

# Roundtable

## **Experiencing Independent Commissions: Japan v. Taiwan**

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## INTRODUCTION

Independent commissions as a novel institutional design have been spread to the world including parts of Asia. For some, the creation of independent commissions manifests government neutrality, judicialization of governance, regulatory efficiency or even a part of economic globalization that is hard to resist. For others, however, it defies administrative unity, separation of powers, or even politicization that works against its efficient promises. Notwithstanding theoretical contestations, independent commissions have been created in both Japan and Taiwan and have already had a great deal of impacts on administrative laws and even beyond. National Taiwan University College of Law is particularly honored to have Professor Katsuya Uga from University of Tokyo, Japan to share with us the experiences of independent commissions in Japan. In order to forge dialogues and develop comparative views on this important issue, we also invite Professor Jiunn-Rong Yeh to discuss the experiences of independent commissions in Taiwan. It is hoped that this roundtable may shed a light on the up-to-date development of independent commissions in Japan and Taiwan and provide accounts for their driving forces, structural constraints, operational difficulties and future challenges.

## I. OPENING REMARKS

**PROF. JIUNN-RONG YEH**

Good morning, we are honored to have Professor Katsuya Uga with us. Professor Uga has been very devoted to the area of administrative law. Our discussion today concerns the development of Japanese administrative laws with regard to its administrative structures. In particular, we shall focus on the creation of independent regulatory commissions. As we all know, in Taiwan we have confronted a fierce debate regarding independent commissions. Despite their creation, independent commissions have been questioned as to their functions and political accountability. Some began to wonder whether organizations such as Financial Supervisory Commission or Central Bank should continue to remain independent or should instead be held more accountable to political leadership. This debate has been undergoing for a while, and thus we are particularly fortunate to have Professor Uga to share with us the experiences of independent agencies or commissions in Japan. Following his presentation, I shall respond by reflecting upon the experiences of independent commissions in Taiwan as this editorial title suggests us: experiencing independent agencies—Japan v. Taiwan. My reflection will be followed by Professor Chang, Wen-Chen and

Professor Lin, Chao-Chun as discussants. In the end we will invite all of you to participate in the discussion. Now, without further delay, please join me to give Professor Uga the biggest applause and welcome him. Professor Uga, please.

## II. PROF. KATSUYA UGA

### ADMINISTRATIVE COMMISSIONS IN JAPAN

Good morning, ladies and gentlemen. It is a great privilege for me to have the opportunity to speak to you. At the outset, let me briefly outline the structure of the Japanese administrative organization. (*See* the Table 1 for government organization of Japan)

#### A. *Japanese Administrative Organization*

The organs which govern administrative business are the Cabinet Office and the eleven ministries, both of which are set-up under the control of the Cabinet. The heads of the Cabinet Office and each ministry are respectively the Prime Minister and the ministers.<sup>1</sup> As the competent ministers per the Cabinet Law, they administer the apportionment of administrative business.<sup>2</sup> The minister of each ministry is appointed from among the Ministers of State by the Prime Minister, but the Prime Minister can also serve concurrently as a minister of one of the ministries.<sup>3</sup>

Commissions and agencies are external organs in relation to the Cabinet Office or ministries. Ministries, commissions and agencies are described in the National Government Organization Act. Please see the Table 1 below, which shows ministries and with respect to which a commission or agency is an external organ. For examples, a commission which is an external organ of the Ministry of Internal Affairs and Communications is the Environmental Disputes Coordination Commission, the Ministry of Justice has the Public Security Commission as an external organ, the Central Labour Relations Commission is an external organ of the Ministry of Health, Labour and Welfare, and a commission which is an external organ of the Ministry of Land, Infrastructure and Transport is the Transport Safety Commission, the newest commission. As for commissions which are external organs of the Cabinet Office, it is necessary to look at another law, the Cabinet Office Establishment Law. The National Public Safety Commission and the Fair

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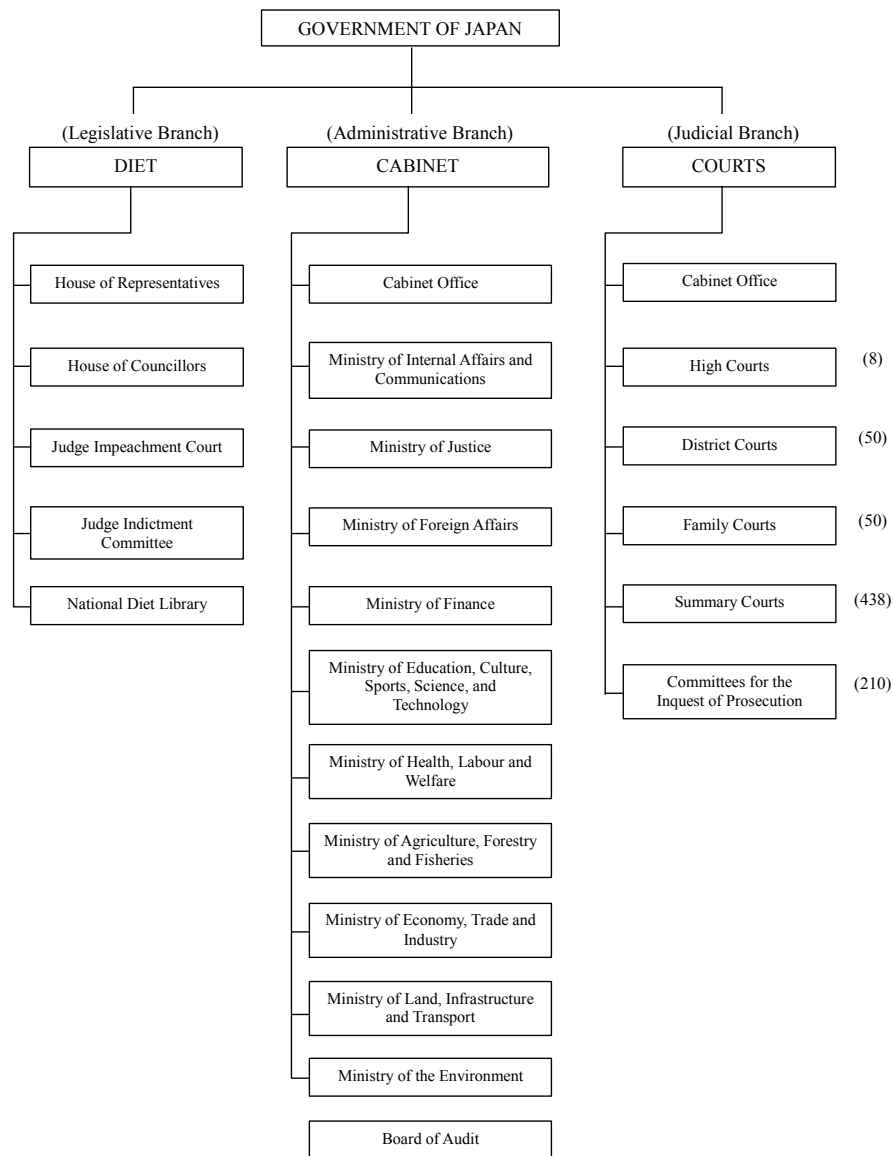
1. Kokka Gyōsei Soshikihō [National Government Organization Act], Law No. 120 of 1948, art. 5(1) (Japan).

2. Naikakuhō [Cabinet Law], Law No. 5 of 1947, arts. 2-3 (Japan).

3. Kokka Gyōsei Soshikihō [National Government Organization Act], art. 5(2) (Japan).

Trade Commission are commissions which are external organs of the Cabinet Office.

**Table 1 Government organization of Japan**



\*From: Professor Katsuya Uga.

**Table 2 Ministries, Commissions and Agencies in Japan**

Ministry	Commission	Agency
Ministry of Internal Affairs and Communications	Environmental Disputes Coordination Commission	Fire and Disaster Management Agency
Ministry of Justice	Public Security Examination Commission	Public Security Intelligence Agency
Ministry of Foreign Affairs		
Ministry of Finance		National Tax Agency
Ministry of Education, Culture, Sports, Science and Technology		Agency for Cultural Affairs
Ministry of Health, Labour and Welfare	Central Labour Relations Commission	Social Insurance Agency
Ministry of Agriculture, Forestry and Fisheries		Forestry Agency
		Fisheries Agency
Ministry of Economy, Trade and Industry		Agency for Natural Resources and Energy
		Japan Patent Office
		Small and Medium Enterprise Agency
Ministry of Land, Infrastructure and Transport	Transport Safety Commission	Japan Meteorological Agency
		Japan Coast Guard Agency
		Tourism Agency
Ministry of the Environment		
Ministry of Defense		

\* From: Kokka Gyōsei Soshikihō [National Government Organization Act], Law No. 120 of 1948 (Japan).

The head of a commission is called a chairperson and the head of an agency is called a director-general.<sup>4</sup> In situations where there is a special need, it is legally possible to set up an additional commission or agency in an already-existing commission or agency of the Cabinet Office. A past example of this was the Defense Facilities Administrative Agency, which was set up in the Defense Agency, but since the Defense Agency has become the Defense Ministry, this arrangement no longer exists. The scope and limits of the jurisdictions of respective administrative organs are stipulated

4. *Id.* art. 6.

in separate laws.<sup>5</sup> It is necessary to establish ministries, commissions, and agencies by statutes because the Diet has democratic control of the administrative organization.<sup>6</sup> Moreover, from the viewpoint of administrative management, statutory requirement is believed to be necessary so as to prevent bureaucrats from causing the hypertrophy of the administrative organization. As Article 7(7) stipulates, a commission may establish an executive office pursuant to the provisions of an act,<sup>7</sup> and as Article 7(8) stipulates, a commission may, when particularly necessary, establish a general executive office pursuant to the provisions of an act.<sup>8</sup> Both the Cabinet Office and the ministries have their respective establishment laws. In addition, for commissions and agencies, stipulations can take the form of establishment laws, such as the Act for Establishment of the Public Security Examination Commission,<sup>9</sup> but they are not necessarily limited to this. For example, the Fair Trade Commission was established in the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Antimonopoly Law),<sup>10</sup> the National Public Safety Commission and the National Police Agency were established according to the Police Act,<sup>11</sup> and the Fire and Disaster Management Agency was established according to the Fire and Disaster Management Organization Act.<sup>12</sup> A commission is independent of the ministry as far as the exercise of its function is concerned.

#### B. *Prewar Period*

Collegial administrative organs did exist in prewar Japan, for example, the Eminent Domain Review Commission and the Seafarers Review Commission, but they were very exceptional. They were independent commissions and performed quasi-judicial function. However, the General Rules on National Administrative Organization (an imperial order)<sup>13</sup> did not refer to collegial administrative organs because they were very few in number. They did not attract academic attention either.

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5. *Id.* art. 4.

6. *Id.* art. 3(2).

7. *Id.* art. 7(7).

8. *Id.* art. 7(8).

9. Kōan Shinsa Iinkai Setchihō [Act for Establishment of the Public Security Examination Commission], Law No. 242 of 1952 (Japan).

10. Shitekidokusen No Kinshi Oyobi Kōseitōrihiki No Kakuho Ni Kansuru Hōritsu [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade], Law No. 54 of 1947, art. 27 (Japan).

11. Keisatsuhō [Police Act], Law No. 162 of 1954, art. 15 (Japan).

12. Shōbō Soshikihō [Fire and Disaster Management Organization Act], Law No. 226 of 1947, art. 2 (Japan).

13. Kakushō Kansei Tūsoku [General Rules on National Administrative Organization], Imperial Order No. 122 of 1893 (Japan).

### C. *Occupation Period*

The situation changed dramatically after the war. The General Headquarters of the Allied Forces (GHQ) tried to establish numerous administrative commissions. A major aim of this was to democratize the traditional bureaucracy both at the national and local level by weakening the influence of career bureaucrats, and to safeguard against the bureaucratization of the state. However, not all administrative commissions established during the Occupation Period were the result of GHQ's suggestions. Some administrative commissions were established by the initiative of the Japanese government. This was the case for various labor commissions. One of the noticeable characteristics of these labor commissions was a unique organizational structure, i.e. they were tripartite commissions. In other words, these commissions were composed of commissioners recommended by labor unions, ones recommended by organizations of employers, and what are called "public interest" commissioners. "Public interest" commissioners are neutral commissioners and are usually chosen from among university professors, practicing attorneys, former judges, etc.

The establishment of Japanese labor commissions did not stem from pressure from GHQ to create a Japanese version of the National Labour Relations Board of the U.S. government. Rather, they were established due to the existence of a prewar tradition that labor disputes be mediated by such tripartite commissions according to the Labor Disputes Mediation Law of 1926.<sup>14</sup> On the other hand, there are some Japanese administrative commissions modeled after U.S. counterparts. For example, the Japanese Securities Exchange Commission was modeled after the U.S. SEC and the Fair Trade Commission is the Japanese counterpart of the U.S. Federal Trade Commission. They were established after the war to democratize the Japanese economy. However, it is not correct to say that they are purely imports. Even during the occupation period, the Japanese government drafted the relevant bills. Although it was in effect necessary to get approval of GHQ to submit bills to the Diet, and it was not rare for drafts to be amended due to requests of GHQ, it is most accurate to say that the finalized bills were a sort of compromise among various actors such as Japanese bureaucrats in each ministry, the administrative management section, the legislation bureau, the Japanese political parties and GHQ. This is also true for the commissions established as a result of the dissolution of the Ministry of Internal Affairs, whose jurisdiction was extensive and covered police,

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14. Rōdō Sōgi Chōteihō [Labor Disputes Mediation Law], Law No. 57 of 1926 (*repealed by Rōdō Kankei Chōseihō* [Labor Relationships Adjustment Act], Law No. 25 of 1946) (Japan).



public works, health and welfare, elections and local government etc. GHQ believed that the breakup of this mighty and powerful ministry was unavoidable. Some bureaus of the Ministry of Internal Affairs were divided and reorganized as administrative commissions to democratize the administrative structure, namely the Local Finance Commission, the National Election Management Commission and the National Public Safety Commission.

At the end of the occupation period, there were twenty-three administrative commissions at the national level. Examples include the Fair Trade Commission, the Securities Exchange Commission, the National Personnel Authority, the Radio Regulatory Council, the Central Labour Commission, the National Public Safety Commission, and the Statistics Commission. It should also be mentioned that at the local level as well, quite a few administrative commissions have been established, including the Public Safety Commission, the Eminent Domain Commission, the Education Commission, the Personnel Commission, and the Agricultural Land Commission, to name a few.

#### D. *Constitutionality of Administrative Commissions*

Although scholars were generally supportive of administrative commissions on the grounds that they would promote democratization of the administrative structure, bureaucrats often assumed a critical attitude toward administrative commissions. One big reason for criticism was the concern over their constitutionality. For example, former Finance Minister Kazuo Aoki published a book entitled “Unconstitutionality of the Fair Trade Commission and a Collection of other Legal Treaties.” Some traditional bureaucratic bodies further criticized administrative commissions as a whole. They argued as follows: Article 65 of the Japanese Constitution stipulates that “Executive power shall be vested in the Cabinet”<sup>15</sup> and Article 66(3) stipulates that “The Cabinet, in the exercise of the executive power, shall be collectively responsible to the Diet.”<sup>16</sup> It is stipulated in Article 66(1) of the Japanese Constitution that “The Cabinet shall consist of the Prime Minister, who shall be its head, and other Ministers of State as provided for by law.”<sup>17</sup> The Prime Minister representing the Cabinet exercises control and supervision over each executive branch. Thus, it is presumed that all executive power is under the Cabinet’s control and supervision and that the Cabinet is responsible to the Diet whose members are directly chosen by popular vote. This is how executive power is supposed to function under the

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15. KENPŌ, art. 65.

16. *Id.* art. 66(3).

17. *Id.* art. 66(1).

democratic control of the people where sovereignty resides. In light of this parliamentary cabinet system, the constitutionality of administrative commissions was seriously debated when postwar administrative commissions were in a germinal stage.

Traditional bureaucrats argued that the fact that cabinet control, which lies at the foundation of the parliamentary cabinet system, was insufficient and in contradiction with the requirements of democracy. In other words, the argument for unconstitutionality of administrative commissions emphasizes that under the parliamentary cabinet system, the Diet is directly accountable to the voters, the Cabinet is directly accountable to the Diet, and all administrative agencies are supposed to be directly accountable to the Cabinet, the highest administrative agency. However, administrative commissions are independent of the cabinet in relation to their exercise of administrative authority, thus they argue that such commissions are unconstitutional.<sup>18</sup>

The counterargument by the Cabinet Legislation Bureau is that the Cabinet can control administrative commissions through its power of appointment of commissioners and control over their budgets. This rationale is not widely supported by academics because the Cabinet can also appoint Supreme Court justices and control the budget of the court but that does not mean that the Supreme Court is directly accountable to the Cabinet.

The argument for the constitutionality of administrative commissions widely supported in academic circles now is that the Diet has the legislative discretion to establish administrative agencies independent of the Cabinet, in terms of the exercise of administrative power, for rational reasons. For example, in a case where it is necessary to establish administrative agencies independent of the Cabinet in order to preserve neutrality from politics, the Diet should be entitled to make such organs. In such a case, the Cabinet's responsibility to the Diet is to respect the intent of the Diet and refrain from intervening in the exercise of administrative power over administrative commissions.

There are no court decisions that have held administrative commissions unconstitutional. On the other hand, there are no court decisions that have explicitly held administrative commissions constitutional either, yet all the court decisions concerning administrative commissions assume they are constitutional. Controversy concerning constitutionality of administrative commissions has subsided now and is seldom discussed now.

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18 . KAZUO AOKI, KŌSEITORIHAKI IINKAI IKENRON SONO TANO HŌRITSU RONSHŪ [UNCONSTITUTIONALITY OF THE FAIR TRADE COMMISSION AND A COLLECTION OF OTHER LEGAL TREATIES] 37 (1976).

E. *Decline of Administrative Commissions at the National Level after the Occupation Ended*

Not only were administrative commissions criticized by traditional bureaucratic bodies out of concern over their constitutionality, they were criticized from the standpoint of administrative management as well. That kind of criticism is clearly seen in the so-called Cabinet Order Advisory Committee's recommendation issued on August 14, 1951. (The committee is established by former Prime Minister Shigeru Yoshida.) It says as follows. "It is undeniable that the administrative commission system played an important role as part of the democratization of the administrative structure. However, unlike the U.S., our social and economic conditions do not necessarily inherently require them. They lead to the expansion of organizations in vain, and their responsibility with regard to administrative affairs that actively pursue public purposes is unclear, making it difficult to accomplish administrative work, and thus they should be abolished in principle. However, with regard to administrative affairs that require mainly careful judgment from a fair and neutral standpoint, they should be maintained after streamlining and simplification."<sup>19</sup> One of the characteristics of the recommendation is its functional approach that seeks a rationale of administrative commission in its quasi-judicial adjudicatory function.

Administrative commissions were also criticized because it was difficult to find appropriate candidates for commissioner, yet the real reason behind this criticism may have been the strong antagonism felt by traditional bureaucrats towards administrative commissions because they felt that their traditional territories were being violated by them. That could explain why quite a few administrative commissions at the national level were either abolished or demoted and at the same time, most administrative commissions at the local level survived. In other words, influential bureaucrats in the central government were eager to abolish or demote *national* administrative commissions in order to enlarge their administrative territories and tried to influence the legislative process but were not interested in *local* administrative commissions because they were too remote from their national concerns.

Partly based on the recommendation of the Cabinet Order Advisory Committee and partly based on the intent of the ruling parties, quite a few administrative commissions were either abolished or reorganized as advisory councils. Examples of the demotion of administrative commissions to

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19. Seirei Kaisei Shimon No Tame No Inkai [Cabinet Order Advisory Committee], *Gyōsei Seido No Kaikaku Ni Kansuru Tōshin* [Recommendation on Administrative System Reform], 6 KŌHŌ KENKYŪ [PUBLIC L. REV.] 147, 156 (1952).

advisory councils include the Securities Exchange Commission, which was reorganized into the Securities Exchange Council, and the Radio Control Commission, which was reorganized into the Radio Control Council. Some administrative commissions were simply abolished. Because of the administrative reform of 1952, the number of administrative commissions decreased from twenty-three to eleven. However, it should also be noted that some national administrative commissions survived despite adverse winds and two new administrative commissions were established in the same year. Therefore, it is fair to say that the administrative commission system survived and took root in post-occupation Japan despite the fact that the number of administrative commissions decreased drastically.

F. *Article 3 Organs v. Article 8 Organs*

Administrative commissions were recognized as a typical form of administrative organization in the National Government Organizations Act of 1948. In Article 3(1) of this law, it is provided that “The organization of the administrative organs of the State shall be prescribed by this Act”<sup>20</sup> and Article 3(3) stipulates that “A commission and an agency shall be established under a ministry as its external organs.”<sup>21</sup>

On the other hand, Article 8 of the National Government Organization Act stipulates that, “An administrative organ of the State as set forth in Article 3 may, within the scope of the affairs under jurisdiction as prescribed by an Act, establish an organ having a council system for taking charge of the study and deliberation of important matters, administrative appeals or other affairs that are considered appropriate to be processed through consultation among persons with the relevant knowledge and experience, pursuant to the provisions of an Act or a Cabinet Order.”<sup>22</sup> These are usually called councils, etc. That means there are two different types of collegial administrative organs in the National Government Organization Act. One is a commission and the other is a council etc. A commission is sometimes called “Article 3 organ,” because it is prescribed in Article 3 of the National Government Organization Act and a council etc. is sometimes called an “Article 8 organ,” because it is prescribed in Article 8 of the same act. Enactment of the National Government Organization Act made it necessary to classify existing formal collegial administrative organs into either commission or council, etc. It has accordingly become necessary to set criteria for their classification. The criteria set by the Administrative

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20. Kokka Gyōsei Soshikihō [National Government Organization Act], Law No. 120 of 1948, art. 3(1).

21. *Id.* art. 3(3).

22. *Id.* art. 8.

Management Agency are as follows: (1) a commission has its own executive office, while a council, etc. does not; and (2) the name “commission” shall be exclusively used for an Article 3 organ. These criteria were short-lived however. The first criterion was abandoned when the Social Security Council Establishment Act was amended in 1950, permitting the Social Security Council to have its own executive office. Since then, it is not uncommon for important councils, etc. to have their own executive offices. The second criterion was abandoned when the Atomic Energy Commission Establishment Act was enacted in 1955. Although the name “commission” is used, it is not an Article 3 organ. It is an Article 8 organ.

Among administrative law scholars, whether or not an administrative organ has the authority to make a legally binding decision in its own name is important. In the professional terminology of administrative law doctrine, this type of administrative organ is called “Gyōseichō” (administrative agency). Generally speaking, Article 3 organs have that kind of authority. On the other hand, Article 8 organs do not have such authority and they can merely make recommendations or express opinions which are only advisory and not legally binding. However, there is also an exception to this rule. Some Article 8 organs do have the authority to make legally binding decisions. For example, the Social Insurance Review Council can make legally binding adjudication in its name when an administrative appeal is made to it. At the local level as well, some councils have that kind of authority. For instance, the Architecture Review Council and the Development Review Council make legally binding adjudication in their own names. Therefore, whether or not a collegial organ has the authority to make a legally binding decision cannot be a definite criterion to differentiate Article 3 organs from Article 8 organs.

Whether commissioners are full-time or part-time members cannot be a criterion for classification either. Although members of commissions are often full-time, this is not always the case. For example, the Central Labour Commission is composed of fifteen commissioners recommended by labor unions, fifteen commissioners recommended by organizations of employers and fifteen “public interest” commissioners, yet almost all of them are part-time members and no more than two “public interest” commissioners can be full-time. In the case of the Public Safety Review Commission, all seven members are part-time. In the case of the Environmental Disputes Coordination Commission, composed of seven members, three are part-time. Members of Article 8 councils, etc. are, as a rule, part-time (Council members of the prefectures and municipalities must be on a part-time basis). However, when there is special need, some full-time members are permitted. For example, in case of the Information Disclosure and Protection of Individual Information Review Council, five among fifteen can be full-time.

The Public Interest Corporation Council is organized by seven commissioners and four of them may be on a full-time basis. In case of the Transport Council, four members are on a full-time basis and two members are on a part-time basis.

The only way to distinguish an Article 3 organ from an Article 8 organ is to see if a particular collegial body is enumerated in the National Government Organization Act appended Table 1 or in Article 64 of the Cabinet Office Establishment Law.<sup>23</sup> Despite the fact that the boundary between Article 3 organ and Article 8 organ is unclear, as a general legislative policy, when a particular collegial body is given the authority to make legally binding decisions, it is in principle classified as a commission. In establishing a collegial body, it is not rare that controversy arises whether that body should be a commission or a council. This should not be over-generalized, but the tendency has been for the ruling party and bureaucrats to prefer councils and opposition parties to prefer commissions. It is understandable that the ruling party prefers councils because recommendations of councils are not legally binding and ministers retain final decision-making power, whereas commissions are independent of ministers with regard to the concrete exercise of their authorities.

It is not clear why bureaucrats tend to prefer councils to commissions. One explanation could be that if bureaucrats have to move from the Cabinet Office or ministries to executive offices of commissions, they would feel as if they were demoted, because commissions as external organs have fewer authorities than the Cabinet Office or ministries, i.e. only the head of the Cabinet Office and ministries can submit a draft bill to the Cabinet. So, if a commission has to submit a draft bill to the Cabinet, it has to ask the head of the Cabinet Office or ministries to do so. Also, only the head of the Cabinet Office and ministries can submit a budget request to the Minister of Finance and a commission cannot do so. Thus, if a commission would like to make a budget request to the Minister of Finance, it has to ask the head of the Cabinet Office or ministries to do so.

The other explanation would be that in principle a chairperson is not a Minister of State, so he or she is not a member of the Cabinet. Whether or not the head of the organization is a member of the Cabinet makes a big difference for the following reason. In Japan, the majority of bills (more than 80 percent) which are actually passed in the Diet are submitted by the Cabinet. Although there is no clear provision to the effect, it is a customary rule that the decisions of the Cabinet meeting have to be made unanimously. That means each Cabinet member has *de facto* veto power, so to speak.

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23. Naikakufu Setchihō [Cabinet Office Establishment Law], Law No. 89 of 1999, art. 64 (Japan).

Ministers are of course members of the Cabinet, thus they have de facto veto power, while the chairperson of a commission does not possess de facto veto power. This makes commissions politically weaker than ministries. Another explanation why bureaucrats tend to hate to move from ministries to executive offices of commissions could be that it is usually easier for bureaucrats to persuade ministers than commissioners. Using the terminology of public administration, “agency cost” is lower at single-person organs than collegial organs for bureaucrats. In Japan, ministers usually become spokespersons of the ministries because they have to be totally dependent on the bureaucrats of the ministries. For example, ministers often have to answer questions from Diet members in the Diet. In Japan ministers are not necessarily experts in the affairs of the ministries because they are sometimes chosen not for their expertise in a particular field but for other reasons, such as out of reward for support in an election to choose the leader of a political party, a close personal relationship with the prime minister, or popularity among voters. Even if ministers are excellent, in reality, they usually serve as ministers of the ministries only for a year or two and that is not long enough to acquire expertise in the field of a ministry. Therefore, it is totally impossible for ministers to answer all questions without the help of the most knowledgeable bureaucrats in specialized fields. Thus it is the bureaucrats who write answers to those questions. That is just one example why ministers have to have an amicable relationship with bureaucrats. It sometimes happens that they are potentially at the mercy of subordinate bureaucrats. On the other hand, in the case of commissioners, being an expert in the field is an essential requirement for the appointment. Even if some commissioners lack enough knowledge and experience at the beginning of their career as commissioners, since they have tenure for a fixed period such as three years or five years, they usually serve much longer than ministers. Thus it is generally assumed that commissioners are less dependent on the expertise of bureaucrats than ministers. Besides, chairpersons of commissions are, unlike ministers, not always obliged to attend the Diet committees and have much fewer chances to answer questions at Diet committees. In this sense, commissioners are less dependent on bureaucrats than ministers. That means that it is more likely that commissions behave against the will of the bureaucrats. For bureaucrats, if they work for commissions, “agency cost” is usually higher than working for ministers.

In choosing between commissions and councils, the question as to whether it is possible for a collegial body to make a decision which overturns the decisions of ministers of other ministries is at issue. It is a widely shared idea among bureaucrats, including those at the Cabinet Legislation Bureau, that commissions cannot overrule the decisions of

ministers because only the Cabinet is superior to ministers. For that reason, in cases where collegial bodies review administrative appeals against the decisions of ministers, they take the form of councils rather than commissions so that ministers are not bound by the recommendation of councils. Examples include the Information Disclosure and Protection of Individual Information Council, the Public Interest Corporation Council, etc. However, there is an exception to this rule. The National Personnel Authority is an administrative commission composed of 3 commissioners, and it can overturn adverse decisions made by ministers against civil servants when administrative appeals are lodged against the decisions. The National Personnel Authority is a special administrative commission because it is the only commission placed directly under the Cabinet and it can be said that it is a subsidiary organ of the Cabinet, thus it is easy to justify the National Personnel Authority overturning the decisions of ministers. However, the Environmental Disputes Coordination Commission, an external organ of the Ministry of Internal Affairs and Communication, can also overturn the decisions of ministers. It is not clear why this exception has been admitted. Chairpersons of “Article 3 organ,” in principle, possess power to appoint employees in their executive offices. However, in case of the Central Labour Relations commission, the Minister of Health, Labour and Welfare appoints employees in the executive office with the consent of the chairperson of the commission. “Article 8 organ” do not possess power to appoint employees in their executive offices. Commissions and Agencies have the power to enact legally binding regulations if there is a special statute which authorizes them to do so. In the case of the Cabinet Office and ministries, authorization by the Cabinet Office Establishment Law or the National Government Organization Act is enough for the authorization to enact regulations; authorization by special statute is not necessary. On the other hand, councils do not possess the power to enact legally binding regulations.

#### G. *Types of Commissions at the National Level*

The current commissions at the national level are classified in the following ways. First, the Board of Audit is a commission composed of three commissioners. Whether the Board of Audit belongs to the executive branch of government is an issue debated among academics, and there is a theory that the Board of Audit does not belong to the legislative, executive or judicial branch of the government, but that it is a fourth branch of the government. However, in practice, it has been treated as an administrative agency. The clear proof for this is that the Act on Access to Information Held



by Administrative Organs<sup>24</sup> and the Act on the Protection of Personal Information Held by Administrative Organs<sup>25</sup> applies to the Board of Audit. Assuming that the Board of Audit is an administrative agency, it is the most independent administrative commission because it is constitutionally independent of the Cabinet as stated in the Board of Audit Law.<sup>26</sup> It is the only administrative commission not under the jurisdiction of the Cabinet, although the commissioners of the Board of Audit are appointed by the Cabinet with the consent of the Diet. The Board of Audit makes a budget proposal to the Minister of Finance as do other administrative commissions, but if the Cabinet curtails the budget proposal for the Board of Audit submitted to the Diet, the original budget request by the Board of Audit has to be attached to the budget documents submitted to the Diet. A source of revenue in case the Diet increases the budget of the Board of Audit has to be demonstrated in these documents. This special budgetary treatment applies only to the Diet, the Supreme Court and the Board of Audit. The term of office of commissioners of the Board of Audit, seven years, is the longest among commissioners of administrative commissions. Reappointment is possible only once, so theoretically it is possible for a commissioner of the Board of Audit to retain its position for fourteen consecutive years.

The National Personnel Authority is the second most independent administrative commission. It is the auxiliary organ of the Cabinet, and neither the Cabinet Office Establishment Law nor the National Government Organization Act applies to it. Commissioners of the National Personnel Authority have a very secure occupational tenure and are not dismissed without impeachment procedures by the Diet and the Supreme Court. The Diet brings impeachment motion, and the Supreme Court holds impeachment hearings.

The third category of administrative commission is the so-called “Minister Commission.” This is a commission with a Minister of State as its chairperson. Although there are other historical precedents, at present the National Public Safety Commission is the only existing example. The authority of a “Minister Commission” is the same as other commissions. It cannot submit a draft bill directly to the Diet nor can it submit a budget request directly to the Minister of Finance. However, since the chairperson is a Minister of State, he or she can attend cabinet meetings and is in a position to exercise *de facto* veto power. Thus a “Minister Commission” is in reality stronger than other commissions. There exists an argument that a “Minister

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24. Gyōseikikan No Hoyūsuru Jōhō No Kōkai Ni Kansuru Hōritsu [Act on Access to Information Held by Administrative Organs], Law No. 42 of 1999, art. 2(1)(vi) (Japan).

25. Gyōseikikan No Hoyūsuru Kojinjōhō No Hogo Ni Kansuru Hōritsu [Act on the Protection of Personal Information Held by Administrative Organs], Law No. 58 of 2003, art. 2(1)(vi) (Japan).

26. Kaikeikensain Hō [Board of Audit Law], Law No. 73 of 1947, art. 1 (Japan).

Commission” should be entitled the same authority as a ministry. Since the National Public Safety Commission, which controls the National Police Agency, was established out of considerations of fairness and neutrality, the question also arises as to whether having a chairperson who is also a Minister of State is consistent with these ideals. The bill to amend the Police Law to make the chairperson of the National Public Safety Commission a Minister of State was submitted to the Diet in 1954 and was passed into law in the same year. Naturally there was strong criticism against the bill in the Diet, but the government did provide an explanation. According to the bill, the National Public Safety Commission is composed of a chairperson and five commissioners. The decision of the commission is made by a majority vote but the chairperson cannot vote as a rule and can decide the issue only in the case of a tie. Because the number of commissioners is five, usually a chairperson cannot cast a vote. However, when the Finance Rehabilitation Commission was established in 1998 as a “Minister Commission,” the chairperson was entitled to vote in the same manner as other commissioners. Therefore, political neutrality of the commission was a serious issue, yet it was not debated mainly because the legislation was approved by cooperation of the ruling parties and the major opposition parties and there was little confrontation among political parties, and, on the other, the Finance Rehabilitation Commission Establishment Act was limited-time legislation.

The fourth category of administrative commission is one allowed to establish a general executive office. In a general executive office, unlike ordinary executive offices, the commission is allowed to establish bureaus as ministries. Therefore commissions with general executive offices are considered to be higher in rank than ordinary commissions. The Board of Audit and the National Personnel Authority have general executive offices, and this is taken for granted because they are special commissions to which neither the Cabinet Office Establishment Law nor the National Government Organization Act applies.

However, the Fair Trade Commission is an external organ of the Cabinet Office and the Cabinet Office Establishment Law applies to this commission, yet it is uniquely allowed to have a general executive office.

The fifth category of commissions are ordinary ones to which either the Cabinet Office Establishment Law or the National Government Organization Act applies, and to which ordinary executive offices are attached.

#### H. *Recent Developments Concerning Administrative Commissions*

Lastly, let me talk about the recent developments concerning administrative commissions. At the end of the 20<sup>th</sup> century, there was a very dynamic movement toward administrative reform. Then Prime Minister

Ryutaro Hashimoto established the Administrative Reform Council. He himself took office as the chairperson of the council. The report of this council was very influential and led to a dramatic reorganization of the Japanese government. It is interesting to note that this report did not assume a critical attitude toward the administrative commission system. Rather, the system was presented in a favorable light by the report, which takes the position that the administrative commission system should be utilized when necessary to establish organs independent of the Cabinet in the interest of fairness and neutrality or expertise.<sup>27</sup>

The Japanese government has a rational reorganization policy with regard to administrative structure that is colloquially called the “scrap and build” principle. That means that if the Cabinet Office or ministries would like to establish new administrative organization such as commissions, agencies and sections, etc., it has to abolish the same type of organization to avoid bloating of the central government bureaucracy. It is the Administrative Management Bureau of the Ministry of Internal Affairs and Communication that examines the plan and gives prior approval. Because of this rational reorganization policy, it is in reality almost impossible to establish a new commission without abolishing another commission of the Cabinet Office or ministries. Thus the Ministry of Justice reorganized the Bar Examination Management Commission (Article 3 organ) as the Bar Examination Management Council (Article 8 organ) in order to establish a new commission (Human Rights Protection Commission), although it failed to establish this commission for political reasons. In 2008, the Seafarers Labour Relation Commission of the Ministry of Land, Infrastructure and Transport was abolished and the Transport Safety Commission was established as an external organ of the same ministry. Urged by the ruling party (Liberal Democratic Party) to abolish the Seafarers Labour Relation Commission, the Ministry of Land, Infrastructure and Transport acceded to the demand and planned to establish a new commission instead.

The Ministry of Health, Labour and Welfare is planning to establish a new collegial body called the Medical Safety Investigation Commission. This commission is expected to investigate the cause of an abnormal death, recommend measures to prevent a recurrence of the same kind of medical accident, and notify the police of the abnormal death in a case where it is admitted that the abnormal death was intentional or due to gross negligence. It is not clear yet whether this Medical Safety Investigation Commission will be established as an Article 3 organ or Article 8 organ. Other important developments concerning administrative commissions at the national level

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27. GYOSEIKAIKAKU KAIGI [ADMINISTRATIVE REFORM COUNCIL], SAISHŪ HŌKOKU [FINAL REPORT] (1997), <http://www.gyokaku.go.jp/siryousouron/report-final/III.html>.

include the following. First, the government is taking steps to reduce the power of the Fair Trade Commission. Economic organizations have been very hostile toward the commission. They have been particularly dissatisfied with its adjudicatory procedures. From their viewpoint, the fact the commission issues retraction orders and imposes surcharges while at the same time adjudicating administrative appeals is akin to simultaneously holding the post of prosecutor and judge. Because of strong pressure from these economic organizations, the ruling parties are planning to submit a bill which will reduce the scope of adjudication by the commission. Second, steps are being taken to reduce the power of the National Personnel Authority. The government is planning to establish a new bureau called the Cabinet Personnel Bureau and deprive the National Personnel Authority of some of its authority.<sup>28</sup> In both cases, it seems that the political weakness of these commissions is partly due to the fact that chairpersons of these commissions are not Ministers of State and do not possess *de facto* veto power.

At the local level, there has been little discussion of administrative commissions and they have taken firm hold in the Japanese system of local government. However, recently there has been some criticism directed toward education commissions. Some argue that far from the original ideal of democratizing education, education commissions have become a tool for the transmission of the wishes of the central government and the ruling parties to local public entities. Against the background of such criticism, some local governments have been asking the central government to make it optional whether or not to establish education commissions. I think it is time for me to pass the floor to Professor Yeh. Thank you for listening.

### III. PROF. JIUNN-RONG YEH

#### INDEPENDENT COMMISSIONS IN TAIWAN

Thank you very much, Professor Uga. Your presentation is excellent, interesting and really insightful. I have been trying to understand Japanese government structure for a while, but nothing compared to your talk today provided me with such a clear and insightful picture of it. Your discussion includes both Japan's government structure and more valuably, a geopolitical analysis on the choice of organizational forms and bureaucratic responses to the types of government organization. My task now is to provide reflections from the aspect of Taiwan, thus shedding some light on possible comparisons.

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28. Kyodo News, *Aso Seeks 'Amakudari' Ban in '09*, JAPAN TIMES, Feb. 4, 2009, at 1-2.

A. *The Government Agencies Structure of Taiwan*

Let me briefly introduce the government structure of Taiwan (Table 3) which is rather simple and includes primarily three kinds of organizational forms: commissions, ministries and others.

The left column of Table 3 indicates core organizations of the Executive Yuan, functionally equivalent to a cabinet, including eight ministries and two commissions. Heads of these ministries and commissions are ministers in both constitutional and legal senses. “Eight ministries” mean those from the Ministry of Interior to the Ministry of Transportation & Communication, and the two very interesting commissions are the Mongolian & Tibetan Affairs Commission and the Overseas Compatriot Affairs Commission. The head of the Mongolian & Tibetan Affairs Commission or the Overseas Compatriot Affairs Commission has been called as “generalissimo,” whereas heads of other commissions have been generally called as “chairperson,” implying the special status enjoyed by the two commissions despite their controversial creation. Given the current political reality, no one is really sure about any functions that the Mongolian & Tibetan Affairs Commission may provide. Notwithstanding their special status, are they independent? Certainly not. Both commissions are not independent and share no similar features to independent commission despite their collegial structure.

In addition to eight ministries and two commissions, there are seven ministers without portfolio. Altogether there are seventeen cabinet members: seven ministers without portfolio, eight ministers, two generalissimos plus prime minister and vice prime minister. These seventeen ministers are real cabinet members who are present and vote at the cabinet meeting. Other commissioners and heads of agencies, while they may be present at the cabinet meeting, cannot vote. The left hand side of Table 3 was the government structure initially intended by the Constitution. Gradually, in response to some present needs—especially rapid social and economic changes since the 1980s—the government structure was changed to include in more and more special agencies and commissions.

In agency form, Central Bank, National Palace Museum, Central Personnel Administration, Government Information Office, Directorate-General of Budget Accounting & Statistics, Department of Health, Coast Guard Administration, and Environmental Protection Administration are examples. Their respective functions are in a rather wide spectrum of variety. In the category of cabinet Commissions, they range from Financial Supervisory Commission to Council of Agriculture, and to Council of Labor Affairs. Some of these commissions are regulatory commissions that are delegated with regulatory powers similar to other ministries. The only difference between them and other ministries is their organizational

**Table 3 Ministries, Commissions, and Agencies in Taiwan**

Core Organizations (Executive Yuan)		Cabinet Agencies and Commissions	Internal Councils	Independent Agencies	
<b>Minister (8)</b>	<ol style="list-style-type: none"> <li>1. Ministry of Interior</li> <li>2. Ministry of Foreign Affairs</li> <li>3. Ministry of National Defense</li> <li>4. Ministry of Finance,</li> <li>5. Ministry of Education</li> <li>6. Ministry of Justice,</li> <li>7. Ministry of Economic Affairs</li> <li>8. Ministry of Transportation &amp; Communication</li> </ol>	Cabinet Agency	<ol style="list-style-type: none"> <li>1. Central Bank,</li> <li>2. National Palace Museum</li> <li>3. Central Personnel Administration</li> <li>4. Governmental Information Office</li> <li>5. Directorate-General of Budget Accounting &amp; Statistics</li> <li>6. Department of Health</li> <li>7. Coast Guard Administration</li> <li>8. Environmental Protection Administration</li> </ol>	Petition & Appeal Committee, Legal Affairs Committee	National Communication Commission
<b>Commission (2)</b>	<ol style="list-style-type: none"> <li>1. Mongolian &amp; Tibetan Affairs Commission</li> <li>2. Overseas Compatriot Affairs Commission</li> </ol>	Cabinet Commission (Regulatory Commission)	<ol style="list-style-type: none"> <li>1. Financial Supervisory Commission</li> <li>2. Mainland Affairs Council</li> <li>3. National Youth Commission</li> <li>4. Veterans Affairs Commission</li> <li>5. Atomic Energy Council</li> <li>6. Fair Trade Commission</li> <li>7. Council for Cultural Affairs</li> <li>8. Council of Agriculture</li> <li>9. Consumer Protection Commission</li> <li>10. Council of Labor Affairs</li> <li>11. Council of Indigenous Peoples</li> <li>12. Sport Affairs Council</li> <li>13. Council for Hakka Affairs</li> </ol>		

Core Organizations (Executive Yuan)		Cabinet Agencies and Commissions		Internal Councils	Independent Agencies
			14. Public Construction Commission 15. Aviation Safety Council 16. Central Election Commission		
		Coordinating Commission	17. Council for Economic Planning And Development 18. Research, Development and Evaluation Commission 19. National Science Council		

\*From: Professor Jiunn-Rong Yeh.

forms as commissions. They cannot be called as ministries because the number of ministries has been fixed by the law.<sup>29</sup> Given the legal constraint, if there was any need in establishing regulatory organs, a commission or a council would be an easy way out. Besides regulatory ministerial commissions, there are at least three commissions that are not granted with regulatory powers but primarily provide coordinative functions within the government. For example, in addition to the Ministry of Economic Affairs that is a regulatory ministry, there is also the Council for Economic Planning and Development that coordinates many different ministries on economic plans, major developments and construction. Another example for such a coordinative commission is the Research, Development and Evaluation Commission that does not regulate, but oversees government budgets, proposals and projects and evaluate them. National Science Council is yet another example that coordinates on science policy. These are at least three typical coordinative commissions.

On the right hand side, I put internal councils such as Petition & Appeal Committee or Legal Affairs Committee. And the last category, indicated in the left column of Table 3, entails real independent regulatory commissions.

29. Hsingchengyuan Tsuchihfa [Organic Act of the Executive Yuan], art. 3 (Taiwan), available at <http://law.moj.gov.tw/Scripts/Query4A.asp?FullDoc=all&Fcode=A0010032> (last visited Aug. 20, 2009). There were many attempts at revising this Act in the past, but neither succeeded in achieving it. The recent genuine effort occurred after 2000 when the Basic Code Governing Central Administrative Agencies Organizations to relax the organization of central government agencies was enacted in 2004 and later amended in 2008. But the revision of the Organic Act of the Executive Yuan however has not yet still on the waiting list for legislative actions.

In 2004, the Basic Code Governing Central Administrative Agencies Organizations was passed. In this law, for the first time, the status of independent commissions was recognized.<sup>30</sup> Any agencies termed as independent commissions must have their organizational structures in compliance with this Basic Code.<sup>31</sup> The first independent commission was the National Communication Commission whose creation was accompanied by huge political controversies.

Besides these four main categories, there are also commissions that do not appear here. For example, an equivalent to Japanese Environmental Dispute Coordination Commission described by Professor Uga earlier is the Committee of Public Nuisance Dispute Mediation, an external organ to the Environmental Protection Administration in Taiwan. International Trade Commission external to Ministry of Economic Affairs is yet another example in this category. It should be also noted that there may be some independent agencies that are not included in the Executive Yuan but in other branches of the government due to the five-power structure of the Constitution. Ministry of Civil Service for example is under the Examination Yuan.<sup>32</sup> Auditor-General is an independent ministry despite being under the Control Yuan.<sup>33</sup>

#### B. *The Definition of Independent Commissions*

Having briefly introduced the administrative structure in Taiwan, now I would like to provide some reflections on the analysis of Professor Uga. The first is concerned with the definition and the scope of independent commissions. What kinds of independent commissions are we discussing here? Based upon what criteria would we define any administrative organizations as independent commissions? Do we determine independent commissions by their organizational positions as to whether they are under the cabinet or any ministries? Or should we define independent commissions not by organizational positions but by functional terms with regard to its functional independence? Would it possible that a commission that is placed under the cabinet remain completely independent from cabinet intervention? The challenge facing here is really about how to classify independent

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30. Chungyang Hsingcheng Chikuan Tsuchih Chichunfa [Basic Code Governing Central Administrative Agencies Organizations], art. 3. (Taiwan), available at <http://law.moj.gov.tw/Scripts/Query4B.asp?FullDoc=%A9%D2%A6%B3%B1%F8%A4%E5&Lcode=A0010036> (last visited Aug. 20, 2009).

31. *Id.*

32. ZHONGHUA MINGUO XIANFA [CONSTITUTION OF THE REPUBLIC OF CHINA], arts. 83-89 [hereinafter CONSTITUTION], available at [http://www.judicial.gov.tw/constitutionalcourt/p07\\_2.asp?lawno=45](http://www.judicial.gov.tw/constitutionalcourt/p07_2.asp?lawno=45) (last visited Aug. 20, 2009).

33. CONSTITUTION, art. 104.



commissions. According to Professor Uga, it seems to me that in Japan, administrative commissions even placed under the cabinet or ministries still maintain independence, thus confirming the idea that where you place a commission is actually irrelevant to whether it is independent. There are indeed some second-tier independent commissions within a ministry or even an agency. According to the aforementioned Basic Code, there are layers of independent agencies and certainly you may have second-tier ones under the first layer.<sup>34</sup>

Besides structural or functional independence, other criteria in judging independence may include term limit, collegial decision-making body, transparent deliberation or removal upon just cause among others. If these criteria are satisfied, perhaps we may call such organizations as independent commissions. But what if one element is not met, for example, collegiality, while everything else is satisfied? Can it still be an independent commission? What would be a critical element to determine independent commissions? In my opinion, collegiality is a must. Yet whether it is true to Japan remains an open question.

### C. *Driving Forces for and History Legacies of Independent Commissions*

The other interesting issue worthy of discussion is concerned with driving forces for or historical legacy of independent commissions. Listening to the presentation of Professor Uga was such a joy as he has provided a very insightful analysis on the post-war creation of administrative commissions in Japan. Some scholars in Taiwan may have mistakenly contended that independent commissions in Japan were a creation of its own. But Professor Uga has taught us that the driving forces for the creation of administrative commissions in post-war Japan were actually very diverse. Some came from the legacy of the U.S. occupation, while others were out of local struggles or attempts at government reorganization.

There is no dispute that the U.S. occupation did play a role. Let me mention a similar aspect in Taiwan. After World War II, when the Republic of China (ROC) government still controlled over the mainland, the U.S. government provided it with a huge amount of aid for post-war agricultural development. The Joint Commission on Rural Reconstruction was created to supervise such an aid, and Mr. Chiang, Meng-Lin, a very famous writer, served as its first head.<sup>35</sup> This Joint Commission continued its operation

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34. Chungyang Hsingcheng Chikuan Tsuchih Chichunfa [Basic Code Governing Central Administrative Agencies Organizations], art. 32, para. 2 (Taiwan). For a short English description of this Basic Code, see Basic Code Governing Central Administrative Agencies Organizations (July 30, 2007), <http://www.rdec.gov.tw/ct.asp?xItem=4088090&ctNode=10100>.

35. For an English introduction of the development of the Commission, see About COA,

after the ROC government was relocated to Taiwan. During the 1950s and 60s, agricultural policies were mainly formulated by this Joint Commission. Even more interestingly, the Commission actually had a number of American commissioners who represented their concerns. By extending American influences into the Commission, the U.S. government intended to make sure that the spending of its aid would be in accordance with its plans and not run any risk of being dominated by local powers. The collegial form of commissions with diverse representation certainly served this goal well. As indicated earlier by Professor Uga, the U.S. imposition of collegial organizations on Japan may open up certain bureaucratic democracy. Did it also in Taiwan? Perhaps not.

The other organ whose legacy was similar to that of the Joint Commission on Rural Construction was the Council for International Economic Cooperation and Development, the predecessor of the Council for Economic Planning and Development.<sup>36</sup> The Joint Commission on Rural Reconstruction was the predecessor of the Council of Agriculture. After the termination of the U.S. aid, the Joint Commission was first reorganized into the Council for Agricultural Planning and Development and later changed into the Council of Agriculture, combining the Agricultural Bureau under the Ministry of Economic Affairs.<sup>37</sup> Based upon what Professor Uga and I have discussed so far, it is intriguing to learn that Japan and Taiwan shared similar post-war legacies at least in certain aspects of administrative organization. The explanation for such similar legacies, however, requires further researches. It may be partly due to the attempt at bureaucratic democratization as suggested by Professor Uga and partly due to certain geopolitical functions provided by the U.S. government in this region. Either way, it is interesting and certainly worthwhile exploring.

I would like to add one more special feature in the establishment of independent commissions in Taiwan. It may be linked to what Professor Uga indicated in the political aspect of creating independent commissions. Professor Uga observed that ruling parties normally are critical about the establishment of independent agencies in fear of losing control. When you establish independent agencies, it means to empower them, allow them to be independent and give away your own powers. Would any ruling governments be willing to set up independent agencies and withhold their own powers? Probably not. In Taiwan, before the regime change in 2000, there was no truly independent commission, not a single one. Before 2000, there was the Fair Trade Commission. Notwithstanding its collegial form, it

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[http://eng.coa.gov.tw/content.php?catid=9501&hot\\_new=8798](http://eng.coa.gov.tw/content.php?catid=9501&hot_new=8798) (last visited Aug. 23, 2009).

36. For an English introduction of the development of the Council, see History and Mission (Apr. 24, 2007), <http://www.cepd.gov.tw/encontent/m1.aspx?sNo=0001432&key=&ex=%20&ic=&cd=>.

37. *Supra* note 35.

is not an independent commission. Neither its organization nor the operation has been independent. The chairman of the Fair Trade Commission is present at the Cabinet meeting. President of the Executive Yuan, the Premier, always contract the chairman and even direct him/her regarding important policies.

The idea of establishing independent commissions in Taiwan was actually born at the Government Reform Committee created after President Chen, Shui-Bian was elected to presidency in 2000. The idea was first accepted by the Committee and later written into the Basic Code. The first one to be created in accordance with this Basic Code was the National Communications Commission (NCC).<sup>38</sup> As odd as it may sound to public-choice theorists, at the time, the ruling party, Democratic Progressive Party (DPP), the long-time opposition that came into power in 2000, was very supportive of creating independent commissions. This can be understood and explained only in Taiwan's context of democratic transitions. For, the DPP came into power with their reform agenda that must precede their self-interests. They were thus compelled to begin government reform as an attempt at democratizing governmental bureaucracy, especially those agencies whose regulatory powers were concerned with free speech, social and cultural diversity. One primary focus is on regulatory reforms of communication technology such as radio, cable, internet, among others. These political, psychological and even geopolitical factors in the context of democratic transitions all facilitated the establishment of the NCC, Taiwan's first independent commission in 2006. The entire process was—unsurprisingly—rather difficult and accompanied by quite a great deal of confrontation.

#### D. *Some Remaining Issues for Independent Commissions*

Lastly, I would like to discuss some remaining issues concerning independent commissions. First and foremost is to understand factors that are critical to or determinative of the operation of independent commission. Factors for the operation of independent commissions in Taiwan may be different from those in Japan. With today's roundtable, we have learned that there may be foreign factors that affect functions of independent commissions. In addition, independent commissions may be created and in operation in either presidential or parliamentary systems. There is no doubt that the Japanese government structure is a parliamentary system, whereas the American government, the one that brought administrative commissions

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38. For an English introduction of this Commission, see Introduction of the National Communications Commission, [http://www.ncc.gov.tw/english/content.aspx?site\\_content\\_sn=2&is\\_history=0](http://www.ncc.gov.tw/english/content.aspx?site_content_sn=2&is_history=0) (last visited Aug. 20, 2009).

into Japan, was a purely presidential system. In Taiwan, the government system is neither parliamentary nor purely presidential, but a so-called mixed system. If independent commissions have been created and operated in various government systems, may we conclude that government system is not a factor affecting independent commissions? To what extent this factor is or is not important?

The second issue is related to the distinction between civil law tradition and common law tradition. Generally I would not like to stress too much on this distinction, but when it comes to the operation of independent commissions, this distinction is perhaps worthy of further discussions. Would civil law tradition or common law tradition somehow affect our perception about independent commissions, especially their operations? Or such a distinction in legal system is not a relevant factor here? Japan and Taiwan have shared different levels of civil law tradition. Would this shared legal tradition help us understand independent commissions in both places? Or would it undermine our ability to understand what has been going on in common law system? Additionally, there is also cultural aspect, particularly regarding the strength of bureaucracy. We all know the Japanese bureaucrats have been very powerful. There is no doubt that bureaucracy has played a very major role in determining whether we may move forward. I think all of the aforementioned factors are important for us to know the real function of independent commissions, despite variations from place to place.

The third and final issue is about government reform. Professor Uga mentioned the “scrap and build” idea, which is very interesting. I wonder what kind of motivation, what kind of political power or political build-up would be required there in order to have such a will to constrain the power of bureaucrats that tend to expand. But to what extent would this have really been put into practice? I was very impressed by the Japanese report of the government reform. In that report, the idea of independent commissions was pretty much accepted and put in a relatively positive term. I wonder what institutional and social backgrounds would be there to allow the creation of independent commissions to be perceived in such relatively positive terms in the context of government reform. These are my reflections and questions for the time being. I have taken so much time and must now turn to the two discussants. Professor Chang, please.

#### IV. COMMENTARY

##### A. PROF. WEN-CHEN CHANG

Thank you, Professor Yeh, and Professor Uga, our distinguished guest speaker, and Professor Lin, our co-discussant. Similar to Professor Yeh, I

have enjoyed Professor Uga's excellent presentation. I already enjoyed reading his paper before the roundtable, and now enjoy even more his detailed discussions accompanied by the remarks of Professor Yeh.

Before I being with my comments, I would like to further honor this event by providing Professor Uga with some more knowledge about our honorary guests here. We are much honored to have two former ministers sitting with us at this roundtable. They are Chairwoman Chang, Fu-Mei of the Overseas Compatriots Commission and Professor Yeh, the former Chairman of the Research, Development and Evaluation Commission, who has been too modest to mention his great service at the Cabinet from 2002 to 2006. Both commissions are included in the Table 3 as ministerial-level organs. It is really a wonderful and extraordinary opportunity for us to discuss about the experiences of independent commissions with two distinguished experts who actually had the practice and the knowledge about government commissions. With their presence, I am worried that my comments would seem naïve in practice and make sense only in theory. But I shall try my best anyway.

First of all, I would like to discuss the idea of departmentalism versus the idea of independent agencies.<sup>39</sup> As I heard from Professor Uga on the history of administrative commissions in Japan, I think this evolutionary process has reflected pretty much upon the idea of departmentalism, in that Congress intends to control the administration by creating various departments and reducing each of their powers so as to make harder for their works and impossible for power concentration. In Japan, the post-war creation of some external councils or commissions was typical of the beginning of departmentalism, in which the Japanese Congress struggled to constrain the strong cabinet and its bureaucracy. By creating external agencies with a little bit separate powers, the cabinet would be put on check at least internally and balanced in its divided powers. As far as I am concerned, the recent British or European developments of administrative agencies or non-departmental public bodies have come from this idea of

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39. Departmentalism in administrative law sense denotes the discussions on the division of various kinds of agencies and their respective powers in the executive. *See, e.g.*, JAN-ERIK LANE, *THE PUBLIC SECTOR: CONCEPTS, MODELS AND APPROACHES* 160-87 (3d ed., 2000); and CHRIS SKELCHER, *THE APPOINTED STATE: QUASI-GOVERNMENTAL ORGANIZATION AND DEMOCRACY* 1-18 (1998). However, departmentalism is also used in the constitutional law discussions on which departmental authority (executive, parliament or judiciary) enjoys the power to interpret the Constitution independently. For its use in the body of constitutional laws, see, for example, Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004) (defending the judiciary department as the ultimate interpretive power); Steven G. Calabresi, *Caesarism, Departmentalism and Professor Paulsen*, 83 MINN. L. REV. 1421 (1999) (arguing that each constitutional department has been vested its own power of constitutional interpretation).

departmentalism as a way of parliamentary control over huge bureaucracy.<sup>40</sup> In contrast, however, the idea of independent agencies at least in the U.S. context is quite different. Professor Uga is also an expert on comparative administrative laws of the U.S. and Japan. The creation of independent agencies was to undermine presidential powers by taking away his/her powers over independent agencies with regard to appointment, policy-making and budgeting, and thus making those agencies independent from the President and to a certain extent more accountable to the Congress.<sup>41</sup> In other words, the creation of independent commissions reflected a real, and sometime confrontational, battle between the President and the Congress. But the creation of external or internal councils or commissions under the idea of departmentalism merely manifests a rather moderate parliamentary intention to control the administration, which exists often in a “strong cabinet v. weak parliament” situation. The post-war creation of external or internal administrative bodies was hardly a confrontation between the parliament and the cabinet but only a gradual evolutionary development of parliamentary control over administrative bureaucracy. This point also resonates the earlier remark made by Professor Yeh regarding parliamentary versus presidential systems. Today when we see developments of various types of agencies and commissions, we often take them in the same line of developments but they are perhaps quite different if not in form but in the underlying contexts and political purposes.

In Japan, if understood in departmentalism theory, administrative commissions were created with the purpose of making more challenges for the prime minister in running the entire executive. But in the U.S. context, independent agencies were established to have some parts of administrative functions to be separated from the President and to make independent agencies even directly answerable to the Congress. If I am correct in understanding the Japanese administrative commissions in this way, I would have some further questions for Professor Uga. First is concerning the appointment or removal of members for Article 3 commissions. Are they appointed and removed in the same way as ministers? Is there any veto power or influence from the Diet, the Congress of Japan, over commissioners’ appointments or removals? I would guess that under departmentalism, Congress would not have such direct influences over these matters, but in the context of real independent agencies, Congress would be

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40. *See, e.g.*, SANDRA VAN THIEL, *QUANGOS: TRENDS, CAUSES AND CONSEQUENCES* (2001) (analyzing the establishment of nongovernment public bodies in United Kingdom, Denmark, Finland and many other European nations); HARVEY FEIGENBAUM ET AL., *SHRINKING THE STATE: THE POLITICAL UNDERPINNINGS OF PRIVATIZATION* (1999) (discussing the systematic privatization in the United Kingdom and its underlying politics).

41. *See, e.g.*, RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 92-107 (4th ed. 2004); BERNARD SCHWARTZ ET AL., *ADMINISTRATIVE LAW* 26-31 (6th ed. 2006).

eager to seize such powers.

In Taiwan, the only commission that was reflected upon the American idea of independent commissions was the National Communication Commission. As Professor Yeh indicated earlier, the number of ministries and commissions was fixed. But that number was fixed only in the law but not in the Constitution. Since the 1980s, various agencies and commissions as illustrated in Table 3 have been created in response of social and political needs. For example, the Environmental Protection Administration was created during the wake of environmental outcry, and the Consumer Protection Commission was established out of the consumer movement. They were definitely not created—in departmentalism theory—as a way for the Parliament to place any checks on the administration since the state was controlled by the Nationalist Party. In this sense, even there are administrative commissions created both in Japan and in Taiwan, but I see a huge difference in both insofar as the underlying political backgrounds are concerned.

Next I would like to extend our discussion to constitutional laws and to enquire whether there would be, if any, constitutional limits to the idea of departmentalism or the creation of independent agencies in the Japanese context. Article 66 of the Japanese Constitution stipulates that the executive function should be primarily served by the Cabinet.<sup>42</sup> It does not use any word such as “only” to indicate the executive function can only be served by a unitary cabinet, thus leaving space for the Congress to create external or internal councils and commissions in departmentalism sense. But I would certainly like to know Professor Uga’s opinion on this. In Taiwan, the Constitutional Court rendered *Interpretation No. 613* regarding the constitutionality of creating independent commissions. In the decision, the Constitutional Court has relied heavily upon the idea of administrative unity idea. Based upon principle of democracy, the Constitutional Court contends that the entire executive branch must be responsible and answerable to the Congress and thus there must be constitutional limits to administrative departmentalism as well as the creation of independent commissions.<sup>43</sup> I wonder whether and in what way this constitutional issue would be debated in the Japanese context. After all, Japan has a parliamentary system in which both executive and legislative powers are controlled by a dominant political party, the Liberal Democratic Party (LDP). In contrast, Taiwan’s constitutional politics is much more contested in recent years, and as illustrated earlier, the creation of independent commissions in Taiwan, and for that matter also in the United States, has not represented any

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42. KENPŌ, art. 66.

43. J.Y. Interpretation No. 613 (2006), available at [http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03\\_01.asp?expno=613](http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=613).

characteristics of departmentalism but rather real power struggles between the Congress and the President. It is equally interesting to examine if there would be any constitutional limits to the creation of independent commissions as power struggles between the Congress and the President. Would there be any of such constitutional rule of law if what we are facing is a divided government where the Congress and the President are represented by different parties as what happened in Taiwan between 2000 and 2008? Are there any constitutional principles that would be capable of putting a brake to power confrontations of a divided government? That is also an issue I would like to put on the table for some further discussions.

The third part of my comments is more tailored to actual administrative operations. As Professor Uga explained earlier, administrative commissions or councils have very different practices in terms of their operations. We would ordinarily expect Article 3 commissioners to be full-time but some of them are actually part-time, and then we would expect members of Article 8 councils to be part-time but some of them are full-time. It seems that commissions or councils notwithstanding, a variety of differences exist in their workings, functions and operations. Thus I wonder, in terms of the decision-making capacity, can Article 3 commissions independently make their own policy decisions? What about some politically contested issues or even sensitive and watchful decisions? Would these decisions be made in consultation or even negotiation with the prime minister, other ministries, or even political party leaders or caucus? In open or closed meetings? In addition, can Article 3 commissions in Japan prescribe externally binding administrative rules? Would these rules be sent to the Cabinet for discussions? Would there be any such discussions regarding rule-making of administrative commissions with the Cabinet?

Lastly, I would like to echo some cautions about the creation and operation of independent commissions brought about by Professor Uga. He mentioned that some administrative commissions, while exercising regulatory functions such as adjudication and rule-making, demand service fees from their regulated parties. This is also happening now in Taiwan. For example, the Financial Supervisory Commission is empowered to supervise and investigate banking and stock exchange systems, but it also takes surcharges for its “services” from those regulated banks and corporations.<sup>44</sup> Similar practices also occur in the National Communication Commission. Both examples indicate a typical agency-client relationship that is likely to render corruption or agency-capture in public-choice theory terms.<sup>45</sup> Here

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44. For an English introduction of this Commission, see Taiwan Financial Supervisory Commission (Apr. 17, 2009), [http://www.fscey.gov.tw/Layout/main\\_en/AllInOne\\_Show.aspx?path=1871&guid=5da0af18-fb31-4ffb-8dfc-05c37d3d0d0e&lang=en-us](http://www.fscey.gov.tw/Layout/main_en/AllInOne_Show.aspx?path=1871&guid=5da0af18-fb31-4ffb-8dfc-05c37d3d0d0e&lang=en-us).

45. For public-choice theory and particularly its applications to the development of administrative



we might want to rethink about the driving forces for or underlying structures of the creation of administrative commissions. Have they been created really because of departmentalism, power struggles between the Congress and the President, or after all cliental demands? In what ways can we really prevent the worse from happening? I see that I may have run out of time and thus must stop here. Thank you.

### B. PROF. CHAO-CHUN LIN

Thank you very much, Professor Uga, for your very interesting and illuminating speech. I thoroughly enjoyed it and have learned so much. Now I would like to raise three simple questions, and then reflect on one issue regarding your discussion. The first question is concerning the status of the National Personnel Authority. What is its exact status? Why is it regarded so highly and independently within your government? I can imagine why the Board of Auditing is the most independent agency, but I do not understand the reason for the National Personnel Authority. Is it merely because this institution has to maintain neutrality of the bureaucracy? Or is it because this institution is responsible for recruiting civil servants into the government?

Secondly, in your paper several kinds of independent commissions in Japan are mentioned. While some of them are external figures to the Cabinet, others are internal to the ministries. What criteria are used to decide which institutions are placed into the ministry level, and which institutions are secondary?

The third question is about the composition of various independent commissions. Why are part-time jobs used so often? Of course we know that you want to use independent commissions to make policies more neutral, but my concern is that whether it is possible for these part-time commissioners to resist political forces and influence from outside. I realized that they have the tenure protection, but I wonder whether it would be better if they have a full-time position.

Finally, my reflection is related to what has been mentioned by Professor Chang. In your speech, you mentioned that the commissions cannot overturn the decisions made by the ministries. Even though it makes decisions, if you use a council-like composition, it has no binding force on the ministry. I cannot help but think that since Japan has the long tradition in the post-war period that the LDP has dominated the Japanese political arena for a long time, is there a *de facto* system of checks and balances within the Japanese separation of powers structure? In this situation, the legislature

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agencies and laws, see generally *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

cannot really check the power of the executive branch. So is it possible to establish a meaningful system of checks and balances? Take the U.S. system for example, some of the independent commissions can review the decisions made by ministries. This means that individuals can appeal decisions of the ministries to independent commissions. Therefore, I am wondering if you would ever consider the possibility of changing the system of independent commissions in the near future. Thank you very much.

#### V. GENERAL DISCUSSIONS AND RESPONSE

*Professor Jiunn-Rong Yeh:*

I think we should give Professor Uga some time to digest our remarks. Professor Uga, would you like to respond to our remarks now or later, or should we open the floor? Yes, please.

*Professor Katsuya Uga:*

I will try to answer some of the questions raised by three professors. First, concerning the definition of commissions, the only clear way to differentiate Article 3 organs from Article 8 organs is to look at appended Table 1. They are commissions only if they are enumerated there. Otherwise they are councils, whether they are operationally equivalent to one or not. Strictly speaking, this is the only way to distinguish Article 3 organs from Article 8 organs. However, the question then becomes, "What criterion is used to put some collegial bodies into appended Table 1?" When the National Government Organization Law was enacted in 1948, the Japanese government, particularly the Administrative Management Bureau, set some criteria: (1) the collegial bodies which own executive offices are commissions, (2) the collegial bodies which do not possess their own executive offices are councils, and finally, (3) the name "commission" is used exclusively for commissions. However, as I explained earlier, those criteria were very short-lived and now there are some councils which do possess their own executive offices and the name commission is sometimes used to refer to collegial bodies classified as councils. While there is no definite criterion, the most influential criterion right now concerns whether a particular collegial body has the authority to make legally binding decisions in its own name. That is the most widely used criterion now. As I explained earlier, there are some exceptions to this rule. Theoretically speaking, as Professor Yeh described, you can define commissions in a different way. For example, from a functional viewpoint, if a particular collegial body makes some decisions independently, and if its commissioners enjoy very secure

tenure, you can define them as commissions from an academic standpoint. If I define commissions from such a viewpoint, there are quite a few councils, Article 8 organs, which could be classified as commissions.

Professor Yeh talked about historical legacy of the occupation, which also relates to the point raised by Professor Chang. Actually, there are very diverse types of administrative commissions in Japan; some commissions are modeled after U.S. independent regulatory commissions, some are the legacy of pre-war Japanese commissions, and some, from a functional viewpoint, were established because it was thought necessary to preserve political neutrality. For example, the National Public Safety Commission, which controls the national police agency, and the National Personnel Authority, which has jurisdiction over the civil service system, have to be politically neutral. In order to preserve the political neutrality of the civil service system, it was considered necessary to establish an independent commission. Some other commissions were established because it was considered necessary for their quasi-judicial functioning by experts. When it is difficult to recruit real experts from the bureaucracy; they have to depend on the university professors or other experts outside the government. In those cases, it was considered necessary to establish independent administrative commissions. In any event, the rationale for the establishment of administrative commissions varies from commission to commission.

Cultural factors are also very important. As you might already know, in Japan, career bureaucrats have traditionally been very influential, particularly in the pre-war period. Even after the occupation ended, career bureaucrats were very influential. More than 80% of the bills actually passed into law by the Diet are ones submitted by the Cabinet. It is the career bureaucrats who draft the bills, so they are very influential. From their viewpoint, the independent commissions are not necessarily favorable, because, as I explained earlier, they can more easily control politicians than expert commissioners. That could be one big reason why more than a half of the administrative commissions established during the occupation period were either abolished or reorganized into advisory panels.

As for the “scrap and build” principle of governmental reform, this system was introduced when governmental reform was considered urgently necessary for the government itself. As Professor Yeh described, the general tendency of bureaucrats is to expand their territories. So in order to prevent this, the government thought it necessary to establish a special bureau responsible for administrative management, Administrative Management Bureau of the Administrative Management Agency. The law gives authority to the bureau to check the expansion plan of a government organization. If a particular ministry wants to build a new section, new department, new agency or new commission, it has to gain prior approval from this bureau. If

this bureau says no, you cannot establish a new government organization. This bureau has a mission to prevent the hypertrophy of administrative organizations, and since it is very loyal to its mission, it seldom says yes. It gives prior approval only on the condition that the ministry in question scrap some equivalent organization. This policy has been very loyally enforced by the bureau. Therefore, now all bureaucrats know that if they want to build a new section, new agency or new commission, they have to sacrifice some equivalent organization. That is why the Ministry of Land, Infrastructure, Transport and Tourism agreed to abolish the Seafarers Labour Commission because in return, they were authorized to build a new commission, the Transport Safety Commission.

At the end of the 20<sup>th</sup> century, the then Prime Minister launched a very ambitious plan of administrative reform. He established an Administrative Reform Council and took office as a chairperson of the Council himself. Although it was an Article 8 council, since the Prime Minister himself was a chairperson, it was very influential. After this council issued a report, the Prime Minister ordered the executive office to draft a bill which contained everything in the report, and that was then passed into law. This very unique law, called the Central Government Reform Act, was actually a copy of the report of this Council. In this report, as Professor Yeh pointed out, administrative commissions are described in a good light. There was no antagonism towards administrative commissions. It is really interesting because even during the occupation period, the advisory panel of the government issued a report, which criticized administrative commissions. As I described in my paper, after the occupation ended, the so-called Cabinet Order Advisory Committee issued a report that recommended the abolition of most administrative commissions. The reason why the Administrative Reform Council established by former Prime Minister Hashimoto was more favorable towards administrative commissions, is that by this time the administrative commission system had already taken root in Japanese administrative organization system. The constitutional debate, which was very hot in the germinal stage of the administrative commission system, had completely subsided. Very few people discuss the constitutionality of administrative commissions at present. Also, because of the “scrap and build” principle, the government does not have to worry about the sudden increase of administrative commissions. These are some of the reasons why the Administrative Reform Council was not so critical towards administrative commissions.

Concerning the appointment of commissioners of administrative commissions, they enjoy very secure tenure, and they can be removed only for good cause. They cannot be removed at the pleasure of a cabinet minister or the prime minister. With regard to the intervention of the Diet, in the case

of administrative commissions, the prime minister usually appoints commissioners. The only exception is that of the Transport Safety Commission. In that case, the Minister of Land, Infrastructure, Transport and Tourism appoints commissioners. In both cases, however, the prime minister or the cabinet minister appoints commissioners with the consent of the Diet. In this sense, the Diet has veto power. Before the ruling Liberal Democratic Party and its allied party lost the majority in the House of Councilors, the candidates presented by the prime minister were usually easily approved. Now that the opposition party holds the majority in the upper house, sometimes the candidates for the commissioners presented by the prime minister are rejected by the upper house. In any event, the reason for removal is clearly stipulated and they can be removed only for good cause. In the case of commissioners of the National Personnel Authority, it is the Diet, which brings forth motions of impeachment and the Supreme Court which holds the hearing. The commissioners of the National Personnel Authority enjoy very secure tenure.

With regard to the constitutional limit question, there are considered to be some constitutional limits placed on administrative commissions. The Japanese Cabinet Legislation Bureau takes the position that the Cabinet has to have some kind of control over the administrative commissions, because under the parliamentary cabinet system, the entire executive branch should be accountable to the cabinet, the highest administrative organ. The cabinet is collectively responsible to the Diet, and the Diet is responsible to the citizens. The position taken by the Cabinet legislation Bureau is that the cabinet has to control the administrative commissions through its power of appointment of commissioners, and through its power of budget.

I have read the interpretation of Taiwanese Constitutional Court, which is very interesting. If the Cabinet or the prime minister is deprived of the power of appointing commissioners, then in Japan, it would be considered unconstitutional. As regards the political negotiation, because the essence of an administrative commission is its independence from the Cabinet in the exercise of concrete administrative power, they could never negotiate with the cabinet ministers or the prime minister in that exercise of power. If that happened, they would be very severely criticized and they would be put in a very difficult position. Therefore, I do not think that could happen. With regard to regulations, administrative commissions have power to issue regulations which are legally binding, not only internally but also externally. Because of the Administrative Procedure Act, when they issue administrative regulations, they have to make the drafts of the regulation public, and invite comments from the public. In other words, they have to go through these public comment procedures. However, they do not have to and they should not negotiate with cabinet ministers or the prime minister because the

commissioners themselves are given the authority to issue the regulations. There is no need to consult with cabinet ministers or the prime minister, and thus they do not do that.

Why does the National Personnel Authority have this very special status? When the National Personnel Authority was established during the occupation period, there was a constitutional debate. After the Second World War, public servants were given the freedom to go on strike. GHQ later took away that right, but in order to compensate for the deprivation of the rights of public servants, the government created the National Personnel Authority. This National Personnel Authority was given the special authority to issue recommendations, for example, on the raise of the salary of the civil servants and so on. Moreover, this National Personnel Authority has the power to adjudicate administrative appeals with regard to the adverse actions taken against public servants. For these reasons, GHQ and also the Japanese government thought it necessary to give the National Personnel Authority a very special high position. Therefore, it is placed directly under the jurisdiction of the Cabinet, although it is independent from the Cabinet in its exercise of administrative power.

Why are some administrative commissions organs external to the cabinet office and why are some administrative commissions organs external to ministries? It is because of the division of administrative work. Some administrative affairs are under the jurisdiction of the cabinet office. For example, the Public Safety Commission is under the jurisdiction of the Cabinet Office, because administrative business on public safety is apportioned to that office. That is why the Public Safety Commission is an organ external to the cabinet office. On the other hand, the adjudication of a labor dispute is under the jurisdiction of the Ministry of Health, Labour and Welfare, and that is why the Central Labour Relations Commission is an organ external to the Ministry of Health, Labour and Welfare.

Why are so many commissioners of the administrative commissions on a part-time basis? If the actual workload to enforce the mission of the administrative commission is not so demanding that it requires full-time commissioners, it is less expensive to hire part-time. The salary of full-time and part-time commissioners are very different. Full-time commissioners get a very high salary, almost the same as the ministers, but the part-time commissioners just get about 20,000 yen for each meeting. It is much less expensive for the government to use part-time commissioners. The other important reason is that sometimes it is difficult to hire full-time commissioners because the number of experts is so limited. Usually they have to be dependent on full-time university professors who usually will not agree to quit their current job, because after their term has expired, they will be in a very unstable position.

There are many advisory councils which issue recommendations. Theoretically speaking, these recommendations are not legally binding, so ministers can theoretically ignore them. However, it seldom happens because the report of the recommendations is made public, so everybody knows what kinds of recommendations are made by councils. If ministers ignore and do not respect the recommendations of councils, politically, they have to explain their behavior and provide very rational, persuasive reasons for it. Otherwise, they will be criticized by opposition parties or by the media. Therefore, theoretically, the recommendations of the councils are not legally binding, but practically speaking, in almost all cases, the recommendations of the councils are very influential. From a functional viewpoint, the distinction between the commissions and the councils is not very noticeable. Even if some collegial bodies are organized as Article 8 organs, they can be very influential. For instance, the Information Disclosure and the Protection of Individual Information Council which is placed in the cabinet office as an Article 8 organ has issued more than five thousand recommendation reports so far. Only four of them were not respected by the cabinet minister. In addition, the newest administrative commission, the Transport Safety Commission, which was established in 2008 as an Article 3 organ, does not have the authority to make legally binding decisions. The mandate of this commission is to investigate the cause of transport accidents such as airplane crash accidents and railway accidents and recommend measures to prevent the reoccurrence of such accidents. It was possible to establish such a collegial body as Article 8 organ. However, because this ministry sacrificed one commission, they were allowed to create a new commission. So from functional viewpoint, there is not a big difference. I am not sure if I could answer all of the questions but I hope I have answered some of them.

*Professor Jiunn-Rong Yeh:*

Well, this is very impressive. I think Professor Uga has answered all of the questions. It is clear that Professor Uga understands thoroughly about the Japanese government organizations and their operations. Although we are running out of time, we can still open the floor for some short comments or questions.

*Chun-Yuan Lin (College of Law, National Taiwan University):*

Professor Uga, I have a short question which is similar to the question posed by Professor Lin. If you read our *Interpretation No. 613* which in my opinion reflects a deep issue in Taiwan: the distrust against independent agencies. Perhaps there are lots of reasons. Some argue that perhaps the

original designs of independent agencies in the United States and those mechanisms to guarantee the independence of independent agencies are not operable in Taiwan. Similar to Professor Lin, I wonder whether it is possible for Japan to have real independent agencies. Under what conditions do you think we should change the design or the guarantee of the independence?

*Professor Jiunn-Rong Yeh:*

This is a short question but obviously very difficult to answer.

*Wen-Yu Chia (College of Law, National Taiwan University):*

Professor Uga and other Professors, I have a question also related to *Interpretation No. 613*. In this decision, the Constitutional Court reasoned that one of the constitutional bases, even as a constitutional duty for the government, for the creation of the National Communication Commission is to protect free speech. As professors also mention about constitutional limits to the creation of independent commissions, I am wondering if there is even constitutional duty to build independent commissions? Are there any such discussions in Japan or what would be your own opinion?

*Professor Katsuya Uga:*

Well, concerning the first question, I think the administrative commission system has already taken root in Japan both at the national and local levels, and there is now almost no constitutional debate about them. Everyone takes it for granted that they are constitutional. Additionally, with regard to their function, in some cases, as the report of the Administrative Reform Council says, the administrative commission system is considered appropriate, particularly in fields where political neutrality or quasi-judicial adjudication is necessary. Nobody denies that anymore in Japan. So I think both at the national and local levels, the administrative commissions have taken root. I did not talk about administrative commissions at the local level much. There are so many administrative commissions, both at the prefectural and municipal level. They have been in existence for more than sixty years, and they have seldom been criticized. I mentioned only one exception, which is the Education Committee. Most of them are considered necessary. What is more important is the security of the status of the commissioners. In every case, they are guaranteed a very secure tenure. They can serve for five or six years, and they can be removed only for good cause. If they want to be reappointed, they might have to worry about offending prime ministers or cabinet ministers. But most of them, even after their term expires, do not



have to worry about losing their job. Usually they can be very independent, and generally speaking, the Japanese administrative commissions have been, at least in some fields, very successful.

With regard to the second question, there is little discussion in Japan whether there is a constitutional duty to create independent commissions. Actually during the deliberation of the Administrative Reform Council, there was a plan to establish a broadcasting and communication commission because freedom of speech is guaranteed by the constitution. In order to preserve this fundamental right to freedom of speech, the members of this council thought it necessary to establish a broadcasting and communication commission, like FCC of the U.S. However, the bureaucrats of the Ministry of Posts and Telecommunication strongly opposed it. In the preliminary report of this council, the establishment of the broadcasting and communication commission was strongly recommended and advocated by a constitutional professor. Yet because of political pressure, in the final report, the plan to establish a broadcasting and communication commission was abandoned.<sup>46</sup> But some scholars hold the opinion that in order to guarantee freedom of speech, the establishment of an administrative commission is necessary.

*Professor Jiunn-Rong Yeh:*

Great, this has been an excellent roundtable discussion. We must extend our greatest thanks to Professor Uga for his wonderful presentation and also very skillful and thoughtful answers to all of the questions. Let us give him the warmest and loudest applaud once again. I would also like to thank our audience and particularly Professor Wen-Chen Chang, who organized this roundtable and has done us a great service. Let us also give her applause.

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46. *Supra* note 27 and accompanying text.

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