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## PROSECUTION REVIEW COMMISSIONS, THE PUBLIC INTEREST, AND THE RIGHTS OF THE ACCUSED: THE NEED FOR A “GROWN UP” IN THE ROOM

Carl F. Goodman<sup>†</sup>

*Abstract:* The recent amendments to Japan’s Inquest of Prosecution Law (popularly called the Prosecution Review Commission (“PRC”) Law) give the eleven lay member PRC (and their court appointed lawyers) unreviewable authority to compel the prosecutions and appeals of defendants who the professional prosecutor service has determined do not require indictment and prosecution. Viewed as “democratic” because it brings lay participation to the criminal justice system, the PRC process differs sharply from the American Federal Grand Jury because it places ordinary citizens at risk of potential retribution and the political system at risk of possible “gaming” of the process for political advantage, much as was the case with the Special Prosecutor’s Law in the United States. To date, PRCs have compelled prosecution of five defendants (of whom two have been found not guilty), one indictment has been dismissed, one defendant is being tried for professional negligence after the professionals on whose advice he relied were found not guilty (in a prosecution by professional prosecutors), and one is on trial despite a serious statute of limitations question. The indictment of a powerful political figure (found not guilty but the court appointed prosecutors have appealed) had serious political repercussions in Japan and caused political turmoil in the first non-Liberal Democratic Party majority elected party and government in the Post War era.

This article reviews the PRC experience in comparison to the U.S. experience with the Special Prosecutor Law and the prosecutions mandated by the PRC to date. Five changes to the PRC process are suggested that, while allowing citizen participation in the indictment and prosecution process, would preserve the rights of those accused and protect the national interest.

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Appreciation is expressed to Professors Dan Rosen (Chuo University, Tokyo) and Matthew J. Wilson (University of Wyoming) who reviewed an earlier draft and whose comments have improved this paper. All errors are, of course, my own.

Japanese cases typically are not cited by reference to the names of the parties. Rather case number, year of filing, and year of decision typically identify Supreme Court cases. I have tried to give cases a “name” to help identify the subject matter of the decision. Case numbers and the Japanese reporter have been provided and where available I have sought to provide a link to the Supreme Court of Japan’s English language translation of the decision.

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## I. INTRODUCTION

At the end of the first decade of the twenty-first century, Japan's criminal procedure underwent significant changes. Reacting to the Law Reform Council's<sup>1</sup> recommendation that criminal procedure should embody lay participation, Japan instituted a new *Saiban'in* system under which a mixed panel of laymen and professionals would hear certain major crime cases.<sup>2</sup> In addition, victims' rights advocates were rewarded for their efforts through two changes.<sup>3</sup> The first allowed victims of specified crimes to appear personally or through counsel at the trial with the right to present witnesses and evidence, to cross examine witnesses, and to address the court. The second modified the Inquest (more popularly known as the Prosecution Review Commission or "PRC") procedure, so that the group of eleven lay persons constituting the PRC panel could, in addition to simply investigating and reviewing a prosecutor's determination not to indict, compel indictment of suspects whom the public prosecutor service had previously determined

<sup>1</sup> JUSTICE REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL – FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY, June 12, 2001, <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>. The Justice System Reform Council was established under the Cabinet in July 1999, for the purposes of "clarifying the role to be played by justice in Japanese society in the 21st century and examining and deliberating fundamental measures necessary for the realization of a justice system that is easy for the people to utilize, participation by the people in the justice system, achievement of a legal profession as it should be and strengthening the functions thereof, and other reforms of the justice system, as well as improvements in the infrastructure of that system." *Id.* (quoting Art. 2, ¶ 1, Law Concerning Establishment of the Justice System Reform Council).

<sup>2</sup> The *Saiban'in* Panel system replaces the all judge trials at the District Court level and substitutes a panel of nine judges (six lay and three professional judges) to determine guilt or innocence, and if guilty the appropriate sentence. The Japan Federation of Bar Associations, to which all Japanese lawyers belong, had wanted an American-style jury system, but such dramatic reform was opposed by the judiciary and a "compromise" was adopted that appears modeled on the German (and certain other civil law) system's use of mixed panels. Mixed panels in a case where guilt is contested consist of six lay judges chosen by lot from among Japanese voters and three professional judges. A verdict of the mixed panel requires a majority vote with at least one professional judge voting for the majority position. Appeal from a verdict of a mixed panel is permitted as are appeals in all first level Japanese criminal cases. The appeal is to a High Court, but the High Court is supposed to give some deference to the determination of the mixed panel. Saiko Saibansho [Sup. Ct.] Feb. 13, 2012, 2011 (A) No. 757, 2:66 SAIKO SAIBANSHO KEIJI HANREISHU [KEISHU], <http://www.courts.go.jp/english/judgments/text/2012.02.13-2011.-A.-No..757.html>. The system has been held to be constitutional. Saiko Saibansho [Sup. Ct.] Nov. 16, 2010, 2010 (A) No. 1196, 8:65 SAIKO SAIBANSHO KEIJI HANREISHU [KEISHU], <http://www.courts.go.jp/english/judgments/text/2011.11.16-2010.-A.-No..1196.html>; see *Lay Judge System OK: Top Court*, JAPAN TIMES, Nov. 18, 2011, available at <http://www.japantimes.co.jp/text/nn20111118a6.html>; Saiko Saibansho, [Sup. Ct.] Jan. 13, 2012, 2010 (A) No. 1299, 1:66 SAIKO SAIBANSHO KEIJI HANREISHU [KEISHU], <http://www.courts.go.jp/english/judgments/text/2012.01.13-2010.-A.-No..1299.html>.

<sup>3</sup> Although Japan has a very safe society, some Japanese have lost confidence in their police and for years Japan has been considered on the low end of countries providing victim support. See, e.g., JOHN VAN KESTEREN, PAT MAYHEW, AND PAUL NIEUWBEERTA, CRIMINAL VICTIMISATION IN SEVENTEEN INDUSTRIALISED COUNTRIES: KEY FINDINGS FROM THE 2000 INTERNATIONAL CRIME VICTIMS SURVEY, 16 (The Hague, Ministry of Justice, WODC 2000), available at [http://www.unicri.it/documentation\\_centre/publications/icvs/\\_pdf\\_files/key2000i/index.htm#download\\_full\\_text\\_in\\_pdf](http://www.unicri.it/documentation_centre/publications/icvs/_pdf_files/key2000i/index.htm#download_full_text_in_pdf).

not to indict. The PRC and *Saiban'in* both utilize lay participants—the PRC at the indictment stage and the *Saiban'in* at the trial stage.<sup>4</sup> These lay participation devices brought forth a number of learned articles discussing the procedures and their role in Japan's criminal process.<sup>5</sup>

In his illuminating and provocative article *People's Panels vs. Imperial Hegemony: Japan's Twin Lay Justice Systems and the Future of American Military Bases in Japan*,<sup>6</sup> Professor Hiroshi Fukurai examined the effect and potential effect of Japan's recent foray into lay participation in the criminal justice arena on Okinawa and its residents. Professor Fukurai concludes, in part:

[T]he investigative function of the PRC can provide another effective strategy to take away the Japanese government's control over the indictment process and insert people's common sense judgments, shared sentiments, and varied life experience into the critical examination of military crimes in Okinawa. Thus, the twin systems of lay adjudication can potentially serve as very powerful vehicles to alter people's consciousness and conception about lay participation in the justice system, and create new strategies to establish popular sovereignty and social independence in the islands of Okinawa. They also have the potential to alter the nature of the political and legal relationship between Okinawa and the "occupying forces" of both Japanese and American governments.

Professor Fukurai concludes that the PRC process of lay participation can alter the consciousness of the public and can be used as a vehicle to alter the relationship between Okinawa Prefecture, on the one hand, and the governments of the United States and Japan, on the other.

While Professor Fukurai's article looked at the PRC through a narrow lens focused on Okinawa's special and troubled relationship with "mainland" Japan and Okinawa's role as the "host" to most of the American

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<sup>4</sup> A Constitutional challenge to the *Saiban'in* system based on the argument that a criminal defendant has a right to be tried by Judges and lay personnel was turned back by the Supreme Court of Japan. See Saiko Saibansho [Sup. Ct.] Nov. 16, 2010, 2010 (A) No. 1196, 8:65 SAIKO SAIBANSHO KEIJI HANREISHU [KEISHU], <http://www.courts.go.jp/english/judgments/text/2011.11.16-2010.-A-.No..1196.html>; *Lay Judge System OK: Top Court, supra* note 2.

<sup>5</sup> See, e.g., Ingram Weber, *The New Japanese Jury System: Empowering the Public, Preserving Continental Justice*, 4 E. ASIA L. REV. 125, 162 (2009); Matthew Wilson, *The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?*, 24 WIS. INT'L L.J. 835, 850 (2007); Colin Jones, *Prospects for Citizen Participation in Criminal Trials in Japan*, 15 PAC. RIM L. & POL'Y J. 363, 365–66 (2006) (reviewing TAKASHI MURATA, SAIBAN'IN SEIDO [THE LAY JUDGE SYSTEM] (Heibonsha 2004)).

<sup>6</sup> Hiroshi Fukurai, *People's Panels vs. Imperial Hegemony: Japan's Twin Lay Justice Systems and the Future of American Military Bases in Japan*, 12 ASIAN-PAC. L. & POL'Y J. 95 (2010).

military, this article looks at the PRC through a wider angle lens that encompasses Japan in general. Indictments brought about as a consequence of the “reformed” PRC proceedings have not been against American military personnel but rather have involved Japanese nationals (and in one case a Chinese ship captain indicted in absentia) and high profile events or figures.<sup>7</sup>

Examined in this light, the PRC—as presently structured—has the potential to damage the personal reputations of Japanese and other nationals, undermine Japan’s relations with foreign countries, and harm Japanese democracy. These effects flow from the “reformed” PRC law taking away the “Japanese government’s control over the indictment process” and replacing it with the unbridled discretion of lay persons whose focus may be unduly skewed by the notoriety of the event or potential accused.

Members of the PRC lack the authority to consider the bigger picture because they have been mandated to perform a narrow role that looks solely at the event, rather than how indictment can affect the standing of the potential accused or Japan’s bigger interests. Emotion, a shared sense that someone must pay, and a potential to embarrass the government may subject individuals accused by the PRC to a loss of reputation, an emotionally draining criminal trial experience, and substantial financial harm when there is simply not enough evidence to proceed. So too, the national interest may be damaged. Allowing the common sense and sentiments of the community to compel a defendant to stand trial is an entirely different matter from allowing the common sense of the community to find an accused guilty of a crime. Thus, as currently structured, the PRC acts as a brake on the public prosecutor’s ability to safeguard the unpopular but innocent.

Further, events transpiring since Professor Fukurai’s article raise substantial questions about the wisdom of a system that permits lay participants unbridled discretion to require the government to place an individual on trial for a crime. These events suggest that further amendment of the Inquest of Prosecution Law is required to remedy defects that have already had an adverse effect on individuals and the Japanese public.

The *Saiban’in*, or mixed panel system, which employs lay jurors as part of the decision making process in certain criminal trials in Japan, is clearly a step in the right direction of furthering liberty. Like the United States petite jury, it places lay participants between the accused and the State when rendering a verdict that can take life or liberty.

The current version of the PRC does not diminish the power of State actors to take away life or liberty. That power remains unfettered. The PRC

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<sup>7</sup> See *infra* Parts IV-V.

just adds an additional layer so that lay persons may now also begin the process of taking away life or liberty. The new PRC law subjects persons to State power rather than protecting persons from State power.

Because the PRC has sometimes been characterized as Japan's version of the Grand Jury,<sup>8</sup> Part II of this paper examines the basic function of the PRC, comparing and differentiating that function with the American Federal Grand Jury. This part will not dwell on the history of the PRC or the 2009 reform, however, as these topics are extensively covered in Professor Fukurai's excellent analysis.<sup>9</sup> Part III will then discuss the now disbanded Special Prosecutor Law in the U.S.<sup>10</sup> to determine whether that experience contains any lessons for the Japanese situation. From there, Part IV will discuss recent actions by the PRC and judicial proceedings involving those actions. Because of its significance, however, the trial of the Democratic Party of Japan ("DPJ") founder<sup>11</sup> and former leader Ichiro Ozawa, his subsequent acquittal, and the effect of that trial on Japanese democracy will be discussed separately in Part V. Lastly, Part VI will discuss the lessons learned from the U.S. and Japanese experiences and Part VII will suggest five modest but important changes to the Inquest of Prosecution Law. The solutions suggested are not draconian and would not return the PRC to its former docile and impotent pre-amendment state, but would make the PRC process more reliable by balancing the interests of the victim, the suspect, and the public. In particular, one suggestion would create an additional body—learned in the law, removed from the prosecutor service, and above politics, composed of people whose experience assures that the interests of the accused, the government, and the public are considered before a PRC-mandated prosecution goes forward. Only if this proposed body concludes that there was in fact sufficient evidence of guilt to warrant indictment (not

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<sup>8</sup> Hiroshi Fukurai, *Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy*, 86 CHIC.-KENT L. REV. 789 (2011) ("May 21, 2009 signaled the beginning of Japan's paradigmatic shift in its effort to democratize its judicial institutions. The Japanese government finally introduced two significant judicial institutions, i.e., the Quasi-Jury (Saiban-in), and the new Grand Jury (Kensatsu Shinsakai or Prosecutorial Review Commission (PRC)) systems."); Stuart Biggs and Masatsugu Horie, *Japan Adopts Grand Juries, Jury Duty After Criminal Case Abuse*, BLOOMBERG, May 18, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aMHcMKnWljBk&refer=japan>.

<sup>9</sup> Fukurai, *supra* note 6.

<sup>10</sup> Ethics in Government Act, Title VI, 28 U.S.C. §§ 591-99.

<sup>11</sup> The Democratic Party of Japan ("DPJ") is, at the time of this writing, the majority party in Japan's Lower House, and the ruling party in Japan.

conviction), and that indictment is not contrary to the national interest, could the PRC mandate an indictment.<sup>12</sup>

## II. THE PROSECUTION REVIEW COMMISSION VERSUS THE UNITED STATES FEDERAL COURT GRAND JURY

### A. *The United States Federal Grand Jury*

The Fifth Amendment of the United States Constitution provides, in relevant part, that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . .”<sup>13</sup> Thus, each person against whom the federal government seeks to proceed in a criminal trial of a capital or infamous crime is entitled to a Federal Grand Jury reviewing the government’s determination that there is enough evidence to go forward with a trial.<sup>14</sup> This is a procedural right flowing from English

<sup>12</sup> In addition to the PRC, Japanese law permits victims of certain crimes to petition the court to appoint a prosecutor when the prosecutor service has declined to prosecute. KEIJI SOSHOHO [KEISOHO][C. CRIM. PRO] 1948, art. 262, available at <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&ft=2&re=02&dn=1&yo=code+of+criminal+procedure&x=45&y=10&ky=&page=1&vm=02> (“Where a person who has filed a complaint or accusation regarding an offense set forth in Articles 193 to 196 of the Penal Code, Article 45 of the Subversive Activities Prevention Act (Act No. 240 of 1952), or Article 42 or 43 of the Act on Regulation of Organizations Which Have Committed Indiscriminate Mass Murder (Act No. 147 of 1999) is dissatisfied with the disposition not to institute prosecution made by a public prosecutor, the complainant or accuser may request the district court which has jurisdiction over the public prosecutor’s office to which that public prosecutor belongs to commit the case to a court for trial.”); see also, *id.* at art. 266 (“A court shall render a ruling according to the following classifications when it receives a claim set forth in Article 266 [sic—likely means article 261]; . . . (ii) Where the request is well-grounded, the case shall be committed to the competent district court for trial.”); *Id.* at, art. 268 (“Where a case has been committed to trial pursuant to the provision of item (ii) of Article 266, the court shall appoint one attorney who shall maintain the prosecution of such case from among the attorneys . . .”). This procedure has been infrequently used and rarely have courts appointed such special prosecutors. See DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN*, 223 (Oxford Univ. Press, 2002) (“ . . . [the prosecution petition] constitutes almost no check at all. . . In the first place, this procedure can be applied to only a narrow range of offenses—mostly police brutality and other abuses of official authority. It is seldom used . . . In the aggregate, analogical prosecution stands a short step away from utter irrelevance.”) This procedure is not considered herein.

<sup>13</sup> U.S. CONST. amend. V.

<sup>14</sup> The Fifth Amendment’s Grand Jury requirement applies only as against the federal government. Differing standards apply to indictment by State Prosecutors. In some States, Grand Jury indictment is required for all serious crimes (felonies). In others it is limited to capital cases, and in some states Grand Juries can compel indictment. The differences between the use of grand juries by differing State law is permitted, but one function of grand juries when they are used to cabin prosecutorial action is the fact that in such situations they check the power of the prosecutor to charge. This is the major function of the Federal Grand Jury, but this function is not a part of the Prosecution Review Commission’s charter. The power to charge in Japan is a prosecutorial power unfettered by judicial review or lay review such as by a Grand Jury. As discussed below, it is only the prosecutor’s determination to refuse to charge that concerns the Prosecution Review Commission.

common law that was enshrined when Grand Juries refused to indict enemies of the King in pre-colonial days.<sup>15</sup> The colonists picked up this right and used it as a protection against the Crown.<sup>16</sup> It was placed in the Constitution to protect persons from unwarranted government prosecution<sup>17</sup> or, as Judge Hawkins has described, as a means of screening the government's desire to prosecute.<sup>18</sup> It is designed, as was most of the Bill of Rights, to protect the rights of citizens against abuse by the government. The Grand Jury serves "as a kind of buffer or referee between the Government and the people."<sup>19</sup> This buffer includes both a review of the evidence and a review of the discretion used by the prosecutor in seeking an indictment. As has been noted:

<sup>15</sup> Mark Kadish, *Behind the Locked Door of a U.S. Grand Jury: Its History, Its Secrecy and Its Process*, 24 FLA. ST. U. L. REV. 1 (1996).

<sup>16</sup> Hon. Michael Daly Hawkins, *The Federal Grand Jury: Fish, Fowl, or Fair-Weather Game*, 33 OKLA. CITY U. L. REV. 823, 826-28 (2008):

The British version of the Grand Jury was an instrument of royal authority, a tax collecting and enforcement arm of the Crown that evolved into something very different—a protective barrier between local colonists and governmental power appointed and directed by George III . . . . The concept of a Grand Jury fits comfortably in a governmental system in which the people are held to be sovereign. Its central notion that government desire to prosecute must be screened through citizen judgment—is entirely consistent with the national mood in which it became part of the Constitution.

<sup>17</sup> See Kadish, *supra* note 15:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .

Two celebrated cases became the catalyst for writers to define the rights and powers of English grand juries. When pro-Protestant grand juries in London refused to indict Catholic King Charles II's enemies, Lord Shaftesbury and Stephen Colledge, the Grand Jury became an institution "capable of being a real safeguard for the liberties of the subject." For the first time, grand juries were positively identified as something other than enforcement agencies of central government; they also existed for the protection of the accused. . . . As the colonies moved closer to revolution, the Grand Jury took on a third role: outright resistance to the monarchy. Three successive grand juries refused to indict John Peter Zenger, whose newspaper criticized the withdrawal of jury trials and the royal control of New York. While the King was withdrawing the right to trial by jury and attempting to initiate prosecutions by informations, colonial grand juries responded by making "stinging denunciations of Great Britain and stirring defenses of their rights as Englishmen." . . . After the Revolution, the centralized government was created without a Federal Grand Jury . . . . In 1791, the Fifth Amendment was adopted as part of the Bill of Rights, with its Grand Jury Clause insuring that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . . The Grand Jury Clause protected the people against arbitrary and overzealous government by protecting 'against hasty, malicious and oppressive prosecution.'"

<sup>18</sup> Hawkins, *supra* note 16. This screening or limiting function is the major—but not exclusive—function of the Federal Grand Jury. The Grand Jury can investigate into criminal activity and file reports upon its dissolution. 18 U.S.C. §§ 3332, 3333 (1970).

<sup>19</sup> *United States v. Williams*, 504 U.S. 36 (1992).



In theory, an indicting Grand Jury is convened to evaluate the sufficiency of the evidence according to a fixed legal standard. In practice, its functions are more subtle and complex. When reviewing individual cases, grand juries can pass independent judgment upon the discretionary decisions made by the prosecutor as well as upon the institutions within the criminal justice system.”<sup>20</sup>

The Grand Jury is not required to indict even if the prosecution presents sufficient evidence to warrant indictment.<sup>21</sup>

Although a “protector of liberty,” there is no constitutional requirement that the Grand Jury be presented with evidence contradictory to the prosecutor’s view of the case. Similarly, there is also no requirement that the jury be told that it retains the power to refuse to indict despite evidence that the accused committed the crime. These “shortcomings” have stirred a sharp debate as to whether the Model Charge goes far enough, should be changed, or should require the prosecutor to present exculpatory evidence to the Grand Jury.<sup>22</sup> By policy determination, “[t]he U.S. Department of Justice’s policy is that a prosecutor must disclose to the Grand Jury, before seeking an indictment, ‘substantial evidence that directly negates the guilt of the subject of the investigation’ when the prosecutor is ‘personally aware’ of that evidence.”<sup>23</sup>

In the words of Professor Fukurai, the Federal Grand Jury, like the petite jury, places the common sense of the community between the prosecutor and the accused—this sense it “can provide another effective strategy to take away the . . . government’s control over the indictment process and insert people’s common sense judgments, shared sentiments,

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<sup>20</sup> Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System*, 82 B. U. L. REV. 1, 2 (2002).

<sup>21</sup> *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). Moreover, “[t]he Grand Jury is not bound to indict in every case where a conviction can be obtained.” *United States v. Ciambrone*, 601 F.2d 616, 629 (2d Cir. 1979)(Friendly, J., dissenting). Judge Friendly in turn stated, “By refusing to indict, the Grand Jury has the unchallengeable power to defend the innocent from government oppression by unjust prosecution. And it has the equally unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce twelve or more jurors to give sanctuary to the guilty.” *United States v. Cox*, 342 F.2d 167, 189-90 (5th Cir. 1965). *See also, Model Grand Jury Charge*, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/JuryService/ModelGrandJuryCharge.aspx> (last visited Oct. 10, 2012, 3:16 PM).

<sup>22</sup> *See, e.g., Hawkins, supra* note 16.

<sup>23</sup> Judge James F. Holderman & Charles B. Redfern, *Preindictment Prosecutorial Conduct in the Federal System Revisited*, 96 J. CRIM. L. & CRIMINOLOGY 527, 557 (2008). The authors explain that “[t]he ABA Prosecution Standards go further by prohibiting the prosecutor from knowingly not disclosing favorable evidence to the Grand Jury.” *Id.* (citing STANDARDS FOR CRIMINAL JUSTICE § 3-3.6(b)(1993) (“No prosecutor should knowingly fail to disclose to the Grand Jury evidence which tends to negate guilt or mitigate the offense.”)).

and varied life experience into the critical examination of . . . crimes . . . .<sup>24</sup> However this is not for the purpose of requiring the suspect be charged, but rather for the purpose of protecting the suspect by refusing to charge. This is a fundamental and critical difference between the Grand Jury and the PRC.<sup>25</sup> This distinction is based on the history of the Grand Jury and its role as a shield between the citizen and the government.<sup>26</sup> Nevertheless, it cannot be denied that the Grand Jury has, to a great extent, become a tool of the prosecutor, and usually follows the prosecutor's will.<sup>27</sup> This shield has significant holes in it, the greatest perhaps being the right of the prosecutor when unsuccessful before one Grand Jury to empanel another to seek (and obtain) the same indictment.<sup>28</sup>

Although the Federal Grand Jury may refuse to indict in the face of evidence of guilt, it lacks the power to force the prosecutor to indict. The Supreme Court has said that “[t]he federal courts have concluded uniformly that Rule 7(c) of the Federal Rules of Criminal Procedure, providing that an indictment ‘must be signed by an attorney for the government,’ precludes federal grand juries from issuing an indictment without the prosecutor’s signature, signifying his or her approval.”<sup>29</sup> In this sense, the Grand Jury’s

<sup>24</sup> Fukurai, *supra* note 6.

<sup>25</sup> See *infra* Part II.C.

<sup>26</sup> United States v. Cotton, 535 U.S. 625, 634 (2002); Wood v. Georgia, 370 U.S. 375, 390, 82 S. Ct. 1364 (1962) (noting that, “[h]istorically, this body has been regarded as a primary security to the innocent against hasty, malicious, and oppressive persecution [and] stand[s] between the accuser and the accused.”)

<sup>27</sup> See Hawkins, *supra* note 16.

<sup>28</sup> *Williams*, 504 U.S. at 49 (“The Double Jeopardy Clause of the Fifth Amendment does not bar a Grand Jury from returning an indictment when a prior Grand Jury has refused to do so.”). In addition,

[T]he decision to indict rests with the Grand Jury. It may indict in the face of probable cause, but it need not; it cannot be required to indict nor punished for failing to do so. On the other hand, the prosecution is free to resubmit a matter for reconsideration by the same Grand Jury or by a subsequent panel and a Grand Jury panel is free to reexamine a matter notwithstanding the prior results of its own deliberations or those of another panel. Moreover, the defendant will not be heard to complain that the panel was not informed of their prerogative to decline to indict even if presented with probable cause.

CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE: THE FEDERAL GRAND JURY (last updated Jan. 22, 2008) (footnotes omitted), available at <http://www.fas.org/sgp/crs/misc/95-1135.pdf>. See also, Roger A. Fairfax, *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 744 (2008) (suggesting that even though a second Grand Jury can be empanelled and the defendant charged, refusal to charge by the first panel “may send a message to the government”).

<sup>29</sup> *Rehberg v. Paulk*, No. 10-788, slip op. at 14, n. 2 (2012) (citing WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING & ORIN KERR, *CRIMINAL PROCEDURE* §15.1(d) (3d ed. 2007)). The Court also noted that “in some jurisdictions, the grand jury may return an indictment and initiate a prosecution without the prosecutor’s signature, but such cases are rare.” *Id.* See also, SARA SUN BEALE, WILLIAM BRYSON, MICHAEL ELSTON & JAMES FELMAN, *GRAND JURY LAW AND PRACTICE*, 4–76, n. 2 (2d ed., West Group 2001). Further, “it is almost always a prosecutor who is responsible for the decision to present a case to a grand jury, and in many jurisdictions, even if an indictment is handed up, a prosecution cannot proceed unless the prosecutor signs the indictment.” See, e.g., *United States v. Cox*, 342 F. 2d 167 (5th Cir. 1965), *cert. denied sub nom*; *Cox v. Hauberg*, 381 U.S. 935 (1965) (“The role of the Grand Jury is restricted to a

power to decline to indict is a corollary to the prosecutors' own discretion to refuse to prosecute. In essence, the Federal Prosecutor and Grand Jury act as a check on each other. The Federal Prosecutor cannot proceed in an infamous crime case without the approval of a Grand Jury and the Federal Grand Jury cannot charge without the consent of the Federal Prosecutor.<sup>30</sup> However, these corollary powers point in the same direction, towards lack of prosecution; they each protect the suspect against criminal proceedings.<sup>31</sup>

In sum, the salutary function of the Grand Jury has unfortunately become in many instances a relic of the past as many prosecutors have commandeered the Grand Jury. Nonetheless, the process meets the important principle to "first do no harm," as compelling indictment still remains with the prosecutor, subject to review by the Federal Grand Jury.

### B. *Comparing and Contrasting the PRC with the U.S. Grand Jury*

The PRC was a creation of the American Occupation, which sought to introduce the American form of Grand Jury to Japan but settled for the PRC

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finding as to whether or not there is probable cause to believe that an offense has been committed. The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause.").

<sup>30</sup> In *United States v. Navarro-Vargas*, 408 F.3d 1184, 1187 (9th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1036, the en banc Ninth Circuit Court of Appeals stated that:

[G]rand juries and prosecutors serve as a check on one another. The Grand Jury, acting on its own information, may return a presentment, may request that the prosecutor prepare an indictment, or may review an indictment submitted by the prosecutor. The prosecutor has no obligation to prosecute the presentment, to sign the return of an indictment, or even to prosecute an indictment properly returned.

*See also*, *United States v. Batchelder*, 442 U.S. 114 (1979) ("[W]hether to prosecute and what charge to file or bring before a Grand Jury are decisions that generally rest in the prosecutor's discretion."); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (assuming probable cause exists, the decision of whether and what to charge "rests entirely in [the prosecutor's] discretion"); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[The] Executive Branch has exclusive and absolute discretion to decide whether to prosecute a case"); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457, 19 L.Ed. 196 (1869) ("Public prosecutions, until they come before the court to which they are returnable, are within the exclusive discretion of the district attorney"); *United States v. Cox*, 342 F.2d at 182 (Brown, J., concurring); *id.* at 193 (Wisdom, J., concurring) (the Grand Jury also has no obligation to prepare a presentment or to return an indictment drafted by the jury). The prosecutor thus determines not only whether probable cause exists, but also whether to "charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense all on the basis of the same facts." Vasquez, 474 U.S. at 263. And, significantly, the Grand Jury may refuse to return an indictment even "where a conviction can be obtained." *Id.* (citing *Ciambrone*, 601 F. 2d at 629) (Friendly, J., dissenting).

<sup>31</sup> As noted, *infra* Part B, the PRC does not protect the suspect against criminal proceedings—it compels such proceedings.

because of Japanese objection.<sup>32</sup> It is an entity that exists throughout Japan.<sup>33</sup> Each Commission is composed of eleven laypersons chosen by lot, each of whom serves a six-month term. Approximately half of each commission is selected every three months, and members cannot serve consecutive terms. Each PRC receives complaints from crime victims dissatisfied by the career public prosecutors' decision not to indict. In addition, the PRC may itself investigate a decision not to indict without receiving a complaint. Under the law prior to the 2009 amendment, the PRC's authority was simply to require that the public prosecutor service reexamine its decision; the PRC could not compel indictment. As a general rule, the prosecutor service stood by its previous decision and no prosecution was initiated.<sup>34</sup>

The decision of the public prosecutor service to stand by its initial decision is not surprising. Japanese prosecutors tend not to act on their own, but rather they work in teams and offices where information is shared, guidance from colleagues is solicited and freely given, and where collegiality and consistency are highly regarded.<sup>35</sup> Consequently, a decision to indict or not to indict is a collegial, collaborative effort.<sup>36</sup> Prosecutors are not elected and do not have to play to the electorate when a "hot button" case reaches the office.<sup>37</sup> Unlike the U.S. prosecutor, the Japanese prosecutor does not have the luxury of indicting and then casting the decision of guilt or innocence on the jury.<sup>38</sup> The existence of the prosecutor's quasi-judicial function—determining to "suspend

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<sup>32</sup> ALFRED C. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN 104-106 (Princeton Univ. Press 1976); Setsuko Kamiya, *Inquest Bodies give Public a Voice*, JAPAN TIMES, Sept. 21, 2010, <http://www.japantimes.co.jp/text/nn20100921i1.html>.

<sup>33</sup> Kenatsu shinsakai hou [Law for the Inquest of Prosecution] Law No. 147 of 1948, amended by Keiji soshōhō to no ichibu wo kaisei suru hōritsu [Law to Amend the Criminal Procedure Code and Other Laws] Law No. 62 of 2004.

<sup>34</sup> For a discussion of the PRC prior to amendment, see Mark D. West, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684 (1992); See also, Fukurai, *supra* note 6.

<sup>35</sup> JOHNSON, *supra* note 12; see also, Motoo Noguchi, *Criminal Justice in Asia and Japan and the International Criminal Court*, 6 INT'L CRIM. L. REV. 585, 594 (2006).

<sup>36</sup> JOHNSON, *supra* note 12.

<sup>37</sup> CARL F. GOODMAN, THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS 406-07 (2d ed., Kluewer Law Int'l 2008).

<sup>38</sup> Cases that are prosecuted almost invariably lead to conviction. The conviction rate in 2008 was approximately 99.8%. MINISTRY OF JUSTICE, WHITE PAPER ON CRIME 2009: ENHANCEMENT OF MEASURES TO PREVENT REPEAT OFFENSES, table 2-3-1-1 [hereinafter WHITE PAPER ON CRIME 2009], available at <http://hakusyo1.moj.go.jp/en/58/image/image/h002003001001h.jpg> (last visited Oct. 26, 2012); see also, Norimitsu Onishi, *Coerced Confessions: Justice Derailed in Japan*, N.Y. TIMES, May 7, 2007, [http://www.nytimes.com/2007/05/07/world/asia/07iht-japan.1.5596308.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2007/05/07/world/asia/07iht-japan.1.5596308.html?pagewanted=all&_r=0) (reporting a conviction rate of 99.8%). Thus, the decision of the public prosecutor service is essentially the guilty or not guilty verdict in the case.

prosecution”—together with the authority of the police to decide not to transmit cases to the prosecutor, even if there is enough evidence to proceed, is well known in Japan.<sup>39</sup> In reality, less than ten percent of all solved crimes wind up being prosecuted.<sup>40</sup> This follows from the Japanese criminal justice system’s primary function—namely, attempting to solve the crime, restoring the victim to some sense of pre-crime normality, and rehabilitating the offender whenever possible.<sup>41</sup> There are, of course, cases where it is felt that the defendant must be punished, either to make the victim whole or because of the nature of the crime or the criminal. These cases are typically prosecuted.

Decisions to prosecute are made when the prosecutor: 1) feels certain of victory—this reflects the reality that the prosecutor will be successful at trial in over 99% of the cases tried and that defendants will have confessed in the vast majority of cases,<sup>42</sup> and 2) has exercised his quasi-judicial authority and decided indictment is appropriate. Because there is no formal plea bargaining in Japan, even where the defendant does not recant a confession, there must still be a trial before the defendant can be found guilty.<sup>43</sup> Whether the Japanese courts defer to prosecutors because they are aware of the high percentage of cases that are not brought to trial, the collegial decision making process in the public prosecutors’ office washes out all but the “sure things,” or for some other reason(s); the reality is that prosecutors rarely lose at the trial court level, and if they do lose, they

<sup>39</sup> For detailed statistics on suspension of prosecution, see JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER* 127, table 6-3 (Oxford Univ. Press 1991); Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CALIF. L. REV. 317, 350 (1992); Masaki Koyama, *Prosecuting – Japanese Style*, NEW L. J. 1267, 1268 (1991); Nobuyoshi Araki, *The Flow of Criminal Cases in the Japanese Criminal Justice System*, 31 CRIME AND DELINQUENCY, 601, 617, table 2 (1985); West, *supra* note 34, at 684. For more recent statistics, see MINISTRY OF JUSTICE, *WHITE PAPER ON CRIME 2008: THE CIRCUMSTANCES AND ATTRIBUTES OF ELDERLY OFFENDERS AND THEIR TREATMENT*, table 2-2-3-3, available at <http://hakusyo1.moj.go.jp/en/57/image/image/h002002003003h.jpg>. (last visited Oct. 26, 2012).

<sup>40</sup> WHITE PAPER ON CRIME 2009, pt. 2, ch. 2, sec. 3, available at [http://hakusyo1.moj.go.jp/en/58/nfm/n\\_58\\_2\\_2\\_2\\_3\\_0.html](http://hakusyo1.moj.go.jp/en/58/nfm/n_58_2_2_2_3_0.html) (last visited Oct. 26, 2012).

<sup>41</sup> GOODMAN, *supra* note 37 at 385, 387-388; John O. Haley, *Comment on Using Criminal Punishment to Serve Both Victim and Social Needs*, 72 LAW & CONTEMP. PROBS. 219 (2009), available at [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1528&context=lcp&seiredir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Djohn%2520o.%2520haley%2520comment%2520on%2520using%2520criminal%2520punishment%2520to%2520serve%2520both%2520victim%2520and%2520social%2520needs%26source%3Dweb%26cd%3D1%26ved%3D0CCEQFjAA%26url%3Dhttp%253A%252F%252Fscholarship.law.duke.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1528%2526context%253Dlcp%26ei%3D0qLUOLcAoWvigKL0YDIBg%26usg%3DAFQjCNEhWYfZ9b5f\\_nQxbnC7YGvj7HohQ#search=%22john%20o.%20haley%2C%20comment%20using%20criminal%20punishment%20serve%20both%20victim%20social%20needs%22](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1528&context=lcp&seiredir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Djohn%2520o.%2520haley%2520comment%2520on%2520using%2520criminal%2520punishment%2520to%2520serve%2520both%2520victim%2520and%2520social%2520needs%26source%3Dweb%26cd%3D1%26ved%3D0CCEQFjAA%26url%3Dhttp%253A%252F%252Fscholarship.law.duke.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1528%2526context%253Dlcp%26ei%3D0qLUOLcAoWvigKL0YDIBg%26usg%3DAFQjCNEhWYfZ9b5f_nQxbnC7YGvj7HohQ#search=%22john%20o.%20haley%2C%20comment%20using%20criminal%20punishment%20serve%20both%20victim%20social%20needs%22)

<sup>42</sup> Daniel H. Foote, *Confessions and the Right to Silence in Japan*, 21 GA. J. INT’L & COMP. L. 415 (1991).

<sup>43</sup> GOODMAN, *supra* note 37 at 396.

frequently win at the appeal level in those few cases lost at the trial court and appealed.<sup>44</sup>

Thus, there is a kind of circular process at work—the decision not to prosecute leads to a high conviction rate, while the high conviction rate means the prosecutor service must be careful to only prosecute when there is a very high certainty of guilt. These are of course generalities, and the need felt on the part of police and prosecutors to solve high profile cases does sometimes lead to indictment, trial, and conviction when the defendant is not guilty.<sup>45</sup> This same need will sometimes lead to police and/or prosecutor misconduct—especially in the process of obtaining the confession from a suspect.<sup>46</sup> Similarly, because counsel are not allowed to be present when prosecutors and/or police question a suspect and interrogation sessions are not recorded in their entirety,<sup>47</sup> the potential for abuse is high. Recent scandals involving prosecutorial misconduct, including doctoring evidence by one of Japan’s “flying squads” (special investigative units in the prosecutors’ office),<sup>48</sup> comments from members of *Saiban’in* panels suggesting that citizen jurors would be better served if the entirety of the interrogation were recorded, and Japan’s growing problem with false confession convictions that have been reversed<sup>49</sup> have led to some movement toward recording interrogation sessions in their entirety. It has been suggested that eventually such full recording will become commonplace in Japan.<sup>50</sup>

Judicial deference to prosecutors after indictment means that many defendants do not have the guarantee of neutral judicial review over whether the prosecutor’s determination of the defendant’s guilt is valid. Recent events such as the refusal of a *Saiban’in* panel to convict a defendant of murder where the defendant’s fingerprints were at the scene of the crime, but

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<sup>44</sup> MINISTRY OF JUSTICE, WHITE PAPER ON CRIME 2007: THE CIRCUMSTANCES AND ATTRIBUTES OF REPEAT OFFENDERS AND COUNTERMEASURES TO RECIDIVISM 69 [hereinafter WHITE PAPER ON CRIME 2007].

<sup>45</sup> See, e.g., Onishi, *supra* note 38.

<sup>46</sup> See, e.g., *Ex-senior officer charged over 'fumiji' interrogation ploy*, JAPAN TIMES, Nov. 23, 2007, <http://www.japantimes.co.jp/text/nn20071123a3.html>.

<sup>47</sup> See *Japanese Justice: Confess and Be Done With It*, THE ECONOMIST, Feb. 8 2007, <http://www.economist.com/node/8680941>.

<sup>48</sup> See *Prosecutor Jailed Over Tampering*, JAPAN TIMES, Apr. 12, 2011, <http://newsonjapan.com/html/newsdesk/article/88913.php>; *Prosecutor Who Cheated Gets 1 ½ Years*, JAPAN TIMES, Apr. 13, 2011, available at <http://www.japantimes.co.jp/text/nn20110413a2.html>.

<sup>49</sup> *Fukawa Incident Case Acquittal May Stir Reforms*, JAPAN TIMES, Mar. 15, 2011, <http://search.japantimes.co.jp/cgi-bin/nn20110315f1.html>; *Court Acquits Pair After Serving Decades in Jail*, JAPAN TIMES, May 25, 2011, <http://search.japantimes.co.jp/cgi-bin/nn20110525a2.html>.

<sup>50</sup> David T. Johnson, *You Don't Need a Weather Man to Know Which Way the Wind Blows: Lessons From the United States and South Korea for Recording Interrogations in Japan*, 24 RITSUMEIKAN L. REV. 13 (2007).

not on the murder weapon or in places where a robber would likely have left them, may herald less deference for prosecutorial determinations.<sup>51</sup> So, too, a sharply divided 2010 decision of the Supreme Court of Japan overturning a conviction and remanding for further trial in a case of circumstantial evidence<sup>52</sup> may reflect a changing judicial attitude. It is too early to tell.

In 2009, the PRC was given additional powers.<sup>53</sup> Now, after a supermajority of eight out of the eleven PRC members determines that a prosecutor should have prosecuted the case, the PRC decision is sent to the prosecutor's office, and the prosecutor is required to reexamine its decision. If the public prosecutor, after review, determines to prosecute, then indictment will follow, and the PRC will be so advised. If the prosecutor remains firm in not prosecuting, it must advise the PRC why it has refused to act favorably on the PRC's first determination. The PRC then reconvenes to consider the matter. Upon reconvening, the PRC may call witnesses, review facts, and receive legal advice from private attorneys. If the PRC decides (by the same supermajority of eight) a second time that the case should be prosecuted then it will report this fact to the court. Thereupon the court must appoint a *bengoshi* (a practicing lawyer or team of lawyers) to prosecute the case in place of the public prosecutor service. This team of "specially appointed" prosecutors will be recommended to the court by the Japan Federation of Bar Associations. As a practical matter, the court will appoint the team selected by the Bar, and the Bar will only select *bengoshi* who have agreed to serve as "specially appointed" prosecutors. The "specially appointed" prosecutor will then obtain the defendant's indictment and bring the case to trial (and if the defendant is acquitted will determine whether to appeal). Challenge to the indictment based on asserted errors or defects in the PRC's handling of the matter cannot be raised as a preliminary matter but is considered along with guilt or innocence as part of the trial of the criminal charge.

It is not always clear who is the victim of a crime, and thus in a position to seek a review by the PRC. For example, if a woman is raped, we easily can identify the victim and she can file a claim with the PRC, as can the family of a murder victim. But if a politician is alleged to have received a bribe, or to have filed or participated in the filing of a false financial report,

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<sup>51</sup> Kagoshima, *Gallows Averted in a First as Llay Judges Acquit*, JAPAN TIMES, Feb. 11, 2010, <http://www.japantimes.co.jp/text/nn20101211a1.html>.

<sup>52</sup> Saiko Saibansho [Sup. Ct.] Apr. 27, 2010, 2007 (A) No. 80, 64 SAIKO SAIBANCHO KEIJI HANREISHU [KEISHU] 3, <http://www.courts.go.jp/english/judgments/text/2010.04.27-2007.-A-.No.80.html> (guilty verdict based on circumstantial evidence only permitted where fact proving guilt cannot be reasonably explained except for guilt).

<sup>53</sup> For a more complete discussion of the 2009 amendments, see Fukurai, *supra* note 6.

the number of victims can be enormous. If the losing candidate or supporters of the losing candidates qualify as victims, any politician could be subject to several proceedings before the PRC. It is possible that such proceedings may take place simultaneously before different PRCs in different parts of Japan or at least in different parts of the candidate's electoral district. In fact, in the Ichiro Ozawa case discussed below there were separate PRCs in different parts of Tokyo that considered aspects of the charges—although one PRC stepped aside once the other had determined that prosecution should have been brought.<sup>54</sup>

As noted earlier, some have compared the PRC to the Grand Jury. However, unlike the U.S. Grand Jury, the PRC does not review determinations of the prosecutor to not prosecute. Indictment is an internal decision of the prosecutor service with no “buffer or referee between the Government and the people.” The PRC's review is limited solely to the decision not to prosecute.<sup>55</sup>

Unlike the Japanese public prosecutor, the PRC need not consider (indeed does not know) precedent in the prosecutor office for handling of similar cases. Likewise, it has no need to consider the gravity of prosecution on either the target of its investigation or the public interest. The PRC is not a protector of the liberties of the target of the investigation as is (or at least could be) the Grand Jury. Rather, it is a protector of the crime victim's right to have the alleged perpetrator indicted, even if the evidence against the suspect is weak, or prosecution is against the national interest. To equate the PRC with the Grand Jury is to turn the function of the Grand Jury on its head.

### III. THE AMERICAN EXPERIENCE WITH THE SPECIAL PROSECUTOR LAW

On May 25, 1973, former Solicitor General during the Kennedy Administration, Archibald Cox, was appointed by Attorney General Elliot Richardson to be the Justice Department's Special Prosecutor to look into the events surrounding the break-in at the Democratic National Committee Headquarters at the Watergate Hotel in Washington, D.C. Cox was given broad authority and discretion by the Attorney General but was a Department of Justice employee and had no “independent” status.<sup>56</sup> Cox

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<sup>54</sup> See notes and text *infra*.

<sup>55</sup> For a discussion of the function of the PRC after the 2009 amendments, see Fukurai, *supra* note 6.

<sup>56</sup> For a history of the Watergate matter and the role of the Special Prosecutor, see *The Nixon Administration and Watergate: Watergate Special Prosecutor*, HISTORY COMMONS, <http://www.historycommons.org/timeline.jsp?> (last visited Oct. 27, 2012) [hereinafter History Commons on Watergate]; *The Watergate Story*, WASH. POST, <http://www.washingtonpost.com/wp->



discovered that President Nixon had a secret recording system in the White House that might have recorded conversations by high level officials amounting to a cover up of the Watergate matter. Cox, using the Grand Jury as an investigative tool, obtained a subpoena<sup>57</sup> for the White House tapes.<sup>58</sup> In response, the President invoked Executive Privilege. Cox would not be deterred, and the President ordered the Attorney General to fire Cox.<sup>59</sup> Richardson resigned and Deputy Attorney General William Ruckelshaus similarly refused and resigned.<sup>60</sup> Solicitor General Bork then became Acting Attorney General and fired Cox.<sup>61</sup> The resignations of Richardson and Ruckelshaus, occurring on Saturday night, became known as the Saturday Night Massacre.<sup>62</sup> The firing and resignations created a public uproar leading to the appointment of Leon Jaworski as the new Watergate Special Prosecutor. Because of the events surrounding the firing of Cox and the public uproar, his independence was assured.<sup>63</sup> Jaworski subpoenaed sixty-four White House Tapes, and—when the White House refused to produce them—instituted litigation to obtain them.<sup>64</sup> In *United States v. Nixon*, the Supreme Court of the United States enforced the subpoena and ordered that the tapes be produced.<sup>65</sup> Eventually, Congress considered Articles of Impeachment against the President. Rather than face impeachment, President Nixon resigned and Vice President Ford became President.<sup>66</sup>

After President Ford lost his bid for election as President to Jimmy Carter, the Carter Administration and Congress enacted a Special Prosecutor Law (the “Act”) as part of the Ethics in Government Act (1978) that created

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srv/politics/special/watergate/part1.htm (last visited, Oct. 27, 2012) [hereinafter The Washington Post on Watergate].

<sup>57</sup> See Jim Mokhiber, *A Brief History of the Independent Counsel Law*, PUBLIC BROADCASTING SERVICE, May 1998, <http://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html>.

<sup>58</sup> A Congressional Committee also sought the tapes and compromised with the White House by agreeing to accept White House summaries of the tapes. Cox, however, refused and insisted on getting the tapes himself. *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* Bork has been criticized in some circles for his act. However, it can be argued that the point had been made by the Richardson and Ruckelshaus resignations, and that the country needed an Attorney General.

<sup>62</sup> *Id.*

<sup>63</sup> See *United States v. Nixon*, 418 U.S. 683, n.8-9 (1974) (concerning the regulations governing Special Prosecutor Jaworsky’s authority).

<sup>64</sup> History Commons on Watergate, *supra* note 56; The Washington Post on Watergate, *supra* note 56.

<sup>65</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>66</sup> *1974 Year in Review: Ford Becomes President*, UPI.COM, [http://www.upi.com/Audio/Year\\_in\\_Review/Events-of-1974/Ford-Becomes-President/12305808208934-2/](http://www.upi.com/Audio/Year_in_Review/Events-of-1974/Ford-Becomes-President/12305808208934-2/) (last visited Oct. 29, 2012).

an independent office of Special Prosecutor.<sup>67</sup> The Act had a sunset provision after five years and was extended after its initial termination date but with amendments that gave the Attorney General more authority and latitude.<sup>68</sup> Thus, the Attorney General could remove a Special Prosecutor (now called an Independent Counsel) for good cause. Further renewals and amendments were made to the law until it expired on June 30, 1999, when Congress refused to extend it. In 1988, in *Morrison v. Olson*, the Act survived a challenge to its constitutionality.<sup>69</sup>

Critical to the discussion herein is the fact that, regardless of the tightening and/or loosening of provisions in the law, a constant was that the appointment of an Independent Counsel was always ultimately in the hands of the Attorney General,<sup>70</sup> and that the Attorney General had the authority to remove an Independent Counsel for misconduct or other “good cause.”<sup>71</sup> Just as public opinion played a role in Presidential decisions to sign extensions of the Act, notwithstanding their objections to its provisions, so too public opinion likely affected the determinations of the Attorney General as to whether to seek appointment of an “Independent Counsel.”

To supporters of the Act, an Independent Counsel was required to protect against corruption at the highest levels of government. The Watergate matter was seen as the primary example supporting a need for such a law.<sup>72</sup> To others, the Watergate matter disclosed that the system worked. Namely, while Cox was gone the Special Prosecutor was not. Leon Jaworski carried on Cox’s work and eventually the President resigned and several law violating aides were convicted.<sup>73</sup> Others saw the law as a

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<sup>67</sup> 28 U.S.C. §§ 591-599. Whether legislation to create such an office was necessary is subject to debate. Some can draw the conclusion from the Cox/Jaworski Watergate experience that an independent office of Special Prosecutor was necessary, while others might look to the experience to show that the system worked even in the absence of special legislation. For the argument that a Special Prosecutor Law is necessary, see Erwin Chemerinsky, *Learning the Wrong Lessons From History: Why There Must be an Independent Counsel Law*, 5 WIDENER L. SYMPOSIUM J. 1 (2000).

<sup>68</sup> See Mokhiber, *supra* note 57.

<sup>69</sup> *Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>70</sup> *Id.* at 695 (“We note nonetheless that under the Act the Special Division has no power to appoint an independent counsel *sua sponte*; it may only do so upon the specific request of the Attorney General, and the courts are specifically prevented from reviewing the Attorney General’s decision not to seek appointment, § 592(f).”).

<sup>71</sup> *Id.* at 692 (“because the independent counsel may be terminated for ‘good cause,’ the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act. Although we need not decide in this case exactly what is encompassed within the term ‘good cause’ under the Act, the legislative history of the removal provision also makes clear that the Attorney General may remove an independent counsel for ‘misconduct.’”).

<sup>72</sup> Chemerinsky, *supra* note 67.

<sup>73</sup> Michael DeHaven Newsome, *Independent Counsel? No. Ombudsman? Yes.: A Parable of American Ideology and Myth*, 5 WIDENER L. SYMPOSIUM J. 141 (2000).

fundamental challenge to the power of the Executive Branch and a fundamental change in the nature of American democracy.<sup>74</sup>

One need not go far to recognize that the Act, placed in the hands of opponents of the President in a legislative branch dominated by the opposition party, is a powerful tool for making trouble and distraction. Justice Scalia in his dissent in *Morrison* aptly noted:

Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naive, ineffective, but, in all probability, "crooks." And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution. The present statute provides ample means for that sort of attack, assuring that massive and lengthy investigations will occur, not merely when the Justice Department in the application of its usual standards believes they are called for, but whenever it cannot be said that there are "no reasonable grounds to believe" they are called for. The statute's highly visible procedures assure, moreover, that unlike most investigations these will be widely known and prominently displayed. Thus, in the 10 years since the institution of the independent counsel was established by law, there have been nine highly publicized investigations, a source of constant political damage to two administrations.<sup>75</sup>

Special Prosecutors were appointed during the term of each President in office during the law's efficacy.<sup>76</sup> Its most "productive" use was in connection with the Iran Contra controversy. Independent counsel Lawrence Walsh had fourteen people indicted and obtained eleven convictions. The most visible and highest ranking of the officials prosecuted were the President's National Security Advisor (whose conviction was overturned on appeal), his subordinate (whose conviction was also overturned on appeal) and a State Department official who was convicted of two misdemeanor charges (and was later pardoned by the President). The most senior official investigated was a Cabinet Secretary who was pardoned before trial.<sup>77</sup> The most debated use was the investigation of the so-called Whitewater matter

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<sup>74</sup> Angela L. Beasley, *The Ethics in Government Act: The Creation of a Quasi-Parliamentary System*, 5 WIDENER L. SYMPOSIUM J. 275, 276 (2000).

<sup>75</sup> *Morrison*, 487 U.S. at 713.

<sup>76</sup> See Mokhiber, *supra* note 57.

<sup>77</sup> WALSH IRAN CONTRA REPORT, SUMMARY OF PROSECUTIONS, available at <http://www.fas.org/irp/ofdocs/walsh/summpros.htm> (last visited Oct. 10, 2012 at 11:30 PM).

that then expanded to the Monica Lewinsky matter during the Clinton Administration. The Special Prosecutor Act was only allowed to permanently expire after the Whitewater Special Counsel's report and the abortive attempt to convict President Clinton of impeachment that was based on the Report issued by the Special Prosecutor.<sup>78</sup> It appears that both the public and Congress at that point in time determined that the utility of the office was not worth the potential for problems that it could create.

The abolition of the Office of the Independent Counsel has not stopped Congress, or a single House in the hands of the opposition party, from pressing its political advantage by demanding appointment of a special counsel to investigate actions of a sitting administration<sup>79</sup> or even of a prior administration.<sup>80</sup> Removing the statutory requirement for appointment (when certain conditions have been met) has left the Attorney General with the normal prosecutorial discretion as to how to proceed—including the power to appoint a special prosecutor within the Department of Justice.<sup>81</sup>

While both the majority and dissent in *Morrison* focused on the separation of powers question posed by the Government in Ethics Act, Justice Scalia in his dissent quoted from a speech by former Attorney General (later Justice of the Supreme Court) Robert H. Jackson. Jackson focused on the rights of the subject of an inquiry by prosecutors, and the need for prosecutors to have and properly exercise discretion:

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<sup>78</sup> See Mokhiber, *supra* note 57.

<sup>79</sup> Letter from the House Judiciary Committee to the President of the United States (Oct. 4, 2011) (public record), available at <http://judiciary.house.gov/news/pdfs/Special%20Counsel%20for%20Fast%20and%20Furious.pdf>; John Bresnahan, *Conyers Wants Probe Into CIA Tapes*, POLITICO (Jan. 2, 2008, 04:44PM), [http://www.politico.com/blogs/thecript/0108/Conyers\\_wants\\_special\\_counsel\\_on\\_CIA\\_tapes.html](http://www.politico.com/blogs/thecript/0108/Conyers_wants_special_counsel_on_CIA_tapes.html).

<sup>80</sup> Conyers Calls for Special Counsel on U.S. Attorney Report, U.S. House of Representatives, Committee on the Judiciary, Sept. 29, 2008. Leslie Schulman, *Conyers calls for special counsel in CIA interrogation videos probe*, JURIST, Jan. 16, 2008, <http://jurist.org/paperchase/2008/01/conyers-calls-for-special-counsel-in.php>; see also, *Key senator calls for special counsel for leaks probe*, REUTERS, June 17, 2012, <http://www.reuters.com/article/2012/06/17/us-usa-security-leaks-idUSBRE85G0ET20120617>.

<sup>81</sup> Jeremy Polofsky & James Vicini, *U.S. Prosecutor Named to Probe CIA Prisoner Abuses*, REUTERS, Aug. 24, 2009, <http://www.reuters.com/article/2009/08/24/us-usa-cia-justice-idUSTRE57N2X020090824>; CNN Wire Staff, *Justice Narrows CIA Torture Probe to 2 Deaths*, CNN POLITICS, June 30, 2011, [http://articles.cnn.com/2011-06-30/politics/justice.torture.probe\\_1\\_prisoners-in-cia-custody-top-al-qaeda-prisoners-interrogation-techniques?\\_s=PM:POLITICS](http://articles.cnn.com/2011-06-30/politics/justice.torture.probe_1_prisoners-in-cia-custody-top-al-qaeda-prisoners-interrogation-techniques?_s=PM:POLITICS) (reporting that interrogators in 99 cases were exonerated while 2 deaths warranted further investigation); Marc A. Thiesson, *The CIA's Exoneration and Holder's Reckoning*, WASH. POST, July 4, 2011, [http://www.washingtonpost.com/opinions/the-cias-exoneration-and-holders-reckoning/2011/07/04/gHQASrfnxH\\_story.html](http://www.washingtonpost.com/opinions/the-cias-exoneration-and-holders-reckoning/2011/07/04/gHQASrfnxH_story.html) (reporting on special Prosecutor's report that there were no crimes to prosecute); *Times Topics: CIA Interrogation Tapes*, N.Y. TIMES, Nov. 9, 2010, [http://topics.nytimes.com/top/reference/timestopics/organizations/c/central\\_intelligence\\_agency/cia\\_interrogation\\_tapes/index.html](http://topics.nytimes.com/top/reference/timestopics/organizations/c/central_intelligence_agency/cia_interrogation_tapes/index.html) (reporting that the special prosecutor had cleared both CIA officers and lawyers in the CIA Tapes destruction matter).

There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints . . . . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted . . . it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.<sup>82</sup>

The quotes from Justice Scalia and Justice Jackson reflect a concern that special counsel laws are inherently biased against the person being investigated because the Special or Independent Counsel has only one case to consider and only one suspect to investigate. This does not change even if the Special Prosecutor staffs the office with professional prosecutors past and/or present.<sup>83</sup>

These concerns should be borne in mind in the context of Japan when considering the unbridled power of an individual citizen to cause a PRC

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<sup>82</sup> R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940).

<sup>83</sup> Geoffrey Moulton Jr. & Daniel C. Richman, *Of Prosecutors and Special Prosecutors: An Organizational Perspective*, 5 WIDENER L. SYMPOSIUM J. 79, 83-84 (2000).

investigation of a particular person—and even more so by the unbridled power of a supermajority of individual citizens to compel the prosecution of that person. This is particularly so because a public prosecutor has already determined either that there is insufficient evidence that the individual charged committed a crime or that for some other public policy reason prosecution should not be undertaken.

#### IV. RECENT ACTIONS BY JAPAN'S PROSECUTION REVIEW COMMISSION

Because of their significance, the actions concerning the PRC compelled prosecution of Ichiro Ozawa are handled separately in Part IV. That said, since the enactment of the 2009 amendments to the PRC law, a Commission has compelled prosecution in four other cases. These cases provide sufficient evidence to consider whether the PRC amendments have advanced the cause of justice in Japan.

##### A. *The Akashi Bridge Indictment*

During the summer, numerous city-sponsored fireworks festivals are held throughout Japan.<sup>84</sup> These celebrations draw huge crowds, and many visitors travel both to and from the displays by train. After the fireworks festival held in the seaside town of Akashi, a large crowd gathered at the pedestrian overpass bridge leading to the railway station. In the ensuing rush to the train station eleven people died and hundreds were injured.<sup>85</sup> The City of Akashi disciplined seven city employees for failure to properly plan event security.<sup>86</sup> The police investigation referred twelve people, including the police official who had been in charge of crowd control at the railroad station<sup>87</sup> to the public prosecutor office, which charged three Akashi City officials, the policeman, and a private security employee with professional negligence.<sup>88</sup> They were all convicted by the District Court, a

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<sup>84</sup> *Ten Die in Crowd Crush After Fireworks*, CNN WORLD, July 21, 2001, [http://articles.cnn.com/2001-07-21/world/japan.stamped\\_1\\_fireworks-display-hyogo-prefecture-japan?\\_s=PM:asiapcf](http://articles.cnn.com/2001-07-21/world/japan.stamped_1_fireworks-display-hyogo-prefecture-japan?_s=PM:asiapcf).

<sup>85</sup> *10 Die in Fireworks Show Crush*, L.A. TIMES, July 22, 2001, <http://articles.latimes.com/2001/jul/22/news/mn-25331>; Colin Joyce, THE TELEGRAPH, July 22, 2001, <http://www.telegraph.co.uk/news/worldnews/asia/japan/1334903/Festival-crush-kills-10-in-Japan.html>.

<sup>86</sup> *7 Civil Servants Punished Over Akashi Fireworks Stamped*, THE FREE LIBRARY, July 8, 2002, [http://www.thefreelibrary.com/\\_/print/PrintArticle.aspx?id=88685855](http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=88685855).

<sup>87</sup> *7 Civil Servants Punished Over Akashi Fireworks Display*, KYODO NEWS INT'L July 5, 2002, <http://www.thefreelibrary.com/7+civil+servants+punished+over+Akashi+fireworks+stamped e.-a088685855>.

<sup>88</sup> *Five Facing Imprisonment Over Fatal Crush on Akashi Overpass*, JAPAN TIMES, July 30, 2004, <http://www.japantimes.co.jp/text/nn20040730a9.html>.

conviction that was upheld by the High Court.<sup>89</sup> The Chief and Deputy Chief of the police station responsible for the overpass were not indicted.<sup>90</sup> In the first case under the amended PRC Act, the local PRC, responding to complaints from victims' families, determined that the police chief should be indicted,<sup>91</sup> and the Chief was placed on trial by a body of lawyers selected by the Kobe District Court.<sup>92</sup>

*B. The JR Fukuchiyama Line Train Wreck in Amagasaki*

In April of 2005, a JR West-operated Fukuchiyama Line train traveling at an excessive speed jumped the track on a curve in Amagasaki, crashing into residential buildings abutting the track. Over 100 people were killed in the accident and over five-hundred were injured.<sup>93</sup> Families of the deceased and some injured parties urged the government to prosecute the railway and its senior officials for professional negligence in failing to install certain equipment that could have prevented the accident. JR West disciplined several employees. The executive responsible for train safety measures and devices was indicted by the public prosecutors and charged with professional negligence.<sup>94</sup> Although relatives sought the indictment of three other executives, including the President of JR West, the public prosecutors declined to indict. The matter was taken up by the local PRC, which indicted the three other executives.<sup>95</sup>

The trial of the executive in charge of safety concluded in January of 2012.<sup>96</sup> The District Court held that there was no professional negligence because the accident was not foreseeable and there was no reason for the executive to have ordered the safety device to be installed prior to the

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<sup>89</sup> *Sentences Stand for Four in Fatal Akashi Crush*, JAPAN TIMES, Apr. 7, 2007, <http://www.japantimes.co.jp/text/nn20070407a6.html#>.

<sup>90</sup> *Ex-cop Pleads Not Guilty in Fatal '01 Akashi Crush*, JAPAN TIMES, Jan. 20, 2012, <http://www.japantimes.co.jp/text/nn20120120a2.html>.

<sup>91</sup> The deputy died prior to the PRC determination.

<sup>92</sup> *Akashi Policing on Trial*, JAPAN TIMES, Jan. 24, 2012, <http://www.japantimes.co.jp/text/ed20120124a1.html>.

<sup>93</sup> *Toll in Japan Train Crash Tops 100*, MSNBC.COM, Apr. 27, 05. [http://www.msnbc.msn.com/id/7624164/ns/world\\_news/t/toll-japan-train-crash-tops/](http://www.msnbc.msn.com/id/7624164/ns/world_news/t/toll-japan-train-crash-tops/). Although original estimates of the injured were in the 450 range, eventually the number was placed at over 500.

<sup>94</sup> Scott North, *Japanese Trial Puts a Culture in Shock*, ASIA TIMES ONLINE, July 15, 2009, <http://www.atimes.com/atimes/Japan/KG15Dh01.html>.

<sup>95</sup> Daisuke Mori & Eri Kurokawa, *Uphill Battle for Prosecution in JR West Case*, DAILY YOMIURI, July 8, 2012, <http://www.yomiuri.co.jp/dy/national/T120707002361.html>.

<sup>96</sup> *EDITORIAL: Former President's Acquittal Doesn't Lessen JR's Responsibility for Disaster*, ASAHI SHIMBUN, Jan. 12, 2012, <http://ajw.asahi.com/article/views/editorial/AJ201201120048>.

accident.<sup>97</sup> The prosecutor service declined to appeal, rendering the acquittal final.<sup>98</sup>

Although the one person against whom the public prosecutors had believed there was sufficient evidence to warrant prosecution has been found not guilty, the PRC law amendments mandate prosecution once the PRC has voted twice to indict and thus the case against the three officials who did not have direct safety responsibilities (and hence are a step removed from the safety decision that was at the heart of the criminal trial and are at the heart of the PRC's required indictment) must continue. Experts believe that, in light of the acquittal of the former head of safety, it is highly unlikely that the three under charges will be convicted.<sup>99</sup>

### C. *The July 2010 Indictment of Alleged Swindler*

In July of 2010, the PRC in Naha, Okinawa twice determined that prosecutors should have indicted the head of a securities firm for fraud in connection with the sale of securities. Mandatory prosecution was required.<sup>100</sup> In March 2012, the defendant was found not guilty.<sup>101</sup> This was the first case forced to indictment by the PRC that went to trial. The court appointed prosecutors have filed an appeal.

### D. *The Chinese Ship Captain's Indictment*

Both Japan and China have conflicting claims to certain islands under Japanese administration called the "Senkaku Islands" in Japan and the "Diaoyu Islands" in China.<sup>102</sup> In September of 2010, a Chinese fishing

<sup>97</sup> *Deadly Crash Could Not Have Been Foreseen: Court Clears Former JR Chief in '05 Derailment*, JAPAN TIMES, Jan. 12, 2012, <http://www.japantimes.co.jp/text/nn20120112a1.html>; *Ex-exec Cleared in Japan Train Crash that Killed 107*, YAHOO! NEWS, Jan. 11, 2012, <http://ph.news.yahoo.com/ex-exec-cleared-japan-train-crash-killed-107-042406282.html>; *Amagasaki Crash Acquittal May Stand*, JAPAN TIMES, Jan. 21, 2012, <http://www.japantimes.co.jp/text/nn20120121a1.html>.

<sup>98</sup> *JR West Ex-Chief's Crash Acquittal to be Finalized*, JAPAN TIMES, Jan. 26, 2012, <http://www.japantimes.co.jp/text/nn20120126a7.html>.

<sup>99</sup> See, e.g., *JR West Cannot Evade Responsibility as Company*, DAILY YOMIURI, Jan. 12, 2012, <http://www.yomiuri.co.jp/dy/editorial/T120112004668.htm>.

<sup>100</sup> *Inquest Panel Indicts Alleged Swindler*, JAPAN TIMES, July 19, 2010, <http://www.japantimes.co.jp/text/nn20100719a3.html>.

<sup>101</sup> *FOCUS: Court Ruling Sheds Light on Indictment Proceeding*, MAINICHI DAILY NEWS, Mar. 19, 2012, <http://mdn.mainichi.jp/mdnnews/national/archive/news/2012/03/19/20120319p2g00m0dm003000c.html>; *Acquittal in First Mandatory Fraud Trial*, JAPAN TIMES, Mar. 15, 2012, <http://www.japantimes.co.jp/text/nn20120315a3.html>.

<sup>102</sup> Joyman Lee, *Senkaku/Diaoyu: Islands of Conflict*, HISTORY TODAY 61:5, 2011, <http://www.historytoday.com/joyman-lee/senkakudiaoyu-islands-conflict>; see also *China Making Waves Again With Senkaku Islands Incursion*, DAILY YOMIURI, July 14, 2012, <http://www.yomiuri.co.jp/dy/editorial/T120713003770.htm>.



trawler in what Japan considers to be its territorial waters around the islands rammed two Coast Guard cutters sent to escort it out of the area. The ship was then taken into Japanese custody as was its captain. The ship and its crew were quickly repatriated to China. The captain remained in Japanese custody. China protested and an international dispute ensued, with China cutting off supplies of rare earth metals that are required by numerous Japanese industries, particularly the electronics industry.<sup>103</sup> The incident was defused, but not resolved, when Japan sent the captain back to China<sup>104</sup> without any criminal indictment. Japan's Justice Minister characterized the return as not politically motivated.<sup>105</sup>

After the return of the captain, a protest was filed with a local PRC on Okinawa. After twice determining that the Chinese ship captain should have been indicted, a mandatory indictment was set in motion.<sup>106</sup> China immediately reacted by calling the indictment unlawful, calling on Japan to take action to better relations between the two countries.<sup>107</sup> Considering that the captain was in China and unlikely to voluntarily return to Japan to stand trial, there was little likelihood that a meaningful criminal proceeding would be held.<sup>108</sup> Indeed, because the indictment could not be served on the captain within the time required by Japanese law, the court eventually dismissed the indictment.<sup>109</sup>

## V. THE OZAWA PROSECUTION

Ichiro Ozawa is one of Japan's best-known and most powerful political figures. He was a prominent member of the ruling Liberal Democratic Party (LDP) and rose to be the Secretary General of the LDP when Toshiki Kaifu was Prime Minister. He was a protégé of Kakuei

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<sup>103</sup> Keith Bradsher, *Amid Tension, China Blocks Crucial Exports to Japan*, N.Y. TIMES, Sept. 23, 2010, [http://www.nytimes.com/2010/09/24/business/global/24rare.html?\\_r=1](http://www.nytimes.com/2010/09/24/business/global/24rare.html?_r=1); David Husband, *On-Shoring the Production of Rare Earth Metals*, HARVARD SECURITY J., Mar. 7, 2012, <http://harvardnsj.org/2012/03/on-shoring-the-production-of-rare-earth-metals/>.

<sup>104</sup> *Times Topics: Zhan Qixiong*, N.Y. TIMES, Sept. 27, 2010, [http://topics.nytimes.com/top/reference/timestopics/people/z/zhan\\_qixiong/index.html](http://topics.nytimes.com/top/reference/timestopics/people/z/zhan_qixiong/index.html).

<sup>105</sup> Minoru Matsutani, *Yanagida Won't Meddle with Prosecutors*, JAPAN TIMES: CABINET INTERVIEW, Oct. 9, 2010, <http://www.japantimes.co.jp/text/nn20101009a3.html>.

<sup>106</sup> *Senkaku's Chinese Skipper Indicted*, JAPAN TIMES, Mar. 16, 2012, <http://www.japantimes.co.jp/text/nn20120316a8.html>.

<sup>107</sup> Xinhua, *Japanese Lawyer's Indictment Against Chinese Captain "Unlawful"*, PEOPLE'S DAILY ONLINE, Mar. 16, 2012, <http://english.peopledaily.com.cn/90883/7759946.html>.

<sup>108</sup> *See Japan Indicts Chinese Trawlerman at Centre of Spat*, YAHOO NEWS, Mar. 14, 2012, <http://news.yahoo.com/japan-indicts-chinese-trawlerman-centre-spat-055211174.html>.

<sup>109</sup> *Naha Court Drops Charges Against Chinese Fishing Boat Captain*, JAPAN TODAY, May 18, 2012, <http://www.japantoday.com/category/crime/view/naha-court-drops-charges-against-chinese-fishing-boat-captain/comments/popular/id/2398375>.

Tanaka, who would later become Japan's Prime Minister<sup>110</sup> and Shin Kanemaru, an LDP "Kingmaker."<sup>111</sup> Both Tanaka and Kanemaru saw their careers end in financial and corruption scandals.<sup>112</sup> Ozawa's close relationship with both Tanaka and Kanemaru also placed him under scrutiny by the prosecutor service.<sup>113</sup>

It appears that two events at about this time dramatically changed Ozawa from what can be considered a loyal LDP political boss to a rebel within the LDP and government in general. One was a heart attack, which he suffered at a relatively young age, and the other was the First Gulf War and the failure of Japan to actively support the United States by sending mine sweepers to the Gulf.<sup>114</sup> Ozawa's view was overruled by older party leaders who embraced the view of the powerful Cabinet Legislation Bureau that such action violated Article 9 of the Constitution, the Renunciation of War clause.<sup>115</sup> This event put Ozawa on a collision course with the bureaucracy.

Ozawa apparently became convinced that politicians should take responsibility for setting government policy and that they should be held accountable for their policy choices through election campaigns. The post-World War II domination of the LDP coalition of conservative parties and the weakness of the Social Democratic Party (SDP) as opposition did not compel politicians to be responsible for choices as there was no effective opposition that could unseat the LDP. In part, the system was supported by the electoral system, which was a multi-seat district system under which voters in large districts cast a single vote but chose several members for the Diet. This system meant that some LDP members had to run against other LDP members, thereby splitting the LDP vote while virtually insuring that some members of the opposition SDP would achieve election. While the SDP was the official opposition, the reality was that it was dependent on the multi-seat system for its continued existence. In essence, the SDP was

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<sup>110</sup> See, e.g., JACOB M. SCHLESINGER, *SHADOW SHOGUNS: THE RISE AND FALL OF JAPAN'S POSTWAR POLITICAL MACHINE* 172-184 (Stanford Univ. Press, 1999).

<sup>111</sup> *Id.* at 157-228; LOUIS D. HAYES, *INTRODUCTION TO JAPANESE POLITICS*, 98, 106 (M.E. Sharpe ed., 5th ed. 2009).

<sup>112</sup> *Id.* at 106-07.

<sup>113</sup> SCHLESINGER, *supra* note 110, at 267-68.

<sup>114</sup> A sample of the effect of the Gulf War on Ozawa's thought process can be gleaned from ICHIRO OZAWA, *BLUEPRINT FOR A NEW JAPAN* 36-45 (Louisa Rubinfien trans., Kodansha Int'l, 1994).

<sup>115</sup> Richard J. Samuels, *Politics, Security Policy and Japan's Cabinet Legislation Bureau: Who Elected These Guys Anyway?* (JPRI, Working Paper No. 99, 2004), available at <http://www.jpri.org/publications/workingpapers/wp99.html>; see also, SCHLESINGER, *supra* note 110, at 256-58 (the unnamed "official government commission" referred to is undoubtedly the Cabinet Legislation Bureau).

dependent on the LDP. The multi-seat system worked for the benefit of both the dominant LDP and the significantly weaker SDP.

Ozawa became a supporter of electoral reform and tried to move the LDP to support such reform.<sup>116</sup> He broke with the LDP on the issue of electoral reform and sided with the Opposition causing the LDP government of Prime Minister Miyazawa to fall. Ozawa left the LDP and started a new Party (Japan Renewal Party) taking with him the over thirty LDP members who had supported his vote against the Miyazawa government. After the ensuing election, Ozawa was mainly responsible for organizing a coalition of parties that brought to an end the LDP's almost forty years of uninterrupted power and brought in the first non-LDP Prime Minister (Morihiro Hosokawa) since 1955.<sup>117</sup> As had been the case while he was in the LDP, Ozawa remained a "power behind the throne" when Prime Minister Hosokawa took the titular lead of the coalition. Ozawa was not able to hold the coalition together and it crumbled after nine months in office. These nine months were, however, a groundbreaking time for Japan.

In 1993, Prime Minister Hosokawa gave the first ever apology by a Japanese Prime Minister for Japan's treatment of Korea and Koreans during the colonial period<sup>118</sup> and recognized the responsibility of Japan for its wartime acts.<sup>119</sup> Ozawa was the prime mover behind the reforms that saw an end to Japan's multi-seat districts in favor of a system of single-seat districts and proportional representation (essentially the current system)<sup>120</sup> although Ozawa would have preferred a system of single-seat districts with no proportional representation seats.<sup>121</sup>

<sup>116</sup> EXCLUSIVE INTERVIEW/ Ozawa: Democracy has not taken hold' in Japan, THE ASAHI SHIMBUN, Feb. 24, 2012, [http://ajw.asahi.com/article/behind\\_news/AJ201202240048](http://ajw.asahi.com/article/behind_news/AJ201202240048).

<sup>117</sup> RAY CHRISTENSEN, ENDING THE LDP HEGEMONY: PARTY COOPERATION IN JAPAN 11-12 ("Ozawa Ichiro was the key actor in 1993 because he led the most significant defection of politicians from the LDP, an act that brought down the government. He also brought together the non-LDP coalition government that took power after the 1993 election, and he led the effort to change the electoral system and to reform Japanese politics.").

<sup>118</sup> Yoshibumi Wakamiya, INTERVIEW/ Morihiro Hosokawa: Genuine Nationalism Includes Tolerance, Respect, ASAHI SHIMBUN, Sept. 4, 2010, <http://www.asahi.com/english/TKY201009030509.htm> l.

<sup>119</sup> *Stop the Denial, Says Hosokawa : Prime Minister Wants Japan to Face its Past*, L.A. TIMES, Aug. 17, 1993, [http://articles.latimes.com/1993-08-17/local/me-24500\\_1\\_world-war-ii](http://articles.latimes.com/1993-08-17/local/me-24500_1_world-war-ii).

<sup>120</sup> Hosokawa Morihiro, Prime Minister of Japan, Policy Speech to the 127th Session of the National Diet (Aug. 23, 1993) (transcript available at <http://www.kantei.go.jp/foreign/127.html>) ("Given the many shortcomings induced by systemic fatigue in the present multiple-representative constituencies for the House of Representatives, I will urge replacing this election system with a combination of single-representative constituencies and proportional representation.").

<sup>121</sup> "The main hindrance to political dynamism today is over-emphasis on proportional representation ... The first step in restoring dynamism and leadership is the reestablishment of the principle of majority rule. I believe that a single-seat district electoral system is the most efficient and direct way of recovering majority rule. Given Japan's relatively homogeneous electorate, whose ideological outlooks tend not to

Ozawa is a strong believer in the responsibility of political leaders to make policy and thus would downgrade the status and authority of bureaucrats.<sup>122</sup> Political leaders, in turn, would have to account for policy decisions in elections where there were two strong parties vying for votes.<sup>123</sup> The prosecutors recalling his strong support in the Diet of both Tanaka and Kanemaru and his former close ties to them have been suspicious of his conduct. Ozawa continues to be one of the most active and successful political funds recipients, notwithstanding his recent indictment.<sup>124</sup>

In 2003, Ozawa merged his party into the Democratic Party of Japan and together with Yukio Hatoyama became one of the leaders of the party and one of their principal political strategists. He is regarded as the strategist behind the DPJ's 2007 victory in the Upper House election that paved the way for the 2009 DPJ victory in the Lower House election. Ozawa became DPJ Secretary General but relinquished the post as a

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diverge too widely, elections are likely to become battles between two large teams. The demands of competition will mean the emergence of two dominant parties that share fundamental goals for Japan's future. Additionally, a single-seat district system will make transfer of power easier. ... We can probably avoid radical changes and ameliorate some of the weaknesses of single-seat systems by including elements of proportional representation. But a simple single-seat district electoral system will be the most effective route if what we are seeking is bold and large-scale political reform. ... However, I do not necessarily support a "combined" proportional representation and single-seat district electoral system." See OZAWA, *supra* note 114 at 66-68; see also Takayuki Sakamoto, *Explaining Electoral Reform: Japan versus Italy and New Zealand*, 5 PARTY POLITICS 419, 422 (1999), available at <http://faculty.smu.edu/sakamoto/PP.pdf>. Sakamoto refers to the corrupting influences of the multi-seat district system challenged by reformers by noting that since party faithful competed against each other in multi-seat elections policy issues were not significant in the election campaign, rather constituency services and large campaign spending was seen as the primary factor for election, saying "[t]heir need to run successful campaigns against party colleagues (as well as candidates of opponent parties) propelled constituency services and the large campaign spending to manage their personal vote-mobilization machines because competition based on policy issues was an ineffective strategy for those who stood on the same party platforms where party discipline was strong" (citation omitted). *Id.*

<sup>122</sup> In his blueprint for a "new Japan," Ozawa writes: "Cabinet ministers and parliamentary vice-ministers should reply to Diet interpellation in their specific area of expertise; bureaucrats must not be given this role. In a democracy, it is politicians who have ultimate responsibility for decision making. It is they who must be called to answer, not bureaucrats..." OZAWA, *supra* note 114 at 58. He goes on to add that "[s]ome in the bureaucracy may be confused about the relationship between their work and that of politicians assigned to their offices. But politicians would not be invading bureaucratic territory. Bureaucrats will remain neutral in the government, providing technocratic assistance to the politicians. ..." *Id.* at 60.

<sup>123</sup> JOE MICHAEL SASANUMA, JAPANESE ELECTORAL POLITICS: REFORM, RESULTS, AND PROSPECTS FOR THE FUTURE 16 (2004) ("In becoming a reformer, what Ozawa sought in the new Japanese political system was to give leaders both the responsibility and the power to make the necessary political decisions. Political accountability required exchanges in power. Hence, Ozawa became a champion of electoral reform that would have voters choose between two candidates with clear policy differences.") (citations omitted).

<sup>124</sup> *Ozawa Top Recipient of Political Funds for Second Year in Row*, JAPAN TODAY, Apr. 20, 2012, <http://www.japantoday.com/category/politics/view/ozawa-top-recipient-of-political-funds-for-second-year-in-row>.

consequence of the PRC investigation into his political fund raising organization.

Ozawa challenged Prime Minister Kan in the September 2010 DPJ party presidential election and lost. At the time it was publically known that the PRC had once voted that the prosecutors should have indicted Ozawa for violations of the political fundraising reporting statutes and that a second PRC was considering such charges. Under the Japanese Constitution members of the Cabinet cannot be the subject of legal proceedings (including criminal proceedings) without approval by the Prime Minister.<sup>125</sup> As the Prime Minister is a member of the Cabinet, if Ozawa had been victorious against Kan, a second PRC vote to indict would have created the anomaly that Ozawa would have to decide whether his own prosecution should be allowed to proceed. It is unknown what effect such knowledge had on the election between Ozawa and Kan; however, it is not unrealistic to think that some DPJ members voting in the election might have wanted to avoid such a situation.

In October of 2010, the PRC, relying in part on a report prepared by the Tokyo Public Prosecutors Office that misstated the substance of an interview conducted by the prosecutors of a key Ozawa aide,<sup>126</sup> determined that Ozawa must be prosecuted.<sup>127</sup> Ozawa's trial opened a window on Japanese criminal process when it was disclosed that one of the assumed principal witnesses for the prosecution—as an Ozawa aide who had been convicted of falsifying the financial disclosure records at issue in Ozawa's case—had secretly recorded his encounter with members of the Tokyo District Prosecutors Office's Special Investigation Unit that had investigated the charges against Ozawa.<sup>128</sup> The recording disclosed that a significant

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<sup>125</sup> “The Ministers of State shall not, during their tenure of office, be subject to legal action without the consent of the Prime Minister. However, the right to take that action is not impaired hereby.” NIHONKOKU KENPO [KENPO][CONSTITUTION], art. 75.

<sup>126</sup> *Ozawa Case Tainted by False Reports / Top Investigation Squad Members Accused of Influencing Committee's Decision*, THE YOMIURI SHIMBUN, May 6, 2012, <http://www.yomiuri.co.jp/dy/national/T120505002842.htm>.

<sup>127</sup> See, e.g., Toko Sekiguchi, *Japan's Ozawa Back in Spotlight as Criminal Trial Begins*, WALL ST. J., Oct. 6, 2011, available at <http://online.wsj.com/article/SB10001424052970203476804576612311780829284.html>.

<sup>128</sup> The Public Prosecutor Service in Japan is organized both vertically and horizontally. There are District Public Prosecutor Offices in each locality where there is a District Court; there are High Public Prosecutor Offices in each location where there is a first level appeal court known as the High Court and there is a Supreme Prosecutors office located in Tokyo, the location of the Supreme Court of Japan. Some District Prosecutors Offices have Special Investigation Units whose function is to investigate high profile cases, such as the Ozawa case. Special Investigation Unit members may be sent from one location to another to assist in investigations requiring person power beyond the scope of the investigating office. Such borrowing was engaged in by the Special Investigation Unit in Tokyo that investigated the Ozawa matter.

incriminating statement attributed to the aide had, in fact, never been made.<sup>129</sup>

At the trial, the court rejected all of the interview reports and depositions taken of that aide as well as several other depositions concluding that the deposition testimony had been unfairly obtained through improper tactics.<sup>130</sup> It appears that senior members of the District Prosecutors Office in charge of the investigation may have been aware of the problems that led the court to reject the depositions but did nothing about them.<sup>131</sup> The inaccurate report was a critical part of the evidence relied on by the PRC when it determined to indict Ozawa.<sup>132</sup>

After the court declined to accept the depositions of Ozawa's aide, the press reported that it was unlikely that Ozawa would be convicted,<sup>133</sup> and Ozawa began to more assertively appear on the political scene.<sup>134</sup> Ozawa was found not guilty by the District Court on April 26, 2012.<sup>135</sup> The court was critical of the public prosecutors, finding that the Prosecutors Office had submitted falsified reports to the PRC. Although the indictment was based on such inaccurate reports, the court held that the PRC's decision to indict should not be set aside. The court thus reached the merits of the case, finding

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<sup>129</sup> *Prosecutor Botched Ozawa Case Report*, YOMIURI SHIMBUN, Dec. 17, 2011, <http://www.yomiuri.co.jp/dy/national/T111216005956.htm> (" 'When I was compiling the report while recalling my memories over several days, I mixed up my recollections of our exchanges while he was detained at the office. They aren't false,' Tashiro explained. When the inquest panel in September last year concluded for the second time Ozawa merited indictment, it said affidavits signed by Ishikawa admitting Ozawa's involvement in the case were credible. 'Ishikawa explained why he decided to admit the truth in a rational manner based on reasons including, for instance, that he himself is a Diet member elected by voters,' the panel said. This took into account the content of the investigation report.") After Ozawa's acquittal the Prosecutor General disciplined the prosecutor involved, who subsequently resigned (but was not charged with any crime).

<sup>130</sup> Masami Ito, *Court Nixes Key Depositions Against Ozawa*, JAPAN TIMES, Feb. 18, 2012, <http://www.japantimes.co.jp/text/nn20120218a1.html>.

<sup>131</sup> *Top Prosecutors Knew About False Statement in Ozawa Case, but Did Nothing*, ASAHI SHIMBUN, Mar. 2, 2012, [http://ajw.asahi.com/article/behind\\_news/social\\_affairs/AJ201203020038](http://ajw.asahi.com/article/behind_news/social_affairs/AJ201203020038). See also, *Prosecutors in Ozawa Case Face Punishment Over False Investigation Report*, THE MAINICHI, June 2, 2012, <http://mainichi.jp/english/english/newsselect/news/20120604p2a00m0na021000c.html>.

<sup>132</sup> *Prosecutors Sat on False Ozawa Report*, DAILY YOMIURI, Mar. 3, 2012, <http://www.yomiuri.co.jp/dy/national/T120302005871.htm>.

<sup>133</sup> See, e.g., Shin Watanabe & Shohei Matsuyama, *Lack of Depositions Hurdle in Ozawa Trial*, DAILY YOMIURI, Feb. 19, 2012, <http://www.yomiuri.co.jp/dy/national/T120218003836.htm>.

<sup>134</sup> *Expectations Rise for Ozawa Comeback*, DAILY YOMIURI, Feb. 19, 2012, <http://www.yomiuri.co.jp/dy/national/T120218003555.htm>.

<sup>135</sup> *Ozawa Found Not Guilty Over Political Funds Scandal*, JAPAN TIMES, Apr. 26, 2012, <http://www.japantimes.co.jp/text/nn20120426x1.html>; *Ozawa Found Not Guilty*, THE YOMIURI SHIMBUN, Apr. 26, 2012, <http://www.yomiuri.co.jp/dy/national/20120426dy01.htm>; *Ozawa Found Not Guilty of Falsifying Fund Reports*, THE ASAHI SHIMBUN, Apr. 26, 2012, [http://ajw.asahi.com/article/behind\\_news/politics/AJ201204260028](http://ajw.asahi.com/article/behind_news/politics/AJ201204260028). The High Court affirmed Ozawa's acquittal in November of 2012. See *Ozawa Relieved at Ruling / Prosecutors Disappointed; Reaction Mixed from Lawmakers*, THE YOMIURI SHIMBUN, Nov. 12, 2012, <http://www.yomiuri.co.jp/dy/national/T121112004084.htm>.

that Ozawa did not have the requisite intent to falsify the financial disclosure records and hence was not guilty.<sup>136</sup> Ozawa's membership in the DPJ was restored by the Party. Immediately thereafter, the court-appointed prosecutors determined to file an appeal of the acquittal.<sup>137</sup> The Consumption tax increase passed the Lower House with seventy DPJ members either abstaining or voting against it. Most were Ozawa supporters. Ozawa and several of his supporters have resigned from the DPJ and formed their own party.<sup>138</sup>

## VI. THE NEED FOR A "GROWN-UP" IN THE ROOM

### A. *Lessons Learned From the American Experience*

American experience demonstrates some of the problems inherent in giving either a lay body authority to indict or providing a professional with such limited scope that only a single defendant or activity is within his sights. During the civil rights revolution of the 1960s, activists from around the U.S. descended on Southern communities to exercise their constitutional rights in support of local African-Americans subjected to racial discrimination. Local residents inflamed by such "outside agitation" responded, and in some cases did so in a criminal fashion. This was the backdrop to the decision in *United States v. Cox*.<sup>139</sup> A federal Grand Jury empanelled to consider whether local residents were denying the outside demonstrators and local African-Americans their civil rights determined instead to indict the civil rights leaders. The "grown up" in the Grand Jury room was the Department of Justice that took from the local United States Attorney the authority to sign indictments and left that authority with the Deputy Attorney General who refused to sign the indictment and thus frustrated the Grand Jury's attempt to turn the process on its head.

The United States' experience with the Special Prosecutor law is illuminating and highly relevant to the Japanese PRC experiment. As Justice

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<sup>136</sup> *Court Finds Ozawa Not Guilty / Judges Acknowledge Involvement, Criticize Falsified Investigative Report*, THE YOMIURI SHIMBUN, Apr. 27, 2012, <http://www.yomiuri.co.jp/dy/national/T120426006495.htm>.

<sup>137</sup> *Prosecution Appeals Over Ozawa Ruling*, DAILY YOMIURI, May 10, 2012, <http://www.yomiuri.co.jp/dy/national/T120509005722.htm>; Minoru Matsutani, Masamii Ito & Natsuko Fukue, *Ozawa Faces Appeal Over His Acquittal: DPJ Kingpin Not Yet in Clear to Flex Clout Anew*, JAPAN TIMES, May 10, 2012, <http://www.japantimes.co.jp/text/nn20120510a1.html>.

<sup>138</sup> John Brinsley & Takashi Hirokawa, *Ozawa Forms New Japan Opposition Party in Challenge to Noda*, BLOOMBERG, July 11, 2012, <http://www.bloomberg.com/news/2012-07-11/ozawa-sets-up-new-japan-opposition-party-in-challenge-to-noda.html>; *Japan's Ichiro Ozawa Forms Rival Political Party*, BBC NEWS, July 11, 2012, <http://www.bbc.co.uk/news/world-asia-18794030>.

<sup>139</sup> *Supra* note 21 .

Scalia had predicted in his dissent in *Morrison*,<sup>140</sup> the law became a tool for political opponents of the Executive branch, regardless of political party affiliation, and neither party lamented its demise. The use of the Special Prosecutor Law had a significant effect on the Executive Branch, especially when the President was in the prosecutor's sights, as most cogently demonstrated by the Whitewater Special Prosecutor investigations and the resulting unsuccessful impeachment trial of President Clinton.

While Japan does not have the terrible and unforgivable slavery and Jim Crow history of the United States, it does have local differences with the national government. These differences show themselves most significantly in places like Hokkaido, where the Ainu<sup>141</sup> and their descendants are discriminated against, and in Okinawa.<sup>142</sup> It is not unrealistic to think that a "runaway" PRC in Okinawa could and would require indictment for purposes other than simply enforcement of the criminal law. Indictment could be seen as a means of protest and as a method of bringing local problems to national attention. It could be used as a weapon in the ongoing debate regarding the size of foreign (United States) troops on Okinawa defending places like Tokyo and Osaka.<sup>143</sup> Since PRCs can themselves initiate investigations and then compel indictments this potential for mischief exists without any outside or victim complaint.

The experience of the United States with the Special Prosecutor law shows that it is dangerous to the rights of others (and the national interest) to give investigation and indictment decisions to an individual or group with a narrow focus of investigating a single individual or event. While PRC can investigate a wide range of matters the reality is that when complaints are

<sup>140</sup> *Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>141</sup> See UNITED NATIONS, COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, QUESTIONS BY THE RAPPORTEUR, Nov. 17, 2009; see also WORLD INDIGENOUS PEOPLES NETWORK AINU, KEY POINTS OF THE REPORT OF THE "PANEL OF EXPERTS ON AINU POLICY COUNTERMEASURES", available at <http://www.win-Ainu.com/Ainu%20Panel%20Experts%20Special%20Report%20Points.pdf>; Masami Ito, *Ainu Outside Hokkaido also Marginalized: Poll*, JAPAN TIMES, June 25, 2011, <http://search.japantimes.co.jp/cgi-bin/nn20110625a9.html>; Ogawa et al. v. Governor of Hokkaido, an English translation may be found at Saeko Kawashima, Apx. B, *The Right to Effective Participation and the Ainu People*, 11 INT'L J. ON MINORITY & GROUP RIGHTS 21 (2004).

<sup>142</sup> UN COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, UN COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION: CONCLUDING OBSERVATIONS, JAPAN (2001), available at <http://www.unhcr.org/refworld/docid/3df9b15d4.html>; UN COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, QUESTIONS BY THE RAPPORTEUR IN CONNECTION WITH THE CONSIDERATION OF THE THIRD TO SIXTH PERIODIC REPORTS OF JAPAN, (2009), available at [http://74.125.93.132/search?q=cache:ZCVdkm4vg2sJ:www2.ohchr.org/english/bodies/cerd/docs/AdvanceVersions/CERD-C-JPN-6-](http://74.125.93.132/search?q=cache:ZCVdkm4vg2sJ:www2.ohchr.org/english/bodies/cerd/docs/AdvanceVersions/CERD-C-JPN-6-Add1.doc+japan+ainu+discrimination+2010+buraku&cd=3&hl=en&ct=clnk&gl=us)

[Add1.doc+japan+ainu+discrimination+2010+buraku&cd=3&hl=en&ct=clnk&gl=us](http://74.125.93.132/search?q=cache:ZCVdkm4vg2sJ:www2.ohchr.org/english/bodies/cerd/docs/AdvanceVersions/CERD-C-JPN-6-Add1.doc+japan+ainu+discrimination+2010+buraku&cd=3&hl=en&ct=clnk&gl=us).

<sup>143</sup> It is relevant that in the debate as to how to deal with the Futenma Airbase some proposals to move troops from Okinawa to the main Islands of Japan have been rejected by the Japanese government because of objection by local residents on the main islands.



brought to the PRC they are then involved in a limited investigation and in view of the short term of service PRC members are basically involved in single issue or defendant matters with no “institutional” memory or history or guides. In this sense they face similar but accentuated problems as the Special Prosecutor.

*B. Lessons Learned From PRC Cases*

*1. The Potential for Partisan Abuse of the PRC Law*

As was the case with the American experience with the Special Prosecutor Law, so too the PRC law holds the potential for partisan use and abuse. The Ozawa case is a clear example of this potential. Ozawa had for years been in the crosshairs of the Public Prosecutor’s Office. After all, Tanaka and Kanemaru, both of whom were the subjects of criminal prosecutions, mentored him. Yet the public prosecutors concluded that they simply could not make out a case and declined to go forward. Considering Ozawa’s rocky relationship with the Japanese bureaucracy, of which the Public Prosecutor Office is a part, it would appear that if the public prosecutors had a case, they would have pursued it.

There is no evidence or reason to believe that the complaint to the PRC was made for partisan or political reasons or for any reason other than good citizenship and all in accordance with the law. But the Ozawa situation shows how a political operative could abuse the PRC system to create difficulties for a political opponent.

The charge against Ozawa had significant political repercussions, whether intended or otherwise. The mere unfolding of the PRC process had the effect of forcing Ozawa to resign as Secretary General of the DPJ and might have cost him the Prime Minister post.

Eleven lay persons with no particular experience with the criminal process, no experience in dealing with prosecutorial discretion, and not having the “big picture” approach that public prosecutors presumably have (but rather having only the alleged “victim’s concerns”) before them should be compelling indictment and prosecution especially when there are public interest or security interests or other national interests at stake.

*2. The Potential for Abuse When the Public Interest Need Not Be Considered By an Indicting Body*

Members of the public, when presented with a charge against a single individual, especially one who is well known and has been the subject of

numerous news reports (some of which may have been uncomplimentary) simply do not have the broad reach of knowledge of matters that may be outside the formal reports they are given but that may affect prosecutorial discretion. For example, members of the PRC need not take into account the public interest in not proceeding against the defendant. The case of the Chinese ship captain would appear to be a prime example of this type of problem.

The captain's release was only brokered after an extremely sharp reaction by China and actions that had a direct and harmful effect on Japanese industry as a whole, but especially the electronics industry, on whose exports so much of the Japanese economy is dependent. There appears to be no indication that such policy considerations were considered by the PRC before handing up its judgment that indictment must proceed.

Indeed, as Professor Fukurai notes, PRCs may be utilized to embarrass the national government. The Chinese ship captain's indictment created a brief stir that went almost, but not completely, unnoticed by China and Chinese citizens. However, it could have once again ignited the kinds of demonstrations and counter measures in and by China that had caused the Captain's release in the first place. Nor do PRC members have to consider the effect of indictment on the accused or the public in general. Only the effect on the complaining party would appear to be relevant to a PRC determination.

### *3. The Potential for Damage to Innocent Persons Caught in the PRC Investigation Process*

The PRC "reform" has not been very successful. Court appointed prosecutors have yet to win a case based on a PRC mandated indictment. The reputations of PRC charged defendants have been damaged. The desire for vengeance by victims or families of victims may have been somewhat met, but innocent persons have been needlessly charged and tried for offenses that professional prosecutors believed should not be pursued.

### *4. The PRC Process Has Placed Stress on the Rule of Law*

Respect for the rule of law may have suffered. The statute of limitations for professional negligence in Japan is five years.<sup>144</sup> The alleged criminal incident occurred in 2001. The PRC indictment occurred in 2010.

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<sup>144</sup> KEIJI SOSHOHO [KEISOHO][C. CRIM. PRO.] art. 250.

At the time of the incident, the PRC was not permitted to compel prosecution, thereby raising questions as to whether, the statute having expired prior to the amendment, the PRC law was applicable at all, or, if applicable, whether it violated Japan's ex post facto principles. The prosecution has argued that because a former police officer was both charged and convicted, the Chief and such officer were "accomplices," and hence the statute was tolled during the trial of the original case.<sup>145</sup> However, the Supreme Court of Japan has indicated that "aider and abettor" responsibility involves a measure of intent. Thus, in holding that a creator of a file sharing computer program was not an aider and abettor of those who used the program to violate the copyright of others the Supreme Court of Japan noted:

An "accessory" set forth in Article 62, paragraph (1) of the Penal Code refers to a person who, with the intent of contributing to another person's commission of a crime, gives tangible or intangible aid so as to make it easy for such other person to commit a crime . . . a person shall be judged to be an accessory when he/she performs an act that will make it easy for another person to commit a crime, while perceiving and accepting such nature of his/her act, and the principal has actually committed a criminal act.<sup>146</sup>

It is difficult to conceive of the police chief being an abettor who gave "tangible or intangible aid . . . with the intention of contributing" to professional negligence. Negligence, as in professional negligence, presupposes lack of intent to cause injury.<sup>147</sup> The court appointed

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<sup>145</sup> KEIJI SOSHOHO [KEISOHO][C. CRIM. PRO.] art. 254; *Ex-Cop Pleads Not Guilty in Fatal '01 Akashi Crash*, JAPAN TIMES, Jan 20, 2012, <http://www.japantimes.co.jp/text/nn20120120a2.html>. A dictionary definition of the word "accomplice" is a "person who knowingly helps another in a crime or wrongdoing, often as a subordinate." Definition of "accomplice", DICTIONARY.COM, <http://dictionary.reference.com> (search "accomplice"). In the instant prosecution it is argued that the Chief committed professional negligence in that he should have foreseen the danger and acted to prevent it. There is no argument that he did in fact foresee the danger and conspired with his subordinate to do nothing to prevent it. As being an accomplice involves a degree of criminal intent, it is difficult to imagine one negligently acting as an accomplice.

<sup>146</sup> Saiko Saibansho [Sup. Ct.] Dec. 19, 2011, 2009 (A) No. 1900, 9:65 SAIKO SAIBANSHO KEIJI HANREISHU [KEISHU], <http://www.courts.go.jp/english/judgments/text/2011.12.19-2009.-A-.No..1900.html>.

<sup>147</sup> Rodney Mesriani, *Differentiating Intentional Torts From Negligence*, TARGETLAW.COM, <http://targetlaw.com/differentiating-intentional-torts-from-negligence> ("Tortious acts have two types: unintentional, or more commonly known as negligent, and intentional. Negligent torts are actions done by the tortfeasor in which he failed to exercise his duty of reasonable care toward other people, resulting to an injury-inducing accident. Being negligent is failing to do what a "reasonable person" would do when caught in the same situation.").

prosecutors cannot concede that the statute of limitations has run, as this would defeat their own indictment. There is no procedure by which either the court appointed prosecutors can acknowledge legal error by the PRC or defendant can challenge the indictment, other than through a trial on the charges. This defense of limitations will be ruled on as part of the entire decision in the case, which is expected in 2013.

5. *The PRC Process Could Damage Japan's Foreign Relations*<sup>148</sup>

Prior to the PRC amendment, a PRC in Okinawa concluded that prosecutors should have charged an employee of the United States military in circumstances where the Japanese prosecutor at the time of its initial decision did not have jurisdiction. At the time, jurisdiction lay with the United States under the Status of Forces Agreement.<sup>149</sup> Technical issues such as jurisdiction apparently were of no concern to the PRC lay participants.<sup>150</sup>

Nor are such issues likely to deter PRC action under the recent reform. It is only a question of time before a PRC in Okinawa calls for the mandatory indictment of a United States service person or an employee of the United States military in circumstances where either the United States and/or Japan conclude that there is no basis for indictment, or where Japan lacks jurisdiction under the Status of Forces Agreement (“SOFA”). Mandatory indictment could create an international incident between Japan and its single most important military partner. While such action might suit the purposes of some in Japan, it would not necessarily be in Japan’s national interest—nor would it be fair to the service person that might simply be a pawn in a domestic Japanese power struggle.

Considering that all PRC mandatory indictment cases to date either have not been, or likely will not be, successful and weighing the unsuccessful record against the almost one hundred percent conviction rate when public prosecutors charge, there is great reason to doubt that the PRC process is working as it should. Of course, it assists victims and thus may be seen as an aid to victim rights regardless of result. However, both the

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<sup>148</sup> The discussion of the Chinese ship captain situation discloses an area where foreign relations could be damaged. Here, we consider relations with the United States.

<sup>149</sup> Fukurai, *supra* note 6. The U.S. forces in Japan are subject to a Status of Forces Agreement that allocates jurisdiction between Japan and the United States in criminal cases involving U.S. personnel. Ian Roberts McConnel, *A Re-Examination of the United States-Japan Status of Forces Agreement*, 29 B. C. INT’L & COMP. L. REV. 165 (2006).

<sup>150</sup> Similarly technical concerns such as the statute of limitations may not have been of concern to the PRC that voted to indict the Police Chief.

general public and those charged have rights. It is these rights that public prosecutors theoretically take into account in utilizing discretion not to prosecute. It is unlikely that PRCs do the same.

## VII. PROPOSED AMENDMENTS TO THE PRC

*What then should be done to balance the interests of victims, the public, and the targets of PRC review? It is suggested that the PRC mechanism and the 2009 reform need not be scrapped but rather that amendment that recognizes the competing interests of the public and target should be added to the present law. This section proposes the following five amendments.*

### *A. The Judicial Secretariat Should Give Members of the PRC Training Including Training as to the Use of Prosecutorial Discretion and Why the Interests of Society are Protected by the Decision of Prosecutors*

Article 248 of the Code of Criminal Procedure of Japan makes prosecutorial discretion a matter of statutory law and provides the following criteria for guiding whether to institute prosecution even when there is evidence of guilt: character, age, and environment of the defendant, seriousness of the crime, and the circumstances surrounding the crime.<sup>151</sup> Japanese prosecutors also have guidelines that direct their use of prosecutorial discretion.<sup>152</sup>

Prosecutorial discretion is particularly relevant in the Japanese context where the decision to prosecute is tantamount to a conviction because of a conviction rate in excess of ninety nine percent. Japanese prosecutors have complete discretion to prosecute, unlike the U.S. prosecutors who, at least for federal capital offenses and “infamous crimes,” must get approval to do so from a grand jury.<sup>153</sup> While both U.S. and Japanese prosecutors possess

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<sup>151</sup> KEIJI SOSHOHO [KEISOHO][C. CRIM. PRO.] art. 248, available at <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&ft=2&re=02&dn=1&yo=code+of+criminal+procedure&x=37&y=13&ky=&p age=1&vm=02>.

<sup>152</sup> The Guidelines are translated in to English in Marcia E. Goodman, *The Exercise and Control of Prosecutorial Discretion in Japan*, 5 UCLA PAC. BASIN L.J. 16 (1986); see also West, *supra* note 34 at 689, n. 29. In addition to the statutory factors, the guidelines include such things as the conduct of the suspect since the commission of the crime, and factors that suggest that the suspect can be rehabilitated without criminal prosecution, such as the existence of a support system (family, community, employment, etc.) that would keep the suspect law-abiding in the future.

<sup>153</sup> JOHNSON, *supra* note 12, at 63-64 (“The most significant judicial attempt to control prosecutor discretion occurred in the late 1970s when High courts ruled in two separate cases that prosecutors had abused their discretion to charge. In both cases, however, the Supreme court reversed the High Courts, thereby affording prosecutors almost complete insulation from judicial scrutiny of their charging decisions.”).

prosecutorial discretion, Japanese prosecutors have a special category of discretion known as “suspension of prosecution,” for which there are formal rules and guidelines.<sup>154</sup> Suspension does not mean that the prosecutor has doubts about the evidence in the case—where such doubts exist the prosecutor can simply decide not to prosecute—but rather it means that, while the prosecutor is convinced of the defendant’s guilt, the prosecution is not moving forward because it is considered in the interest of justice not to proceed. This is not simply a ruse to cover up a lack of evidence in cases but instead a special category concerning which records have been kept since 1909.<sup>155</sup> In making this decision the Public Prosecutor Office engages in a quasi-judicial function and bases its determination on factors that indicate whether incarceration and/or criminal prosecution should be set aside so that the defendant can be rehabilitated. Suspension of prosecution is a significant element of Japan’s criminal justice system. For example, during the period from 1997-2006 prosecutors never prosecuted more than ten percent of all cases sent to them by police authorities; suspension of prosecution determinations outweighed lack of evidence as the reason for failing to prosecute by more than two to one in each of these years.<sup>156</sup> Discretion not to send cases to the prosecutor office from the police authorities<sup>157</sup> as well as to not prosecute and/or to suspend prosecution of cases sent is an important aspect of the criminal justice system as it furthers the goal of rehabilitation.<sup>158</sup>

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<sup>154</sup> Marcia E. Goodman, *The Exercise and Control of Prosecutorial Discretion in Japan*, 5 UCLA PAC. BASIN L. J. 16 (1986); Daniel H. Foote, *Prosecutorial Discretion in Japan: A Response*, 5 UCLA PAC. BASIN L. J. 96 (1986).

<sup>155</sup> See Shigemitsu Dando, *System of Discretionary Prosecution in Japan*, 18 AM. J. OF COMP. L. 518 (1970).

<sup>156</sup> WHITE PAPER ON CRIME 2007, 63, charts 2-2-3-2 and 2-2-3-3. .

<sup>157</sup> Like the prosecutor service, so too the Japanese police (acting under supervision of the prosecutor) have an authority to fail to send cases forward. Known as *bizai shobun* the authority is based on Article 246 of the Code of Criminal Procedure which directs police to forward cases to the prosecutor “provided however, that this shall not apply to cases which have been specially designated by a public prosecutor.” KEIJI SOSHOHO [KEISOHO][C. CRIM. Pro.] art. 246, available at <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&ft=2&re=02&dn=1&yo=code+of+criminal+procedure&x=37&y=13&ky=&page=1&vm=02>.

<sup>158</sup> GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS*, 415-16 (Wolters Kluwer Law & Bus., 3d ed. 2012) (“The prosecutor’s decision to suspend prosecution is governed by Article 248 of the Code of Criminal Procedure and internal procurator policies written down in the Prosecutor’s Manual. Local prosecutor offices may have their own policies to supplement the Manual. The determination is not subject to judicial review and the Manual is not considered as a rule that must be followed by the prosecutor (as might be the case in the United States). The device of suspension of prosecution is considered an important weapon in the fight against crime in Japan. By giving the defendant a second bite at the apple, the prosecutor is attempting to restore the defendant to a state of harmony with and return him/her to society. It is felt that the shame of having gone through the initial process will serve the accused in good stead and result in his turning from crime to a restored position in society. Rehabilitation is the goal of suspension of prosecution.”).

The training of PRC members should include sample instructions prepared by the Supreme Court's Secretariat that, amongst other things, explain the value of prosecutorial discretion and the need for the PRC to consider the victim's claim, the rights of the target of their investigation, and the public interest so that members of the PRC can apply similar standards to the decision whether to compel prosecution.

PRCs should be advised that their role is determining whether, in the face of evidence of guilt, the prosecutor has fairly and objectively made the decision not to prosecute and, if so, that statutorily based determination should be upheld. As things now stand, the PRC reviews the matter *de novo* using the prosecutors' dossier as a starting point, to determine whether there was sufficient evidence so that the prosecutor should have indicted. This status takes the important factor of prosecutorial discretion off the table.

Prosecutorial discretion can be a subject of abuse—both when deciding to prosecute and when determining not to prosecute. For this reason, it is important that prosecution offices exercise the discretion in a consistent manner. “To maintain ‘tolerable consistency’ in discretionary prosecutorial decision-making, each prosecutor in the system must have some notion of the criteria that he and his fellows are applying.”<sup>159</sup> In Japan, this is achieved through the use of guidelines and collegial decision making.<sup>160</sup> When a PRC reviews the exercise of prosecutorial discretion, the prosecutor office must be prepared to explain how its determination not to prosecute a particular case is consistent (or if inconsistent why it is inconsistent) with prior practice. The various objective and subjective factors considered by the prosecutor service in making a determination not to prosecute must be laid before the PRC so that the prosecutor's action can be measured by the appropriate criteria.

PRCs should also be informed that exercising prosecutorial discretion is not a unique Japanese practice. Rather it is used by various and sundry prosecutor services from a wide range of countries and legal systems.<sup>161</sup>

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<sup>159</sup> Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 7 (1971).

<sup>160</sup> JOHNSON, *supra* note 12, at 140 (“...it is not so much the individual prosecutor who exercises discretion in Japan as it is the *prosecutors collectively*. Indeed, from arrest to detention, investigation, charge, and trial, almost all major discretionary decisions are made collectively, after thorough consultation among at least several prosecutors.”) (emphasis original).

<sup>161</sup> OZAWA, *supra* note 114 at 14 (“There are a number of well-known instances where prosecutors have seemingly adopted policies of nonprosecution, such as Attorney General Robert H. Jackson's refusal to enforce the District of Columbia criminal libel provisions, the English police prosecution policy refusing to enforce the antigambling laws, Attorney General William P. Rogers' policy barring federal prosecutions for conduct previously prosecuted in state courts, and Israeli Attorney General Haim Cohen's directions to local prosecutors regarding abortion.”) (footnotes omitted).

If PRCs are to make the ultimate decision whether or not to prosecute and if such decision is to be made in a structured fashion that is cabined by objective factors rather than some ulterior motive be it vengeance or political, then PRCs should have both the authority and knowledge that prosecutors have as to the utility of prosecutorial discretion. This includes knowledge of the factors that should be considered when deciding not to prosecute, even in the face of evidence of guilt. The current system fails to account for appropriate prosecutorial discretion. This should be changed. While it is true that PRCs may obtain legal advice at the first round determination of whether to prosecute and must obtain such assistance at the second round determination,<sup>162</sup> there is no requirement that the inquest assistant lawyer provide advice as to the proper use of prosecutorial discretion. Indeed, this subject is not mentioned in the Japan Federation of Bar Associations' comments on the function of inquest assistants.<sup>163</sup> This should be changed.

*B. Prosecutors Should Be Required to Give PRCs Exculpatory Evidence So That They Can Determine Not Simply Whether There is Enough Evidence to Indict but Rather Whether it is Fair to All Parties, Including the Target of the PRC Review*

Under the Code of Criminal Procedure, Japanese prosecutors have traditionally not been required to give either suspects or the accused exculpatory evidence. This practice is in the process of modification as a consequence of the *Saiban'in* mixed lay/professional panel procedure and a series of abuses by Japanese prosecutors. Thus, in 2005, the Code was amended to provide for a form of pre-trial procedure in *Saiban'in* cases in which prosecutors are required to give defense counsel the evidence they intended to submit at trial. In addition, defense counsel is permitted to ask for production of other evidence relevant to the case believed to be in the possession of the prosecutor. The court in non-*Saiban'in* cases may order similar pre-trial procedures and disclosures when the court considers it necessary.<sup>164</sup> While not the equivalent of a *Brady v. Maryland*<sup>165</sup> due process requirement for disclosure, the Code allows the defense to request

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<sup>162</sup> See JAPAN FEDERATION OF BAR ASSOCIATIONS, *A New System of Inquest Prosecution Committees to Start*, available at <http://www.nichibenren.or.jp/en/meetings/year/2009/090201.html> (“When a Committee for the Inquest of Prosecution reviews whether a decision by public prosecutors not to prosecute a case is appropriate or not, it may voluntarily entrust an attorney as an inquest assistant to seek legal advice, and for the second inquest, an inquest assistant is mandatory.”).

<sup>163</sup> *Id.*

<sup>164</sup> KEIJI SOSHOHO [KEISOHO][C. CRIM. Pro.] art. 316-2—316-32.

<sup>165</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).



production of exculpatory evidence the existence of which it may know, but the substance of which it is not known. For example, even where the prosecutor has not indicated that it will submit DNA results at trial defense counsel may ask for production of DNA collected at the crime scene or DNA test results.<sup>166</sup> In response to such request, the court may order the prosecutor to disclose such exculpatory evidence. This procedure has resulted in several instances where convicted persons have had their cases re-opened as a consequence of the production of evidence revealing their innocence.<sup>167</sup> As the PRC is to determine whether the prosecutor was correct in not charging, it should have available to it the same evidence the prosecutor had when making the decision not to prosecute, not simply the evidence the prosecutor might present at trial.

The Secretariat's sample instructions to the PRC discussed above should include rules dealing with the use of circumstantial evidence. PRC members should not indict merely because they feel the evidence could point to the target of their review, but must consider whether the evidence rises to the level that would allow a court (if it believed the evidence and found it credible) to convict. The decision not to prosecute likely took this factor into account, and, if not, should have. This is especially so considering the almost 100% conviction rate in public prosecutor tried cases and the deference shown to the public prosecutors by the court.<sup>168</sup>

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<sup>166</sup> See, e.g., KEIJI SOSHOHO [KEISOHO][C. CRIM. Pro.] art. 316-20, available at JAPANESE LAW TRANSLATION, <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&ft=2&re=02&dn=1&yo=code+of+criminal+procedure&x=37&y=13&ky=&page=1&vm=02> (last visited Oct. 19, 2012):

With regard to evidence other than that which has been disclosed pursuant to the provisions of Article 316-14 and paragraph (1) of Article 316-15 and which is deemed to be connected to the allegation prescribed in paragraph (1) of Article 316-17, the public prosecutor shall, upon the request of disclosure by the defendant or his/her counsel, promptly disclose it by the means prescribed in item (i) of Article 316-14 when he/she deems it appropriate considering the extent of the connection, other necessities for disclosure in order to prepare for the defense of the accused, and the contents and the extent of possible harmful effects of disclosure. In this case, the public prosecutor may, when he/she deems it necessary, designate the time or method of disclosure or set appropriate conditions for the disclosure.

(2) When the accused or his/her counsel requests the disclosure prescribed in the preceding paragraph, he/she shall clearly indicate:

- (i) Matters to identify the evidence which he/she is requesting for disclosure;
- (ii) The connection between the allegation prescribed in paragraph (1) of Article 316-17 and the evidence which is requested for disclosure and other reasons why the disclosure is necessary to prepare for the defense of the accused.

<sup>167</sup> See, e.g., *DNA Evidence Again Points to 2nd Man in Mainali Case*, DAILY YOMIURI, Mar. 7, 2012, <http://www.yomiuri.co.jp/dy/national/T120306005456.htm>.

<sup>168</sup> The Supreme Court of Japan has recently held that a conviction based on indirect evidence (e.g., circumstantial evidence) is only permitted when the evidence can only be explained by the defendant's guilt. See Saiko Saibansho [Sup. Ct.] Apr. 27, 2010, No. 2007 (A) 80, 64:3 SAIKO SAIBANSHO KEIJI

Finally Japanese prosecutors and presumably PRCs should have the same ethical obligations as U.S. prosecutors to see not only that the guilty are convicted (when prosecution is called for) but also that the innocent are not improperly charged.<sup>169</sup>

*C. All PRC Proceedings Should Be Kept Secret While the Proceedings Are Pending*

Two important values are at stake here: the credibility of the PRC process and protection of the target of the investigation's rights. Once it is known that a PRC complaint is being considered there is pressure on the PRC, at least from the victim and the victim's supporters, and in high profile cases there may also be pressure from news organizations or others, to indict. Once the public knows that a first PRC has voted for indictment there is pressure on the second review panel to reach the same conclusion. This pressure increases once it is known that at least eight people have already decided that the prosecutor's determination not to indict was erroneous. Members of the second review panel may feel pressure to indict simply because the first panel made that decision. A decision not to indict could be seen by the public as disrespect of the first panel. The PRC, both at its first and second review, should be free of pressure to indict just as it should be free of pressure not to indict. Secrecy concerning the name of the target, process, and interim decisions (such as the determination of a first panel to indict) is thus required.

Public reports of a PRC recommendation to prosecute after a first round review not only identify the target of the investigation but also gives the public impression that the target of the investigation is guilty of a crime. Otherwise why would the PRC suggest indictment? This report has the potential to damage the reputation of innocent persons. Of course, indictment itself contains that potential, but that cannot be avoided, as secret trial of indicted persons present a far worse situation. And, if the target is a political or otherwise well-known figure, why should that figure have to step down from normal activities when they have not been convicted or even charged with any crime? The reality is that the public prosecutors have already said the target should not be prosecuted. It would seem the presumption of innocence, or at least not guilt, should apply during the PRC

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HANREISHU [KEISHU], <http://www.courts.go.jp/english/judgments/text/2010.04.27-2007.-A-.No..80.html>. The PRC should be informed of this standard of proof in determining whether to indict.

<sup>169</sup> Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259 (2000).

process (of course the presumption of innocence should also apply during trial, at least until a guilty verdict is rendered).<sup>170</sup>

Rights of the accused take a back seat under the current PRC procedure. Indeed, at about the same time as it expanded the PRC's authority, the Diet enacted a change in the Criminal Procedure Code that allows victims of certain crimes to actively participate in the criminal trial.<sup>171</sup> When the case is before a *Saiban'in* panel consisting of lay jurors, it is easy to understand that the presence of the victim standing before the bar and accusing the indicted of the crime could have a powerful emotional effect on the lay jurors. This has the potential to undermine due process rights, including the presumption of innocence.<sup>172</sup> The timing indicates that, like the PRC amendments, the Victim's Participation Law was designed to protect victim rights. However, the rights of the accused also need protection. Providing for secrecy of PRC proceedings and its first review conclusions is a small, but nonetheless necessary measure of protection.

Once an indictment has been issued, the accused should have access to the same information the PRC had access to. This would include evidence of guilt, evidence of innocence, as well as evidence that might show bias on the part of prosecutors.

*D. In Cases Where the National or Public Interest Is Implicated Indictment Should Not Be Required Until A Further Review Is Held Of How*

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<sup>170</sup> There is reason to question whether the presumption of innocence actually applies in Japan. The extraordinarily high conviction rate (over 99%) in prosecutor generated cases might reasonably lead to the conclusion that courts view their role not as determining guilt or innocence but as placing the seal of approval on the actions of the prosecutors. Lower courts can glean this role from the fact that while few persons convicted at the lower court have their convictions reversed on appeal the prosecutor service fares significantly better on appeal. See MINISTRY OF JUSTICE, WHITE PAPER ON CRIME 2007, 65, 69 (2007) (in 2006 of thirty-five appeals by prosecutors, courts reversed not guilty verdicts twenty-five times; only twenty of 9,343 convicted defendants had their verdicts reversed on appeal in the same year). Moreover, the events in the Ozawa trial (and the trial of his aides) disclose that the courts do not require that the prosecutor prove beyond a reasonable doubt that the defendant is guilty—rather the burden of proof shifts almost immediately to the defendant to prove innocence and notwithstanding the Constitutional right not to incriminate oneself the defendant had best testify and the court must be convinced that the testimony or explanation given by the defendant is reliable. Thus in the Ozawa case although the court found Ozawa not guilty because he lacked the statutorily required knowledge of falsity the court noted that it was not convinced that Ozawa did not know some of the facts in the matter because it did not find his testimony credible—not because the prosecution had shown that he knew those facts.).

<sup>171</sup> In essence the victim is an “intervener” in the case with the general rights of a party in litigation. See TOSHIHIRO KAWAIDE, VICTIM'S PARTICIPATION IN THE CRIMINAL TRIAL IN JAPAN, available at <http://www.j.u-tokyo.ac.jp/~sota/info/Papers/kawaide.pdf>.

<sup>172</sup> GOODMAN, *supra* note 158 at 451 (“The presence of the victim in the courtroom participating in the trial alongside the prosecutor and challenging the defendant not as a witness but as an interrogator is likely to have a damaging effect on the defendant's fair trial rights, especially when lay participants are on the deciding bench—and may result in more severe sentences than would be the case without lay judge participation.”).

*Indictment Would Affect the National Interest and the Conclusion Reached that Indictment Is Proper Under the Circumstances*

It is suggested that the target of the PRC review, the prosecutor's office, the Minister of Justice, Defense or Foreign Affairs should be allowed to initiate the process. A Review Panel of distinguished citizens whose determinations would be accepted by the public, such as a three or five-member board composed of persons such as retired Justices of the Supreme Court, a former head of the Japan Federation of Bar Associations, a retired Prosecutor General, a former Minister of Foreign Affairs now retired from politics (and if possible belonging to a political party that is neither the ruling party nor a member of the ruling coalition) and/or a retired president of one of Japan's national or private universities, or other similarly positioned individuals. It should hear the views of persons with relevant information about how the national interest might be affected and the weight to be given to such national interest consideration such as the prosecutor service, the target, the victim or counsel for the victim, and most importantly the government before reaching a judgment that would then be binding. Review by this panel would not be of whether there is sufficient evidence to warrant indictment but would be solely limited to whether indictment would so seriously adversely affect national security, foreign relations or the public interest that indictment should not be pursued. In this manner, public policy considerations could be discussed before a group that has both legal and policy experience and can objectively review whether the public interest is served through prosecutorial discretion not to indict.

Such suggestion is not unprecedented, as Japanese law recognizes that there are situations where the private interests of parties may need to be sacrificed in the national interest. Japan's Code of Civil Procedure (CCP) deals with requests to produce government documents. In part, it provides, that documents in the government's possession are subject to production in litigation except for a document containing a public secret that if revealed would likely harm the public interest or performance of official duties. In such cases, government documents need not be produced.<sup>173</sup> The CCP allows the government entity involved to set forth its reasons for withholding the document based on the factors contained in Article 220(iv) (b). The reasons are not conclusive. Rather, the court will review the matter

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MINJI SOSHOHO [MINSOHO](C. CIV. PRO.) 1996, art. 220(iv)(b), available at <http://www.japanese-lawtranslation.go.jp/law/detail/?printID=&ft=1&re=02&dn=1&co=01&x=40&y=14&ky=civil+code&page=60&vm=02>.

and can order production if it finds there are not reasonable grounds for the agency's view such as insufficient risk that production will harm national security, relations with a foreign state or states, or international organization, or otherwise adversely affect negotiations with a foreign state, or international organization.<sup>174</sup> Thus, the CCP recognizes that there may be situations where the private interests of a litigant may need to be sacrificed for the greater public interest. It also allows for government comment and gives the court final authority as to whether production is required.<sup>175</sup> Japan's equivalent of the Freedom of Information Act<sup>176</sup> contains a similar exception although the procedure involved differs.<sup>177</sup> It is difficult to understand why a PRC decision to indict should not be subject to similar standards, especially as experience to date indicates that the PRC process can be used for improper purposes and can adversely affect the public interest.

*E. The PRC Law Should be Amended to Make Clear That While a Convicted Party Can Appeal to the High Court, the Court Appointed Prosecutors Should Not Have the Right to Appeal From an Acquittal*

Japan follows the civil law double jeopardy rule, under which the appeal is considered as a continuation of the initial trial and thus appeal by the prosecutor is not considered as placing the defendant in jeopardy a second time.<sup>178</sup> Thus, in the normal criminal case, the prosecutor may appeal from a not guilty verdict. This is true even in the case of a judgment by a *Saiban'in* panel, although the Supreme Court of Japan has established a high burden of proof for setting aside a *Saiban'in* panel judgment.<sup>179</sup> In fact,

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<sup>174</sup> *Id.* at art. 223(4).

<sup>175</sup> Saiko Saibansho [Sup. Ct.], July 22, 2005, No. 4 (Gyo-Fu) of 2005, 59:6 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU], available at <http://www.courts.go.jp/english/judgments/text/2005.07.22-2005.-Gyo-Fu-.No..4.html>.

<sup>176</sup> Joho kokai ho [Law Concerning Disclosure of Information Held by Administrative Organs], Law No. 42 of 1999, art. 5(iii), available at <http://www.cas.go.jp/jp/seisaku/hourei/data/AIHAO.pdf>.

<sup>177</sup> Although the exemptions from production are similar the procedure involved when production is denied and court review is undertaken is not. In CCP cases the Court may conduct an in camera review of the document(s) involved, while in an FOIA type case such in camera review is not permitted. Saiko Saibansho [Sup. Ct.], Jan. 15, 2009, 2008 (Gyo-Fu), 63:1 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU], <http://www.courts.go.jp/english/judgments/text/2009.01.15-2008.-Gyo-Fu-.No..5.html>; *but cf.* Saiko Saibansho [Sup. Ct.], July 22, 2005, No. 4 (Gyo-Fu) of 2005, 59:6 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU], available at <http://www.courts.go.jp/english/judgments/text/2005.07.22-2005.-Gyo-Fu-.No..4.html>. The court's rationale in the FOIA case is questionable.

<sup>178</sup> Saiko Saibansho [Sup. Ct.], Sept. 27, 1950, 4 SAIKO SAIBANCHO KEIJI HANREISHU [KEISHU] 1805; *see also*, OPPLER, *supra* note 32, at 144.

<sup>179</sup> Saiko Saibansho [Sup. Ct.], Feb. 13, 2012, 2011 (A) No. 757, 66:2 SAIKO SAIBANCHO KEIJI HANREISHU [KEISHU], <http://www.courts.go.jp/english/judgments/text/2012.02.13-2011.-A-.No..757.html>;

even a judgment of acquittal by the District Court does not require that the defendant be granted bail during the period when the prosecutor is pursuing an appeal from a judgment of acquittal.<sup>180</sup>

In the case of a PRC-compelled indictment, there is good reason to deny the special court appointed prosecutors the right to appeal. At this point, both the public prosecutor service and the District Court will have determined that there is insufficient evidence for conviction. The defendant may well be the victim of retribution by the victim and a sympathetic PRC. The victim, the complainant and/or the PRC will have had the opportunity to have an “independent” prosecutor present the best possible case to the District Court. The victim will have had both a public prosecutor examination of the case and a judicial confirmation that the public prosecutors were correct in determining not to indict. That should be sufficient. The accused should not be required to go through yet another judicial proceeding.

District public prosecutors, having lost a case at the District Court level, have no authority to appeal on their own but must escalate the case to the High Prosecutor Office for determination of whether an appeal is proper. In contrast, court appointed prosecutors have no “reviewing body” to determine whether appeal is appropriate. To allow the court appointed lawyers to take an appeal means that the lawyers who became convinced of the guilt of the defendant while prosecuting the case, now have the right to further subject the defendant to an appeal based on their clearly biased judgment of guilt. While prosecutors have the right to appeal either from a not guilty verdict or from a sentence considered too lenient, the reality is that public prosecutors rarely exercise the appeal right.<sup>181</sup> Indeed, while the High Prosecutor office has standards and a structure for making the appeal/non-appeal decision, to allow the court appointed prosecutors carte blanche to file an appeal—and potentially to request that the defendant be denied bail pending appeal—smacks of abuse of the prosecutorial function. This is especially so in a high profile case such as Ozawa’s where the defendant likely holds views not shared by the prosecuting attorneys—those who agree with Ozawa have probably previously advised the Bar Association that they would not serve as prosecutors. This creates a potential conflict of interest between the prosecuting lawyers’ own views (political, social,

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*see also*, *Lay Judges Acquittal Reinstated*, JAPAN TIMES, Feb. 14, 2012, <http://www.japantimes.co.jp/text/n20120214a3.html>.

<sup>180</sup> Saiko Saibansho [Sup. Ct.] Oct. 5, 2011, 2011 (Shi) No. 376, 65:7 SAIKO SAIBANCHO KEJI HANREISHU [KEISHU], <http://www.courts.go.jp/english/judgments/text/2011.10.05-2011.-Shi-.No..376.html>.

<sup>181</sup> *See* JOHNSON, *supra* note 174 at 41.

governmental—all subjects on which Ozawa has written and where his views are outside the mainstream of conservative Japanese political thought) and a prosecutor's duty to both convict the guilty and not pursue the innocent. So too, handling a high profile case such as Ozawa's places the prosecuting attorneys in the public eye—a place they may wish to be for any number of personal reasons (such as potential future business as defense attorneys in high profile cases). Granting private parties unreviewable discretion to continue a prosecution once the District Court has ruled that the defendant is not guilty raises “due process” and fairness questions.<sup>182</sup>

## VII. CONCLUSION

Like Professor Fukurai, I believe that the Japanese criminal justice system needs public participation. At the post indictment stage, that participation should also limit the authority of the state so as to prevent the state from convicting a person of a crime unless the common sense of the community deems that conviction appropriate. The quasi-jury *Saiban'in* system moves in this direction and should be expanded to all major crimes. A jury, composed entirely of laypersons would be preferred, but at a minimum, there should be a mixed panel on which the lay participants confer separately from the professional judges to reach a tentative verdict before a “grand bench” of the panel meets to render a final verdict.<sup>183</sup> In all cases, the appellate court should have the right to overturn a verdict of guilty

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<sup>182</sup> Unlike the Constitution of the United States, the Constitution of Japan has no “due process” clause. However, in a recent civil litigation the Supreme Court of Japan held that the failure of the Court to require that a party be given notice of a petition so that it could respond thereto “is clearly contrary to the requirement of due process in civil procedure.” See Saiko Saibansho [Sup. Ct.] Apr. 13, 2011, 2010 (Ku) No. 1088, 65:3 SAIKO SAIBANCHO MINJI HANREISHU [MINSHU], <http://www.courts.go.jp/english/judgments/text/2011.04.13-2010.-Ku-.No.1088.html> (indicating that some form of due process may exist in civil cases. So too, a form of due process requirement exists in Japanese Administrative Law. “However, the case law doctrine that fairness in the procedure for rendering administrative dispositions must be firmly maintained, as described in 1 above, has been formed through the accumulation of a number of lower court rulings as well as the Supreme Court precedents indicated in 1 above over a long period of time, while taking into consideration the issues pointed out by Justice NASU. The legitimacy of an administrative disposition cannot be affirmed unless it is endorsed by appropriateness of the procedure for rendering it. The issue of efficiency in court proceedings must give way to the mission to ensure the execution of due process.”). See Saiko Saibansho [Sup. Ct.] June 7, 2011, 2009 (Gyo-Hi) No. 91, 65:4 SAIKO SAIBANCHO MINJI HANREISHU [MINSHU] (Tahara, J., concurring), <http://www.courts.go.jp/english/judgments/text/2011.06.07-2009.-Gyo-Hi-.No.91.html>. A similar doctrine may well be applied to PRC prosecutors who attempt to appeal an acquittal granted in a PRC required prosecution.

<sup>183</sup> Korea is experimenting with a mixed lay/professional judge panel system where the lay jurors meet separately to render their verdict that may then be reversed by the professional judges. Ryan Y. Park, *The Globalizing Jury Trial: Lessons and Insights from Korea*, 58 AM. J. COMP. L. 525 (2010), available at [http://www.law.harvard.edu/programs/plp/pdf/Globalizing\\_Jury\\_Trial.pdf](http://www.law.harvard.edu/programs/plp/pdf/Globalizing_Jury_Trial.pdf); see also, Jae-Hyup Lee, *Getting Citizens Involved: Civil Participation in Judicial Decision-Making in Korea*, 4 E. ASIAN L. REV. 177 (2009), available at [http://www.pennalr.com/media/articles/vol4/4EALR177\\_Lee.pdf](http://www.pennalr.com/media/articles/vol4/4EALR177_Lee.pdf).

when the evidence cannot support such a decision. However, public participation is best used at the pre-indictment stage to limit the authority of government to abuse its power through accusing persons of committing crimes when the common sense of the public is that such accusation is unwarranted or otherwise improper.

Writing in 1992, Professor West made suggestions for modifications of the PRC mechanism to make it a more effective check on prosecutorial discretion not to prosecute.<sup>184</sup> Japan chose a different route by giving the PRC authority to compel prosecution.

Now that the PRC “reforms” have had time to be tested and have been shown to need reform themselves, it is time to consider both the interests of targets of PRC review and/or investigation and the public interest.

The demand for vengeance in the guise of justice, or the use of criminal process to embarrass the government, or meet the demands of a local community in a dispute with the national government should not permit private parties to be the final arbiter of whether a defendant who prosecutors have determined should not be subjected to a criminal trial must stand trial. Nor should the rights of the victim complaining to the PRC overshadow the national interest or the target’s interests. Ordinary people, whatever their status or position in society or government, should not be pawns in personal, political or regional strategies. There needs to be a greater understanding of the role of prosecutorial discretion before citizens or residents can be called upon to defend themselves against the power of the state to imprison or irrevocably damage reputations. The suggestions contained above would at least provide PRC members with a greater understanding of their proper role and the proper role of prosecutorial discretion and place a “grown-up” in the room before the national interest and the rights of the target of PRC review are sacrificed to victim or parochial or local interests.

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<sup>184</sup> West, *supra* note 34, at at 722-23 (footnotes omitted).