *Seinen Hōritsuka Kyōkai*, or the Young Lawyers Association.<sup>85</sup> In brief, its aim is to "defend the constitution,"<sup>86</sup> which means in practice that it seeks to protect the pacifist provisions of the constitution from revision or amendment.<sup>87</sup> Conservatives viewed *Seihōkyō* as little better than "a Communist Party affiliate"<sup>88</sup> and attacked the judiciary for allowing its members to belong to a group such as *Seihōkyō*.<sup>89</sup> In response, the General Secretariat urged judges to quit the organization.<sup>90</sup> Of those who complied, many enjoyed successful careers; indeed, several eventually became

80. See RAMSEYER & RASMUSEN, MEASURING JUDICIAL INDEPENDENCE, *supra* note 3, at 23 (discussing how one *Seihōkyō* member, Toshio Konno, resigned upon hearing that the General Secretariat would not reappoint him at the end of his term as assistant judge); Haley, *supra* note 2, at 103 ("[A] few others may have resigned in anticipation that they would be terminated if they did not.").

81. Miyazawa, *supra* note 22, at 48; Interview with Haruhiko Abe, *supra* note 63.

82. Haley, *supra* note 2, at 126.

83. See, e.g., O'BRIEN WITH OHKOSHI, *supra* note 25, at 74 (noting that "[j]udges who are too independent or too liberal" tend to be kept at a lower pay grade and assigned to less prestigious courts and less desirable locations); Upham, *supra* note 61, at 424 ("No one disputes that the Secretariat closely monitors judges' performance for both competence and political reliability.").

84. E.g., O'BRIEN WITH OHKOSHI, *supra* note 25, at 75–76; RAMSEYER & RASMUSEN, MEASURING JUDICIAL INDEPENDENCE, *supra* note 3, at 19–25, 37–43, 162–70; Haley, *supra* note 2, at 121; Miyazawa, *supra* note 22, at 55.

85. See RAMSEYER & RASMUSEN, MEASURING JUDICIAL INDEPENDENCE, *supra* note 3, at 19 (translating the name of the organization as the Young Jurists League); Miyazawa, *supra* note 22, at 55–57 (translating its name as the Young Lawyers Association).

86. Interview with Yasuaki Miyamoto, Legal Aid Attorney & Retired Judge, in Hachioji, Japan (July 14, 2008); Interview with Yoshitomo Ode, *supra* note 46.

87. RAMSEYER & RASMUSEN, MEASURING JUDICIAL INDEPENDENCE, *supra* note 3, at 18–19.

88. *Id.* at 19.

89. HIROSHI ITOH & LAWRENCE WARD BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961–70, at 16–17 (1978).

90. *Id.* at 17.

Supreme Court justices, and one, Akira Machida, even rose to the position of Chief Justice.<sup>91</sup> Those who refused to quit the organization, however, fared much worse. Professors Ramseyer and Rasmusen find statistically that, on the whole, judges who belong to *Seihōkyō* are likely to receive less pay, fewer administrative assignments, and more frequent assignments to undesirable locations.<sup>92</sup> So too are judges who rule against the national government on sensitive issues such as electoral apportionment or the constitutionality of the armed forces, or who otherwise defy the wishes of the LDP.<sup>93</sup>

The General Secretariat's practice of reassigning judges on a periodic basis has been an effective tool for encouraging those who are too independent or too liberal to quit.<sup>94</sup> Reassignment to a rural or outlying area means that a judge will lose not only the lifestyle and amenities but also the salary supplement, that come with assignment to a major city.<sup>95</sup> The hardship is even greater for those with families.<sup>96</sup> A judge with children will most likely want them to attend the best schools, which are mostly located in Tokyo and Osaka.<sup>97</sup> In practice, many judges in less desirable locations choose to leave their families behind and live in government dormitories.<sup>98</sup> And even if a judge refuses to quit voluntarily, a string of undesirable assignments is guaranteed to limit his or her ability to cause trouble: a judge who has been assigned to a family court in Kagoshima will not have the same opportunities to decide sensitive cases or shape the law as a judge on the Tokyo High Court.

My interviewees with firsthand experience in the PAB acknowledged that the General Secretariat gives more desirable assignments to some judges than to others, but sought to offer an explanation that casts the General Secretariat's personnel decisions in a more sympathetic and nonideological

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91. See RAMSEYER & RASMUSEN, MEASURING JUDICIAL INDEPENDENCE, *supra* note 3, at 23–24 (noting the success enjoyed by a handful of former *Seihōkyō* members, including Machida).

92. RAMSEYER & RASMUSEN, MEASURING JUDICIAL INDEPENDENCE, *supra* note 3, at 41–47. But see Kentaro Fukumoto & Mikitaka Masuyama, Judging Political Promotion of Judges: Survival Analysis, Split Population Model and Matching Method 12–13 (2006) (unpublished manuscript, on file at <http://www-cc.gakushuin.ac.jp/~e982440/research/FKMM-APSA06.pdf>) (applying split-population survival analysis and matching techniques to the data analyzed by Ramseyer and Rasmusen and finding no statistically significant evidence that judges who belonged to *Seihōkyō* were promoted more slowly to prestigious administrative positions).

93. RAMSEYER & RASMUSEN, MEASURING JUDICIAL INDEPENDENCE, *supra* note 3, at 60–61, 80–81.

94. O'BRIEN WITH OHKOSHI, *supra* note 25, at 74.

95. Judges stationed in certain urban areas are eligible for a potentially hefty salary supplement that phases out two years after the judge's departure from the area in question. Interview with Judge 5, *supra* note 32.

96. Interview with Judge 3, *supra* note 37.

97. RAMSEYER & RASMUSEN, MEASURING JUDICIAL INDEPENDENCE, *supra* note 3, at 12; Ramseyer & Rasmusen, *Managed Judges*, *supra* note 3, at 1887; Interview with Judge 3, *supra* note 37.

98. RAMSEYER & RASMUSEN, MEASURING JUDICIAL INDEPENDENCE, *supra* note 3, at 12; Interview with Judge 3, *supra* note 37.

light. These judges uniformly described the biggest challenge facing the General Secretariat as the recruitment of personnel. The next hardest task that they confronted, however, was that of “encouraging” judges to relocate every two to four years to where they are most needed.<sup>99</sup> One justice defended the rotation system by comparing its performance to that of the German system, which does not rotate its career judges. In his view, the result in Germany has been divergence in the quality of courts around the country.<sup>100</sup> The Japanese system avoids this problem, he argued, but at a cost to the judges themselves: in a system of deliberate and continuous professional and geographical reassignment, some judges must inevitably receive assignments that are considered less desirable.<sup>101</sup> Meanwhile, the most desirable assignments—namely, in the biggest cities and on the largest courts—also carry with them the heaviest caseloads and the greatest need for judges who process cases quickly.<sup>102</sup> Yet the result of assigning only the most capable judges to Japan’s biggest cities and largest courts is to make slower, less competent judges feel that they are perpetually mistreated.<sup>103</sup> The General Secretariat therefore faces a difficult tradeoff between making judges feel that the personnel assignment system is fair and sending judges where they are most needed—one that is necessarily resolved to some degree to the systematic disadvantage of some judges. This explanation certainly sounds plausible, but it flies in the face of the scholarly consensus, if not also the statistical evidence.<sup>104</sup> The prevailing view among observers is that Japanese judges march out of ideological sync with the bureaucracy at their own peril.<sup>105</sup>

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99. Interview with Justice F, *supra* note 58. As a formal matter, judges are free to reject reassignment, but as a practical matter, such reassignments are a requirement of the job, and a judge who refuses to accept a routine transfer runs the risk of being denied reappointment at the expiration of his or her ten-year term. See *supra* note 63 and accompanying text.

100. Interview with Justice A, *supra* note 17.

101. *Id.*

102. *Id.*; see also Miyazawa, *supra* note 22, at 49–50 (describing the usual justifications given for the preferential assignment of certain judges to more desirable courts and locations).

103. Interview with Justice A, *supra* note 17.

104. Even after controlling for differences in productivity as measured by each judge’s output of opinions, Ramseyer and Rasmusen find that “leftist” judges fare worse in their careers. RAMSEYER & RASMUSEN, MEASURING JUDICIAL INDEPENDENCE, *supra* note 3, at 80–81. The validity of this finding, however, has been questioned on methodological grounds. See Fukumoto & Masuyama, *supra* note 92, at 12 (arguing that Ramseyer and Rasmusen’s analysis is based on inaccurate data, fails to account for time dependence, and critically depends on their model’s misspecification).

105. See, e.g., O’BRIEN WITH OHKOSHI, *supra* note 25, at 72–76 (noting that judicial assignments and salary adjustments have been manipulated to ensure ideological conformity); Abe, *supra* note 22, at 307–09, 318 (arguing that the General Secretariat uses its power over transfers and promotions to secure obedience to the internal norms of the judiciary); Haley, *supra* note 2, at 121–28 (arguing that the conservatism of the Japanese judiciary is the product of strong internal discipline exerted by the conservative leadership of an autonomous judicial bureaucracy); Miyazawa, *supra* note 22, at 52, 50–52 (arguing, and offering evidence, that Japanese judges “need tremendous courage to decide a case in the way that is likely to displease the [General Secretariat]” and that their assignments depend more upon the policy content of their decisions and their outside

The General Secretariat, or perhaps more accurately, the PAB, possesses two powers that effectively ensure that an already conservative judiciary will remain conservative with very little effort or intervention on the part of political actors. The first, as discussed above, is its power to advance or derail a judge's career.<sup>106</sup> The second, which is equally crucial, is its ability to choose its own members and leadership. In theory, the most influential members of the judiciary should be, in descending order of formal rank, the Chief Justice, followed by the Secretary General, and then the Director of the PAB. Both the Secretary General and the Director of the PAB are, in theory, selected by the *saibankan kaigi*, or justices' conference, which consists of all fifteen members of the SCJ.<sup>107</sup> According to one experienced observer of the Japanese judiciary, however, the most influential official may in fact be the Director of the PAB.<sup>108</sup> Moreover, although the *saibankan kaigi* is formally responsible for personnel matters such as the selection of the Director of the PAB, it does not decide who the *candidates* for the position will be.<sup>109</sup> One justice with PAB experience explained the reality thusly: "The most influential person chooses the candidate. Who is most influential depends on the situation."<sup>110</sup> The Chief Justice is, "generally speaking," "the most influential" person in the judiciary, but not necessarily so, especially if he personally lacks experience in personnel matters.<sup>111</sup> With respect to the directorship of the PAB in particular, the existing director will usually name his successor; failing that, the Chief Justice, "a more influential justice," or the Secretary General will come up with a nominee.<sup>112</sup> Ordinarily, a handful of senior judges will consult one another, with the practical result that "everyone knows who will be picked."<sup>113</sup> The Chief Justice is free to reject the candidate who emerges from this process of heir selection and informal consultation, but the justice in question stated quite bluntly that he could not even "imagine such a case."<sup>114</sup>

It is on account of the judiciary's power not only to decide who will advance professionally, but also to select its own membership and leadership, that the institution is characterized by a high degree of ideological inertia: once set in motion upon a particular path, it will continue reliably and indefi-

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activities than upon their legal-reasoning skills or ability to dispose of cases efficiently); *supra* note 92 and accompanying text (discussing the statistical findings of Ramseyer and Rasmusen regarding the fate of "leftist" judges).

106. *See supra* notes 61–105 and accompanying text.

107. *See* ITOH, *supra* note 14, at 250–51 (discussing the composition and operating procedures of the *kaigi*).

108. Interview with Shinichi Nishikawa, Professor, Meiji University, in Tokyo, Japan (Aug. 20, 2008).

109. Interview with Justice A, *supra* note 17.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

nately down that path. Those in the PAB use their power over the careers of other judges to place likeminded colleagues in positions of power much like their own. The resulting patterns of appointment and promotion are both circular and self-reinforcing. Judge A, on assignment to the PAB, may assign Judges B and C to positions in the PAB; Judges B and C will, in turn, promote one another and later bring Judge A back into the administrative fold after a brief foray into the world of actual adjudication. In the words of Miyazawa and Otsuka, the “elite judges who repeatedly serve in the General Secretariat virtually appoint and promote each other.”<sup>115</sup> And, one might add, they are unlikely to appoint and promote someone like Hidari to a position from which he might reach the SCJ unless he is able to deceive everyone around him, over several decades as a career judge, of his true intentions. Relatively few jurists are likely to succeed at hiding their true colors for over forty years in the distant hope of one day securing a spot on the Supreme Court. The Chief Justice could, in theory, pluck Hidari from the depths of obscurity, were he to be so inclined. But there is no reason to think that he would be. He is likely not to defy, but to embody, the ideological proclivities of the system that screened, groomed, and elevated him.

#### *D. Other Paths to the Supreme Court*

In light of the realities of a career in the judiciary, Hidari might seriously wish to consider pursuing an alternative route to the Supreme Court. The good news is that alternative routes do exist: career judges are allocated only six of the court’s fifteen seats.<sup>116</sup> With respect to a number of the remaining seats, the judiciary plays a relatively minimal role in the identification and nomination of candidates. Moreover, vacancies occur much more frequently in Japan than in the United States owing to a combination of factors—namely, the relatively high number of seats, the statutorily imposed mandatory retirement age of seventy, and the practice of appointing justices in their mid-sixties.<sup>117</sup> It is not unusual, therefore, for three or four vacancies to materialize in the space of a single year.<sup>118</sup> The bad news is

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115. Miyazawa & Otsuka, *supra* note 66, at 2:23; *see also* ITOH, *supra* note 14, at 254 (observing that “the secretaries general have predominantly been recruited from among bureaucrats in the general secretariat”).

116. *See infra* notes 141–43 and accompanying text.

117. *See* Kunio Hamada, *Korekara no Saikō Saibansho no Arikata ni Tsuite Zenpen [What the Supreme Court Should Be in the Future, Part One]*, NIBEN FRONTIER, Oct. 2007, at 23, 29 (noting that, as of October 2007, 148 justices had served on the Court); *infra* text accompanying notes 179–82 (discussing the deliberate preference for appointing law professors who are already close to retirement age).

118. *See* O’Brien & Ohkoshi, *supra* note 17, at 54 tbl.3.2 (setting forth the number of SCJ appointments made by each of Japan’s Prime Ministers); Ramseyer & Rasmusen, *Managed Judges*, *supra* note 3, at 1883–84 tbl.2 (listing all appointments to the SCJ from 1983 through 2005). Between September 2008 and February 2009, for example, four justices were appointed to the Court. *See* Supreme Court of Japan, Justices of the Supreme Court, <http://www.courts.go.jp/english>

that, no matter what route Hidari might attempt to pursue, the deck remains firmly stacked against him. Each of the extrajudicial career paths by which our liberal protagonist might attempt to reach the SCJ has its own pitfalls and limitations. Let us consider each in turn.

1. *Appointment to the Court as a Former Prosecutor.*—As unlikely as Hidari is to succeed at reaching the SCJ via a career in the judiciary, he is probably even less likely to succeed via a career as a prosecutor in the Ministry of Justice, or *Hōmushō*. Even more so than its judges, Japan’s prosecutors have a reputation for conservatism.<sup>119</sup> In practice, the Ministry of Justice makes recommendations to the Chief Justice as to who should be appointed to fill the two seats that are allocated to former prosecutors.<sup>120</sup> By all accounts, the Chief Justice and General Secretariat do not give much scrutiny to its recommendations before relaying them to the Prime Minister.<sup>121</sup> Nor is there much reason why they should. From the judiciary’s perspective, the *Hōmushō* qualifies as a trusted partner. Prior to World War II, the judiciary was under the control and supervision of the Ministry of Justice.<sup>122</sup> Although the postwar constitution conferred independence upon the judiciary, the two organizations have continued to maintain close ties. The long-established practice of *hanken kōryū*, by which up to twenty percent of prosecutors spend time as judges and vice versa, is one mechanism for the deliberate cultivation of a shared outlook and mindset.<sup>123</sup> The justices selected by the *Hōmushō* enjoy a reputation for being conservative and thinking the same way as the career judges on the Court.<sup>124</sup> Without exception, my interviewees lumped together the former career judges and the former prosecutors when discussing the ideological fault lines on the SCJ. It should come as little surprise that former prosecutors who have spent their lives representing the government in court should exhibit a continuing tendency to side with the government once appointed to the bench.

In short, unless Hidari has reason to believe that it will be easier for him to fool the senior bureaucrats at the *Hōmushō* than the senior judges in the

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[/justices/index.html](#) (providing the dates of appointment for Justices Miyakawa, Sakurai, Takeuchi, and Kanetsuki).

119. Interview with Justice B, *supra* note 17; Interview with Justice F, *supra* note 58.

120. Interview with Justice F, *supra* note 58; *see also* Haley, *supra* note 2, at 111 (indicating that “senior prosecutors” are responsible for selecting the candidates).

121. Interview with Justice F, *supra* note 58; *see also* Haley, *supra* note 2, at 111–12 (suggesting that “[n]either the chief justice nor the secretary general has any voice” in determining which prosecutors will be eligible for appointment to the Court).

122. RAMSEYER & ROSENBLUTH, *supra* note 3, at 158; Haley, *supra* note 2, at 117.

123. *See* Miyazawa, *supra* note 22, at 50–51 (discussing the personnel exchange arrangement between the judiciary and the Ministry of Justice); *see also* Yasuo Hasebe, *The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Freedoms*, 5 INT’L J. CONST. L. 296, 300 (2007) (noting that the Ministry of Justice recruits heavily from the judiciary to fill “higher-ranking” positions).

124. Interview with Justice B, *supra* note 17; Interview with Justice F, *supra* note 58.

General Secretariat, he will not find a career as a prosecutor to be a promising route to the Supreme Court.

2. *Appointment to the Court as a Former Attorney.*—Hidari is likely to find the Japanese bar a more hospitable environment than either the judiciary or the Ministry of Justice. Traditionally, lawyers in Japan have been a relatively left-leaning bunch.<sup>125</sup> The “protection of fundamental human rights” and the pursuit of “social justice” are, quite literally, the official goals and responsibilities of the bar.<sup>126</sup> Japanese lawyers are likely, moreover, to work in very small firms and to prize their independence—to exhibit, in other words, the very opposite of a bureaucratic mentality.<sup>127</sup> These characteristics of the Japanese bar have been reflected to some extent in the behavior of the justices who are appointed from private practice. The justices I interviewed were in agreement that, on the whole, the former *bengoshi* tend to be more liberal, and are more prone to dissent, than their colleagues who were judges or prosecutors. Two justices from opposite backgrounds—a generally liberal justice who had been a lawyer and a generally conservative justice who had been a career judge—characterized and explained the differences in outlook between the two groups in almost exactly the same terms: decades of experience on the bench lead the former judges to value “stability,” whereas former lawyers are more likely to emphasize the protection of human rights and “how the world should be.”<sup>128</sup>

In the same manner as the Ministry of Justice nominates candidates to fill the seats allocated to former prosecutors, it falls upon the Japan Federation of Bar Associations (JFBA) and its member organizations to suggest candidates for the four seats on the SCJ that are allocated to former lawyers. One justice who was appointed from the bar described the process by which the JFBA nominates candidates as follows.<sup>129</sup> Each of Japan’s five major local bar associations—the Tokyo Bar Association, the Tokyo First Bar Association, the Tokyo Second Bar Association, the Osaka Bar Association, and the Kyoto Bar Association—holds hearings and selects a candidate.<sup>130</sup> Historically, the candidate has typically been the president or some other high-ranking officer of the bar association in question, but this pattern appears to have broken down somewhat in recent years. Among the

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125. See Haley, *supra* note 2, at 51 (noting the “remarkable” extent to which “left-liberal” and “[p]rogressive-reform” lawyers have dominated both national and local bar associations and influenced Japanese society at large).

126. See *id.* at 52 (quoting the Preamble to the 1987 Code of Attorney Ethics); Japan Federation of Bar Associations, *Articles of Association of Japan Federation of Bar Associations*, July 9, 1949, at 2, <http://www.nichibenren.or.jp/en/about/pdf/articles.pdf> (“This Federation shall be the source of protection of fundamental human rights and of realization of social justice.”).

127. See Haley, *supra* note 2, at 53–54 (“A deeply felt desire for independence or freedom from control by others motivates nearly all lawyers in Japan.”).

128. Interview with Justice B, *supra* note 17; Interview with Justice G, *supra* note 14.

129. Interview with Justice B, *supra* note 17.

130. *Id.*

three Tokyo-based organizations, lawyers self-select into the bar association of their choice, which has the result of creating “big differences” among them in overall professional background and ideological flavor.<sup>131</sup> The Tokyo Bar Association, in particular, enjoys a reputation for being more heavily stocked with graduates of private universities (as opposed to *Todai* and *Kyodai*), and thus having a more liberal atmosphere, whereas the Tokyo First Bar Association is comprised more heavily of lawyers from large firms who tend to be somewhat more conservative.<sup>132</sup> These ideological differences among the three Tokyo bar associations have contributed indirectly to a permanent shift in the composition of the Court, as will be explained below.

The JFBA, which is an umbrella organization encompassing all of the local bar associations, subsequently holds an all-bar committee meeting at which the number of candidates is reduced to roughly three.<sup>133</sup> This short list of candidates is forwarded to the judiciary, which then selects one or two names for recommendation to the Prime Minister.<sup>134</sup> In deciding whom to nominate in any given case, the JFBA strives to maintain a balance of representation on the SCJ from each of the local bar associations. Although the rule is an informal one, the three Tokyo-based bar associations and Osaka’s bar association each expect to have at least one member on the Court, with the Nagoya and Kobe bar associations vying on occasion for the last seat.<sup>135</sup>

Those with experience in the PAB indicated that the JFBA’s recommendations are accepted as a matter of course and that the judiciary neither interferes with nor intervenes in the process by which the bar associations choose their nominees. It would be naive to conclude, however, that the JFBA has a free hand in deciding who will be appointed to the Court. No one denies that the bar associations consult and negotiate with the

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131. *Id.*

132. The justice in question characterized the Tokyo Bar Association as the most liberal of the three local bar associations in Tokyo, *see id.*, but the Tokyo Second Bar Association, having split from the other two on ideological grounds, is sometimes said to be more liberal. *See* E-mail from Masako Kamiya, Professor, Gakushuin University Law School, to David S. Law, Professor, Washington University in St. Louis (Mar. 10, 2009, 23:34:43 CST) (on file with the author) (deeming the Tokyo Second Bar Association the “most liberal” of the three and describing the Tokyo Bar Association as “middle-of-the-road”). In either case, however, both are reputedly to the left of the Tokyo First Bar Association.

133. Interview with Justice B, *supra* note 17.

134. *Id.*

135. Of the twenty-six practicing attorneys appointed to the Supreme Court of Japan between 1947 and 1980, sixteen had previously served as president or vice president of a local bar association. Of these, ten hailed from the various Tokyo bar associations, two from the Osaka Bar Association, and one from each of the Nagoya and Kobe bar associations. MERYLL DEAN, *JAPANESE LEGAL SYSTEM* 324 (2d ed. 2002); *see also* Haley, *supra* note 2, at 109 (“[T]he predominance of former bar officials [among those attorneys appointed to the Supreme Court of Japan] exemplifies the influence of the bar itself rather than political leaders on which attorneys are selected to become justices.”).

General Secretariat before settling formally upon their nominees. Such discussions prevent the nomination of candidates who will be unacceptable to the judiciary. The leadership of the bar is aware that there are unwritten limits to whom it can choose. Candidates cannot be unacceptably liberal or possess a paper trail of public statements on controversial issues that will offend the sensibilities of the government.<sup>136</sup> The relevant bar associations are aware that if they recommend candidates who turn out to be unacceptable to the judiciary, not only will the candidates be rejected, but the bar associations themselves risk jeopardizing their credibility and influence over future nominations.<sup>137</sup> If the JFBA's recommendations are always accepted by the Chief Justice, that is because the bar takes care only to recommend people who are acceptable to the Chief Justice.

It should be obvious to Hidari that the bar offers liberal-minded people such as himself a plausible path to a seat on the Supreme Court. Given the sheer number of lawyers with whom he must compete, the odds are of course against him. Nevertheless, if he were to pursue a career in private practice, cultivate his professional associations carefully, refrain from taking overtly liberal positions in public, and rise to a position of prominence within one of Tokyo's bar associations, Hidari might stand a chance of reaching the SCJ. Unfortunately, the potentially liberal influence of the bar on the SCJ is obvious to the judiciary as well, and it has responded over time by altering the composition of the Court to ensure that it maintains the upper hand to the disadvantage of the bar and, in particular, the relatively liberal Tokyo Bar Association.

There is no formal or legal requirement that the fifteen seats on the Court must be allocated in any particular way among different segments of the legal community, but such a practice established itself early in the Court's history. At its inception in 1947, the Court consisted of six career judges, five lawyers, one prosecutor, one law professor, one judicial administrator, and one diplomat.<sup>138</sup> An expectation soon developed that the seats on the Court would be equally split among three different groups: five seats were to be allocated to "judicial officials" (a category that encompassed both judges and prosecutors), five seats to private attorneys, and the last five to academics, bureaucrats, and persons who might loosely be classified in some sense as "intellectuals."<sup>139</sup> As Hiroshi Itoh observes, "the equal ratio among these groups came to be seen almost as a vested right of each group.

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136. See Interview with Setsuo Miyazawa, Professor, Aoyama Gakuin Law School, in Tokyo, Japan (Aug. 7, 2008).

137. *Id.*

138. ITOH, *supra* note 14, at 24.

139. *Id.*; Shigenori Matsui, The History of the Japanese Supreme Court 6 & n.12 (June 14, 2008) (unpublished manuscript, on file with the author).

Whenever a vacancy arose, the group which had lost the position acted as if it were entitled to have one of its men fill the vacancy.”<sup>140</sup>

According to Professors O’Brien and Ohkoshi, the current convention is for the Court to have six former judges; four or five former lawyers; two former bureaucrats, one of whom should be a former diplomat; one or two former prosecutors; and one former law professor.<sup>141</sup> As of this writing, the Court’s actual membership matches the unwritten rule perfectly. It consists of six career judges (including Chief Justice Hironobu Takesaki), four former lawyers, two prosecutors, one law professor, one bureaucrat (who also happens to be the only woman on the court), and one diplomat.<sup>142</sup> The precise allocation of seats does vary from time to time. For example, from April 2003 through March 2006, the Court had three former bureaucrats and only seven judges and prosecutors.

One change in the Court’s composition, however, appears to have been both permanent and deliberate. In 1958, under Chief Justice Koutarou Tanaka, two former lawyers left the Court, but only one of them was replaced by another former lawyer; the other seat was reallocated to the career judiciary.<sup>143</sup> The real reason for this change is a matter of some dispute. The official rationale, according to one justice, had to do with the structure of the Court.<sup>144</sup> The SCJ is divided into three petty benches, each consisting of five justices, which handle the vast majority of the court’s caseload.<sup>145</sup> Only in rare and unusually important cases does the SCJ convene in the form of a grand bench consisting of all fifteen justices.<sup>146</sup> The justices do not rotate among the petty benches;<sup>147</sup> nor do the petty benches specialize by subject matter. In light of the fact that all of the petty benches hear both criminal and civil cases, it was argued that each petty bench should possess both criminal and civil law expertise. By expanding the number of career judges on the Court from five to six, it would supposedly become possible to equip each of the petty benches with both a criminal law judge and a civil law judge.

The same justice who described this explanation to me also considered it utterly unconvincing. As he emphasized, the fact that there are a total of six former judges on the Court does not, in fact, enable each petty bench to enjoy the services of both a criminal law judge and a civil law judge. The Chief Justice is among this total of six, but he customarily does not

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140. ITOH, *supra* note 14, at 24–25.

141. O’Brien & Ohkoshi, *supra* note 17, at 52.

142. See Supreme Court of Japan, *supra* note 118 (linking to biographies of the justices).

143. Interview with Justice F, *supra* note 58.

144. Interview with Justice B, *supra* note 17.

145. J. Mark Ramseyer, *Predicting Court Outcomes Through Political Preferences: The Japanese Supreme Court and the Chaos of 1993*, 58 DUKE L.J. 1557, 1576 & tbl.1 (2009).

146. See *id.* (noting that, in practice, even cases that are supposed to be heard by the grand bench tend to be decided by the petty benches and that the grand bench has tended to publish zero to two opinions per year).

147. Interview with Justice B, *supra* note 17.

participate at all in petty bench deliberations.<sup>148</sup> To the extent that he participates in actual adjudication, he does so only in his capacity as head of the grand bench. Thus, one of the petty benches ordinarily operates with only four members, only one of whom is a former judge, yet there has never been any serious suggestion or genuine suspicion that the short-handed petty bench handles cases less capably than the other two petty benches.

This justice voiced his belief that the real reason for this permanent shift in the composition of the Court was that some person or group—perhaps Chief Justice Tanaka, who was known for being strongly conservative—sought to empower the conservatives on the Court at the expense of the liberals. A reallocation of seats to the judiciary, at the expense of the bar, has a substantive impact on the ideological direction of the Court because, on the whole, former judges and prosecutors have generally been the most conservative members of the Court, while former attorneys and academics have generally enjoyed the opposite reputation.<sup>149</sup> The brunt of the change, moreover, was borne specifically by the Tokyo Bar Association, which had previously enjoyed two seats but was henceforth reduced to one.<sup>150</sup> Among the various local bar associations that are informally allocated seats on the SCJ, the Tokyo Bar Association enjoys a relatively liberal reputation.<sup>151</sup> Nor did this justice consider it mere coincidence that at the same time that its allocation of seats was halved, the Tokyo Bar Association had been voicing criticism of the conservative decisions being issued by the SCJ.<sup>152</sup>

The result of this shift in the Court's composition has been not only to reduce the number of opportunities for a liberal like Hidari to join the SCJ but also to ensure that even if liberals like Hidari occasionally reach the SCJ, they will be outnumbered. The justice noted that, even under a best-case scenario, any liberals on the Court are likely to be outnumbered by the Court's conservatives: at best, the liberals are likely to muster only seven votes, whereas the conservatives can reliably expect to muster a minimum of eight votes. For the liberals even to reach seven votes requires not only that the four lawyers on the Court and the law professor must exhibit ideological solidarity but also that the two bureaucrats on the Court must join them. That, in turn, is inherently unlikely, given that the bureaucrats are by

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148. *Id.*; see also ITOH, *supra* note 14, at 251 (noting that the Chief Justice “spends most of his time on judicial administration”). The current Chief Justice is a rare exception. Chief Justice Takesaki explained his recent decision to participate in petty bench deliberations on the ground that he wished to acquire firsthand knowledge of the Court's activities: unlike most of his predecessors, he had not previously served on the SCJ at the time of his appointment. *Saikōsai Shōhōtei de Chōkan ga saibanchō ni Takesaki-shi Irei no sankā* [Chief Justice Takesaki Takes the Unusual Step of Participating in Petty Bench Deliberations: Rare for Chief Justice to Participate in Petty Bench Deliberations], Nihon Keizai Shimbun [NIKKEI], Mar. 10, 2009, at 34; E-mail from Masako Kamiya, *supra* note 132.

149. See *supra* notes 124–25 and accompanying text.

150. *Id.*

151. See *supra* notes 126, 132 and accompanying text.

152. See Interview with Justice B, *supra* note 17.

definition products of the Japanese bureaucracy and have moreover been handpicked by the LDP to serve on the Court, as discussed below.<sup>153</sup> By contrast, the six judges and two prosecutors are likely to be reliably conservative, and even if they are unable to secure an ally or two from among the bureaucrats, they already constitute a majority of the Court.

3. *Appointment to the Court as a Former Bureaucrat.*—The two former bureaucrats on the SCJ come from a range of backgrounds. Typically, one of the two seats is held by a former diplomat.<sup>154</sup> There are substantive reasons for allocating one seat to a diplomat: it is considered useful for the Court to have someone with expertise in questions of treaty interpretation and international law.<sup>155</sup> The other seat may be held by someone with experience in the Cabinet Legislation Bureau, or by someone with little or no legal experience at all apart from an undergraduate degree in law.<sup>156</sup> This seat is also the only one ever to have been occupied by a woman—most recently Justice Ryuko Sakurai, formerly of the Ministry of Labor.<sup>157</sup>

For present purposes, there are two important things to know about the former bureaucrats who serve on the Court. First, they are usually not that liberal.<sup>158</sup> Such generalizations about the ideology of the justices based on their professional background and personal history are, of course, subject to notable exceptions. Thus, for example, Hiroshi Fukuda, a former ambassador who retired from the Court in 2005, earned a reputation, albeit almost invariably in dissent, as a steadfast champion of voting rights.<sup>159</sup> Nor, for that matter, has every former career judge to serve on the Court been relentlessly conservative: Tokuji Izumi, a former Director of the PAB and Secretary General who recently retired from the Court, was noted in the press for having compiled a surprisingly liberal voting record after his elevation to the SCJ.<sup>160</sup> But such individuals are indeed exceptions, and as this Article has sought to illustrate, there is a gamut of reasons why such individuals do not reach the Court in greater numbers.

The second thing to know is that the former bureaucrats are the only justices who are, in practice, selected in precisely the manner contemplated

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153. See *infra* section II(D)(3).

154. See Ramseyer & Rasmusen, *Managed Judges*, *supra* note 3, at 1885 (noting that five of the twelve bureaucrats to serve on the Court from 1983 to 2005 were former diplomats).

155. Interview with Justice A, *supra* note 17.

156. Ramseyer & Rasmusen, *Managed Judges*, *supra* note 3, at 1885; Interview with Justice A, *supra* note 17.

157. See Haley, *supra* note 2, at 108 (describing the two previous female occupants of the seat); Supreme Court of Japan, Justices of the Supreme Court, <http://www.courts.go.jp/english/justices/sakurai.html> (providing Justice Sakurai's biography).

158. Interview with Justice B, *supra* note 17.

159. *Id.*; see also Interview with Justice G, *supra* note 14 (suggesting that Justice Fukuda might arguably be grouped with the Court's former attorneys in terms of his willingness to dissent).

160. Shingo Miyake, *Wadai hanketsu erito syudō* [*High-Profile Judgments Issued by the Elite*], Nihon Keizai Shimbun [NIKKEI], July 5, 2004, at 19, 19–20.

by the constitution: namely, they are selected by the Cabinet.<sup>161</sup> One justice noted, perhaps with irony, that the notion that the Chief Justice is the one who actually decides whom to nominate is mere *tatema*, or superficial appearance.<sup>162</sup> Rather, what lies on the face of the document, which would appear to be *tatema*, is in fact the truth: the Cabinet tells the Chief Justice whom it would like to appoint, the Chief Justice duly submits this name to the Prime Minister, and the Cabinet then approves its own choice.<sup>163</sup>

The odds are thus extremely slim that an ideological outlier such as Hidari could ever reach the Court via a career in some bureaucracy other than the Ministry of Justice or the judiciary itself. Were he to take this route, he would maximize his meager chances by entering the Ministry of Foreign Affairs as a junior diplomat in the hope of someday rising to the rank of ambassador, or by somehow becoming the head of the Cabinet Legislation Bureau. Above all, he must be directly selected by the LDP from a wide universe of candidates. And the LDP is not in the business of appointing liberals to the Supreme Court of Japan.

4. *Appointment to the Court as a Former Law Professor.*—To date, little has been written about the process by which a law professor is chosen to fill the last seat on the Court. Professor Haley has argued that, as with the other seats on the SCJ, the process is a relatively structured one that narrows the field down to a small handful of candidates and ultimately leaves the Chief Justice with relatively little discretion.<sup>164</sup> My own research suggests, however, that the process is relatively ad hoc and unstructured, with few informal rules or understandings to guide it. As a result, there may be no seat on the Court that the Chief Justice has greater discretion in filling than that of the lone legal academic.

This lack of structure reflects both the relative infrequency with which former academics are appointed and the absence of any formal organization of legal academics, analogous to the JFBA or a government ministry, that might generate the requisite procedure for identifying candidates. One justice, himself a former law professor, described the process by which he was appointed as a “black box” of which he had no knowledge.<sup>165</sup> Another justice who had served as both Secretary General and Director of the PAB indicated that the appointment of legal academics operates on a “case by case” basis.<sup>166</sup>

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161. See KENPŌ art. 79, para. 1 (“The Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law. All such judges excepting the Chief Judge shall be appointed by the Cabinet.”).

162. Interview with Justice F, *supra* note 58.

163. *Id.*

164. Haley, *supra* note 2, at 108–09.

165. Interview with Justice C, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

166. Interview with Justice F, *supra* note 58.

This justice was, however, able to elaborate upon the process at slightly greater length. He characterized the overall process as an underdeveloped, if not “primitive,” one in which the General Secretariat plays a substantial role.<sup>167</sup> If the Cabinet happens to have a particular candidate in mind, it will simply make the selection itself. If it does not, it will ask the judiciary to choose, and the choice will devolve upon the Chief Justice, who will ask the General Secretariat to identify and evaluate potential candidates. In such cases, it will fall upon the Director of the PAB to do most of the work.<sup>168</sup> The Director of the PAB, in turn, is likely to lack a clear roadmap for performing the necessary consultations and evaluations.<sup>169</sup> In this justice’s view, the absence of any preexisting institutional structure for narrowing the field and grooming potential candidates tends to ensure that the General Secretariat will be involved to a greater extent in the selection of law professors than in filling any other type of vacancy on the SCJ.

To be sure, the field of candidates can be pared down somewhat by age, reputation, and area of expertise. A different justice who had also been Director of the PAB opined that the search would be likely to focus on scholars in areas of substantive expertise that are especially valuable to the SCJ, namely civil law, criminal law, administrative law, and treaty interpretation.<sup>170</sup> He also noted that the General Secretariat would be likely to seek the input of the former law professor who was being replaced. My judicial and academic interviewees alike agreed, however, that it has become harder over time to identify a single obvious choice for the academic seat. Some twenty years ago, Shigemitsu Dando and Masami Itoh were Todai law professors of uniquely towering reputation that rendered them obvious choices for the Court.<sup>171</sup> By contrast, Japanese legal academia today presents a larger, more complex, and more varied field of candidates from which no obvious single, choice can be expected to emerge.<sup>172</sup>

The law professors who have served on the Court have, on the whole, enjoyed a reputation for being relatively liberal and independent minded.<sup>173</sup> This should come as no surprise to anyone, given the leftward tilt of Japanese legal academia. It is not difficult, however, for the judiciary to blunt their impact. One simple but effective way in which it has done so has been to limit the professoriate to a single seat. Another way has been to refrain from selecting candidates who are too liberal. No professor can hope to reach the Court if he or she is further to the left than the Chief Justice and General

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167. *Id.*

168. *Id.*

169. *Id.*

170. Interview with Justice A, *supra* note 17.

171. Interview with Justice F, *supra* note 58.

172. Interview with Justice A, *supra* note 17; Interview with Justice F, *supra* note 58; Interview with Justice G, *supra* note 14; Interview with Masako Kamiya & Hidenori Tomatsu, *supra* note 46.

173. See O’Brien & Ohkoshi, *supra* note 17, at 57–58 (finding that the Court’s former law professors authored over a quarter of all nonmajority opinions issued between 1981 and 1993).

Secretariat are prepared to tolerate. The conservative senior judges who participate in the selection process enjoy both substantial discretion and an increasingly wide range of candidates from which to choose. They have both the incentive and the capacity to avoid appointing a dedicated liberal whose goal in life is to push the Court to the left. To reach the Supreme Court, someone like Hidari has little alternative but to fool these gatekeepers, and it will certainly not be easy for him to do so via a career in academia. It is not clear how he could rise to sufficient prominence as a scholar without also generating a substantial, and most likely incriminating, paper trail. His obligation and responsibility as an academic will be to express his views, not to conceal them, but in doing so, he will give the gatekeepers all the warning they need to keep him locked safely outside the gates.

### III. Institutional Pressures on Sitting Justices

#### A. *Time Constraints—Part I: Imminent Retirement*

Even if Hidari somehow beats the very considerable odds and manages to secure a place on Japan's highest court, he will still be in no position to revolutionize Japanese constitutional jurisprudence or awaken the Court from its long slumber. Instead, he will find himself operating under a set of demands and constraints that make it difficult for him to have much impact. He will also discover, as one justice ruefully observed, that the Supreme Court of Japan is "just another bureaucratic organization."<sup>174</sup> As in any bureaucratic organization, the rules and practices of the institution can be expected to shape the outlook and behavior of its members. Indeed, in certain respects, one might say that the Court constrains the justices more than the justices shape the Court.

The first problem that Justice Hidari can expect to encounter, as previously discussed, is that he will be outnumbered: the process for appointing justices and the manner in which seats are allocated ensure that liberals are very unlikely to constitute a majority of the Court. The second problem is that he will lack the raw resources that he needs to accomplish his goals. One crucial resource that he will clearly lack is time. Whatever he wishes to accomplish—and the goal of transforming the Court's constitutional jurisprudence is extremely ambitious—he will have very little time in which to do so. Justices are appointed very close to the mandatory retirement age of seventy that is imposed by statute.<sup>175</sup> The average length of service on the Court has declined from over eight years in the 1940s and 1950s to five and a half years as of the 1990s.<sup>176</sup>

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174. Interview with Justice E, Current or Former Member of the Supreme Court of Japan, in Tokyo, Japan (Date Concealed).

175. See O'Brien & Ohkoshi, *supra* note 17, at 53–54 (reporting that most justices are appointed in their sixties and that the average age of justices appointed in 1990–1995 was 64.2).

176. See *id.* at 54 tbl.3.2.

Nor does the variation in length of tenure among justices appear to be entirely random. Rather, the historical pattern suggests a deliberate effort to prevent potentially liberal justices from exercising too great an influence over the Court. Those justices whose professional background suggests they are at greater risk of behaving more independently—namely, former attorneys—appear to be appointed at an older age. From the creation of the Court in 1947 through the present, former judges have served an average of 7.0 years, while both former bureaucrats and former prosecutors have served 6.9 years, but former attorneys have served only 5.0 years on average.<sup>177</sup> The gap between the average tenure of former attorneys and that of justices from other backgrounds is statistically significant.<sup>178</sup> Consistent with this pattern, the latest attorney to join the court, Koji Miyakawa, was sixty-six at the time of his appointment in the summer of 2008, which means he will serve no longer than four years.

Former law professors have served an average of almost 7.5 years, but from a statistical perspective, they serve no longer than any other group of former justices except the former attorneys.<sup>179</sup> Moreover, there is reason to expect that law professors will, in the future, be appointed to the Court closer to retirement age. A justice with extensive experience in personnel matters indicated that the current goal is to appoint law professors who will serve no longer than five years.<sup>180</sup> The motivating concern, he explained, is that there is little that the Diet or Cabinet can do if a justice turns out to adopt “unpopular” positions or to decide cases in ways “not supported by the people.”<sup>181</sup> If someone who takes such positions is appointed at too young an age, the resulting situation will be “hard to change.”<sup>182</sup> Appointing potentially problematic justices at an older age, by contrast, helps to ensure that, even if the occasional troublemaker slips through the appointments process, he or she will be quickly replaced.

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177. These statistics are calculated from the biographical data on all former justices that is posted on the Court’s official website, which is current through the retirement of Justice Tokuji Izumi in January of 2009. Courts in Japan, [http://www.courts.go.jp/saikosai/about/saibankan/hanzi\\_itiran](http://www.courts.go.jp/saikosai/about/saibankan/hanzi_itiran); see also O’Brien & Ohkoshi, *supra* note 17, at 57 tbl.3.3 (reporting figures that were current as of 1995). Justices who had pursued multiple careers prior to their appointment to the Court, such as Itsuo Sonobe, were classified according to their occupation at the time of their appointment, as identified by the Court’s website. See Miyazawa, *supra* note 22, at 54–55 (describing Sonobe’s varied career).

178. The statistical tests performed were a one-way analysis of variance covering all five groups of justices—namely, former judges, former attorneys, former bureaucrats, former prosecutors, and former professors—( $F = 4.31$ ;  $p < 0.01$ ), and two-sample  $t$ -test comparisons of former attorneys against former judges ( $p < 0.01$ ) and former professors ( $p < 0.01$ ).

179. This conclusion is based on two-sample  $t$ -test comparisons of former professors against former judges ( $p = 0.69$ ), former bureaucrats ( $p = 0.63$ ), former prosecutors ( $p = 0.68$ ), and former lawyers ( $p < 0.01$ ). The data included fifty-five former judges, forty-four former lawyers, fourteen former bureaucrats, thirteen former prosecutors, and twelve former professors.

180. Interview with Justice A, *supra* note 17.

181. *Id.*

182. *Id.*

This justice's inside account directly supports the argument made by Ramseyer and his co-authors that the appointment of justices to short terms of office has constituted a deliberate strategy for the exercise of political and ideological control over a court whose members are difficult to remove.<sup>183</sup> Such a strategy curtails both the likelihood that a justice will drift ideologically over time, and the cost of deviance by any particular judge. Unlike the Republican or Democratic Party in the United States, the LDP can reasonably expect to be in power most, if not all, of the time.<sup>184</sup> American political parties have an incentive to appoint younger Justices, they argue, as insurance against the possibility that a competing party will acquire power and fill a judicial vacancy with someone who is likely to be worse.<sup>185</sup> This strategy runs the risk, however, that a Justice will behave unexpectedly from the outset or shift ideologically over time.<sup>186</sup> By contrast, because the LDP has little reason to worry that another party will fill future vacancies with liberal jurists,<sup>187</sup> it can instead pursue a strategy of appointing justices who are

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183. RAMSEYER & ROSENBLUTH, *supra* note 3, at 144, 153; J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 AM. POL. SCI. REV. 331, 333 (2001).

184. *See* Ramseyer & Rasmusen, *supra* note 183, at 333 (“From 1955 to 1993, the LDP maintained steady control over the Diet and could rationally expect that situation to continue.”); *infra* note 187 (discussing the LDP’s immediate prospects for remaining in power).

185. *See* Ramseyer & Rasmusen, *supra* note 183, at 333 (“Given the frequent political turnover in America, U.S. presidents try to stack the Supreme Court with relatively young justices to take advantage of lifetime tenure.”).

186. *See* RAMSEYER & ROSENBLUTH, *supra* note 3, at 153 (referring to the “risk of the Earl Warren type of agency slack: the chance that a politically reliable appointee will shift, over time, to very different positions”); Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1486 (2007) (documenting the extent of ideological drift on the U.S. Supreme Court).

187. Recent opinion polls suggest that the LDP is in danger of losing power for only the second time in over fifty years. *Japan’s Crashing Economy: Cold Medicine*, ECONOMIST, Feb. 21, 2009, at 44. In a number of ways, however, the LDP’s main opposition, the Democratic Party of Japan (DPJ), behaves less like a genuine opposition party than a rival faction of the LDP: indeed, the current head of the DPJ is himself a former LDP chieftain who broke away as a result of internal party politics. *See* CURTIS, *supra* note 3, at 71 (discussing the intraparty power struggles that led to Ichiro Ozawa’s departure from the LDP). On matters of substantive policy, it is difficult to distinguish the DPJ from the LDP. *Id.* at 194; *see also* Craig Martin, *The Case Against “Revising Interpretations” of the Japanese Constitution*, ASIA-PAC. J.: JAPAN FOCUS, <http://japanfocus.org/-Craig-Martin/2434> (noting that both the LDP and DPJ favor dilution of the pacifist provisions of Article 9). Consequently, even if the DPJ takes power, it is unlikely either to upset the LDP’s central policy achievements—including, most notably, the expansion and strengthening of Japan’s military capabilities—or to induce a dramatic ideological shift by the courts. *Cf.* CURTIS, *supra* note 3, at 197–98 (describing how, upon taking power, the Socialists abandoned their traditional positions on the constitutionality of the Self-Defense Forces and the desirability of Japan’s security arrangements with the United States); Ramseyer, *supra* note 145, at 1573–81, 1577 tbl.2, 1582 tbl.3 (finding that the Socialist government that held power briefly during the early 1990s attempted neither to overcome the “anti-leftist bias” of the lower courts nor to appoint “transformative justices” to the SCJ).

bound to retire in the near future.<sup>188</sup>

Justice Hidari's limited opportunity to reshape the court's constitutional jurisprudence will be further curtailed by the fact that constitutional-impact litigation, of the type brought by plaintiffs equipped and determined to secure legal change, is relatively rare in Japan, even at the level of the Supreme Court.<sup>189</sup> As one justice observed of his colleagues, the relative infrequency of genuine constitutional litigation, combined with the shortness of tenure on the Court, means that "by the time they get confidence in constitutional cases, they have to retire."<sup>190</sup>

#### *B. Time Constraints—Part II: The Crushing Workload*

But surely, Justice Hidari might think, there is a silver lining to this news: does the dearth of constitutional litigation not imply that he will have more time and energy to focus upon the cases that do come along and to make the most of each? It does not. This is the other sense in which Justice Hidari will lack the time he needs to accomplish his goals: the workload of the Japanese Supreme Court is nothing short of overwhelming. In 2006, 7,180 new civil and administrative cases and 4,293 criminal cases were added to its docket.<sup>191</sup> Thus, its total docket is not unlike that of the U.S. Supreme Court in size.<sup>192</sup> Unlike the U.S. Supreme Court, however, the Supreme Court of Japan has very little discretion to refuse to decide a case.<sup>193</sup> Legislation was enacted in 1996 to render its civil docket partly discretionary, but these reforms were both incomplete and ineffectual, and there have been no corresponding reforms on either the criminal or the administrative side.<sup>194</sup> To make matters worse, criminal appellants can and routinely do raise time-consuming factual challenges to their convictions on appeal to the SCJ.<sup>195</sup>

188. See Ramseyer & Rasmusen, *supra* note 183, at 333 (observing that, insofar as the LDP expects to remain in power, its leaders can "afford to appoint justices old enough . . . not to change their views before mandatory retirement").

189. Hidenori Tomatsu, Kenpō Soshō [CONSTITUTIONAL LITIGATION] 416–17 (2d ed. 2008); Interview with Justice E, *supra* note 174.

190. Interview with Justice E, *supra* note 174.

191. Hamada, *supra* note 117, at 24.

192. See O'Brien & Ohkoshi, *supra* note 17, at 41 (making the point that the SCJ's docket "is as large as that of the U.S. Supreme Court, yet in a country with less than half of the population of the United States").

193. See Haley, *supra* note 2, at 105 (noting that, unlike its American counterpart, "the Supreme Court of Japan does not exercise any significant discretion over its docket").

194. See *id.* (describing the effect of the Code of Civil Procedure, which became effective in 1998, on certain types of civil appeals); Interview with Judge 1, in Location Concealed (Date Concealed) (indicating that the reforms have given the SCJ only minimal relief from docket pressures).

195. Interview with Judge 1, *supra* note 194 (discussing the *shokken hatsudō* procedure, which translates roughly as review for misuse of authority or abuse of discretion); Interview with Justice B, *supra* note 17 (lamenting the abundance of fact-driven appeals that the SCJ is required to

The net result is that the Supreme Court of Japan decides in the neighborhood of ten thousand cases per year, a significant fraction of which can be resolved only on the basis of a review of the factual record. This means in practical terms that, on a typical working day, each five-member petty bench must dispose of eight to ten cases per day; ten is the more appropriate figure if one assumes, as one justice indicated, that the Court works approximately three hundred days per year.<sup>196</sup> Approximately half of these cases receive actual discussion,<sup>197</sup> which can be time-consuming: even easier cases may require one or two hours of discussion, and it is not uncommon for the members of a petty bench to spend five or six hours discussing a difficult case.<sup>198</sup> Grand bench cases require even more time, owing not only to the difficulty and importance of such cases but also to the sheer number of justices involved.<sup>199</sup> When discussion is deemed unnecessary, the petty benches save time by deciding cases via correspondence,<sup>200</sup> and the *chōsakan* provide much-needed assistance by preparing vast numbers of boilerplate dispositions.<sup>201</sup> Even with the help of such coping mechanisms, however, the SCJ's workload remains staggering when compared to that of other courts. By way of comparison, in 2006, the U.S. Supreme Court decided sixty-eight cases,<sup>202</sup> while the Supreme Court of Canada decided fifty-nine cases.<sup>203</sup>

Remarkably, the SCJ manages to decide approximately 98% of all civil and criminal cases within two years of filing.<sup>204</sup> Its administrative cases, however, tend to drag out much longer: only 89% are decided within two years, and that rate has declined in recent years.<sup>205</sup> The Court has in recent years increased the number of *gyōsei chōsakan*—namely, law clerks who specialize in administrative cases—but it has been unable to keep pace with the rising size and complexity of its administrative docket.<sup>206</sup> A number of justices observed that case overload makes it difficult for the SCJ to give

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handle); *see also* Hamada, *supra* note 117, at 28 (noting that the SCJ typically receives, and must review, a more extensive record on appeal than its American counterpart does).

196. Interview with Justice D, *supra* note 59; *see also* Interview with Judge 5, *supra* note 32 (suggesting that the number of working days on the SCJ's calendar may be closer to 250, after allowing for national holidays and the possibility of summer vacation).

197. Interview with Justice D, *supra* note 59.

198. Interview with Justice B, *supra* note 17.

199. *Id.*

200. Interview with Justice D, *supra* note 59.

201. Interview with Justice A, *supra* note 17.

202. RICHARD A. POSNER, HOW JUDGES THINK 299 (2008); *see also* ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS ON THE SUPREME COURT 25 fig.1.1 (2006) (graphing the Court's caseload up to 1994).

203. Supreme Court of Canada, Cases Decided in 2006, <http://www.thecourt.ca/decisions-2006>.

204. Hamada, *supra* note 117, at 25.

205. *Id.*

206. *See id.* (noting that the percentage of administrative cases decided by the SCJ within two years actually declined between 2000 and 2005, despite the introduction of additional *gyōsei chōsakan*).

adequate attention to constitutional questions when they do emerge.<sup>207</sup> These docket pressures pose an obvious challenge for Justice Hidari: if he is to steer the course of Japanese constitutional jurisprudence to the left, he will need to find the time both to identify worthwhile cases and to give them the attention they deserve. But time is a commodity that he will not have.

*C. Manpower Constraints: Independent Clerks, Dependent Dissenters*

Justice Hidari might not consider these obstacles insurmountable. Even if he is in the numerical minority, he might strive to sway his colleagues by authoring richly persuasive opinions of his own. Failing that, he might aim to leave behind an intellectual legacy of influential concurring and dissenting opinions upon which future litigants and jurists might build. To do so in the face of a crushing workload and imminent retirement, however, he will need help—and lots of it, given that a justice who wishes to write a separate opinion has only three weeks to one month in which to do so.<sup>208</sup> There is one obvious way in which Justice Hidari might hope to deal with the simultaneous pressures of too few allies, too many cases, and too little time—namely, the time-honored American tradition of relying upon one’s law clerks.

Except, of course, that this is Japan, and Justice Hidari therefore has no law clerks of his own. The *chōsakan* are not hired by, and do not work for, specific justices. Instead, as noted previously, they are successful career judges handpicked by the General Secretariat to work for the Court as a whole.<sup>209</sup> They are, as Hiroshi Itoh observes, “among the most able career judges of ten to twenty years of experience and expertise as trial judges,” whereas the justices themselves are of “relatively advanced ages,” face a “very heavy workload,” and in many cases “have little prior judicial experience.”<sup>210</sup> Moreover, *chōsakan* typically serve for at least three years,<sup>211</sup> which means in practical terms that they may have more experience at the Court than many of the justices. In short, the *chōsakan* are unlikely to feel especially cowed by, or indebted to, the justices whom they nominally serve.

The *chōsakan* system is in many ways a rational response to the caseload pressures that the Court faces. At present, the Court has thirty-seven *chōsakan*.<sup>212</sup> They are divided by substantive expertise into groups: seventeen specialize in civil law, ten specialize in criminal law, and nine specialize in administrative law.<sup>213</sup> Efforts are made to ensure that a couple

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207. *Id.* at 25; Interview with Justice B, *supra* note 17; Interview with Justice E, *supra* note 174.

208. Interview with Justice D, *supra* note 59.

209. ITOH, *supra* note 14, at 77; O’Brien & Ohkoshi, *supra* note 17, at 42; *supra* subpart II(C).

210. ITOH, *supra* note 14, at 79.

211. *Id.* at 77; Interview with Judge 2, *supra* note 64; *see also* Interview with Judge 1, *supra* note 194 (indicating that *chōsakan* serve four or five years on average).

212. Interview with Judge 2, *supra* note 64.

213. *Id.*

of the civil *chōsakan* have experience with intellectual property matters.<sup>214</sup> Even the justices who reported relatively frequent disagreement or sometimes difficult relations with the *chōsakan* described them with grudging respect as “elite judges” who are “confident, no question of that,”<sup>215</sup> as the “cream of the crop” in terms of sheer “ability,”<sup>216</sup> and so forth.

The *chōsakan* have a formal hierarchical leadership structure and decision-making procedures of their own. When a case arrives at the SCJ, it is sent to the appropriate group of *chōsakan*—civil, criminal, or administrative—and the group then assigns the case to one of its members.<sup>217</sup> At the same time, incoming cases are also assigned to one of the three petty benches, which also divide the cases among their members.<sup>218</sup> Thus, the presiding justice does not determine who the corresponding *chōsakan* will be. The *chōsakan* is responsible for preparing a *jikken* memo on the case that is comparable to a bench memorandum of the type familiar to law clerks in other countries: it includes a summary of the arguments on both sides, a summary of the facts (which can be extensive in criminal cases), an explanation of the relevant law, and a draft opinion.<sup>219</sup>

If the *chōsakan* concludes that the case or the lower court’s decision presents an important issue—for example, a potential inconsistency with SCJ precedent or a constitutional question—he or she will call for group discussion of the case.<sup>220</sup> These group meetings occur at least once a month, but the exact frequency varies according to need.<sup>221</sup> The *chōsakan*’s report will reflect the outcome of the group discussion.<sup>222</sup> The *chōsakan* are led by a *shuseki chōsakan*, who is their overall head, and by three *jyōseki chōsakan*, one for each group.<sup>223</sup> The *shuseki chōsakan* is a highly experienced judge of thirty to thirty-five years experience in most cases.<sup>224</sup> He or she has typically already served as the chief judge of a district court and also as a judge on a high court.<sup>225</sup> Serving as *shuseki chōsakan* is one of the last steps, if not the last step, on his or her way to becoming chief judge of a high court.<sup>226</sup> The *jyōseki chōsakan* is typically a judge of approximately twenty-years experi-

214. Interview with Justice B, *supra* note 17.

215. *Id.*

216. Interview with Justice D, *supra* note 59.

217. O’Brien & Ohkoshi, *supra* note 17, at 42.

218. *Id.*

219. Interview with Judge 1, *supra* note 194; Interview with Judge 5, *supra* note 32.

220. Interview with Judge 1, *supra* note 194.

221. *Id.*

222. See ITOH, *supra* note 14, at 79 (explaining that “[i]f a presiding justice feels that the case report is insufficient or that a group discussion raises further questions to be clarified,” the *chōsakan* revises the report).

223. Interview with Judge 1, *supra* note 194.

224. *Id.*

225. *Id.*

226. *Id.*

ence who is being groomed for even greater things.<sup>227</sup> A judge is usually assigned to be a *kyōseki chōsakan* just before becoming chief judge of a district court.<sup>228</sup> In most cases, the *shuseki* and *kyōseki chōsakan* do not become involved in the substantive work of the other *chōsakan*.<sup>229</sup> They do, however, lead group discussions and, in such cases, will also review the *chōsakan*'s written report before it is circulated to the justices.<sup>230</sup> The *shuseki chōsakan* also has the added responsibility of evaluating the performance of the *chōsakan* under him or her.<sup>231</sup>

The net result is that the *chōsakan* are more influential, more confident, and more independent from the justices than their American or Canadian counterparts. Their confidence and influence derives in large part from their experience, talent, and professional success. Their independence from the justices, meanwhile, derives from the fact that they possess their own leadership and owe their continuing professional success and career prospects to the General Secretariat rather than to the justices with whom they work on a random, sporadic basis. It is also bolstered by the fact that when a justice disagrees with a *chōsakan* in an important case, he is disagreeing not merely with a single *chōsakan*, but with an entire group of judges who are experts in their field and may, both collectively and individually, possess more judicial experience than him.

This system has the effect, intentional or otherwise, of giving the General Secretariat a measure of indirect control over the Court's output and jurisprudence, and of curtailing the ability of justices to deviate from the judicial mainstream. Even justices who might themselves fairly be described as conservative in their voting behavior or who were themselves *chōsakan* acknowledge that the manner in which the *chōsakan* conceive of their role causes them to be conservative.<sup>232</sup> According to sympathetic observers, the *chōsakan* consider it their responsibility to ensure that the SCJ's decisions are consistent with its own existing case law; they do not feel free to suggest, and indeed discourage, departures from precedent.<sup>233</sup> No one felt any need to apologize for the mindset of the *chōsakan*, and by all indications, it is a mindset that the General Secretariat actively values when choosing them.<sup>234</sup>

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227. Interview with Judge 5, *supra* note 32.

228. Interview with Judge 1, *supra* note 194.

229. *Id.*

230. *Id.*

231. *Id.*; see also Interview with Judge 2, *supra* note 64 (explaining that the General Secretariat confers with both the *saibankan kaigi* and the *shuseki chōsakan* when evaluating the performance of the *chōsakan*).

232. Interview with Justice F, *supra* note 58.

233. Interview with Judge 1, *supra* note 194; Interview with Justice F, *supra* note 58.

234. See Interview with Judge 1, *supra* note 194 (deeming it a strength of the system that the *chōsakan* ensure consistency with precedent); Interview with Justice F, *supra* note 58 (describing the General Secretariat's sense of the role that the *chōsakan* should play).

More generally, it seems naive to think that the General Secretariat, the guardian of judicial orthodoxy, pays no attention to the views of potential *chōsakan*, either directly or indirectly. None of my judicial interviewees suspected the General Secretariat of deliberately choosing conservative *chōsakan* for the purpose of influencing the ideological direction of the court. What seems more likely, however, is that the ideological norms of the General Secretariat influence its selection of *chōsakan* in more indirect and less explicit ways, with the result that the views of the *chōsakan* tend to mirror those of the General Secretariat.<sup>235</sup> As judges on an elite career trajectory, the *chōsakan* have, by definition, demonstrated to the satisfaction of the General Secretariat that they can be trusted to perform reliably, predictably, and without any overt signs of deviancy from the ideological norm.<sup>236</sup> To the extent that those with firsthand knowledge were willing to discuss how the *chōsakan* are chosen, they insisted that the sole selection criteria are ability and competence, as necessitated by the intense demands of the Court's workload. It is more than plausible, however, that evaluation of a judge's ability and competence will be colored by the extent to which the judge in question conforms to the evaluator's own ideological views. Indeed, the possession of a particular mindset may become part of the definition of what it means to be competent. Likeminded senior judges may take their shared ideological bent for granted to such an extent that their subjective views become the benchmark of objective competence. The concepts of ability and competence are sufficiently elastic to encompass the notion that judges ought to think a particular way.

Imagine what is likely to happen, therefore, if Justice Hidari finds himself presiding over a sensitive constitutional case involving, say, the constitutionality of Japan's naval refueling operations in support of American military operations in Afghanistan.<sup>237</sup> Let us assume that Justice Hidari takes the view not only that the case is justiciable—which contradicts earlier precedent to the effect that issues surrounding the interpretation of Article 9 are nonjusticiable political questions in all but the most extreme cases<sup>238</sup>—but also that these naval operations are unconstitutional, which places him squarely on a collision course with the LDP. As someone who holds such a liberal position, he is likely to have reached the Court through some route other than a career in the judiciary; as a matter of raw numbers, he is there-

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235. See Miyazawa, *supra* note 22, at 54 (observing that the *chōsakan* are likely to “share the same perspective” as, and to behave in ways that are predictable to, the General Secretariat).

236. See Abe, *supra* note 22, at 314–16, 318 (arguing that Japanese judges must comply with a norm of avoiding challenges to “the will of the political majority” if they are to rise to “responsible positions” in the judiciary).

237. See, e.g., Craig Martin, *Lessons for Japan from Canada: Establish Limits on Naval Support to U.S.*, JAPAN TIMES, Jan. 10, 2008, at 15, available at <http://search.japantimes.co.jp/cgi-bin/ea20080110a1.html> (describing the debate over the constitutionality of a Japanese statute authorizing the supply of fuel to naval forces engaged in Afghanistan).

238. See *supra* note 12 and accompanying text.

fore most likely to have been appointed from the bar. That means, in turn, that he has been appointed close to retirement age. Thus, he is heavily lacking in judicial experience, having in all likelihood served no more than a year or two on the Court, yet he must make haste if he wishes to have any impact on the Court's jurisprudence.

The design and composition of the Court ensure that Justice Hidari will face an uphill battle in a variety of ways. First, as a former attorney with little or no prior judicial experience who is faced with a crushing caseload, he will be desperately in need of highly capable help, both in preparing the masterfully persuasive opinion that he has in mind and in dealing with his other cases so that he can focus on the more important task at hand.

Second, it is safe to assume that the *chōsakan* assigned to the case will not share Justice Hidari's view of how it should be decided. My judicial interviewees varied widely in their assessments of how frequently the justices and the clerks disagree, and how severe such disagreement can be. One *chōsakan* indicated that, in the presence of a major constitutional question, a justice will "usually" disagree with at least some aspect of the *chōsakan*'s report, but he further estimated that such disagreement occurred in only one out of every hundred cases.<sup>239</sup> By contrast, a justice with a liberal reputation indicated that he disagreed with the *chōsakan* from ten to twenty percent of the time and no more so in constitutional cases than in other types of cases.<sup>240</sup> Not surprisingly, those justices with a reputation for being liberal tended to report more frequent and severe conflict with the *chōsakan* than either their more orthodox colleagues or the *chōsakan* themselves. Although the *chōsakan* are capable of exercising a more liberal influence on the justices from time to time,<sup>241</sup> such influence appears to be more the exception than the rule. On the whole, it is difficult to imagine a legal position more likely to elicit squeals of protest from a typical *chōsakan* than the one that Justice Hidari proposes to take.

Third, in taking the position that Japanese naval operations abroad are unconstitutional, Justice Hidari will be disagreeing not merely with an individual *chōsakan*, but with an entire troupe of experienced, elite judges who will almost certainly present a unanimous front. Even in the unlikely event that the *chōsakan* assigned to the case sympathizes with his position, she will be expected to flag such an important case for group discussion and to conform her own views to those of her fellow *chōsakan* when she prepares her report. Evaluation of her performance and review of her report by the *kyōseki* and *shuseki chōsakan* will help to ensure that she does so. Anecdotal

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239. Interview with Judge I, *supra* note 194.

240. Interview with Justice B, *supra* note 17.

241. One liberal justice—who described his jurisprudential approach as greatly influenced by the understanding of judicial review expressed in the famous footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), and expounded in JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980)—indicated that he had been exposed to this body of American constitutional theory by a *chōsakan*.

evidence and common sense alike suggest that the prospect of having one's legal position unanimously rejected by a body of highly confident judges with special expertise in the topic at hand may, in and of itself, be enough to induce a left-leaning but overworked and perhaps also inexperienced justice to capitulate.<sup>242</sup>

Indeed, even Justice Hidari's fellow justices may behave in ways that squelch his will to dissent. It appears that some of the Court's career judges, in particular, may frown upon an undue propensity to dissent as contrary to the norms of the judiciary or to their understanding of how the Court is supposed to decide cases.<sup>243</sup> One justice described an incident between a member of the Court who was a former career judge and another who was not.<sup>244</sup> The justice who had been appointed from outside the judiciary chose not to speak during the Court's oral discussion of a particular case but simply stated at the close of the discussion that he intended to dissent. The former career judge was apparently unimpressed with his colleague's unwillingness to argue his position before publishing a dissent: having first weighed with due regard to relevant social norms the fact that he was older than the would-be dissenter, he told his colleague to "sit down and do your job."<sup>245</sup>

Fourth, in the face of the collective recommendation of the *chōsakan* and a bench that is stacked in favor of conservatives, Justice Hidari will almost certainly find himself in dissent. The *chōsakan* will in all likelihood present an impressive, unanimous front in support of their position, which the inexperienced Justice Hidari may be hard-pressed to rebut persuasively without help. The career judges on the Court, in turn, are likely to be receptive to the *chōsakan* position, given that they share the same training, outlook, and professional experience. The former prosecutors on the Court will, if anything, be even more conservative. Added together, these two groups already constitute a majority of the Court, regardless of how any of the other justices behave.

Fifth, Justice Hidari cannot count on receiving much help from the *chōsakan*—or, indeed, from any other source—in drafting his dissent. The *chōsakan* assigned to a case is expected to prepare a report that anticipates and reflects the relevant range of views and to assist in drafting the opinion of the Court, which is in any event likely to be based upon the report.<sup>246</sup> He

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242. One of my interviewees related to me precisely such a story on a not-for-attribution basis. A former member of the Court who was known both for his intellectual ability and liberal leanings confided in my source that he had once told a *chōsakan* that he wished to decide a case against the *chōsakan*'s recommendations. The clerk in question convened a full meeting of the *chōsakan* to discuss the case then returned to the justice and told him: "All thirty of us think your way of thinking is wrong." The justice acquiesced.

243. See O'BRIEN WITH OHKOSHI, *supra* note 25, at 83 (observing that both "the Court's norms" and "the legal culture" disfavor the authorship of dissenting or even concurring opinions).

244. Interview with Justice G, *supra* note 14.

245. *Id.*

246. ITOH, *supra* note 14, at 78–79.

or she is not under any firm obligation, however, to help individual justices author separate opinions, be they concurring or dissenting. Even in the best-case scenario, the *chōsakan* will at most check the “outline” and “basic ideas” of a prospective separate opinion, according to one justice who had himself been a *chōsakan*.<sup>247</sup> Nor can Justice Hidari draw upon certain other basic resources that dissenting judges in other countries might take for granted. The Supreme Court of Japan rarely allows or receives amicus briefs: the last time it did so was in a 1989 case involving the subdivision of forestry land when it received a brief from the Ministry of Justice.<sup>248</sup> If he is indeed to author a separate opinion within the expected time frame of one month or less in the face of a crushing caseload, he must attempt to fashion what he can from the parties’ own briefs, his own hard work, and possibly some general input from a generous *chōsakan*.

But the worst-case scenario is, needless to say, significantly worse. When asked what happens in the event that they disagree with a member of the Court, the *chōsakan* with whom I spoke insisted that they comply faithfully with the wishes of the justices and, indeed, that things could not logically be otherwise. The justices, however, painted a more complex picture. Some justices reported experiencing difficulty with *chōsakan* who do not agree with them; others characterized the relationship as largely harmonious. One moderately liberal justice observed that some *chōsakan* could indeed be “not cooperative” but characterized his own relations with the *chōsakan* as “very good” and suggested that a justice’s ability to work productively with the *chōsakan* depends more upon personality than substantive agreement: an “authoritative personality,” he suggested, as opposed to a justice who merely holds liberal views, would be more likely to experience difficulty securing the cooperation of the relevant *chōsakan* in the event of disagreement.<sup>249</sup> Another justice with a liberal reputation on certain issues indicated that, in “exceptional cases,” the *chōsakan* can be “very hostile” and may engage in deliberate foot-dragging.<sup>250</sup> This justice alluded by way of example to a “hideous experience” in a high-profile voting rights case but declined to elaborate.<sup>251</sup>

Sixth, the members of the Court who are most likely to have liberal leanings, such as Justice Hidari, are also most likely to be dependent upon the *chōsakan* for help. Those justices who rose through the ranks of the career judiciary make a habit of writing their own opinions: as one such justice observed, it is a point of pride and “almost a tradition” for them to do so.<sup>252</sup> The justices who most need assistance, by contrast, are likely to be those who

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247. Interview with Justice A, *supra* note 17.

248. Interview with Masako Kamiya & Hidenori Tomatsu, *supra* note 46.

249. Interview with Justice C, *supra* note 165.

250. Interview with Justice D, *supra* note 59.

251. *Id.*

252. Interview with Justice A, *supra* note 17.

lack judicial experience—namely, the former lawyers, bureaucrats, and professors on the Court. Precisely because they have not spent their lives in the career judiciary, however, these same justices, who are most in need of *chōsakan* assistance, are also the most likely to constitute the liberal wing of the Court. Yet, precisely because they are liberal, they cannot count upon the *chōsakan* for the very assistance of which they are in the greatest need.<sup>253</sup>

In sum, the Court's allocation of institutional resources, combined with its organizational structure and composition, strongly favor conformity and capitulation on the part of a would-be liberal such as Justice Hidari. The justices who are most inclined to fight the ideological current of the Court will also be the least well-equipped to do so. From the outset, they are likely to be underprepared, overwhelmed, and short of time in more ways than one. They will be in the greatest need of assistance from the *chōsakan* but also the least likely to receive it. Because they lack direct control over the *chōsakan*, their ability to secure the assistance that they need will depend to a significant degree upon their relations with the *chōsakan*. It is difficult not to suspect, in turn, that the extent to which the relationship is harmonious will depend at least partly upon the extent to which the *chōsakan* shares the justice's views. For the same reasons that the career judiciary is conservative, however, a typical clerk and a liberal justice are unlikely to see eye-to-eye. Moreover, even if the justice is fortunate enough to secure the *chōsakan's* ungrudging assistance, the actual level of assistance that he or she can hope to receive is minimal as compared to what the judges on certain other appellate courts in certain other countries routinely demand, and receive, from their clerks.

#### IV. Conclusion: The Nature of Judicial Politics and the Impact of Institutional Design

The conservatism of the Japanese Supreme Court illustrates two recurring features of judicial politics. The first is that judicial politics and

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253. It should be noted that neither a lack of judicial experience nor a lack of *chōsakan* assistance has prevented the former law professors on the Court from being relatively prolific dissenters. See O'Brien & Ohkoshi, *supra* note 17, at 57–58, 57 tbl.3.3 (finding that the Court's former law professors authored over a quarter of all nonmajority opinions issued between 1981 and 1993 and listing by occupation the most frequent dissenters on the Court during that time). Their capacity for generating separate opinions with little or no help from the *chōsakan* is perhaps unsurprising in light of the fact that, unlike private attorneys or bureaucrats, they are professionally accustomed to publishing their own ideas and critiquing judicial decisions. The sole law professor on the Court at any given time cannot be expected, however, to shoulder the burden of articulating an alternative vision of the law on every occasion that such vision is needed. Not only the sheer magnitude of the task, but also the internal organization of the SCJ, limit what one justice can accomplish: a lone justice has no effective way of monitoring, much less influencing, the cases handled by the two petty benches to which he or she does not belong.

electoral politics cannot be decoupled.<sup>254</sup> There is more than one way in which the Japanese judiciary can be characterized as independent, but whatever judicial independence means, it cannot mean independence over the long term from prevailing political forces. In the Japanese context, judicial independence has meant that the courts have enjoyed the power to manage their own personnel matters in the first instance while also escaping overt forms of control by other political actors over the manner in which specific cases are decided. What the courts do not possess, however, is the capacity to pursue policies out of sync with those favored by a government that has been in power for decades. The conservatism of Japan's courts is the inevitable result of their longtime and ongoing immersion in a conservative political environment. There is no institutional structure or mechanism capable of thoroughly insulating courts from politics.

Political control over judicial behavior need not be overt. Political actors can influence a court's behavior directly or indirectly by manipulating the composition of the court, the resources available to members of the court, and the range of strategic options available to the court as an institution. In the case of the SCJ, all of these forms of influence are at work. A gauntlet of screening mechanisms ensures that left-leaning jurists who are prepared to strike down policies favored by the LDP are unlikely to reach the Supreme Court,<sup>255</sup> while the few who do reach the Court are hobbled by acute resource constraints that make it difficult for them to steer the law in a new direction.<sup>256</sup> What is perhaps most interesting about Japan from an institutional perspective is that the LDP has, in effect, delegated much of the task of political control to ideologically reliable agents within the judiciary itself—namely, a cadre of senior judges centered upon the Chief Justice and his administrative aides in the General Secretariat. The result of this deft bit of engineering is a judiciary that amply satisfies formal criteria of judicial independence yet remains reliably in tune with the wishes of the government.

The SCJ is further constrained by the practical difficulty of prevailing against the government. Judicial efforts to strike down government policy may fail or even backfire: past experience suggests that the LDP may respond to an irksome constitutional decision by ignoring the decision<sup>257</sup> or

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254. See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 20 (1981) (“[T]he universal pattern is that judging runs as an integral part of the mainstream of political authority rather than as a separate entity.”).

255. See *supra* Part II.

256. See *supra* Part III.

257. Last year, for example, the Nagoya High Court held that the SDF's air support operations in Iraq violate Article 9, but it denied relief on the ground that the plaintiffs lacked standing. The government responded by vowing publicly to ignore the decision. See Craig Martin, *Rule of Law Comes Under Fire: Government Response to High Court Ruling on SDF Operations in Iraq*, JAPAN TIMES, May 3, 2008, available at <http://search.japantimes.co.jp/print/ea20080503a1.html> (quoting Cabinet Secretary Machimura's public statement that the government “could not accept such a court ruling”). Nor is it only the Nagoya High Court that has met with less than complete obedience: the SCJ has held repeatedly that Japan's House of Representatives is unconstitutionally malapportioned,

seeking a constitutional amendment.<sup>258</sup> From a strategic perspective, it is probably better for the Court to render no decision at all than to render a decision that is disobeyed. Disobedience makes a court look ineffectual and thus begets further disobedience. The perception that a court lacks power is ultimately self-fulfilling.<sup>259</sup> This fact does not appear to be lost on the justices, one of whom likened the power of the SCJ to that of a *denka no hōtō*, or “treasured sword” of legendary power that is “passed from generation to generation.”<sup>260</sup> The sword has legendary power as long as it is left unused on the mantelpiece, but actual use of the sword is profoundly risky: “If you discover it doesn’t cut well . . . its value is destroyed.”<sup>261</sup> There is a similar paradoxical quality to the Court: the extent to which it has power depends upon the extent to which it *appears* to have power. By steering clear of potentially losing battles with the government, it avoids the appearance of weakness and thus safeguards whatever power it does possess.

The institutional characteristics of the SCJ also play an important role in shaping its behavior. Although the impact of politics on judicial behavior is inescapable, the timing and extent of that impact can vary greatly. Even a dog on a leash enjoys a degree of slack: it can follow faithfully, or it can drag its heels. Likewise, the political environment defines the outer limits of what a court can hope to accomplish, but within those limits, the court can either facilitate or hinder the government’s efforts to make policy. The internal organization, rules, and practices of the Court play a crucial role in determining which course it will take. The SCJ has proven more help than hindrance to the LDP because the manner in which it is designed provides political actors with the means to reshape its behavior rapidly and dramatically. Its structural sensitivity to political intervention demonstrates a second recurring feature of judicial politics: the institutional characteristics of a court govern its responsiveness to the political environment.

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but the Diet has continually failed to comply with the standards set forth by the Court. *See supra* note 11 (discussing both the Court’s decisions and the inadequacy of the Diet’s response).

258. *See* RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR 320 (2002) (noting that, from the moment that the LDP was formed in 1955, one of its “principal aims” has been revision of the postwar constitution in a manner that would deemphasize the protection of individual rights and weaken Article 9’s prohibition against militarization); J. Patrick Boyd & Richard J. Samuels, *Nine Lives?: The Politics of Constitutional Reform in Japan*, 29 POL’Y STUD. 1, 17–26 (2005), available at <http://www.eastwestcenter.org/fileadmin/stored/pdfs/PS019.pdf> (describing early efforts by the LDP to amend Article 9); Masami Ito, *Article 9 in Abe’s Sights*, JAPAN TIMES, Apr. 14, 2007, available at <http://search.japantimes.co.jp/cgi-bin/nn20070414a2.html> (noting that amending Article 9 has been a goal of the LDP since the party was founded and discussing recent efforts to lay the legal groundwork for such an amendment).

259. *See* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 778–85 (2009) (discussing how and why actual judicial power depends upon the appearance of judicial power).

260. Interview with Justice E, *supra* note 174.

261. *Id.*

There are two organizational characteristics in particular that are likely to play an especially important role in determining how responsive a given court will be. The first is the frequency with which political actors—be they elected officials, voters, or some combination of the two—have the opportunity to shape the composition of the court. In Japan, a relatively large number of seats on the Court and a deliberate strategy of appointing justices near mandatory retirement age have ensured a regular flow of vacancies that give the government the opportunity to adjust and correct the ideological direction of the Court on a relatively constant basis.<sup>262</sup> The fact that the justices face retention elections ought to further enhance the responsiveness of the Court,<sup>263</sup> but in practice, they are appointed so close to retirement age that the retention elections are largely moot.<sup>264</sup> By comparison, the opportunities for a governing majority to shape the Supreme Court of the United States are relatively fitful and irregular. Years can go by without a vacancy, and the opportunity to make an appointment that will actually affect the ideological balance of the Court may not arise for more than a decade at a time.<sup>265</sup> As a result, there is an elevated risk that the Court will embody a lagging average of electoral politics and attempt to impose upon today's governing coalition the views of yesterday's governing coalition.<sup>266</sup>

The second characteristic is important because it interacts with the first: it is the extent to which power within the court is centralized or diffuse. Political actors need not engage in sustained and repeated efforts to influence the direction of a court if power on the court itself is concentrated in the

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262. See Ramseyer & Rasmusen, *Managed Judges*, *supra* note 3, at 1890–91, 1883–84 (tbl.2 (listing all appointments made to the SCJ from 1983 to 2005 and noting that Prime Minister Koizumi, for example, was able to appoint a majority of its members within two years of taking office)).

263. See KENPŌ art. 79, para. 2 (“The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten years, and in the same manner thereafter.”).

264. O'Brien & Ohkoshi, *supra* note 17, at 53–54; see also RAMSEYER & ROSENBLUTH, *supra* note 3, at 152–53 (noting that the retention elections have in practice been meaningless).

265. See Keith Krehbiel, *Supreme Court Appointments as a Move-the-Median Game*, 51 AM. J. POL. SCI. 231, 233 (2007) (describing and adding to a body of literature that treats appointment of the median member of the Court as being of unusual importance because the policy outcomes that the Court reaches will reflect the views of the median justice).

266. See, e.g., THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 79–80 (1989) (observing that the Supreme Court tends to adopt policies favored by the general public, but only after a four-year lag); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795, 806 (1975) (arguing that the Supreme Court tends to invalidate laws during the “lag period” after a realigning election that leaves it temporarily out of sync with the elected branches); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 97 (1993) (finding that the Supreme Court responds on a majority of occasions to changes in public opinion, but only after a “significant delay” of approximately five years on average). *But see* John B. Taylor, *The Supreme Court and Political Eras: A Perspective on Judicial Power in a Democratic Polity*, 54 REV. POL. 345, 364–68 (1992) (questioning whether the “lag period” explanation applies beyond the New Deal Era).

hands of a single individual who is subject to replacement at relatively frequent intervals. In the present case, the concentration of power in the hands of the Chief Justice and the General Secretariat renders the Supreme Court of Japan capable not only of bending rapidly to the wishes of today's government but also of bringing the rest of the Japanese judiciary along with it.

If management of the judiciary is left to this self-replicating clique of judges—as it has been, for most of the past—the result will be a judiciary that is both formally independent and highly inertial. But the way to change its direction is simple: one need only replace the head of the mechanism, the Chief Justice. Notwithstanding the intensely bureaucratic character of the judiciary, it should be faster and easier for a liberal Prime Minister in Japan to transform the Japanese Supreme Court than for a liberal President in the United States to do the same for our Supreme Court. The most important thing—and perhaps the *only* thing—that the Prime Minister need do is to defy convention and appoint as Chief Justice someone who is unusually young, highly energetic, very liberal, and, perhaps most importantly, has *not* been recommended by the existing leadership of the judiciary.

The powers of the Chief Justice are formidable and can take effect rapidly. In the right hands—those, say, of a Chief Justice Hidari—they would be nothing short of transformative. To appreciate their full impact, let us contrast the powers of a Chief Justice Hidari with those of Chief Justice John Roberts. Chief Justice Roberts is, as they say, merely first among equals.<sup>267</sup> He has one equally weighted vote among nine and has the right to speak and vote first in conference and to assign authorship of opinions if and when he happens to be in the majority.<sup>268</sup> He has the privilege of presiding over impeachments<sup>269</sup> and of flubbing the presidential oath of office.<sup>270</sup> He also has various administrative duties that include, not surprisingly, lobbying Congress for more money,<sup>271</sup> and less obviously, overseeing a number of art museums.<sup>272</sup> Not bad, but not the kind of stuff that should cause Justice Stevens to turn green with envy either.

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267. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II, at 324 (5th ed. 2008).

268. *Id.*; see also H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 43–44 (1994) (documenting the order in which the Justices vote and speak in conference).

269. U.S. CONST. art. I, § 3, cl. 6.

270. See DENIS S. RUTKUS & LORRAINE H. TONG, CONGRESSIONAL RESEARCH SERVICE, THE CHIEF JUSTICE OF THE UNITED STATES: RESPONSIBILITIES OF THE OFFICE AND PROCESS FOR APPOINTMENT 6 & n.26 (2005), <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-7287> (noting that the duty of administering the presidential oath of office is traditionally reserved for the Chief Justice).

271. See *id.* (discussing the annual report on the federal judiciary that is prepared by the Chief Justice).

272. See 20 U.S.C. § 76cc (2007) (designating the Chief Justice a trustee of the Joseph H. Hirshhorn Museum and Sculpture Garden); Alan B. Morrison & D. Scott Stenhouse, *The Chief*

Now picture Chief Justice Hidari. Like his American counterpart, he has some miscellaneous responsibilities, such as that of greeting the Emperor of Japan at the airport.<sup>273</sup> Unlike his American counterpart, however, his involvement in actual adjudication is less than that of his fellow justices: he does not participate at all in the work of the petty benches and casts a vote only when the grand bench convenes.<sup>274</sup> Even then, his vote is worth less than that of his American counterpart: it is merely one out of fifteen. To focus on his role in deciding cases, however, is to lose sight of what matters more: his administrative powers are truly awesome. He selects trusted subordinates to head the General Secretariat and its Personnel Affairs Bureau.<sup>275</sup> Together, they have the power to assign any career judge to any court anywhere in the country—or, indeed, even to send a judge overseas—as often and for as long as they wish.<sup>276</sup> (By way of analogy, imagine if Chief Justice Roberts could exile any federal district or circuit judge to sit by designation in the District of Alaska or on the Court of International Trade as frequently, and for as long, as he saw fit.) And if that were not enough, the Chief Justice and his handpicked aides also decide whether, and when, a judge will receive pay raises.<sup>277</sup>

Given enough time—and he will not have to wait long, given the average tenure of the justices—the new Chief Justice will also be able to fill as many as seven of the fifteen seats on the Supreme Court itself, as long as the political winds do not shift drastically enough to place in power a government that will veto his choices. The seats that he will be able to fill include the six seats held by former career judges and, in all likelihood, the seat designated for a former law professor. The four former attorneys on the Court, meanwhile, are unlikely to resist Hidari's *coup de cour*: if anything, the bar is likely to seize the opportunity to nominate future candidates who are even further to the left, safe in the knowledge that Hidari will embrace rather than veto them. Thus, with relatively little time and effort, he will have secured the votes that he needs not only to reshape the Court's jurispru-

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*Justice of the United States: More than Just the Highest Ranking Judge*, 1 CONST. COMMENT. 57, 61, 61–62 (1984) (listing a number of responsibilities of the Chief Justice that are “remote from judicial administration”). On a more serious note, the Chief Justice does also have the power to select the members of certain temporary or special-purpose tribunals, wherein lies some opportunity for ideological manipulation. See Morrison & Stenhouse, *supra*, at 61; Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 343, 391–94 (2004) (listing the tribunals that the Chief Justice is authorized to fill and hypothesizing that conservative chief justices may favor conservative judges for tribunals that perform politically sensitive tasks).

273. See Interview with Justice E, *supra* note 174 (describing some of the Chief Justice's responsibilities for matters of administration and protocol as “just ridiculous”).

274. See *supra* note 148.

275. Interview with Justice A, *supra* note 17; see *supra* notes 108–15 and accompanying text.

276. See Ramseyer & Rasmusen, *Managed Judges*, *supra* note 3, at 1879 (summarizing the various ways in which the powers of Japan's Chief Justice are much greater than those of his American counterpart).

277. RAMSEYER & RASMUSEN, MEASURING JUDICIAL INDEPENDENCE, *supra* note 3, at 12, 37–38; O'Brien & Ohkoshi, *supra* note 17, at 48.

dence but also to take control of the *saibankan kaigi*, which possesses the formal authority to make most decisions concerning the judiciary—not that the *kaigi* has ever been prone, in any event, to do more than ratify the decisions of the Chief Justice and General Secretariat.<sup>278</sup>

Not least of all, among the seats that the Chief Justice can fill is his own. In true dynastic fashion, he can anoint his successor: although the Cabinet makes the decision,<sup>279</sup> the Chief Justice reportedly decides whom to recommend for the post without any input from the other justices or even his own aides in the General Secretariat.<sup>280</sup> This last power, if wielded wisely, should enable the Hidari Court to perpetuate itself long after Hidari himself has passed into the annals of history as Japan's answer to John Marshall and Thurgood Marshall combined.

The proposition that the government can drastically reorient the Supreme Court and, indeed, the entire judiciary simply by giving careful thought to its choice of Chief Justice may sound too good to be true, but it is one that has been tested. The LDP employed precisely this tactic in the late 1960s, and it proved very effective. At that time, the SCJ handed down a pair of controversial labor decisions that aroused the ire of conservatives. Against LDP efforts to break the public employee unions, which were bastions of support for the Communist Party, the Court decided the 1966 *All Postal Workers Case*,<sup>281</sup> in which it held that, in light of the *Kenpō*'s explicit guarantee of the "right of workers to organize and to bargain and act collectively,"<sup>282</sup> public employees could not face criminal prosecution for conduct of a type that ordinarily accompanied a strike.<sup>283</sup> Three years later, the Court roiled the waters again by deciding the *Metropolitan Teachers' Association Case*,<sup>284</sup> which specifically restricted the government's ability to prosecute the offense of incitement to an illegal strike.<sup>285</sup>

Some attributed these decisions to the influence of Justice Jirou Tanaka, a former Todai law professor who was also widely expected to be named the next Chief Justice.<sup>286</sup> To the surprise of many, however, Prime Minister Sato instead elevated Justice Kazuto Ishida, who had personal ties to the LDP and

278. See ITOH, *supra* note 14, at 250–51 (discussing the formal authority and operating procedures of the *kaigi*); Interview with Justice G, *supra* note 14 (indicating that, although the *kaigi* does perform "important work," the justices are generally too busy handling cases to manage the judiciary via the *kaigi*).

279. KENPŌ art. 6, para 2.

280. Interview with Justice G, *supra* note 14. This justice further revealed that when he was Secretary General, he was simply told after the fact who the next Chief Justice would be, without any prior consultation.

281. *Japan v. Sotoyama*, 20 KEISHŪ 901 (Sup. Ct., Oct. 26, 1966).

282. KENPŌ art. 28.

283. Matsui, *supra* note 139, at 19.

284. *Japan v. Hasegawa*, 23 KEISHŪ 305 (Sup. Ct., Apr. 2, 1969).

285. Matsui, *supra* note 139, at 19–20.

286. Miyazawa, *supra* note 22, at 58; Interview with Masako Kamiya & Hidenori Tomatsu, *supra* note 46; Interview with Yoshitomo Ode, *supra* note 46; Matsui, *supra* note 139, at 21.

had already carved out a reputation as a conservative on the Court.<sup>287</sup> By 1973, the SCJ had effectively overruled its earlier pro-labor decisions, and the judiciary had embarked upon its internal campaign against *Seihōkyō*.<sup>288</sup> Between the Court's ruling in the *Metropolitan Teachers' Association Case* and its subsequent change of course, seven new justices joined the Court, and five of those new appointees joined Ishida in overruling the earlier pair of decisions.<sup>289</sup> Not long thereafter—and short of mandatory retirement age—Justice Tanaka resigned, reportedly in frustration at his inability to prevent the Court's sharp rightward turn.<sup>290</sup>

The Japanese judiciary may be a bureaucracy, but it is also a highly disciplined one in which power is concentrated to an unusual degree in the hands of one person. It is, as a result, neither resistant nor unresponsive to political influence. By the time Kazuto Ishida retired after serving only four years as Chief Justice, the Supreme Court of Japan was a changed institution. There is no reason to think that history cannot repeat itself. Precisely because the judiciary is institutionally responsive to political influence, however, it is unlikely to change course unless the government does so as well. Because no amount of institutional engineering can sever the connection between electoral politics and judicial politics, any enduring change in the behavior or direction of the Court must either originate or find support at the ballot box. If the Court is conservative, that is ultimately because the government is conservative, and so too are a majority of the nation's voters. It is implausible that *any* judiciary could defy an ideologically aligned government and electorate for any meaningful period of time. What the institutional structure of the Japanese judiciary ensures is that it will bend sooner rather than later.

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287. See Abe, *supra* note 22, at 316 (reporting that the selection of Ishida was a deliberate move by the Cabinet to correct the “leftist bias” of the judiciary); Miyazawa, *supra* note 22, at 58; Matsui, *supra* note 139, at 21 & n.55 (both describing lobbying efforts made on behalf of Ishida by Tokutaro Kimura, a former LDP justice minister); Interview with Setsuo Miyazawa, *supra* note 136 (noting that Kimura was Ishida's *kendo* partner).

288. See O'Brien & Ohkoshi, *supra* note 17, at 49 (noting Ishida's efforts to “purge the bench” of *Seihōkyō* members); Matsui, *supra* note 139, at 20–21 (discussing *Tsuruzono v. Japan* (The All Agricultural & Forest Workers Case), 27 KEISHŪ 547 (Sup. Ct., Apr. 25, 1973), and the crackdown on *Seihōkyō*).

289. Matsui, *supra* note 139, at 23.

290. See Miyazawa, *supra* note 22, at 58 (describing Tanaka as “disappointed and demoralized” at the time of his departure from the Court in 1973).