

Japan's "Reinterpretation" of Article 9: A Pyrrhic Victory for American Foreign Policy?

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ABSTRACT: Article 9 of the Japanese constitution expressly renounces war as a means to resolve international disputes. Yet since its initial promulgation in 1947, Article 9 has been interpreted to allow Japan the right to self-defense. To that end, Japan today possesses one of the most powerful and modern militaries in the world. In the summer of 2014, Prime Minister Shinzo Abe circumvented the constitutional amendment process, and, through a cabinet decision, issued a "reinterpretation" of Article 9 that allowed Japan for the first time to engage in collective self-defense. The questionable constitutionality of Abe's reinterpretation engendered much debate and protest in Japan and abroad. The United States effectively ignored the domestic and international outcry and gave the reinterpretation its blessing, however, as it has desired greater assistance from the Japanese military since the beginning of the Cold War. Yet the unstable legal basis on which Abe's reinterpretation rests creates the very real danger that Japan's newly-declared right of collective self-defense could eventually be retracted, leaving the United States without the support upon which it has based new foreign policy commitments. This Note argues that the United States must take steps in order to prevent Japan's reinterpretation of Article 9 from becoming a Pyrrhic victory for American foreign policy. First, the United States should encourage Japan to legitimize any right of collective self-defense through traditional legal structures and thus solidify its reinterpretation of Article 9. Second, the United States should continue to reduce tensions between Japan and its neighbors before investing further resources into the Japanese side of regional disputes.

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I. INTRODUCTION

*My Lord, is that . . . legal?
I will make it legal.¹*

It was a warm Sunday afternoon in the spring of 2014, and Tokyo’s Shinjuku Station, the busiest train station in the world, was bustling as usual.² Throngs of people streamed in and out of the enormous station, as friends and family met in the heart of the metropolis to enjoy their day off. Amidst the crowd of leisure-seekers, a lone man climbed to the top of an elevated pedestrian bridge outside one of the station’s numerous exits. Hundreds of curious people stopped to peer up at him. Sitting cross-legged and brandishing a megaphone, the man began to shout protests against Prime Minister Shinzo Abe’s attempt to amend Japan’s “pacifist” constitution. After

1. STAR WARS EPISODE I: THE PHANTOM MENACE 0:04:48 (20th Century Fox 1999) (quoting Darth Sidious, responding to Viceroy Nute Gunray).

2. *Busiest Station*, GUINNESS WORLD RECORDS, <http://www.guinnessworldrecords.com/world-records/busiest-station> (last visited Jan. 20, 2016).

speaking for over an hour, the protestor recited a poem by the anti-war poet Yosano Akiko and set his megaphone aside. He then reached for the plastic bottle he had brought with him and began to douse himself with liquid. Some of the onlookers below thought he was just drunk. However, the crowd soon reacted in horror as the man suddenly burst into flame.³

The Shinjuku self-immolation incident was just one of the many protests against Prime Minister Abe's efforts to "reinterpret" Article 9 of the Japanese constitution.⁴ Often referred to as the "pacifist clause," Article 9 expressly "renounce[s] war as a sovereign right of the nation and the threat or use of force as means of settling international disputes," and forbids Japan from maintaining "land, sea, and air forces, as well as other war potential" for such purposes.⁵ However, since its initial promulgation in 1947, the Japanese government and its judiciary have interpreted Article 9 to allow Japan the right to self-defense, and to that end the country today possesses one of the most powerful and modern militaries in the world.⁶ Yet as its name implies, Japan's Self-Defense Force has traditionally been curtailed by Article 9 to a strictly self-defensive posture.⁷ This posture changed in the summer of 2014, when Abe circumvented the constitutional amendment process and, through a controversial cabinet decision, issued a "reinterpretation" of Article 9 that allowed Japan for the first time to engage in collective self-defense and thus come to the aid of an ally under attack.⁸

3. Reiji Yoshida & Tomohiro Osaki, *Fiery Suicide Bid Shocks Shinjuku on Eve of Historic Security Decision*, JAPAN TIMES (June 30, 2014), <http://www.japantimes.co.jp/news/2014/06/30/national/fiery-suicide-bid-shocks-shinjuku>; see also Jeff Kingston & Asano Ken'ichi, *Japanese Mass Media Buries Self-Immolation Protest over Abe Government's Constitutional Coup*, ASIA-PAC. J.: JAPAN FOCUS (Sept. 15, 2014), http://japanfocus.org/events/make_pdf/228. The protestor survived the suicide attempt. Martin Fackler, *Japanese Protester Sets Himself on Fire at Train Station in Tokyo*, N.Y. TIMES (June 29, 2014), <http://www.nytimes.com/2014/06/30/world/asia/japanese-protester-sets-himself-on-fire-in-tokyo.html>.

4. See Minami Funakoshi, *Thousands Denounce Japanese PM Abe's Security Shift*, REUTERS (June 30, 2014, 8:53 AM), <http://www.reuters.com/article/2014/06/30/us-japan-defenseidUSKBNof503U20140630>; Maan Pamintuan-Lamorena, *3,000 Protest in Tokyo Against Revision of Japan's Pacifist Constitution*, JAPAN DAILY PRESS (Apr. 9, 2014), <http://japandailynews.com/3000-protest-in-tokyo-against-revision-of-japans-pacifist-constitution-0947015>; Yoshida & Osaki, *supra* note 3. Even the celebrated animation director Hayao Miyazaki of Studio Ghibli lent his voice to the chorus advocating for the preservation of Article 9. Miyazaki Hayao, *Constitutional Amendment Is Out of the Question*, ASIA-PAC. J.: JAPAN FOCUS (Sept. 8, 2014), <http://japanfocus.org/~Miyazaki-Hayao/4176/article.pdf>.

5. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9 (Japan).

6. See STOCKHOLM INT'L PEACE RESEARCH INST., THE SHARE OF WORLD MILITARY EXPENDITURE OF THE 15 STATES WITH THE HIGHEST EXPENDITURE IN 2013 (2014), <http://www.sipri.org/research/armaments/milex/milex-graphs-for-data-launch-2014/The-share-of-world-military-expenditure-of-the-15-states-with-the-highest-expenditure-in-2013.png> (showing Japan's military spending in 2013 was ranked eighth globally, accounting for 2.8% of the world's combined military spending that year); see also *infra* Part II.C.

7. See *infra* Part II.D.

8. See *infra* Part III.A.

While the questionable constitutionality of Abe's reinterpretation engendered much debate and protest in Japan and abroad, the U.S. government effectively ignored such rhetoric and gave the reinterpretation its blessing,⁹ as it has for decades been pushing Japan to repeal Article 9 so that it could assist the United States and its allies during the Cold War.¹⁰ Now that Abe's reinterpretation has been accepted, the United States seems to have finally achieved this desire. It has responded to Abe's declaration by reaffirming its support for Japan in its regional disputes and significantly increasing military assistance and cooperation with Japan.¹¹

The geopolitical makeup of East Asia, however, has changed greatly since the days of the Cold War. During the post-World War II ("WWII") and Cold War periods, Japan was worried about being dragged into American conflicts, but today the inverse holds true—the United States is relatively stable in its relations with East Asia and instead stands poised to be dragged into a Japanese conflict. Japan's reinterpretation of Article 9 and the American response has exacerbated this danger of conflict. Further, the unstable legality of Abe's reinterpretation could ultimately lead to the revocation of the newly declared right of collective self-defense, leaving the United States exposed and unable to call upon the Japanese military support it relied upon in forming its foreign policy strategy in the region.

This Note argues that the United States must take steps to prevent Japan's reinterpretation of Article 9 from becoming a Pyrrhic victory¹² for American foreign policy in East Asia.¹³ Part II traces the unique development of Article 9 within the Japanese constitution, serving to highlight the significant role the

9. See *infra* Part III.B.

10. See *infra* Part II.B.

11. See *infra* Part III.B.

12. A "Pyrrhic victory" is a victory that comes at such a great cost to the victor that it negates any expected benefits. *Pyrrhic Victory*, DICTIONARY.COM, <http://dictionary.reference.com/browse/pyrrhic-victory> (last visited Jan. 20, 2016). The expression refers to a decisive battle between King Pyrrhus of Epirus and a Roman army in 279 B.C. *Id.* King Pyrrhus was victorious, but lost so many officers and soldiers that he was unable to continue his campaign to conquer Rome, causing him to famously remark that "[i]f we are victorious in one more battle with the Romans, we shall be utterly ruined." 9 PLUTARCH, PLUTARCH'S LIVES 417 (E. Capps et al. eds., Bernadotte Perrin trans., 1920). Justice Hugo Black alluded to King Pyrrhus in one of his dissents. See *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, J., dissenting) ("If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: 'Another such victory and I am undone.'").

13. This Note does not attempt to address the benefits or detriments of the reinterpretation of Article 9 from a Japanese perspective. For such a discussion, see generally BRYCE WAKEFIELD, *ABE'S LAW: DOMESTIC DIMENSIONS OF JAPAN'S COLLECTIVE SELF-DEFENSE DEBATE* (2014), <http://www.wilsoncenter.org/sites/default/files/WakefieldEssay.pdf>; Noah Feldman, *It's OK for Japan to Fudge Its Constitution*, BLOOMBERGVIEW (July 16, 2015, 6:14 PM), <http://www.bloombergview.com/articles/2015-07-16/its-ok-for-japan-to-fudge-its-constitution>; Bryce Wakefield & Craig Martin, *Reexamining "Myths" About Japan's Collective Self-Defense Change—What Critics (and the Japanese Public) Do Understand About Japan's Constitutional Reinterpretation*, ASIA-PAC. J.: JAPAN FOCUS (Sept. 8, 2014), http://japanfocus.org/events/make_pdf/227.

United States played in the promulgation process and its subsequent efforts to then overturn Article 9 in the context of the Cold War and beyond. Part III focuses on Prime Minister Abe's reinterpretation of Article 9 in the summer of 2014 and the potential negative effects it could have on American interests. Part IV offers solutions to turn the reinterpretation into a foreign policy victory for the United States.

II. HISTORICAL CONSIDERATIONS OF THE JAPANESE CONSTITUTION AND ARTICLE 9

*If we hold somewhere in the back of our minds the idea of protecting ourselves by armaments, or the idea of protecting ourselves by force of arms in case of war, then we ourselves will impede the security of Japan.*¹⁴

In the aftermath of WWII, America's goals for the occupation of Japan were twofold: prevent its defeated foe from reemerging as a threat to global security, and establish a system of government modeled after the principles of American democracy.¹⁵ General Douglas MacArthur, commander of the U.S. forces in the Pacific during WWII,¹⁶ was installed by President Truman in 1945 to lead Japan in this effort.¹⁷ Rewriting the Japanese constitution became an essential aspect of the occupation,¹⁸ and after a lengthy drafting process, a new constitution was signed into law on May 3, 1947.¹⁹

14. JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 398 (1999) (quoting Prime Minister Shigeru Yoshida, addressing the House of Councilors, January 1950).

15. *See id.* at 76–77. Put succinctly, these goals were “the ‘demilitarization and democratization’ of Japan.” *Id.* at 77. The scope of the means employed to achieve this end were unprecedented. *Id.* at 77–78. According to Dower, the occupation “set about doing what no other occupation force had done before: remaking the political, social, cultural, and economic fabric of a defeated nation, and in the process changing the very way of thinking of its populace.” *Id.* at 78. These objectives were in large part driven by America's desire to create a stable international framework to support the new Bretton Woods economic system. *See* WALTER LAFEBER, *THE CLASH: A HISTORY OF U.S.–JAPANESE RELATIONS* 259 (1997); *see also* M.J. Stephey, *A Brief History of Bretton Woods System*, *TIME* (Oct. 21, 2008), <http://content.time.com/time/business/article/0,8599,1852254,00.html>. With Soviet influence encroaching upon East Asia and threatening America's proposed new world order, for the United States “[t]he key to Asia was becoming Japan.” LAFEBER, *supra*, at 259. The Americans were in a unique position to attain these goals; unlike occupied Germany, which had been divided amongst four victorious nations (the United States, the United Kingdom, France, and the Soviet Union), Japan was placed entirely under American control. DOWER, *supra* note 14, at 78.

16. LAFEBER, *supra* note 15, at 223.

17. *Id.* at 260. General MacArthur and his officers were initially afforded near total autonomy in command over the occupation. DOWER, *supra* note 14, at 78–79. The degree of power wielded by MacArthur, coupled with his force-of-personality, had its own unique effects on the occupation policy and Japanese perceptions of it. *See id.* at 226–33 (discussing the Japanese impressions and attitudes towards MacArthur).

18. *See* DOWER, *supra* note 14, at 346–47; LAFEBER, *supra* note 15, at 266–67. Japan's indigenous constitution, the Meiji Constitution, and most all jurisprudence prior to World War II was modeled after the German legal system. DOWER, *supra* note 14, at 346.

19. LAFEBER, *supra* note 15, at 267–68.

Article 9 of the modern constitution remains unchanged from the initial format promulgated by the Diet, the legislative body of Japan,²⁰ in 1947, and reads as follows:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.²¹

On its face, this language appears to clearly support the American aims of demilitarizing Japan and preventing its resurgence as a military threat to the world. Today, however, Japan maintains an advanced military; as of April 2015, it had an annual budget of \$41.6 billion and was comprised of 247,173 active personnel, 1613 aircraft, and 131 ships.²² How did this seemingly blatant contradiction between the constitution and reality come about? The answer lies in the shifting priorities of both Japan and the United States amidst the changing geopolitics of the 20th century.

Shortly after Article 9's promulgation, the United States began to demand the rearmament of Japan in the context of the Korean War and the rise of communism.²³ Bolstered by the constitutional restraint of Article 9, Japan successfully stayed out of the conflict in Korea, but the conflict had lasting effects on the development of the Article and its interpretation.²⁴ Furthermore, American attempts to persuade Japan to shoulder some of the burden of promoting capitalism in East Asia and amend Article 9 became a recurring theme of the Cold War and beyond.²⁵ Criticism and controversy over the Article have not been limited to an American perspective; it has been the subject of numerous debates and challenges among Japanese politicians

20. The Diet was initially established as the Imperial Diet in 1889 with the ratification of Japan's first constitution, and was a bicameral body consisting of a House of Representatives chosen by the common people and a House of Peers made up of imperial family members and nobles selected by the emperor. JAMES L. MCCLAIN, *JAPAN: A MODERN HISTORY* 205 (2002). Japan's postwar constitution retained the Diet (rechristened as the National Diet) while elevating its position to "the highest organ of state power" and "the sole law-making organ of the State." NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 41 (Japan).

21. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9 (Japan).

22. *Japan Military Strength*, GLOBAL FIREPOWER, http://www.globalfirepower.com/country-military-strength-detail.asp?country_id=Japan (last updated Oct. 17, 2015).

23. LAFEBER, *supra* note 15, at 283-95.

24. See KENNETH L. PORT, *TRANSCENDING LAW: THE UNINTENDED LIFE OF ARTICLE 9 OF THE JAPANESE CONSTITUTION* 42-43 (rev. prtg. 2010).

25. See DOWER, *supra* note 14, at 394-98.

and bureaucrats.²⁶ Indeed, throughout its history, the “pacifist” clause has served as both friend and foe to the Japanese nation and its allies.

A. *DRAFTING A NEW CONSTITUTION: GIVE PEACE A CHANCE?*

From the beginning, the drafting of the new Japanese constitution in the aftermath of WWII proved to be a confusing and convoluted process, marked with miscommunication, uncertainty, and numerous drafts.²⁷ MacArthur initially believed “that any amendments to the old constitution should come from the [Japanese] government.”²⁸ Heeding MacArthur’s call, the Japanese Prime Minister’s cabinet established the Constitutional Problem Investigation Committee, consisting of 17 members and led by Matsumoto Jōji, an experienced Japanese legal scholar (hereinafter “Matsumoto’s committee”).²⁹ But the committee members, being firmly rooted in the traditional legal structures of Meiji-Era Japan,³⁰ were ultimately unable to satisfy America’s vision for a more Western-style liberal constitution,³¹ and the draft they produced on behalf of the Japanese government was deemed insufficient by MacArthur’s team.³² The content of drafts submitted by other Japanese

26. See PORT, *supra* note 24, at 57–85; see also SHŌICHI KOSEKI, THE BIRTH OF JAPAN’S POSTWAR CONSTITUTION, at xi (Ray A. Moore ed. & trans., 1997).

27. KOSEKI, *supra* note 26, at 3–4. Japanese and American officials were involved in the various stages of the drafting process from the beginning. The historical record shows that MacArthur first mentioned the subject of constitutional revision to a Japanese party during a private meeting with former Prime Minister Konoe Fumimaro on October 4, 1946. *Id.* at 8–9. Konoe felt encouraged by his meeting with MacArthur to begin working on his own draft. *Id.* at 9. A power struggle over the authority to write the draft soon erupted amongst Japanese officials, however, and Konoe’s involvement in the revision process would come to an inglorious, and, as a result of suspicion for having participated in war crimes, ultimately tragic end. See *id.* at 12–21. For a thorough analysis of Konoe’s fascinating story and his role as Prime Minister from 1937–1941, see generally KAZUO YAGAMI, KONOE FUMIMARO AND THE FAILURE OF PEACE IN JAPAN, 1937–1941: A CRITICAL APPRAISAL OF THE THREE-TIME PRIME MINISTER (2006).

28. DOWER, *supra* note 14, at 348.

29. *Id.* at 351. This response from the Japanese legal community demonstrates the rich culture of jurisprudence that had developed since Japan’s westernization in the 19th century. See, e.g., CARL F. GOODMAN, THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS 195–96 (3d rev. ed. 2012).

30. The Meiji Period lasted from 1868–1912, coinciding with the reign of Emperor Meiji. See MCGCLAIN, *supra* note 20, at 116, 280. Beginning with the overthrow of the feudal, samurai-led system of government, the Meiji Period saw the modernization of Japan through the complete transformation of its “political, economic, and social institutions.” *Id.* at 153–54. For further reading of this period and Japan’s rapid modernization, see generally *id.* at 119–82.

31. See DOWER, *supra* note 14, at 351–55. For a brief discussion of constitutional liberalism, see generally Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFF., Nov.–Dec. 1997, at 22, 25–26 (“[Constitutional liberalism] refers to the tradition, deep in Western history, that seeks to protect an individual’s autonomy and dignity against coercion, whatever the source—state, church, or society.”).

32. See DOWER, *supra* note 14, at 359–60. The committee’s draft (or at least a version of it) was initially revealed by the *Mainichi Shinbun* newspaper. KOSEKI, *supra* note 26, at 60. The Japanese public’s reaction to the draft was “extremely unfavorable,” thus hastening its ultimate rejection by the Americans. *Id.* at 61; see also *id.* at 76–79 (exploring how the newspaper’s “scoop”

groups was deemed lacking as well.³³ These submissions by the Japanese, when coupled with outside considerations that threatened to subvert MacArthur's authority to reform the constitution,³⁴ convinced MacArthur "to take the lead" and clearly demonstrate to the Japanese the reforms that he and America—but mostly him—had in mind.³⁵

In February 1946, MacArthur tasked SCAP ("Supreme Commander for the Allied Powers," a moniker for the office of MacArthur and the American occupation) with creating from scratch, in secret, its own draft of a Japanese constitution.³⁶ In preparation for the drafting, MacArthur delivered to his aide the following three "essential requirements for constitutional reform":³⁷

1. Emperor is at the head of state.

His succession is dynastic.

His duties and powers will be exercised in accordance with the [c]onstitution and responsive to the basic will of the people as provided therein.

2. War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are now stirring the world for its defense and its protection.

No Japanese Army, Navy or Air Force will ever be authorized and no rights of belligerency will ever be conferred upon any Japanese force.

3. The feudal system of Japan will cease.

No rights of peerage except those of the Imperial family will extend beyond the lines of those now existent.

affected the American draft of Japan's constitution and the theory that the American authorities themselves may have been behind the leak).

33. DOWER, *supra* note 14, at 356. "[A]t least a dozen other proposals for constitutional revision were presented between the fall of 1945 and March 1946" from sources that included political parties, the Japan Bar Association, and "private groups and individuals." *Id.*

34. According to Dower, MacArthur's sudden determination to take over the drafting was in large part "because he believed such an initiative had become essential to protect the emperor." *Id.* at 362. MacArthur had long been convinced that preserving the Japanese imperial institution was essential to a successful occupation and reformation of Japan. *See id.* at 277-79. When the new Far Eastern Commission ("FEC"), which was made up of multiple nations whose representatives potentially harbored anti-emperor sentiments, began to take an interest in the revisions to the Japanese constitution, MacArthur felt compelled to act unilaterally, as "[s]uddenly, it appeared that countries hostile to the emperor and the imperial institution might be in a position to override MacArthur." *Id.* at 363.

35. *Id.* at 360.

36. *Id.*

37. KOSEKI, *supra* note 26, at 79.

No patent of nobility will from this time forth embody within itself any National or Civic power of government.

Pattern budget after British system.³⁸

The second clause clearly provided the framework for what would become Article 9. However, whether the idea of the war-renouncing provision originated with the American occupiers or the Japanese themselves is contested.³⁹ Regardless of its origins, the language was undeniably conducive to the occupation's expressed goal of demilitarization and preventing a resurgent threat from Japan.

After drafting these guidelines, MacArthur created his own "constitutional convention," consisting of a team of 24 American officials, and granted them a single week to secretly generate an entirely new national charter for Japan.⁴⁰ MacArthur's staff incorporated the war-renouncing clause but decided to "ton[e] down" the original language given to them by MacArthur, as they considered the "categorical renunciation of 'war as a sovereign right of the nation . . . *even for preserving its own security*' as too sweeping."⁴¹ The drafters reasoned that every nation possessed the right to self-defense.⁴² Accordingly, they removed some of the language from MacArthur's guidelines and intentionally "left vague the possibility of modest rearmament 'for preserving [Japan's] own security.'"⁴³ This seemingly small change to Article 9 effectively "planted the seed of decades of controversy."⁴⁴

On the sixth day, the team presented its completed draft to MacArthur, which he approved and submitted to the Japanese government with only one

38. *Id.*

39. See Klaus Schlichtmann, *Article Nine in Context—Limitations of National Sovereignty and the Abolition of War in Constitutional Law*, ASIA-PAC. J.: JAPAN FOCUS (June 8, 2009), http://japanfocus.org/site/make_pdf/3168. Former Prime Minister Kijuro Shidehara claimed years after the drafting that Article 9 was his idea. DOWER, *supra* note 14, at 404. However, scholars disagree about whether this is likely the case. Compare Schlichtmann, *supra* ("[I]n my own research I have found no proof of anyone having been the author other than Shidehara."), with DOWER, *supra* note 14, at 404 (arguing Shidehara's claims were likely "the mistaken recollection[s] of an elderly man"), and PORT, *supra* note 24, at 39–41 (explaining that Article 9 was MacArthur's idea but that the General had sometimes portrayed it as a Japanese idea in order to persuade various stakeholders in the drafting process).

40. DOWER, *supra* note 14, at 364. The new draft "was being kept secret not just from the Japanese government, but from just about everybody in the world: the Washington policy-making structure, possible opponents of revision within the occupation command structure, and the many nations in the Allied camp now gathering in the Far Eastern Commission." *Id.* at 371. For further analysis of this incredible story, including the team itself and the writing process, see *id.* at 364–73, and KOSEKI, *supra* note 26, at 68–97 (discussing, in the book's fourth chapter, "A Week in a Secret Room: Writing the SCAP Draft").

41. DOWER, *supra* note 14, at 369 (emphasis added).

42. *Id.*

43. *Id.*

44. *Id.*

minor change.⁴⁵ Notably, MacArthur did not reject the changes to the blueprint for the war-renouncing clause.⁴⁶ The draft's existence had been completely unknown to the Japanese, who were still working on their own ideas for constitutional revision.⁴⁷ The Japanese government initially resisted the draft, but after MacArthur "suggested" that acceptance of his draft was necessary to ensure the survival of the Imperial institution, the government subsequently announced the new constitution to the people—portraying it as a Japanese product that had been approved by the Americans, when the inverse was in fact much closer to the truth.⁴⁸

Once completed, MacArthur ordered that a copy be sent to Matsumoto's committee, the group of legal scholars organized by the Japanese government in response to MacArthur's original call for constitutional revision.⁴⁹ The committee was initially bewildered by Article 9, as a war-renouncing provision was at the time unheard of in a national charter.⁵⁰ However, any surprise or hesitation by the Japanese government was not advertised to the people. At the ceremony announcing the new constitution in March 1946, Prime Minister Shidehara's rhetoric wholeheartedly embraced the idea that Japan as a nation would forever renounce war:

If our people are to occupy a place of honor in the family of nations, we must see to it that our constitution internally establishes the foundation for a democratic government and externally leads the rest of the world for the abolition of war. Namely, we must renounce for all time war as a sovereign right of the State and declare to all the world our determination to settle by peaceful means all disputes with other countries.⁵¹

Although it was certainly to an extent grandstanding, this rhetoric is important because it demonstrates how the new constitution was packaged and presented to the Japanese people from the beginning, foreshadowing the affection much of the populace would come to develop for Article 9.⁵² But

45. *Id.* at 372–73.

46. *See id.*

47. *See id.* at 374–75.

48. *Id.* at 383–84. Controversy remains over whether the Americans essentially forced the Japanese to accept the constitution by delivering to them an ultimatum: accept the draft or the Imperial house will fall. *See* KOSEKI, *supra* note 26, at 98–110 (discussing, in the book's fifth chapter, "A Second Defeat 'Imposed' on Japan?").

49. MCCLAIN, *supra* note 20, at 539.

50. *Id.* at 540–41. Interestingly, at nearly the exact same time in history, France was in the process of adopting a constitution containing a similar clause renouncing war. *See* Schlichtmann, *supra* note 39.

51. DOWER, *supra* note 14, at 384. Of course, this was the man who would later take credit for introducing the concept of a war-renouncing clause to MacArthur in the first place. *See supra* note 39 and accompanying text.

52. The rescript issued by Emperor Hirohito for the occasion was equally sweeping in its embrace of the war-renouncing clause:

this affection was not shared by everyone within the Japanese government.⁵³ After all, how was Japan supposed to defend itself in the event of a foreign invasion if it did not possess a military? Stemming from the changes made to MacArthur's guidelines during the drafting of Article 9,⁵⁴ officials within the Japanese government undertook a further series of alterations and interpretations which eventually allowed an exception for self-defense to be interpreted from the language of the war-renouncing clause.

The first of these alterations occurred during the translation phase. After receiving the American constitutional draft, Matsumoto's committee "w[as] incensed that the result of Article 9 would be that Japan not only had to give up arms but that it had to even forgo the sovereign right to defend itself."⁵⁵ Matsumoto's committee was tasked with translating MacArthur's English-language draft into Japanese, and used the opportunity to "'soften' the impact of Article 9" by carefully choosing words from the notoriously ambiguous Japanese language, the impact of which is indiscernible in the English version.⁵⁶ With the translation finished, the Emperor ceremoniously submitted the draft of the constitution to the Diet on June 20, 1946 for deliberation and ratification.⁵⁷ By the end of the legislative debates, the government's "official interpretation" of Article 9 did not include any exceptions for self-defense.⁵⁸ This was not an oversight by Japanese officials; the rationale for rejecting a right to self-defense can be seen in remarks made by Prime Minister Yoshida during the debates:

Consequent upon our acceptance of the Potsdam Declaration the ultimate form of Japanese government is to be determined by the freely expressed will of the Japanese people. I am fully aware of our nation's strong consciousness of justice, its aspirations to live a peaceful life and promote cultural enlightenment and its firm resolve to renounce war and to foster friendship with all the countries of the world. It is, therefore, my desire that the constitution of our empire be revised drastically upon the basis of the general will of the people and the principle of respect for the fundamental human rights. I command hereby the competent authorities of my government to put forth in conformity with my wish their best efforts toward the accomplishment of this end.

DOWER, *supra* note 14, at 384–85. In addition to the inherent humanistic appeal of a pacifist ideal, the Japanese public's initial support of Article 9 can in part be attributed to a general sense of war weariness in the aftermath of WWII. SHIGENORI MATSUI, *THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS* 238 (2011).

53. See DOWER, *supra* note 14, at 388.

54. See *supra* text accompanying note 42.

55. PORT, *supra* note 24, at 51.

56. *Id.* at 51–53 (analyzing the specifics of the two translations).

57. DOWER, *supra* note 14, at 388. Through this process, the Americans were careful to ensure their principles were not compromised, albeit secretly: "Free discussion of the constitution per se was encouraged, both in the Diet and in the media, but until 1949 all references to SCAP's decisive shaping of the new charter was suppressed." *Id.* at 391.

58. KOSEKI, *supra* note 26, at 193.

I think that the very recognition of such a thing (for a State to wage war in legitimate self-defense) is harmful. . . . It is a notable fact that most modern wars have been waged in the name of the self-defense of States. It seems to me, therefore, that the recognition of the right of self-defense provides the cause for starting a war.⁵⁹

The Diet approved Article 9 and the rest of the new Japanese constitution on October 7, 1946, and it came into effect on May 3, 1947.⁶⁰ Yet just three years later, the world's first "pacifist" nation began training a modern standing army.⁶¹

B. A PACIFIST NATION IN A WORLD AT COLD WAR

The escalation of the Cold War in the late 1940s changed the direction of the occupation of Japan.⁶² America's original goals of demilitarization and democratization gave way to a new objective: ensuring Japan's rapid recovery and transformation into a capable ally in the global fight against communism.⁶³ This objective came to include Japan's rearmament, and by November 1948, officials in Washington, D.C. were calling for the creation of "a paramilitary force of 150,000 inductees to supplement the regular Japanese police," regardless of a direct conflict with the language of Article 9.⁶⁴ It seemed the Japanese were receiving another lesson in American democracy—searching for innovative constitutional interpretations in times of emergency.⁶⁵

MacArthur sharply disagreed with Washington over Japan's rearmament and for years simply refused the order.⁶⁶ However, "the outbreak of the Korean War" in 1950 left him no choice but to comply.⁶⁷ American troops were leaving Japan to join the new conflict in Korea, so MacArthur ordered Japan to create a "National Police Reserve" to fill the vacuum.⁶⁸ The name of this new force was a bit of a misnomer—the "police" brandished "M-1 rifles, machine guns, mortars, flamethrowers, artillery, tanks, and American

59. *Id.*

60. *Id.* at 208.

61. *See* DOWER, *supra* note 14, at 526.

62. MCCLAIN, *supra* note 20, at 550.

63. *Id.*

64. *Id.* at 554-55.

65. A famous example being when the United States Supreme Court upheld the internment of Japanese-Americans during WWII. *See* *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); Exec. Order No. 9066, 3 C.F.R. 1092, 1092-93 (1938-1943).

66. MCCLAIN, *supra* note 20, at 554.

67. *Id.*

68. *Id.* at 554-55. In the absence of American forces in Japan, "both American and Japanese planners became concerned that the then-Soviet Union might either invade Japan or cause instability, which might result in Japan coming to fit under its communist umbrella." PORT, *supra* note 24, at 43.

advisers."⁶⁹ In order to avoid conflict with Article 9, the Americans used special non-military vocabulary when referring to this equipment,⁷⁰ and Prime Minister Yoshida⁷¹ installed a man with no military background as the force's head in an attempt to assuage his countrymen's fears of rearmament.⁷²

Yoshida resisted further attempts by the United States to rearm Japan, however, as he quickly realized the economic benefits to be reaped by removing military spending from the national budget.⁷³ By not participating in foreign conflicts and relying on the United States for defense, Japan could afford to devote the majority of its resources to reconstructing its economy.⁷⁴ Given America's response to the communist invasion of Korea, there was little doubt America would not hesitate to defend Japan if need be. Prime Minister Yoshida's strategy—the "notion of aggressive economic recovery coupled with passive international strategic disassociation"—is today known as the "Yoshida Doctrine."⁷⁵ Article 9 was one of the means used to effectuate this doctrine, as it "gave Yoshida the perfect excuse to shun international military entanglements."⁷⁶ Thus, despite the ideals of world peace and human rights that many today associate with Article 9, its initial propagation by the Japanese government cannot be attributed solely to these ideals, but rather instead to Yoshida's radically pragmatic and unprecedented approach to international relations.

Nevertheless, the United States continued to press Japan to rearm, and during negotiations to end the occupation, the issue of rearmament ended up being the "main obstacle."⁷⁷ Negotiations began in 1950, led by John Foster Dulles.⁷⁸ With the Korean War still raging, the United States was more

69. MCCLAIN, *supra* note 20, at 555.

70. PORT, *supra* note 24, at 43 ("For example, tanks were not called 'tanks,' but instead were called 'special vehicles.'"). In addition to enforcing laws, the new police force was "trained to repel [a foreign military] invasion from the sea." *Id.*

71. "Shigeru Yoshida . . . was [Japan's] Prime Minister from 1946–47 and 1948–54 . . ." *Id.* at 57.

72. LAFEBER, *supra* note 15, at 287.

73. PORT, *supra* note 24, at 57–58.

74. *Id.*

75. *Id.* The "three main principles to this Doctrine" were

1. Economic rehabilitation was the prime goal and cooperation with the [United States] was essential to achieve that goal;
2. Japan should be lightly armed and avoid international conflict. This would contribute to economic development and avoid internal struggles;
3. In exchange for security, Japan would provide bases for United States military.

Id. at 58.

76. *Id.* at 62.

77. LAFEBER, *supra* note 15, at 291.

78. MCCLAIN, *supra* note 20, at 556. John Foster Dulles was an American international lawyer and prominent diplomat. Edward Weintal, *John Foster Dulles*, ENCYCLOPAEDIA BRITANNICA,

eager than ever for Japan to build upon its “police” force and help defend American interests. Furthermore, MacArthur, always a staunch opponent to Japan’s rearmament, was no longer in the picture—Truman removed him from East Asia in 1950 after he publicly criticized the President’s policies.⁷⁹ At a meeting between Dulles and Yoshida in January 1951, Dulles suggested that Japan retain an army of 300,000 troops.⁸⁰ Yoshida firmly rejected the proposal.⁸¹ Talks continued back-and-forth for much of the year, and Dulles eventually caved on the issue of rearmament, settling instead on commitments from Japan to allow U.S. bases to operate on its soil.⁸² In September 1951, 49 nations signed a general peace treaty to officially end WWII hostilities with Japan, and Japan and the United States signed an additional bilateral security agreement.⁸³ The sole purpose of the latter agreement was to secure America’s right to operate military bases in Japan.⁸⁴ Although Yoshida had successfully resisted United States demands for greater rearmament, the United States nevertheless expected this situation to change in the future, as reflected in the text of the 1951 security agreement:

The United States of America, in the interest of peace and security, is presently willing to maintain certain of its armed forces in and about Japan, *in the expectation, however, that Japan will itself increasingly assume responsibility for its own defense against direct and indirect aggression*, always avoiding any armament which could be an offensive threat or serve other than to promote peace and security in accordance with the purposes and principles of the United Nations Charter.⁸⁵

<http://www.britannica.com/biography/John-Foster-Dulles> (last updated Aug. 5, 2014). He later became President Eisenhower’s Secretary of State and was responsible for shaping America’s foreign policy during the early stages of the Cold War. *Id.*

79. MCCLAIN, *supra* note 20, at 556. Specifically, MacArthur “advocat[ed] a more aggressive military policy” towards China than Truman was willing to employ. DOWER, *supra* note 14, at 548. Truman claimed he dismissed MacArthur “in order to avoid World War III.” *Id.* The Japanese perceived MacArthur’s sudden and disgraceful termination as a tragedy, and the “day after [Truman’s] announcement, the . . . *Asahi* newspaper published an editorial [entitled] ‘Lament for General MacArthur.’” *Id.*

80. MCCLAIN, *supra* note 20, at 557.

81. *Id.* In rejecting Dulles’s proposal, “Yoshida drew the arrows from his quiver: His country couldn’t afford it; the public wouldn’t tolerate it; the constitution prohibited it; Japan’s neighbors would be horrified.” *Id.* There were certainly elements of truth behind each of these “arrows,” but Yoshida also feared that rearming so soon would cause Japan to be drawn into the conflict in Korea. See DOWER, *supra* note 14, at 548.

82. LAFEBER, *supra* note 15, at 291.

83. *Id.* at 288–92.

84. See Security Treaty, U.S.-Japan, Sept. 8, 1951, T.I.A.S. No. 2491.

85. *Id.* (emphasis added).

C. THE BIRTH AND DEVELOPMENT OF THE SELF-DEFENSE FORCE

The pressure from the United States for Japan to strengthen its military continued to escalate throughout the decade. Dwight D. Eisenhower assumed the Presidency in 1953 and set a goal of reducing the U.S. military budget from \$52 billion to \$34 billion.⁸⁶ This was to be achieved in part by pressuring allied nations to take charge of their own security.⁸⁷ To this end, then-Vice President Richard Nixon told a large gathering of Japanese leaders that America had "made a mistake in 1946" when it drafted Article 9.⁸⁸ While Japan was able to resist American pressure for a time, eventually an offer of American capital finally tipped the scales and swayed Japan: the United States conditioned badly-needed monetary aid on Japan's assurances of rearmament, and so Yoshida began to strengthen Japan's military.⁸⁹

Building up Japan's armed forces clearly conflicted with both Article 9 and the Prime Minister's earlier pronouncement that Japan would never maintain an army, even for self-defense.⁹⁰ Furthermore, it became clear that the farce of the National Police Reserve could no longer be seriously maintained.⁹¹ Yoshida thus changed his tune, "adopt[ing] the thesis that Article 9 permitted Japan to maintain military forces as long as those units did not possess 'war potential.'"⁹² The Police Reserve was subsequently renamed the National Safety Force.⁹³ Yoshida advocated that Japan, just like every other nation on earth, possessed an inherent right to defend itself, and that a military force maintained solely for such a purpose did not violate the constitution's "spirit."⁹⁴

In adopting this interpretation, Yoshida and his officials relied on textual changes made to Article 9 by a legislative subcommittee during the initial legislative debates in 1946, additions known today as the Ashida amendment.⁹⁵ The best way to understand the effect of this amendment is by examining the language of Article 9 itself. The original version initially submitted to the Diet in 1946 was as follows:

86. LAFEBER, *supra* note 15, at 298.

87. *Id.*

88. *Id.*

89. *Id.* at 299. The United States offered "\$150 million in military equipment, and another \$100 million in agricultural goods and U.S. purchases of Japanese products. . . . U.S. military payments between 1952 and 1956 were equivalent to paying for a critical one-quarter of Japan's commodity imports." *Id.*

90. MCCLAIN, *supra* note 20, at 557.

91. *See id.* at 555. In February 1952, an opinion poll showed that 48% of the Japanese public believed "[Yoshida] was lying when he said that Japan was not rearming." *Id.*

92. *Id.*

93. MATSUI, *supra* note 52, at 239.

94. MCCLAIN, *supra* note 20, at 555.

95. KOSEKI, *supra* note 26, at 198-200.

War, as a sovereign right of the nation, and the threat or use of force, is forever renounced as a means of settling disputes with other nations.

The maintenance of land, sea, and air forces, as well as war potential, will never be authorized. The right of belligerency of the state will not be recognized.⁹⁶

The legislative subcommittee, however, inserted the prefatory language “[i]n order to achieve the purpose of the preceding paragraph” into the beginning of the second paragraph.⁹⁷ Coupled with the inclusion of a “purpose” phrase in the beginning of the first paragraph,⁹⁸ the new version of Article 9 became as follows:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation, or the threat or use of force, as a means of settling disputes with other nations.

*In order to achieve the purpose of the preceding paragraph, land, sea, and air forces as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.*⁹⁹

The addition of this phrase effectively linked the second paragraph’s proscription on the “maintenance of land, sea, and air forces” to the first paragraph’s ban on Japan making war, allowing for an interpretation that the second paragraph’s ban of military forces applies only to an *aggressive* military force, maintained for the purpose of carrying out the acts expressed in the first paragraph, and not necessarily for acts of national self-defense.¹⁰⁰ Interestingly, the historical record appears to show that no one on the subcommittee realized the ramification of the Ashida amendment on the potential interpretation of Japan’s right to self-defense.¹⁰¹ However, the possibility of this interpretation was not lost on SCAP at the time. Charles Kades, the leader of the “constitutional convention” that had originally drafted Article 9 based on MacArthur’s principles, immediately recognized

96. *Id.* at 193.

97. *Id.* at 194.

98. The reason for inclusion of this phrase was explained by Inukai Takeru, a member of the subcommittee: “The first part of Article 9 gives the impression that it had to be written this way because of existing circumstances (i.e., because of the defeat). Therefore, I wanted to put in a sentence that would be more positive.” *Id.*

99. *Id.* at 193 (emphasis added).

100. See DOWER, *supra* note 14, at 396.

101. KOSEKI, *supra* note 26, at 200. In 1951, however, in the context of the Korean War and an intensive government campaign for Japan’s rearmament, Ashida claimed that Japan’s self-defense had always been his intent behind the amendment, thus bolstering Yoshida’s argument for rearmament. *Id.* at 194.

the implications of the Ashida amendment.¹⁰² SCAP's rationale for accepting the amendment was the same as when Kades struck the phrase "even for preserving its own security" from Article 9 during the original drafting: "We thought that . . . Japan as a sovereign nation possessed the inherent right of self-preservation."¹⁰³

Relying on the Ashida amendment, by 1954, the Japanese government's official interpretation of Article 9 now recognized a right to self-defense, a complete reversal of the position it had espoused when the constitution was first enacted.¹⁰⁴ That same year, the Diet passed the Self-Defense Forces Act, transforming the National Safety Force into the Self-Defense Forces ("SDF"), made up of three branches: the Air Self-Defense Force, the Maritime Self-Defense Force, and the Land Self-Defense Force.¹⁰⁵

Notably, this new interpretation of Article 9 was not the product of judicial interpretation, but instead was the work of Prime Minister Yoshida and a single government agency—the Cabinet Legislation Bureau ("CLB").¹⁰⁶ Unique among world governments, the CLB is responsible for ensuring that legislation does not violate the Japanese constitution, and for giving opinions to government officials on legal matters, including interpretations of the constitution.¹⁰⁷ Although the Supreme Court of Japan ultimately has the final say on issues of constitutionality, the court only rules on legislation *ex post*, while the CLB has the authority to issue "judgments" *ex ante*.¹⁰⁸ Its rulings are rarely overturned by the courts, and while the agency only issues "advice," this advice is widely followed, and, when combined with a reluctance to overturn past opinions, carries, in effect, the rule of law.¹⁰⁹ This responsibility vests the CLB with extraordinary power, and it is accordingly the most prestigious—and, appropriately, independent—of Japan's administrative agencies.¹¹⁰

The collaboration between Yoshida's government and the CLB in 1954 was the first time that the agency interpreted Article 9.¹¹¹ While the CLB's

102. *Id.* at 201.

103. *Id.*; see also *supra* notes 41–42 and accompanying text.

104. KOSEKI, *supra* note 26, at 193.

105. MATSUI, *supra* note 52, at 239.

106. Richard J. Samuels, *Politics, Security Policy, and Japan's Cabinet Legislation Bureau: Who Elected These Guys, Anyway?* (Japan Policy Research Inst., Working Paper No. 99, 2004), <http://www.jpri.org/publications/workingpapers/wp99.html>.

107. *The Cabinet [sic] Legislation Bureau*, CABINET LEGIS. BUREAU, <http://www.clb.go.jp/english/about.html> (last visited Jan. 20, 2016).

108. Samuels, *supra* note 106.

109. *Id.* ("Although the CLB is limited formally . . . to the provision of legal advice, it derives enormous power from its formal monopoly on the use of the government's 'formal seal of approval' [T]he CLB effectively 'collateralizes' the authority of bureaucrats, lawmakers, and jurists alike Thus, the CLB's approval is solicited by officials on all matters—from regulations to legislation to speeches.")

110. *Id.*

111. *Id.*

interpretation stated that Japan could engage in self-defense and possess a military for that purpose, it also stated that Japan could not dispatch its soldiers overseas, or engage in collective self-defense.¹¹² Five years later, in the 1959 *Sunakawa* case, the Japanese Supreme Court confirmed that the country possessed the right to self-defense, but it did not consider the constitutionality of the SDF.¹¹³ This was the only time that the court has opined on Article 9, as it held that, absent extraordinary circumstances, such issues of defense were political questions properly left to the government.¹¹⁴ The court's ruling in the *Sunakawa* case effectively allowed for decades of disagreement and controversy within Japan's government over the meaning of Article 9.

D. THE RESTRICTIONS "IMPOSED" BY ARTICLE 9

Although the legality of self-defense and the SDF is (partially) recognized, over the years, the Japanese government has interpreted the language of Article 9 as imposing significant limits on the SDF by confining it to a strictly defensive posture. Examples have included: "[the SDF] does not have military weapons used mainly for attacks, such as Intercontinental ballistic missile (ICBM)[;] [t]he SDF is also only allowed to defend the country and is therefore not allowed to strike another country first";¹¹⁵ the military budget has for much of its existence been confined to 1% of the GDP; and Japan cannot enter into collective self-defense agreements to come to the aid of allies under attack.¹¹⁶

Despite these limitations, near-continuous pressure from the United States since the 1970s has led to a number of treaties, agreements, and government measures that have slowly eroded the limitations Article 9 seemingly imposes on Japan's capability to militarily assist the United States, raising serious questions over whether the actions of the SDF are still truly confined to just acts of its own self-defense.¹¹⁷ In 1978, Japan and the United States signed the Guidelines for Japan-U.S. Defense Cooperation, which created a framework for the two militaries working together in the context of deterring aggression, resisting attacks against Japan, and confronting situations in the Far East that "influence . . . the security of Japan."¹¹⁸ The guidelines were revised in 1997 in response to missile tests by North Korea

112. *Id.*

113. Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, 1959(A) no. 710, 13 SAIKŌ SAIBANSHO HANREISHŪ [SAIBANSHO WEB] 3225, http://www.courts.go.jp/app/hanrei_en/detail?id=13 (Japan).

114. *Id.* For further discussion of the *Sunakawa* case, see *infra* Part III.C.2.

115. MATSUI, *supra* note 52, at 243.

116. *Id.* at 244-48.

117. Beina Xu, *The U.S.-Japan Security Alliance*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/japan/us-japan-security-alliance/p31437> (last updated July 1, 2014).

118. *Guidelines for Japan-U.S. Defense Cooperation, November 27, 1978*, FED'N AM. SCIENTISTS, <https://fas.org/news/japan/sisin1e.htm> (last visited Nov. 12, 2015).

and China in the mid-1990s.¹¹⁹ These guidelines, combined with legislation by Japan in 1999—the Vicinity Area Incidents Act and “an amendment to the SDF Act”—sanctioned “cooperative military action in response to emergency situations in the vicinity of Japan, if the lack of response might lead to a direct attack on Japan.”¹²⁰ Notably, the guidelines emphasize that the concept of these emergency situations “is not geographic but situational.”¹²¹ As a result, Japan’s right to self-defense seemingly includes preventative military actions by the SDF against foreign threats to Japan that are perceived to be imminent, although this result has never been seriously tested.

In addition to these guidelines, Japan has also passed several pieces of legislation allowing it to deploy SDF forces in foreign nations, albeit in non-combat roles. For example, the 1992 International Peace Cooperation Act allows the country to send SDF forces abroad in support of UN peacekeeping operations.¹²² America’s War on Terror brought new pressure on Japan to assist the U.S. overseas military operations, which led to the 2001 Anti-terrorism Special Measures Act, allowing the SDF to provide logistical support to NATO forces in Afghanistan;¹²³ the 2003 Iraq Special Measures Act;¹²⁴ and the 2009 Act to Punish and Prevent Piracy.¹²⁵ While the SDF deployments sanctioned by these legislative acts arguably had at best a tenuous connection to Japan’s own self-defense, Article 9 nevertheless restrained the deployments to strictly non-combat roles, a limitation that was apparent when Japan’s

119. Xu, *supra* note 117; see also Chris Ajemian, *The 1997 U.S.–Japan Defense Guidelines Under the Japanese Constitution and Their Implications for U.S. Foreign Policy*, 7 PAC. RIM L. & POL’Y J. 323, 348 (1998).

120. MATSUI, *supra* note 52, at 249; see also Ajemian, *supra* note 119, at 340–41; PORT, *supra* note 24, at 84–85.

121. JAPAN MINISTRY OF DEF., THE GUIDELINES FOR JAPAN–U.S. DEFENSE COOPERATION, pt. V, at 6 (1997), http://www.mod.go.jp/e/d_act/anpo/pdf/19970923.pdf; see also PORT, *supra* note 24, at 85.

122. The Act requires the following principles to be met to authorize the deployment of SDF Forces:

- (1) [T]here must be an agreement to cease fire among the parties;
- (2) the participation must be supported by the consent of all relevant countries;
- (3) the SDF must remain neutral in the conflict;
- (4) the SDF will withdraw if any of the conditions for participation are undermined and
- (5) the SDF can use weapons only to defend its personnel.

MATSUI, *supra* note 52, at 251. Since the Act’s passage, Japan has sent peacekeeping forces to a large variety of nations, including the Golan Heights, Iraq, Rwanda, Sudan, and Iran. See JAPAN MINISTRY OF DEF., OVERVIEW OF JAPAN’S DEFENSE POLICY 20 (n.d.), http://www.mod.go.jp/e/d_act/d_policy/pdf/english.pdf.

123. MATSUI, *supra* note 52, at 251; see also Craig Martin, Opinion, *Japan’s Antiterrorism Special Measures Law and Confusion over U.N. Authority*, JAPAN TIMES (Oct. 8, 2007), <http://www.japan-times.co.jp/opinion/2007/10/08/commentary/world-commentary/japans-antiterrorism-special-measures-law-and-confusion-over-u-n-authority>.

124. MATSUI, *supra* note 52, at 252; see also Jonathan Watts, *End of an Era as Japan Enters Iraq*, GUARDIAN (July 25, 2003, 8:23 PM), <http://www.theguardian.com/world/2003/jul/26/iraqjapan>.

125. MATSUI, *supra* note 52, at 252.

forces in Iraq required protection from soldiers of allied countries as they carried out various logistical tasks.¹²⁶

Thus, although Japanese politicians and bureaucrats have at times taken great strides to increase the SDF's ability to militarily assist the United States, it has always been limited. Any assistance Japan musters is ultimately constrained by Article 9, falling short of America's desire for effective military assistance.¹²⁷ Moreover, new legislation passed by Japanese politicians to send troops abroad is time-consuming and comes at the expense of great political capital.¹²⁸ The remedy for this situation, long strived-for by parties in both countries, is a permanent treaty of collective self-defense, which would allow Japan to not only militarily assist and defend the United States, but also to be able to do so without the need to pass special legislative acts for each individual situation.

III. JAPAN'S NEWLY-DECLARED RIGHT OF COLLECTIVE SELF-DEFENSE

*The prime minister is trying to take away the Constitution that belongs to the public. I believe he is a thief.*¹²⁹

*The German Weimar constitution changed, without being noticed, to the Nazi German constitution. Why don't we learn from their tactics?*¹³⁰

Pressure from the United States, while substantial, has not been the only driving force behind Japan's efforts to amend Article 9. Historically, the benefit of the Yoshida Doctrine was that Japan could focus its resources towards rebuilding its economy by freeing up funds that would otherwise be used for defensive purposes.¹³¹ However, the rationale for adhering to the doctrine weakened after Japan's miraculous recovery from a devastated and defeated nation into one of the world's largest economies.¹³² This increase in prosperity inevitably created a certain rise in national pride, and politicians in

126. See James Simpson, *Ten Years Ago, Japan Went to Iraq . . . and Learned Nothing: Forgotten Lessons of a Military Misadventure*, MEDIUM (Apr. 10, 2014), <https://medium.com/war-is-boring/ten-years-ago-japan-went-to-iraq-and-learned-nothing-b7f3c702dd1f>.

127. See *id.*

128. *Id.*

129. Shunichi Kawabata, *Major Security Shift: Abe Labeled "Thief" by Group Opposed to Collective Self-Defense Right*, ASAHI SHIMBUN (May 29, 2014), http://ajw.asahi.com/article/behind_news/politics/AJ201405290041 (quoting Setsu Kobayashi, professor emeritus of constitutional law, Keio University).

130. Taro Aso, *Japan's Deputy Prime Minister, Says Tokyo Could Learn from Nazis' Tactics*, WORLD POST (Sept. 30, 2013, 5:12 AM), http://www.huffingtonpost.com/2013/07/31/taro-aso-nazis-japan_n_3682801.html (quoting Taro Aso, Deputy Prime Minister of Japan).

131. See *supra* notes 73–76 and accompanying text.

132. For an overview of Japan's rapid post-WWII economic development, see MCCLAIN, *supra* note 20, at 571–82.

Japan's ruling party, the Liberal Democratic Party ("LDP"),¹³³ soon yearned for Japan to be regarded as an "equal" player on the world stage.¹³⁴ Many have equated this with a need to amend Article 9, arguing that it prevents Japan from acting like a "regular country doing regular things (such as peacekeeping, collective self defense, or even preemptive war)."¹³⁵ Furthermore, there is also a growing group of conservative, right-wing politicians fostering a new sense of nationalism that glorifies Japan's military past, denies any wrongdoing during WWII, and laments the modern state of Japan's military.¹³⁶ The LDP has also argued that Article 9 stands in the way of Japan being granted a permanent seat on the UN Security Council,¹³⁷ an argument reinforced by Colin Powell in remarks made to Japan while he was Secretary of State.¹³⁸

The combination of these domestic forces, a dramatically changing geopolitical environment in Asia,¹³⁹ and pressures from the United States has led to several unsuccessful attempts by Japanese politicians to formally amend Article 9 and allow the SDF to behave like an ordinary modern military force.¹⁴⁰ The procedure for amending the Japanese constitution is found in Article 96, which stipulates that a successful amendment requires affirmation by a two-thirds super-majority of both legislative houses and a majority vote from a popular referendum.¹⁴¹ However, not only have amendments to Article 9 failed to pass the Diet so far, no amendment to *any* part of the constitution has succeeded since the document's ratification in 1947.¹⁴² This

133. The LDP was created in 1955 with the merger of several political parties, and has controlled Japan for the vast majority of the post-war era. See *A History of the Liberal Democratic Party*, LIB DEMS, <https://www.jimin.jp/english/about-ldp/history/104257.html> (last visited Jan. 20, 2016).

134. PORT, *supra* note 24, at 133.

135. *Id.*

136. See, e.g., Philip J. Cunningham, *Japan's Revisionist History*, L.A. TIMES (Apr. 11, 2005), <http://articles.latimes.com/2005/apr/11/opinion/oe-cunningham11>; D.M., *Japan's Right-Wing Politicians: Making a Hash of History*, ECONOMIST (June 3, 2013, 4:30 AM), <http://www.economist.com/blogs/banyan/2013/06/japans-right-wing-politicians?zid=309&ah=80dcf288b8561b012f603b9fd9577foe>; Noah Kristula-Green, *Japan's Dangerous World War II Attitude*, U.S. NEWS & WORLD REP. (May 14, 2013, 10:00 AM), <http://www.usnews.com/opinion/blogs/noah-kristula-green/2013/05/14/japans-dangerous-revisionist-world-war-ii-attitude>; Linda Sieg et al., *Special Report: The Deeper Agenda Behind "Abenomics"*, REUTERS (May 23, 2013, 11:55 PM), <http://www.reuters.com/article/2013/05/24/us-japan-abe-specialreport-idUSBRE94No4020130524> (identifying the "True Conservatives" of Japanese politics).

137. See PORT, *supra* note 24, at 133.

138. See *Article 9 a UNSC-Bid Hurdle: Powell*, JAPAN TIMES (Aug. 14, 2004), <http://www.japan-times.co.jp/news/2004/08/14/national/article-9-a-uns-c-bid-hurdle-powell>.

139. See Malcolm Cook, *Yes, Japan Is Alarmed by China's Rise*, INTERPRETER (Oct. 15, 2013, 4:52 PM), <http://www.lowyinterpreter.org/post/2013/10/15/Yes-Japan-is-alarmed-by-Chinas-rise.aspx>.

140. MATSUI, *supra* note 52, at 270–72. For a detailed analysis of past proposals to amend Article 9 and interpretations of its meaning according to various parties, see PORT, *supra* note 24, at 129–48.

141. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 96 (Japan).

142. See MATSUI, *supra* note 52, at 262–65.

has led Japanese politicians to attempt to find alternative means for teasing out a right of collective defense from Article 9,¹⁴³ and in the summer of 2014, Prime Minister Shinzo Abe seemingly succeeded.

A. PRIME MINISTER SHINZO ABE'S "REINTERPRETATION" OF ARTICLE 9

Abe is currently serving his second term as Prime Minister of Japan, and is well-known for his conservative and hawkish views.¹⁴⁴ During his first term from 2006–2007, Abe supported a law mandating patriotism be taught in Japanese schools,¹⁴⁵ questioned evidence that Japan had forced foreign women to become sex slaves for its military in WWII,¹⁴⁶ and set about revising Article 9 to enable Japan the ability of collective self-defense.¹⁴⁷ In 2007, Abe created a blue-ribbon panel to examine whether Japan could engage in the latter.¹⁴⁸ The Advisory Panel on Reconstruction of the Legal Basis for Security examined four scenarios related to collective self-defense: "(1) repelling attacks against a U.S. fleet on the open sea; (2) intercepting ballistic missiles fired toward the United States; (3) using weapons to safeguard units of other countries engaged in joint U.N. peacekeeping operations; and (4) providing a wider range of logistic support to other nations for peacekeeping operations."¹⁴⁹ The panel concluded that resolving each of the above scenarios satisfactorily would require Japan to exercise a right of collective self-defense.¹⁵⁰ The panel further stated that recognition of the right could be achieved through constitutional interpretation rather than a formal

143. See PORT, *supra* note 24, at 129–48.

144. See Simon Tisdall, *Shinzo Abe: Is Japan's PM a Dangerous Militarist or Modernising Reformer?*, GUARDIAN (May 22, 2014, 6:30 AM), <http://www.theguardian.com/world/2013/dec/16/shinzo-abe-japan-pm>; see also J. Berkshire Miller & Takashi Yokota, *No About-Face for Abe: Why Japan's Prime Minister Won't Turn Hawkish*, FOREIGN AFF. (July 30, 2013), <http://www.foreignaffairs.com/articles/139610/j-berkshire-miller-and-takashi-yokota/no-about-face-for-abe> (arguing that Abe is more "pragmatist" than "nationalist").

145. See Tisdall, *supra* note 144.

146. For a historical look at the tragedy of the "comfort women," see generally GEORGE HICKS, *THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* (1997).

147. *Profile: Shinzo Abe*, BBC NEWS (Aug. 28, 2015), <http://www.bbc.com/news/world-asia-19725705>.

148. *Abe's Advisory Panel to Urge Lifting of Ban on Collective Self-Defense*, ASAHI SHIMBUN (Aug. 5, 2013), http://ajw.asahi.com/article/behind_news/politics/AJ201308050115.

149. *Id.*

150. THE ADVISORY PANEL ON RECONSTRUCTION OF THE LEGAL BASIS FOR SEC., REPORT OF THE ADVISORY PANEL ON RECONSTRUCTION OF THE LEGAL BASIS FOR SECURITY 19–21 (2008), <http://www.kantei.go.jp/jp/singi/anzenhosyou/report.pdf>.

amendment.¹⁵¹ The report, however, was not released until after Abe's resignation in 2007,¹⁵² and his successor Yasuo Fukuda chose to ignore it.¹⁵³

When Abe returned as Prime Minister in December 2012, he wasted little time in resuming his plans for revising Article 9.¹⁵⁴ Abe knew he did not have the number of votes required for a formal amendment to Article 9, so he first pushed to change the amendment procedures in Article 96 in an attempt to lower the super-majority requirement to a simple majority.¹⁵⁵ However, given his hawkish reputation and expressed desire to revise Article 9,¹⁵⁶ it was obvious what Abe's true aim was, and so the measure to amend Article 96 failed to garner sufficient support.¹⁵⁷ Abe then decided to reconvene the Advisory Panel on the Reconstruction of the Legal Basis for Security that he had established during his first term, and asked it to update its report.¹⁵⁸ After deliberating for over a year, the panel's new report was released in May 2014 and predictably reached the same conclusion as before—Japan's right of

151. *Id.* at 26–27. The panel gave three reasons why a constitutional amendment was unnecessary: (1) Article 9 does not expressly forbid collective self-defense, which the panel characterized “as an inherent right under international law”; (2) the interpretation that Article 9 forbids Japan from engaging in collective self-defense was formulated by the Diet in response to questions over the “security environment and political situations of the past”; (3) the current security and political environment “ha[s] dramatically changed.” *Id.* at 27.

152. See Julian Ryall, *Japanese PM Shinzo Abe Resigns*, TELEGRAPH (Sept. 12, 2007, 10:30 PM), <http://www.telegraph.co.uk/news/worldnews/1562931/Japanese-PM-Shinzo-Abe-resigns.html> (“Mr[.] Abe’s decision follows several torrid months that saw the suicide of a minister, a raft of resignations and corruption allegations, an election drubbing for his Liberal Democratic Party (LDP) in the upper parliament and a bungled cabinet reshuffle last month.”).

153. *Abe’s Advisory Panel to Urge Lifting of Ban on Collective Self-Defense*, *supra* note 148.

154. *Id.*

155. John Hofilena, *PM Abe Set to Prioritize Revision of Japan’s Article 96*, JAPAN DAILY PRESS (Apr. 17, 2013), <http://japandailynews.com/pm-abe-set-to-prioritize-revision-of-japans-article-96-1727157>. In Abe’s words: “It’s unfair that just more than one-third of lawmakers could block revisions even if 50 percent or more of the public want to amend the Constitution.” *Id.* Abe and the LDP’s desires for constitutional revision are not limited solely to collective defense either: the proposed revisions “include stipulating the emperor as the head of the nation, symbol of the nation and the people’s unity; . . . changing the name of the Self-Defense Forces to the National Defense Military; and deleting an article that guarantees human rights.” JEFFREY W. HORNUNG, CTR. FOR STRATEGIC & INT’L STUDIES, *ABE’S CHALLENGES AHEAD 1* (2013), http://csis.org/files/publication/130710_Hornung_AbesChallengesAhead_JapanPlatform.pdf.

156. See *supra* notes 144–47 and accompanying text.

157. Craig Martin, Opinion, “Reinterpreting” Article 9 Endangers Japan’s Rule of Law, JAPAN TIMES (June 27, 2014), <http://www.japantimes.co.jp/opinion/2014/06/27/commentary/japan-commentary/reinterpreting-article-9-endangers-japans-rule-of-law>. Although Abe’s LDP and its allies won a majority in both houses in the elections of summer 2013, the coalition failed to secure a two-thirds majority. Martin Fackler, *Election Win by Ruling Party Signals Change in Japan*, N.Y. TIMES (July 21, 2013), <http://www.nytimes.com/2013/07/22/world/asia/governing-party-appears-headed-to-lead-japanese-parliament.html>.

158. Martin, *supra* note 157; see also *supra* notes 148–51 and accompanying text.

collective self-defense could be gleaned from a new interpretation of the constitution and did not require a formal amendment to Article 9.¹⁵⁹

Following the report's release, Abe held talks with his coalition partners over implementing the panel's recommendations, as his LDP party alone did not control the majority needed to pass the legislation necessary for any new interpretation of the constitution to have legal effect.¹⁶⁰ Many predicted that securing support from his political allies would be a difficult hurdle for Abe to overcome, as one of these partners was New Komeito, a party founded and backed by the pacifist Buddhist group Soka Gakkai.¹⁶¹ New Komeito had long said it would defend Article 9,¹⁶² and while it was able to extract concessions¹⁶³ from Abe's proposed interpretation, executives within the party ultimately relented and gave Abe the support he needed.¹⁶⁴ On July 1, 2014, Abe's cabinet announced its new interpretation—Article 9 now permitted Japan to exercise collective self-defense and come to the military aid of an ally under attack—and released its decision in a paper titled *Cabinet Decision on*

159. THE ADVISORY PANEL ON RECONSTRUCTION OF THE LEGAL BASIS FOR SEC., REPORT OF THE ADVISORY PANEL ON RECONSTRUCTION OF THE LEGAL BASIS FOR SECURITY 48–49 (2014), http://www.kantei.go.jp/jp/singi/anzenhosyou2/dai7/houkoku_en.pdf. For a critique of the panel's conclusions, see Martin, *supra* note 157; WAKEFIELD, *supra* note 13, at 3–7.

160. Jeremy A. Yellen, *Shinzo Abe's Constitutional Ambitions*, DIPLOMAT (June 12, 2014), <http://thediplomat.com/2014/06/shinzo-abes-constitutional-ambitions>.

161. *Moment of Reckoning*, ECONOMIST (June 7, 2014), <http://www.economist.com/news/asia/21603495-prime-ministers-attempts-reform-both-economy-and-pacifist-constitution-are-entering>. For a broader look at the history of the relationship between New Komeito and the LDP, see Toko Sekiguchi, *How Buddhists Reconcile with a Hawk*, WALL STREET J.: JAPAN REAL TIME (July 9, 2013, 3:54 PM), <http://blogs.wsj.com/japanrealtime/2013/07/09/how-buddhists-reconcile-with-a-hawk>.

162. See John Hofilena, *New Komeito Pledges to Protect Japan's Pacifist Constitution*, JAPAN DAILY PRESS (May 13, 2013), <http://japandailynews.com/new-komeito-pledges-to-protect-japans-pacifist-constitution-1328709>; Opinion, *New Komeito's Raison D'etre*, JAPAN TIMES (Sept. 24, 2014), <http://www.japantimes.co.jp/opinion/2014/09/24/editorials/new-komeitos-raison-detre>; Yellen, *supra* note 160.

163. The concessions won by New Komeito essentially make Japan's right to collective self-defense conditional on its actions being necessary to Japan's immediate defense. *Major Security Shift: Abe Offers 1st Explanation in Diet, but Many Not Buying It*, ASAHI SHIMBUN (July 15, 2014), http://ajw.asahi.com/article/behind_news/politics/AJ201407150054. Time will ultimately tell the significance of these concessions; history shows it is not difficult for any military action to be portrayed as being "necessary" to the country's defense. See, e.g., Jon Rosenwasser, *The Bush Administration's Doctrine of Preemption (and Prevention): When, How, Where?*, COUNCIL ON FOREIGN REL. (Feb. 1, 2004), <http://www.cfr.org/world/bush-administrations-doctrine-preemption-prevention/p6799>. In this regard, Japan's leaders would be wise to remember the words of former Prime Minister Yoshida Shigeru: "It seems to me, therefore, that the recognition of the right of self-defense provides the cause for starting a war." KOSEKI, *supra* note 26, at 193.

164. Ayako Mie, *Japan on Verge of Legalizing War as Komeito Bends*, JAPAN TIMES (June 30, 2014), <http://www.japantimes.co.jp/news/2014/06/30/national/politics-diplomacy/japan-on-verge-of-legalizing-war-as-komeito-bends>.

*Development of Seamless Security Legislation to Ensure Japan's Survival and Protect Its People.*¹⁶⁵ The paper reads in part:

[T]he Government has reached a conclusion that not only when an armed attack against Japan occurs but also when an armed attack against a foreign country that is in a close relationship with Japan occurs and as a result threatens Japan's survival and poses a clear danger to fundamentally overturn people's right to life, liberty and pursuit of happiness, and when there is no other appropriate means available to repel the attack and ensure Japan's survival and protect its people, use of force to the minimum extent necessary should be interpreted to be permitted under the Constitution as measures for self-defense in accordance with the basic logic of the Government's view to date.¹⁶⁶

B. AMERICA'S RESPONSE: QUID PRO QUO?

Chief among the arguments Abe made in his campaign for reinterpreting Article 9 was the changing geopolitical environment in Asia and the resulting need for a stronger alliance with the United States.¹⁶⁷ China's rapid economic rise in the past few decades and its attempts to secure territorial rights to the resource-rich oceans surrounding it have led to increasing friction between the world's second-largest economy¹⁶⁸ and its neighbors.¹⁶⁹ The main dispute between China and Japan centers around a chain of uninhabited islands in the East China Sea known as the Senkaku Islands (called the Diaoyu Islands in China).¹⁷⁰ The islands occupy a strategically important position and the surrounding waters are rich in natural resources, containing valuable fishing grounds and oil and gas reserves.¹⁷¹ Japan currently controls the islands, but

165. CABINET DECISION ON DEVELOPMENT OF SEAMLESS SECURITY LEGISLATION TO ENSURE JAPAN'S SURVIVAL AND PROTECT ITS PEOPLE (2014), http://japan.kantei.go.jp/g6_abe/decisions/2014/_icsFiles/afiedfile/2014/07/03/anpohosei_eng.pdf.

166. *Id.* at 7–8.

167. *See id.* at 1.

168. Andrew Bergmann, *World's Largest Economies*, CNN MONEY, http://money.cnn.com/news/economy/world_economies_gdp (last visited Jan. 20, 2016) (listing China as the world's second largest economy in terms of GDP).

169. *See Q&A: South China Sea Dispute*, BBC NEWS (Oct. 27, 2015), <http://www.bbc.com/news/world-asia-pacific-13748349> (outlining territorial disputes in the South China Sea); Matthew Rosenberg, *China Deployed Artillery on Disputed Islands, U.S. Says*, N.Y. TIMES (May 29, 2015), <http://www.nytimes.com/2015/05/30/world/asia/chinese-artillery-spotted-on-spratly-island.html> (discussing China's construction of artificial islands in disputed territories); Edward Wong, *China Says It Could Set Up Air Defense Zone in South China Sea*, N.Y. TIMES (May 31, 2015), <http://www.nytimes.com/2015/06/01/world/asia/china-says-it-could-set-up-air-defense-zone-in-south-china-sea.html> (discussing China's attempts to create an "air defense identification zone" in the South China Sea).

170. *How Uninhabited Islands Soured China-Japan Ties*, BBC NEWS (Nov. 10, 2014), <http://www.bbc.com/news/world-asia-pacific-11341139>.

171. *Id.*

China contends that they have been a “part of its territory since ancient times.”¹⁷² The dispute has technically existed since the 1970s, but recently erupted in 2012 when the Japanese government purchased three of the islands from their private Japanese owner.¹⁷³ Since then, China and Japan have lodged numerous diplomatic protests against each other, and Chinese vessels and aircraft have provoked Japanese forces by travelling around the islands.¹⁷⁴ One analyst for the BBC remarked in early 2013 that “[t]he situation is certainly the most serious for Sino-Japanese relations in the post-war period in terms of the risk of militarised conflict.”¹⁷⁵

The rise of China and this escalating dispute left Japan in 2012 questioning America’s resolve to defend its ally in the event of a conflict over the islands.¹⁷⁶ These concerns were compounded by a perceived war-weariness among the U.S. populace, and in the context of the civil war in Syria, reluctance by the Obama administration to commit to foreign conflict.¹⁷⁷ Thus, it is not difficult to understand Abe and the LDP’s motivation in pursuing the reinterpretation of Article 9: by recognizing the right to collective self-defense and giving the United States what it had long desired, the United States would in return reaffirm and strengthen its commitment to defend Japan—a quid pro quo exchange. Following the 2013 meeting of the United States–Japan Security Consultative Committee (“SCC”), the United States publicly reaffirmed its desire for the new interpretation, issuing a joint statement that it “welcomed” the Japanese government “re-examining the legal basis for its security including the matter of exercising its right of collective self-defense.”¹⁷⁸

Naturally, the United States reacted positively to the news of Abe’s reinterpretation of Article 9. Secretary of Defense Chuck Hagel released a statement calling the decision “an important step for Japan as it seeks to make a greater contribution to regional and global peace and security,” and remarked that it “will enable the [SDF] to engage in a wider range of

172. *Id.*

173. *Id.*

174. *Id.*; see also D.Z., *Who Really Owns the Senkaku Islands?*, *ECONOMIST* (Dec. 3, 2013, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2013/12/economist-explains-1>.

175. Christopher Hughes, *Viewpoints: How Serious are China-Japan Tensions?*, *BBC NEWS* (Feb. 8, 2013), <http://www.bbc.com/news/world-asia-21290349>.

176. Kirk Spitzer, *Japan Frets over U.S. Support in China Dispute*, *TIME* (Sept. 14, 2012), <http://nation.time.com/2012/09/14/84857>.

177. See, e.g., Doyle McManus, *Obama, the Reluctant Warrior on Syria*, *L.A. TIMES* (Sept. 11, 2013), <http://www.latimes.com/opinion/op-ed/la-oe-mcmanus-column-obama-syria-speech-20130911-column.html>.

178. U.S.–JAPAN SEC. CONSULTATIVE COMM., *JOINT STATEMENT: TOWARD A MORE ROBUST ALLIANCE AND GREATER SHARED RESPONSIBILITIES 1–2* (2013), http://www.mod.go.jp/e/d_act/us/JointStatement2013.pdf; see also Ann Wright, *Japanese Prime Minister Abe and President Obama Want Japan to Be Able to Wage War*, *WARISACRIME.ORG*, <http://www.warisacrime.org/content/japanese-prime-minister-abe-and-president-obama-want-japan-be-able-wage-war> (last visited Jan. 20, 2016).

operations and make the U.S.-Japan alliance even more effective."¹⁷⁹ The U.S. Department of State echoed these sentiments, "welcoming" Abe's announcement and stating that "we think it's a good thing."¹⁸⁰ Indeed, not only has the United States finally gotten its wish for Japan to assume a greater burden in regional security, Japan's commitment to strengthen its alliance with the United States comes at an especially opportune time for Obama's foreign policy goals, as it dovetails with the administration's "pivot" towards Asia.¹⁸¹

And what has Japan received in exchange for its reinterpretation of Article 9? Precisely what it desired: a reaffirmation and strengthening of America's commitment to defend Japan's interests and territory. Obama visited Japan in April 2014, the first state visit to the country by a sitting American president in nearly 20 years.¹⁸² It was no secret that one of the main purposes of the trip was to reassure Japan on the issue of security.¹⁸³ During a joint press conference with Abe, Obama not only stressed dedication to the alliance with Japan but also went a step farther, surprising analysts when he explicitly said that the United States-Japan security treaty covered the Senkaku Islands.¹⁸⁴ While Obama's historic visit took place a few months before Abe's cabinet announced its official reinterpretation of Article 9, it is impossible to divorce his visit from the then-ongoing reinterpretation process. Indeed, during the press conference, Obama stated that the issue of Japan's collective self-defense was "important" to the countries' alliance, and Abe confirmed that Obama told him he "welcomed" and "supported" the process of reinterpreting Article 9.¹⁸⁵

One year later, in the spring of 2015, the United States returned the favor and invited Abe to Washington, D.C. for a state visit, where he "became the first Japanese prime minister to address a joint [session of the U.S.]

179. Press Release, U.S. Dep't of Def., Statement by Secretary of Defense Chuck Hagel on Japan's Collective Self-Defense Decision, No. NR-351-14 (July 1, 2014), <http://www.defense.gov/News/News-Releases/News-Release-View/Article/605062>.

180. Daily Press Briefing, Marie Harf, Deputy Spokesperson, U.S. Dep't of State (July 1, 2014), <http://www.state.gov/r/pa/prs/dpb/2014/07/228665.htm>.

181. See, e.g., KURT CAMPBELL & BRIAN ANDREWS, EXPLAINING THE US 'PIVOT' TO ASIA (2013), http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Americas/o813pp_pivottoasia.pdf.

182. Jethro Mullen & Kevin Liptak, *Obama Begins Asia Tour with Reassurance to Japan*, CNN (Apr. 23, 2014, 10:35 AM), <http://www.cnn.com/2014/04/23/world/asia/obama-asia-visit>.

183. *Id.*

184. Justin McCurry & Tania Branigan, *Obama Says US Will Defend Japan in Island Dispute with China*, GUARDIAN (Oct. 4, 2014, 10:55 AM), <http://www.theguardian.com/world/2014/apr/24/obama-in-japan-backs-status-quo-in-island-dispute-with-china>. For a full transcript of the press conference, see Press Release, White House, Office of the Press Sec'y, Joint Press Conference with President Obama and Prime Minister Abe of Japan (Apr. 24, 2014), <https://www.whitehouse.gov/the-press-office/2014/04/24/joint-press-conference-president-obama-and-prime-minister-abe-japan>.

185. Press Release, White House, Office of the Press Sec'y, *supra* note 184.

Congress.”¹⁸⁶ At the onset of the visit, Obama remarked that “Prime Minister Abe is leading Japan to a new role on the world stage,” and that the alliance between the two countries was stronger than ever.¹⁸⁷

The United States stood by its word, responding to Article 9’s reinterpretation by significantly ramping up its military relationship with Japan. Days before Abe’s state visit to the United States, the two countries unveiled their new Guidelines for Defense Cooperation, updated for the first time since 1997.¹⁸⁸ Reflecting Abe’s reinterpretation of Article 9, “[t]he guidelines allow for global cooperation militarily, ranging from defense against ballistic missiles, cyber and space attacks as well as maritime security.”¹⁸⁹ The revised guidelines expressly provide for Japan to engage in collective self-defense and provide assistance to the United States if the United States is attacked, as long as Japanese security is also threatened.¹⁹⁰ In effect, this means that Japan could theoretically join the United States on a military campaign anywhere in the world.

The two countries have also bolstered their trade in military hardware. In September 2014, the two countries discussed future exports of “offensive weapons” to Japan,¹⁹¹ and earlier that year two of the U.S. Air Force’s advanced Global Hawk drones were deployed to Japan for the first time.¹⁹² Japan plans to purchase three of the drones for itself in the future.¹⁹³ In October 2014, a U.S. X-band missile defense radar system arrived in Japan, on its way to permanent deployment in Kyoto.¹⁹⁴ The United States is also constructing a new military base in Okinawa, the first of its kind since WWII.¹⁹⁵ The new Guidelines for Defense Cooperation also state that Japan and the

186. Jennifer Mason, *Measuring the Success of Abe’s U.S. Visit*, BROOKINGS (May 11, 2015, 3:13 PM), <http://www.brookings.edu/blogs/order-from-chaos/posts/2015/05/11-abe-us-visit-success-mason>.

187. See President Barack Obama, Remarks by President Obama and Prime Minister Abe of Japan at Arrival Ceremony (Apr. 28, 2015), <https://www.whitehouse.gov/the-press-office/2015/04/28/remarks-president-obama-and-prime-minister-abe-japan-arrival-ceremony>.

188. Arshad Mohammed, *U.S., Japan Unveil New Defense Guidelines for Global Japanese Role*, REUTERS (Apr. 28, 2015, 4:49 AM), <http://www.reuters.com/article/2015/04/28/us-usa-japan-defense-idUSKBN0Nl08O20150428>.

189. *Id.*

190. JAPANESE MINISTRY OF DEF., THE GUIDELINES FOR JAPAN–U.S. DEFENSE COOPERATION pt. IV.D, at 15–17 (2015), http://www.mod.go.jp/e/d_act/anpo/pdf/shishin_20150427e.pdf [hereinafter 2015 GUIDELINES].

191. *Historical Shift: Japan & US Beef Up Defense Pact to Counter “China Threat,”* RT (Oct. 11, 2014, 9:30 AM), <http://rt.com/news/194424-usa-japan-defense-agreement>.

192. *US Air Force Deploys First Advanced Drones to Japan*, FOX NEWS (May 30, 2014), <http://www.foxnews.com/politics/2014/05/30/us-air-force-deploys-first-advanced-drones-to-japan>.

193. *Id.*

194. *China Accuses US of Damaging Regional Stability with Japan Defense Radar*, RT (Oct. 23, 2014, 4:16 PM), <http://rt.com/news/198528-china-japan-us-radar>.

195. Hayat Norimine, *Top DoD Official: U.S. Will “Respond” if Japan-China Dispute Escalates*, MARINE CORPS TIMES (Sept. 30, 2014, 2:59 PM), <http://www.marinecorpstimes.com/article/20140930/NEWS08/309300061>.

United States will enhance their cooperation on defense technology in the future, including research, development, and "reciprocal defense procurement."¹⁹⁶

The recent actions and rhetoric by American and Japanese leaders leave little doubt that this military buildup will continue in the future, and its sudden rapidity can be attributed to an alignment between Abe and the United States' goals. The combination of Abe's desire to strengthen Japan's military capabilities, his fear of a rising and increasingly assertive China, and the majority he controls in the Diet has created a Japanese leadership that is remarkably conducive to America's long-held strategic goals for East Asia. But while the United States has finally gotten Japan to handle its share of security in the region, the questionable legality of Abe's reinterpretation of Article 9 raises serious concerns that, when coupled with the modern security environment in East Asia, may serve to ultimately transform Japan's newly declared right of collective self-defense into a Pyrrhic victory for American foreign policy.

C. A PYRRHIC VICTORY FOR THE UNITED STATES?

The 1960 Security Treaty between Japan and the United States "has lasted longer than any other alliance between two great powers since the 1648 Peace of Westphalia."¹⁹⁷ At the time of its ratification, however, the geopolitical environment of East Asia was radically different than today.¹⁹⁸ The Cold War between Communist nations and America's allies dominated foreign policy in the region, and Japan was ever wary of being dragged into America's conflicts. It was in this context that America began to pressure Japan to take charge of its own security. Ironically, however, the political climate in East Asia today has seemingly created the opposite dynamic for the two countries, with Japan potentially dragging the United States into its own conflicts. Compounding this problem is the unstable legal ground on which Abe's reinterpretation of Article 9 rests. If the reinterpretation is rescinded, it would nullify the benefit the United States derived from the quid pro quo exchange described above, leaving the United States without Japanese military assistance after having dramatically committed itself to a foreign policy in East Asia that relies on that support.

1. Foreign Relations in 21st-Century Asia

The memory of Japan's wars of aggression against its neighbors in the first half of the 20th century continues to linger in East Asia to this day. Motivated in large part by a desire for equality with the West, in the late 19th

196. 2015 GUIDELINES, *supra* note 190, pt. VII.A, at 22–23.

197. George R. Packard, *The United States-Japan Security Treaty at 50: Still a Grand Bargain?*, FOREIGN AFF., Mar.–Apr. 2010, at 92, 92.

198. See *supra* Part II.B.

century Japan emulated Western imperialism and began to carve out colonies of its own.¹⁹⁹ By the 1930s, a surge of nationalism flowed through the country as Japan's military rose to become an unstoppable political force in the Japanese government, and "[f]rom 1931 until 1936, various segments of the military instigated overseas aggression, coup d'état attempts at home, and assassinations that changed the nature of Japan's government and foreign policy."²⁰⁰ The Japanese invasion of China commenced in 1937, followed by invasions of Hong Kong and Southeast Asia, including French Indo-China and other Western colonies.²⁰¹ Atrocities committed by Japanese soldiers during the war are well documented.²⁰²

The original impetus for Article 9 was to curb Japan's ability to engage in wars of aggression,²⁰³ and the victims of Japan's past invasions continue to view the provision through this lens. The Asian community thus regards proposals to change Article 9 with great suspicion.²⁰⁴ This suspicion is compounded by the recent rise in Japan of right-wing politicians who espouse revisionist views of the country's war-time actions across Asia, a camp in which Prime Minister Abe unquestionably resides.²⁰⁵ According to Akio Takahara, a professor of law and international relations at Tokyo University, "Abe is very rightwing by traditional measures He is a historical revisionist at heart . . . [and] a nationalist [pursuing] his 'new nationalism.'"²⁰⁶ Fifteen members of Abe's 19-

199. Richard J. Smethurst, *Japan, the United States, and the Road to World War II in the Pacific*, ASIA-PAC. J.: JAPAN FOCUS (Sept. 10, 2012), http://www.japanfocus.org/site/make_pdf/3825 ("In 1879 Japan annexed Okinawa. In 1894[-95], Japan won a war with China and gained another colony, Taiwan In 1904-[05], Japan fought a war with Russia, and won once again. This brought Korea into [its] empire, and Manchuria into its economic sphere of influence.").

200. *Id.*

201. *Id.*

202. See, e.g., IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* (1997) (examining atrocities committed by Japanese soldiers after the fall of the Chinese capital of Nanking); HICKS, *supra* note 146 (analyzing the history of "comfort women"); Nicholas D. Kristof, *Unmasking Horror—A Special Report.; Japan Confronting Gruesome War Atrocity*, N.Y. TIMES (Mar. 17, 1995), <http://www.nytimes.com/1995/03/17/world/unmasking-horror-a-special-report-japan-confronting-gruesome-war-atrocity.html> (examining medical experiments committed in Manchuria by Japanese Army Unit 731).

203. See *supra* Part II.A.

204. See *infra* notes 208-10, 213-18 and accompanying text.

205. Tisdall, *supra* note 144. Abe's grandfather, Nobusuke Kishi, was a cabinet member during WWII and was suspected of war crimes. *Id.* Abe has previously sponsored an education bill that sought to amend school textbooks to include "a more benign, sanitised view of imperial Japan's past actions." *Id.* In a 2006 bestselling publication entitled *Towards a Beautiful Country*, he "argued that 'class-A' war criminals charged by the Tokyo tribunal after the 1945 capitulation were not criminals under domestic law." *Id.* Abe has also "queried the definition of 'aggression' in relation to Japan's colonial wars in Asia." D.M., *supra* note 136. He has also in the past been a frequent visitor to the controversial Yasukuni shrine, a Shinto shrine in the heart of Tokyo that enshrines Japan's war dead, including convicted war criminals. See Rupert Wingfield-Hayes, *Why Japan's Shinzo Abe Went to Yasukuni Shrine*, BBC NEWS (Dec. 26, 2013), <http://www.bbc.com/news/world-asia-25518137>.

206. Tisdall, *supra* note 144 (fourth alteration in original).

member cabinet belong to Japan's largest right-wing organization, the Japan Conference.²⁰⁷

Japan's neighbors—particularly China—have responded to this new breed of Japanese nationalism with widespread condemnation.²⁰⁸ The 2012 dispute over the Senkaku Islands²⁰⁹ cannot be divorced from this greater conflict between Japan and China over the rise of Japanese historical revisionism. According to journalist Kirk Spitzer, "keen observers of Japan know its territorial disputes with its neighbors aren't really about World War II aggression or ancient historical claims. . . . [T]hey are really about . . . the Japanese inability to admit they did anything wrong during their long colonial rule in Asia."²¹⁰ While Spitzer's view is arguably an exaggeration, as various Japanese Prime Ministers have over the years made numerous apologies for the atrocities committed abroad by Imperial Japan,²¹¹ the combination of the territorial dispute, deep-seated animosities fueled by the history of WWII, and rising nationalism in both countries has created the very real danger of a confrontation between the two superpowers. Abe has thrown his reinterpretation of Article 9 into this powder keg, and the response from China has been expectedly negative.²¹²

Abe's reinterpretation of Article 9 could further increase the likelihood of Japan becoming involved in such a conflict with China. First, many in China—and, for that matter, Japan and the rest of the world²¹³—fear that the vagueness of the reinterpretation may "represent a blank check to [Japanese] conservative nationalists to invoke the right of collective self-defense to pursue national interests."²¹⁴ The legislative bills enshrining the reinterpretation of Article 9 into law were submitted by Abe to the Japanese Diet in the summer of 2015, and state that "[c]ollective self-defense would be allowed only when there is a 'clear danger' to Japan's survival due to an armed attack on a

207. Kawasaki Akira & Céline Nahory, *Japan's Decision on Collective Self-Defense in Context*, DIPLOMAT (Oct. 3, 2014), <http://thediplomat.com/2014/10/japans-decision-on-collective-self-defense-in-context>.

208. See Dennis McCornac, "New Nationalism" in Japan, DIPLOMAT (Aug. 21, 2014), <http://thediplomat.com/2014/08/new-nationalism-in-japan>. In response, anti-Japanese nationalism has also been growing in China. See Eric Fish, *A Glimpse into Chinese Nationalism*, DIPLOMAT (Nov. 7, 2014), <http://thediplomat.com/2014/11/a-glimpse-into-chinese-nationalism>.

209. See *supra* notes 170–75 and accompanying text.

210. McCornac, *supra* note 208.

211. Robert Dujarric, *Viewpoint: Japan's "Sorry" Seems to Be the Hardest Word to Remember*, BBC NEWS (Aug. 14, 2015), <http://www.bbc.com/news/world-asia-33902065>.

212. See Amy King, *China's Response to Japan's Constitutional Reinterpretation*, EAST ASIA F. (July 27, 2014), <http://www.eastasiaforum.org/2014/07/27/china-responds-to-japans-constitutional-reinterp-retation>.

213. See Sachiko Miwa, *Insight: Conditions for Exercising Right to Collective Self-Defense Open to Interpretation*, ASAHI SHIMBUN (May 12, 2015), http://ajw.asahi.com/article/behind_news/politics/AJ201505120059.

214. Grace Cheng, *China's Response to a Post-Pacifist Japan*, E-INT'L REL. (Sept. 14, 2014), <http://www.e-ir.info/2014/09/14/chinas-response-to-a-post-pacifist-japan>.

country with which Tokyo has ‘close ties’ and there are ‘no other appropriate means’ to protect Japanese citizens.”²¹⁵ Just what constitutes a “clear danger” to Japan, a nation with “close ties” to Japan, and “other appropriate means” for defending its citizens, or who has the authority to make such determinations, has been criticized as being vague and susceptible to various interpretations.²¹⁶ The Chinese state-run media Xinhua has characterized the bills as “war legislation” that revive militarism in Japan.²¹⁷ Second, the strengthening of the alliance between the United States and Japan means that Japan could increase its maritime patrols in the China Sea, thereby increasing the potential for an altercation between China and Japan.²¹⁸

This reality illustrates an ironic role-reversal in the United States–Japan relationship: during the Cold War, Japan feared that America’s actions would “drag Japan into a conflict that was solely a product of American foreign policy machinations and not at all in Japan’s interests,” but today Japan’s actions and relationships with its neighbors might instead drag the United States into a conflict that is a product of Japanese foreign policy machinations and not at all in America’s interests.²¹⁹ This concern is further exacerbated by the unstable legality of Abe’s reinterpretation of Article 9.

2. An Unstable Legal Foundation

The reinterpretation process of Article 9 was enacted by Abe with the specific intent of foregoing the constitutional requirements for a formal amendment. Not only did he circumnavigate these requirements, he also installed officials who agreed with his politics in various governmental positions relevant to the reinterpretation process in an attempt to guarantee his desired outcome.

Abe selected the entire membership of the Advisory Panel on Reconstruction of the Legal Basis for Security, whose recommendation formed the basis for his reinterpretation.²²⁰ The panel’s membership has been criticized as being assembled simply to agree with the prime minister’s position.²²¹ According to Professor Craig Martin, “[t]his was a group with few

215. Masaaki Kameda, *Abe Cabinet OKs Bills to Relax Limits on SDF Operations Abroad*, JAPAN TIMES (May 15, 2015), <http://www.japantimes.co.jp/news/2015/05/15/national/politics-diplomacy/abe-cabinet-oks-bills-relax-limits-sdf-operations-abroad>.

216. See Miwa, *supra* note 213; see also *Japan’s New Defense Bills Pose Threat to Regional Peace*, CHINA DAILY USA (May 15, 2015, 11:33 AM), http://usa.chinadaily.com.cn/world/2015-05/15/content_20725906.htm.

217. *Japan’s New Defense Bills Pose Threat to Regional Peace*, *supra* note 216.

218. See Dingding Chen, *A Deepening US-Japan Alliance: Be Careful What You Wish For*, DIPLOMAT (May 1, 2015), <http://thediplomat.com/2015/05/a-deepening-us-japan-alliance-be-careful-what-you-wish-for>.

219. MCCLAIN, *supra* note 20, at 558.

220. *No Rush for Nod on Collective Defense: Abe*, JAPAN TIMES (Dec, 25, 2014), <http://www.japantimes.co.jp/news/2014/05/08/national/rush-see-approval-collective-self-defense-abe-says>.

221. See Martin, *supra* note 157.

lawyers, [and] far less constitutional scholars, who were primarily selected for their hawkish views on national security.”²²² A group of 12 Japanese legal scholars and foreign policy experts criticized the conclusions and membership of the panel, noting that only one person on the panel could be considered a constitutional law expert.²²³

Abe also installed his own man, Ichiro Komatsu, to head the CLB—the government group made up of legal experts that is traditionally responsible both for advising the cabinet and the Diet on questions of constitutional law and for reviewing government-proposed legislation and policy.²²⁴ Komatsu was well-known as a supporter of Abe’s views on collective self-defense.²²⁵ Notwithstanding these concerns, his appointment was also highly unusual and controversial because Komatsu was an outsider, and directors of the CLB are traditionally chosen from within the ranks of the bureau itself.²²⁶ Although Komatsu resigned for health reasons before Abe announced the reinterpretation of Article 9,²²⁷ the CLB was notably absent from the reinterpretation process.

The measures taken by Abe to reinterpret Article 9 not only raise serious concerns about democracy and the rule of law in Japan,²²⁸ but also draw into question the ultimate staying power of the newly declared right to engage in collective self-defense. As previously mentioned, the Japanese Supreme Court has not addressed the constitutionality of the SDF or the limitations imposed on that force by Article 9.²²⁹ While an in-depth analysis of the Japanese courts and their relationship to Article 9 is beyond the scope of this Note,²³⁰ discussion of the reinterpretation would be incomplete without addressing the role of the courts.

Article 81 of the Japanese constitution states that “[t]he Supreme Court is the court of last resort with power to determine the constitutionality of any

222. *Id.*

223. Kawabata, *supra* note 129. The group’s members include Masasuke Omori and Masahiro Sakata, both previous directors of the CLB; Yoichi Higuchi, a constitutional law professor emeritus at The University of Tokyo; and Setsu Kobayashi, a constitutional law professor emeritus at Keio University. *Id.*

224. *Abe to Pick Backer of Collective Self-Defense as Head of Legislation Bureau*, ASAHI SHIMBUN (Aug. 2, 2013), http://ajw.asahi.com/article/behind_news/politics/AJ201308020080.

225. *Id.*

226. WAKEFIELD, *supra* note 13, at 1.

227. *Former Cabinet Legislation Bureau Chief Komatsu Dies at 63*, JAPAN TIMES (June 23, 2014), <http://www.japantimes.co.jp/news/2014/06/23/national/politics-diplomacy/former-cabinet-legislation-bureau-chief-komatsu-dies-63>.

228. For a detailed exploration of these concerns, see generally Martin, *supra* note 157, and WAKEFIELD, *supra* note 13, at 2–7.

229. See *supra* text accompanying notes 113–14.

230. For such an analysis, see John O. Haley, *Waging War: Japan’s Constitutional Constraints*, 14 CONST. F. 18, 23–24 (2005). For a broader look at the Japanese Supreme Court’s conservatism and reluctance to strike down legislation on constitutionality grounds, see also David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1586–93 (2009).

law, order, regulation or official act.”²³¹ Yet from 1951–2001 there was only one “precedent-setting *en banc* decision” involving the constitutionality of Article 9, which has served as “the controlling interpretation of” the Article ever since;²³² this 1959 decision is known as the *Sunakawa* case.²³³ The case involved Japanese anti-war protesters charged with trespassing on the U.S. Tachikawa Air Base.²³⁴ The Tokyo District Court held for the protestors under the reasoning that their prosecution was based on the 1951 Security Treaty with the United States, which the court found to be unconstitutional vis-à-vis Article 9’s proscription on maintaining war potential in Japan because it sanctioned the deployment of U.S. soldiers in Japan.²³⁵

In a special appeal directly to the Japanese Supreme Court, that court unanimously reversed the District Court, essentially holding that the lower court had exceeded its authority by ruling on the constitutionality of the security treaty.²³⁶ The majority went on to interpret Article 9 for the first (and last) time in the court’s history, albeit briefly, holding that “Japan retained a fundamental right of self-defence and could enter into treaties for mutual security.”²³⁷ Finally, the majority also “established parameters for judicial review,” ruling that “[i]n the absence of an unmistakable or ‘clear’ violation, the courts were to defer to the judgment of the political branches on the issue of constitutionality.”²³⁸

The Japanese Supreme Court’s decision in the *Sunakawa* case did not rule on the constitutionality of the SDF or the right of collective self-defence.²³⁹ The consensus of academics is that “the Court refused to rule on the merits by employing the political question doctrine.”²⁴⁰ The court has since deferred to the government on questions of defense and Article 9, effectively “permitting the government—and above all, the Cabinet Legislation Bureau—to define constitutionally permissible defence policy.”²⁴¹ Because the court did not elaborate on what constitutes a “clear violation” of Article 9, scholars can only speculate as to when this boundary has been crossed and the court will intervene.²⁴² However, it is clear that although the court has granted the government “significant discretion” on matters of

231. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 81 (Japan).

232. Haley, *supra* note 228, at 24.

233. *Id.*; *see also* Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, 1959(A) no. 710, 13 SAIKŌ SAIBANSHO HANREISHŪ [SAIBANSHO WEB] 3225, http://www.courts.go.jp/app/hanrei_en/detail?id=13 (Japan).

234. Haley, *supra* note 230, at 24.

235. *Id.*

236. *Id.* at 24–25.

237. *Id.* at 24.

238. *Id.*

239. *Id.* at 24–25.

240. MATSUI, *supra* note 52, at 247.

241. Haley, *supra* note 230, at 28.

242. *Id.*

defense, the ultimate authority over the constitutionality of such issues still rests with the Japanese Supreme Court, as "the Diet and [the] cabinet are permitted to act only to the extent that the judiciary considers their actions acceptable."²⁴³

So will the Japanese Supreme Court consider Abe's reinterpretation of Article 9 and its accompanying legislation as crossing the line set by the court in the *Sunakawa* case? Although impossible to know for certain, the likelihood that the court will opine on Article 9 is arguably greater now than it has ever been since that decision. Since 1955, the CLB has consistently interpreted Article 9 as prohibiting Japan from practicing collective self-defense, and the court's silence on this interpretation in and since 1959 can be interpreted as tacit approval.²⁴⁴ Abe's interpretation not only overturns the CLB's respected precedent, Abe instead relied on a recommendation made entirely by an external panel.²⁴⁵ These actions subvert the established framework for interpreting the constitution, and if left unchecked, set a dangerous precedent. If the Japanese Supreme Court refuses to address the issue, it could effectively be interpreted as approval of Abe's measures, and thus open the door for the CLB to be circumnavigated in the future, casting a long shadow of uncertainty on constitutional interpretation, and the supremacy of the constitution itself, in Japanese law.

While the possibility of intervention by the court may now be higher than ever before, this admittedly is not a strong indication that the court will *actually* intervene; the court is notorious for its deference to legislators on issues not only pertaining to defense and Article 9, but constitutionality in general. According to Professor David S. Law:

The Supreme Court of Japan . . . has been described as the most conservative constitutional court in the world, and for good reason. One might characterize it as "conservative" in the sense of being so passive or cautious that it almost never challenges the government. Alternatively, or in addition, one might characterize it as "conservative" in the sense that it happens to share the ideological views and preferences of Japan's long-ruling conservative party, the Liberal Democratic Party What is clear however, is that the label fits.

Since its creation in 1947, the court . . . has struck down only eight statutes on constitutional grounds.²⁴⁶

243. *Id.*

244. See WAKEFIELD, *supra* note 13, at 2-3.

245. For a critique on the merits of the panel's arguments, see *id.* at 3-5.

246. Law, *supra* note 230, at 1546-47 (footnotes omitted). Professor Law identifies several explanations for this conservatism, including the court's methods of appointment, a mandatory retirement age of 70, an enormous docket and workload for the judges to tackle, the LDP's near-

Furthermore, stringent standing requirements mean that the Japanese Supreme Court, if it does get involved, will not hear arguments until parties come before it that were personally affected by the legislation.²⁴⁷ This effectively means that the Court cannot issue a ruling until Abe's security bills are passed and put into effect.²⁴⁸

Thus, the Supreme Court's deference to the government on issues of defense and Abe's circumnavigation of the CLB have created an alarming vacuum of legal legitimacy in respect to the reinterpretation of Article 9. Japan's legal community has stepped in to fill this void, and has come down overwhelmingly against Abe's reinterpretation.

Abe submitted his security bills to the lower house of the Diet in May 2015,²⁴⁹ sparking "months of contentious debate."²⁵⁰ On June 4, amid the debates, a committee of the lower house called three renowned constitutional scholars from Japan's top universities to provide expert testimony on the bills' constitutionality.²⁵¹ The scholars unanimously agreed that the bills violated the constitution.²⁵² Especially noteworthy was the fact that one of the scholars, Hasebe Yasuo, a professor of constitutional law at The University of Tokyo from 1993 until 2014, had been selected to testify by Abe's own political party.²⁵³ The three scholars were not alone in their assessment; the day before their testimony in the lower house, 176 other constitutional law professors issued a joint statement proclaiming the bills unconstitutional.²⁵⁴ Abe and the LDP subsequently scrambled to find scholars to support their own view, with relatively little success.²⁵⁵ Several weeks later, two former director-generals of the CLB testified before the lower house that the bills were unconstitutional.²⁵⁶ Japan's national bar association has also condemned the

monopolization of political control since 1947, and the influence of the Chief Justice over the rest of the court. *See id.* at 1548.

247. Reiji Yoshida, *National Ruckus over Security Bills Puts Spotlight on Supreme Court*, JAPAN TIMES (June 18, 2015), <http://www.japantimes.co.jp/news/2015/06/18/national/politics-diplomacy/supreme-court-unlikely-rule-abes-article-9-revamp>.

248. *Id.*

249. Lawrence Repeta, *Japan's Proposed National Security Legislation—Will This Be the End of Article 9?*, ASIA-PAC. J.: JAPAN FOCUS (June 22, 2015), <http://japanfocus.org/-Lawrence-Repeta/4335/article.html>.

250. Jonathan Soble, *Japan Moves to Allow Military Combat for First Time in 70 Years*, N.Y. TIMES (July 16, 2015), <http://www.nytimes.com/2015/07/17/world/asia/japans-lower-house-passes-bills-giving-military-freer-hand-to-fight.html>.

251. Repeta, *supra* note 249.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. Kotaro Ono, *Former Legislation Bureau Chiefs Criticize Security Bills as Placing Citizens in Danger*, ASahi SHIMBUN (June 22, 2015), http://ajw.asahi.com/article/behind_news/politics/AJ201506220041. According to Reichi Miyazaki, one of the former directors, "[n]ot being allowed to exercise [collective self-defense] under Article 9 of the Constitution is the established

bills.²⁵⁷ According to Professor Lawrence Repeta of Meiji University in Tokyo, the significance of this overwhelming opposition to the reinterpretation of Article 9 cannot be overstated:

We are witnessing a severe test for constitutional democracy in Japan. Given the clarity and near-unanimity of the experts' opinions, it seems highly unlikely that the Abe administration can make any compelling legal argument to support its position. If Abe goes ahead, the message that his action defies the constitution will be pounded home ceaselessly in lecture halls and articles published in all forms of the media. Abe's legacy as the man who abandoned the rule of law will be fixed.²⁵⁸

Despite the opposition and protests, Abe's LDP party and its coalition controlled a majority of seats, and the bills cleared the lower house in July 2015.²⁵⁹ On September 18, 2015, the bills were passed by the upper house as well, enshrining Abe's reinterpretation of the Japanese constitution into law.²⁶⁰

However, even though the right to engage in collective self-defense is legalized, the possibility remains that a future administration will simply reverse Abe's reinterpretation by using a similar process as Abe himself used. Although the ultimate constitutional question of whether Article 9 allows Japan the right to engage in collective self-defense is debatable, the legal ground on which Abe's current interpretation rests is shaky at best. Furthermore, as discussed above, the United States has invested heavily in exchange for Japan assuming a greater role in the collective security in Asia, and by doing so, the United States has greatly increased its chances of being dragged into a conflict adverse to its interests. By sanctioning Abe's reinterpretation process and the uncertain legal foundations on which it rests, the United States has put its benefit from that exchange in jeopardy.

IV. CRAFTING A FOREIGN POLICY VICTORY IN EAST ASIA

For the United States, Abe's announcement in the summer of 2014 was an achievement of its long-held desire for Japan to reinterpret Article 9 and share the burden of maintaining security in Asia.²⁶¹ However, this apparent victory for American foreign policy may ultimately prove to be Pyrrhic. The

interpretation of the Constitution in Japan, and to have the government itself overturn it means nothing less than the government itself destroying legal stability." *Id.*

257. *Japan Lawyers Join Opposition to Controversial Security Bills*, DEFENSENEWS (Aug. 26, 2015, 2:47 PM), <http://www.defensenews.com/story/defense/international/asia-pacific/2015/08/26/japan-lawyers-join-opposition-controversial-security-bills/32416069>.

258. Repeta, *supra* note 249.

259. Soble, *supra* note 250.

260. *Japan to Allow Military Role Overseas in Historic Move*, BBC NEWS (Sept. 18, 2015), <http://www.bbc.com/news/world-asia-34287362>.

261. *See supra* Part II.C.

United States wields an enormous amount of influence over Japan's affairs, and, given the unique role it played in the creation of Article 9, it should use this influence to encourage changes made in accordance with Japan's rule of law. This should be an important goal for the United States not only in the context of upholding principles of democracy and constitutional law, but also in order to reduce the chances that Japanese commitment to the alliance between the two countries will not be rescinded later. In addition, the United States needs to put greater emphasis on reducing tensions in East Asia instead of just throwing its weight into one side of the ring. Nationalism is increasing in both China and Japan, and Abe's reinterpretation of Article 9 has exacerbated this problem.²⁶² Efforts should be made towards diffusing this tension and resolving disputes surrounding potential flashpoints. Specifically, the United States should put greater pressure on Abe to tone down his nationalistic rhetoric. America's successful pivot to Asia will require the responsible use of its strengths for the benefit of relations among all nations in the region. Any other approach runs the risk of fanning the flames of conflict and sparking a detrimental arms race.²⁶³

A. PROMOTING JAPAN'S RULE OF LAW

The United States has never masked its desire to see Article 9 amended. It has long considered its need for Japan as a partner in East Asia, rather than as a dependent, to be more important than Japan's adherence to the principles of pacifism and world peace that are espoused in Article 9. But in seeking this change to Article 9, the United States needs to respect and promote not only Japan's rule of law and constitution, but also the will of the Japanese public.

In the lead-up to Abe's reinterpretation, the U.S. State Department stated that any reinterpretation should be transparent and reflect the will of the Japanese populace.²⁶⁴ After the reinterpretation was announced, the Department hailed "Japan's efforts to maintain openness and transparency throughout this decision-making process."²⁶⁵ However, polls put to the Japanese public have shown conflicting results regarding support for Abe's measures—calling into question both how well the general populace

262. See *supra* Part III.C.1.

263. There is growing evidence that this has already occurred, as China and Russia have recently increased joint naval exercises, seemingly in response to the strengthening of the U.S.–Japan alliance. See Tony Halpin, *Russia, China Start Joint Naval Drills of "Unprecedented" Scale*, BLOOMBERG BUS. (Aug. 20, 2015, 8:37 AM), <http://www.bloomberg.com/news/articles/2015-08-20/russia-china-start-joint-naval-drills-of-unprecedented-scale>.

264. See Daily Press Briefing, Marie Harf, Deputy Spokesperson, U.S. Dep't of State (May 15, 2014), <http://www.state.gov/r/pa/prs/dpb/2014/05/226224.htm> ("[T]his is a decision for the Japanese Government to make and for their people to make. . . . [W]e are confident that Japan will continue its tradition of respect for peace, for global security, and will have this debate in an open and transparent manner . . .").

265. Daily Press Briefing, Marie Harf, Deputy Spokesperson, U.S. Dep't of State, *supra* note 180.

understands the reinterpretation and the overall transparency of the process.²⁶⁶ In May 2015, a survey showed that 81.4% of the Japanese public felt that the bills had not been sufficiently explained to them.²⁶⁷ Furthermore, Abe's circumnavigation of the formal amendment procedure in Article 96 has effectively cut the population out of the debate, as an amendment would require affirmation by the Japanese public via popular referendum. In addition, it is difficult to argue that Abe's election victory served as a public endorsement for his reinterpretation, as the central component of his platform was economic recovery ("Abenomics").²⁶⁸ Now that Abe has moved his focus away from the economy and towards the security bills, his approval ratings have plummeted.²⁶⁹

At this point, the United States needs to encourage Abe to incorporate traditional modes of constitutional interpretation into the reinterpretation of Article 9. Accordingly, the United States should encourage Abe to seek and incorporate greater input from the body that traditionally decides constitutional issues for the Japanese government, the CLB.²⁷⁰ Furthermore, the United States should encourage Abe to seek a formal amendment to Article 9. An amendment would have the same lasting effect as a Japanese Supreme Court decision, and, most importantly, incorporate public opinion by means of a popular referendum. This would appropriately shift the public debate in Japan away from the legality of Abe's reinterpretation towards perhaps the more important question: whether collective self-defense is in the best interest of the Japanese nation and people.

B. RESOLVING, RATHER THAN EXACERBATING, DISPUTES

As mentioned above, recent disputes between Japan and China over the Senkaku Islands are tied directly to the rise of right-wing conservatives in

266. See Reiji Yoshida, *Polling Shows Voters Unclear About Article 9 Reinterpretation: Expert*, JAPAN TIMES (July 11, 2014), <http://www.japantimes.co.jp/news/2014/07/11/national/media-national/polling-shows-voters-unclear-constitutional-reinterpretation-expert-says>.

267. *Abe's Security Bills Baffle 81% of the Public: Survey*, JAPAN TIMES (June 1, 2015), <http://www.japantimes.co.jp/news/2015/05/31/national/politics-diplomacy/81-say-state-explanations-controversial-security-bills-insufficient-poll>. Facing these numbers and public opposition, in July 2015, Abe made a television appearance in an attempt to explain to the public the necessity of his security bills. With the aid of paper models, he drew an analogy between collective self-defense and assisting a friend whose house was on fire. The appearance was widely mocked, with many deriding the explanation as arrogant and insulting to the Japanese public. *Japan PM Mocked on Internet Over Model Explanation*, DEFENSENEWS (July 22, 2015, 9:06 AM), <http://www.defensenews.com/story/defense/international/asia-pacific/2015/07/22/japan-pm-mocked-internet-over-model-explanation/30503955>.

268. Will Ripley et al., *In Japan Snap Elections, Voters Back Abe's Economic Reforms*, CNN (Dec. 14, 2014, 4:48 PM), <http://www.cnn.com/2014/12/14/world/asia/japan-election>.

269. Toru Fujioka, *Japan's Economy Contracts as Consumption, Investment Decline*, BLOOMBERG BUS. (Aug. 16, 2015, 9:09 PM), <http://www.bloomberg.com/news/articles/2015-08-16/japan-s-economy-contracts-as-consumption-investment-decline>.

270. See *supra* notes 107–10, 224–26 and accompanying text.

Japan, who are actively stoking the flame of nationalism and disseminating revisionist views of history.²⁷¹ The United States should attempt to ease the tensions between the two countries before ramping up its support for Japan in order to decrease the risk of being dragged into conflict. Any relaxation of tensions and improvement of security will have to be conditioned upon a reduction in the nationalistic rhetoric coming out of Tokyo. To its credit, the United States has recently put pressure on Japan to “turn down [its] rhetoric,”²⁷² and Abe has, to an extent, responded.²⁷³ But the pressure needs to be stepped up, with the United States sending a clear signal to Japan that it will no longer tolerate such behavior. At a minimum, the United States should sponsor a dialogue between Japan and China that seeks to ease tensions on both sides and promote a common understanding.

V. CONCLUSION

Historical analysis shows that while Article 9 was enacted under the tutelage of the United States during its occupation of Japan, the United States has been actively pressuring Japan to violate the principles of Article 9 ever since the start of the Cold War. Abe’s recent campaign against the pacifist clause cannot be divorced from this history. Considering the immense amount of influence the United States continues to wield in the affairs of Japan, the United States undoubtedly played a large role in pressuring Abe to declare a right to engage in collective self-defense. It is unclear whether that pressure took the form of expressly encouraging Abe to circumnavigate Japan’s constitution, or simply compelling Abe to make some kind of change. Regardless, the outcome of Abe’s reinterpretation not only poses serious risks to America’s foreign policy in East Asia, it also runs contrary to the basic tenets of democracy and constitutional law.

Given the central role that the United States played in the promulgation of Japan’s current constitution, it arguably possesses a special responsibility as an advocate for that document’s sanctity. If the United States works to reduce regional tensions in Asia and encourages Abe to adhere to Japan’s rule of law, it will have upheld the principles of democracy it so often espouses and set the foundations for achieving a true foreign policy victory in the region.

271. See *supra* text accompanying notes 167–75, 208–12.

272. Yuka Hayashi, *Tensions in Asia Stoke Rising Nationalism in Japan*, WALL STREET J. (Feb. 26, 2014, 10:30 PM), <http://online.wsj.com/articles/SB100014240527023046104579403492918900378> (quoting Daniel Russel, Assistant Secretary of State for East Asia); see also George Nishiyama, *Abe Visit to Controversial Japanese Shrine Draws Rare U.S. Criticism*, WALL STREET J. (Dec. 26, 2013, 3:04 PM), <http://online.wsj.com/news/articles/SB10001424052702304483804579281103015121712>.

273. Robert Dujarric, *Why Are Japan’s Apologies Forgotten?*, DIPLOMAT (Nov. 25, 2013), <http://thediplomat.com/2013/11/why-are-japans-apologies-forgotten>.