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Japan's Communications Interception Act: Unconstitutional Invasion of Privacy or Necessary Tool?

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Japan's Communications Interception Act: Unconstitutional Invasion of Privacy or Necessary Tool?

ABSTRACT

In August 1999, Japan became the last of the G8 nations to pass legislation to allow law enforcement to wiretap communications. For some, passage of the law was long overdue; for others, its passage marked the beginning of an impermissible government encroachment on civil rights. This Note examines Japan's Communications Interception Act, the forces in Japanese society creating the need for the law, and the reasons why the law is being challenged. Part II examines the policy behind the law, its history, and public reaction to the law. Part III presents the history of organized crime in Japan, and a commentary on its impact in Japan and on the international community. Part IV analyzes the legal challenges to the law. Part V discusses the potential efficacy of the wiretap law in combating Japanese organized crime and the likelihood of abuse in the implementation of the law.

TABLE OF CONTENTS

I.	INTRODUCTION.....	894
II.	THE COMMUNICATIONS INTERCEPTION ACT	896
	A. <i>The Communications Interception Act and Other Anti-Organized Crime Laws</i>	896
	B. <i>Contrasting Japan's Wiretapping Law with that of Other G8 Countries</i>	899
	C. <i>Public Reaction to the Communications Interception Act</i>	900
III.	THE NECESSITY OF THE WIRETAP: GROWTH OF ORGANIZED CRIME IN JAPAN	902
	A. <i>The Yakuza and Other Organized Criminal Groups</i>	902
	B. <i>Dangers of Organized Crime to Japanese Society</i>	905
	C. <i>Global Threats of Organized Crime</i>	909
IV.	LEGAL CHALLENGES TO THE COMMUNICATIONS INTERCEPTION ACT	910
	A. <i>Constitutional Issues</i>	910
	B. <i>Objections Based on Criminal Procedure</i>	915
	C. <i>Public Distrust of Police</i>	919

V.	WILL THE WIRETAP LAW BE AN EFFECTIVE TOOL IN FIGHTING ORGANIZED CRIME?	920
VI.	CONCLUSION	923

I. INTRODUCTION

Organized crime poses problems not only for the individual countries in which criminal groups reside and operate, but also creates significant risks for the international community. As international borders become more porous, the world is becoming a global community where events in one country no longer have only domestic consequences. As international exchange continues at a rapidly expanding pace, cooperation among foreign governments becomes increasingly important to ensure that domestic problems do not penetrate into the international community. Implicit in this phenomenon is the reality that individual countries must pass legislation, even make significant changes to existing domestic laws, to protect the global community from organized crime.

To better cooperate with the international community in combating organized crime, many facets of the Japanese criminal procedure law are in need of revision. Criminal procedure laws in Japan are ill equipped to deal with the requirements of modern investigations and trials.¹ Outdated provisions that hinder Japanese authorities' ability to adequately fight organized crime in Japan make it difficult for Japan to play an effective role in the global fight against organized crime across borders.² However, increasing pressure from the international community on Japan to strengthen its laws to fight organized crime,³ as well as concern among Japanese citizens, has caused Japan to begin debating the passage of new, more assertive criminal laws. One such step in that direction came in August 1999, when the Japanese Diet passed the Communications

1. *Combating Cross-Border Crime*, JAPAN WKLY. MONITOR, May 1, 2000, available at 2000 WL 10658165.

2. *Id.* Examples of outdated provisions that inhibit Japanese investigations into organized criminal activities include an absence of legislation that allows prisoners in Japan to be transported abroad for testimony, and an absence of legislation giving witnesses immunity from criminal prosecution, or freedom to travel safely without fear of arrest or harm. *Id.* In addition, a 1998 U.N. General Assembly draft protocol to combat organized crime called for international cooperation in criminal investigations and trials, a plan under which Japan cannot cooperate due to the fact that under existing Japanese law, an act in question must be recognized as a crime both in Japan and in the country requesting cooperation before Japan can cooperate. *Id.*

3. Tatsuya Fukumoto, *Government looks at bills to fight organized crime*, DAILY YOMIURI, Mar. 11, 1999, at 3, available at 1999 WL 5466664.

Interception Act,⁴ a law that allows investigators to wiretap telephone conversations and other communications of suspected criminals for the first time in Japan's history.

Wiretapping is an effective measure for combating organized crime because it enables investigators to target the pivotal figures controlling criminal organizations that have consistently remained beyond the reach of the law in Japan.⁵ Investigators in most other industrialized nations have the authority to tap communications for criminal investigations.⁶ Japan is the last of the G8 nations to pass such a law.⁷ Even though the new wiretap law may benefit Japan's citizens by combating organized crime, it is one of the most controversial laws passed by the Japanese Diet in recent history.⁸ In an attempt to delay the final vote, opposition Diet Members dragged out voting on the bill and turned the vote into a twenty-eight hour session.⁹ Reaction to the Communications Interception Act has been divided, with some sectors of society claiming that the law is necessary to prevent Japan from becoming a hotbed for international crime,¹⁰ and other groups claiming that the law is an unconstitutional invasion of privacy subject to abuse due to the nature of Japanese criminal investigations and police powers. August 18, 1999, the date of the bill's passage, has even been called "Japan's Day of Shame."¹¹ The law went into effect in August 2000, but there is substantial support in Japan for its repeal.

This Note examines the Communications Interception Act, the forces in Japanese society creating the necessity for the law, and the reasons why the law is being challenged. Part II analyzes the law itself, including the history and policy behind the passage of the law, as well as public reaction to it. Part III explores the history and

4. Hanzai sosa no tame no tsushin boju ni kansuru horitsu [Communications Interception Act], Law No. 137 of Aug. 18, 1999. This law has not yet been translated into English; the Japanese text is available at <http://www.ron.gr.jp/law/law/touchou.htm>.

5. Editorial, *Care needed in application of wiretap law*, DAILY YOMIURI, Aug. 16, 2000, available at 2000 WL 25270801.

6. Editorial, *Listening in on organized crime*, DAILY YOMIURI, May 26, 1999, available at 1999 WL 177754312 [hereinafter *Listening in*].

7. Fukumoto, *supra* note 3.

8. Martyn Williams, *Japan Wiretap Bill Debate Goes Through the Night*, NEWSBYTES, Aug. 11, 1999, available at 1999 WL 20018684 (stating that opposition parties in the Diet forced the government into an all-night debate, an event that had not occurred since 1992).

9. Jon Choy, *New Laws Boost Tokyo's Anticrime Powers and Public's Privacy Concerns*, JAPAN ECON. INST. REP., Aug. 20, 1999, available at <http://www.jei.org/Archive/JEIR99/9932w2.html>.

10. Fukumoto, *supra* note 3 (quoting Kazuhiro Watanabe, counselor with the Secretariat of the Justice Minister).

11. Michael Hoffman, *Bugged by Big Brother*, MAINICHI DAILY NEWS, Sept. 3, 2000, at 7, available at 2000 WL 6948388 (quoting *Shukan Hoseki*, a Japanese magazine, referring to the passage of the Communications Interception Act).

growth of organized crime in Japan, and its impact upon both the Japanese and international communities. Part IV analyzes the legal challenges to the law, including constitutional issues, and characteristics of the Japanese law enforcement system that create the potential for abuse in the law's application. Finally, Part V discusses the potential efficacy of the wiretap law in combating Japanese organized crime, and the likelihood of abuse in the implementation of the law.

II. THE COMMUNICATIONS INTERCEPTION ACT

This section addresses the Communications Interception Act itself. Reasons for the passage of the law are discussed, and the law itself is compared with that of other G8 countries. This section concludes with an examination of public reaction to the law.

A. *The Communications Interception Act and Other Anti-Organized Crime Laws*

During the last decade, the United Nations has devoted significant attention to the growth of transnational organized crime;¹² such crime has increased due to factors such as the end of the Cold War and the process of globalization of trade and information.¹³ In 1999, the United Nations set up a special panel to work out a global anti-crime treaty, in an effort to combat the globalization of crime.¹⁴ By taking part in the treaty, signatories agree to take legislative measures designed to strengthen government power to fight organized crime to ensure compliance with the treaty.¹⁵ The treaty calls for international cooperation in criminal investigations and trials, but Japan's criminal procedure laws contain provisions that make it difficult to meet the requirements of modern investigations and trials.¹⁶ The treaty's proposal encouraged the Japanese legislature to begin thinking about updating some of its own criminal

12. UNITED NATIONS, GLOBAL REPORT ON CRIME AND JUSTICE 221 (Graeme Newman ed., 1999).

13. *Id.*

14. *Combating Cross-Border Crime*, *supra* note 1.

15. *Id.*

16. *Id.* Signatories to the treaty, which was signed in Palermo, Italy in December 2000, are legally required to harmonize laws against organized criminal groups and corruption. See Gu Zhenqiu, *New U.N. Treaty Marks Major Advance in World Cooperation to Clamp Down on Global Crime*, XINHUA NEWS AGENCY, Nov. 17, 2000, available at 2000 WL 29162783. Countries must harmonize laws on money laundering, extradition, the protection of witnesses testifying against criminal groups, and provide resources to countries that need help. *Id.*

laws.¹⁷ In a step toward enacting effective laws to fight organized crime, the Japanese legislature passed a series of laws against organized crime in 1999, the most notable of which was the Communications Interception Act.¹⁸

Until the passage of the Communications Interception Act in 1999, Japan remained the only Member Country of the G8 without a law permitting law enforcement authorities to monitor telephone and computer communications.¹⁹ Government wiretapping of suspicious communications is not only an effective way to stop criminal acts before they occur, but it is also an effective tool to fight organized crime, because it enables the authorities to obtain valuable evidence against leaders of organized criminal groups who are typically insulated and difficult to catch.²⁰

In addition to the pressure on Japan from the United Nations, Japan's government faced increasing pressure from foreign governments to strengthen laws designed to fight organized crime.²¹ In recent years, the incidence of drug and arms smuggling involving Japanese crime syndicates has been on the rise, which has led to increased pressure on the Japanese government both internally and externally to strengthen investigative powers.²² Members of the Japanese government, as well as foreign governments, have become concerned that Japan lacks effective laws to deal with organized crime.²³

The Communications Interception Act was one of three bills passed by the Japanese Diet in 1999 designed to tighten measures against organized crime.²⁴ The bill's passage, however, was not easy;

17. See *Combating Cross Border Crime*, *supra* note 1.

18. *Id.* Japan still lacks laws necessary for complete compliance with the U.N. Treaty, such as laws that would allow Japanese prisoners to be transported abroad for testimony, and laws protecting foreign witnesses in Japan, giving them freedom to travel safely without fear of arrest or harm. *Id.* Japan also lacks laws permitting the Japanese government to cooperate with a country requesting cooperation unless the crime in question is recognized as a crime both at home and in the country requesting assistance. *Id.*

19. Fukumoto, *supra* note 3. In fact, investigators in most major industrialized countries have the ability to tap communications. *Listening in*, *supra* note 6.

20. *Listening in*, *supra* note 6.

21. Fukumoto, *supra* note 3.

22. *Id.* In December 1998, a G8 teleconference concerning the transfer of illegally obtained funds by crime syndicates was held and attended by the justice and home affairs ministers of Member Governments of the G8. *Id.* In the conference, U.K. representatives who chaired the meeting asked Japanese participants to explain the current situation of Japanese laws designed to tackle organized crime, including its lack of a statute allowing law enforcement authorities to monitor telephone and computer communications. *Id.*

23. Fukumoto, *supra* note 3 (quoting Kazuhiro Watanabe, a counselor with the Secretariat of Justice).

24. Mina Hasegawa, *Wiretapping Law has Cities Cringing*, NIKKEI WKLY., Aug. 21, 2000, available in LEXIS, News Library, Nikkei Weekly File. Other bills included

opposition parties used every possible tactic to block or delay passage of the bill.²⁵ Concerned that authorities could easily abuse their expanded powers, opposition parties boycotted meetings of the Judicial Affairs subcommittees of both houses, threatened to walk out of the general assembly, and submitted a series of no confidence motions against Prime Minister Keizo Obuchi and cabinet ministers involved in drafting the bill.²⁶ When it became apparent that they could not stop the wiretap bill's passage, opposition parties attempted to delay the vote as long as possible and turned the final vote into a twenty-eight hour session.²⁷ The bill passed in August 1999, but its enactment was delayed until August 2000 due to the need to develop necessary systems and equipment, and to finalize specific procedures and rules.²⁸

The final version of the Communications Interception Act is a compromise from its original form. Japanese police, feeling constrained in their ability to assist in global crime-fighting efforts and investigations while organized crime has grown in sophistication and widened in scope in recent years,²⁹ believed that wiretapping communications would be the only effective way to identify the chains of command in criminal syndicates.³⁰ Accordingly, the initial wiretap bill would have given authorities the power to tap communications in more than one hundred types of crimes generally committed by organized criminal groups.³¹ The strong opposition to the bill combined with a feeling of an urgent need to address organized crime issues caused the drafters to revise the bill so that only four specific crimes could provide the basis for legitimate wiretapping.³² The final version of the bill also restricts the ability of investigators to use the law by placing strict conditions on its usage.

a bill to impose heavier penalties for organized crimes such as money laundering and a bill to amend the Criminal Procedure Code to protect witnesses in cases involving organized crime. *Id.*

25. Choy, *supra* note 9. Four political groups, the Liberal Democratic Party, the Liberal Party, the Kaikaku Club, and the New Komeito formed a majority alliance to pass the bill. *Id.*

26. *Id.* Political parties opposed to the bill included the Democratic Party of Japan, the Japanese Communist Party, and the Social Democratic Party. *Wiretap bills rammed through upper house panel*, JAPAN POL'Y & POL., Aug. 16, 1999, available at 1999 WL 22841133 [hereinafter *Wiretap bills*].

27. *Wiretap bills*, *supra* note 26. Opponents engaged in the "ox-walk," creeping up to the podium at a snail's pace to cast their ballots, thus turning a five-minute procedure into an almost two-hour procedure. Williams, *supra* note 8. The bill passed by a vote of 142 to 99. See Choy, *supra* note 9.

28. Hasegawa, *supra* note 24.

29. Choy, *supra* note 9.

30. Hasegawa, *supra* note 24.

31. *Listening in*, *supra* note 6.

32. *Id.*

The four types of crime in which wiretapping is allowed under the Communications Interception Act are drug trafficking, illicit firearms trade, organized murder, and the smuggling of illegal immigrants into Japan.³³ Media that can be tapped include telephone calls, facsimiles, and e-mail communications.³⁴ Communications can only be wiretapped for a period of ten days, and can be extended to no more than thirty days.³⁵ Authorities can only resort to wiretapping if a warrant is obtained and there is no other way to obtain evidence,³⁶ and only public prosecutors and police officers of the rank of superintendent and above can seek warrants.³⁷ District court judges must issue warrants.³⁸ If telephone lines are tapped, a third-party non-police witness, such as a staff member of the telephone company or an employee from regional governments, must be present.³⁹ Furthermore, investigators must use a technique called spot monitoring, in which only portions of conversations may be listened to and wiretapping must terminate when a conversation is understood to be innocent.⁴⁰ Individuals must be notified that they have been the subjects of wiretapping within thirty days and all records of innocent conversation must be destroyed⁴¹ after notifying individuals that their communications have been monitored.⁴²

B. *Contrasting Japan's Wiretapping Law with that of Other G8 Countries*

Proponents of the Communications Interception Act have called attention to its strict procedures in contrast to similar laws already introduced in the United States and other major industrialized countries. Arguably, strict procedures guard against abuse of the wiretapping law. For example, Japan's law allows wiretapping of communications in only four specific types of crimes.⁴³ In contrast, wiretapping laws in the United States, Germany, France, and Italy permit the interception of communications in a broader variety of

33. *Id.* These four types of crimes represent activities in which organized criminal groups are heavily involved. See *supra* notes 12-13 and accompanying text.

34. Choy, *supra* note 9.

35. *Id.*

36. Hoffman, *supra* note 11.

37. Choy, *supra* note 9.

38. *Id.*

39. Hasegawa, *supra* note 24.

40. Hoffman, *supra* note 11. Spot tapping involves using equipment that automatically cuts the connection when a certain length of time has passed. *Wiretaps Vital in War on High-Tech Crime*, NIKKEI WKLY., Aug. 21, 2000, available in LEXIS, News Library, Nikkei Weekly File.

41. Hoffman, *supra* note 11.

42. Choy, *supra* note 9.

43. *Listening in*, *supra* note 6.

crimes.⁴⁴ The ten day limit on duration in Japan is far more strict than in other countries.⁴⁵ In the United States, a suspect can be wiretapped for thirty days with an unlimited number of extensions, in Germany, monitoring can be conducted for up to three months with no limit on extensions, and in France, the limit is four months with no limit on the number of extensions.⁴⁶

Critics of the law have not been comforted by these contrasts, however. As one critic pointed out, “[j]ust a simple comparison of institutional differences is nonsense.”⁴⁷ Japanese procedures for criminal investigation are different from procedures in other countries, so drawing simple contrasts between the Japanese wiretap law and the laws in other countries cannot adequately quell fears that the law will not lead to unconstitutional invasions of privacy.⁴⁸ In particular, differences in the treatment of criminal suspects and evidence laws may make the restrictions less meaningful.⁴⁹

C. *Public Reaction to the Communications Interception Act*

The newly-enacted wiretap law has met strong opposition from political parties, citizens groups, and the Japan Federation of Bar Associations.⁵⁰ The main concerns stem from a fear that authorities will abuse the powers granted to them by the new law. In recent years, the Japanese public has grown increasingly distrustful of the police.⁵¹ Critics of the law claim that the restrictions placed on its use, such as limiting wiretapping to only certain types of crime, will be impossible to enforce.⁵² There are also claims that police might use information obtained through the course of wiretapping that is not directly related to a crime.⁵³ The wiretapping law allows a reporter’s conversations and messages to be tapped, leading some to fear that investigations will interfere with freedom of the press.⁵⁴

Some lawmakers claim that by allowing wiretapping, the Japanese public will be exposed to the danger of arbitrary police

44. *Japan's Wiretap Law in Comparison with Major Countries' Systems* (Aug. 13, 1999), available at <http://www.usc.edu/isd/archives/dsjp/summaries/1999/August/Sm990816.htm> [hereinafter *Wiretap Law*].

45. See *infra* note 46 and accompanying text.

46. *Wiretap Law*, *supra* note 44.

47. *Id.* (quoting Hiroaki Kami, deputy chief of the secretariat to the anti-wiretapping law headquarters set up by the Japanese Federation of Bar Associations).

48. See *id.*

49. *Id.*

50. Fukumoto, *supra* note 3.

51. See Williams, *supra* note 8.

52. *Id.*

53. *Id.*

54. *Wiretap, but Carefully*, JAPAN TIMES, Aug. 28, 2000, available in LEXIS, News Library, Japan Times File.

surveillance of their day-to-day communications.⁵⁵ Studies that report rights violations in the United States from excesses in wiretapping by U.S. authorities have further fueled the fear that Japanese authorities will abuse the new law.⁵⁶ Some critics have pointed to legal culture, such as the broad authority granted to police in criminal procedural laws, as a reason why the general public should be concerned about the implementation of the law.⁵⁷ These claims have caused fears that the checks and safeguards placed on the law's use are not sufficient to constrain the powers conferred upon the authorities.⁵⁸

There has been considerable support in Japan to repeal the Communications Interception Act. The most vocal opponents, however, are not members of the general public, but specific interest groups. Telecommunications industry workers, who will be responsible for acting as third party witnesses to wiretapping,⁵⁹ Internet service providers,⁶⁰ and opposition politicians have been vocal in opposing the law.⁶¹

Japanese attorneys are also vocal opponents of the law. According to Kazuo Miyazaka, a Japanese attorney, attorneys fear that some of the advice that an attorney gives to a client, if overheard by police, could raise legal issues, or possibly even criminal charges.⁶² For example, Miyazaka asserts that it is common practice for attorneys in Japan to advise clients on the brink of bankruptcy to make some transfers of assets to protect the client's estate.⁶³ In Japan, it is not only illegal for bankrupt individuals to transfer assets in this situation, but it is also illegal for attorneys to advise their clients to do so.⁶⁴

Some Japanese citizens have suggested that opposition to the Communications Interception Act is exaggerated because members of the media are among those most opposed to the Act. Hajime Nakata, a Japanese attorney with the law firm of Miyake and Yamazaki, believes that the media has drummed up a considerable amount of

55. *Listening in, supra* note 6.

56. *Wiretap, but Carefully, supra* note 54 (reporting on a U.S. human rights group report that wiretaps were used twelve million times in a fourteen-year period, but most cases had nothing to do with the crime).

57. Choy, *supra* note 9.

58. *See id.*

59. Hasegawa, *supra* note 24.

60. Internet service providers fear the costs involved in establishing a system that would enable police to catch all e-mail sent to a single account. Williams, *supra* note 8.

61. Martyn Williams, *Japan's Police Gain Right to Tap Phones and E-Mail*, at <http://europe.cnn.com.com/2000/TECH/computing/08/16/japan.police.idg>.

62. Interview with Kazuo Miyazaka, attorney in Nashville, TN (Dec. 4, 2001). Kazuo Miyazaka is an alias used to protect the identity of the source.

63. *Id.*

64. *Id.*

opposition to the Act because the media fears that the police will use the law to monitor communications between the media and its sources.⁶⁵ Nakata suggests that this fear stems from the broad powers granted to police after World War II, which police used to keep a close watch over the media.⁶⁶ Fearful of the past, the media generates much of the negative publicity of the law in an attempt to create more opposition. Despite opinion polls showing that most of the general public did not support the law and felt that clauses to prevent abuses would be ineffective, much of the Japanese public seems unconcerned by the wiretapping law, and many people even view the law as a necessity.⁶⁷

III. THE NECESSITY OF THE WIRETAP: GROWTH OF ORGANIZED CRIME IN JAPAN

To understand why Japan decided to pass the Communications Interception Act, it is important to understand the nature and activities of Japanese organized criminal syndicates, and the extent to which organized crime affects Japan and the global community. The dangers that organized crime poses to Japanese society and the Japanese economy threatens to create more problems for the international community and Japan if criminal syndicates continue to remain beyond the reach of law enforcement.

A. *The Yakuza and Other Organized Criminal Groups*

Organized crime is as problematic in Japan as it is in many other industrialized countries. In Japan, organized criminal groups pose a threat not only to the general safety of society, but more significantly in recent years, to the economic welfare of the country. Organized criminal groups in Japan are composed predominantly of professional criminals known as *yakuza*, who are politically connected and financially strong.⁶⁸ Today, there are more than eighty thousand members of the *yakuza*—a number four times larger than that of the Italian-American Mafia—active worldwide, with investments ranging from nightclubs in China to real estate in New York.⁶⁹

65. Interview with Hajime Nakata, attorney, Miyake & Yamazaki, in Nashville, TN (Dec. 4, 2001).

66. *Id.*

67. Williams, *supra* note 61.

68. David E. Kaplan, *Japanese Organized Crime and the Bubble Economy*, The Woodrow Wilson Center Asia Program Occasional Paper, No. 70, 1 (Dec. 13, 1996).

69. *Id.*

Following World War II, the *yakuza* began to grow in membership and power.⁷⁰ In the 1960s, politicians began to employ gang members to keep left-wing protesters in line.⁷¹ The *yakuza* soon developed front companies that made bids on construction projects, rigged sports games, negotiated contract disputes, and eventually seized control of legitimate businesses.⁷² They invested heavily in the entertainment, real estate, and securities industries.⁷³ Due to the strong emphasis in Japan on saving face, Japan proved to be a fertile ground for extortion and blackmail, and a vast industry of *yakuza* corporate racketeers, called *sokaiya*, developed around Japan's largest companies.⁷⁴ During Japan's Bubble Economy⁷⁵ the *yakuza* diversified, and at the peak of the bubble, Tokyo police counted 740 offices run by organized criminal gangs in Tokyo alone.⁷⁶ When the economic bubble burst in 1990,⁷⁷ the *yakuza* gained an unprecedented windfall of tens of billions of dollars from loans that banks are now unable to collect.⁷⁸

Today, the *yakuza* are engaged in traditional underworld activities such as gambling, pornography, prostitution, and drugs, as well as gray-area activities such as settling civil disputes and property development.⁷⁹ The *yakuza* have been called the "driving force" behind almost all crime committed in Japan, and their activities affect not only Japanese business and industry, but the rest

70. *Id.* The *yakuza* emerged in the seventeenth century as gambling gangs. Hiroaki Iwai, *Organized Crime in Japan*, in ORGANIZED CRIME: A GLOBAL PERSPECTIVE 208, 208-09 (Robert J. Kelly ed., 1986). The conditions following World War II were ripe for *yakuza* expansion due to the chaotic conditions of post-war Japan where urban residents were forced to scrounge on the black market to survive. *Id.* Under such circumstances, it was very difficult for people to stay within the confines of the law, and the *yakuza* took advantage of these conditions to extend their power and influence. *Id.*

71. Brian Bremmer & Emily Thornton, *Blackmail*, BUS. WK., July 21, 1997, at 42.

72. Kaplan, *supra* note 68, at 2.

73. *Id.*

74. Bremmer & Thornton, *supra* note 71.

75. The bubble economy refers to the skyrocketing real estate and stock market in Japan in the middle to late 1980s. Over-inflated land values became collateral for endless amounts of credit extended to virtually any business in Japan. Kaplan, *supra* note 68, at 3. In the late 1980s, the *yakuza* power and influence expanded greatly as *yakuza* became absorbers of excess credit and gained access to billions of dollars in loans from banks that did not screen borrowers. *Id.* at 4.

76. *Id.* at 4.

77. In 1990, stock and real estate values plunged and the Nikkei index, Japan's stock exchange, lost \$2 trillion in value, leading Japan into its worst economic slump in 40 years. *Id.* at 5.

78. *Id.* at 1.

79. Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41, 66 (2000).

of the world as well.⁸⁰ Due to a dearth of available attorneys and the inefficiency of the Japanese court system, Japan is a fruitful place for *yakuza* operations.⁸¹ Mobsters are used to settle everything from car accident cases to landlord-tenant disputes.⁸² Law enforcement officials have had a difficult time fighting the *yakuza* due to the unwillingness of victims to report crimes,⁸³ the skillfulness of *yakuza* in evading the law,⁸⁴ and the tight links between leaders and followers in *yakuza* crime syndicates.⁸⁵ The nature of the *yakuza*, coupled with a lack of laws to enable authorities to effectively combat organized crime, have enabled the *yakuza* to expand their operations. Today, the *yakuza* operate in many foreign countries, including the United States.⁸⁶

In addition to the *yakuza*, there are other organized criminal groups operating in Japan that pose a threat to the safety of society. One recent example was the Aum Supreme Truth cult, a terrorist group that evaded the Japanese authorities for years and ultimately killed ten people and injured over five thousand in a nerve gas attack in a crowded Tokyo subway.⁸⁷ The Aum Supreme Truth cult embarked on an extraordinary crime spree for nearly six years before being caught by authorities.⁸⁸ Journalists, concerned parents, and defecting cult members repeatedly warned authorities about the cult,

80. Lt. Bruce A. Gragert, *Yakuza: The Warlords of Japanese Organized Crime*, 4 ANN. SURV. INT'L & COMP. L. 147, 179 (1997).

81. Bremmer & Thornton, *supra* note 71; see also Milhaupt & West, *supra* note 79, at 67 (stating that parties to civil disputes in Japan turn to organized crime-linked settlement specialists to help resolve a variety of problems). For example, traffic accident victims might hire a gang member to convince the other driver to provide compensation. *Id.* Milhaupt and West suggest that such a phenomenon is linked to low lawyer populations in Japan. *Id.* In fact, some members of organized criminal firms view themselves as *urashakai no bengoshi*, or lawyers for the dark side of society. *Id.*

82. *Id.*

83. Iwai, *supra* note 70, at 229-30. Victims of crimes fear reprisals by the *yakuza*, and are therefore unwilling to report the crime to the police. *Id.* This in turn creates a climate of exploitation and victimization that the *yakuza* can easily uncover. *Id.*

84. See *id.* at 230. Organized criminals are familiar with legal loopholes and tend to receive short prison sentences or fines. *Id.*

85. See *id.* at 231. The main obstacle in seeking arrest and obtaining conviction of a leader of an organized criminal syndicate is the willingness of followers to assume blame and the lack of direct links between a leader and a criminal act. *Id.* Members of crime syndicates are loyal and want to enhance their prestige among leaders, so they often do the dirty work for a boss. *Id.* A young member's imprisonment for a leader will bring him great prestige and, upon his release from prison, he will be given a grand homecoming. *Id.*

86. See *infra* Part III.C.

87. Police plan to question cult leader on sarin gas attack, JAPAN WKLY. MONITOR, Mar. 27, 1995, available at 1995 WL 2232916.

88. Kaplan, *supra* note 68, at 9. Criminal activities that the cult engaged in included drug dealing, kidnapping, murder, and manufacture of biological and chemical weapons. *Id.*

but they did not take action until the cult released the deadly nerve gas in the Tokyo subway.⁸⁹ While authorities may have been unwilling to investigate leads, a large part of their failure was due to the antiquated structure of the system in which they were working.⁹⁰ David Kaplan categorized the situation as "a 1940s police force trying to fight twenty-first century crime."⁹¹ Without effective tools to fight highly sophisticated criminal groups, Japanese authorities will continue to have difficulty eradicating organized crime. The Communications Interception Act is one tool with which lawmakers have equipped authorities in an attempt to bring leaders of criminal groups to justice.

B. *Dangers of Organized Crime to Japanese Society*

Organized crime has had a significant impact on the economic welfare of Japan. A number of financial analysts agree with the police that the *yakuza* are the key to rectifying the current banking crisis that exists in Japan as a result of bad loans made during the Bubble Economy.⁹² Japanese lenders have been unable to collect the vast sums lent to the *yakuza* during 1980s.⁹³ Those who have tried to collect on their loans have faced threats and violent attacks, and three executives have been murdered since 1993.⁹⁴ Although the amount of money lent to the *yakuza* during the 1980s is uncertain, some economists believe that ten percent of the bad loans left by the collapse of the bubble are tied directly to the *yakuza*, and another thirty percent may be indirectly tied to gangs.⁹⁵ Some economists put the figure much higher, but even pegging the figure at a conservative amount, the *yakuza* owe more than \$40 billion to Japanese lenders.⁹⁶

The impact of these bad loans on the Japanese economy has been harmful, leading some analysts to call Japan's current economic problems a "*yakuza* recession."⁹⁷ Many Japanese have called for a crackdown on the growing economic strength of the *yakuza*, but the anti-organized crime laws in Japan have not given authorities

89. *Id.*

90. *Id.*

91. *Id.* Kaplan attributes a number of factors to the failure of Japanese law enforcement in the case of the Aum cult, including police incompetence, the bureaucratic nature of the police force and decentralized police power which results in local police departments trying to tackle sophisticated crimes for which they are ill-equipped to investigate. *Id.*

92. *Id.* at 1.

93. *Id.* at 5.

94. *Id.*

95. *Id.* at 6.

96. *Id.*

97. *Id.* (quoting Raisuke Miyawaki, former head of the Organized Crime Division of the National Police Agency).

sufficient measures to investigate bad loans and "crack-down" on gangs.⁹⁸ If debts are not collected and the *yakuza* are able to retain their assets, their current economic presence in Japan may increase markedly, and they will emerge even stronger as the economy improves.⁹⁹ With greater assets and a worldwide reach, the Japanese mobs can prey on legitimate businesses as never before, which will be detrimental to Japan and the rest of the world as well.¹⁰⁰

Organized criminals already play a major role in Japanese business, and many large corporations have close ties to *yakuza* gangs.¹⁰¹ Corporations have used gangsters for decades in a variety of ways to ensure that business runs as planned.¹⁰² One economic commentator stated that the bigger the company is, the closer are its links to the underworld.¹⁰³ Criminal groups began associating with big companies when executives turned to *yakuza* for private law enforcement decades ago.¹⁰⁴ Corporations turned to *yakuza* to handle activities that they were unwilling to undertake directly or were unequipped to handle.¹⁰⁵ They hired *yakuza* for tasks such as enforcing judgments, monitoring bid-rigging for public works projects, manipulating stock prices, and collecting debts.¹⁰⁶ The degree of *yakuza* involvement varies from industry to industry, but such criminal services offered by the *yakuza* are more available in Japan than most other industrialized countries, and most firms in Japan are likely to encounter organized crime representatives.¹⁰⁷ Problems began to arise for corporations once they turned to *yakuza* because the *yakuza*, through the *sokaiya*, used information gathered in performing these services to blackmail the company.¹⁰⁸

Sokaiya are white collar gangsters tied to criminal syndicates that extort money from companies.¹⁰⁹ Typically, *sokaiya* are nominal shareholders and succeed in their extortion attempts by threatening to ask embarrassing questions about the company's wrongdoings at annual shareholder meetings.¹¹⁰ Corporate executives are willing to pay off the *sokaiya* for fear of losing face before their employees and

98. *Id.* at 6-7.

99. *Id.* at 7.

100. *See id.*

101. Michael Hirsh & Hideko Takayama, *Big Bang or Bust; Mobsters Slow Tokyo's Plan to Join World Markets*, NEWSWEEK, Sept. 1, 1997, at 44.

102. *See id.*

103. Richard McGregor, *Japan Inc.'s dirty secret*, WORLD PRESS REV., Dec. 1994, at 40 (quoting Hirokazu Itoh).

104. Mark D. West, *Information, Institutions, and Extortion in Japan and the United States: Making Sense of Sokaiya Racketeers*, 93 NW. U. L. REV. 767, 787 (1999).

105. *Id.*

106. *Id.* However, it should be noted that not all firms hire *yakuza*. *Id.* at 788.

107. *Id.*

108. *Id.*

109. *See id.* at 767.

110. Gragert, *supra* note 80, at 182.

the public.¹¹¹ No other industrialized country has lived with corporate blackmail as Japan has,¹¹² and in recent years scandals involving payments to *sokaiya* by some of Japan's most prestigious financial institutions have drawn international attention to Japan's corporate problems.¹¹³ Mob pressure on Japanese corporations is so pervasive that many large companies maintain budgets for payments to *sokaiya*.¹¹⁴ In a 1997 survey of large Japanese firms, ninety percent indicated that they had been approached by *sokaiya* with extortionist demands; another poll of two thousand firms revealed that seventy-seven percent of the firms polled paid the *sokaiya*.¹¹⁵ Mark West has suggested that the nearest U.S. equivalent to these recent Japanese scandals would be if the directors and managers of Citicorp, Ford, General Electric, Motorola, Intel, Sara Lee, Macy's, Bloomingdale's, Merrill Lynch, Lehman Brothers, Salomon Smith Barney, and Morgan Stanley were all arrested in the same year for paying the Italian Mafia to keep their shareholder meetings short.¹¹⁶

The blackmail suffered by Japanese corporations due to their corporate ties with organized crime only adds to Japan's economic woes. Organized crime impedes Japan's efforts to open its markets and seek investment from global sources. If Japan is unable to cut back the power of *sokaiya* racketeers, it will not become a more influential player in the global financial system.¹¹⁷ In recent years, the government has begun to take efforts to sever the ties between corporations and organized crime in an attempt to grow in the global financial market.¹¹⁸ Authorities are beginning to crack down on companies for paying off organized criminals; dozens of top executives have been arrested.¹¹⁹ Still, the process of rooting organized crime from corporate Japan has not been easy.¹²⁰ Racketeers have become angry and lashed out with violence against corporate officers.¹²¹

111. See *id.* Payment to the *sokaiya* is illegal and can result in civil or criminal liability for corporate executives, but this has not deterred payments to *sokaiya*. West, *supra* note 104, at 791-93.

112. Bremmer & Thornton, *supra* note 71.

113. West, *supra* note 104, at 785.

114. Bremmer & Thornton, *supra* note 71 (quoting Satoshi Yamamoto, owner of a publishing company that publishes stories on corporate misdeeds and who has allegedly been linked to *yakuza* crime syndicates). Ten percent of the billings from Japan's largest law firm, Mori Sogo, now come from advising 100 major listed companies on how to deal with *sokaiya*. *Id.*

115. *Id.*

116. West, *supra* note 104, at 769.

117. Hirsh & Takayama, *supra* note 101, at 44.

118. *Id.*

119. *Id.* Some of the most noted figures who have been arrested are former the Nomura Securities President and the former Dai-Ichi Kangyo Bank chairman. *Id.*

120. See *id.* Some murders of corporate executives have been tied to *sokaiya*. Once such example was the 1997 murder of Koichiro Tarutani, who headed up the customer complaint department of Yamaichi Securities. *Id.*

121. *Id.*

Companies have been unwilling to provide helpful information to authorities out of fear of what may happen if they cooperate.¹²² As one unnamed executive said, "We are likely to lose our lives if we try to cut our ties with criminal organizations and the sokaiya . . . [b]ut if we continue relations with them, we are likely to be arrested, thus destroying our careers. Either way, we have to put our lives on the line."¹²³ Thus, laws that merely outlaw corporate payoffs are unlikely to stop the practice or to encourage foreign investment. Authorities need more aggressive measures to investigate organized crime if Japan wishes to achieve a truly free, fair, and global financial market.¹²⁴

The wiretapping law is not aimed directly at fighting the types of crimes that have had a hand in Japan's current financial problems, but the law may indirectly help Japan correct some of its economic problems. If Japan is able to collect on its bad debt and root out corporate extortion, it will be able to entice foreign investment and facilitate recovery from the current recession. One of the main reasons why corporations and financial institutions have been unable to solve these problems is fear that if they try to collect on loans or stop blackmail payments, there will be reprisals.¹²⁵ With the death and violence that have already occurred, those fears seem to be well founded. Thus, Japan cannot depend upon corporations to correct the problems that they have arguably created for themselves, and authorities cannot count on companies to provide much assistance in catching these criminals. Authorities need more tools to discover criminal activity on their own, without relying so heavily on the assistance of those who have been directly affected by organized crime. Electronic surveillance gives the authorities one of the necessary tools because it enables them to gather the evidence needed to arrest criminal suspects and stop criminal activity.

Murder is one of the four crimes for which wiretapping is permitted.¹²⁶ Threats of murder and physical violence are the means by which criminal syndicates have perpetuated their grasp on corporate Japan; wiretapping, if used aggressively, could help destabilize the criminal hold on financial institutions by preventing organized murders of corporate executives and enabling authorities to arrest those behind the extortion.

Removing some of the threat of violence might encourage corporations to sever ties with organized crime, but realistically, the

122. *Id.*

123. McGregor, *supra* note 103, at 40.

124. See Hirsh & Takayama, *supra* note 101, at 40. Former Prime Minister Ryutaro Hashimoto stated that his goal was to achieve a "free, fair, and global" financial market by 2001. *Id.*

125. See *supra* notes 121-24 and accompanying text.

126. See *supra* note 33 and accompanying text.

wiretapping law does not give authorities enough power to eradicate organized crime from the Japanese economy. In its current form, the wiretapping law does not permit the use of electronic surveillance for the types of financial crimes in which the *yakuza* are involved. Only threats of murder in connection with financial crimes can trigger permissible legal use of wiretapping. For Japan's financial markets to be more attractive to foreign investors, investors will need more assurance that Japan is working to abolish corporate ties with the underworld. A more aggressive wiretapping law that allows authorities to conduct wiretapping in a wider variety of suspected crimes may help. Although such a law will not automatically cure the current problems, it will give authorities more power to locate criminal activity.

C. Global Threats of Organized Crime

The *yakuza* began to expand their activities into foreign countries in the late 1960s.¹²⁷ First, the gangs expanded their activities into nearby Korea after ethnic Koreans living in Japan joined criminal groups in substantial numbers and were able to open up doors to their country.¹²⁸ Then, as the yen became stronger and more Japanese began traveling abroad, the *yakuza* followed their countrymen to other Asian countries and appeared in Taipei, Manila, and Bangkok, arriving in places as far away as Brazil, Italy, Australia, and the United States by the 1980s.¹²⁹ As the *yakuza* expanded abroad, they began forging criminal alliances, smuggling guns and drugs, and engaging in sexual slavery.¹³⁰

Two of the activities in which organized criminal groups in Japan are heavily involved are drug trafficking¹³¹ and human smuggling, both of which have a significant impact on the global community, and which were some of the primary concerns of the United Nations General Assembly when the Convention Against Transnational Organized Crime was signed in December 2000.¹³²

127. Kaplan, *supra* note 68, at 1.

128. *Id.*

129. *Id.* at 2; see also Frank F.Y. Huang & Michael S. Vaughn, *A Descriptive Analysis of Japanese Organized Crime: The Boryokudan from 1945 to 1988*, 2 INT. CRIM. JUST. REV. 19, 38 (1992) (reporting that in 1984 the President's Commission on Organized Crime received testimony from witnesses who stated that the illegal activities of Japanese criminals were appearing in Hawaii, Los Angeles, San Diego, and New York).

130. Kaplan, *supra* note 68, at 2.

131. *Id.* Kaplan states that drugs, especially crystal methamphetamine, are the biggest moneymakers for the gangs providing one third of all *yakuza* income. *Id.*

132. U.S. Department of State, *General Assembly adopts Major Treaty targeting Organized Crime*, (Nov. 15, 2000), available at <http://www.usinfo.state.gov/topical/global/traffic/00111601.htm>.

Japan's prostitution industry, for instance, is controlled by the *yakuza*. It is vast and expansive, a classic example of the internationalization of criminal activity that harms the global community.¹³³ The *yakuza* are responsible for importing many of the more than 100,000 Asian women who have been smuggled into Japan illegally from Thailand, the Philippines, Vietnam, Taiwan, and Korea, lured by the promise of economic success.¹³⁴ Without effective laws enabling Japanese police to discover these activities, Japanese criminal syndicates will continue to pose a threat to the international community.

IV. LEGAL CHALLENGES TO THE COMMUNICATIONS INTERCEPTION ACT

Critics of the wiretap law raise two primary legal challenges: that the law is unconstitutional and that police and prosecutors who already possess overly broad investigative powers will apply it illegally. The Japanese Supreme Court has reviewed the law and held it to be constitutional so long as it is implemented according to legal procedures.¹³⁵ Authorities have vowed that they will not apply the law arbitrarily; however, opponents are not satisfied because they believe that potential for abuse of the law is high and that it directly conflicts with Article 21 of the Japanese Constitution.¹³⁶

A. Constitutional Issues

On its face, the Communications Interception Act appears to violate two human rights protections guaranteed by the Japanese Constitution. Article 21 protects secrecy of any means of communication: "No censorship shall be maintained, nor shall the secrecy of any means of communication be violated."¹³⁷ Article 35 guarantees the right to privacy: "The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized. . . ."¹³⁸ These unresolved constitutional issues led to the revision of the original bill, limiting wiretapping to only four types of crime and placing other restrictions on the practice.¹³⁹

133. Huang & Vaughn, *supra* note 129, at 39.

134. *Id.*

135. *See infra* note 142 and accompanying text.

136. *See infra* notes 139-40 and accompanying text.

137. KENPO, art. 21.

138. *Id.* art. 35.

139. Choy, *supra* note 9.

In December 1999, the Japanese Supreme Court examined the law and opined that if performed according to the required procedures, the law is constitutionally permissible so long as it is needed for a criminal investigation.¹⁴⁰ Proponents have not been able to give an explanation that is completely satisfactory to opponents for why the wiretapping law does not violate Article 21, but there are two explanations for why the Japanese Supreme Court held the law to be constitutional.

First, Japanese society as a whole has always been more focused on group welfare than individual rights, and this characteristic is reflected in the court's historically narrow interpretation of individual rights. Japan has been referred to as a "communitarian feudal democracy," where mutual respect and understanding are prized, and the enforcement of individual rights an anathema.¹⁴¹ When the current Japanese Constitution went into effect in 1947, some Japanese resented what they felt was a forced adoption of a foreign-authored constitution.¹⁴² Conservative Japanese objected to the heavy emphasis on individual rights, which they believed to be radical content for the hierarchical Japanese society.¹⁴³ In fact, in 1957 the Japanese Diet appointed a Commission on the Constitution to review possible amendments to strengthen public and collective rights against private and individual rights.¹⁴⁴ Although the revisions were never made,¹⁴⁵ a public opinion poll conducted at the time revealed that the general public felt that Japanese law should place more emphasis on public welfare.¹⁴⁶ Given these public sentiments, it is understandable why the court chose to interpret individual rights narrowly. Expanding individual rights would place the judges at risk of public disapproval and would not be in accordance with general public sentiment.¹⁴⁷ Moreover, judges may

140. *Wiretaps Vital in War on High-Tech Crime*, NIKKEI WKLY., Aug. 21, 2000, available in LEXIS, News Library, Nikkei Weekly File.

141. MERYLL DEAN, *JAPANESE LEGAL SYSTEM: TEXT AND MATERIALS* 510 (1997) (quoting Lawrence W. Beer, who comments that mutualist understanding may more adequately protect individuality and the rights of each person than a self-centered individualism blind to the rights and needs of other individuals and the community).

142. Herbert W. Bolz, *Judicial Review in Japan: The Strategy of Restraint*, 4 HASTINGS INT'L & COMP. L. REV. 87 (1980), reprinted in *COMPARATIVE LAW: LAW AND LEGAL PROCESS IN JAPAN* 225 (Kenneth L. Port ed., 1996).

143. *See id.*

144. *Id.* at 256.

145. The Commission on the Constitution was boycotted by progressive parties and chose to make no formal recommendations to the Diet, but the Commission did file a report to the legislature noting its proposal that public rights be strengthened and individual rights limited. *Id.*

146. *Id.* The Japanese public opposed revisions to the Constitution to make public welfare clauses more clearly restrictive of individual rights, but they did feel that more emphasis should be placed on public welfare.

147. *Id.* at 256.

believe that they are expected to moderate the more objectionable provisions of the Constitution by interpreting it according to public welfare ideals in an effort to assimilate the Constitution into Japanese society and forestall amendments.¹⁴⁸

In past decisions where the court has ruled on constitutional provisions concerning individual rights, the court has made clear that articles in the Constitution that protect individual rights can be limited, even without a provision for restricting such rights.¹⁴⁹ In *Koyama v. Japan*,¹⁵⁰ the court ruled on how the freedom of censorship guaranteed under Article 21(2) was to be balanced against Article 175 of the Penal Code, which prohibits the distribution or sale of obscene material. In this case, a Japanese publisher was held to have violated Article 175 by publishing a translation of *Lady Chatterley's Lover*.¹⁵¹ The court found the novel obscene because it "wantonly stimulates or arouses sexual desire or offends the normal sense of sexual modesty of ordinary persons, and is contrary to proper ideas of sexual morality."¹⁵² The court stated that the standard to be applied was "the good sense operating generally through society . . . [which is] not the sum of understanding of separate individuals . . . [but is] a collective understanding."¹⁵³ Furthermore, the court stated that the judgment on what the prevailing ideas of the society are is entrusted to judges.¹⁵⁴ The court found that the novel went beyond the limits recognized by the prevailing ideas of society, and upheld the conviction of the publisher.¹⁵⁵

In reconciling its finding with Article 21, which expressly states that no censorship shall be maintained, the court held that Article 21 and other articles guaranteeing individual fundamental human rights stand under restriction for public welfare and are not unlimited.¹⁵⁶ The court held that this principle meant that such rights could be restricted for the public welfare.¹⁵⁷ Thus, not only did the court establish that constitutional provisions were not absolute and that their effect could be modified by legislation, it also established that the concept of public welfare was malleable and could change over time. Furthermore, the court established itself as the final arbiter of what the standard for public welfare should be, a

148. *Id.*

149. *See infra* notes 152-59 and accompanying text.

150. *Koyama v. Japan*, 11 KEISHO 97 (1957), reprinted in KENNETH L. PORT, *COMPARATIVE LAW AND THE LEGAL PROCESS IN JAPAN* 196 (1996).

151. An English novel by D.H. Lawrence, published in 1928.

152. PORT, *supra* note 150, at 197.

153. *Id.*

154. *Id.*

155. *Id.* at 198.

156. *Id.* at 199.

157. *Id.* at 199-200.

significant holding considering that, in Japan, there are no jury trials.

The wiretap law undoubtedly will restrict individual privacy and violate the secrecy of communication to some extent, but it is clearly a law designed to advance the public welfare because it protects the general population. Even though the law appears to contradict Article 21 of the Constitution directly, the law comports with traditional Japanese ideology and legal theory. Furthermore, Articles 12 and 13 counterbalance individual rights with the public welfare.¹⁵⁸ Article 12 states that the people "shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare."¹⁵⁹ Article 13 provides that a person's right to "life liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation. . . ."¹⁶⁰ Kazuo Izawa, an officer with the National Police Agency, and Hajime Nakata, stated that these two Articles have consistently been used to uphold government restrictions on individual liberties, provided that the restrictions adopted are the least restrictive means for protecting the public welfare.¹⁶¹ There is, therefore, some constitutional basis for the court's opinion that the law is constitutional if used in accordance with legal procedures.

A second explanation for the court's reluctance to declare the wiretap law unconstitutional is that, under the Japanese system, judges lack strong judicial review powers. The fifty-three year history of the present system has been characterized as a period of "cautious conservatism," in which the court has been self-restrained and deferential to the legislative branch.¹⁶² The court has declared a law unconstitutional only five times; it has invalidated legislation only four times.¹⁶³ One explanation for the court's conservatism is that there is considerable ambiguity concerning which branch of government is superior. Article 81 grants the court the power of judicial review,¹⁶⁴ but Article 41 designates the Diet as the "highest

158. Lawrence W. Beer, *Freedom of Expression: The Continuing Revolution*, 53 *LAW & CONTEMP. PROBS.* 39 (1990), reprinted in *PORT*, *supra* note 150, at 212.

159. *KENPO*, art. 12.

160. *Id.* art. 13.

161. Interview with Kazuo Izawa and Hajime Nakata, attorneys in Nashville, TN (Dec. 4, 2001).

162. *DEAN*, *supra* note 141, at 513.

163. *Id.* Another interpretation of the rarity in invalidating legislation is that the Japanese Diet has been extremely successful in drafting legislation. *Id.*

164. Article 81 reads: "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation, or official act." *KENPO*, art. 81.

organ of state power."¹⁶⁵ This apparent inconsistency could be the reason why the court has been hesitant to invalidate laws passed by the Diet, and it may also explain why the court did not find the wiretap law unconstitutional.¹⁶⁶

Another possible explanation for the conservative attitude of the court and its restraint in invalidating legislation is that judicial independence is nominal, due to the control that one political party has held over the Diet since the implementation of the current political regime. The Liberal Democratic Party (LDP) has dominated politics in the post-war period and has exerted control over all aspects of judicial appointments.¹⁶⁷ The LDP is a conservative party and has appointed conservative judges.¹⁶⁸ These conservative judges have been predisposed to support government actions.¹⁶⁹ It is therefore predictable that the court has exercised self-restraint in its judicial review powers and interpreted the Constitution in accordance with the conservative viewpoints of the LDP. It was the LDP that promoted the wiretap law, thus it is not surprising that the court found a way to interpret the wiretap law to be consistent with the Constitution.

Still, such explanations would not be satisfactory to hard-liners who interpret the Constitution literally. One might wonder why, then, the Diet did not choose to amend the Constitution to avoid the constitutional attack that the law has suffered. Although it was considered, an amendment would not have been an easy route for the Diet to choose. To amend the Constitution, two-thirds of the Members of both houses of the Diet and a majority of all votes cast in a national referendum must approve a constitutional amendment.¹⁷⁰ Opposition parties have always held enough seats to block such an amendment.¹⁷¹ When amendments have been proposed, opposition parties respond that amendments will take Japan back to the days of pre-World War II military rule.¹⁷² A judicial decree declaring the law constitutional, therefore, is much more acceptable than an amendment revising Article 21.

165. Article 41 states: "The Diet shall be the highest organization of state power, and shall be the sole law-making organ of the state." *Id.* art. 41.

166. DEAN, *supra* note 141, at 506.

167. *Id.* at 509.

168. Bolz, *supra* note 142, at 253.

169. *Id.*

170. *Id.* at 256.

171. *Id.*

172. *Id.*

B. Objections Based on Criminal Procedure

Criminal procedural laws in Japan give investigators and prosecutors broad discretion to deal with criminal suspects. Opponents of the law fear that these broad powers will give authorities license to apply the wiretap law arbitrarily to the detriment of individual privacy.¹⁷³ There are concerns that the restrictions placed on the law will be impossible to enforce.¹⁷⁴ These fears can be traced to several laws and practices in the criminal justice system, which has eroded constitutional protections of privacy by granting police and prosecutors significant powers to investigate crimes. Opponents of the law fear that the protections of individual freedoms will be further eroded with the introduction of the wiretap law.

One law that gives police tremendous discretion and provided a broad statutory exception to the right to privacy is the Police Duties Law.¹⁷⁵ The Police Duties Law grants law enforcement officials the authority to stop and question anyone in connection with a criminal investigation.¹⁷⁶ Investigators have used the law to conduct searches when police feel that criminal activity may be taking place.¹⁷⁷ The Supreme Court has interpreted this law liberally and broadened the statutory exception under the law in 1978 when it ruled in *Japan v. Sakai*¹⁷⁸ that the law vested police with the power to search anyone in relation to a criminal investigation without a warrant, even when there is adequate opportunity to obtain a warrant.¹⁷⁹ Furthermore, the court held that police were authorized to take all reasonably necessary steps to confirm suspicions of criminal activity.¹⁸⁰ The court stressed that the rights of individuals are not paramount in all situations; at times individual rights must yield to the public's interest in successfully completing a criminal investigation.¹⁸¹ As interpreted, the Police Duty Law allows authorities to conduct searches in the absence of probable cause.¹⁸²

173. See *supra* Part II.C.

174. See *id.*

175. The Police Duties Law, Law No. 163 of 1954.

176. See *infra* note 181 and accompanying text.

177. William B. Cleary, *The Law of Criminal Procedure in Contemporary Japan*, 41 HOKKAIDO L. REV. 1284, 1346 (1991).

178. *Japan v. Sakai*, 32 KEISHO 670 (1978).

179. Susan Maslen, *Japan and the Rule of Law*, 16 UCLA PAC. BASIN L.J. 281, 287 (1998); see also Cleary, *supra* note 177, at 1362.

180. Maslen, *supra* note 179, at 287.

181. *Sakai*, 32 KEISHO at 688; see also Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins?*, 8 EMORY INT'L L. REV. 127, 159 (1994).

182. William B. Cleary, *Opinion of a Scholar: Criminal Investigation in Japan*, 26 CAL. W. L. REV. 123, 133 (1989).

Japanese courts are highly deferential to the judgment of law enforcement officials and have upheld a variety of search practices.¹⁸³ Evidence obtained under questionable circumstances is rarely excluded because courts always find that the requisite degree of necessity for the search exists.¹⁸⁴ Evidence can—and has been—obtained in ways that appear to violate individual rights, and the methods used by police to obtain evidence would not be tolerated in many other countries. In *Japan v. Sakai*, for instance, the court upheld a warrantless search where the search took place two hours after an arrest was made.¹⁸⁵ In this case, police received word that there was a bank robbery and picked up two men in the vicinity of the robbery for questioning.¹⁸⁶ The two men were taken to the police station where the police requested that they open their briefcase and reveal the contents.¹⁸⁷ The men refused, and after over an hour of questioning, the police became impatient and searched the bag without a warrant, even though the two men were in custody and a warrant could easily have been obtained.¹⁸⁸ Nonetheless, the court held that the search was not illegal under the Police Duties Law.¹⁸⁹

In another case, the Japanese High Court ruled that evidence obtained pursuant to a warrantless search that occurred almost two months after the incident that gave rise to the arrest nevertheless was permissible, because the evidence obtained in the search was more important to the investigation than the rights of the individual.¹⁹⁰ The propensity for courts to rule that evidence obtained in a questionable manner is admissible in a trial demonstrates the great degree of latitude given to police. In Japan, objectionable procedures are not an extreme affront to individual liberties because individual liberties are considered to be of secondary importance to public safety.¹⁹¹

183. *Id.* at 146.

184. *Id.*

185. Ramlogan, *supra* note 181, at 159.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* (discussing Judgment of Dec. 26, 1983, 23 KEISHO 1625). In this case, the police did obtain a warrant for arresting a man who had struck his girlfriend, but they did not execute the warrant until two months after a complaint was filed against the suspect, after they later learned that the suspect had a history of drug involvement. When they finally acted upon the warrant for arrest for the battery charge, they conducted a warrantless search of his house. *Id.*

191. Cleary, *supra* note 182, at 147. *But see* SETSUO MIYAZAWA, POLICING IN JAPAN 23 (Frank G. Bennett & John O. Haley trans., 1992) (stating that the Supreme Court ruled in 1978 that evidence would not be admissible if the procedures were gravely illegal and the exclusion of the evidence would be appropriate in the interest of preventing future illegality). At the same time, the court held that it would be unreasonable to exclude all illegally obtained evidence because doing so would jeopardize the search for truth. 32 KEISHO 1672 (1978).

The Police Duty Law thus provides powerful precedent for the belief that courts will not enforce the restrictions in the wiretap law, and will consider evidence obtained through illegal wiretaps. If police decide to arbitrarily wiretap individuals who have committed minor crimes, they may discover information of criminal activity that they might not otherwise have obtained. For people who are not suspected in any crime at all, there are concerns that police might be able to listen to a non-criminal conversation without any fear of reprisal for abuse of the law.

Restrictions on the law designed to ensure that police do not abuse their powers under the law seem insufficient. For example, the requirement that a third party monitor the wiretapping will do little to ensure compliance with the law, because the third party is barred from reading or listening to the intercepted communication.¹⁹² The obligation to send notification to a party who has been wiretapped applies only to crime-related conversation; all other intercepted communications do not have to be reported to the monitored party.¹⁹³ The requirement that communications can only be intercepted pursuant to a court order is also unsatisfactory because judges tend to take police presentations at face value. For instance, in cases of arrest, which also require a court order, courts refuse warrants for arrest only 0.1% of the time.¹⁹⁴ As critics have noted, unlike other countries with a wiretap law, the Japanese police system does not have organizations analogous to the U.S. Federal Bureau of Investigations to expose injustice.¹⁹⁵ Without proper restraint, authorities could become a "big brother," indiscriminately monitoring people's lives and violating people's privacy.

Not only have the courts given police license to use their discretion to investigate criminal suspects, prosecutors, too, have enabled police to conduct liberal investigations of criminal suspects. Police and prosecutors in Japan have a close working relationship, and prosecutors in Japan exercise a substantial amount of control over the police relative to U.S. prosecutors.¹⁹⁶ Japanese prosecutors have little responsibility for reviewing police practices to ensure that the rights of defendants are protected.¹⁹⁷ Prosecutors are almost exclusively concerned with the nature of the evidence obtained by the police, not the methods by which the evidence is obtained.¹⁹⁸ Although there is judicial review of a prosecutor's discretion to indict

192. Hoffman, *supra* note 11.

193. *Id.*

194. *Id.*

195. Hasegawa, *supra* note 24.

196. See Didrick A. Castberg, *Prosecutorial Independence in Japan*, 16 UCLA PAC. BASIN L.J. 38, 72 (1997).

197. *Id.*

198. *Id.*

or suspend prosecution, courts are reluctant to overrule the prosecutor's discretion and judicial review is deferential at best.¹⁹⁹ With such a lack of oversight by either courts or prosecutors, the Japanese public has to rely on the police, who they have increasingly grown to distrust, to self-police when using their wiretapping powers.

Police and prosecutors have other powerful investigative tools that they are entitled to use after they have detained a suspect but before filing any charges. For example, criminal suspects can be detained for up to twenty-three days without formal charges being brought against them.²⁰⁰ During this time, suspects are placed in holding cells at police stations, where they are readily available for interrogations that may run late into the evening.²⁰¹ During these sessions, the defendant does not have the right to have counsel present, and defense counsel must have the approval of police or prosecutors to see a client.²⁰² In general, attorneys are allowed one meeting with the suspect while the suspect is in police custody for two days, and from two to five visits during the remaining twenty days.²⁰³ In contrast to the lengthy investigation that precedes arrest in the United States, Japanese prosecutors use this time to build up their case and to attempt to coerce a confession.²⁰⁴ As one Ministry of Justice official noted: "When all is said and done, pre-indictment detention in Japan is for the purposes of questioning the suspect, demanding a confession, and pursuing other crimes."²⁰⁵

Daniel H. Foote asserts that the main danger presented by the Japanese criminal justice process is the possibility that investigators will unconsciously manipulate evidence.²⁰⁶ For example, if investigators act on circumstantial evidence, they would be able to

199. *Id.* at 73. In a case in which the Supreme Court validated the principle of reversal of conviction based on misuse of prosecutorial discretion, the court did not actually reverse the defendant's conviction because it held that discrimination on the part of police should not result in invalidating the prosecution of the defendant. *Id.* (discussing *Japan v. Fukumoto*).

200. See Daniel H. Foote, *The Right to Silence in Japan*, 21 GA. J. INT'L & COMP. L. 415, 431 (1991).

201. *Id.*

202. MIYAZAWA, *supra* note 191, at 22. Article 39 of the Code of Criminal Procedure provides that when necessary for the investigation, the prosecutor and police may designate times, places, and durations for meetings between suspects and their counsel. *Id.*

203. *Id.* These meetings typically last fifteen minutes, and meetings are usually denied if the suspect refuses to talk or admit to the crime. *Id.* Thus, the primary focus of the detention period is investigation rather than defense. *Id.*

204. Confessions are extremely important for the prosecution in Japan. Courts have come to expect full and detailed confessions, and judges are reluctant to convict a defendant without a confession. Foote, *supra* note 200, at 472. Investigators are therefore concerned that if they do not obtain full confessions they cannot prove guilt. *Id.*

205. *Id.* at 431 (translating the statement of Masayoshi Honda).

206. *Id.* at 475.

pick up a suspect and lead him to a confession that fits the existing evidence.²⁰⁷ Some people have suggested that Japanese suspects are more likely to give false confessions as a result of cultural expectations and their great deference to authority.²⁰⁸ This tendency, coupled with the suspect's isolation for up to twenty-three days, creates the potential for a suspect to confess to a crime that he did not commit.²⁰⁹

The new wiretap law gives investigators an easy means to act on their hunches. Investigators can wiretap communications and use any hint of criminal activity to pick up a suspect and bring him in for extensive questioning. Even if the suspect is not guilty of the crime in question, he could be brought in and interrogated for other crimes, or confess to a crime he did not commit based on the limited evidence obtained by police during the wiretapping.

C. Public Distrust of Police

In the past few years, the image of the Japanese police has been tarnished due to a string of scandals involving several different prefectural police offices and high-ranking officers.²¹⁰ The national perception of police as honest protectors of the public welfare has eroded considerably, and has led a large percentage of the population to distrust the police.²¹¹ This carries over into a distrust of police use of the wiretap law. With such broad powers granted to the police, critics fear that police will have free license to invade the privacy of all citizens, not merely criminal suspects.

The Japanese public has not always lacked confidence in their police force. In public opinion polls taken in the 1980s and 1990s, seventy percent of respondents said they trusted the police.²¹² In opinion polls taken during 2000, the number of respondents who said that they trust the police had declined considerably.²¹³ The decline in public confidence in the police may be due to many scandalous affairs that have recently surfaced. In a six-month period from September 1999 to March 2000, a *Kyodo News* survey reported that police forces had been involved in 167 scandals, and 113 police officers and

207. *Id.* at 475-76.

208. *Id.*

209. *Id.*

210. *See infra* note 217 and accompanying text.

211. *See infra* note 218 and accompanying text.

212. *See* Peter Hadfield, *Japanese Shocked by Police Misdeeds*, U.S. NEWS & WORLD REP., July 10, 2000, at 32.

213. The *Japan Times* reported that in one nationwide survey conducted in 2000, 73.1% of those surveyed voiced dissatisfaction with one or more aspects of police investigations. *See Police Promises are not Enough*, JAPAN TIMES, Sept. 28, 2000. In a spring 2000 poll conducted by the *Asahi Shimbun* newspaper, 60% of respondents said that they do not trust the police. *See* Hadfield, *supra* note 212.

officials were arrested in connection with cover-ups, leaks of investigative information, and performance of obscene acts.²¹⁴ By contrast, the number of disciplinary actions imposed on police officers from 1990 to 1998 ranged between eleven and twenty per year.²¹⁵

With news of police cover-ups and other abuses of power, it is not surprising that critics of the wiretap law claim that police will abuse the law. Reinforcing this fear is the memory of the illegal wiretapping of a Japan Communist Party leader in 1986 by the Kanagawa police.²¹⁶ Despite a ruling by the Tokyo High Court that members of the police force were involved in illegal wiretapping and an order that the prefectural government pay four million yen in damages, the police have continued to deny that wiretapping ever took place and insist that nothing illegal was done.²¹⁷

The ability of the police to cover-up wrongdoing within the department is facilitated by the nature of the Japanese police system. There is no system to obtain information about the internal workings of law enforcement, so the police are able to keep their internal affairs secret.²¹⁸ The police force is also very hierarchical, with the head of the department treated like a king, and subordinates hesitant to express critical opinions no matter how correct they may be.²¹⁹ Until the police system undergoes major reforms, or the police demonstrate that they are able to monitor themselves, critics will continue to attack the wiretap law on the grounds that police cannot be trusted to enforce the law properly.

V. WILL THE WIRETAP LAW BE AN EFFECTIVE TOOL IN FIGHTING ORGANIZED CRIME?

With the wiretap law in its early stages, it remains to be seen whether it will create a rash of illegal privacy violations, or whether it will be effective against organized criminal activity. As the Diet passes legislation aimed at making law enforcement authorities more accountable for their actions, the public should feel some comfort that police will not abuse the law. In late 2000, the Diet took steps in that

214. See *167 Police Scandals Registered in Last Six Months*, JAPAN ECON. NEWSWIRE, Mar. 19, 2000.

215. *Id.*

216. See MIYAZAWA, *supra* note 191, at 5. Members of the Kanagawa Prefectural Police Headquarters in charge of national security matters were found to have placed a wiretap on the phone of Yasuo Ogata, but they would not reveal who the higher-ranking officers were who approved the wiretapping. *Id.*

217. Kiroku Hanai, *Police Resisting Vital Reform*, JAPAN TIMES, Mar. 24, 2000, available in LEXIS, News Library, Japan Times File.

218. *Japanese Police Must Lift Shroud of Secrecy*, DAILY YOMIURI, Sept. 20, 1999, at 3, available at 1999 WL 17757239.

219. See Hanai, *supra* note 217.

direction, proposing a Police Reform Bill.²²⁰ If passed, the bill would give public safety commissions the power to order and lead investigations into alleged police abuses, thus lifting the veil of secrecy behind which the police force has been able to hide.²²¹ As the police force undergoes reform, it will be more difficult for law enforcement to abuse their powers, and public faith in the police force may be restored.

At present, signs indicate that the problem with the law will not be overuse and abuse, but under-use and inefficiency in fighting crime. In February 2001, six months after the law was enacted, the Justice Ministry reported that investigators had not engaged in any wiretapping whatsoever.²²² The Justice Ministry listed several problems that prevented investigators from resorting to wiretaps in criminal investigations, including technical problems, strict conditions placed on the law, and public opposition to the legislation.²²³ Technical problems resulted because of difficulties encountered in wiretapping cellular phone conversations.²²⁴ With time, these technical problems will likely be solved and not impede the use of wiretaps. Strict conditions placed on the law and opposition to the law are more difficult problems, however, and must be overcome before the law can be used effectively. Hajime Nakata asserts that the law has so many restrictions that it is essentially impossible for the police to take advantage of it.²²⁵ Nakata notes that the conditions for using a wiretap are more burdensome than the conditions for obtaining an arrest warrant.²²⁶ The requirement that a third party be present during the wiretapping, that wiretapped individuals be contacted and informed as to why they were wiretapped, and the strict limitation on the crimes for which wiretaps can be used make the law impractical. Until these conditions are relaxed, it is unlikely that the law will be used at all.

The distrust that the public feels toward the police today should not cause the public to be concerned that police will abuse their powers under the Communications Interception Act. Rather, law enforcement is well aware that they have lost public approval and are

220. *Police Reform Bill Clears Lower House*, JAPAN POL'Y & POL., Nov. 6, 2000, available in 2000 WL 29267263. The proposed law would be the first major reform of the police force since it was inaugurated in 1954. *Id.*

221. *See id.*

222. *Ministry to Report No Wiretapping since Law Entered into Force*, JAPAN ECON. NEWSWIRE, Feb. 8, 2001, available in LEXIS, News Library, Japan Economic Newswire File.

223. *Id.*

224. *Id.*

225. Interview with Hajime Nakata, *supra* note 65.

226. *See id.*

therefore likely to be concerned about cleaning up their image.²²⁷ Before the law went into effect, law enforcement authorities were warned against infringing on constitutional privacy provisions when using surveillance.²²⁸ These warnings, coupled with memories of the 1986 illegal wiretapping,²²⁹ seem to have made police too hesitant to use wiretaps in criminal investigations. Until police overcome their hesitancy to use the law, the law will not have any effect in reducing organized criminal activity.

Some detectives and journalists who keep tabs on the *yakuza* have warned that not only will the law have no effect on fighting organized crime, but that it might have the opposite effect, pushing organized criminal activity further underground.²³⁰ Masahiro Yamada, a journalist who follows the criminal underworld, has said that he believes the law will not lead to any arrests of organized criminals because higher-level criminals have assumed for years that police are listening to their conversations and have developed sophisticated ways to avoid having their communications intercepted.²³¹ The most important messages are conveyed in person, often by written notes that are quickly destroyed.²³² Yamada also believes that the law will have an adverse effect on law enforcement abilities to fight organized crime because little information about gang activities will filter back to the police.²³³ Yamada points out that prior to the enforcement of an anti-gang law passed in 1992, police and *yakuza* maintained a give-and-take relationship, tipping each other off to their respective activities through informal channels.²³⁴ After the 1992 law went into effect, gang members were ordered by their superiors to assume a lower profile and keep quiet, which resulted in less information filtering back to the police.²³⁵ Potential inefficacy remains a large concern for critics of the wiretap law.

227. The National Police Agency's white paper (a yearly report) for 2000 recognized for the first time ever the need to repair the tarnished image of Japan's police forces and tackled the subject of criminal acts committed by police, including cover-ups of illegal behavior by fellow officers. *Police Promises are not Enough*, *supra* note 213.

228. *Id.*

229. *See supra* Part III.C.

230. *See* Eric Johnston, *Will Wiretap Law Catch Mob Off Guard?*, JAPAN TIMES, Aug. 21, 1999, available in LEXIS, News Library, Japan Times File.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

VI. CONCLUSION

The Communications Interception Act may not help law enforcement eradicate organized crime, but when coupled with other anti-organized crime laws, it will give authorities some needed assistance to locate criminal activity. As criminal groups grow in power and sophistication, law enforcement authorities need to be given expanded powers to fight criminal activity. As law enforcement powers are expanded, it will be difficult to avoid invasions into the privacy of innocent citizens, but that is a price that people pay for living in safer societies.

Furthermore, the Communications Interception Act may be irreconcilable with the text of Japan's Constitution. But the Japanese people have demonstrated through their history and legal culture that they are willing to sacrifice individual freedoms for the sake of the public welfare. With the passage of time, Japanese people will likely realize that what seems at present to be a "Big Brother" invasion of privacy is actually necessary for the public welfare.

As Japanese people become more comfortable with the law and more accustomed to its usage, lawmakers will have room to expand the law and relax the strict conditions placed on the Communications Interception Act. Thus, for the first several years after implementation, the law should not be expected to assist greatly in the fight against organized crime. Rather, the next few years should be viewed as transitional years in which the Japanese public is given an opportunity to become comfortable with the law. It is possible that the Communications Interception Act might not be used at all in the next few years, but it should not be regarded as a failure if this proves to be the case. It is most important now that the law gain public acceptance so that it can be used effectively in the future. Given the Japanese history of commitment to the public welfare, vocal opposition to the law will likely subside over the next few years, and legislators will be able to adapt the law to fit its intended purpose better. When Japan reaches this point, the Communications Interception Act may begin to help Japan in its fight against organized crime.

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