



6-1-1974

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Recommended Citation

David J. Danelski, *Political Impact of the Japanese Supreme Court*, 49 Notre Dame L. Rev. 955 (1974).

Available at: <http://scholarship.law.nd.edu/ndlr/vol49/iss5/2>

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THE POLITICAL IMPACT OF THE JAPANESE SUPREME COURT*

David J. Danelski**

The Japanese Supreme Court, which was created in 1947, has developed slowly and gradually as a political institution and only recently its impact has been obvious.¹ It is now clear that in many areas of political life the Court has exercised power, which is another way of saying that it has had political impact. Every discussion of impact is also a discussion of power; hence a useful way of conducting impact analysis is to use power concepts. That is the approach taken in this article.

I. Toward Conceptual Clarity

A court or a judge acts, and as a result of that action, others act. This is an impact relation, and the language of power is useful in understanding it. "Any power relation," writes Frey, "minimally involves four components: an influencer (R), an influencee (E), the influential behavior of the influencer (α), and the . . . response of the influencee (β). Moreover, the relation occurs in some specified setting or context."² Thus Frey defines a power relation as: $R^{\alpha} \rightarrow E^{\beta}$, in a given setting, X. Put somewhat differently, R exercises power (or has impact) in regard to E when α is an independent variable and β is a dependent variable in the same relation. The setting or context must be taken into account to determine (a) the meaning of α and β not only in relation to each other but also in relation to other activity of which each is a part, (b) the extent to which α (though independent in regard to β) is dependent on other variables, and (c) the extent to which β is dependent on variables other than α .

The four components in a typical Japanese Supreme Court impact relationship are defined as follows:

1) *Influencer (R)*. The influencer in the typical impact relationship considered in this paper is, of course, the Supreme Court; but the Court is understood in a broad sense to include individuals (for example, the chief justice, justices, and the secretary general) and groups (for example, judicial conferences and the Court's personnel section) whose behavior influences others because of their perceived association with the Court.

2) *Influencee (E)*. An influencee is any person, group, or institution whose

* I gratefully acknowledge financial support provided by a fellowship from the John Simon Guggenheim Foundation in 1968-69 when much of the data for this paper was collected in Japan. I should also like to express my appreciation to good friends both in Japan and in the United States whose help was indispensable in writing this paper. They are Jill Parmer Danelski, Seiko Mieczkowski, Kahei Rokomoto, Takao Tanase, Takeo Hayakawa, Shunzo Nakamura, Masaaki Takagi, T. J. Pempel, and Scott Heyman.

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1 On the Japanese Supreme Court generally, see Y. NODA, INTRODUCTION AU DROIT JAPONAIS 134-138 (1966); D. Danelski, *The Supreme Court of Japan: An Exploratory Study*, in COMPARATIVE JUDICIAL BEHAVIOR 121-156 (1969); Itoh, *Judicial Decision-Making in the Japanese Supreme Court*, 3 LAW IN JAPAN 128 (1969).

2 F. Frey, *Political Power* 10, 1971 (unpublished manuscript).

behavior results from, or is altered by, the Supreme Court (R). The influences focused upon in this article will be narrowed in the discussion of the scope of impact in the next section.

3) *Influential behavior* (α). The typical influential behaviors of the Supreme Court are its decisions in cases and matters concerning the judiciary generally. Among such behaviors are opinions (majority, dissenting and supplementary), speeches, statements to the press, nominations of persons for judgeships, recommendations of judges for retention and promotion, requests and demands to other governmental officials, transfer of judges, and demotion of judges.

4) *Influenced behavior* (β). Among influenced behaviors are compliance, praise, criticism, defiance, judicial appointments, and promotions. Influenced behavior, like the other components in the typical impact relation, is viewed broadly. It also includes press coverage and expression of perceptions of the Court and attitudes toward it.

The language of power is useful not only in specifying the components of impact; it is also useful in structuring impact analysis by providing the concepts of scope, domain, and weight. *Scope* refers to the values affected by the Court's influence. *Domain* refers to the persons, groups, or institutions influenced. *Weight* refers to the extent to which influenced behavior is dependent on Court behavior.³

II. Scope

The scope of the Court's impact is potentially great, for its impact may be moral, economic, or political. It is clear that at least some of the justices wanted the Court's decision holding D. H. Lawrence's *Lady Chatterley's Lover* obscene to have moral impact, for the majority opinion stated that "the Court is invested with the duty of protecting society from moral degeneration."⁴ And the Court's decisions extending the right to strike in labor disputes appear to have had economic impact. The scope value for moral impact is rectitude; for economic impact it is wealth; and for political impact it is power. The definition of political power is useful in understanding political impact. Frey defines it as

power over the allocation and distribution of power. Political power is power over power, as distinguished from power over the allocation of goods and services, education, prestige, and other values. The more a particular power relation affects other power relations, the more political it is.⁵

3 Harold D. Lasswell and Abraham Kaplan defined these concepts as follows:

"The weight of power is the degree of participation in the making of decisions; its scope consists of the values whose shaping and enjoyment are controlled; the domain of power consists of the persons over whom power is exercised. All three enter into the notion of 'amount' of powers." D. LASSWELL & A. KAPLAN, *POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY* 77 (1950).

4 General Secretariat, Supreme Court of Japan, Judgment upon the Case of Translation and publication of *LADY CHATTERLEY'S LOVER* and Article 175 of the Penal Code at 7 (1958); 11 SAIKO SAIBANSHO HANREISHU 997 (1952); COURT AND CONSTITUTION IN JAPAN 3 (J. Maki ed. 1964).

5 Frey, *supra* note 2, at 5.

The Supreme Court's political impact, then, is manifested in relations in which influences have power, and the Court's influential behavior in some way enhances, diminishes, or reallocates that power.

Although political impact may be analytically differentiated without difficulty from other kinds of impact, existentially the various types of impact overlap and intermingle. For example, a Supreme Court decision declaring a book obscene may have moral impact; but it has political impact, too, for it enhances the power of the police to raid bookstores, the power of procurators to prosecute booksellers, and the power of judges to punish them. In a decision that upholds the rights of workers to strike without the imposition of criminal sanctions, the Court's impact is political as well as economic, a fact that is well understood by labor unions.⁶

Since the subject of this article is political impact, its focus is the Court's relations with institutions that exercise power. There are many such institutions, but only those for which there is available data will be considered. They are the Emperor, the Diet, the Cabinet, the judiciary, the media, and the electorate. The power exercised by the Diet, Cabinet, and judiciary over individuals and groups is obvious and needs no comment; but the power of the other institutions requires at least brief comment.

Some might argue that today the Emperor has so little power that he should not be considered in this discussion. A survey conducted in Tokyo in 1969, which is presented in detail later in this article, showed that perceptions of the Emperor were mixed. A 42-year-old businessman said the Emperor is an obstacle to progress. "Because such a person exists, evil people will use him. The Emperor's history has been a history of having been used by evil people." Others said the Emperor is useless. He is, said a 49-year-old rice store owner, "like a navel in a belly—we cannot do anything with him." For some, mention of the Emperor evoked memories of the war. "I do not respect him much," said a 51-year-old man. "I am not interested in him at all. I dedicated myself to him but I did not get my reward. Most of my friends died in the war. I am very sorry for them. Why did he force us to go to war and kill my friends?" What power the Emperor has is based largely on symbolism, and that symbolism was deliberately used after 1946 to enhance the prestige and power of the Supreme Court and its members. Only two government officers receive their appointments from the Emperor—the prime minister and the chief justice. This was written into the Constitution of 1946 to demonstrate the importance of the chief justice's office and the Supreme Court. When the chief justice and justices were installed in office in 1947, each was "presented personally to the Emperor and Empress and received from them both admonitions and certain indicia of office."⁷ The act symbolized the passing of some power under the new Constitution.

The media—particularly the press—have power to shape public perceptions

6 Soon after the Supreme Court ruled that public workers might strike without incurring criminal penalties, the Japan Times reported: "The General Council of Trade Unions of Japan (Sohyo) Wednesday praised the Supreme Court for criticizing the police and prosecutors for excessively intervening in the labor movement." Japan Times Oct. 27, 1966.

7 T. Blakemore, Memorandum for the Record: Conversation with Justice Hasegawa, August 6, 1947. (Record Group 331, SCAP Archives.)

and attitudes in regard to individuals, institutions, and issues. Often the press is an intermediary link in influence chains, and how it presents the Supreme Court's behavior to the public often determines the weight of the Court's impact.

The electorate's power in Japan is exercised not only in voting governments in and out of office; it may also indicate its dissatisfaction with the Supreme Court and even vote justices out of office in periodic referenda called people's review. After each chief justice and justice is appointed to the Supreme Court, and every ten years thereafter, he is reviewed by the electorate to determine whether he should remain on the Court. Thus far no member of the Court has been removed by this procedure, but in 1972 the percentage of negative votes reached an all-time high of 13 percent with seven justices on the ballot.⁸ One justice's negative vote was more than 15 percent and six prefectures (including Tokyo, Kyoto, and Osaka) registered an overall negative vote of more than 15 percent.⁹

III. Domain

A. *The Emperor*

The Supreme Court's impact on the Emperor has been negligible. One of the first cases before the Court concerned the Emperor. Matsutaro Matsushima, a former Chuo University law student, had been convicted of the crime of *lèse-majesté* for carrying a placard criticizing the Emperor at a Communist demonstration in front of the Imperial Palace. Since amnesty had been declared in such cases, the Tokyo High Court ordered dismissal of the indictment (*menso*). Believing the effect of the High Court's action left him still convicted of *lèse-majesté*, Matsushima, seeking an acquittal (*muzai*), appealed to the Supreme Court. The Court rejected his appeal, but two justices—Shimoyama and Sawada—indicated in a dictum that they thought the crime of *lèse-majesté* had not been completely abolished in Japan. To the contrary, Justice Shono argued that when the Emperor's status had been changed with Japan's acceptance of the Potsdam Declaration, the crime of *lèse-majesté* had been completely abolished.¹⁰ Today slander of the Emperor may be punished as ordinary defamation, but the prime minister must make the complaint. No complaint was made against Fukasawa when his novel, *Furyu Yume Monogatari* (The Tale of an Elegant Dream), describing the beheading of the Emperor and his family, was published in 1960. This stirred the ire of right-wing groups, and in 1961 a young extremist murdered the maid and wounded the wife of the novel's publisher.¹¹

8 The percentage of negative votes in people's review has been correlated with the number of justices on the ballot—the lower the number of justices, the higher the percentage of negative votes. In 1967, the last time seven justices were on the ballot, the percentage of negative votes was 7.5. See D. Danelski, *The People and the Court in Japan*, THE FRONTIERS OF JUDICIAL RESEARCH 58-59 (J. Grossman & J. Tanenhaus eds., 1969).

9 Ishimura, *Seikosai Saibankan Kokumin Shimsa no Kekka to Tokushoku* (The Results of People's Review of Supreme Court Justices and Its Peculiarities), GENDAI HO JANARU 58-68 (Feb. 1973).

10 2 SAIKO SAIBANSHO HANREISHU 529 (1948).

11 Ito, *The Rule of Law: Constitutional Development*, LAW IN JAPAN 225 (A. von Mehren ed. 1963).

About the time the Court decided the *Placard* case (May 1948) Chief Justice Mibuchi participated in a round-table conference on the Emperor's responsibility for the war, and he was reported as saying that the Emperor should abdicate. When this statement was published in the *Shukan Asahi*, Mibuchi claimed he had been misquoted or misinterpreted. "At the time," he told reporters later, "I said I thought it would have had a better effect on the morality of the people in general if the Emperor at the time of surrender had issued an Imperial Rescript morally blaming his own self." The effect of Mibuchi's statements cannot be gauged, but they reflected and supported a view held by many Japanese.¹²

B. *The Diet*

During the first two years of its existence, the Supreme Court faced a Diet challenge to judicial independence. The Judiciary Committee of the House of Councillors began an investigation of a criminal case decided by a district court in which the defendant had been convicted of killing her three children and given a light sentence. On May 20, 1949, acting Chief Justice Tsukazaki wrote to the Speaker of the House of Councillors stating that the Committee's action was "absolutely unpardonable from the standpoint of the Constitution." "The Constitution is the supreme law of the State," he added, "and it is needless to say that the Diet should respect it." Tsukazaki's final words in behalf of the Supreme Court were: "We hereby ask you to reflect seriously on the matter."¹³ The Judiciary Committee did not capitulate and made counter-constitutional arguments, but eventually the matter was settled in the Court's favor.

In the years that followed the Supreme Court viewed its power of judicial review with caution and exercised it with restraint. It managed to avoid passing on the constitutionality of important statutes and treaties by invoking the doctrine of political questions and by refusing to decide cases unless they involved concrete legal disputes.¹⁴ The most important example of judicial restraint was the Court's decision in the *Sunakawa* case in which it held that the constitutionality of the United States-Japan Security Treaty was a political question it could not answer.¹⁵ Some have argued that the Court's early timidity in exercising judicial review was necessary because the Court was still in the process of legitimation. Others argued that restraint was appropriate because the rule of law is better realized through the political process rather than the judicial process. Chief Justice Tanaka, who served on the Court from 1950 to 1960, felt that even though the Court had not exercised judicial review in an important case during his tenure, "the very power of judicial review would have a psychological effect

12 Japan Times, May 29, 1948; K. TSURUMI, *SOCIAL CHANGE AND THE INDIVIDUAL: JAPAN BEFORE AND AFTER DEFEAT IN WORLD WAR II* 186 (1970).

13 N. Tsukazaki to T. Matsudaira, May 20, 1949. (Record Group 331, SCAP Archives.)

14 See D. Henderson, *Japanese Judicial Review of Legislation: The First Twenty Years* and K. Yokota, *Political Questions and Judicial Review: A Comparison, THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS* 126-138 (D. Henderson ed. 1968).

15 See *Id.*, at 146-166.

in persuading the legislature to respect the Constitution," a conclusion many scholars found dubious.¹⁶

The Court has exercised judicial review only four times—in 1953, 1960, 1962, and 1973. The first case involved Cabinet Order 325, which had been issued during the Occupation, and two transitional statutes covering the period immediately preceding the 1952 peace treaty. At the time the Court declared the statutes unconstitutional, they were no longer in effect.¹⁷ The statute declared unconstitutional in 1960 was likewise not in effect when it was struck down.¹⁸

In 1962 the Court held unconstitutional Article 118 (1) of the Customs Law in *Nakamura v. Japan*.¹⁹ Nakamura and others attempted to smuggle from Japan to Korea a large quantity of textiles belonging to a third party. They were caught, and under Article 118 (1) the textiles were confiscated. On appeal the owner of the textiles argued that the property had been confiscated unconstitutionally because the procedure used under Article 118 (1) did not provide notice and hearing as required by the Constitution. The Supreme Court agreed, declared Article 118 (1) to be in violation of Articles 29 and 31 of the Constitution and, as required by law, notified the Cabinet of its action. As a result of the Court's decision, new rules governing confiscation of third parties' property were established in 1963; and those rules require notice and hearing before confiscation.²⁰

Although the *Nakamura* decision was a clear exercise of judicial review, it was not regarded as important. The *Asahi Shimbun* devoted only 35 lines to it, and in 1973, when the Court declared Article 200 of the Penal Law unconstitutional in the *Parricide* cases, some newspapers reported that as the Court's first exercise of judicial review.²¹ Certainly it was the first important exercise of judicial review in regard to a statute still in effect.

The defendants in the *Parricide* cases were women. One killed her father who had forced her to have sexual relations with him when she was 14. After 20 years of intimate relations with him and five children by him, she decided to leave him and marry a man she met at her place of employment. When her father objected, she strangled him in his sleep. The second woman strangled her foster father to death because she could not stand his excessive drinking. The third woman, perturbed by her mother-in-law's incessant criticism, attempted to kill her by serving her poison in some rice balls. The women were charged with violating Article 200 of the Penal Code, which makes mandatory more severe penalties in parricide cases. In one of the cases the trial court declared the statute unconstitutional. The Supreme Court, by a vote of 14 to 1, overruled a 1950 decision in which two justices—Mano and Hozumi—had dissented and held that Article 200 violated Section 14 of the Constitution, which provides that all persons are equal under the law.

16 Ito, *supra* note 11, at 238.

17 See *supra* note 14, at 128-133.

18 See Ito, *supra* note 11, at 238.

19 See *supra* note 14, at 133-138.

20 Kagawa, *Tekihotetsuzuki to Daisansha Shoyubutsu no Bosshu* (Due Process and Confiscation of Goods Belonging to Third Parties), *JURISUTO* (Standard Judicial Precedents: Series No. 1, Constitutional Precedents) 92-93 (Special Issue 1966).

21 *Asahi Shimbun*, Nov. 28, 1962; *Japan Times*, April 5, 1973.

Reaction to the decision was generally favorable. Professor Takeyoshi Kawashima of Tokyo University praised the decision saying that Article 200 reflected old feudal notions. Professors Seiichi Isono of Tokyo Educational University and Jiro Kamijima of Rikkyo University also praised the decision. The latter said it shows the Supreme Court is following the principles of the Constitution. Dr. Inada Nada, the physician-novelist, said that "even the judges who are always behind the times" this time could not help seeing the contradiction in the parricide statute. Justice Mano, now retired and in his mid-80s, said that the decision points to the "true flow of history." His former conservative colleague, Yusuke Saito, was annoyed with the decision. He said that it seemed to him that 14 justices had lost their qualifications for the Supreme Court. "The new decision," he added with some exaggeration, "is ruining the whole penal system of the country." There was also some popular criticism. The writer, Ayako Sono, said that the penalties for parricide should be more severe because there is greater regret in such crimes and so the heavier penalty allows for special atonement. The popular entertainer Sanyutei said with all the talk about fundamental human rights and equality, social life has become abnormal. "The existence of the special penalty for parricide is a reasonable thing."²²

Justice Minister Isaji Tanaka told a Diet committee in answer to a question by a Komeito member that he would "respect" the *Parricide* decision. Daizo Yokoi, director of the trial section of the Supreme Public Prosecutor's office, said that sentences in 36 parricide cases now before the courts would be determined by the penalty provisions for regular crimes. In addition, he said the sentences in previous parricide convictions would be reviewed because of the Supreme Court decision.²³

Some newspapers saw the *Parricide* decision as a sign of the Court's willingness to act vigorously in defense of the Constitution. The *Asahi Shimbun* pointed out that since 1966 the Court had been moving in this direction as evidenced by its decisions granting public workers the right to strike and by insisting that persons accused of crimes be given prompt trials.²⁴ The observation may be accurate and indicate a willingness of the Court to be more activist. A recently retired justice who participated in the decision of the *Parricide* cases told a group of students at the Harvard Law School that he had hoped there would be at least one case in which the Court would exercise judicial review before he retired, and he got his wish.

A similar sequence of activity led to the exercise of judicial review in the *Parricide* and *Nakamura* cases:

- 1) Each involved constitutional issues that had been decided earlier by a divided Court.
- 2) The earlier decisions had been criticized by scholars.
- 3) Lawyers continued to raise constitutional objections to statutes upheld earlier, and sometimes lower court judges declared the statutes unconstitutional.

²² Mainichi Shimbun, April 4, 1973; Japan Times, April 5, 1973.

²³ *Id.*

²⁴ Asahi Shimbun, April 4, 1973.

- 4) The issues continued to return to the Court, and chances of overruling the statutes became better because of changes in personnel on the Court and a different climate of constitutional opinion.

This suggests that sometimes dissenting opinions—such as Mano's and Hozumi's in the 1950 *Parricide* case—have impact, particularly in the scholarly and judicial communities.²⁵ Mano, for example, believed that the dissenting opinions in the 1950 *Parricide* case may have influenced the drafters of the proposed Revised Penal Code to delete Article 200 in 1961.²⁶ The work of scholars like Professor Shigemitsu Dando is read with respect, and his belief that Article 118 (1) of the Customs Law was constitutionally suspect probably played some role in the Court's decision in the *Nakamura* case.²⁷ Whether the sequence described indicates a pattern is something that will not be known until the Court exercises judicial review in a number of cases.

The exercise of judicial review in the *Parricide* cases is a reminder to members of the Diet that they must follow the Constitution or run the risk of being reversed by the courts. But judicial review is not the only means of Supreme Court impact on the Diet. Court interpretations of statutes and ordinances have been known to influence the legislative process in the Diet.²⁸ What influence the Court has with the Impeachment Committee of the Diet is not known, but Chief Justices Tanaka and Ishida easily survived attempts to impeach them.

C. *The Cabinet*

The Supreme Court has influenced the Cabinet chiefly in the area of judicial appointments. The Court plays a crucial role in the appointment of lower-court judges because the Constitution requires the Cabinet to appoint judges from a list of persons nominated by the Court, and the practice has been for the Supreme Court to nominate the exact number of judges for the available positions, thus leaving no choice to the Cabinet.²⁹ Constitutionally, the power to select Supreme Court justices is entirely the Cabinet's, but Court members, especially the chief justice, have influenced the selection of their own colleagues. During the Ashida administration—circa 1949—Chief Justice Mibuchi asked that he be consulted when appointments to the Court were made. The reason for his request was to assure that the Cabinet selected persons who were compatible with other members of the Court. The request was granted, and the practice of consulting the chief justice on appointments to the Court has con-

25 See, e.g., H. WADA, *SAIKO SAIBANSHO RON* (The Supreme Court) at 11 (1971).

26 T. Mano, *Saikosai no Juichinen: Hanketso no Omoide* (Eleven Years on the Supreme Court: Some Memories of Decisions) *SAIBAN TO GENDAI* (Trial and Modern Age) 16-17 (T. Mano ed. 1964).

27 Kagawa, *supra* note 20, at 93. Cf. S. DANDO, *JAPANESE CRIMINAL PROCEDURE* 475 (B. George, trans. 1965).

28 An example is the Supreme Court's decision in the *Tokyo Ordinances* case. Beer notes that some believed that the decision played a part in establishing the controversial 1958 Police Duties Bill that failed to come to a vote in the Diet. L. Beer, *The Public Welfare Standard and Freedom of Expression in Japan*, *THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS* at 235 (Henderson ed. 1968).

29 Stevens, *The Miyamoto Case: A Legal Analysis* 12, 1972 (unpublished paper).

tinued. Consultation is informal. The chief justice and the prime minister often meet at ceremonial functions—for example, at an Imperial garden party or in the waiting room of the Diet just before its opening ceremony. The views expressed by the chief justice are his own, not the Court's, because as a former chief justice said, “[i]t would be a grave matter if the Court's opinion were rejected.” The last consultation for a chief justice concerns the choice of his successor. How frequently the advice of the various chief justices was followed by the prime ministers will probably never be known, but one former chief justice told me that his advice was almost invariably followed.³⁰

In the early 1950s there was some feeling in the Court that a person selected by the Cabinet for the Supreme Court was too young. Because others in the judiciary who had graduated from the university the same year were still in much lower positions, some judges and judicial administrators believed that his appointment was highly premature. As a result, two justices called on the justice minister in an effort to persuade him that the appointment should be withdrawn. They were unsuccessful.³¹ Recently, however, Liberal-Democratic governments have been unsuccessful in countering the Court in the selection process. Both Sato and Tanaka wanted to appoint Minoru Tsuda, a justice ministry official, to the Court, the former in 1971 and the latter in 1973; but Chief Justice Ishida was able to prevail with his candidates in both instances. In 1971 Seiichi Kishi, secretary general of the Court and “Ishida's right arm,” was appointed. In 1973 Yutaka Yoshida, Kishi's successor as secretary general, was appointed. And when Ishida retired from the chief justiceship in 1973, he supported his colleague, Tomokazu Murakami, as his successor, and Murakami was named chief justice.³²

Some decisions of the Supreme Court have impact on the policies of the government and its ministries. In 1969, for example, when the Court decided public workers could strike without incurring criminal penalties, Prime Minister Sato directed that the government's coordinated position on the ruling be put in writing, and ministers immediately began a review of policies in relation to the decision.³³ Another example is the Court's 1971 decision that held the Ministry of Transport's procedure for screening applicants for owner-driver taxi licenses was illegal. Soon after the decision, a spokesman for the Ministry said that the policy in question had changed and no similar trouble would arise in the future.³⁴

D. *The Judiciary*

The Supreme Court has had a substantial impact on the judiciary. The main reason for its influence over lower-court judges is that it plays a crucial role in their nomination, assignment, and promotion; but it would be a mistake to

30 Confidential interviews, May 22, 1969; June 26, 1969.

31 Confidential interviews, March 10, 1969; June 26, 1969.

32 *Asahi Shimbun*, May 16, 1973; *Japan Times*, May 19, 1973.

33 *Japan Times*, Oct. 29, 1966.

34 Nakagawa, *Konin Taxi Jigyo no Menkyo Shinsei: no Shinsa to Koseitetsuzuki* (Application for Owner-Driver Licenses and Fair Procedure), 24 *Hoso Jihō* 199 (1971); *Japan Times*, Oct. 29, 1971.

generalize about Supreme Court influence over the entire 25 years of its existence because the makeup of the lower-judiciary has changed considerably during that period.

The typical judge from the late 1940s to the early 1960s cautiously decided cases with expectations of his superiors in mind. If he believed the Supreme Court would decide a case a certain way, he would feel constrained to decide it that way, and he was aware that his seniors tended to be conservative and that their views on him might well be reflected in his dossier in the personnel section of the Supreme Court. During most of this period Kotaro Tanaka, a conservative and a militant anti-communist, was chief justice; and he frequently gave his views at judicial conferences and to the press. He is often quoted as having said that communists should not be treated by the courts as law-abiding citizens but as criminals by conviction. Some judges were undoubtedly influenced by such statements. During this period, however, some judges were atypical. One of them, Tokyo District Judge Akio Date, declared the United States-Japanese Security Treaty unconstitutional in the *Sunakawa* case and thereafter resigned his judgeship. In his writings he urged judges to be more independent, to think for themselves, and to decide cases according to their best judgment without worrying about the Supreme Court. It has been said that he resigned because the Supreme Court reversed his decision in the *Sunakawa* case. When I asked him about this in 1969, he denied it, saying he had made up his mind to leave the bench before he decided the case. He had been a Supreme Court research official (*chosakan*) before he returned to the Tokyo District Court, and hence he knew the Chief Justice and justices fairly well. Because of that, he believed that they would know that he had been sincere in his decision; hence he was not concerned about their criticism of him. He was, however, surprised that when the Court announced its decision not a single justice agreed with him. If Date did not resign because of a Supreme Court decision, at least one judge during this period did. He was Eigoro Aoki, who resigned in 1962 in protest of the Supreme Court's decision in the *Yakai* case that year.³⁵

By the middle 1960s a generation gap had developed in the judiciary. Older judges tended to be conservative and younger judges progressive; a few younger judges perhaps even saw themselves as radical. The more radical students at the Legal Training and Research Institute during this period almost invariably chose to become lawyers, refusing to become a part of the conservative establishment by becoming judges or procurators. Thus there were few if any radical judges, but to their older colleagues, some of the young judges seemed radical. As confirmation, the older judges pointed to the fact that many young judges (about 200) belonged to the Young Jurists Association (*Seinen Horitsuka Kyokai*, generally known in abbreviated form as *Seihokyo*), which has been described by some as a group of anti-government, leftist lawyers and judges. In 1968 and

³⁵ YAKAI JUHACHINENSHI SHICHI TO MUZAI NO TANIMA (Eighteen Years of the Yakai Case: in the Valley Between Death and Innocence) 118-119. (Yakai Case Committee ed. 1969.)

1969 I talked to a number of judges in Japan about the developing generation gap, and the major portion of a meeting I had with judges of the Sapporo District and High Courts was devoted to it. Several judges under 40 spoke openly about differences of attitude between younger and older judges. The senior judges present said nothing but asked to talk to me privately later. At that meeting they expressed their concern about the developing polarization in the judiciary. They did not see themselves, they said, as conservatives. Judging to them was not ideological; rather it was something requiring technical skill and experience. By the fall of 1969 the tensions between the two groups of judges erupted in a series of incidents, the first of which occurred in Sapporo.

On August 14, 1969, Kenta Hiraga, Chief Judge of the Sapporo District Court, wrote a private letter of "advice" to District Judge Shigeo Fukushima, a 39-year-old Kyoto graduate, giving his views on the merits of a controversial case that Fukushima had before him in which 173 local citizens sought to enjoin the building of a missile base of the Self-Defense Forces on the ground that this action violated Article 9 of the Constitution. Fukushima ignored Hiraga's advice, granted the injunction, and Fukushima's friends gave a copy of Hiraga's letter to reporters. Thereupon the judicial conference of Hiraga's own court disciplined him for his action, and less than a week later Chief Justice Ishida convened a judicial conference of the Supreme Court which also disciplined Hiraga and transferred him to the Tokyo High Court. Soon thereafter, Chief Judge Shigeto Iimori of the Kagoshima District Court, the younger brother of Kotaro Tanaka and an ultra-rightist, came to Hiraga's defense contending that the whole incident had been engineered by judges who were members of the "subversive" Young Jurists Association. For this he was reprimanded by the Fukuoka High Court. In late October Chief Justice Ishida, troubled by the matter and probably with Fukushima in mind, told an assembly of Kanto area judges that in a case involving the propriety or impropriety of the exercise of governmental power, "it is desirable that each judge avoid falling into self-righteousness. . . . I hope I can expect that you will mutually exchange acquired experience and knowledge in a spirit of modesty." The Court's secretary general, Seiichi Kishi, said on April 8, 1970: "If judges join groups that are vested with political color this will give rise to public doubts as to the probity of the courts; judges should not join [such] groups." Less than a month later Chief Justice Ishida told reporters at a press conference on the eve of Constitution Day, May 2: "As a matter of ethics, it is undesirable that ultranationalists, militarists, and clearly not communists, should be judges." Proceedings were brought against Fukushima, Hiraga, and Ishida in the Diet's Impeachment Committee. It ruled that proceedings could be brought against Fukushima but suspended them during his good behavior. The petitions against Ishida and Hiraga were rejected. On October 28, the Sapporo High Court, apparently influenced by the Impeachment Committee's action, orally reprimanded Fukushima for permitting Hiraga's letter to become public. The next day, the Supreme Court announced it supported the High Court's action. Fukushima resigned the same day, criticizing the High Court for being subservient to political power. On the following day he had a change of heart and asked if he might withdraw his resignation. His request was granted. He

was reprimanded again for his critical remarks, he formally apologized, and he resumed his work on the bench.³⁶

In April, 1970, the Supreme Court refused to nominate three graduates of the Legal Training and Research Institute as assistant judges. No reason was given for its action, but two of the three were known to be members of the Young Jurists Association.³⁷

On December 22, 1970, Chief Judge Iimori sent a letter to his young colleagues in Kagoshima District Court, asking them if they were members of the Young Jurists Association. Upon being summoned to the Fukuoka High Court for discipline he withdrew his questionnaire. Immediately the Supreme Court also acted. On December 25 it transferred Iimori to the Tokyo High Court. When he refused to come to Tokyo, he was demoted to the position of regular judge in his court. As a result of the Court's tough action, he resigned.³⁸

In April, 1971, the Supreme Court refused to nominate seven judicial trainees at the Legal Training and Research Institute for posts as assistant judges. The secretary general of the Supreme Court insisted there had been no discrimination, but six of the persons rejected were members of the Young Jurists Association, and one was a sympathizer. When the president of the Japan Federated Bar Association, Kijuro Watabe, criticized the Court for its failure to nominate the seven Institute trainees, the Court's secretary general, Yoshida, wrote an angry rebuttal, saying Watabe "threatened to damage the independence of the judiciary." The Federated Bar, the latter continued, should act with restraint and stop interfering in matters that were entirely in the province of the Court.³⁹

During the graduation ceremony at the Legal Training and Research Institute on April 5, 1971, one of the graduating students, Tokuo Sakaguchi, grabbed the microphone from Director Tadashi Morita and started to protest what he thought was discriminatory action of the Supreme Court in denying judicial nomination to seven of his fellow students and pleaded that the seven be given a chance to speak. The ceremony ended at that point, and Sakaguchi was dismissed from the Institute by the Supreme Court the same day. Despite considerable political pressure directed toward the Court to reverse itself, it refused to do so. Graduation ceremonies were held a few days later, but the press was barred. A Court public relations officer later quoted Chief Justice Ishida as telling the graduating students: "I wish all of you to act with confidence and pride but try not to be too over-confident or self-conceited."⁴⁰

In January, 1971, the chief judges and senior judges from four high courts and 36 district and family courts throughout Japan met for six hours at the Supreme Court to discuss the propriety of judges' membership in *Seihokyo*.

36 This brief account of the Hiraga-Fukushima incident is based on Hayakawa, *The Japanese Judiciary in the Whirlwind of Politics*, *KORE L. REV.* 15-18 (International Edition No. 7, 1971); Ushiom, *Hiraga Shokan to Iimori Shoshin* (The Hiraga Letter and the Iimori Statement) 489 *Horitsu Jiho* 64 (1969); F. Miller, *The Naganuma Case: Judge Fukushima and the Seihokyo*, 1972 (unpublished paper). Fukushima later held the Self-Defense Forces unconstitutional. See *Mainichi Shimbun*, Sept. 7, 1973; *New York Times*, Sept. 8, 1973.

37 *Japan Times*, April 1, 1971.

38 Hayakawa, *supra* note 36, at 18.

39 *Japan Times*, April 1, 9, 1971.

40 *Japan Times*, April 7, 1971; May 9, 1971.

"According to the secretariat of the Supreme Court," the *Japan Times* reported on January 23, "it was unanimously agreed at the meeting to hold that membership in the association was undesirable from the standpoint of fairness and the neutral stand that judges have to maintain." About this time, a controversy about Assistant Judge Yasuaki Miyamoto of the Kumamoto District Court was just getting under way. Like Fukushima, he was a member of the Young Jurists Association but, unlike Fukushima, he was just completing ten years in the judiciary, which meant his record would be reviewed by the Supreme Court and a decision would be made whether to reappoint him. The decision was negative, and the Supreme Court did not explain its action even though several persons and groups sought an explanation. On April 7 and April 9 two assistant judges who were also up for reappointment—Etsuru Suzuki, 37, and Keikichi Hirasawa, 35—resigned in protest.⁴¹ On April 15, Miyamoto went to Tokyo and asked the director of the personnel bureau of the Supreme Court, Koichi Yaguchi, why he had not been reappointed; but Yaguchi would not tell him. All the Supreme Court would say about the matter was that Miyamoto was not rejected because he was a member of the Young Jurists Association. Its official position in 1971 was that it did not discriminate against members of the Young Jurists Association. When Yaguchi was asked by a Socialist Diet member during a House Audit Committee hearing whether the Court discriminated on the basis of sex or ideology in nominating judges, he answered it did not. "We never use anyone's ideology as criteria for adoption or reappointment of judges," he said, "and we will not do so in the future. And we have never checked on whether a judge is a member of *Seihokyo*, nor have we ever discriminated against a judge because of that affiliation." Despite a campaign by scholars, lawyers, and judges who argued that the Court was violating judicial independence and freedom of conscience, the Court held fast in its decision not to reappoint Miyamoto or to tell why it would not do so. Miyamoto also held an appointment as summary court judge and served in Kumamoto in that capacity until March of 1973 when he resigned. He said he had remained in that post so that he could better manifest his resistance to the Supreme Court. Miyamoto told reporters that he would continue as a citizen fighting for reinstatement.⁴²

When the Supreme Court was faced with the decision to reappoint judges in March, 1972, there was a report that five of the 62 judges being reviewed were in limbo. All were members of the Young Jurists Association. One of them was Toshio Konno, an assistant judge in the Nagoya District Court. When he had served in the district courts of Nagano and Gifu he had ruled 11 times that a provision of the Road Traffic Law was unconstitutional because it required anyone who was responsible for a traffic accident to report it to the police. In 1970, he was arrested for speeding in Nagano Prefecture and failed to identify himself as a judge, saying he was a businessman. He did this, he said, because if he had identified himself correctly he might not have been fined. When he learned that there were problems in Tokyo concerning his application for reappointment,

⁴¹ Hayakawa, *supra* note 36, at 19-23.

⁴² Stevens, *supra* note 29; *Japan Times*, April 2, 10, 11, 13, 14, 15, 16, 24, 1971; May 3, 5, 7, 24, 1971; July 3, 17, 1971; Jan. 23, 1971; March 15, 1973.

he withdrew it. He told reporters that he did not have confidence in his work as a judge; obviously he did not think about legal matters like the Supreme Court justices did; so perhaps he should not be a judge. The Court recommended reappointment of the remaining 61 judges, including the four members of the Young Jurists Association.⁴³

The Supreme Court's impact on the lower judiciary in the past few years has been great. Its confrontation with the Young Jurists Association and its supporters appears to have enhanced its power over the judiciary because (1) it has driven some independent-minded judges from the bench, (2) it has brought would-be recalcitrants into line, (3) it has indicated that membership in the Young Jurists Association is suspect, and as a result membership in the Association has declined among judges, (4) it has shown that it will act against the right as well as the left if its authority is challenged, (5) it has discouraged persons with strong ideological views from choosing the judiciary as a career, and (6) it has shown that as long as it has the support of the government, as clearly shown in the incidents described above, it cannot be successfully challenged by bar associations and other groups.

In exercising power over lower courts, the Supreme Court is constantly creating the judiciary in its own image or, more accurately, in the image of the Court's secretariat, which has been controlled from the beginning by bureaucratic career judges like Ishida, Kishi, and Yoshida. Although the generation gap led to a crisis in the Japanese judiciary in the past few years, Ushiomu predicted that the Supreme Court would have prevailed anyway because of the bureaucratic nature of judicial life in Japan. As today's young, fresh, independent-minded judges grow older, he wrote, they will turn out much like their seniors because they lead isolated lives, they must "breathe old bureaucratic air" while they wait many years for promotion to important posts, and little by little they conform until they too fit the Supreme Court secretariat's bureaucratic mold.⁴⁴

Perhaps Ushiomu is correct, but it is too early to tell. This much is clear: the Supreme Court has had great impact on the judiciary and quite likely will continue to have such impact for the indefinite future.

E. *The Media*

Newspapers have been the most influential medium portraying the Supreme Court to the Japanese people. A content analysis of the *Asahi Shimbun* from 1947 through 1968 shows that news coverage of the Supreme Court fluctuated from year to year, depending largely on the importance of cases before the Court. The most extensive coverage of the Court was in 1959 and 1960 when there were 40 front-page stories concerning the Court each year. Much of the coverage concerned the *Matsukawa* and *Sunakawa* cases that had been decided late in 1959.

In an effort to determine whether news coverage of the Court increased or decreased in the period studied, news stories on the appointments of justices were analyzed separately. The analysis showed that coverage of appointments remained

43 *Asahi Shimbun*, March 7, 1972; *Japan Times*, March 3, 7, 9, 1972.

44 T. USHIOMI, HORITSUKA (Jurists) 137 (1970).

about the same throughout the 1947-1968 period. Significant exceptions were appointments of chief justices, which, after the appointment of the initial chief justice, received from five to twenty times as much coverage as other appointments. This is not surprising, for hierarchy is important in Japan; and the chief justice is not only at the top of the judicial hierarchy but is the only judicial officer in Japan who is officially appointed by the Emperor. Moreover, as administrative head of the Court, he has considerable formal and informal power in administering the judiciary and in exercising influence in such matters as appointments to the Supreme Court.

Table I

Editorials on the Supreme Court
in the *Asahi Shimbun*, 1947-1968

	1947-1957	1958-1968
Favorable	2	7
Neutral	8	16
Unfavorable	23	10
	—	—
TOTALS	33	33

An analysis of the *Asahi's* editorials concerning the Court shows that they too fluctuated from year to year, but there were just as many editorials in the first half as in the second half of the period analyzed. As Table I shows, there was a trend in the *Asahi's* praise and criticism of the Court. Although the Court fared much better in the second period, it still received more editorial criticism than praise. Nonetheless, criticism is a sign that the Court and its decisions are regarded as important, and an average of six editorials a year for some 21 years is an indication that the Court has been taken seriously.

The *Asahi Shimbun* did more than report on cases, appointments, and people's review. It published articles by such scholars as Kenzo Takayanagi and Toshiyoshi Miyazawa on the Court's authority to interpret the Constitution. Immediately after important cases were decided, often there were articles or comments by leading scholars and sometimes former Supreme Court justices about the decisions. In addition to educating their readers, the *Asahi* and other newspapers that follow this practice participate in the legitimation of the Court's decisions or lay a foundation for contrary decisions in the future.

Two celebrated cases—the *Matsukawa* and *Yakai* cases—did more to make the general public aware of the Supreme Court than perhaps anything else.⁴⁵ The litigation in these cases almost spans the history of the Supreme Court. Each case was before the Court more than once, and each was finally decided in favor of the defendants. Organizations were formed for the defense in both cases; they held demonstrations, marches, and produced a flow of propaganda designed to influence public opinion and the judiciary.

The *Matsukawa* case was a criminal prosecution of 20 defendants for

45 See C. Johnson, *CONSPIRACY AT MATSUKAWA* (1972).

murder of three persons killed in a 1949 train derailment that many believed had been inspired by communists. It was in the courts almost a decade before it reached the Supreme Court, but long before that the Court, through Chief Justice Tanaka, was involved in the case. In May, 1955, he sent an official instruction to lower-court judges calling the Matsukawa movement "indeed regrettable" (*makotoni ikan de aru*) and told them "not to listen to the noise of public opinion" (*seken no zatsuon ni mimi o kasu na*).⁴⁶ Bitterly criticized by the left for the statement, he refused to back down.

When the case came to the Supreme Court in 1958, the Court allotted ten days for oral argument, an unprecedented action that was reported with banner headlines in Japanese newspapers; and for the entire period the case was before the Court, press coverage was extensive. Other media also presented the *Matsukawa* case to the public—a play, at least five movies, and a number of Matsukawa songs. The play was shown in Tokyo while the Supreme Court was considering the case in 1959. Critics thought it was too ideological to be good theatre, and a television network concluded that it was too one-sided to show, but nonetheless it publicized the case. The most important movie was made two years after the Supreme Court remanded the case to the Sendai High Court for retrial. The movie was entitled *The Matsukawa Case* and its makers claimed that 3.7 million persons had seen it within 90 days of its release. The film used documentary techniques and received some comment in movie magazines. It may not have been a critical success—Chalmers Johnson says "the film's dramatic credibility was compromised by its ideological slant"—but there is no doubt that it helped make the Japanese population aware of the *Matsukawa* case and, indirectly, of the Supreme Court.⁴⁷

The *Yakai* case was also a criminal prosecution, but it did not have the political overtones of the *Matsukawa* case. In 1951 one Yoshioka brutally murdered a farmer and his wife while they were sleeping. He confessed, but the police did not believe he had committed the murder himself, and as a result of coercive questioning he named five others as his accomplices. One of the men named was released, but the other four were tried and convicted of the crime. The matter was not resolved until 1968 when the Supreme Court, hearing the case for the third time, exonerated the four persons named by Yoshioka. For some 17 years it periodically dominated the news concerning the Supreme Court. There were several books written about the case, the most important being *Saibankan* (The Judges), which was written by Hiroshi Masaki, the chief lawyer in the case, and published in Kobunsha's popular Kappa Books series. It was a best seller. Masaki's book was the basis of a feature-length film on the case. When the filmmaker, Tadashi Imai, asked to see the *Yakai* defendants, procurators asked the Supreme Court to prohibit him from doing so. The Court denied the request and asked the film company to postpone filming until the case was finally decided. The Court also requested changes in the story and it was changed five times. Finally Kakiwa Gokijo, who was then secretary general of the Court and later became a Supreme Court justice, asked the film company not to make

⁴⁶ *Id.* at 258.

⁴⁷ *Id.*, at 227, 285, 326-327.

the film because it would interfere with the judicial process. Imai decided to go ahead anyway with the movie which he called *Mahiru no Anko* (Darkness at Noon), but Toei, the film distribution company, at first refused to book it, "having allegedly received threats from high government sources. Eventually Imai and Toei got together and the director abandoned independent production for the security of a Toei contract." Two critics' analysis of the film was that Imai had "sacrificed technique in the heat of argument and was not above using tear-jerking of the most unabashed *haha-mono* variety to win the sympathy of his characters." Nonetheless the film has been shown widely and won a number of awards. There are few adults in Japan who have not heard of the *Yakai* case.⁴⁸

Films calling attention to the Supreme Court are unusual. Newspapers are the main source of information about the Court and its work, and recently it has received extensive coverage concerning the Court's power over the lower judiciary and its power of judicial review, which was dramatically illustrated in 1973 in the *Parricide* cases. If the Court does not have high visibility in Japanese society, it is not because it has been ignored by the media.⁴⁹

F. *The Electorate*

To determine the Supreme Court's impact on the electorate, a survey was conducted under my direction in Tokyo in 1969.⁵⁰ A sample of 100 adults who lived in a ward near Tokyo University was interviewed to ascertain (1) their perceptions of the Court, (2) their attitudes toward it, (3) their knowledge of it, and (4) their behavior in people's review (the periodic referenda on retention of Court members). Each of the respondents was aware of the Supreme Court and was able to answer most of the questions. A few refused to answer questions on their voting behavior in people's review.

The respondents were asked how they perceived the Supreme Court, and were given six descriptions from which to choose. Some chose more than one,

48 ANDERSON & RICHIE, *THE JAPANESE FILM: ART AND INDUSTRY* 284 (1949). Roughly translated, *haha mono* means the woes of a long-suffering mother.

49 This section has dealt primarily with the media's presentation of the Court because perceptions of the Court and its actions are important behaviors in impact relations. Occasionally the Court seeks to influence the press directly or use it to influence others. In April, 1971, the *Shukan Asahi* and the *Asahi Shimbun* published reports of secret meetings of the Supreme Court in which it discussed Judge Miyamoto and made its decision not to reappoint him. The Court's secretary general, Yoshida, claimed the reports were groundless and demanded a retraction and an apology. At first, an *Asahi* editor maintained the reports were accurate and the Court had no right to brand them as fabrications, but a few days later the *Asahi Shimbun* made a retraction and apology, which the Court accepted. *Japan Times*, April 24, 29, 1971. An illustration of the Court using the press to influence others occurred in November, 1971. An investigator for the Public Security Investigation Agency asked a young female judge to divulge the contents of a recent judges' meeting in Nagoya. The investigator and the judge were graduates of the same university, and he approached her several times in an effort to get the information. She reported the matter to her superiors who notified the Supreme Court. The Court issued a press release which stated that such an attempt by the government to learn of judicial matters was "regrettable." *Japan Times*, Nov. 20, 1971.

50 Mr. Kahei Rokomoto, a graduate student at Tokyo University who is now on its faculty, drew the sample for a study he was conducting on the settlement of civil disputes. It is a random sample of adults living in Bunkyo-ku who had been involved in civil disputes (principally growing out of auto accidents and landlord-tenant conflicts) at any time during a nine-year period. I wrote the questionnaire in consultation with him. He translated it into Japanese and conducted the interviews. I am deeply indebted to him for his fine work.

and a few volunteered descriptions of their own. The six descriptions and the number of choices for each were:

The highest court in Japan	54
An institution that protects human rights	41
An institution that interprets the Constitution	19
An institution that maintains the status quo	8
A progressive or left-wing institution	2
A conservative institution	1

A clear finding indicated by these responses is that the Supreme Court in 1969 was viewed neutrally or functionally but not ideologically. Here are some perceptions that were volunteered:

- "It's an institution up in the clouds."
- "The distance between the people and the Court is great."
- "It's an institution that considers matters carefully."
- "It protects us."
- "It gives us justice."
- "It is progressive; recently more people have been found not guilty."
- "It changes its attitude according to the political situation."

The responses to the question, "How do you feel about the Supreme Court?" were:

Very favorable	6
Favorable	28
Neutral	48
Unfavorable	18
Very unfavorable	0

Some explained their responses. Here are some illustrative comments:

Very favorable: "It is not disturbed by politics."

Favorable: "In reading the newspapers I began to have a favorable feeling toward the Supreme Court. For example, I like the decision in the *Teacher's Union* case. The Liberal-Democratic Party was not satisfied with the result I learned, but I think the decision shows the neutrality of the Court."

"To a reasonable extent, I trust the Supreme Court."

"I have a favorable feeling about the Supreme Court because of its decisions in cases like *Matsukawa*."

"From time to time, the Court gave decisions that did not agree with the ideas of the Liberal-Democratic Party."

Neutral: "I'm not interested in the Supreme Court. I have never taken a case to it. But it has power."

"The Supreme Court seems very distant."

"There is no direct line between me and the Supreme Court."

"Since I get information from TV, I don't know much about the Supreme Court."

"I do not read carefully the newspapers."

"I do not like to decide matters with law. It is better to solve matters with talk."

"I put all my interest in business; so I am not interested in other matters."

Unfavorable: "I am not for the Supreme Court recently because of its recent decisions. The Supreme Court is not the guardian of the Constitution, but has become the guardian of power."

"My suit was rejected by the Supreme Court. I had hoped the Court would study my case more closely."

"It seems the Supreme Court is a scary place."

"I am dissatisfied with the defendants in the *Matsukawa* case receiving compensation."

"It looks authoritarian."

"At present, the Supreme Court is a left-wing minded institution. Look at the decisions."

The comments suggest that the Court is regarded favorably or unfavorably because of its decisions. Some of the references are general, but the *Matsukawa* case was mentioned three times and the *Teacher's Union* case once. Those who have an unfavorable attitude to the Court are not ideologically the same. Some dislike the Court because of its conservative decisions while others dislike it because of its progressive decisions. The comments of persons who neither like nor dislike the Court are consistently neutral. By and large, they are simply uninterested.⁵¹

Table II

Party Affiliation and Attitudes toward the Supreme Court

	Liberal-Democrat *N=48	Social Democrat *N=6	Komei *N=4	Socialist *N=24	Communist *N=10	Other or None *N=11
Favorable	42	33	25	25	30	30
Neutral	48	67	50	25	30	54
Unfavorable	10	0	25	50	40	16
TOTALS	100%	100%	100%	100%	100%	100%

*Respondents who indicated that they voted for more than one party were counted more than once; hence the total N is more than 100.

Table III

Sex and Attitudes toward the Supreme Court

	Women N=26	Men N=74
Favorable	27	36
Neutral	65	43
Unfavorable	8	21
TOTALS	100%	100%

⁵¹ Attitudes toward the Court are related to perceptions of it. Those who view the Court favorably tend to perceive it principally as a protector of human rights, while those who view it unfavorably or neutrally tend to perceive it as the highest Court in Japan. In general, the respondents' perceptions are consistent with their attitudes.

Table IV

Rural and Urban Backgrounds
and Attitudes toward the Supreme Court

	Urban N=47	Rural N=51
Favorable	44	25
Neutral	46	50
Unfavorable	10	25
	—	—
TOTALS	100%	100%

Table V

Age and Attitudes toward the Supreme Court

	19-30 N=17	31-40 N=23	41-50 N=30	51-60 N=17	Over 60 N=10
Favorable	18	43	40	29	30
Neutral	41	52	47	47	60
Unfavorable	41	5	13	24	10
	—	—	—	—	—
TOTALS	100%	100%	100%	100%	100%

Attitudes were also related to party affiliation and demographic characteristics, as Tables II through V show. Not surprisingly, 90 percent of persons voting for the Liberal-Democratic Party had either favorable or neutral attitudes toward the Court, and almost half of those voting for Socialist and Communist Parties had unfavorable attitudes. This confirms the correlation previously found between party affiliation and voting in people's review.⁵² Women were inclined to be more neutral than men, and only a few of them indicated an unfavorable attitude toward the Court. Persons coming from rural backgrounds were more inclined to have unfavorable attitudes toward the Court than those from urban backgrounds. This was somewhat surprising because in people's review rural prefectures generally support the Court more than urban prefectures. Of course, practically all of the respondents had lived in Tokyo for many years. Perhaps persons who come to Tokyo from rural communities develop attitudes over time that are different from attitudes of persons who have lived only in rural communities or urban communities. Different generations have different attitudes toward the Court. Persons under 30 are most inclined to have an unfavorable attitude; persons from 30 through 50 have the most favorable attitude; and those over 50 fall in between these two age groups.

Even though the Supreme Court had not exercised judicial review in an important case by 1969, 53 percent of persons in the sample indicated that they knew the Court had this power; 32 percent said that the Court did not have this power; and 15 percent said they did not know. Knowledge of the Court's

⁵² D. Danelski, *supra* note 8, at 60; Ishimura, *supra* note 9, at 64.

power of judicial review was related to attitudes toward it. Among those holding a favorable attitude, 70 percent knew the Court had the power to declare laws of the Diet unconstitutional, compared with 42 percent of those whose attitude was neutral and 50 percent of those whose attitude was unfavorable.

The questions about voting behavior in people's review elicited a number of voluntary comments that the procedure was "meaningless," "useless," "unreasonable," and "foolish," and the majority of comments indicated that the respondents did not know much about it or the justices when they voted. About 95 percent of the respondents who voted in regular elections said they also cast judicial ballots. Fewer than 10 percent of them indicated that they had cast negative votes. When they were asked what was the source of information about the justices, almost half of them said they consulted no source. Others indicated newspapers, other news media, and the official biographies of the justices as the principal sources of their information. One man said that the Communist Party was his source of information, and he voted as directed by the party. Of those who cast negative votes, only one person could remember the name of a justice against whom he had cast his vote. It was the communist just mentioned, and he said he had voted against Chief Justice Tanaka. The only other mention of a justice's name was also Tanaka's. One respondent said Tanaka was his friend. In 1958 Tanaka, realistically appraising people's review, said that it

is very doubtful whether a great majority of the people who voted knew—not only anything of the judgments rendered by the individual judge, or his views as expressed therein—but anything even of his character, intellect, or career.

He went on to say that it is conceivable that the "votes for dismissal were cast chiefly on instructions issued by leaders of labor unions to their members, by some elements of the left-wing parties and in particular by the communists." Nevertheless, he concluded that it is "undeniable that the system has been instrumental in linking the people psychologically with the Supreme Court, and has thus emphasized the latter's importance."⁵³ Perhaps Tanaka is correct, but the survey discussed here does not confirm his conclusion. Yet the respondents had fairly clear images of the Court and attitudes toward it. It may be that those images and attitudes were due, at least in part, to people's review.

IV. Weight

The weight of the Supreme Court's impact depends on the extent to which (1) its behavior α is uninfluenced by others and (2) its behavior α contributes to the behavior β of others. Thus the impact relation having the greatest weight is:

$$\text{S.Ct. } \alpha \rightarrow E\beta$$

Although such relations occur, they are not typical. Typically the Court reacts to the actions of others. For example, in the *Sunakawa* case, it reacted to the ap-

⁵³ D. Danelski, *supra* note 8, at 57.

peals and arguments of the government, which was seeking to influence the Supreme Court to reverse Judge Date's ruling of unconstitutionality of the Security Treaty. And typically the Court's behavior influences others who in turn influence still others and so on until the Court's behavior is effective. Thus even a simplified typical impact relation looks more like this:

$$\begin{array}{l} Aa \rightarrow \beta S.Ct.a \rightarrow \beta Xa \rightarrow \beta Ya \rightarrow \beta Z \\ Ba \rightarrow \end{array}$$

Such a relation is an influence chain, and impact in the chain is consecutive. In more complicated chains, impact may be also sequential; that is, the Court appears two or more times in an impact relation. The *Matsukawa* and *Yakai* cases, which came before the Court more than once, are examples. The recent *Parricide* decision is even a better example. The issue was initially decided in 1950 over the dissents of Justices Mano and Hozumi, which contributed to the criticism of the majority decision by scholars, which together encouraged some trial judges to declare Article 200 of the Penal Code unconstitutional, all of which contributed to the Supreme Court declaring Article 200 unconstitutional in 1973, which contributed to behavior of the justice minister, procurators, and judges that finally resulted in the reduction of sentences of convicted persons and an end of more severe sentences in parricide cases in the future.

A difficult problem facing the impact analyst is ascertaining the extent to which the Supreme Court contributes to the occurrence of an event at the end of an influence chain. Although difficult, the problem is in principle solvable. What is needed is extensive, high-quality data to determine patterns in influence chains, and given certain specified conditions, the probability and extent of the Court's behavior a contributing to the behavior β of others. Statistical methods for such analysis are presently available.

Some things are already known about the nature of impact relations. For example, when the Court nominates judges for appointment by the Cabinet, the relation is ordinarily simple; and the probability of the Supreme Court a contributing to Cabinet β is very high. Another class of relations in which the Court's impact has considerable weight is Court behavior directed toward a member of the judiciary. The cases of Miyamoto, Konno, and Iimori are dramatic illustrations. But when the Court makes decisions that are contrary to government policy, it is difficult to predict the pattern and weight of impact. It would, of course, turn on the issue decided. The *Parricide* cases are one thing; the *Sunakawa* case another. Important in such cases are contextual considerations—the climate of opinion concerning the Court among the elite and people at a given time, the likelihood of persons having political power acting in support of the Court's decision, and similar considerations.

Perhaps the most important question in regard to the weight of impact concerns the Court's ability to influence the behavior of others. In other words, why does $S.Ct.a \rightarrow E\beta$ occur? This is perhaps the most important question in the study of judicial impact in Japan or any other country. In my work on the impact of American courts, I have suggested four hypotheses as possible answers and shall use them in attempting to explain the weight of judicial impact in Japan.⁵⁴

54 D. DANIELSKI, JUDICIAL BEHAVIOR (forthcoming).

1) *Judges can exercise power because of popular beliefs that they do exercise it and should exercise it.* Belief systems result from socialization and vary from culture to culture. The judicial symbolism of the West, rooted in religion, does not apply to Japan. Before the Occupation judges were to a large extent viewed as bureaucrats, and like other bureaucrats they were perceived as powerful and as being entitled to deference. After the present Constitution went into effect, judges gradually acquired a new image. They formally acquired independence, and one of their main functions was believed to be the protection of human rights.

Table VI

Popular Perceptions of Judges, Procurators,
Lawyers, Professors, and Politicians in the Tokyo Area, 1971*

	Friend of Justice	Trustworthy	Intelligent	Good Feeling About Them
Judges	57.0%	71.9%	85.9%	17.1%
Procurators	39.5	51.0	78.4	11.3
Lawyers	38.9	62.2	81.9	20.2
Professors	19.6	52.2	85.3	28.7
Politicians	8.4	10.5	38.1	6.5

*The figures in this table are percentages of respondents who said they agreed or strongly agreed with the descriptions indicated.

Source: NIHON BUNKA KAIGI, NIHON JIN NO HOISHIKI (Japanese Legal Consciousness) 186-189 (1973).

A 1971 survey conducted by researchers at Tokyo University shows that Japanese judges are favorably perceived.⁵⁵ Table VI reports the sum of percentages of respondents indicating agreement and strong agreement with the indicated perceptions of judges, lawyers, procurators, professors, and politicians. The descriptions "friend of justice" and "trustworthy" are the most important for judges. It is a tribute to the Japanese legal system that judges and procurators head the list as friends of justice, and it is remarkable that judges lead procurators by more than 17 percent. Judges again head the list as trustworthy with almost 72 percent agreement. And in intelligence they head the list with professors. Judges do not lead, however, in being persons who are perceived as giving others a good feeling. They rank third under professors and lawyers and above procurators and politicians. This is not surprising. In the 1969 survey previously described some respondents volunteered perceptions of the Supreme Court as being a scary place. Courts and judges were also regarded as being distant—in clouds, a group with which a typical citizen had no direct connection. It should be noted that politicians in the 1971 survey consistently received the lowest percentages across the board. This may be significant for the impact of the Supreme Court in clashes with the Diet or with the Cabinet.

⁵⁵ NIHON BUNKA KAIGI, NIHON JIN NO HOISHIKI (Japanese Legal Consciousness) 186-189 (1973). The survey was conducted in the Tokyo area. The sample was random and consisted of 1053 respondents, who were interviewed.

In the 1969 survey respondents were asked to rank the following: Emperor, prime minister, chief justice, cabinet minister, Supreme Court justice, governor of Tokyo, dean of law faculty at Tokyo University, and president of the Japan Bar Association. Some of the respondents felt they could not rank the Emperor and others facing the same problem solved it by ranking him zero. For the most part the remaining respondents ranked him as either 1 or 8. In order to check the relationship of the rank order that emerged, four former justices were also asked to rank the same offices. Table VII reports the survey rank order based on average scores and next to it are the rank orders of the former justices.

Table VII

Rank Order of Official Positions, 1969

	Survey respondents' average rankings	Former justices' rankings			
		A	B	C	D
Emperor	2.260	1	1	(can't rank)	(can't rank)
Prime Minister	2.275	2	2	1	1.5
Chief Justice	2.868	3	3	2	1.5
Cabinet Minister	4.231	4	4	3.5	3.5
Supreme Court Justice	4.516	5	5	3.5	3.5
Governor of Tokyo	5.033	6	8	5	7
Dean of Tokyo U. Law Faculty	6.100	8	6	7	6
President of Japan Bar Association	6.193	7	7	6	5

When the Constitution was written in 1946, an effort was made to put the chief justice on the same level as the prime minister and the justices on the same level as cabinet ministers. Former Justice D apparently took this into account in his ranking. He said that the prime minister and the chief justice must be ranked at the same level because they have the Emperor's personal investiture (*shinnin-kan*), and the cabinet minister and justice must be ranked at the same level because they are prime minister appointees through the Emperor's attestation (*ninsho-kan*). The popular rank order puts the chief justice a little below the prime minister and the justices a little below cabinet ministers, as two of the four former justices do; hence the hopes of the Constitution's framers appear to be substantially fulfilled.

In the Court's early years it exercised considerable restraint in declaring statutes unconstitutional or otherwise making decisions that would be inconsistent with government policies. It did, however, ultimately free the defendants in the *Matsukawa* and *Yakai* cases, but in view of the years of litigation involved and no clear signal from the government to do otherwise, these were not necessarily important exercises of power. The Court's decisions in the *Tokyo Teacher's Union* case in 1966, the *Government Worker's Union* case in 1969, and the

Parricide cases in 1973 were clear exercises of power that were not consistent with government policy. Such exercises of power contributed to the image of a powerful institution. In a sense, by exercising such power the Court pulled itself up by its bootstraps.

2) *Judges are able to exercise power because they possess power independently of their offices.* In regard to the Japanese Supreme Court, the hypothesis seems to be true, for the Court is the top rung of a number of career ladders. There is a practice, which is sometimes honored in the breach, of appointing five justices from the career judiciary, five from the bar, and five men of learning and experience (professors, procurators, and diplomats). Although top lawyers and professors in recent years have had to be persuaded to accept appointment to the Court, appointees to the Court are generally men of distinction and power in their own professions. To some extent they bring that with them when they come to the bench. In regard to the career judiciary, there is little doubt that powerful judges rise to the Supreme Court, and the route is fairly clear. One of the important—and powerful—offices on the way up is the secretary generalship of the Court. Graduates from Tokyo University have been overrepresented in the Court, but that is an indication of power in a double sense: first the Tokyo graduate who has done well enough to gain admission to the University and become a lawyer, judge, procurator, or professor is marked for the elite if he or she is not already a junior member of it; and, second, the Tokyo University cliques (*gakubastu*) have wielded power in the judiciary for generations. The fact that judges come to the Supreme Court late in their careers—about the age of 60—and the fact that retirement is mandatory at 70 means that there is a constant influx of persons having power bases outside the Court. The five-five-five rule was not instituted in the interest of maintaining the Court's power, but that appears to be one of its consequences.

3) *Judges are able to exercise power because they are perceived to be experts.* In the United States there is some evidence that legal compliance is related to popular perception of legal expertise of judges.⁵⁶ There are few societies in which expertise is as important as it is in Japan. For career judges, there is solid educational and experiential foundation for expertise—a university education, graduation from the Legal Research and Training Institute, years of apprenticeship on the bench, and perhaps further formal training (sometimes abroad). Even then, a judge is usually only an expert in a given area of the law, for example, civil law, criminal law, or administrative law. Professors also come to the Court as specialists. In this regard lawyers are sometimes handicapped, and this sometimes affects their power within the Court. Overall, however, the Supreme Court is perceived as a body of legal experts, and because of that perception, their interpretations of law and decisions are more readily accepted.

4) *Judges are able to exercise power because they are perceived as being independent.* A judge does not personally exercise power if he does the bidding of the cabinet, political party, or boss. In those instances power is exercised but it is not judicial power except in a formal sense. In pre-war Japan judges were

under the supervision of the justice ministry. Today the Constitution provides for judicial independence. Lower-court judges are answerable to the Supreme Court, but constitutionally, except for impeachment, the chief justices and justices are answerable only to the people periodically at elections. In the 1969 survey it will be recalled that some respondents indicated they had favorable attitudes toward the Court because it had decided some cases contrary to the Liberal-Democratic Party's policy positions. In other words, they supported the Court because it appeared to act independently. Furthermore, many respondents saw the Court as the protector of human rights. To fulfill this function, it has to be independent of the Diet and Cabinet for those are the likely sources of violations of human rights. This is another way of stating Montesquieu's notion of separation of powers. Its purpose was to protect individual liberty, which in Japan would be understood today as human rights. In the Fukushima and Miyamoto incidents the Court was charged with violating judicial independence and freedom of conscience and with carrying out the will of the government. Such charges raise questions about the Court's independence, and if it is perceived as doing the government's bidding or being unfaithful to the principle of judicial independence, one of its important power bases is undercut.

V. Conclusion

If one wants to know whether an institution is important, the question to ask is: Does it have impact? And for a political institution, the most significant impact is political. The scope of the Japanese Supreme Court's impact includes power; hence it has political impact. The domain of its impact reaches important Japanese political institutions, but the weight of that impact varies. The Court's impact has been greater on the judiciary than on the Cabinet and greater on the Cabinet than on the Diet. Although difficult to measure, there has been judicial impact on the press and the electorate. Perhaps as important as the Court's impact thus far has been its popular support, which has developed gradually. In 1947 the Supreme Court came into being largely because the Occupation authorities insisted upon it, and so it was written into the MacArthur Constitution. Its history has been like the history of that Constitution. It was accepted politely but not altogether willingly, marked for revision after the Occupation, tolerated, Japanized little by little, and finally established as part of Japanese life. Indeed, the Court is coming to political maturity more quickly than many expected, even more quickly than did its American counterpart after which it was modeled. In its maturity much is expected of it, no less, in the words of a recent editorial, than giving "real life to the Constitution."⁵⁷ No Court can fully meet that expectation, but the Japanese Supreme Court has a better chance of at least some success than most constitutional courts.

57 Japan Times, May 3, 1973.