

Japan: Interpretations of Article 9 of the Constitution

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I. Introduction

The current Constitution of Japan was promulgated on November 3, 1946, and came into effect on May 3, 1947. One of the Constitution's distinctive features is its embrace of pacifism. Article 9 of the Constitution, which renounces war, is considered unique.¹ Japan is allowed the Jieitai, the Self-Defense Forces (SDF), which is comprised of the Air SDF, the Maritime SDF, and the Ground SDF. These SDF components cannot be called land, sea, and air forces because article 9 prohibits Japan from maintaining military forces (*gun*). However, despite the names of the SDF components, many have argued that the SDF is in fact a military organization and that its existence is, in essence, unconstitutional.² The government naturally interprets the Constitution differently, in a manner that validates the SDF. That interpretation emerged in the 1950's following closer cooperation between the United States and Japan in maintaining Japan's military security.

The government has developed a somewhat unique interpretation of article 9 and its related rules in order to legalize the existence of the SDF, and has also put limitations on the SDF in the spirit of article 9.

The Liberal Democratic Party (LDP), which has been the ruling party for most of the period following World War II, has discussed amending the Constitution, especially article 9, but resistance has been strong. It once looked impossible to amend article 9 because the majority of Japanese people would not support the amendment. However, global political and security issues impacting Japan have changed, as have the viewpoints of the Japanese people. There now appears to be realistic opportunities to amend article 9.

II. Interpretation of the Pacifist Constitution and the Right to Self-Defense

The Constitution of Japan³ is known as the Pacifist Constitution. Both its Preamble and article 9 express principles of pacifism. The Preamble proclaims,

[w]e, the Japanese people, . . . resolved that never again shall we be visited with the horrors of war through the action of government

We . . . desire peace for all time . . . and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world.⁴

¹ There was a movement in 2014 to award the Nobel Prize to the "Japanese people for preservation of Article 9." Howard LaFranchi, *Nobel Peace Prize: Five Favored Front-runners*, CHRISTIAN SCIENCE MONITOR (Oct. 9, 2014), <http://www.csmonitor.com/USA/2014/1009/Nobel-Peace-Prize-five-favored-front-runners-video>.

² JAMES E. AUER, *THE POSTWAR REARMAMENT OF JAPANESE MARITIME FORCES, 1945–71* at 122 (1973).

³ NIHONKOKU KENPŌ [CONSTITUTION OF JAPAN] 1946.

⁴ The translation of the Constitution of Japan is available on the Prime Minister of Japan and His Cabinet's website, http://www.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html (last visited May 1, 2015).

It is understood commonly that the Preamble of the Constitution does not have a legally binding effect by itself because the preamble is very abstract. Rather, all concepts in the Preamble are realized by the individual articles of the Constitution with the Preamble serving as guidance for the interpretation of those articles.⁵ This was recognized in the so-called *Sunak(g)awa* case, where the Supreme Court stated, “[i]n conjunction with the spirit of international cooperation expressed in the Preamble and paragraph 2, article 98 of the Constitution, [article 9] is an embodiment of the concept of pacifism which characterizes the Japanese Constitution.”⁶ However, the Preamble has not led researchers and politicians to an unanimous interpretation of article 9.

Article 9 reads as follows:

1. 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.
2. 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.

Paragraph 1 of article 9 renounces war, while paragraph 2 prohibits maintaining the potential for war. Interpretations of this article have varied broadly, from absolute pacifism to the admission of a collective right of self-defense.

The majority of scholars and government officials agree that paragraph 1 of article 9 renounces acts of war as a means of invasion of other countries.⁷ It is unclear in English translation whether the phrase “as a means of settling international disputes” is connected to “war as a sovereign right of the nation.” However, in the original Japanese text, “as a means of settling international disputes” is clearly connected to not only “the threat or use of force,” but also to “war as a sovereign right of the nation.”

War “as a means of settling international disputes” is commonly interpreted to mean invading other countries.⁸ The 1928 General Treaty for the Renunciation of War, to which Japan is a signatory, uses a similar phrase—“war for the solution of international controversies.”⁹ This phrase in the Treaty excluded the concept of war in self-defense.¹⁰ It is said in Japan that when such similar phrases are used in legal documents from the same era, they must be interpreted consistently.¹¹ The majority of scholars and government officials, therefore, think that war in

⁵ MIYOKO TSUJIMURA, *KENPŌ* [CONSTITUTION] 59 (2000).

⁶ 13 KEISHŪ 13, 3225, 3232 (Sup. Ct. Grand Bench, Dec. 16, 1959, summary of judgment in English available on Courts of Japan’s website, http://www.courts.go.jp/app/hanrei_en/detail?id=13 (last visited May 1, 2015).

⁷ See NOBUYOSHI ASHIBE, *KENPŌGAKU I* [CONSTITUTION STUDY] 259 (1992); TSUJIMURA, *supra* note 5, at 107–11.

⁸ ASHIBE, *supra* note 7, at 257; KOKUSAI HŌ [INTERNATIONAL LAW] 238 (Kisaburo Yokota ed., New ed. 1966).

⁹ General Treaty for the Renunciation of War, 46 Stat. pt. 2, 2343 (1928).

¹⁰ Further Correspondence with Government of the United States respecting the United States Proposal for the Renunciation of War, 1. Self-defense (June 23, 1928), available at http://avalon.law.yale.edu/20th_century/kbbr.asp.

¹¹ ASHIBE, *supra* note 7, at 257.

self-defense is not renounced by paragraph 1 of article 9. Some well-known scholars, however, insist that paragraph 1 of article 9 renounces all wars without distinguishing between offensive and defensive operations. Their reasons are: (1) all wars, including a war in self-defense, can be means of settling international disputes; and (2) practically speaking, it is very difficult to distinguish a war of invasion and a war in self-defense.¹² This view has not persuaded the majority of scholars and government officials, though the majority admit the reasons listed above are generally right.¹³

In regard to paragraph 2 of article 9, an opinion has been expressed that war for the purpose of self-defense is permitted by the Constitution. The commentators advocating this view emphasize that the second paragraph states “in order to accomplish the aim of the preceding paragraph.” The aim of the first paragraph is to renounce war “as a means of settling international disputes.” Therefore, a self-defensive war and war as sanctioned under the United Nations Charter are not forbidden by the Constitution, they assert. In addition, they claim that article 66, paragraph 2, of the Constitution, which requires the Prime Minister and other Ministers of State to be civilians, makes no sense if no war is permitted by the Constitution, because military personnel would not exist if war was not permitted in any form.¹⁴ The majority of scholars criticize this view because it overemphasizes the phrase “in order to accomplish the aim of the preceding paragraph.”¹⁵ The scholarly majority claims that the phrase does not necessarily have this meaning. In addition, the civilian requirement might mean that former members of the military and SDF officers cannot serve as Prime Minister and Ministers of State.¹⁶ Historically, this view authorizing a self-defensive war was not supported by many scholars although recently it has become more popular.

The majority of scholars take the view that, although Japan does not renounce a right to self-defense under the first paragraph of article 9, the denial of the right to belligerency and to maintain war potential under the second paragraph denies the country’s right to self-defense through either a standing military or quasi-military force.¹⁷ The only ways to resist foreign aggression are through police power and an *ad hoc* militia (citizens with weapons).¹⁸ This is also the view the government adopted during its legislative debates, as discussed below in Part III.

The current government agrees that Japan cannot have war potential (*sen-ryoku*), because the second paragraph of article 9 clearly forbids it.¹⁹ The question has naturally been raised, if the government interprets the first paragraph of article 9 as prohibiting all types of war and that

¹² See TSUJIMURA, *supra* note 5, at 108 (listing books by Professor Toshiyoshi Miyazawa, Professor Shirō Kiyomiya, and Professor Noriho Urabe as examples).

¹³ *Id.* at 108.

¹⁴ ASHIBE, *supra* note 7, at 258–61.

¹⁵ *Id.* at 260.

¹⁶ *Id.* at 259–61.

¹⁷ *See id.* at 266.

¹⁸ *Id.*

¹⁹ Answer of Ichiro Yoshikuni before the Budget Committee of the House of Councillors, Nov. 13, 1972, SANGIIN YOSAN IIN KAIGIROKU [BUDGET COMMITTEE OF HOUSE OF COUNCILLORS MINUTES], 70th Diet Session, No. 5, at 2 (Nov. 13, 1972).

Japan cannot have war potential, how can Japan maintain the SDF without violating the Constitution? The government's answer is that it construes the SDF differently than the "war potential" of article 9, paragraph 2. The government insists that, because article 9, paragraph 1 does not deny the state's inherent right of self-defense, creating standing forces for the purpose of self-defense does not constitute maintaining the "war potential" forbidden by article 9, paragraph 2. They define "war potential" as forces much greater than those forces minimally required for self-defense.²⁰ Therefore, the SDF, according to the government, is not a force with "war" potential, but only with "self-defense" potential.

As the discussion below illustrates, the government's interpretation did not emerge overnight; it has an extensive history.

III. Legislative History of the Post-World War II Constitution

The Constitution of Japan was enacted under unusual circumstances and has an unusual legislative history. After the Second World War, the Allied Powers occupied Japan, which accepted the terms of the Potsdam Declaration upon its surrender to the Allies in August 1945.²¹ Relevant terms of the Declaration are as follows:

6. There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.
7. Until such a new order is established and until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth.
- ...
10. . . . The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.
- ...
12. The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government.²²

²⁰ *Id.*

²¹ Arthur Krock, *Japan Surrenders, End of War!*, N.Y. TIMES (Aug. 14, 1945), <http://www.nytimes.com/learning/general/onthisday/big/0814.html>. The Potsdam Declaration was issued on July 26, 1945, by Harry S. Truman, Winston Churchill, and Chiang Kai-Shek, outlining the terms of surrender for Japan.

²² The text of the Potsdam Declaration is available at the National Diet Library's website, <http://www.ndl.go.jp/constitution/e/etc/c06.html> (last visited May 1, 2015).

In September 1945, General Douglas MacArthur, the Supreme Commander for the Allied Powers (SCAP), urged the Japanese government to amend the Imperial Constitution of 1889 (Meiji Constitution).²³ In October 1945, the new Prime Minister, Kijūrō Shidehara, appointed Dr. Jōji Matsumoto as chairman of the Constitution Research Committee (*Kenpō mondai chōsa iinkai*, hereinafter Matsumoto Committee).²⁴ While the Matsumoto Committee researched the amendment of the Constitution in closed chambers, many private constitutional research groups published drafts of the new Constitution.²⁵ Though the Matsumoto Committee sought to keep their arguments and two drafts secret, even from the General Headquarters of SCAP (GHQ), one of the major newspapers in Japan, the *Mainichi Newspaper*, obtained the information and published one of the Matsumoto Committee's tentative drafts on February 1, 1946.²⁶ The tentative draft did not meet the standards of the Potsdam Declaration.²⁷ The draft was based on the Imperial Constitution and amended, in some small way, each of its articles. General MacArthur directed his staff to draft a new Japanese Constitution on February 3, 1946.²⁸ Not knowing that MacArthur had given his staff this direction, the Japanese government requested and waited for a meeting with GHQ regarding the Matsumoto Committee's draft. At the meeting on February 13, 1946, the Matsumoto Committee draft was simply rejected and the GHQ draft was given to the Japanese for consideration.²⁹

The fact that the GHQ drafted a Constitution without informing the Japanese government, and the contents of the draft itself, surprised the Japanese government.³⁰ After some negotiations and discussions, on February 22, 1946, Matsumoto, then Minister of State, started to draft a constitution based on the GHQ draft.³¹ Although the GHQ agreed that the translation of the final draft would be submitted to them by March 11, 1946, they demanded to see Matsumoto's draft (the so-called "March second draft"), which had not yet been discussed by the Cabinet and not yet translated, on March 4, 1946.³² Most of the changes from the GHQ draft that had been made by Matsumoto were reversed by GHQ by the next day, March 5, 1946. The draft ("March fifth draft"), which GHQ approved, was therefore very close to the original GHQ draft.³³ GHQ strongly pressured the Cabinet to adopt the March fifth draft of its own volition and the Cabinet

²³ SUPREME COMMANDER FOR THE ALLIED POWERS, GOVERNMENT SECTION, POLITICAL REORIENTATION OF JAPAN 91 (1968).

²⁴ KENZO TAKAYANAGI ET AL., *NIHON-KOKU KENPO SEITEI NO KATEI* [PROCESS OF ENACTMENT OF JAPANESE CONSTITUTION] II, at 13 (1972).

²⁵ *Id.* at 15–16.

²⁶ *Id.* at 23.

²⁷ SUPREME COMMANDER FOR THE ALLIED POWERS, *supra* note 23, at 99–101.

²⁸ *Id.* at 102.

²⁹ TAKAYANAGI, *supra* note 24, at 55.

³⁰ Letter from Jiro Shirasu to General Whitney dated February 15, 1946, *reprinted in* JUN ETO ET AL. EDS., *KENPO SEITEI KEIKA* [LEGISLATIVE PROCESS OF THE CONSTITUTION] vol. 3, 213–19 (1982).

³¹ TAKAYANAGI, *supra* note 24, at 77–100.

³² *Id.* at 101.

³³ *Id.* at 102.

did so.³⁴ The March fifth draft was released by the Cabinet and SCAP immediately. After some adjustments in the Japanese language, the draft was finalized on April 17, 1946.³⁵

Though the draft constitution was fundamentally different from the Meiji Constitution, it was submitted to the Imperial Diet as an amendment of the Meiji Constitution by the Emperor's order.³⁶ The Diet, whose members were elected by the first post-war general election in April 1946, discussed the draft intensively. Both Houses established special committees to discuss and study the new constitutional bill. After intensive discussions, the bill was amended and passed by the Diet.

Legal questions have been raised about the legitimate genesis of the new Constitution: (1) there was interference by GHQ during the legislative process in drafting the Constitution, which violated article 43 of the Laws and Customs of War and Land (Hague IV), October 18, 1907,³⁷ and item 12 of the Potsdam Declaration;³⁸ and (2) the amendment was beyond the boundary of what could be considered a legitimate amendment of the Meiji Constitution, under which there had been a monarchy-based system of government.³⁹ Despite these theoretical problems, the new Constitution of 1946 has been enforced since the day it took effect because Japan was not in a position to reject a new constitution drafted by GHQ.

IV. Changes in the Draft of Article 9

When the Matsumoto Committee drafted the Constitution in early 1946 without GHQ interference, the draft did not include an article renouncing war. Rather, article XII of the draft stated “[t]he emperor declares war and makes peace, with the advice and approval of the Imperial Diet.”⁴⁰ An article renouncing war was first drafted by SCAP.

The government section of SCAP was bound by two documents when it drafted the Japanese Constitution:⁴¹ a policy statement by the State-War-Navy Coordinating Committee (SWNCC)

³⁴ *Id.*; ETO, *supra* note 30, at 255–56.

³⁵ The English version was kept intact. NISHI OSAMU, *NIHONKOKU KENPO NO TANJO O KENSHO SURU* [EXAMINING THE BIRTH OF THE CONSTITUTION OF JAPAN] 135 (1986).

³⁶ *Shugiin giji sokkiroku dai 5 go* [House of Representatives Stenographic Records], KANPŌ [OFFICIAL GAZETTE], Gōgai [Extra], 63 (June 26, 1946). The Meiji Constitution provided its amendment procedure: the amendment draft should be submitted to the Imperial Diet by the Emperor's order. THE MEIJI CONSTITUTION OF 1889, art. 73.

³⁷ Article 43 reads: the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. The 1907 Convention can be found at the website of Yale University Avalon Project, available at http://avalon.law.yale.edu/20th_century/hague04.asp (last visited May 1, 2015).

³⁸ Potsdam Declaration, *supra* note 22.

³⁹ See TSUJIMURA, *supra* note 5, at 52-56.

⁴⁰ SUPREME COMMANDER FOR THE ALLIED POWERS, *supra* note 23, at 605.

⁴¹ *Id.* at 41.

titled Reform of the Japanese Government System (SWNCC-228)⁴² and what has come to be known as the MacArthur Note, which General MacArthur handed to Brigadier General Courtney Whitney at SCAP when he directed the drafting of Japan's new Constitution.⁴³ SWNCC-228 was the guideline for Japanese government reform, in which the basic principles for governing post-war Japan accorded with the Potsdam Declaration. In the MacArthur Note, General MacArthur identified three key points for inclusion in the new Constitution: a new Emperor system, renunciation of war, and the end of the feudal system.

SWNCC-228 did not suggest that Japan would renounce war. Rather, it anticipated the establishment of a new Japanese military after the abolition of the old Japanese armed forces. Discussion 10 of SWNCC-228 reads as follows:

10. Although the authority and influence of the military in Japan's governmental structure will presumably disappear with the abolition of the Japanese armed forces, formal action permanently subordinating the military services to the civil government by requiring that the ministers of state or the members of a Cabinet must, in all cases, be civilians would be advisable.

General MacArthur was the first person to write down the idea that the Japanese Constitution would renounce war. Researchers agree that the idea was first introduced in discussions between General MacArthur and Prime Minister Shidehara.⁴⁴ However, there has been a debate as to which one conceived the idea. Both claimed the other told them first, a debate now impossible to settle because both have passed away. The relevant part of the MacArthur Note reads as follows:

II

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.⁴⁵

Brigadier General Whitney instructed Charles L. Kades, deputy chief of the government section of SCAP, to draft a new Japanese constitution in accordance with the MacArthur Note.⁴⁶ Kades thought renouncing war "even for preserving its own security" was unrealistic. Kades deleted

⁴² The State-War-Navy Coordinating Committee (SWNCC), Reform of the Japanese Government System (SWNCC 228) (Jan. 7, 1946), available at <http://www.ndl.go.jp/constitution/shiryō/03/059shoshi.html>.

⁴³ Douglas H. MacArthur, the so-called MacArthur Note (Feb. 3, 1946), available at <http://www.ndl.go.jp/constitution/shiryō/03/072shoshi.html>. See SUPREME COMMANDER FOR THE ALLIED POWERS, *supra* note 23, at 102.

⁴⁴ ASHIBE, *supra* note 7, at 253; DOUGLAS MACARTHUR, REMINISCENCES 303(1964); Michitarō Shidehara, *Kenpō 9jō wo kyōyō sareta chichi, shidehara kijūrō no higeki* [Forced to Take Article 9, My Father, Shidehara Kijuro's Tragedy], SHŪKAN BUNSHUN (Mar. 26, 1981).

⁴⁵ MacArthur Note, *supra* note 43.

⁴⁶ KIICHIRO YASUZAWA, KENPŌ DAI 9 JŌ NO KAISHAKU [INTERPRETATION OF ARTICLE 9] 114–15 (1981).

the phrase when he discussed drafting a constitution with other staff of the government section.⁴⁷ In his mind, a constitution should not prohibit war to any country to preserve its own security. General MacArthur and Brigadier General Whitney did not express an objection to this change.⁴⁸ The “renunciation of war” chapter of the first draft by GHQ, which was handed over to the Japanese government on February 13, 1946, read as follows:

Article VIII. War as a sovereign right of the nation is abolished. The threat or use of force is forever renounced as a means for settling disputes with any other nation.

No army, navy, air force, or other war potential will ever be authorized and no rights of belligerency will ever be conferred upon the State.

The wording of article 9 as it appeared in the March second draft by Matsumoto,⁴⁹ similar to the above-quoted article 8 under the GHQ draft, stated as follows (in English translation):

Article 9. War, as a sovereign right of the nation, and the threat or use of force, is forever abolished as a means of settling disputes with other nations.

The maintenance of land, sea, and air forces, as well as other war potential, and the right of belligerency of the state will not be recognized.⁵⁰

The most notable difference is that Matsumoto made the two sentences of the first paragraph into one sentence. Still, in the Japanese language, “as a means for settling disputes with any other nation” was connected to only “[t]he threat or use of force,” but not to “[w]ar” in paragraph 1. However, under SCAP’s English translation above, it became ambiguous whether “as a means of settling disputes with other nations” was connected to “war.” In the March fifth draft and in the final draft submitted to the Diet, article 9 reads as follows:

Article IX. 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 other war potential, will never be authorized. The right of belligerency of the state will not be recognized.⁵¹

The final draft was further amended during the Diet session, as proposed by the Constitutional Amendment Committee chaired by Dr. Hitoshi Ashida. The Committee introduced the phrases “aspiring sincerely to an international peace based on justice and order” to the top of paragraph 1 and “in order to accomplish the aim of the preceding paragraph” to the top of paragraph 2, among other changes of wording.⁵² Dr. Ashida reported to the Diet that the proposed changes

⁴⁷ Kiyoshi Yamamoto, “*Shuyaku*” *kejisu shi wa kataru* [“Main person” Mr. Kades Talked], MAINICHI NEWSPAPER, May 31, 1976 (on file with author).

⁴⁸ *Id.*

⁴⁹ The so-called “March second draft,” *reprinted in* ETO, *supra* note 30, at 238–55 (in Japanese).

⁵⁰ SUPREME COMMANDER FOR THE ALLIED POWERS, *supra* note 23, at 625 (in English translation).

⁵¹ *Id.* at 631.

⁵² *Id.* at 73.

aimed to express motives of renunciation of war and disarmament and that the meaning of article 9 was not changed because of the proposed change. However, he claimed that the change made it possible for Japan to rearm for its self-defense later.⁵³ This proposal was accepted by the Diet. The final article 9 reads:

1. 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.
2. 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.

V. Rearmament of Japan

Since the enactment of the 1946 Constitution, the government interpretation of article 9 has changed as the international situation surrounding Japan and US policy toward Japan has changed.

A. Initial Disarmament

On the same day that Japan signed the instrument of surrender, September 2, 1945, General MacArthur issued General Order No. 1, which ordered all Japanese military officers to disarm completely.⁵⁴ By November 30, 1945, the dismantlement of the Imperial Army and Navy was complete with the exception of a Navy mine-sweeping group.⁵⁵ The Far Eastern Commission (FEC) also imposed limitations on Japanese rearmament.⁵⁶ The FEC was composed of representatives of the Soviet Union, United Kingdom, United States, China, and seven other countries. The FEC formulated basic policies regarding occupied Japan and, on the request of any member, reviewed SCAP actions involving policy decisions.⁵⁷

B. Relevant Proceedings in the 90th (1946) Imperial Diet Session

When the Imperial Diet discussed the new Constitution of Japan in 1946, Japan did not have any military. During the 90th session of the House of Representatives, when Fujio Hara, a House member, asked whether Japan must abandon the right of self-defense under the proposed article 9, then Prime Minister Shigeru Yoshida, the successor of Shidehara, answered that “the

⁵³ See ASHIBE, *supra* note 7, at 260.

⁵⁴ KENPŌ CHŌSAKAI JIMUKYOKU, KENPŌ UNYŌ NO JISSAI NI TUI TE NO DAISAN IINKAI HŌKOKUSHO [NUMBER THREE COMMITTEE REPORT REGARDING ADMINISTRATION OF THE CONSTITUTION] 117 (1961).

⁵⁵ *Id.* at 117–18.

⁵⁶ *Memorandum by the Officer in Charge of Japanese Affairs (Green) to the Director of the Office of Northeast Asian Affairs (Allison)* (July 19, 1950), in DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1950 Vol. VI, 1244-6 (1976). The FEC decisions are: (1) FEC-014/9 Basic Post-Surrender Policy for Japan (June 20, 1947); (2) FEC-084/21 Reduction of Japanese Industrial War Potential (Aug. 18, 1947); and (3) FEC-017/20 Prohibition of Military Activity in Japan and Disposition of the Japanese Military Equipment (Feb. 17, 1948).

⁵⁷ See Soviet-Anglo-American Communique (Dec. 7, 1945), available at http://avalon.law.yale.edu/20th_century/decade19.asp.

provision of the draft regarding renouncing war does not directly deny the right of self-defense, but as a result of denial of all war potential and the right of belligerency of the state under article 9, paragraph 2, [Japan] renounces even war based on the right of self-defense and the right of belligerency.”⁵⁸ In the same Diet session, Prime Minister Yoshida, in answering questions from House Member Sanzō Nosaka, said,

[r]egarding the article of the draft constitution concerning renunciation of war, it looks as though you think war based on the self-defense right of the state is justifiable, but I think it is harmful to admit such a thing.⁵⁹ Most wars have been fought in the cause of self-defense, so that it is better to wage no war at all in any cases. To acknowledge and justify a war in self-defense would only serve to invite another war and would be harmful and unprofitable.⁶⁰

As seen in Yoshida’s statement during the Diet session discussing the new constitution, the government understood that all war potential was denied in paragraph 2 of article 9, although paragraph 1 of article 9 did not deny the Japanese the right to self-defense.

C. Continuation of Naval Activities

At the end of World War II, there were over 100,000 American- and Japanese-planted acoustic, magnetic, and moored mines scattered around Japan.⁶¹ Japanese naval forces were the only ones skilled enough to perform the complex and time-consuming duty of minesweeping.⁶² Although the Imperial Navy had officially been dissolved, units were, in fact, still operating for the purpose of performing minesweeping duties. In 1948, the Diet enacted the Maritime Safety Agency Law,⁶³ giving the Agency authority to govern minesweepers.⁶⁴

D. Instability of East Asia

The Communist threat to Far East Asia changed the situation regarding the security of Japan. A March 1948 report by George F. Kennan, US State Department director of the policy planning staff, recommended that

[t]he United States tactical forces should be retained in Japan until the entrance into effect of a peace treaty. A final U.S. position concerning the post-treaty arrangements for Japanese

⁵⁸ Answer of Shigeru Yoshida Before the House of Representatives, June 26, 1946, SHŪGIIN GIJI SOKKIROKU (HOUSE OF REPRESENTATIVES STENOGRAPHIC RECORDS) 90th Session, No. 6, *reprinted in* KENPŌ CHŌSAKAI JIMUKYOKU, TEIKOKU KENPŌ KAISEI SHINGIROKU [IMPERIAL CONSTITUTION AMENDMENT MINUTES], No. 5, 46–47 (Mar. 1958) (translation by the author).

⁵⁹ Shigeru Yoshida’s answer at the House of Representatives on June 28, 1946, SHŪGIIN GIJI SOKKIROKU (HOUSE OF REPRESENTATIVE STENOGRAPHIC RECORDS) 90th session, No. 8, *printed in* KENPŌ CHŌSAKAI JIMUKYOKU, *id.*, at 68. The author translated the quoted sentence.

⁶⁰ *Id.* translated in AUER, *supra* note 2, at 122.

⁶¹ AUER, *supra* note 2, at 49. Shogo Nose, *Chosen senso ni shutsudo shita nihon tokubetsu sokaitai* [Special Minesweepers Dispatched to Korean War], MOD, <http://www.mod.go.jp/msdf/mf/history/img/005.pdf> (last visited May 1, 2015).

⁶² AUER, *supra* note 2, at 49; Shogo Nose, *supra* note 61.

⁶³ Kaijō hoanchō hō [Coast Guard Law], Law No. 36 of 1948.

⁶⁴ AUER, *supra* note 2, at 57.

military security should not be formulated until the peace negotiations are upon us. It should then be formulated in the light of the prevailing international situation and degree of internal stability achieved in Japan. If Russia has not been extensively weakened and sobered by that time or if Japanese society still seems excessively vulnerable in the political sense, we should either postpone the treaty or insist on a limited remilitarization of Japan, preferably under U.S. guidance and supervision. But if by that time the Russian situation should really have changed for better and if we are reasonably confident of the internal stability of Japan, we should aim at a complete demilitarization, guaranteed by an international treaty of the most explicit and concrete nature, to which the Russians would be a party.⁶⁵

The Kennan report was incorporated, for the most part, into the Report by the National Security Council on Recommendations with Respect to United States Policy Toward Japan (NSC 13/2) of October 7, 1948.⁶⁶

Obviously, Russia had “not been extensively weakened” in the following few years and the United States began to change its policy toward the disarmament of Japan. In his New Year’s statement of 1950 to the Japanese people, General MacArthur wrote that “[a]rticle 9 is based upon the highest of moral ideals, but by no sophistry of reasoning can it be interpreted as complete negation of the inalienable right of self-defense against unprovoked attack.”⁶⁷ On June 25, 1950, North Korean forces invaded South Korea. The United Nations called upon its members to aid South Korea. US President Truman authorized American troops in Korea to assist South Korea. A week later, the United Nations placed the forces of fifteen other member nations under US command, and President Truman appointed General MacArthur as the supreme commander.⁶⁸ Because the US army stationed in Japan was moved to Korea, General MacArthur needed to protect Japan, which had no military power. There was a fear that the Soviet Union would invade Japan from its northern island, Hokkaido. On July 8, 1950, General MacArthur sent a letter to Prime Minister Yoshida, which authorized establishing the National Police Reserve of 75,000 people, and adding 8,000 people to the Japan Coast Guard.⁶⁹ Though the expression used in the letter was “authorize . . . to establish” the National Police Reserve, it was based upon no such request from the Japanese government. This was viewed in Japan an order from General MacArthur to the Japanese government.⁷⁰ Based on this letter, the National Police Reserve (*keisatsu yobitai*), which is the origin of the Self-Defense Forces, was

⁶⁵ PPS 28 (Recommendations with Respect to U.S. Policy Toward Japan), Mar. 25, 1948, *Report by the Director of the Policy Planning Staff (Kennan)*, in DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1948, vol. VI, 631, 632 (1974). This was the established position of the Policy Planning Staff. *Unsigned Memorandum by the Policy Planning Staff*, July 26, 1950, in DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1950, vol. VI, 1255, 1256 (1976).

⁶⁶ *Report by the National Security Council on Recommendations with Respect to United States Policy Toward Japan (NSC 13/2)*, in DEPARTMENT OF STATE, FOREIGN RELATIONS, 1948, vol. VI, at 858.

⁶⁷ MACARTHUR, *supra* note 44, at 304. Although in the book, when and where the statement was published is not explained, the statement matches with the Japanese translation of his 1950 New Year’s statement that was published in the *Asahi* and *Mainichi newspapers* on January 1, 1950.

⁶⁸ The Korean War, 1950–1953, Office of the Historian, Bureau of Public Affairs, United States Department of State, <https://history.state.gov/milestones/1945-1952/korean-war-2> (last visited May 1, 2015).

⁶⁹ GENDAI HŌSEI SHIRYŌ HENSANKAI, SENGO SENRYŌKA HŌREISHU [POST-WAR LAWS AND REGULATIONS UNDER OCCUPATION] 938 (1984).

⁷⁰ TETSUO MAEDA, THE HIDDEN ARMY 6 (1995).

established.⁷¹ SCAP could not instruct Japan to rearm because the FEC decisions imposed limitations on Japanese rearmament.⁷² The arming or mobilization of the Japanese people, other than the police, was prohibited.

In order to establish the National Police Reserve, the government issued the National Police Reserve Order in August 1950.⁷³ When a government agency is established under a new constitution, corresponding legislation by the Diet is normally required. However, during the occupation, SCAP had super-constitutional power.⁷⁴ As a special measure under the occupation, the government could enact orders and ordinances when SCAP instructed Japan to do so based on the Imperial Order Regarding Orders Issued Based on the Potsdam Declaration.⁷⁵ Though the government did not submit a bill to establish the National Police Reserve, the Diet members asked many questions regarding the establishment of the National Police Reserve in the 8th Diet session. During the discussion, Prime Minister Yoshida stated that “the main purpose [of the establishment of the National Police Reserve] is, entirely, to keep peace and the public order of present Japan, under the present conditions. Therefore, [the National Police Reserve] is not of [a] militaristic nature.”⁷⁶

At first, the National Police Reserve had only carbines and machine guns. However, as more equipment, including artillery, airplanes, and frigates, was provided by the United States after the Peace Treaty, the discussion concerning the interpretation of “war potential,” which Japan is prohibited to possess under article 9 of the Constitution, became more intense.⁷⁷

E. Peace Treaty and Security Agreement

From 1948 to early 1950, there was a difference of views between the US State Department, the Defense Department, and SCAP regarding the post-war security of and against Japan, and the timing of the peace treaty.⁷⁸ However, in September 1950, a basic agreement was reached between them, as reflected in the Joint Memorandum Regarding a Peace Treaty in Japan drafted

⁷¹ KENPŌ CHŌSAKAI JIMUKYOKU, *supra* note 54.

⁷² See FOREIGN RELATIONS OF THE UNITED STATES, *supra* note 56.

⁷³ Keisatsu yobitai rei [National Police Reserve Order], Order No. 260 (Aug. 10, 1950).

⁷⁴ “Of course, because any peace treaty has not been agreed upon and Japan is under the occupation, it is inevitable that [Japan] is under SCAP’s super-constitution power and that the government must rely on the Potsdam order if the occupation policy requires.” Statement of Shozo Sase Before the House of Representatives on July 29, 1950, SHŪGIIN KAIGIROKU [HOUSE OF REPRESENTATIVES PLENARY SESSION MINUTES] 8th Diet Session, No. 10, 1 (July 29, 1950) (translation by author).

⁷⁵ Potsudamu sengen no judaku ni tomonai hassuru meirei ni kansuru ken [Regarding Orders Issued as a Result of Acceptance of the Potsdam Declaration], Imperial Order 542 (1945). See Toshihiro Kato, *Horitsu bangō ga husarete inai hōritsu* [Laws Without Law Numbers], LEGISLATIVE BUREAU, HOUSE OF COUNCILLORS, <http://houseikyoku.sangiin.go.jp/column/column032.htm> (last visited May 11, 2015).

⁷⁶ Prime Minister Shigeru Yoshida’s answer at the House of Representatives on July 26, 1950, SHŪGIIN KAIGIROKU [HOUSE OF REPRESENTATIVES PLENARY SESSION MINUTES] 8th Diet Session, No. 10, 2 (July 29, 1950).

⁷⁷ KENPŌ CHŌSAKAI JIMUKYOKU, KENPŌ UNYŌ NO JISSAI NI TUIE NO DAISAN IINKAI HŌKOKUSHO [REPORT OF THIRD COMMITTEE ON ACTUAL PRACTICE OF THE CONSTITUTION] 121 (1961).

⁷⁸ See CHIHIRO HOSOYA, SANHURANSISUKO KŌWA E NO MICHU [THE ROAD TO SAN FRANCISCO PEACE TREATY], 50-71 (1984).

by the Secretaries of State and Defense and approved by President Harry S. Truman on September 8, 1950.⁷⁹ The Memorandum included the following guidance:

- f. [The Treaty] must not contain any prohibition, direct or implicit, now or in the future, of Japan's inalienable right to self-defense in case of external attack, and to possess the means to exercise that right;
- g. The Treaty must give the United States the right to maintain armed forces in Japan, wherever, for so long, and to such extent as it deems necessary. Questions . . . regarding the detailed implementation of the security arrangement will be [the] subject of a supplementary bilateral agreement between the United States and Japan to come into effect simultaneously with the coming into effect of the Treaty.⁸⁰

President Truman appointed John Foster Dulles as the Special Representative of the President for negotiations concerning the Japanese Peace Treaty in January 1951. Though the United States wanted Japan to rearm and “assume at least part of the burden of its own defense,”⁸¹ doing so was legally difficult under the FEC decisions. The Japanese government was also reluctant to rearm Japan due to the country's own internal difficulties.⁸² During the last phase of the war, Japan was bombed intensively and much infrastructure was destroyed. It lost at least 2.7 million servicemen and civilians, roughly 3–4% of the country's 1941 population, as a result of the war.⁸³ The war led by the Japanese military brought Japanese devastation. In the mid-1940s, many Japanese had died from hunger. Though daily life was improving by 1950, there was no money for a standing military and little desire to build a new military power. During the peace treaty negotiation, however, Japan was pressured by the US to rearm after the conclusion of a peace treaty. When Dulles went to Japan in January 1951, he told Prime Minister Yoshida that

it was necessary for all who expected to benefit [from the United Nation's collective security system] to make contributions in accordance with their own means and abilities. . . . [I]t was felt that Japan should be willing to make at least a token contribution and a commitment to a general cause of collective security.⁸⁴

Due to the strong desire to terminate the occupation, the Japanese government finally agreed that, “with the coming into effect of the proposed peace and security treaties[,] it would be necessary for Japan to undertake a program of rearmament.”⁸⁵ The Treaty of Peace with Japan was signed in San Francisco on September 8, 1951, by Japan, the United States, and forty-seven other

⁷⁹ DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1950 vol. VI, 1293-96 (1976).

⁸⁰ *Id.* at 1294.

⁸¹ *The Deputy to the Consultant (Allison) to the United States Political Advisor to SCAP (Sebald)* (Jan. 19, 1951), in DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1951 vol. VI, 807 (1977).

⁸² *Undated Memorandum by the Prime Minister of Japan (Yoshida) (Tokyo –1951)*, *id.*, at 833–34.

⁸³ JOHN W. DOWER, *EMBRACING DEFEAT* 45 (1999).

⁸⁴ *Memorandum of Conversation, by the Deputy to the Consultant (Allison)* (Jan. 29, 1951), in FOREIGN RELATIONS OF THE UNITED STATES, 1951 vol. VI, *supra* note 81, at 829.

⁸⁵ *Id.*, Ed. Note, at 849. See Shōichi Kozeki, *Amerika ni yoru gunkaku yōkyū no rekishiteki keiken* [Historical experience of demand for armament expansion by the United States], in HŌGAKU SEMINA ZŌKAN, SŌGŌ TOKUSHŪ SIRĪZU 15, NIHON NO BŌEI TO KENPŌ [DEFENSE OF JAPAN AND CONSTITUTION] 170, 171 (1981).

nations.⁸⁶ The Soviet Union refused to sign it. The Security Treaty between the United States and Japan was signed later that day.⁸⁷ The Peace Treaty went into effect in April 1952, officially terminating the US military occupation and restoring Japan's independence.

The Peace Treaty states, "Japan as a sovereign nation possesses the inherent right of individual or collective self-defense referred to in Article 51 of the Charter of the United Nations and . . . Japan may voluntarily enter into collective security arrangements."⁸⁸ Although all occupation forces of the Allied Powers were to be withdrawn from Japan as soon as possible, the stationing or retention of foreign armed forces in Japanese territory under any bilateral agreements between Japan and one of the Allied Powers was permitted.⁸⁹ In the Japan-US Security Treaty of 1951, the United States agreed to maintain its armed forces in and about Japan so as to deter armed attack upon Japan, "in the expectation, however, that Japan will itself increasingly assume responsibility for its own defense against direct and indirect aggression."⁹⁰

To comply with US expectations, the Japanese government decided to increase Japan's defense ability.⁹¹ On April 26, 1952, the Marine Guard (*kaijō keibitai*) was established within the Maritime Safety Agency.⁹² On August 1 of the same year, the Security Agency (*hoanchō*) was established. The Maritime Safety Agency was placed under the Security Agency. The Marine Guard was reorganized as the Security Force (*keibitai*). At the same time, the National Police Reserve was also brought under the Security Agency.⁹³ The National Police Reserve was then reorganized as the National Safety Force (*hoantai*) on October 15, 1952.⁹⁴ The Security Agency Law stated that the forces under it "take action when particular necessity is recognized in order to maintain peace and public order of the nation and protect lives and assets."⁹⁵ The Security Force rented eight patrol frigates and fifty landing support ships from the United States.⁹⁶ The government explained to the Diet that both forces were still being maintained in the nature of a police force.⁹⁷

⁸⁶ Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, T.I.A.S. 2490 (1951), <https://treaties.un.org/doc/Publication/UNTS/Volume%20136/volume-136-I-1832-English.pdf>.

⁸⁷ Security Treaty Between the United States and Japan, U.S.-Japan, Sept. 8, 1951, 3 U.S.T. 3329, T.I.A.S. 2491, available at http://avalon.law.yale.edu/20th_century/japan001.asp.

⁸⁸ Treaty of Peace with Japan, *supra* note 86, art. 5(c).

⁸⁹ *Id.* art. 6(a).

⁹⁰ Security Treaty Between the United States and Japan, *supra* note 87, preamble, 5th para.

⁹¹ KENPŌ CHŌSAKAI JIMUKYOKU, THIRD COMMITTEE, *supra* note 77, at 122.

⁹² Amendment to the Japan Coast Guard Law, Law No. 97 of 1952.

⁹³ KENPŌ CHŌSAKAI JIMUKYOKU, THIRD COMMITTEE, *supra* note 77, at 122–23.

⁹⁴ *Id.* at 123.

⁹⁵ Hoanchō hō [Security Agency Law], Law No. 265 of 1952, art. 4 (repealed in 1954).

⁹⁶ Charter for Lease of U.S. Vessels to Japan, U.S.-Japan, Nov. 12, 1952, 3 U.S.T. 5183; Senpaku taiyo kyōtei, Treaty No. 20 of 1952. See Statement of Tokutaro Kimura's Before the House of Representatives, SHŪGIN KAIGIROKU [HOUSE OF REPRESENTATIVES PLENARY SESSION MINUTES], 15th Diet Session, No. 24, at 14 (Feb. 2, 1953).

⁹⁷ Statement of Tokutaro Kimura, *supra* note 96, at 10.

F. Birth of the SDF

In 1954, the bill to reorganize the Security Force in order to establish the SDF and the bill to establish the Defense Agency were discussed in the Diet. Because of the US–Japan Mutual Defense Assistance Agreement (MSA Agreement), which was signed on March 8, 1954, and entered into force on May 1, 1954,⁹⁸ Japan was obliged to strengthen its defense capabilities. Article VIII of the Agreement reads as follows:

The Government of Japan . . . will make . . . the full contribution permitted by its manpower, resources, facilities and general economic condition to the development and maintenance of its own defensive strength and the defensive strength of the free world, take all reasonable measures which may be needed to develop its defense capacities, and take appropriate steps to ensure the effective utilization of any assistance provided by the Government of the United States of America.

The proposed SDF Law stated that the primary purpose of the SDF was to defend the nation against direct or indirect invasion. During the discussion in the Diet, the ruling party asserted for the first time that Japan had the right to maintain some sort of force to defend herself.⁹⁹ The bill was passed by the Diet and, subsequently, the Security Agency was reorganized as the Self Defense Agency (*bōeichō*).¹⁰⁰ The Security Forces were also reorganized as the SDF.¹⁰¹

Diet member Junzō Inamura’s statement, when he introduced the SDF bill to the plenary session of the House of Representative, should be noted. He stated, as a representative of the Cabinet Committee that examined the bill before the plenary session, that many members of the Committee criticized the government because of the ambiguity of the relationship between the bill and article 9 of the Constitution. Among other things, he detailed their concern that after the MSA Agreement became effective, Japan would have obligations under the right of collective defense and would be obliged to dispatch the SDF overseas. He also raised the concern that the government’s interpretation of article 9 would ultimately allow an unlimited increase in self-defense capabilities in the name of self-defense.¹⁰² When the House of Councillors passed the SDF Law, it also passed the Resolution on the Ban on Dispatching the SDF Abroad to address concerns that the MSA Agreement would lead Japan to dispatch the SDF not to defend Japan, but for the collective defense of an ally.¹⁰³

At a Budget Committee meeting on December 21, 1954, the Cabinet answered that the SDF was outside the scope of the “war potential” referenced in article 9, paragraph 2 of the Constitution,

⁹⁸ Mutual Defense Assistance Agreement Between the United States of America and Japan, U.S.-Japan, Mar. 8, 1954, 5 U.S.T. 661; Nihonkoku to amerika gasshūkoku to no aida no sōgo bōei enjo kyōtei, Treaty No. 6 of 1954..

⁹⁹ See SHŪGIN KAIGIROKU [HOUSE OF REPRESENTATIVES PLENARY SESSION MINUTES], 19th Diet Session, No. 45, 5 (May 7, 1954).

¹⁰⁰ Bōeichō secchihō [Self Defense Agency Establishment Law], Law No. 164 of 1954.

¹⁰¹ Jieitaihō [Self Defense Forces Law], Law No. 165 of 1954.

¹⁰² HOUSE OF REPRESENTATIVES MINUTES, 19th Diet Session, No. 45, *supra* note 99.

¹⁰³ House of Councillors, Jieitai no kaigai shutsudō kinshi ketsugi [Resolution on the Ban on Dispatching the SDF Abroad] (June 2, 1954).

because the right of self-defense was not prohibited by article 9. Possession of the necessary force to defend Japan was therefore not prohibited by the Constitution.¹⁰⁴ The next day, at the same committee meeting, the Cabinet expressed its official interpretation of the Constitution as follows:

The Constitution did not deny the self-defense right; Japan renounced war, but did not renounce the right to struggle in order to defend itself;

Establishment of the SDF is not against the Constitution because SDF's mission is self-defense and its ability is limited to necessary and adequate levels of self-defense.¹⁰⁵

Although the government was able to establish the SDF, Japan's right of self-defense is limited because of the constitutional restriction. The government stated in 1954 that there are three requirements that must be met in order to use the right of self-defense: (1) there is a present and wrongful danger of invasion to Japan; (2) no other appropriate measures exist to defend Japan; and (3) the use of force to defend Japan is limited to the extent only minimally necessary.¹⁰⁶ Therefore, Japan adopted an exclusively defense-oriented policy. The Cabinet has changed its members frequently, but has not changed its interpretation of article 9 with regard to the right of self-defense.

VI. Cabinet Legislation Bureau

Despite frequent changes in its membership, the Cabinet maintained a fairly consistent interpretation of article 9 from the effective date of the post-World War II Constitution until 2014, when it reinterpreted Japan's right of collective defense, as discussed below. The Cabinet Legislation Bureau (CLB) is the office that created the legal theory underlying the government's interpretation of the Constitution and has kept that interpretation consistent. The CLB was established under the Cabinet,¹⁰⁷ and the Cabinet and ministries consult with the CLB regarding various legal matters.¹⁰⁸ All bills to be submitted to the Cabinet meeting, Cabinet Order drafts, and treaties to be ratified are examined by the CLB before the Cabinet meeting.¹⁰⁹ CLB Directors General have been invited to Diet committee meetings to answer questions from Diet members, including questions regarding article 9.

¹⁰⁴ Director General of the Cabinet Legislative Bureau, Shōzō Hayashi's answer at Budget Committee of House of Representatives, YOSAN IIN KAIGIROKU [BUDGET COMMITTEE MINUTES, HOUSE OF REPRESENTATIVES], 21st Diet Session No. 1 (Dec. 21, 1954).

¹⁰⁵ Director General of the Defense Agency, Seiichi Ohmura's answer at Budget Committee of House of Representatives, YOSAN IIN KAIGIROKU [BUDGET COMMITTEE MINUTES, HOUSE OF REPRESENTATIVES], 21st Diet Session, No. 2, 1 (Dec. 22, 1954).

¹⁰⁶ Director General of CLB, Tatsuo Satō's answer at Cabinet Committee of House of Representatives, NAIKAKU IIN KAIGIROKU [CABINET COMMITTEE MINUTES, HOUSE OF REPRESENTATIVES], 19th Diet Session, No. 20, 2 (Apr. 6, 1954).

¹⁰⁷ Naikaku hōseikyoku secchi hō [CLB Establishment Law], Law No. 252 of 1952, *as amended*, art. 1.

¹⁰⁸ *Id.* art. 3, item 3.

¹⁰⁹ *Id.* art. 3, item 1.

One of the reasons that the CLB has been able to maintain consistent interpretations of Japan's laws, despite political pressures, is its stable personnel system. The CLB has twenty-six counselors¹¹⁰ who are experts on legal matters.¹¹¹ All ministries, the National Police Agency, and the Cabinet office dispatch at least one counselor to the CLB.¹¹² After five years of service, counselors usually return to their original office. Counselors from the five most powerful ministries (Ministries of Justice; Finance; Agriculture, Fishery and Forestry; Economy, Trade and Industry; and Internal Affairs and Communication) who excel are promoted to the position of CLB manager. One of these managers (with the exception of the Agriculture CLB manager) is chosen as the Director General.¹¹³ The other reason for the CLB's consistent interpretations of the laws is its authority and reputation, which has been earned over many years. The CLB's record was such that no bill it examined had ever been judged unconstitutional by the Supreme Court¹¹⁴ until 2005, when the Supreme Court declared a part of the Public Office Election Law unconstitutional.¹¹⁵

The CLB has come under pressure from some Diet members and conservative groups to change its interpretation of article 9.¹¹⁶ Former CLB Director General Ichirō Yoshikuni stated before the Budget Committee of the House of Representatives in 1975 that a law should be interpreted objectively with only one meaning and correctly, and that the executive branch must never change a law indiscriminately.¹¹⁷ When the CLB was pressured in 1994 to change its interpretation regarding the collective self-defense right and article 9 of the Constitution, it expressed the opinion that when the government tries to pursue a policy that cannot be implemented unless the interpretation of the Constitution is reversed, the government must begin the process of amending the Constitution.¹¹⁸

VII. Judicial Interpretation on the Existence of the SDF

The Supreme Court has not yet decided directly whether the SDF is constitutional, though many lawsuits have been filed raising the issue. Article 81 of the Constitution states that the Supreme

¹¹⁰ Naikaku hoseikyoku secchi ho sekō rei [Enforcement Order of CLB Establishment Law], Order No. 290 of 1952, art. 8.

¹¹¹ They are most likely not members of the bar, as most bureaucrats do not have bar membership. See Richard S. Miller, *Apples v. Persimmons: The Legal Profession in Japan and the United States*, 39 J. LEGAL EDUC. 1, 27, 30 (1989).

¹¹² AKIRA NAKAMURA, *SENGO SEJI NI YURETA KENPO 9 JO* [ARTICLE 9 OF THE CONSTITUTION SHAKEN BY POST-WAR POLITICS] 18 (2d ed. 2001).

¹¹³ *Id.* at 19.

¹¹⁴ *Id.* at 29–31.

¹¹⁵ Heisei 13 (gyo tsu) 82, 59 MINSHŪ 2087 (Sup. Ct., Grand Bench, Sept. 14, 2005), http://www.courts.go.jp/app/hanrei_jp/detail2?id=52338.

¹¹⁶ SHUN ŌIDE, *SHIN GAIDORAIN TO NICHU-BEI ANPO NO HENSHITSU* [NEW GUIDELINES AND CHANGE OF JAPAN-U.S. SECURITY AGREEMENT], 143–44 (1998).

¹¹⁷ Statement of CLB Director General Ichirō Yoshikuni, YOSAN IIN KAIGIROKU [BUDGET COMMITTEE MINUTES, HOUSE OF REPRESENTATIVES], 75th Diet Session, No. 9, 7 (Feb. 7, 1975).

¹¹⁸ NAKAMURA, *supra* note 112, at 171.

Court has the “power to determine the constitutionality of any law, order, regulation or official act.” It is legally possible, therefore, for the Supreme Court to examine legislation relating to article 9. However, it appears that the Supreme Court avoids to render an opinion on article 9, relying on “judicial negativism.” It was influenced by the Ashwander rules¹¹⁹—a set of rules set forth in Justice Louis Brandeis’s concurring opinion in *Ashwander v. TVA* in the United States, which outlined the Supreme Court’s policy of not ruling on constitutional issues unless absolutely necessary.¹²⁰

In the so-called *Keisatsu yobitai iken soshō* (the Constitutionality of the National Police Reserve case), a member of the Diet and the Socialist Party filed a lawsuit to seek a ruling that the establishment of the National Police Reserve under the National Police Reserve Order was unconstitutional.¹²¹ The Supreme Court dismissed the case in 1952, reasoning that it could not determine the constitutionality of a law or an official act in the abstract and in the absence of any concrete legal dispute.

Although the interpretation of article 9 has been raised as an issue in several cases,¹²² the courts have not mentioned anything about the constitutionality of the SDF when rendering judgments. In the so-called *Eniwa* case, the accused cut the phone lines of an SDF maneuvers facility and was indicted under the SDF Law, which punishes the act of destroying materials that serve defensive purposes. The court held that the phone lines were not material serving defense purposes and acquitted the accused. The court stated in dictum that the constitutionality of a law could be examined only to the extent necessary to solve the concrete legal dispute.¹²³ Since the accused was acquitted, the court did not have to decide the issue of the SDF Law’s constitutionality. The judgment prompted strong criticisms that the court neither understood modern warfare nor appreciated that bombs and tanks are not the only materials that serve a defensive purpose.¹²⁴ If the finding that the phone lines were not materials that served defense purposes was wrong, the court should have judged the constitutionality of the Law, critics argued.¹²⁵

In the 1973 *Naganuma*, the Sapporo District Court held that the SDF was unconstitutional,¹²⁶ but the judgment was reversed by the Sapporo High Court on technical grounds. The Supreme Court

¹¹⁹ TSUJIMURA, *supra* note 5, at 511–12.

¹²⁰ *Ashwander v. TVA*, 297 U.S. 288, 346 (1936).

¹²¹ 6 MINSHŪ 9, 783 (S. Ct. Oct. 8, 1952).

¹²² For example, the so-called *Hyakuri kichi* [Hyakuri Base] Case, 43 MINSHŪ 6, 385 (Sup. Ct. 3d Petit Bench, June 20, 1989) and the so-called *Konishi hansen jieikan* [Konishi, Anti-war SDF Personnel] Case, 13 KEIJI SAIBAN GEPPŌ 3, 251 (Niigata Dist. Ct. Mar. 27, 1981).

¹²³ HANREI JIHŌ 476, 25 (Sapporo Dist. Ct., Mar. 29, 1967).

¹²⁴ Comment of Self-Defense Agency Officer, *cited in* Nobuyoshi Ashibe, *Hōritsu kaishaku ni yoru kenpō handan no kaihi* [Interpreting a Law in a Way to Avoid Constitutional Judgment], in KENPO HANREI HYAKUSEN 362, 363 (4th ed. 2000).

¹²⁵ Nobuyoshi Ashibe, *Hōritsu kaishaku ni yoru kenpō handan no kaihi* [Interpreting a Law in a Way to Avoid Constitutional Judgment], in KENPO HANREI HYAKUSEN II, 374, 375 (Mar. 2007).

¹²⁶ HANREI JIHŌ 712, 24 (Sapporo Dist. Ct., Sep. 7, 1973), translation available in LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990 at 83 (1996).

confirmed the High Court judgment. The Sapporo High Court stated in dictum, on the basis of “state governance” theory, that whether the establishment of the SDF was constitutional was basically outside the scope of judicial review:¹²⁷ “[t]he choice of means of defense is nothing other than a determination of the most fundamental national policy, requiring both a high level of specialized technical judgment and a high level of political judgment.”¹²⁸ The state governance theory was developed among Japanese scholars under the postwar Constitution by referring to the French *acte de gouvernement*, German *Regierungsakt*, and United States political-question theory, which defer to the political branches of government (the executive and legislative branches) for the resolution of certain disputes.¹²⁹ Some high courts and district courts have adopted this theory in order to avoid the examination of the constitutionality of the SDF.¹³⁰ Many other lawsuits have been filed regarding the SDF’s activities but courts have denied standing to sue in those cases.¹³¹

However, in the so-called *Sunakawa* case,¹³² concerning whether the stationing of US forces in Japan violated the Constitution, the Supreme Court recognized Japan’s inherent right to self-defense and held in dictum that article 9

renounces the so-called war and prohibits the maintenance of the so-called war potential, but certainly there is nothing in it which would deny the right of self-defense inherent in our nation as a sovereign power. The pacifism advocated in our Constitution was never intended to mean defenselessness or nonresistance.¹³³

The Supreme Court further stated that “[a]rticle 9 of the Constitution does not at all prohibit our country from seeking a guarantee from another country in order to maintain the peace and security of the country.”¹³⁴ The Court determined that, because US forces were foreign troops, their presence did not constitute war potential of Japan.

¹²⁷ HANREI JIHŌ 821, 21 (Sapporo High Ct., Aug. 5, 1976), translation available in BEER & ITOH, *supra* note 126, at 112.

¹²⁸ BEER & ITOH, *supra* note 126, at 118.

¹²⁹ Sadao Morone, *Tōchi kōi I – Tomabechi jiken*, in KENPŌ HANREI HYAKUSEN [A HUNDRED SELECTED CONSTITUTIONAL CASES] (Nobuyoshi Ashibe et al. eds., 4th ed. 2000).

¹³⁰ Toshihiro Yamauchi, *Jieitai to tōchikōri – Naganuma jiken kososhin* [SDF and State Governance – Appealed Naganuma Case Judgment], in KENPŌ HANREI HYAKUSEN, *id.*, at 366, 367.

¹³¹ See *Jieitai kanbojia hahei soshō (ōsaka soshō) saikō saibansho hanketsubun* [Supreme Court Judgment on Dispatch of SDF to Cambodia], LOVEPEACE, <http://www.lovepeace.org/ks-m/peace-st/kansai/kan-sai.html> (last visited May 1, 2015).

¹³² Sunakawa Case, *supra* note 6.

¹³³ *Id.*

¹³⁴ *Id.*

VIII. Value of Scholarly Opinion

Mainstream constitutional scholars who have stated that the existence of the SDF violates the Constitution have been ridiculed by the government. They were called *Don Quixote*.¹³⁵ Debates on article 9 have also been sarcastically referred to as “theological debates.”¹³⁶ On the other hand, the significance of the opinions of constitutional scholars is that their opinions have given strong support to those who want to keep article 9 as is and eventually reduce the size of the SDF.¹³⁷ Scholars have expressed feelings of powerlessness because the courts have ignored those cases involving legislation relating to article 9 of the Constitution, as discussed above.

An increasing number of new-generation scholars have doubts concerning the view that the existence of the SDF is unconstitutional. This does not mean the government’s interpretation has gained more academic or theoretical value. Rather, these scholars have started to adopt more practical views. In a prominent law professors’ round table discussion in 2004, Professor Junji An’nen stated that he supported the government’s interpretation because it was, as a practical matter, the best interpretation of article 9 for reaping the most benefits in the area of security and international relations.¹³⁸ He stated that if the government’s interpretation was not impossible under article 9 of the Constitution, scholars had better adopt it, and he thought the government interpretation was acceptable under the Constitution. He admitted that, if an innocent person without prejudice simply reads article 9, he would understand that Japan would not have any force of any kind.¹³⁹ However, in light of practical considerations, article 9 could technically be read as the government reads it.

Professor An’nen also stated that, in reality, Japan needs to be protected by the United States, the world’s strongest country, and therefore Japan needs to cooperate with the United States by interpreting article 9 of the Constitution as the government has interpreted it. However, at the same time, restrictions on activities of the SDF under article 9, which existed even under the government’s interpretation, have played a great role in balancing Japan’s interests against US demands.¹⁴⁰ Naturally, there was criticism of such a utilitarian view.¹⁴¹ On the other hand,

¹³⁵ See Yasuhiro Okudaira, *Dai 9 jō ni okeru kenpō gakusetsu no ichi* [The Place of Scholarly Opinion on Article 9 of the Constitution], HÖRITSU JIHŌ, V. 76, No. 7, 27, at 30 (2004). The name of Don Quixote, a character in the novel *Don Quixote de la Mancha* authored by Miguel De Cervantes, is often used to describe someone who is too idealistic and impractical. *Don ki hote*, GOO JISHO [GOO DICTIONARY], <http://dictionary.goo.ne.jp/leaf/jn2/161964/m0u/> (last visited May 1, 2015).

¹³⁶ In Japan where religion does not play a great role in society, “theological” can be a sarcastic word. In the context of the article 9 debate, it means too idealistic and impractical. See *Shingaku ronsō*, ASAHI NEWSPAPER (Evening ed.) (Oct. 15, 2001) (on file with author). Prime Minister Koizumi told the Diet Committee, regarding the conditions for SDF members to use weapons in relation with article 9, “I am about to say ‘let us stop the theological debates.’” Kokusai terorizumu no bōshi oyobi wagakuni no kyōryoku shien katudō tō ni kansuru tokubetsu iin kaigiroku [Minutes of the Special Committee on Prevention of International Terrorism and the Nation’s Cooperation and Supports Activities], House of Representatives, 153th Session, No. 3 (Oct. 11. 2001).

¹³⁷ Okudaira, *supra* note 135, at 36.

¹³⁸ Statement of Junji An’nen, in *Kenpō 9 jō no kako-genzai mirai* [Past, Present and Future of Article 9], 1260 JURISTO 7, 48 (2004).

¹³⁹ *Id.* at 17.

¹⁴⁰ *Id.* at 48.

Professor Kazuyuki Takahashi stated that neither the majority scholarly view nor the government's interpretation was satisfactory, and that he had not been able to find the perfect answer to how article 9 should be interpreted. He thought what divided the interpretations was whether a person thought it necessary to have a force to defend Japan. If a person thought it unnecessary and based his interpretation strictly on the words contained in the article, the government's interpretation was wrong, he said. A view that the right of self-defense is necessary for Japan, appears to be in agreement with the government's interpretation.

IX. Limitations on the SDF Under the Government's Understanding

Even under the government's interpretation of article 9 of the Constitution, there are two limitations on the SDF being dispatched abroad or cooperating with foreign military forces. One is the Japanese people's renunciation of the "use of force" under article 9. Thus, in accordance with article 9, the SDF cannot use force. The other limitation is on the right to collective defense, discussed below, under which Japan can defend only itself.

A. Use of Force

The government has explained that "use of force" under article 9, paragraph 1 of the Constitution means an act of combat by an organization consisting of Japanese people carried out with materials provided by Japan and is part of an international armed conflict.¹⁴² This explanation was provided during legislative debates in relation to the use of firearms and small weapons by SDF members, which is discussed in Part X, below.

B. Collective Defense

The issue of Japan's ability to participate in a collective defense system is becoming increasingly important as Japan's cooperation with the United States in the area of security increases. Collective defense had not been discussed when the Japanese Constitution was enacted. The government at first took the view that even the right of individual self-defense would be restricted under the article 9.¹⁴³ The exercise of a right of collective defense was therefore out of the question. Collective defense was debated when the Peace Treaty and the Japan-United States Security Agreement were submitted to the Diet for ratification.¹⁴⁴ The Peace Treaty recognized Japan's right of collective self-defense, referred to in article 51 of the Charter of the United Nations.¹⁴⁵ The relevant section of the 1951 Japan-United States Security Agreement reads as follows:

¹⁴¹ Statement of Takeshi Igarashi, *id.*, at 17–18; Statement of Toshihiro Yamauchi, *id.* at 18–19.

¹⁴² Government Consensus View, Submitted to the Diet on Sept. 27, 1991, *cited in* Ichirō Urata, *Buryoku no kōshi/buki no shiyō to shūdan teki jie ken [Use of Force/ Use of Weapons and Collective Defense Right]*, in NICHIBEI SHIN GAIDORAIN TO SHUHEN JITAI HO [JAPAN-US NEW GUIDELINES AND SITUATIONS IN AREAS SURROUNDING JAPAN LAW] 65, at 65 (Toshihiro Yamauchi ed., 1999).

¹⁴³ *See* discussion, Part V.B.

¹⁴⁴ KIYOFUKU CHŪMA, SAIGUNBI NO SEIJIGAKU [POLITICS ON REARMAMENT] 129–31 (1985).

¹⁴⁵ Peace Treaty with Japan, *supra* note 86, art. 5(c).

The Treaty of Peace recognizes that Japan as a sovereign nation has the right to enter into collective security arrangements, and further, the Charter of the United Nations recognizes that all nations possess an inherent right of individual and collective self-defense.

In exercise of these rights, Japan desires, as a provisional arrangement for its defense, that the United States of America should maintain armed forces of its own in and about Japan so as to deter armed attack upon Japan.

When Kumao Nishimura, director-general of the Ministry of Foreign Affairs' Treaty Bureau, was asked at a meeting of the House of Councillors' Peace Treaty and Japan-United States Security Agreement Special Committee whether the government took the position that Japan could attack an aggressor based on the right of collective self-defense in case a United States military base in Japan was attacked, he stated that Japan had a collective defense right, but had decided against war potential under article 9 of the Constitution.¹⁴⁶ Therefore, Japan could not attack such an aggressor, he said.¹⁴⁷ When the Diet held debates on the MSA Agreement in 1954,¹⁴⁸ the government representative also stated Japan could not act based on the collective self-defense right under the Constitution.¹⁴⁹

When the Japan-US Security Agreement was revised in 1960,¹⁵⁰ there were extensive protests against the agreement in Japan¹⁵¹ and heated debates in the Diet. The discussion in the Diet focused on two issues: (1) what is the "collective self-defense right," and (2) whether it is an act of collective self-defense if Japan reacts to an attack on a US base in Japan.¹⁵² The relevant part of article 5 of the new Security Agreement reads as follows:

Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes.

Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations in accordance with the provisions of Article 51 of the Charter. . . .

¹⁴⁶ Kumao Nishimura's answer at House of Councillors, PEACE TREATY AND JAPAN-US SECURITY AGREEMENT SPECIAL COMMITTEE MINUTES, HOUSE OF COUNCILLORS, 12th Diet Session, No. 12, 5 (Nov. 7, 1951).

¹⁴⁷ *Id.*

¹⁴⁸ Mutual Defense Assistance Agreement, U.S.-Japan, Mar. 8, 1954, 5 U.S.T. 661.

¹⁴⁹ Answer of Takezō Shimoda Before the House of Representatives, GAIMU IIN KAIGIROKU [FOREIGN AFFAIRS COMMITTEE MINUTES, HOUSE OF REPRESENTATIVES], 19th Diet Session, No. 57, 4 (June 3, 1954).

¹⁵⁰ Treaty of Mutual Cooperation and Security Between Japan and the United States of America (Japan-U.S. Security Agreement), U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1632; Nihonkoku to amerika gasshūkoku to no aida no sōgo hoshō oyobi anzen hoshō jōyaku, Treaty No. 6 of 1960, available at <http://www.mofa.go.jp/region/n-america/us/q&a/ref/1.html>.

¹⁵¹ GEORGE R. PACKARD III, PROTEST IN TOKYO: THE SECURITY TREATY CRISIS OF 1960, at 258 (1966).

¹⁵² CHŪMA, *supra* note 144, at 133.

CLB Director General Shūzō Hayashi answered in the Foreign Affairs Committee, House of Councillors, on September 2, 1959, that it is an act of individual self-defense when Japan defends herself against an attack by a foreign country. If a US base in Japan was attacked, such an attack would necessarily involve an invasion of Japan's land and sea, and if the US were to join Japan's defense response in such a case, then US activities could be labeled as a kind of act of collective self-defense, he said. "If we then use the word as such, Japan has the right to collective self-defense. However, at the same time, such an act can be explained by Japan's right to individual self-defense."¹⁵³ The United States defends Japan based on a collective self-defense agreement, but Japan defends herself based on an individual self-defense right.¹⁵⁴

From time to time, the government has further explained its interpretation of the relationship between collective self-defense and the Constitution. Though the government's explanations typically refer to a right of individual self-defense, and although the right of individual self-defense does not have concrete boundaries, the government has not changed its basic position: Japan has a right of collective self-defense, but cannot act on it because of the constitutional restriction.¹⁵⁵

As explained in Part XI.B, below, the government recently changed its interpretation of article 9 concerning collective defense. The legislation discussed in the following section was based on the old understanding of collective defense.

X. Legislation to Expand the SDF's Role

There have been gradual developments regarding the SDF under article 9 of the Constitution from the 1960s through the 1980s. However, beginning with the Gulf War in 1990, the security policy climate in Japan has changed more rapidly.¹⁵⁶ There was a bitter feeling that, even though Japan had provided huge amounts of money to support the Gulf War, the United States and Kuwait did not sufficiently appreciate its contribution.¹⁵⁷ Conservatives gained public recognition by emphasizing international contributions and the importance of the United Nations' decisions.¹⁵⁸

¹⁵³ Statement of Shuzo Hayashi, FOREIGN AFFAIRS COMMITTEE MINUTES, HOUSE OF COUNCILLORS, POST 32ND DIET SESSION, No. 3 (Sept. 2, 1959), at 15.

¹⁵⁴ *Id.*

¹⁵⁵ The government clarified its opinion in writing in *Inaba Seiichi giin ni taisuru tōbensho* [Written Answer from Prime Minister Zenkō Suzuki to House Member Seiichi Inaba] (May 29, 1981).

¹⁵⁶ MOTOFUMI ASAI, SHUDANTEKI JIEIKEN TO NIHONKOKU KENPŌ [THE COLLECTIVE DEFENSE RIGHT AND THE CONSTITUTION OF JAPAN] 184–90 (2002).

¹⁵⁷ NAKAMURA, *supra* note 112, at 325.

¹⁵⁸ ASAI, *supra* note 156, at 187.

A. PKO Law

In 1992, the Law Concerning Cooperation for United Nations Peacekeeping Operations and Other Operations (PKO Law), which enabled the dispatch of the SDF overseas, was passed.¹⁵⁹ As stated in Part V.F, above, the House of Councillors had drafted a resolution in 1954 that banned the dispatch of the SDF overseas, with the pacifism concept adopted in the Constitution as an underlying basis for the resolution. The government has indicated that it understands that dispatching the SDF abroad for the purpose of use of force is prohibited, but that dispatching the SDF for reconstruction support for humanitarian purposes is not prohibited.¹⁶⁰ In order to avoid the use of force by the SDF, the SDF's activities must not be integrated with the use of force of foreign military forces, and the SDF must remain in a noncombat zone.¹⁶¹

Under the PKO Law, SDF troops cannot be placed under UN command and may only conduct those activities in which the use of force is not expected—e.g., providing medical care, delivering support goods in noncombat areas, and carrying out noncombat (post-conflict) roles, such as constructing roads and helping to run refugee camps and hospitals.

The government has established five principles to guide the SDF's participation in peacekeeping operations:

1. Agreement on a cease-fire shall have been reached among the parties to armed conflicts.
2. Consent for the undertaking of UN peacekeeping operations as well as Japan's participation in such operations shall have been obtained from the host countries as well as the parties to armed conflicts.
3. The operations shall strictly maintain impartiality, not favoring any of the parties to armed conflicts.
4. Should any of the requirements in the above-mentioned principles cease to be satisfied, the Government of Japan may withdraw Self-Defense Force (SDF) units.
5. The use of weapons shall be limited to the minimum necessary to protect the lives of personnel, etc.¹⁶²

Initially, the provisions of the PKO Law that allowed SDF troops to join mainly peacekeeping operations, such as deployment to prevent the outbreak of conflict; the operation of checkpoints to prevent the supply of arms; and the collection, storage, and disposal of arms, were frozen.¹⁶³ Later, in December 2001, the Diet activated the provisions.¹⁶⁴

¹⁵⁹ Kokusai rengō heiwa iji katsudō tō ni kansuru kyōryoku ni kansuru hōritsu [Law Concerning Cooperation with United Nations Peacekeeping Operations, etc. (PKO Law)], Law No. 79 of 1992.

¹⁶⁰ Osamu Watanabe, *Abe seiken to gendai kaiken no shin dankai* [Abe Administration and New Stage of Change of Constitution], in *KAIKEN O TOU* [QUESTIONING CONSTITUTIONAL AMENDMENT] 10, at 13 (Dec. 2014).

¹⁶¹ *Id.*

¹⁶² MOFA, JAPAN'S CONTRIBUTION TO UNITED NATIONS PEACEKEEPING OPERATIONS 2 (Mar. 2014), <http://www.mofa.go.jp/policy/un/pko/pdfs/contribution.pdf>.

¹⁶³ PKO Law, Law No. 79 of 1992, supplementary provision art. 2 (repealed by Law No. 157 of 2001).

¹⁶⁴ Act to Amend PKO Law, Law No. 157 of 2001.

The use of weapons is restricted, as the last of the five principles states. The PKO Law initially stated that dispatched SDF personnel could use small arms and light weapons within reasonable limits under the circumstances, when unavoidably necessary to protect the lives of or prevent bodily harm to themselves, other SDF personnel, or others engaged in the operation.¹⁶⁵ Except for cases of self-defense authorized under the Japanese Criminal Code, SDF members could not hurt other people.¹⁶⁶ The government justified the use-of-weapons provision when the law was enacted on the basis of the individual's right of self-defense.¹⁶⁷ Concerning the relationship between the "use of force" and the "use of weapons," the government explained that the concept of "use of force" includes "use of weapons," but not all "use of weapons" are prohibited by the "use of force" under article 9, paragraph 1. According to the government, the "use of weapons" for the self-defense right that is naturally given to people is excluded from a prohibited "use of force."¹⁶⁸

This provision was amended in 1998.¹⁶⁹ By virtue of a newly added provision, "use of weapons" became subject to a superior's order, except when there is an imminent threat to someone's life or body and there is no time to wait for a superior's order.¹⁷⁰ The requirement of a superior's order is for the purpose of the orderly and proper use of weapons and to avoid confusion within the group and not-concerted use of weapons by individuals.¹⁷¹ One scholar has asserted that the nature of "use of weapons" was changed by this amendment because after the amendment, the use of weapons became an organized action. The organized nature of the action brings such "use of weapons" under the "use of force" prohibited by article 9, he said.¹⁷² As seen in Part IX.A, the "use of force" is "an act of combat by an organization consisting of Japanese people." Such an organized act of combat could constitute the "use of force."

Thus far, SDF units have been dispatched to twenty-seven places since 1992, including Cambodia, Mozambique, the Golan Heights, Rwanda, and Honduras.¹⁷³

The PKO Law was amended again in 2001, as discussed below.

B. Guidelines and Law Concerning Situations in Areas Surrounding Japan

The suspicions raised by North Korea's possession of nuclear weapons and its missile test over the Japanese mainland in 1993 drove the Japanese to seek concrete security measures against North Korea.¹⁷⁴ It became possible for Japan to review the Japan-US security agreement and the

¹⁶⁵ PKO Law, Law No. 79 of 1992, art. 24, para. 3.

¹⁶⁶ *Id.* art. 24, para. 4.

¹⁶⁷ Urata, *supra* note 142, at 67.

¹⁶⁸ *Id.* at 66.

¹⁶⁹ Act to amend PKO Law, Law No. 102 of 1998.

¹⁷⁰ PKO Law, Law No. 79 of 1992, art. 24, para. 4, amended by Law No. 102 of 1998.

¹⁷¹ *Id.* art. 24, para. 5, amended by Law No. 102 of 1998.

¹⁷² Urata, *supra* note 142, at 70-71.

¹⁷³ MOFA, *supra* note 162.

¹⁷⁴ ASAI, *supra* note 156, at 191.

guidelines, in order to strengthen it. The Guidelines for US-Japan Defense Cooperation of 1978 were issued during the Cold War era but the security situation changed as the Cold War waned. The potential for instability and uncertainty in the Asia-Pacific region became of greater importance for the security of both Japan and the United States. Then President Bill Clinton and Prime Minister Ryūtarō Hashimoto agreed to initiate a review of the 1978 Guidelines in April 1996.¹⁷⁵ On September 23, 1997, the new Guidelines for US-Japan Defense Cooperation were approved by the Japan-US Security Consultative Committee.¹⁷⁶

Part II.2 of the Guidelines state that “Japan will conduct all its actions within the limitations of its Constitution and in accordance with such basic positions as the maintenance of its exclusively defense-oriented policy and its three non-nuclear principles.”¹⁷⁷ However, Part V, on Cooperation in Situations in Areas Surrounding Japan that Will Have an Important Influence on Japan’s Peace and Security, provides details of Japan’s cooperation with the US military, stipulating Japan’s support for US Forces activities in the Far East (the area surrounding Japan), such as ensuring the temporary use by US Forces of SDF facilities, civilian airports, and ports, as well as “rear-area support.”¹⁷⁸ The “rear area” is defined as “Japan’s territory, and public sea around Japan where no act of hostility is and will not be throughout the term in which the operations are expected and the upper air thereof.”¹⁷⁹

This arrangement is problematic in view of the Constitution¹⁸⁰ and even the terms of the Japan-US Security Agreement.¹⁸¹ The Japan-US Security Agreement states that both countries will cooperate in cases where either country is attacked within Japan’s territory.¹⁸² To maintain international peace and security in the Far East, Japan is obliged only to provide military bases for the United States.¹⁸³

The Guidelines were not submitted to the Diet for its approval. While the Constitution requires the Cabinet to obtain the Diet’s approval for the conclusion of a treaty,¹⁸⁴ it is commonly

¹⁷⁵ See Japan-U.S. Joint Declaration on Security-Alliance for the 21st Century (Apr. 17, 1996), available at <http://japan2.usembassy.gov/pdfs/wwwf-mdao-joint-declaration1996.pdf>.

¹⁷⁶ News Release: Completion of the Review of the Guidelines for U.S.-Japan Defense Cooperation (Sept. 23, 1997), U.S. Dept. of Defense, <http://www.defense.gov/releases/release.aspx?releaseid=1417>. The text of the Guidelines is available on the same page.

¹⁷⁷ “Three Non-Nuclear Principles” refers to Japan’s policy of not possessing, producing, or permitting the introduction of nuclear weapons, in keeping with its Constitution. *Three Non-Nuclear Principles*, MOFA, <http://www.mofa.go.jp/policy/un/disarmament/nnp/> (last visited Apr. 29, 2015) (quoting statement of Prime Minister Eisaku Sato before the Budget Committee of the House of Representatives, Dec. 11, 1967).

¹⁷⁸ Guidelines for U.S.-Japan Defense Cooperation, V 2(2).

¹⁷⁹ Situations in Areas Surrounding Japan Law art. 3, para. 1, item 3.

¹⁸⁰ See Robert A. Fisher, *The Erosion of Japanese Pacifism: The Constitutionality of the 1997 U.S.-Japan Defense Guidelines*, 32 CORNELL INT’L L.J. 2, 393 (1999).

¹⁸¹ Japan-U.S. Security Agreement, *supra* note 150.

¹⁸² *Id.* art. 5.

¹⁸³ *Id.* art. 6.

¹⁸⁴ Constitution art. 73, item 3.

understood that only certain important international agreements are treaties requiring the Diet's approval within the meaning of the Constitution.¹⁸⁵ Diet members considered the Guidelines to be a significant international agreement. Though the Diet members repeatedly demanded that the government submit the Guidelines for the Diet's approval, the Cabinet refused.¹⁸⁶ The Minister of Foreign Affairs explained that "the guidelines . . . do not obligate Japan or the US to take legislative, administrative or budgetary action. Consequently, they are not an international promise that requires deliberation of the Diet."¹⁸⁷

Though the Minister stated Japan was not obligated to enact implementing legislation, after the two governments agreed on the Guidelines, the Cabinet took immediate legislative action to implement them. To implement Part V of the new Guidelines, the Cabinet submitted a bill titled the Law Concerning Measures in Order to Secure Peace and Safety of Japan in Situations in Areas Surrounding Japan (hereinafter Situations in Areas Surrounding Japan Law).¹⁸⁸ The Director General of the Defense Agency, Housei Norota, stated at the plenary meeting of the House of Representatives that the legislation was for the purpose of securing the effectiveness of the Guidelines.¹⁸⁹ Because of strong opposition, more than 120 hours were spent discussing the bill in the special committees of both Houses of the Diet.¹⁹⁰ The bill was enacted as law in May 1999.¹⁹¹

As the government defines "use of force" as an act of combat (see Part IX. A), an operation to support the US military that is not an act of combat does not directly constitute "use of force."¹⁹² However, the doctrine of the "integration to the use of military force" was further discussed. Under the doctrine, an act that forms an integral part of the use of the military force of a foreign country can be regarded as the use of force.¹⁹³ In order to avoid integration to the use of military forces, the Situations in Areas Surrounding Japan Law only allows operations in the rear area.¹⁹⁴

¹⁸⁵ Yasuo Nakauch, *Jōyaku no kokkai shōnin ni kansuru seido / unyō to kokkai ni okeru giron* [Systems / Management of Approval of Treaties by the Diet and Their Discussions in the Diet], RIPPON CHOSA, No. 330, at 4–5 (July 2012), available at http://www.sangiin.go.jp/japanese/annai/chousa/rippou_chousa/backnumber/2012pdf/20120702003.pdf.

¹⁸⁶ *Id.* at 6.

¹⁸⁷ Minister of Foreign Affairs Yukihiko Ikeda's statement, FOREIGN AFFAIRS COMMITTEE MINUTES, HOUSE OF REPRESENTATIVES, June 11, 1997, at 17.

¹⁸⁸ Bill No. 109 of 142th Session (submitted to the Diet Apr. 28, 1998).

¹⁸⁹ HOUSE OF REPRESENTATIVES PLENARY MEETING MINUTES, 145th Session, at 3 (Mar. 12, 1999).

¹⁹⁰ Toshihiro Yamauchi, Shin gaidorain kanren hō no kenpō jō no mondai ten (Constitutional problems of new Guidelines' related laws), JURISUTO 1160, 36 (1999).

¹⁹¹ Shuhen jitai ni saishite wagakuni no heiwa oyobi anzen o kakuho suru tame no sochi ni kansuru hōritsu (Situations in Areas Surrounding Japan Law), Law No. 60 of 1999.

¹⁹² Urata, *supra* note 142, at 75.

¹⁹³ Q&A, Buryoku koshi to no ittaika [Integration to the Use of Military Force], 2003 White Paper of Defence, MOD, http://www.clearing.mod.go.jp/hakusho_data/2003/2003/html/1521c100.html.

¹⁹⁴ <4> Kenpo kaishaku [Interpretation of Constitution] in Anpo hōsei ākaibu [Security Law System Archive], YOMIURI NEWSPAPER, <http://www.yomiuri.co.jp/feature/matome/20150410-OYT8T50058.html> (last visited Apr. 14, 2015).

Rear-area support includes the supply of materials (except weapons and ammunition) and petroleum, oil, and lubricants (POL) to US vessels and aircrafts at SDF facilities and civilian ports and airports, and the use of vehicles and cranes for the transportation of materials, personnel, and POL. The use of weapons is authorized in the Law during a rear-area support and search-and-rescue operations, under conditions similar to those allowed by the 1998 amendment to the PKO Law.¹⁹⁵

Scholars have disagreed with the government's explanation of the Guidelines and implementing legislation for several reasons: (1) the organized use of weapons can constitute the "use of force"; (2) rear support can be a part of combat actions and, therefore, can constitute the "use of force"; and (3) supporting the US military not for the purpose of directly defending Japan is exercising the right of collective defense.¹⁹⁶

C. Antiterrorism Special Measures Law

A post-9/11 antiterrorism law has also operated to expand the role of the SDF. Junichirō Koizumi became Japan's fifty-sixth prime minister on April 26, 2001,¹⁹⁷ and in his first press conference as prime minister stressed the friendly relationship between Japan and the United States.¹⁹⁸ He also stated that it would be preferable to amend the Constitution to enable Japan to act based on the right of collective defense.

After the September 11, 2001, terrorist attacks on the United States, US Deputy Secretary of State Richard Armitage sought Japan's cooperation in US campaigns against terrorism by telling Japanese Ambassador Shunji Yanai to "show the flag" on September 15, 2001.¹⁹⁹ The Cabinet submitted a bill on October 5, 2001 and special legislation, including the Anti-Terrorism Special Measures Law was enacted and promulgated on November 2, 2001.²⁰⁰ Because the Situations in Areas Surrounding Japan Law covers only those areas immediately surrounding Japan, which excludes Afghanistan, Japan needed this new legislation to support the United States military action there. It took only twenty-one days for the Diet to pass the Anti-Terrorism Special

¹⁹⁵ *Id.* art. 11.

¹⁹⁶ Urata, *supra* note 142, at 74–76 & 78–79.

¹⁹⁷ *Naikaku sori daijin ichiran* [Prime Minister List], KANTEI, <http://www.kantei.go.jp/jp/rekidai/ichiran.html> (last visited May 4, 2015).

¹⁹⁸ Koizumi naikaku sōridaijin kisha kaiken [Prime Minister Koizumi Press Conference] (Apr. 27, 2001), available at <http://www.kantei.go.jp/jp/koizumispeech/2001/0427kisyakaiken.html>.

¹⁹⁹ *Armitage Wants Bills on SDF Role Passed Soon*, JAPAN TIMES, Oct. 7, 2001 (on file with author).

²⁰⁰ Heisei jusan nen ku gatsu juichi nichi no amerika gasshukoku ni oite hassei shita terorisuro ni yoru kōgeki tō ni taiō shite okonawareru kokusai rengō kenshō no mokuteki tassei no tame no shogaikoku no katsudō ni taishite wagakuni ga jisshi suru sochi oyobi kanren suru kokusai rengō ketsugi tō ni motodoku jindō teki sochi ni kansuru tokubetsu sochi hō [Special Measures Law Concerning Measures Taken by Japan in Support of the Activities of Foreign Countries Aiming to Achieve the Purposes of the Charter of the United Nations in Response to the Terrorist Attacks Which Took Place on September 11, 2001, in the United States of America as well as Concerning Humanitarian Measures Based on the Relevant Resolutions of the United Nations (Anti-Terrorism Special Measures Law)], Law No. 113 of 2001. The history of the bill is available on the House of Representatives' website at http://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/keika/1D65E4E.htm.

Measures Law.²⁰¹ The constitutionality of the bill was not fully discussed during the legislative process. The bill was supported by the three ruling parties—the Liberal Democratic Party, New Kōmeitō, and the New Conservative Party—who controlled enough votes to pass the bill. Because the US was already deploying its military forces, the ruling parties rushed to pass the legislation without conducting a thorough debate.²⁰²

The Anti-Terrorism Special Measures Law stated that it aimed to contribute to international efforts led by the United Nations to prevent terrorism and to secure Japan's and the international community's peace and safety.²⁰³ Under the Law, Japan must obtain consent from the relevant governments before dispatching the SDF. SDF troops may be dispatched to areas where no act of hostility is occurring and will not be occurring throughout the expected term of the operations.²⁰⁴ It is similar to the rear area defined in the Area Surrounding Japan Law, except that the area does not have a geographic limitation. SDF troops are authorized to provide noncombatant and humanitarian support,²⁰⁵ including the transport (except for ground transport) of weapons and ammunition,²⁰⁶ to the US-led Coalition in the Indian Ocean.

The Anti-Terrorism Special Measures Law eased restrictions on the use of weapons, compared with those enacted under the 1998 PKO Law amendment. The Law allowed SDF personnel to protect not only themselves but also those “who have come under their control,” such as refugees and the injured soldiers of other countries.²⁰⁷ The use of weapons to protect weapons was also allowed.²⁰⁸ Under the SDF Law, SDF personnel have been able to use weapons to protect their weapons.²⁰⁹ The 1998 PKO Law had excluded such a provision. The Anti-Terrorism Special Measures Law did not adopt such exclusion. The PKO Law was also amended in the same Diet session to ease the restrictions on the use of weapons.²¹⁰

Acting on the authority provided by the new Law, Maritime Self-Defense Force supply vessels and destroyers were dispatched to the Indian Ocean to provide assistance to combat forces. Air Self-Defense Force cargo planes transported supplies for US forces overseas to places such as Guam.²¹¹

²⁰¹ House of Representatives, Horitsuan shinsa keika gaiyo [Summary of Progression of Deliberation of Bills] http://www.shugiin.go.jp/internet/itdb_iinkai.nsf/html/gianrireki/165_165_kakuho_1.htm (last visited May 4, 2015).

²⁰² *A Green Light for Antiterrorism Bill*, JAPAN TIMES (Oct. 18, 2001), <http://st.japantimes.co.jp/english/news/editorial/2001/ed20011102.htm?print=noiframe>.

²⁰³ Anti-Terrorism Special Measures Law art. 1.

²⁰⁴ *Id.* art. 2, para. 3.

²⁰⁵ *Id.* arts. 3, 4, 6 & 7.

²⁰⁶ *Id.* art. 3, paras. 2 & 3, and Annexed Table 1 & 2, notes.

²⁰⁷ *Id.* art. 12.

²⁰⁸ *Id.*

²⁰⁹ SDF Law art. 95.

²¹⁰ Law to Amend PKO Law, Law No. 157 of 2001.

²¹¹ *MSDF Transport Refuels U.S. Ships*, JAPAN TIMES, Dec. 4, 2001 (on file with author).

At the same Diet session in which the Anti-Terrorism Special Measures Law was adopted, two other pieces of legislation that enhance Japan's defense capabilities were enacted. The Japan Coast Guard Law authorized the Coast Guard to fire on suspicious vessels, if necessary, in order to search them in Japanese waters.²¹² The SDF Law was amended to allow the SDF to help guard US military bases inside Japan when it deemed a terrorist attack on the bases possible.²¹³

Former Defense Agency Chief Gen Nakatani, comparing the legislation with a triple jump in track and field, described "the 1992 law on SDF involvement in U.N. peacekeeping operations as a hop, the 1999 guidelines laws as steps, '[a]nd . . . I call the enactment of the special antiterrorism law a jump.'" ²¹⁴ Many scholars, observers, and minority parties think the legislation was a triple jump to de facto denial of article 9. They feel it would be a small step to actions based on a collective defense right. One professor stated that "the government exploited the people's compassion and fear stemming from peculiar events, such as the Sept. 11 terror attacks, to enact a series of laws, including the antiterrorism law."²¹⁵

The Anti-Terrorism Special Measures Law was a temporary law, as the title of the Law itself suggests, stating that the measure was enacted "in support of the activities of foreign countries aiming to achieve the purposes of the charter of the United Nations in response to [the September 11 terrorist attacks]." The Law was originally effective for two years.²¹⁶ The effective period was extended three times for a total of four years, and expired on November 1, 2007.²¹⁷

D. Three War-Contingency Laws in 2003

In April 2002, a set of bills that defines the rules under which Japan may respond to attacks by a foreign enemy was submitted to the Diet by the Cabinet. In June 2003, the bills were passed by the Diet. Though the Defense Agency studied war contingency legislation between 1977 and 1984,²¹⁸ efforts toward legislation were put on hold by the government until 2001. For a long time, it was taboo to enact such contingency legislation.²¹⁹ Because of a strong commitment to pacifism, people did not even want to consider such legislation.

²¹² Kaijō hoanchō hō [Japan Coast Guard Law], Law No. 28 of 1948, art. 20 (amended by Law No. 114 of 2001).

²¹³ SDF Law, Law No. 165 of 1954, *as amended*, art. 81-2 (added by Law No. 115 of 2001).

²¹⁴ *Defense Policy Emerges from 2001 with New Face*, JAPAN TIMES (Jan. 3, 2002), <http://www.japantimes.co.jp/news/2002/01/03/national/defense-policy-emerges-from-2001-with-new-face/>.

²¹⁵ *Id.*

²¹⁶ Anti-Terrorism Special Measures Law, Act No. 113 of 2001, Annexed Provisions, art. 3.

²¹⁷ Act to Amend Anti-Terrorism Special Measures Law, Act No. 147 of 2003; Act to Amend Anti-Terrorism Special Measures Act, Act No. 103 of 2005; Act to Amend Anti-Terrorism Special Measures Law, Act No. 99 of 2006.

²¹⁸ Japan Defense Agency, Yūji hōsei [Contingency Legislation], in BŌEIHAKUSHO [DEFENSE OF JAPAN], ch. 3, § 6 (1988).

²¹⁹ Nao Shimoyachi & Reiji Yoshida, *Diet Enacts Legislation for War Contingencies*, JAPAN TIMES (June 7, 2003), <http://www.japantimes.co.jp/news/2003/06/07/national/diet-enacts-legislation-for-war-contingencies/#.VUeGCf50zcs>.

The Japanese government had implemented suggestions contained in the so-called Armitage Report, a report published by the Institute for National Strategic Studies of the National Defense University in October 2000. Among other things, the report urged Japan to diligently implement “the revised Guidelines for US-Japan Defense Cooperation, *including passage of crisis management legislation.*”²²⁰

The Law for Peace and Independence of Japan and Maintenance of the Nation and the People’s Security in Armed Attack Situations etc. (Situation of Armed Attack Law) obliges the government to formulate a plan of action for cases where there is an attack against Japan or when the government determines that the danger of an attack is imminent.²²¹ After the plan is drafted, the Prime Minister must obtain approval from the Cabinet and the Diet.²²² The Prime Minister may establish a headquarters to counter the contingency situation, reporting through the Cabinet.²²³ In situations deemed particularly urgent, the Prime Minister may mobilize the SDF before drawing up a plan²²⁴ but must halt the deployment of forces if the plan is rejected by the Diet at a later time.²²⁵ The SDF is not supposed to attack the source of danger until an armed attack is started,²²⁶ but this does not mean that the SDF cannot retaliate until after the harm from an aggressor has occurred. For example, in the case of a missile attack, when missiles are readied into position, the attack is deemed to have started.²²⁷ The Situation of Armed Attack Law organizes a nation-wide basic emergency system and procedures. In addition, this Law provides the system and procedures applicable in the case of an emergency situation, such as terrorism, that may amount to an armed attack.²²⁸ The Prime Minister drafts a plan of action for the emergency situation, obtains Cabinet approval, publicizes the plan, and obtains the Diet’s approval.²²⁹ The Prime Minister then establishes a headquarters within the Cabinet to implement the plan.²³⁰

There is no constitutional guidance on contingency legislation because the Constitution did not anticipate the presence of military forces at the time it was enacted and it does not have any provision for contingency situations. The constitutional issues raised concerning the Situation of

²²⁰ RICHARD L. ARMITAGE ET AL., THE UNITED STATES AND JAPAN: ADVANCING TOWARD A MATURE PARTNERSHIP 4 (INSS Special Report, Oct. 11, 2000), <http://www.dtic.mil/dtic/tr/fulltext/u2/a403599.pdf> (emphasis added by author).

²²¹ Buryoku kōgeki jitai tō ni okeru wagakuni no heiwa to dokuritsu narabini kuni oyobi kokumin no anzen no kakuho ni kanrusu hōritsu [Law for Peace and Independence of Japan and Maintenance of the Nation and the People’s Security in Armed Attack Situations etc. (Situation of Armed Attack Law)], Law No. 79 of 2003, *as amended*, art. 9, para. 1.

²²² *Id.* art. 9, paras. 6 and 7.

²²³ *Id.* art. 10.

²²⁴ *Id.* art. 9, para. 4, item 2.

²²⁵ *Id.* art. 9, para. 11.

²²⁶ Haruhiko Morishita, *Yūji kanren sanpō (2)*, TOKI NO HŌREI 1699, 12, at 15 (2003).

²²⁷ Masahiko Asada’s statement in *Past, Present and Future of Article 9*, *supra* note 138, at 37.

²²⁸ Situation of Armed Attack Act, Act No. 79 of 2003, Ch. 4 *amended by* Act No. 112 of 2004.

²²⁹ *Id.* art. 25, *amended by* Act No. 112 of 2004.

²³⁰ *Id.* art. 26, *amended by* Act No. 112 of 2004.

Armed Attack Law were based on article 9. The Japanese Communist Party and the Social Democratic Party opposed the legislation, arguing that it violates the pacifist Constitution. However, because the biggest opposition party, the Democratic Party of Japan, supported the bill, the bill was approved by an overwhelming majority in the Diet.²³¹

The Law to Amend the Security Council Establishment Law²³² was enacted at the same time.²³³ Under the amended law, the Prime Minister must ask the opinion of the Security Council (currently the National Security Council, see Part XI(A)) regarding a plan of action in the situation of an armed attack and individual important measures to be taken under the plan.²³⁴ The Expert Committee on Contingency Situation was established within the Security Council to assist the Council in these matters.²³⁵

The amendment to the SDF law eased and clarified the procedure to seize land and other property for operations.²³⁶ A person who does not maintain the designated personal property for the use of the SDF will be punished.²³⁷ The amendment clarified that the SDF is exempted from various regulations, such as those in the Road Traffic Law, the Sea Shore Law, the Green Area Preservation Law, and the Medical Treatment Law.²³⁸

E. Iraq Special Measures Law

In 2003, another legislative expansion of the SDF was enacted. The Special Measures Law Concerning Humanitarian Relief Support Activities and Security Maintenance Support Activities in Iraq (Iraq Special Measures Law)²³⁹ enabled Japan to send SDF troops to an occupied country where small-scale fighting continued. The SDF troops may be dispatched to an area where there is no act of hostility and no such act is expected during the planned activities.²⁴⁰ An “act of hostility” means acts of killing or injuring persons or destroying buildings and their contents in the course of an international armed conflict.²⁴¹ The area where SDF troops may be dispatched is similarly defined in the Area Surrounding Japan Law. Under this Law, it was more questionable whether such an area exists in the situation to which the Law applies. When the Cabinet was asked such questions at Diet meetings, it explained that “an area where there is no

²³¹ Shimoyachi and Yoshida, *supra* note 219.

²³² Anzen hoshō kaigi secchi hō [Security Council Establishment Law], Law No. 71 of 1986.

²³³ Law to Amend the Security Council Establishment Law, Law No. 78 of 2003.

²³⁴ Security Council Establishment Law, Law No. 71 of 1986, art. 2, items 5 & 7, *amended by* Law No. 78 of 2003.

²³⁵ *Id.* art. 9, *amended by* Law No. 78 of 2003

²³⁶ SDF Law, Law No. 165 of 1954, *amended by* Law No. 80 of 2003, art. 103.

²³⁷ *Id.* arts. 125.

²³⁸ *Id.* arts. 115-2 to 115-22.

²³⁹ Iraku ni okeru jindo fukko shien katsudo oyobi anzan kakuho shien katsudo no jisshi ni kansuru tokubetsu sochi ho [Special Measures Law Concerning Humanitarian Relief Support Activities and Security Maintenance Support Activities in Iraq (Iraq Special Measures Law)], Law No. 137 of 2003.

²⁴⁰ *Id.* art. 3, para. 3.

²⁴¹ *Id.*

act of hostility” does not mean the area is safe, but rather an area where no force is used organically and systematically by a state or a state-like organization.²⁴² Critics called such a distinction fictional.²⁴³

The Law calls for assistance in two areas: humanitarian relief for the Iraqi people and logistical support for security-maintenance efforts by US-led coalition forces.²⁴⁴ That support includes water purification, the supply of gasoline and other materials to coalition forces, and transportation of personnel and equipment.²⁴⁵ Unlike the case under the Anti-Terrorism Special Measures Law, ground transportation of weapons and ammunition was not excluded.²⁴⁶ The Iraq Special Measures Law was a temporary law with an initial effective period of four years,²⁴⁷ which was later extended by two years.²⁴⁸ The Law expired at the end of July 2009.

Up to six hundred Japanese Ground Self-Defense Force troops were stationed in Samawah in southern Iraq beginning in early 2004 to repair schools and roads and provide clean water and medical aid. About two hundred Air Self-Defense Force troops stationed in Kuwait transported goods and US military personnel to and from Iraq.²⁴⁹ The same restrictions on the use of weapons as existed under the PKO Law and the Anti-Terrorism Special Measures Law applied. SDF members in Iraq could use weapons when unavoidable in order to protect themselves and persons under their protection.²⁵⁰ Unless self-defense within the meaning of the Japanese Criminal Code applied, SDF members could not hurt other people.²⁵¹ Because of this restriction, it was hard for SDF troops to secure their safety even in Samawah, allegedly a relatively peaceful place. The Ground SDF in Samawah was protected by Dutch troops until March 2005 and subsequently by Australian troops until the Ground SDF withdrew in 2006 as Australian troops withdrew.²⁵²

Even as it is said that SDF is not a military force, the SDF, not the police, was dispatched to foreign soil that was not a peaceful place, and members of the SDF were restricted in the use of weapons, and must secure protection by another foreign military force. The SDF’s task was to

²⁴² For example, statement of Shigeru Ishiba, Iraq Reconstruction Humanitarian Support Activities Committee Minutes, House of Councillors, 159 Diet Session, No. 6 (Feb. 25, 2004), at 12.

²⁴³ TOSHIHIKO NONAKA ET AL., *KENPO I* [CONSTITUTION I] at 196 (5th ed. 2012).

²⁴⁴ *Id.* art. 1.

²⁴⁵ *Id.* art. 3, paras. 2 & 3; *Iraku jindo fukko shien tokusoho ni motodoku taio sochi ni kansuru kihon keikaku* [Basic Plan Concerning Measures Based on the Iraq Special Measures Law] (Dec. 9, 2003), available at <http://www.kantei.go.jp/jp/fukkosien/iraq/031209kihon.pdf>.

²⁴⁶ See Iraq Special Measures Law art. 3, para. 3.

²⁴⁷ Iraq Special Measures Law, Annexed Provisions, art. 2.

²⁴⁸ Act to Amend Iraq Special Measures Law, Law No. 101 of 2007.

²⁴⁹ *Japan to Pull Troops from Iraq by Dec. 14*, JAPAN TIMES, May 5, 2005 (on file with author).

²⁵⁰ Iraq Special Measures Law, art. 17, para. 1.

²⁵¹ *Id.* art. 17, para. 4.

²⁵² Deborah Cameron, *It’s an Order – Japanese Bid Sayonara, Iraq*, SYDNEY MORNING HERALD (June 21, 2006), <http://www.smh.com.au/news/world/its-an-order-japanese-bid-sayonara-iraq/2006/06/20/1150701555070.html>.

repair schools and roads and to provide clean water and medical aid.²⁵³ Participation of SDF in anti-terrorist operations was viewed by those who want the SDF to be acknowledged as a normal military force as a good opportunity to explore ways to lift the restrictions imposed on the SDF under article 9 of the Constitution.

When Iraqi Interim Government was established on June 28, 2004, the Japanese government placed the dispatched SDF members under the framework of the United Nations multi-national force.²⁵⁴ There have been debates in the Diet regarding the relationship between the SDF and the UN multi-national force. In 1980, the government expressed its view that the Constitution restricts the participation of the SDF in the multi-national force under the United Nations, if the mission of the force contemplates the use of force.²⁵⁵ If the mission does not contemplate the use of force as such, the SDF may participate in the activities of the UN multi-national force. In the early 1990s, when the participation of the SDF in the UN Peacekeeping Force was debated in the Diet, the government gave the same answer.²⁵⁶ Based on these debates, the government placed restrictions on the SDF. For example, they must not fight under the command of the UN multi-national forces. They are also under the Japanese government's control, may not be involved in UN activities where the use of force is expected, and must remain in a noncombat zone.²⁵⁷

Citizens groups filed lawsuits against the government seeking the cancellation of the SDF's dispatch to Iraq, confirmation of the unconstitutionality of the Iraq Special Measures Law, and damages for the violation of the plaintiffs' right to live in peace. Most of the judgments have simply dismissed the claims based on the plaintiffs' lack of concrete rights and lack of standing to bring suit.²⁵⁸ The Nagoya High Court also dismissed a similar claim but stated in dicta that the Air SDF's airlifts of members of the UN multi-national forces violated article 9 of the Constitution. The Court stated that Air SDF was operating in a combat region—the Baghdad airport—where airplanes have often been subject to attack by militants, and that the Air SDF activities formed an integral part of the use of the military force of a foreign country; therefore, its activities are regarded as a part of that use of force.²⁵⁹ Because the government won the case on procedural grounds, it could not file an appeal. The plaintiffs were pleased by the Court's

²⁵³ *Id.*

²⁵⁴ Iraku no shuken kaihuku go no jieitaino jindo hukko shien katsudo tou ni tsuite [Regarding SDF's Humanitarian Support, etc. After Iraq's Recovery of Sovereignty], Cabinet Understandings (June 18, 2005, *as amended* June 28, 2005).

²⁵⁵ Written Answer from the Cabinet to Written Questions from Seiichi Inaba, a Member of the House of Representatives (Oct. 28, 1980), in ASAKUMO SHINBUN EDITORIAL DEPARTMENT, BOEI HANDOBUKKU [HANDBOOK FOR DEFENSE] 557 (2003).

²⁵⁶ *Id.* at 560–62.

²⁵⁷ Cabinet Understandings, *supra* note 254.

²⁵⁸ See Sayuri Umeda, *Japan: High Court Calls Air Self-Defense Force Activities in Iraq Unconstitutional*, GLOBAL LEGAL MONITOR (May 2, 2008), http://www.loc.gov/lawweb/servlet/lloc_news?disp0_120540470_text.

²⁵⁹ Heisei 19 (ne) 58 (Nagoya High Ct., Apr. 17, 2008), available on Courts of Japan's website at http://www.courts.go.jp/app/files/hanrei_jp/333/036333_hanrei.pdf.

statement in dicta so likewise did not appeal, even though they lost the case.²⁶⁰ The judgment became final. The government emphasized that the Nagoya High Court judgment only stated in dicta that the Air SDF airlifts in Iraq included activities that are against the Constitution; therefore, the judgment does not have any influence over the government.²⁶¹

F. Seven Contingency Laws in 2004

The Situation of Armed Attack Law of 2003 contained a provision that obligated the government to enact necessary laws and regulations to complete a contingency system for protecting the nation against attack.²⁶² In accordance with the Law, the following seven bills regarding military emergencies were submitted by the Cabinet and passed by the Diet in 2004:

- Law Concerning Measures to Protect Nationals in the Situations of Armed Attack (Nationals Protection Law)²⁶³
- Law Concerning Measures Taken by Japan During United States Military Actions While Japan is Under Armed Attack (Law Concerning Measures Relating to US Military Actions)²⁶⁴
- Law Concerning Use of Designated Public Facilities, etc. Under Armed Attack²⁶⁵
- Law Concerning Punishment of Grave Violations Against International Humanitarian Law²⁶⁶
- Law on the Restriction of Maritime Transportation of Foreign Military Supplies, etc. in Armed Attack Situations (Maritime Transportation Restriction Law)²⁶⁷
- Law Concerning Dealing with Prisoners of War While Under Armed Attack²⁶⁸
- Act to Amend the SDF Law²⁶⁹

²⁶⁰ Iraku jieitai hahei sashitome sosho no kai [Coalition of Plaintiffs to Stop SDF Dispatch to Iraq], Statement (Apr. 17, 2008), <http://www.haheisashidome.jp/seimei/ikenHanketsu.htm>. Plaintiffs called the judgment “historic” and “revolutionary.” *Id.*

²⁶¹ Written Answer from Yasuo Fukuda, Prime Minister to Tokushin Yamauchi, House of Councilor (Naikaku san shitsu 169, No. 141, June 13, 2008), available at <http://www.mod.go.jp/j/presiding/touben/169kai/san/tou141.html>.

²⁶² Situation of Armed Attack Law, Law No. 79 of 2003, arts. 21 & 22.

²⁶³ Buryoku kōgeki jitai tō ni okeru kokumin no hogo no tame no sochi ni kansuru hōritsu [Law Concerning Measures to Protect Nationals in Situations of Armed Attack], Law No. 112 of 2004.

²⁶⁴ Buryoku kōgeki jitai tō ni okeru amerika gasshūkoku no guntai no kōdō ni tomonai wagakuni ga jisshi suru sochi ni kansuru hōritsu [Law Concerning Measures Relating to U.S. Military Actions], Law No. 113 of 2004.

²⁶⁵ Buryoku kōgeki jitai tō ni okeru tokutei kōkyō shisetsu tō no riyō ni kansuru hōritsu [Law Concerning Use of Designated Public Facilities, etc., Under Armed Attack], Law No. 114 of 2004.

²⁶⁶ Kokusai jindō hō no jūdai na ihan kōi no shobatsu ni kansuru hōritsu [Law Concerning Punishment of Grave Violations Against International Humanitarian Law], Law No. 115 of 2004.

²⁶⁷ Buryoku kōgeki jitai tō ni okeru gaikoku gubyōhin tō no kaijō yusō no kisei ni kansuru hōritsu [Law on the Restriction of Maritime Transportation of Foreign Military Supplies, etc., in Armed Attack Situations], Law No. 116 of 2004.

²⁶⁸ Buryoku kōgeki jitai tō ni okeru horyo tō no toriatsukai ni kansuru hōritsu [Act on Restricting Maritime Transportation of Foreign Military Supplies, etc., in Armed Attack Situations], Law No. 117 of 2004.

Among them, the Law Concerning Measures Relating to US Military Actions was intended to facilitate US military operations that operate in accordance with the Japan-United States Security Agreement in the event of an attack or imminent attack on Japan. The legislation enabled the SDF and US forces in Japan to share goods and services.²⁷⁰ The legislation corresponds to the revision of the Japan-US bilateral Acquisition and Cross-Servicing Agreement,²⁷¹ which was approved by the Diet during the same Diet session.²⁷² Before the revision of the Agreement, the SDF and the US military could provide logistic support on a reciprocal basis only during joint drills, international relief operations such as UN peacekeeping operations, or in a situation occurring in areas surrounding Japan.²⁷³ The laws also empower the Prime Minister to allow the US military to use privately-owned land or buildings if Japan comes under or anticipates an attack.²⁷⁴ The Act to Amend the SDF Law was to accommodate changes resulting from other new legislation, including procedures for sharing goods and services with US forces.²⁷⁵

The Maritime Transportation Restriction Law allows the Minister of Defense to order Maritime SDF units to inspect ships in Japan's territorial seas or the high seas surrounding Japan, the master of the ship to deliver cargo consisting of foreign military supplies to Maritime SDF ships, and the master of the ship to take the ship to a port in Japan by obtaining the approval of the Prime Minister in the event of an attack or imminent attack on Japan.²⁷⁶ During debates on the Law in the Diet a House member asked Defense Minister Shigeru Ishiba whether the Law violated article 9 of the Constitution, which does not recognize the right of belligerency of the state. Minister Ishiba stated that the measures under the Law are taken to the minimally necessary extent for the purpose of self-defense at the time of an imminent or actual attack on Japan and premised on the right to self-defense, not on the right of belligerency. He further

²⁶⁹ Act to Amend SDF Law, Law No. 118 of 2004.

²⁷⁰ Law Concerning Measures Relating to U.S. Military Actions, Law No. 113 of 2004, art. 10.

²⁷¹ Agreement Concerning Reciprocal Provision of Logistic Support, Supplies and Services Between the Armed Forces of the United States of America and the Self-Defense Forces of Japan (Acquisition and Cross-Servicing Agreement), with Annex, U.S.-Japan, April 15, 1996, T.I.A.S. 12742.

²⁷² Agreement Amending the Agreement Between the Government of Japan and the Government of the United States of America Concerning Reciprocal Provision of Logistic Support, Supplies and Services Between the Self-Defense Forces of Japan and the Armed Forces of the United States of America, U.S.-Japan; Nihonkoku no jieitai to amerika gasshūkoku guntai to no aida ni okeru kōhō shien, buppin mata wa ekimu no sōgo no teikyō ni kansuru nihonkoku seifu to amerika gasshūkoku seifu to no aida no kyōtei o kaisei suru kyōtei, Feb. 27, 2004, Treaty No. 8 of 2004 (Japan). See Exchange of Notes Concerning Modification of Annex 2 of the Acquisition and Cross-Servicing Agreement (ACSA) Between Japan and the U.S., Ministry of Foreign Affairs (July 29, 2004), <http://www.mofa.go.jp/announce/announce/2004/7/0729-2.html>.

²⁷³ “Shishin” oyobi sono jikkōsei kakuho no tame no hō seibi ni tsuite [Completing Laws for the “Guidelines” and for Securing Their Effectiveness], at 8 (Japan Defense Agency), <http://www.mod.go.jp/j/approach/ampo/shishin/pdf/seibi2.pdf> (last visited May 4, 2015).

²⁷⁴ Law Concerning Measures Relating to U.S. Military Actions, Law No. 113 of 2004, art. 15.

²⁷⁵ SDF Law, Law No. 165 of 1954, arts. 100-10 & 100-11, added by Act No. 118 of 2004. These articles were renumbered as articles 100-6 & 100-7 by Act No. 111 of 2006.

²⁷⁶ Maritime Transportation Restriction Act, Act No. 116 of 2004, art. 4 & ch. 4.

stated that measures based on the right of belligerency are much broader than the measures under the Law, therefore it is clearly distinguished by the provisions under the Law themselves.²⁷⁷

XI. Establishing a National Security System: The Changing Interpretation of the Right to Collective Defense

A. National Security Council

The National Security Council's functions have been enhanced from time to time since the predecessor council, the National Defense Council, was established within the Cabinet at the time of the establishment of the SDF.²⁷⁸ In 1986, as the Cabinet's responsibilities for crisis and national security management were strengthened, the new Security Council Establishment Law was enacted²⁷⁹ to replace the National Defense Council with the Security Council.²⁸⁰ The National Security Council (NSC) was again reorganized in 2013,²⁸¹ "with the aim of establishing a forum to undertake strategic discussions under the Prime Minister on a regular basis and as necessary on various national security issues."²⁸²

After consulting with the NSC,²⁸³ the Cabinet adopted the National Security Strategy (NSS) on December 17, 2013, which "sets the basic orientation of diplomatic and defense policies related to national security."²⁸⁴ On the same day, the National Defense Program Guidelines and Mid-Term Defense Program based on the NSS were adopted.²⁸⁵ By these documents, the defense budget increase was set.²⁸⁶

B. Collective Defense Right

The government's position on collective self-defense (see Part IX.B), which had lasted nearly sixty years, changed in 2014. The NSC acted as a coordinator between the Ministry of Defense

²⁷⁷ Shigeru Ishiba's statement, HOUSE OF COUNCILLORS PLENARY MEETING MINUTES, 159th Diet Session, at 10 (May 26, 2004).

²⁷⁸ Yuichiro Hitoshi, "Nihon ban NSC (kokka anzen hoshō kaigi)" no kadai [Tasks of "Japanese NSC (National Security Council)"], Issue Brief No. 548, at 1 (Sept. 22, 2006), <http://www.ndl.go.jp/jp/diet/publication/issue/0548.pdf>.

²⁷⁹ Anzen hoshō kaigi secchi hō [Security Council Establishment Law], Law No. 71 of 1986.

²⁸⁰ Hitoshi, *supra* note 278, at 1.

²⁸¹ Amendment to Security Council Establishment Law, Law No. 89 of 2013.

²⁸² *Japan's Security Policy*, MOFA (Mar. 10, 2015), <http://www.mofa.go.jp/policy/security/index.html>.

²⁸³ Security Council Establishment Law, Law No. 71 of 1986, *amended by* Law No. 89 of 2013.

²⁸⁴ MOFA, *supra* note 282.

²⁸⁵ *Id.*

²⁸⁶ Nobuhiro Kubo, *Boei taiko o kakugi kettei, buki rushutsu san gensoku no minaoshi e* [Cabinet Decided National Defence Program Guidelines, Three Principles of Weapons Export to Be Reviewed], HUFFINGTON POST JAPAN, Dec. 17, 2013, http://www.huffingtonpost.jp/2013/12/16/basic-defense-program_n_4456761.html. See also *Japan to Hike Mid-term Defense Spending by 5 Pct – Nikkei*, YAHOO FINANCE (Dec. 12, 2013), <http://finance.yahoo.com/news/japan-hike-mid-term-defense-185512060.html>.

(MOD), Ministry of Foreign Affairs (MOFA), and ruling parties on this matter.²⁸⁷ The Cabinet adopted a resolution that allows the SDF to take action in support of an ally that has come under enemy attack.²⁸⁸ The preamble of the resolution states as follows:

No country can secure its own peace only by itself, and the international community also expects Japan to play a more proactive role for peace and stability in the world, in a way commensurate with its national capability.

...

... In particular, it is essential to avoid armed conflicts before they materialize and prevent threats from reaching Japan by further elevating the effectiveness of the Japan-United States security arrangements and enhancing the deterrence of the Japan-United States Alliance for the security of Japan and peace and stability in the Asia-Pacific region.²⁸⁹

The government claimed that the basic logic behind the interpretation of article 9 was not changed—that is, article 9 does not prohibit Japan from taking measures of self-defense, but that

[s]uch measures for self-defense are permitted only when they are inevitable for dealing with imminent unlawful situations where the people’s right to life, liberty and the pursuit of happiness is fundamentally overturned due to an armed attack by a foreign country, and for safeguarding these rights of the people. Hence, “use of force” to the minimum extent necessary to that end is permitted.²⁹⁰

Under this logic, the government understood that the “use of force” was permitted only when Japan was under armed attack.²⁹¹ While the same basic logic has been maintained, after consideration of multiple changes to the security environment,

[the 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 is permitted.²⁹²

²⁸⁷ *Kokka anzen hoshō kaigi (NSC) hōsoku kara 1 nen, Shūdanteki jieiken, nicchu shuno kaidan de jisseki* [1 Year from Establishment of NSC, Collective Defense Right, Japan-China Top-Level Meeting], SANKEI NEWSPAPER (Jan. 7, 2015), <http://www.sankei.com/politics/news/150107/pl1501070029-n1.html>.

²⁸⁸ *Kuni no sonritsu o mattou shi, kokumin o mamoru tameno kireme no nai anzen hoshō hōsei no seibi ni tsuite* [Regarding Development of Seamless Security Legislation to Ensure Japan’s Survival and Protect Its People], National Security Committee & Cabinet Decision, July 1, 2014, <http://www.cas.go.jp/jp/gaiyou/jimu/pdf/anpohosei.pdf>, English translation available on Cabinet Secretariat’s website, at http://www.cas.go.jp/jp/gaiyou/jimu/pdf/anpohosei_eng.pdf.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 3(2).

²⁹¹ *Id.* at 3(3).

²⁹² *Id.*

The government did not state that acts based on “collective self-defense” are permitted under article 9. Rather, the government expanded the standards of the “use of force,” so that Japan can use force, if other conditions are met, when an ally of Japan is attacked.²⁹³

The resolution did not have immediate effects on the SDF’s activities; rather, it stated that new legislation was needed to enable the SDF to undertake acts based on the new interpretation.²⁹⁴

C. Export of Arms

The government has maintained the so-called “three principles of arms export” and had been restrictive on arms exports in the spirit of the Constitution.²⁹⁵ In the 2013 NSS, the government stated that it would renew the principle to participate in international joint development and production projects of defense equipment.²⁹⁶ The government set out “the three principles of transfer of defense equipment and technology,” which eased arms export control, on April 1, 2014.²⁹⁷ Under the new principles, Japan can “jointly develop arms with allies and give its defense industry access to new markets and technology.”²⁹⁸ Japanese businesses welcomed the change.²⁹⁹ Subsequently, the MOD set up a plan to transfer defense equipment and technology.³⁰⁰

Japan made deals concerning the supply of missile interceptor parts to the United States and the transfer of sensor-related technology to Britain in July 2014.³⁰¹ In the same month, the Japanese and Australian governments signed the Agreement Concerning the Transfer of Defense

²⁹³ *Shudanteki jieiken o koshi dekiru “shin 3 yoken” o shimeshita kakugi kettei* [Cabinet Decision That Showed “New Three Elements” That Enable Acts Based on Collective Defense], MEDIA WATCH JAPAN (Sept. 17, 2014), <http://mediawatchjapan.com/集团的自衛権を行使できる「新3要件」を示した>.

²⁹⁴ National Security Committee & Cabinet Decision, at 4.

²⁹⁵ *Japan’s Policies on the Control of Arms Exports*, MOFA, <http://www.mofa.go.jp/policy/un/disarmament/policy/> (last visited June 10, 2015).

²⁹⁶ National Security Strategy, Cabinet Decision IV(1)(8), at 19 (Dec. 17, 2013), http://japan.kantei.go.jp/96_abe/documents/2013/_icsFiles/afieldfile/2013/12/17/NSS.pdf (provisional translation).

²⁹⁷ MOFA, *supra* note 295.

²⁹⁸ *Japan to Relax Arms Export Ban*, BBC NEWS (Apr. 1, 2014), <http://www.bbc.com/news/world-asia-26830504>.

²⁹⁹ *Chairman Yonekura’s Comment on the Japanese Government’s “Three Principles on Transfer of Defense Equipment and Technology,”* KEIDANREN – JAPAN BUSINESS FEDERATION (Apr. 1, 2014), <http://www.keidanren.or.jp/en/speech/comment/2014/0401.html>.

³⁰⁰ *Bōei sōbi gijutsu iten no genjō to kadai ni tsuite* [Regarding Current Situation and Tasks of Defense Equipment and Technology Transfer], MOD (Dec. 18, 2014), <http://www.mod.go.jp/j/approach/agenda/meeting/sobi-gijutsuiten/sonota/pdf/01/001.pdf>.

³⁰¹ *Japan OKs First Major Military Tech Deals Since Arms Export Ban Eased*, JAPAN TIMES (July 18, 2014), <http://www.japantimes.co.jp/news/2014/07/18/national/japan-supply-arms-parts-u-s-sensor-technology-u-k/>.

Equipment and Technology.³⁰² Japan and India have discussed defense technology cooperation and the sale of Japanese amphibious search-and-rescue aircraft to India.³⁰³

D. New Security Laws and New Defense Guidelines

In February 2015, the ruling party began discussing new security legislation that was called for by the above-referenced Cabinet resolution.³⁰⁴ The ruling parties, the LDP and Komeito, entered into an agreement on the legislation in March 2015.³⁰⁵

The governments of the US and Japan agreed that the new Defense Guidelines would reflect the new security legislation,³⁰⁶ and revised the Guidelines for US-Japan Defense Cooperation on April 27, 2015.³⁰⁷ The geographical limitation on situations that will have an important influence on Japan's peace and security and to which the US and Japan can respond was removed. The 2015 Guidelines states "[s]uch situations cannot be defined geographically."³⁰⁸ In addition, the Guidelines states that when Japan "decides to take actions involving the use of force ... to respond to an armed attack against" the US or a third country, where Japan has not come under armed attack itself, the US and Japan "will cooperate closely to respond to the armed attack and to deter further attacks."³⁰⁹ The *Mainichi Newspaper* was critical of this statement, arguing that the Constitution is the supreme law and is followed by the US-Japan Security Agreement, but through the Guidelines the government has made a promise on this issue that exceeds the boundary set by the Security Agreement. *Mainichi* claimed that the government acted as if the Guidelines are superior to the Security Agreement and the Constitution.³¹⁰

³⁰² Press Release, MOFA, Signing of the Agreement Between the Government of Japan and the Government of Australia Concerning the Transfer of Defence Equipment and Technology (July 8, 2014), http://www.mofa.go.jp/press/release/press4e_000349.html.

³⁰³ Mina Pollmann, *Japan and India's Warming Defense Ties*, DIPLOMAT (Mar. 4, 2015), <http://thediplomat.com/2015/03/japan-and-indias-warming-defense-ties/>.

³⁰⁴ *Mazu wa gure zone . . . yoto, anpo hosei no giron saikai* [Grey Zone First . . . Ruling Parties, Restarted Discussion of Security Legislation], YOMIURI NEWSPAPER (Feb. 13, 2015) (on file with author).

³⁰⁵ *Anpo hosei, seishiki goi ... jieitai katsudo 5 bunya de kakuju* [Security Legislation, Formal Agreement . . . Expansion of SDF Activities in 5 Areas], YOMIURI NEWSPAPER (Mar. 20, 2015) (on file with author).

³⁰⁶ *Anpo hosei, "shishin" ni hanei e . . . Shusho/bei kokubo chokan* [Security Legislation, to Be Reflected in "Guidelines" . . . Prime Minister & US Defense Secretary], YOMIURI NEWSPAPER (Apr. 8, 2015) (on file with author).

³⁰⁷ Guidelines for Japan-U.S. Defense Cooperation, Apr. 27, 2015, [http://www.defense.gov/Portals/1/Documents/pubs/20150427 -- GUIDELINES FOR US-JAPAN DEFENSE COOPERATION.pdf](http://www.defense.gov/Portals/1/Documents/pubs/20150427_-_GUIDELINES_FOR_US-JAPAN_DEFENSE_COOPERATION.pdf).

³⁰⁸ *Id.* IV.B.

³⁰⁹ *Id.* IV.D.

³¹⁰ Editorial: New Japan-US Guidelines, "Amendment of the Security Agreement," disregarding Japanese people's opinions, *Mainichi Newspaper*, Apr. 28, 2015, <http://mainichi.jp/opinion/news/20150428k0000m070130000c.html>.

When Prime Minister Abe visited the United States and addressed a joint meeting of Congress on April 29, 2015, he stated that “[i]n Japan we are working hard to enhance the legislative foundations for our security. . . . This reform is the first of its kind and a sweeping one in our post-war history. We will achieve this by this coming summer.”³¹¹ Democratic Party of Japan Secretary-General Yukio Edano criticized Abe because Abe told a foreign parliament that Japan would enact laws that have not yet been submitted to the Diet for consideration.³¹²

Two security bills (Act to amend SDF Law and others³¹³ and Law on situation requiring cooperative measures with other countries for international peace³¹⁴) were submitted to the Diet on May 15, 2015. The proposed Act to amend SDF Law and others would revise the SDF Law, the PKO Law and the Situation in the Area Surrounding Japan Law and other laws to expand the scope of the activities of SDF. The new situation for which the SDF can be mobilized is added to the list: in cases where another country that has a close connection to Japan is attacked and, in consequence, the existence of Japan is threatened and Japanese people’s lives and liberties and right to seek happiness is threatened in a profound way.³¹⁵ The scope of logistics support to foreign forces by SDF would be expanded.³¹⁶ The scope of peacekeeping activities would be also expanded.³¹⁷ The Area Surrounding Japan Law would be renamed to the Serious Influence Situation Law, and the geographical restriction (i.e., the area surrounding Japan) on activities based on the Law would be removed.³¹⁸ The Diet passed the two bills on September 19, 2015.³¹⁹

XII. Effort to Amend the Constitution

A. Amendment Procedure

Since the present Constitution of Japan was enacted in 1946, it has never been amended. The SCAP designed the Constitution so as to make it difficult to amend, in order to prevent Japanese society from returning to the pre-World War II situation of imperialism, militarism, and

³¹¹ *Full Text of Abe’s Speech in US Congress*, NIKKEI ASIAN REVIEW (April 30, 2015), <http://asia.nikkei.com/Politics-Economy/International-Relations/Full-text-of-Abe-s-speech-in-US-Congress>.

³¹² *Abe shusho enzetsu: Minshu, Kyosan, Shamin kakuto ga hihan [Prime Minister Abe Speech: DPJ, Communist Party and Social Democratic Party Criticized]*, NIPPON NEWS NETWORK (May 1, 2015) (on file with author).

³¹³ Bill of an act to amend the SDF Act and others for peace and security of our country and international society, Cabinet Bill No. 72 of 189th Diet Session, bill process information is available on House of Representatives’ website on http://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/keika/1DBDD46.htm.

³¹⁴ Bill of an act on our country’s activities of cooperation and supports to foreign militaries in the event of situation requiring cooperation with other countries for international peace, Cabinet Bill No. 73 of 189th Diet Session, bill process information is available at http://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/keika/1DBDD56.htm.

³¹⁵ Proposed SDF Law art. 76, para. 1.

³¹⁶ *Id.* arts. 84-5 & 100-6.

³¹⁷ Proposed PKO Act art. 3.

³¹⁸ Proposed Serious Influence Situation Act.

³¹⁹ Histories of bills can be searched on the House of Representative’s website at http://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/menu.htm.

restrictions on democracy.³²⁰ Article 96 of the Constitution provides that an amendment to the Constitution can only be made by a two-thirds affirmative vote in both houses of the Diet and with ratification by a majority of the electorate.

A law to establish the procedure for the national referendum was not enacted until 2007.³²¹ There was no need for such legislation prior to that time, as no concrete proposal to amend the Constitution was made until recently. There had also been negative feelings against any move to amend the Constitution, with the main target always having been article 9. Under the Law on Amendment Procedure of the Constitution of Japan, in order to submit a bill to amend the Constitution, more than one hundred members of the House of Representatives or more than fifty members of the House of Councillors must sponsor it.³²² Proposals for constitutional revision must be made item by item, not as a comprehensive package of revisions.³²³ If the vote on the bill exceeds two-thirds of both houses of the Diet, the Chairmen of each house must publicize the bill in the official gazette.³²⁴ The national referendum must then be held between sixty to 180 days after the publication.³²⁵ Regardless of how many people vote, the decision is based on the majority of all valid votes.³²⁶

The Law obligated both houses to establish the *Kenpo Shinsakai* (Commission on the Constitution) to discuss proposals for amending the Constitution.³²⁷ Both Houses established the *Kenpo Shinsakai* in August 2007.³²⁸

The Law on Amendment Procedure of the Constitution of Japan was amended in 2014 to lower the voting age from twenty to eighteen years of age for national referendums.³²⁹ In addition, the Law relaxed a ban on government employees' political activities in relation to national referendums.³³⁰ The voting age for national elections was also lowered to eighteen years of age by a June 2015 amendment to the Public Office Election Law.³³¹

³²⁰ TAKAYANAGI ET AL., *supra* note 24, at 274–75.

³²¹ Nihonkoku kenpō no kaisei tetuduki ni kansuru hōritsu [Act on Amendment Procedure of the Constitution of Japan], Act No. 51 of 2007.

³²² Diet Law, Law No. 79 of 1947, *amended by* Law No. 51 of 2007, art. 68-2.

³²³ *Id.* art. 68-3.

³²⁴ *Id.* art. 68-5.

³²⁵ Act on Amendment Procedure of the Constitution of Japan, Law No. 51 of 2007, art. 2.

³²⁶ *Id.* art. 98.

³²⁷ Diet Law, Law No. 79 of 1947, *amended by* Law No. 51 of 2007, art. 102-6.

³²⁸ Secchi no keii [Establishment History], Commission of the Constitution, House of Representatives, http://www.shugiin.go.jp/internet/itdb_kenpou.nsf/html/kenpou/kei.htm (last visited Apr. 25, 2015).

³²⁹ Act on Amendment Procedure of the Constitution of Japan, Law No. 51 of 2007, *amended by* Law No. 75 of 2014, art. 3.

³³⁰ *Id.* art. 100-2.

³³¹ Public Office Election Law, Law No. 100 of 1950, art. 9, para. 1, *amended by* Act No. 43 of 2015. *See also*, Sayuri Umeda, *Japan: Voting Age Lowered from 20 to 18*, GLOBAL LEGAL MONITOR (June 24, 2015), http://www.loc.gov/lawweb/servlet/lloc_news?disp0_l205404469_text.

B. Public Opinion

Just after the Allied forces' occupation of Japan ended, there was a movement to review and amend the Constitution without foreign interference.³³² As preparation for the enactment of a new constitution by the Japanese people,³³³ the Cabinet established the *Kenpō chōsakai* (Constitution Research Committee) in 1956.³³⁴ The Committee examined the process for enacting the existing Constitution, how the Constitution is actually applied, and what the problems were within the Constitution. It released its report in July 1964. The report did not articulate just one conclusion, but showed alternative views. However, after the report was released, no bill to amend the Constitution was submitted to the Diet. From the late-1950s to the 1980s, public opinion polls showed that a clear majority of the Japanese people did not favor constitutional amendment.³³⁵ There were no proposals to amend the Constitution during that time.

Although the results of public opinion polls vary, all major Japanese newspaper polls have found that, since 1993, more people have favored the amendment of the Constitution than opposed it.³³⁶ That Japan should draft a constitution without foreign interference is not as popular a reason to amend the Constitution as it had been previously. Despite the questionable procedures surrounding the birth of post-World War II Constitution, the Japanese have accepted it and generally like it. Many Japanese people, however, think the Constitution needs to be updated to keep up with the changing world.³³⁷

Though public opinion favors amendment of the Constitution, the public does not necessarily favor the amendment of article 9. In a 2000 poll by *Mainichi Newspaper*, 46% of respondents were against amending article 9 and 41% were for such amendment.³³⁸ A report on a public opinion poll conducted by NHK (Japan Broadcasting Corporation) in 2007 stated that 28% of poll respondents were for amending article 9 and 41% were against. The support for an amendment was greater among male respondents (36%) than female respondents (20%). Among the eighteen to thirty-nine, forty to fifty-nine, and sixty and older age groups, the latter group

³³² KENPŌ CHŌSAKAI, KENPŌ CHŌSAKAI HŌKOKUSHO (CONSTITUTION RESEARCH COMMITTEE REPORT) 1–8 (July 1964).

³³³ Statement of Prime Minister Hatoyama, House of Representatives Plenary Session Minutes, 24th Diet Session, No. 4, at 1 (Jan. 30, 1956).

³³⁴ *Id.* at 10.

³³⁵ Susumu Wada, *Kenpō kaisei zenin ishiki zōdai to watashitachi no kadai* [Increase in People's Acceptance of Amendment of the Constitution and Our Task], 473 KOKKŌ RŌREN CHŌSA JIHŌ (May 2002), available at <http://www.jca.apc.org/~kenpoweb/articles/wada041202b.html>; *Kenpo o kaisei subeki ka: [kiso chishiki] nihon wa naze kenpo o kaisei dekinakatta no ka?* [Shall We Amend the Constitution: [Basic Knowledge] Why Has Japan Not Been Able to Amend the Constitution?], MAINICHI NEWSPAPER (May 1, 2014), <http://mainichi.jp/ronten/news/20140430dyo00m010034000c.html>.

³³⁶ Susumu Wada, *Shinbunsha no seron chōsa o yomu* [Reading Newspaper Public Opinion Polls] JCA-NET (Oct. 30, 2000), <http://www.jca.apc.org/~kenpoweb/articles/wada103000.html>.

³³⁷ KOJI SHIODA, KENPO KAISEI RONGI TO KOKUMIN NO ISHIKI [DISCUSSION OF CONSTITUTIONAL AMENDMENT AND THE GENERAL PUBLIC'S VIEW], HŌSŌ KENKYŪ TO CHŌSA [SURVEY AND RESEARCH ON BROADCASTING] 72, 74 (Dec. 2007), http://www.nhk.or.jp/bunken/summary/research/report/2007_12/071205.pdf.

³³⁸ Wada, *supra* note 336.

showed the most support for the amendment.³³⁹ In 2014 newspaper polls, *Yomiuri* reported that 43% of poll respondents favored not amending the article itself but changing its interpretation when necessary, while 30% supported the amendment.³⁴⁰ *Asahi* reported that 64% of poll respondents were against amending article 9 and 29% were for the amendment.³⁴¹ In the most recent poll in March 2015, *Yomiuri* reported that 40% of respondents favored not amending the article itself but changing its interpretation when necessary, while 35% supported the amendment.³⁴²

In another public opinion poll conducted by the government, the existence of the SDF was accepted by a vast majority of respondents. When they were asked what method should be taken to protect Japan's security, 84.6% of respondents chose "as currently done, by the Japan-US security agreements and SDF," while 6.6% chose "by SDF and abolishing the Japan-US security agreements."³⁴³ Only 2.6% of respondents chose "by downsizing or abolishing SDF and abolishing the Japan-US security agreements."³⁴⁴ Regarding the reinforcement of the SDF, 29.9% of respondents were for reinforcement, 59.2% were for maintaining the current level of forces, and 4.6% were for reduction.³⁴⁵ No public opinion poll that asked about the constitutionality of the SDF was found.

It appears that the Japanese people would like to secure Japan's security by the SDF and the Japan-US security agreements whether or not there is a constitutional problem.

C. First Draft Amendment to the Constitution (2005)

Led by the initiative of one of the major ruling parties, the LDP, both houses of the Diet established another *Kenpō chōsakai* (Constitution Research Committee) on January 20, 2000.³⁴⁶ The Committee researched various aspects of the Constitution and submitted reports to the Diet. Following hearings on the Committee's reports, the final reports of two Diet committees were

³³⁹ SHIODA, *supra* note 337, at 75–76.

³⁴⁰ *Kenpō kaisei sansei 42%, hantai 41% . . . Yomiuri yoron chōsa* [42% for Amending the Constitution, 41% Opposed . . . Yomiuri Newspaper Public Poll], YOMIURI NEWSPAPER (Mar. 15, 2014), <http://www.yomiuri.co.jp/feature/TO000302/20140314-OYT1T01354.html>.

³⁴¹ *Shūdanteki jieiken, kōshi yōnin hantai 63% ni zou: Asahi shinbun chōsa* [Opposition to Acts Based on Collective Defense Right Increases to 63%: Asahi Newspaper Survey], ASAHI NEWSPAPER (Apr. 6, 2014), <http://www.asahi.com/articles/ASG3L72L6G3LUZPS007.html>, English translation available on the Mansfield Foundation website at <http://mansfieldfdn.org/program/research-education-and-communication/asian-opinion-poll-database/listofpolls/2014-polls/asahi-shimbun-special-public-opinion-poll-040714/>.

³⁴² *Kenpo "Kaisei suru ho ga yoi" 51%* [51% Said "Better to Amend" the Constitution], YOMIURI NEWSPAPER (Mar. 22, 2015) (on file with author).

³⁴³ "Jieitai/boei mondai ni kansuru yoron chosa" no gaiyo [Summary of "Public Opinion Polls on SDF/Defense Issues"], Cabinet Office, Q. 13, at 17 (Mar. 2015), <http://survey.gov-online.go.jp/h26/h26-bouei/gairyaku.pdf>.

³⁴⁴ *Id.*

³⁴⁵ *Id.* Q. 3, at 5.

³⁴⁶ *Shōgiin kenpō chōsakai no secchi no keii* [Circumstances of Establishment of Constitution Research Committee], House of Representatives, http://www.shugiin.go.jp/internet/itdb_kenpou.nsf/html/kenpou/chosa/keii.htm (last visited May 4, 2015).

submitted to both Houses in April 2005.³⁴⁷ The House of Representatives Committee report stated that most of the members and witnesses said that article 9, paragraph 1 should be maintained.³⁴⁸ However, regarding article 9, paragraph 2, opinions were divided on whether the Constitution must recognize the SDF, and whether Japan must take actions based on the collective defense right. The House of Councillors Committee report was similar.

As a result of the House of Representatives' election in September 2005, the LDP member ratio in the House of Representatives went up to 61.7%. The ratio is the second highest since the end of World War II.³⁴⁹ Under such a stable political situation, for the first time as a major political party, the LDP successfully completed the first draft of a new Constitution and released it on November 22, 2005, when the LDP celebrated its fiftieth anniversary.³⁵⁰ It changed the title of chapter 2 from "Renunciation of War" to "Security."³⁵¹ The spirit of the current article 9, paragraph 1 was kept; as a means of settling international disputes, Japan continues to renounce war and the threat or use of force.³⁵² The current paragraph 2 was deleted. New article 9-2 clarified the existence of the SDF; put the SDF under the Prime Minister's command; and required Diet control, through the Prime Minister, over SDF activities. It also encouraged Japan's participation in international peacekeeping activities.³⁵³ A right to collective defense was not written explicitly, but obviously included in the right of defense, according to the deputy secretary of the LDP Constitution Draft Committee.³⁵⁴ The biggest opposition party, the Democratic Party, released its basic opinion on the new Constitution on October 31, 2005.³⁵⁵ It stated that the right of self-defense and the restrictions on its use should be clarified.

The biggest business organization in Japan, Keidanren (the Japan Business Federation), released its report titled *Waga kuni no kihon mondai o kangaeru (Thinking About Our Country's Basic Issues)* on January 18, 2005.³⁵⁶ The report stated that article 9, which prohibits Japan from

³⁴⁷ HOUSE OF REPRESENTATIVES CONSTITUTION RESEARCH COMMITTEE, HOUSE OF REPRESENTATIVES CONSTITUTION RESEARCH COMMITTEE REPORT (Apr. 15, 2005), http://www.shugiin.go.jp/internet/itdb_kenpou.nsf/html/kenpou/chosa/report.htm; KENPŌ CHŌSA KAIGIROKU [CONSTITUTION RESEARCH COMMITTEE MINUTES], HOUSE OF COUNCILORS, 162th Diet Session, No. 7 (Apr. 20, 2005), available at <http://www.sangiin.go.jp/japanese/kenpou/houkokusyo/pdf/honhoukoku.pdf>.

³⁴⁸ HOUSE OF REPRESENTATIVES CONSTITUTION RESEARCH COMMITTEE, *supra* note 347, at 301.

³⁴⁹ *Jimin no "asshō do" sengo 2i, Giseki senyu ritsu 61.7% [LDP's "Lopsided Victory" 2nd Highest After WWII, Percentage of Seats Held 61.7%]*, ASAHI NEWSPAPER (Sept. 12, 2005), <http://www.asahi.com/senkyo2005/news/TKY200509120170.html>.

³⁵⁰ *Ima koso jishu kenpo no seitei o [Enact Our Own Constitution Now]*, JIYU MINSHU No. 2461, <https://www.jimin.jp/activity/colum/110291.html> (last visited May 4, 2015).

³⁵¹ LIBERAL DEMOCRATIC PARTY (LDP), SHIN KENPŌ SŌAN [NEW DRAFT CONSTITUTION] (Nov. 22, 2005), <http://www.kenpoukaigi.gr.jp/seitoutou/051122jimin-sinkenpousouan.pdf>.

³⁵² *Id.* art. 9.

³⁵³ *Id.* art. 9-2.

³⁵⁴ *Jimintō ga shin kenpō sōan no jōbun-an kōhyō [New Draft Constitution Released by LDP]*, ASAHI NEWSPAPER (Aug. 1, 2005) (on file with author).

³⁵⁵ MINSHUTŌ [DEMOCRATIC PARTY], KENPŌ TEIGEN [PLAN TOWARD NEW CONSTITUTION] (Oct. 31, 2005), <http://www.dpj.or.jp/article/102276>.

³⁵⁶ The report is available at <http://www.keidanren.or.jp/japanese/policy/2005/002/honbun.html>.

possessing “war potential,” does not recognize reality. The report stated that Japan must give a clear constitutional basis for the SDF and, further, that the SDF’s roles, such as self-defense and activities to contribute to international peace and cooperation, must be specified in the Constitution.³⁵⁷ The report also proposed that the Constitution clarify that Japan has the right of collective defense and may take actions based upon that right.³⁵⁸

The United States has also consistently pressured Japan to amend article 9 of the Constitution since the US directed Japan to rearm in 1948.³⁵⁹ The Armitage Report stated “Japan’s prohibition against collective self-defense is a constraint on alliance cooperation.”³⁶⁰ In July 2004, then Deputy Secretary of State Armitage “told a Japanese lawmaker that the war-renouncing Article 9 of Japan’s Constitution is becoming an obstacle to strengthening the Japan-US alliance,” according to a Nautilus Institute report.³⁶¹ In August 2004, then US Secretary of State Colin Powell reportedly said Japan must consider revising its pacifist Constitution if it wanted a permanent UN Security Council seat.³⁶²

D. Most Recent Draft Amendment to the Constitution

When Junichiro Koizumi left the Prime Minister’s office in September 2006 after holding the position for five years, which is the maximum term under LDP rules,³⁶³ the LDP started to lose seats in the Diet. The LDP lost its majority in the House in the July 2007 House of Councillors election.³⁶⁴ That meant for the LDP that it became almost impossible to pass a bill to amend the Constitution in the House. The defeat of the LDP coalition in the 2009 House of Representatives election brought the Democratic Party of Japan (DPJ) into power.³⁶⁵ The DPJ had not formulated a concrete policy on amending the Constitution.³⁶⁶ DPJ cabinets were unstable and

³⁵⁷ KEIDANREN, WAGA KUNI NO KIHON MONDAI O KANGAERU [THINKING ABOUT OUR COUNTRY’S BASIC ISSUES] ch IV, 2(1) (Jan. 18, 2005).

³⁵⁸ *Id.* ch. IV, 2(2).

³⁵⁹ Gavan McCormack, *Japan’s Afghan Expedition*, JAPAN IN THE WORLD, SEC. 4 (Nov. 5, 2001), available at <http://www.iwanami.co.jp/jpworld/text/Afghanexpedition01.html>.

³⁶⁰ ARMITAGE ET AL., *supra* note 220, at 3.

³⁶¹ Part II, “Japan,” para. 21, in *Armitage on Japanese Constitution*, NAPSNET DAILY REPORT (Aug. 5, 2004), <http://nautilus.org/napsnet/napsnet-daily-report/napsnet-daily-report-thursday-august-5-2004/#item21>.

³⁶² *US Questions Japan’s Pacifism*, BBC NEWS (Aug. 13, 2004), <http://news.bbc.co.uk/2/hi/asia-pacific/3561378.stm>.

³⁶³ *Koizumi Junichiro*, in ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/761351/Koizumi-Junichiro> (last visited Feb. 17, 2015).

³⁶⁴ *Ruling Coalition Suffers Huge Defeat*, JAPAN TIMES (July 30, 2007), <http://www.japantimes.co.jp/news/2007/07/30/national/ruling-coalition-suffers-huge-defeat/>.

³⁶⁵ *Minshu 308 giseki o kakutoku, Hatoyama seiken tanjo e [DPJ Wins 308 Seats, Birth of Hatoyama Cabinet]*, ASAHI NEWSPAPER (Aug. 31, 2009), <http://www.asahi.com/senkyo2009/news/TKY200908300212.html>.

³⁶⁶ *See Kenpo [Constitution]*, DPJ, <http://www.dpj.or.jp/compilation/policies2013/50073> (last visited Feb. 17, 2015). DPJ’s policy on the Constitution is still abstract.

the Noda cabinet's approval rating was lower than its disapproval rating at the end of 2011.³⁶⁷ As a result, the LDP was able to return to power after the December 2012 election.³⁶⁸

The LDP has prepared for the amendment of the Constitution and even released a draft amendment in April 2012 at the sixty-year anniversary of the San Francisco Peace Treaty.³⁶⁹ The LDP explains the draft as follows on its website:

All articles of the present constitution from the preamble to the provisions have been reviewed and revised. The revised draft is composed of eleven chapters, 110 articles in total, whereas the present Constitution has ten chapters comprising 103 articles. The preamble has been entirely redrafted. They state that Japan has a long history, a distinctive culture that respects harmony, and that the nation is a family whose members contribute to the common good.³⁷⁰

Article 9 is currently located under chapter 2, titled "Renunciation of War," which consists only of that article. The title of the LDP's proposed chapter is "Security." Paragraph one of article 9 is not changed significantly but the wording is adjusted to make clear which words are connected: what was *renounced* by the paragraph is "war as a sovereign right of the nation"; and Japanese people may not *use* "the threat or use of force as a means of settling international disputes." (See Part IV.)

Paragraph 2 of article 9 would be repealed and replaced by new provisions. A new paragraph 2 of article 9 would make it clear that Japan has the right of self-defense by stating, "[t]he prescription of the preceding paragraph does not prevent the exercise of the self-defense right." A paragraph 1 of new article 9-2 would clarify that Japan has defense forces that are under the control of the Prime Minister. Paragraph 2 of article 9-2 would provide that activities of the defense forces may require the Diet's approval or other control as provided by law. Paragraph 3 would clarify that defense forces can conduct activities other than defending Japan, such as international peacekeeping activities and activities to keep peace or public order to support Japanese people's lives. Paragraph 4 would provide that the organization, internal control, and protection of the secrets of defense forces are to be set by law. Paragraph 5 would obligate the government to establish a military court to decide cases concerning crimes committed during the course of their duties by military personnel and civilians who belong to the defense forces. The right to appeal to an ordinary court would be secured.

³⁶⁷ *Kurashi Kaisetsu* "Noda naikaku no shijiritsu o yomu," NHK (Apr. 11, 2010), <http://www.nhk.or.jp/kaisetsu-blog/700/116784.html>.

³⁶⁸ *Jimin taisho 294, kako 4banme no osa . . . Giseki kakutei* [LDP Sweep to Power with 294 Seats, 4th Highest in History . . . Final Counts Done], YOMIURI NEWSPAPER, Dec. 17, 2012, <http://www.yomiuri.co.jp/election/shugiin/2012/news/20121217-OYT1T00510.htm>.

³⁶⁹ "Kenpo kaisei sosan" o happyō [Releasing "a New Constitution of Japan"], LDP (Apr. 2012), <https://www.jimin.jp/activity/colum/116667.html>.

³⁷⁰ Press Release, LDP, LDP Announces a New Draft Constitution for Japan (May 7, 2012), <https://www.jimin.jp/english/news/117099.html>.

A new article 9-3 would require the government to protect Japan's land, sea, air, and resources in cooperation with the Japanese people in order to maintain the sovereign rights and independence of the nation.

Among other proposals, the LDP's draft Constitution would add a new chapter on "Emergency Situations." The new chapter 9 of the Constitution would give the Prime Minister broad, temporary power during an emergency. If an emergency situation such as a military attack by a foreign country occurred, the Prime Minister could declare an emergency situation upon Cabinet approval³⁷¹ and issue orders with equivalent authority to measures enacted by the Diet.³⁷² If the Diet were to disapprove of the declaration, the declaration would be cancelled.³⁷³

Two small parties, Your Party (Minna no tō) and the Sunrise Party of Japan (Tachiagare Nippon) also established the basic concepts of their proposed constitutional amendments around the time that the LDP released its draft of the new Constitution,³⁷⁴ but these parties were later dissolved.³⁷⁵ The Japan Innovation Party, which was reorganized on September 21, 2014, released its Basic Policy on the same day.³⁷⁶ That Policy proposes an amendment to the Constitution in order to reform the nation's governance system. It does not propose to amend article 9 of the Constitution, but states that the government must enhance its self-defense ability and establish by legislation a system to deal with the so-called "grey zone" situation.³⁷⁷ A grey-zone situation means that an armed attack by a foreign country has not been recognized yet, but the situation affects the security of Japan, such as an occupation of a remote island by a foreign armed group.³⁷⁸ In such a case, the SDF could be mobilized for public security operations, but the use of weapons by SDF members would be extremely restricted under current laws.³⁷⁹ In addition, the Policy proposes that legal boundaries of acts of self-defense, including acts based on collective self-defense rights, should be clarified by legislation.³⁸⁰

³⁷¹ LDP Draft Constitution, Apr. 27, 2012, art. 98, para. 1.

³⁷² *Id.* art. 99.

³⁷³ *Id.* art. 98, paras. 2 & 3.

³⁷⁴ *Kakutō no kenpō kaisei an [Each Party's Drafts of Constitution Amendment]*, SANKEI NEWSPAPER (Apr. 27, 2012), <http://sankei.jp.msn.com/politics/news/120427/stt12042723400012-n1.htm>.

³⁷⁵ Your Party announced its dissolution on its website at <https://www.your-party.jp/> (in Japanese; last visited on Apr. 25, 2015); *Tachiagare nippon*, HATENA KEYWORD, <http://d.hatena.ne.jp/keyword/%A4%BF%A4%C1%A4%A2%A4%AC%A4%EC%C6%FC%CB%DC> (last visited Apr. 25, 2015).

³⁷⁶ *Basic Policy*, JAPAN INNOVATION PARTY (Sept. 21, 2014), <https://ishinnotoh.jp/policy/policydetail/> (in Japanese).

³⁷⁷ *Id.* IV, 39.

³⁷⁸ *Sōtei sareru gurē zōn no nakami to kadai wa [What Are Contents and Unsolved Issues of Expected Grey Zone Situations]*, SANKEI NEWSPAPER (May 21, 2014), <http://www.sankei.com/politics/news/140521/plt1405210021-n1.html>.

³⁷⁹ SDF Law, Law No. 165 of 1954, amended by Act No. 82 of 2014, arts. 78, 81 & 89.

³⁸⁰ *Basic Policy*, *supra* note 376, IV, 41.

XIII. Current Situation (August 2015)

The Japanese government's interpretation of article 9 apparently allows unlimited expansion of Japan's defense ability, as Junzō Inamura pointed out at the plenary session of the Diet in 1954 when the SDF bill was first introduced. (See Part V.F.) According to some, it seems as though the words of article 9 were simply emptied of much of their original meaning. It is generally agreed that there is a gap between the wording of article 9 and the reality of the current situation in Japan.³⁸¹ To maintain the Constitution's supremacy, the LDP's position is that the strong skepticism about the government's interpretation of article 9 must be addressed by amending the article and clarifying Japan's military ability.³⁸²

As of January 2015, the ruling coalition had obtained 135 out of 242 seats in Japan's House of Councillors and 327 out of 475 seats in the House of Representatives.³⁸³ The number of seats in the House of Representatives is greater than the two-thirds of all seats required to propose a national referendum. The number of seats in the House of Councillors has not reached two-thirds, but some small opposition parties are in favor of amending the Constitution. Therefore, it may be possible to pass the LDP's constitutional amendment bill in the House.³⁸⁴

As of the latest national election in December 2014, the LDP manifesto stated that the LDP aims to submit a bill to the Diet to amend the Constitution after achieving more understanding and support among the Japanese people.³⁸⁵ The LDP has held educational sessions on the constitutional amendment nationwide since 2014.³⁸⁶ The 2015 manifesto states that the LDP promotes the amendment of the Constitution.³⁸⁷ The House of Representatives' Commission on the Constitution (see Part XII.A, above) has started discussing the provisions to be amended. The LDP reportedly plans to submit a bill to amend the Constitution after the 2016 House of

³⁸¹ Summary of Statements by Committee Members House of Councillors Constitution Research Committee, at 5–6 (Apr. 2005), <http://www.kenpoushinsa.sangiin.go.jp/kenpou/houkokusyo/pdf/youyaku.pdf>.

³⁸² LDP Constitution Amendment Promotion Headquarters Chief, Mr. Hajime Funada, “Gap from the reality, change it with courage”, Sankei Newspaper, May 4, 2015, <http://www.sankei.com/politics/news/150504/pl1505040001-n1.html>.

³⁸³ Jiji Press, *Shugiin Sangiin no giseki haibun* [House of Representatives' Councillors Seats by Party], YAHOO JAPAN (Jan. 26, 2015), <http://seiji.yahoo.co.jp/guide/giseki/>.

³⁸⁴ Abe shusho: “osaka-to” ni rikai . . . kaiken, ishin kyoryoku ni kitai [Prime Minister Abe: Understanding “Osaka Metropolitan” . . . Constitution Amendment, Hoping for Cooperation of Innovation Party], MAINICHI NEWSPAPER (Apr. 7, 2015), <http://mainichi.jp/select/news/20150407k0000m010125000c.html>.

³⁸⁵ LDP, JŪTEN SEISAKU SHŪ [IMPORTANT POLICIES] 26 (2014), http://jimin.ncss.nifty.com/pdf/news/policy/126585_1.pdf.

³⁸⁶ *Heisei 26 nen to undō hōshin* [2014 Party Policy on Action Plan], § 1(3), LDP, <https://www.jimin.jp/aboutus/convention/81/123389.html> (last visited Feb. 20, 2015). See also “Jimin, zenkoku de kenpo taiwa shukai” jissai wa tonai kenshu kai [“LDP, Nationwide Dialogs” Actually Party Study meetings], GOHOO (Apr. 10, 2014), <http://archive.gohoo.org/alerts/140410/>.

³⁸⁷ *Heisei 27 nen to undo hoshin* [2015 Party Manifesto], LDP, § 1(9) (Mar. 8, 2015), <https://www.jimin.jp/aboutus/convention/82/127229.html>.

Councillors election.³⁸⁸ However, as the security bills passed in 2015 (Part XI.D, above) become more unpopular, the Abe administration is also becoming less popular.³⁸⁹ It is therefore unclear whether the Abe administration will have enough support for amending article 9 of the Constitution in near future.

³⁸⁸ *Kenpo kaisei e jiyu togi yobikake* [Calling for Free Discussion for Constitution Amendment], YOMIURI NEWSPAPER (Apr. 2, 2015) (on file with author).

³⁸⁹ *Mainichi Newspaper Public Opinion Poll: Approval Rate of the Administration Nose Dive; 82% Answered the Security Bills “Not Explained Enough”, the Administration and Ruling Party Feel Pressed*, MAINICHI NEWSPAPER (July 19, 2015), <http://mainichi.jp/shimen/news/20150719ddm003010081000c.html>.