

2005

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Recommended Citation

John O. Haley, *Waging War: Japan's Constitutional Constraints*, 14 *Constitutional Forum*. 18 (2005)

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WAGING WAR: JAPAN'S CONSTITUTIONAL CONSTRAINTS

John O. Haley

Article 9 of Japan's postwar constitution subjects the nation to stringently worded constraints on its legal capacity to wage war. Although not the only constitution to include a renunciation of war,¹ Japan's postwar constitution is unique in its prohibition of military forces that make war possible.² The article reads:

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 means of settling international disputes.

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

From inception, the article's meaning and application was the object of controversy. For half

a century, article 9, and the questions of military capacity and action it raises, defined the divide between progressive and conservative political ideologies. The fundamental and most contentious legal and political issues were the legality of Japan's security arrangements with the United States – including the continued presence of American military forces – and the maintenance of military forces for any purpose. For over half a century, lawsuits and criminal defence claims challenging American military bases and the Self-Defence Forces (SDF) have been a routine feature of progressive political action. And corresponding proposals to delete or amend the article significantly continue to be an equally repeated rejoinder by conservative politicians.

During the 1980s, controversy over these basic issues faded as a political and legal consensus affirming the legality of both U.S.-Japan mutual security arrangements and the SDF evolved. In the process, debate shifted to other concerns. Although the disproportional U.S. military presence on Okinawa has been raised as an issue under article 9, the most significant question has been Japan's legal capacity to engage in or even contribute to collective security actions under United Nations or other auspices, particularly outside of East Asia. This issue has gained particular intensity in the wake of the twin Iraqi and North Korean crises. Events involving both states have forced Japan to consider, once again, its political and military role as a member of the elite group of global economic and military powers.

Also subject to reconsideration in the process is the role of the judiciary in what the late Dan Henderson viewed as Japan's peculiar system of "double supremacy," in which the competence for

* This paper developed out of a conference on "Waging War" sponsored by the University of Alberta in November 2002. James Hofman, a J.D. candidate at the School of Law, Washington University in St. Louis provided research assistance. The author is also deeply indebted to Professor James E. Auer of Vanderbilt University for his painstaking review of an earlier draft and his very helpful comments and suggestions. All errors remain mine alone.

¹ See e.g., Constitution of the Republic of the Philippines (1987), art. II, s. 2, which provides: "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations." Along with the Philippines, McNelly adds France and Brazil to the list. See Theodore McNelly, *The Origins of Japan's Democratic Constitution* (Lanham, New York & Oxford: University Press of America, 2000) at 148 [McNelly, *Origins*].

² McNelly, *Origins*, *ibid.*

authoritative legal construction is shared by the courts and the Diet.³ The line between law and politics is hardly more clearly delineated in Japan, however, than elsewhere. On the one hand, when judges speak, they play a significant role in the development of political consensus, and Japanese judges explicitly look to the “sense of society” in construing the law.⁴ When the courts remain silent, however, they leave a vacuum to be filled by other voices. In the case of Japan, the silence of the Supreme Court has given one agency – the Cabinet Legislation Bureau (Naikaku Hōsei Kyoku) – a distinctive role in the interpretation of article 9 and thereby imposed a lasting and politically effective constitutional constraint on Japan’s capacity to wage war.

ISSUES

No one seriously questions the fundamental prohibition of article 9: Japan may not engage in or maintain military forces for the purpose of “waging a war of aggression” as that term was understood both prior to and at the end of World War II.⁵ Were that all, however, article 9 could be viewed as adding little to the obligations Japan shares today with all states under the principles embodied in the Kellogg-Briand Pact and generally accepted principles of international law. Does article 9 go further? Do its provisions subject Japan to more stringent constraints than those that apply to other states?

The most radical claim has been long settled: that the renunciation of war as a sovereign right extended even to self-defence. Japan’s legal capacity to enter bilateral security arrangements with the United States for its defence hinged on this issue. Even recognition of a theoretical right to self-defence does not, however, fully resolve the question of the constitutionality of concomitant arrangements and actions. To what extent, under article 9, is Japan permitted to maintain any military forces or allowed to participate in collective security actions in cases where Japan is not under direct threat? May Japan

take precautionary measures considered necessary for its national security either through protective military arrangements with other states, or unilateral military defence programs, or both? Answering these questions still leaves other issues unresolved. These issues include a pair of closely related questions: whether any meaningful distinctions may be made between military weaponry, equipment, or facilities designed for aggressive or defensive warfare; and, equally important, especially in light of recent events, whether distinctions may also be reasonably drawn between “offensive” and “defensive” military actions.

The distinction between offensive and defensive actions becomes particularly poignant in the context of collective security measures where no direct or significant threat to Japanese security may exist. As explained below, by the early 1980s, a legal and political consensus had emerged, corresponding to Japan’s actual military capacity. Article 9 is widely, but not uniformly,⁶ understood to prohibit aggressive actions and related “war potential,” but not “defensive” actions, narrowly defined. It certainly does not prohibit the maintenance of military forces for defence or, with legislative authorization, non-combat support for United Nations peacekeeping operations (UNPKO) and similar military operations abroad. Events in North Korea and Iraq have challenged this consensus. The Koizumi cabinet’s decision to send a contingent of troops to Iraq, as well the apparent support for revision of the constitution signal a potentially significant shift in both government policy and public opinion.

Military capacity also matters. Japan today possesses the most advanced anti-submarine, air defence, and intelligence-gathering equipment, including missile-mounted Aegis destroyers with advanced detection and analysis systems. Some of these were, in fact, deployed in the Indian Ocean in support of the U.S. coalition action against Afghanistan. With legislative authorization, Japan also contributed logistically, but not with combat forces, to UNPKO in Cambodia in 1993 and in

³ Dan Fenno Henderson, *Foreign Enterprise in Japan* (Chapel Hill, NC: University of North Carolina Press, 1973) at 173.

⁴ See e.g., John Owen Haley, *The Spirit of Japanese Law* (Athens, GA: University of Georgia Press, 1998) at 156-76.

⁵ See e.g., Quincy Wright, “The Concept of Aggression in International Law” (1935) 29 *American Journal of International Law* 373.

⁶ See “Zadankai (Roundtable discussion),” as well as articles and commentary on art. 9 in (2004) 1260 *Jurisuto* 7. Unless otherwise indicated by context or express attribution, all translations from Japanese are the author’s.

East Timor in 2002. Legislation enacted in June 2003 enables SDF forces to support the U.S. in non-combat activities in Iraq. And in February 2004, a contingent of 500 Ground Self-Defence Forces (GSDF) were sent to Iraq ostensibly for “humanitarian and construction assistance.”⁷ How may these forces be utilized constitutionally? May they be enhanced? If so, how? Is Japan’s “war potential” truly restrained? And above all, may Japan constitutionally contribute to or participate actively in these and other collective security actions, even with legislative approval?

These are not idle questions. Japan apparently lacks the military capability to make a preemptive strike against a North Korean nuclear weapons threat and, it seems, even the capacity to defend effectively against a North Korean ballistic missile attack.⁸ In other words, Japan is not today in a position to act autonomously even with respect to its own defence. Public concern over this apparent weakness appears to be moving the political consensus towards allowing expansion of Japan’s military capacity to levels that many would have thought unthinkable a decade ago and, perhaps, even towards support of preemptive action. In response to these questions, as constitutional law, article 9 does seem to matter. Authoritative interpretation of article 9 both shapes and constrains public views, political consensus, and governmental discretion.

A set of final questions remains. Who has the competence or legal authority to construe article 9? Who determines its parameters? Are they matters for judicial decision or political or bureaucratic determination? In any event, what is the role of precedent – that is, how binding on future courts or governments are past determinations by the judiciary, past actions by cabinets and the legislature, or past opinions by any administrative agency? Or, indeed, is any permanent or enduring legal construction mandated or even politically possible or legally required?

History, judicial decision, and political consensus provide some answers. As detailed below, each affirms the proposition that the scope of article 9 is limited to “aggressive war” and does not apply to Japan’s right to engage in military action for self-defence, perceived as a fundamental right common to all states. Article 9 thus allows bilateral, as well as multilateral, arrangements for self-defence. Article 9 is also perceived to allow non-military aid and logistical support to UNPKO, and even collective security actions.

The prohibition of “war potential” has been more controversial and has been resolved with less certainty. The Japanese government’s early statements were inconsistent. As late as March 1952, Prime Minister Shigeru Yoshida conceded that article 9 prohibited Japan from maintaining even defensive military forces.⁹ Nevertheless, over time, a political (and bureaucratic) consensus with broad public support emerged. For over two decades, article 9 has been construed by the Japanese government to permit the SDF and, at least with specific legislative approval, their role in collective security actions not directly related to the defence of Japan, so long as the forces did not engage in active combat.¹⁰ No consensus appears to have been reached however, with respect to other issues, among them, for example, the deployment of combat forces in collective self-defence actions or the legal capacity to maintain weapons capable of preemptive military action. Thus, the constitutionality of legislation allowing the cabinet to authorize any deployment or the acquisition of such weaponry has not yet been fully addressed, either politically or judicially.

The discretion of the Diet and the cabinet over defence policy remains legally restricted. The ultimate authority to define these boundaries and, thus, the extent to which either Diet or cabinet actions are constitutional, remains with the courts. In other words, the fifteen justices of Japan’s Supreme Court have the final word. They

⁷ See Japan Defence Agency, “For the Future of Iraq,” (14 March 2005), online: Japan Defence Agency <<http://www.jda.go.jp/e/index.htm>>.

⁸ See e.g., “Agency Pondered Airstrikes for North” *The Asahi Shintoun* (9 April 2005), online: Asahi News <<http://www.asahi.com/english/Herald-asahi/TKY200504090142.html>>.

⁹ Prime Minister Shigeru Yoshida, Statement of 10 Mar 1952, quoted in James E. Auer, *The Postwar Rearmament of Japanese Maritime Forces, 1945-71* (New York: Praeger, 1973) at 122 [Auer, *Postwar Rearmament*].

¹⁰ As detailed below, the 2003 White Paper on Defence Policy made a subtle but potentially significant change in the wording of the government’s position that would presumably permit the dispatch of military forces and at least the incidental use of armed force.

collectively retain the competence to set the outer limits of Japan's constitutional capacity to wage war. Yet the Court has not fully exercised its authority. The Court has determined that the constitutionality of bilateral and multilateral security arrangements, taken with or without specific legislative approval, depends on the perception of judges whether such actions constitute unmistakably "clear" violations of article 9. The Court has yet to rule, however, on the constitutionality of the SDF or even whether its rulings on bilateral security arrangements also define the scope of the Diet's political authority with respect to the maintenance of the SDF. Until it does so, a legal vacuum will persist. This vacuum has been filled in part by contending politicians, with supporting opinions of allied lawyers and legal scholars. The silence of the Court, however, has given the Cabinet Legislation Bureau unparalleled influence over defence policy through the Bureau's authority to issue advisory legal opinions on constitutional issues.¹¹ The consequence, as stated above and detailed below, has been a significant and lasting constitutional constraint on the political capacity of successive governments to determine Japan's defence policy.

HISTORY

The origins of article 9 remain a mystery.¹² Few today fully credit Supreme Commander for the Allied Powers Douglas MacArthur's public attribution of Prime Minister Kijūrō Shidehara as the source, although Shidehara remains a plausible choice.¹³ Some believe that MacArthur himself conceived the idea. Dale Hellegers suggests that the idea may have come to MacArthur via a similar provision in the 1935 Philippine

Constitution,¹⁴ which Hellegers assumes would have been well known to MacArthur.¹⁵ Charles Kades, deputy chief of Government Section, actually drafted the provision as chair of the secret steering committee responsible for the initial draft of the constitution. He raised the possibility that the idea originated with Emperor Hirohito.¹⁶ Theodore McNelly, on the other hand, argues that Kades himself was the most likely source, an attribution made in Kades' presence that he did not expressly disavow.¹⁷

Whatever its origin, the clause reflects MacArthur's determination that a renunciation of war be included in the postwar Japanese constitution. As described by Kades:

MacArthur had directed [Courtney] Whitney [Chief of Government Section] to have the Government Section draft a model for a constitution to be handed to [Prime Minister Shigeru] Yoshida and [State Minister Jōji] Matsumoto for their consideration at the meeting which the Japanese had postponed to the following week....Whitney handed me a legal-size sheet of green-lined yellow paper on which were handwritten, in pencil, notes that Whitney said were to be used as the basis for a model constitution.¹⁸

¹¹ I am enormously indebted to James E. Auer for suggesting that the failure of the Supreme Court to rule on the constitutionality of the SDF has contributed significantly to the influence of the Cabinet Legislation Bureau interpretation of art. 9.

¹² For a concise history of art. 9 in Japanese, see Takami Katsutoshi, 1 *Chūshaku kenpō* (General Commentary on Constitutional Law) (Tokyo: Yuhikaku, 2000) at 376-88 [Katsutoshi]. For an account by one of the key Japanese participants in the drafting process, who in 1947 became Director of the Cabinet Legislation Bureau, see Sato Tatsuo, *Nihon Kenpō Seiritsu Shi* (History of the Establishment of the Constitution of Japan) (Tokyo: Yuhikaku, 1964).

¹³ See e.g., Theodore McNelly, "General Douglas MacArthur and the Constitutional Disarmament of Japan" (1982) 17 Transactions of the Asiatic Society of Japan, Third Series 1 [McNelly, "General Douglas MacArthur"].

¹⁴ Art. II, s. 3, of the 1935 Constitution (also included, as noted *supra* note 1, in the 1987 Constitution) provided: "The Philippines renounces war as an instrument of national policy." However, art. II, s. 2, made the "defence of the State... a prime duty of the Government and the people." See Enrique M. Fernando, *The Constitution of the Philippines* (Dobbs Ferry: Oceana Publications, 1974) at LII (Appendix B). The language of s. 3 was identical to art. I of the Kellogg-Briand Pact.

¹⁵ Dale M. Hellegers, *We the Japanese People: World War II and the Origins of the Japanese Constitution*, vol. 2 (Stanford, CA: Stanford University Press, 2001) at 576 [Appendix C] [Hellegers].

¹⁶ Charles L. Kades, "The American Role in Revising Japan's Imperial Constitution" (1989) 104 Political Science Quarterly 215 at 218 [Kades, "The American Role"].

¹⁷ McNelly, "General Douglas MacArthur," *supra* note 13 at 9, 32. See Charles L. Kades, "Discussion of Professor Theodore McNelly's Paper, 'General Douglas MacArthur and the Constitutional Disarmament of Japan'" (1982) 17 Transactions of the Asiatic Society of Japan, Third Series 35 [Kades, "Discussion"]. Kades could have suggested a renunciation of war provision but, without first-hand knowledge of MacArthur's thoughts, could not have known whether such remark could have been the source for MacArthur's idea.

¹⁸ Kades repeatedly stated that he could not tell whether MacArthur or Whitney had written the notes because their handwriting was so similar. See McNelly, *ibid* at 15-16; Kades, *ibid* at 224.

The MacArthur/Whitney notes included this provision:

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

No Japanese Army, Navy, or Air Force will ever be authorized and no right of belligerency will ever be conferred upon any Japanese force.¹⁹

Kades, drafting the article, rewrote the MacArthur/Whitney notes to read:

Article 8. War as a sovereign right of the nation is abolished. The threat of use of force is forever renounced as a means for settling disputes with any other nation No Japanese Army, Navy, or Air Force will ever be authorized and no right of belligerency will ever be conferred upon any Japanese force.²⁰

Kades deleted the critical phrase “even preserving its own security,” as he explained to Whitney, because to say a country could not defend itself was “unrealistic.”²¹ He appears to have had in mind the 1928 Kellogg-Briand Pact, which both condemned “recourse to war for the solution of international controversies” and “renounced war as an instrument of national policy in their relations with one another” (article I).²² Like article 9, as drafted by Kades, the Kellogg-Briand Pact did not explicitly distinguish between “aggressive” and “defensive” war. Nor did the Pact include any mention of a residual right to self-defence. However, the renunciation of war was understood, at the insistence of the United States, not to extend to defensive military

action. As the United States’ official note of transmission of the proposed pact emphasized, “[t]here is nothing in the language of the pact” that “restricts or impairs in any way the right of self-defence.”²³

Kades’ version was then approved by MacArthur and included in the “model” constitution presented to the Japanese government at the home of the foreign minister on 13 February 1946. The draft was subsequently reworked from the morning of March 4 to the evening of 5 March 1946, with the members of both the SCAP steering committee and members of the Japanese Constitutional Problem Investigation Committee chaired by State Minister Jōji Matsumoto. During the course of this marathon negotiating session, the text of the provision was further revised to read as a renumbered article 9:

The recognition of war as a sovereign right of the nation and the threat or use of force as means of settling international disputes 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.²⁴

The draft was next reviewed by the Yoshida cabinet and submitted to the Diet in the form of a bill to amend the Imperial Constitution of 1889. The government’s first official interpretation of article 9 was that it did not deny Japan the right of self-defence but did prohibit war and even defensive armaments.²⁵ The article was then amended further by the Diet’s Constitutional Amendments Committee, chaired by Ashida Hitoshi. The Ashida amendments added introductory phrases to each of the article’s two paragraphs for the official purpose of “making it clear that the resolve to renounce war and to abolish armaments is motivated solely by

¹⁹ Kades, *ibid.* at 224.

²⁰ See Takayanagi Kenzō, Ohtomo Ichirō & Tanaka Hideo, eds., *Nihon Koku Kempō seitei no katei* [Making of the Constitution of Japan], Vol. 1 (Tokyo: Yuhikaku, 1973) at 244.

²¹ McNelly, “General Douglas MacArthur,” *supra* note 13 at 17.

²² See remarks by Kades to Osamu Nishi during a 13 November 1984 interview, quoted in Osamu Nishi, *The Constitution and the National Defence Law System in Japan* (Tokyo: Seibundo, 1987) at 9 [Nishi].

²³ “Press Notice of Identical Notes of Transmission of [Draft] Multinational Treaty for Renunciation of War, June 23, 1928” (reproduced in (1928) 22 *American Journal of International Law: Official Documents* 109). See also Quincy Wright, “The Meaning of the Pact of Paris” (1935) 27 *American Journal of International Law* 39.

²⁴ See Hellegers, *supra* note 15, vol. 2 at 677-78.

²⁵ McNelly, “General Douglas MacArthur,” *supra* note 13 at 31.

aspiration for the concord and cooperation of mankind and for the pace of the world.”²⁶ Ashida was later to explain that the aim of the amendments was to clarify Japan’s right to self-defence.²⁷ The Diet seems to have recognized Ashida’s claim at the time in that article 66 was also amended to restrict members of the cabinet to civilians.²⁸ Nevertheless, at least among legal scholars, the view prevailed that Japan may not have renounced its inherent right of self-defence in an abstract sense but that article 9 did seem to prohibit the nation from maintaining military forces of any kind for whatever purpose.²⁹ This view, which, as noted, even Prime Minister Yoshida once endorsed, would have required Japan to depend permanently upon military forces provided by others – particularly the United States – for its security.

Why the Americans and Japanese responsible for drafting article 9 did not make a right of self-defence explicit or clarify whether and for what purposes military forces could be maintained was perhaps best explained by Kades in a 25 May 1989 interview. Kades told the author that he feared popular American reaction against the constitution had article 9 expressly recognized an inherent right of self-defence. After all, he noted, Japan had justified military invasion of China and Southeast Asia, not to mention Pearl Harbor, as acts of self-defence. Kades could have added that, as noted above, the 1928 Kellogg-Briand Pact similarly makes no explicit mention of a right to self-defence but was understood by all not to restrict acts of legitimate self-defence. Similarly, and carefully read in context, the comments by Prime Minister Yoshida during the deliberations in the Diet that any explicit recognition of a right of self-defence would be “too dangerous,”³⁰ could be understood as an implicit expression of concern

over Japanese wartime justifications and possible American public reaction.

With almost unanimous approval of the new constitution by both houses of the Diet and promulgation by the Emperor in the autumn of 1946, the postwar constitution with, article 9, became effective on 3 May 1947. Thenceforth, notwithstanding academic or popular views, the Japanese government and the Occupation authorities consistently interpreted article 9 as not including a renunciation of an inherent right of self-defence. However, their positions on the issue of “war potential” were less consistent. Nevertheless, within weeks of article 9 becoming effective (and two years before “containment” and the “reverse course”), the National Safety Agency was created.³¹ A year later, Japan established a coast guard. And then, in the wake of the Korean War, at MacArthur’s direction, the National Police Reserve was established and Japanese minesweepers were sent to support UN forces, resulting in the first, and presumably only, post World War II Japanese combat casualties.³² As the Allied Occupation ended and Japan regained full sovereignty, the 1951 Japan-U.S. Security Treaty³³ came into effect on 28 April 1952. By August, the coast guard and Police Reserve were merged into a new National Security Force. Two years later, in March 1954, the Defence Agency was established.³⁴ By organizing the National Security Force and coast guard into separate Ground and Maritime Self-Defence Forces, while adding a new Air Self-Defence Force, the three SDFs were formed.³⁵

JUDICIAL DECISIONS

Since 1947, Japan’s judges have decided about two dozen civil and criminal cases involving constitutional challenges to Japan’s security

²⁶ Official Gazette Extra, No. 35 (26 August 1946) 7, cited in Kades, “Discussion,” *supra* note 17 at 40.

²⁷ McNelly, “General Arthur MacArthur,” *supra* note 13 at 31.

²⁸ Katsutoshi, *supra* note 12 at 388. Auer (citing a document authored by Tatsuo Sato for the Commission on the Constitution and McNelly) notes that SCAP actually proposed the amendment at the insistence of the Far East Commission, forcing the Japanese to coin the Chinese character compound *bunmin* for “civilian.” Auer, *supra* note 9 at 47-48.

²⁹ See McNelly, *Origins*, *supra* note 1 at 149. See also Kenzō Takayanagi, “Some Reminiscences of Japan’s Commission on the Constitution” (1968) 43 *Washington Law Review* 961 at 973.

³⁰ See Nishi, *supra* note 22 at 5.

³¹ Japan, *Hoanchō hō* (National Safety Agency Law), Law No. 265 (1947).

³² James E. Auer, “Article Nine: Renunciation of War” in P.R. Luney & K. Takahashi, eds., *Japanese Constitutional Law* (Tokyo: University of Tokyo Press, 1993) 79 [Auer, “Article Nine”]. Auer notes that two minesweepers were sunk, one Japanese sailor was killed, and eight others were injured.

³³ Reproduced in (1952) 46 *American Journal of International Law*: Official Documents 91.

³⁴ Japan, *Bōeichō sochi hō* (Self-Defence Agency Establishment Law), Law No. 164 (1954).

³⁵ Japan, *Jieitai hō* (Self-Defence Forces Law), Law No. 165 (1954).

arrangements with the United States and the establishment and role of the SDF. Statistics are not available on the total number of lawsuits filed that have included a constitutional challenge to U.S. and Japanese military forces, nor are all judgments reported. However, the most inclusive source of judicial decisions lists sixty-seven separate pronouncements, including appellate court judgments.³⁶ Closer examination reveals fewer actual judgments and even fewer cases. In many instances, several separate civil or criminal actions with similar claims or arising out of the same incidents were consolidated. All in all, between 1951 and 2001, there appear to be about twenty-five separate cases, including appeals. The Supreme Court has adjudicated appeals in seven,³⁷ only one of which, the *Sunakawa* case,³⁸ was a precedent-setting *en banc* decision. With two exceptions, both decisions that affirmed *Sunakawa*,³⁹ all of the others were decided by a five-justice petty bench.

Handed down in 1959, the *Sunakawa* case was the first Supreme Court decision on the constitutionality of Japan's defence policies. In it, all fifteen justices endorsed the view that Japan retained a fundamental right of self-defence and

could enter into treaties for mutual security. The Court also established parameters for judicial review and thereby the scope of legislative and executive discretion. In the absence of an unmistakable or "clear" violation, the courts were to defer to the judgment of the political branches on the issue of constitutionality. The *Sunakawa* case has remained the controlling interpretation of article 9 for half a century.

The decision reversed and remanded a Tokyo District Court decision by a three-judge panel. The judgment, authored by presiding judge Akio Date, held that the Japan's 1951 Security Treaty with the United States was unconstitutional under article 9. The case involved the prosecution of demonstrators charged with criminal trespass for unauthorized entry on the U.S. Tachikawa Air Base outside of Tokyo during a protest against the acquisition of land for the expansion of a runway. Acquitting the defendants, Judge Date reasoned that the statutory basis for the prosecution was legally invalid because the crime of criminal trespass for entry onto an American military base in Japan had been enacted pursuant to the implementation of the 1951 Security Treaty, which provided for the maintenance of war potential in Japan in violation of article 9. In a special appeal bypassing the intermediate appellate court, all fifteen justices endorsed reversal of Judge Date's decision. The decision of the Court explicitly determined that article 9 does not deny Japan's "inherent right of self-defence," nor does it disable Japan from taking necessary measures for its own "peace and security," including collective security actions under the auspices of the United Nations or under bilateral security arrangements with the United States, including the 1951 Security Treaty. The Court also interpreted maintenance of war potential to mean the resort to "aggressive war through the maintenance by our country of what is termed war potential and the exercise of rights of command and control over it."⁴⁰ Thus, the Court expressly subscribed to a view that the SDF might possibly be considered to violate article 9 as war potential under the "command and control" of the Japanese government. However, the Court held that the District Court had exceeded its judicial authority in determining the constitutionality of the 1951

³⁶ See CD-Rom: *Hanrei taikēi* [Precedents Digest] (Tokyo: Tokyo Daiichi Hōki) [HT CD-ROM].

³⁷ *Sakata v. Japan*, 13 Keishū 3225, HT CD-ROM Case ID No. 27660683 (Sup. Ct. G.B., Dec. 16, 1959) [*Sunakawa*], translated with commentary in John M. Maki, *Court and Constitution in Japan: Selected Supreme Court Decisions, 1948-60* (Seattle: University of Washington Press, 1964) at 298-361[Maki]; *Japan v. Shiino*, 359 Hanrei jihō 12, HT CD-ROM Case ID No. 27760754 (Sup. Ct. 2nd P.B., Dec. 25, 1963); *Japan v. Sakane*, 214 Hanrei taimuzu 260, HT CD-ROM Case ID No. 27670505 (Sup. Ct. G.B., April 2, 1969) [*Sakane*], trans. in H. Itoh & L. Beer, eds., *The Constitutional Case Law of Japan: Selected Supreme Court Decisions, 1961-70* (Seattle: University of Washington Press, 1978) at 103-31; *Sakane Itō v. Japan*, 94 Zaimushō shiryō 138, HT CD-ROM Case ID No. 21057680 (Sup. Ct. 3rd P.B., April 19, 1977) [*Itō*]; *Itō v. Minister of Agriculture and Forestry*, 36 Minshū 1679, HT CD-ROM Case ID No. 27000070 (Sup. Ct. 1st P.B., Sept. 9, 1982) [*Naganuma*]; *Japan v. Ishitsuka*, 43 Minshū 385, HT CD-ROM Case ID No. 27431916 (Sup. Ct. 3rd P.B., June 20, 1989) [*Hyakuri Base*]; *Ota v. Hashimoto*, 50 Minshū 1952, HT CD-ROM Case ID No. 28011109 (Sup. Ct. G.B., Aug. 28, 1996) [*Okinawa Bases*], translated in Prominent Judgments of the Supreme Court, online <<http://courts.go.jp/promjudg.nsf>>.

³⁸ *Sunakawa*, *ibid.* On remand, the Tokyo District Court found the defendants to be guilty. *Japan v. Sakata*, 255 Hanrei jihō 8303 (Tokyo Dist. Ct., Mar. 27, 1962).

³⁹ The two other *en banc* decisions of the Supreme Court dealing with an art. 9 challenge were *Japan v. Sakane* and *Ota v. Hashimoto*, *supra* note 37. Both dealt primarily with other constitutional issues but the question of the constitutionality of the 1951 Security Treaty was also raised. And in both the Supreme Court reaffirmed its holding in the *Sunakawa* case.

⁴⁰ Maki, *supra* note 37 at 304.

Security Treaty, thereby precluding a determinative judicial decision on the constitutionality of the Treaty or the stationing of U.S. forces in Japan under article 9. Ten of the fifteen justices added supplementary opinions. All agreed with the disposition of the case – the reversal of Judge Date’s decision and remand – and all endorsed the interpretation of article 9 with respect to an inherent right of self-defence and the constitutionality of the 1951 Security Treaty. Three justices (Kōtarō Tanaka, Tamotsu Shima, and Daisuke Kawamura), writing separate supplementary opinions, expressly agreed with the Court’s opinion that Japan possesses a sovereign right of self-defence and that both bilateral and multilateral security arrangements are constitutional. Justice Tanaka noted that in article 9, Japan renounces “aggressive war” but made no explicit reference to the application of article 9 to the maintenance of “war potential” under Japanese control. Justice Shima, however, expressed agreement with the determination that article 9 only covers war potential under Japanese command and control. Three justices (Hachirō Fujita, Toshio Iriye, and Katsumi Tarumi) expressed no opinion on the constitutional issues in the case except to agree that the District Court had exceeded its constitutional authority by reviewing an “act of government,” analogous to the “political question” doctrine in the United States. Three others (Katsushige Otani, Ken’ichi Okuno, and Kiyoshi Takahashi) took issue with the majority with respect to the justiciability of the issues raised, arguing that the courts did have the competence to adjudicate the constitutional issues raised by the Treaty. One (Shu’ichi Ishizaka) made an impassioned argument against any interpretation of article 9 that would deny Japan the right to self-defence or the capacity to maintain military forces for its own protection and agreed with Justices Otani and Okuno that the issue in this case was justiciable.

Over the course of nearly five decades since the *Sunakawa* decision, litigants have used various stratagems to challenge the legitimacy of U.S.-Japan security arrangements. The most recent Supreme Court decision was in 1996 in *Ota v. Hashimoto*, or the *Okinawa Bases* case.⁴¹ The case arose as a result of the refusal of Okinawa

landowners to renew leases of land used by U.S. armed forces. Their refusal to consent to the renewal forced the government to commence formal expropriation proceedings, which, under the applicable statute and regulations, required certain reports related to the land in question to be signed either by the owners or the appropriate local officials. Upon their refusal, the director of the Naha Defence Facilities Administration Agency sought instead the signature of the Masahide Ota as governor of Okinawa Prefecture. He also refused. Thereupon, Prime Minister Ryūtarō Hashimoto ordered the governor to sign the documents pursuant to provisions of the Local Autonomy Law. Governor Ota again refused and Prime Minister Hashimoto filed a petition in special proceedings in the Naha Branch of the Fukuoka High Court for a judicial order to require Governor Ota to perform his legal duty under the law. On 25 March 1996, the Court issued the order, finding that Ota’s failure to comply constituted a dereliction of his official duties and seriously impaired the public interest. On appeal, the Supreme Court *en banc* affirmed the lower court decision. In the decision, the Court expressly reaffirmed the continuing validity of the *Sunakawa* decision, upholding the constitutionality under article 9 of the U.S.-Japan Security Treaty under which, by extension, implementing legislation and the related measures for leasing land were also deemed to be constitutional.

The Court’s reasoning in *Ota v. Hashimoto* echoed the rationale of lower court decisions. In similar challenges to the legality of U.S. bases in Okinawa, the City of Naha, Okinawa, and two groups of private citizens filed separate lawsuits in 1985 against the Kaifu cabinet. They sought judicial revocation of certain administrative measures allowing the use of land within the city by the U.S. military. The plaintiffs argued that these measures were illegal because of the underlying unconstitutionality of the U.S.-Japan Security Treaty in general, certain of its provisions, as well as implementing legislation and related administrative actions. In a consolidated judgment handed down in 1990,⁴² the

⁴¹ *Okinawa Bases*, *supra* note 34.

⁴² *Naha City v. Kaifu*, 727 Hanfreitaimuzu 118, HT CD-ROM Case ID No. 27806665 (Naha Dist. Ct., May 29, 1990), annotated in (1990) 34 *The Japanese Annual of International Laws* 157.

Naha District Court rejected each claim. Adhering to the reasoning of the majority of justices in the *Sunakawa* decision, the three-judge panel noted that Japan retains an intrinsic sovereign right to self-defence that it may secure by mutual security arrangements with the United States. Article 9, the Court continued, does not prohibit the maintenance in Japan of military equipment not under the direct command and control of the Japanese government. The judges dismissed the action, concluding that the plaintiff had not shown that the Security Treaty or any of the other challenged measures constituted an unmistakably “clear” violation of article 9.

In 1991, the Kanazawa District Court similarly rejected an effort to regulate use of U.S. military aircraft in Japan. On grounds repeated with approval by the Nagoya High Court in 1994, the District Court rejected claims of constitutionality against U.S. military and Air Self-Defence Force use of the Komatsu Air Field. The two courts rejected the plaintiffs’ petition for a court order to terminate or at least regulate U.S. military flights at the base to prevent noise pollution.⁴³ The two courts also agreed, however, that flights by the Air Self-Defence Force were subject to regulation, and the High Court upheld with modification the District Court’s damage awards.

Progressive litigants and their lawyers have also repeatedly challenged the constitutionality of the SDF.⁴⁴ In several, like *Sunakawa* and the 1969 *Sakane* case,⁴⁵ the issue has been raised in defence to a criminal prosecution. The *Eniwa* case⁴⁶ is typical. It involved the criminal prosecution of the Nozaki brothers under article 121 of the SDF Law. The prosecution accused the brothers of having cut telephone lines to the SDF training facility at

Eniwa, Hokkaido. By dismissing the case on the grounds that telephone wires did not come within the definition of “an implement used for military defence” for purposes of criminal prosecution under the SDF Law, the Sapporo District Court avoided the constitutional issue. Only twice, however, has any court fully reached the merits – in both instances at the district court level – and only once has a court held the SDF to be unconstitutional. This was the *Naganuma* case,⁴⁷ which was filed almost immediately after the *Eniwa* decision.

The plaintiffs were all residents of Naganuma, a village in Hokkaido. They claimed that the village watershed would be damaged by the construction of an SDF Nike missile site and anti-aircraft training facility in what had previously been designated as a national forest preserve. A statutorily mandated finding of a “public interest” had been required to effect the requisite change in the designation of the forest. In a decision authored by presiding judge Shigeo Fukushima, the Court declared that the change in designation was invalid inasmuch as the SDF constituted “war potential” in violation of article 9, because their intended use of the preserve could not be deemed to be in the public interest.⁴⁸ The decision was predictably reversed by the Sapporo High Court on appeal, denying the reviewability of the constitutionality of the SDF.⁴⁹ The plaintiffs appealed and, as expected, in 1982, the Supreme Court affirmed the High Court judgment.⁵⁰ Progressive political efforts to bypass the Diet and achieve an authoritative judicial decision on the constitutionality of the SDF essentially ended with the Supreme Court’s decision that, because measures had been taken to preserve the watershed, the residents of Naganuma no longer had standing (legal interest) to sue. Thus, the Court avoided review of the *Naganuma* decision on the merits.

⁴³ *Fukuda v. Japan*, 886 Hanrei taimuzu 114, HT CD-ROM Case ID No. 27826961 (Nagoya High Ct., Dec. 26, 1994), modifying and affirming in part the decision by Kanazawa District Court, 754 Hanrei taimuzu 74, HT-CD-ROM Case ID No. 27808655 (Kanazawa Dist. Ct., Mar. 13, 1991).

⁴⁴ For an introductory analysis of the early cases in Japanese, see Katsutoshi, *supra* note 12 at 403, 416, 429-30, 486. For discussion of these and other cases in English, see Nishi, *supra* note 22 at 25-29. For a relatively recent taxpayer suit, see *Ōno v. Japan*, 771 Hanrei taimizu 116, HT CD-ROM Case ID No. 22004601 (Tokyo High Ct., Sept. 17, 1991), dismissed for lack of standing and interest to sue.

⁴⁵ *Sakane*, *supra* note 37.

⁴⁶ *Japan v. Nozaki*, 9 Kakyū keishū 359 (Sapporo Dist. Ct., Mar. 29, 1967) [*Eniwa*].

⁴⁷ *Itō v. Minister of Agriculture and Forestry*, 712 Hanrei jihō 24 (Sapporo Dist. Ct., Sept. 7, 1973) [*Naganuma*].

⁴⁸ In an earlier decision on preliminary relief in the same case, Judge Fukushima had ordered that the change in designation be suspended thereby precluding the construction of the SDF facilities until the adjudication of the case on the merits was complete. The Sapporo High Court reversed and remanded this decision. The SDF was thus able to complete construction of the disputed facilities before the 1973 district court judgment.

⁴⁹ 43 Gyōshū 1175, HT CD-ROM Case ID No. 2700135 (Sapporo High Ct., Aug. 5, 1976).

⁵⁰ Auer, “Article Nine,” *supra* note 32.

In addition to *Naganuma*, the Supreme Court has decided only two challenges to the constitutionality of the SDF: the 1977 decision in *Itô v. Japan*⁵¹ and *Japan v. Ishitsuka*, the *Hyakuri Base* case.⁵² In *Itô v. Japan*, the Third Petty Bench rejected a claim for injunctive relief against funding for the SDF and for “war pollution.” The Court found that the plaintiffs had no standing based on their claim of religious conviction. In the *Hyakuri Base* case, the Court again avoided the issue, affirming a Tokyo High Court decision that had upheld a Mito District Court decision, but on separate grounds. The Mito court’s judgment in the case was significant as the first judicial decision expressly applying the *Sunakawa* rationale to the constitutionality of the SDF. The case involved a sale of land, originally to be sold to the government to be used for an SDF base, to a private buyer opposed to the SDF. The buyer did not pay and the seller concluded the originally intended sale with the government. Both seller and the state sued for confirmation of the state’s ownership and transfer of registration. The buyer countered that inasmuch as the SDF were unconstitutional, any sale to the government for purposes of SDF use violated the general private law requirement of “public order and good morals” under article 90 of the Civil Code. On the merits, the Mito District Court upheld Japan’s right to self-defence under article 9 as a justiciable legal issue but declared that the legality of the SDF and its facilities was not reviewable. Unless unmistakably “clear” that the forces or their use were unconstitutional, the Court reasoned, such issues under article 9 are left to political decision. The Tokyo High Court and Supreme Court quashed the appeal on the grounds that article 9 was not applicable in the context of private law disputes. Neither court ruled on either the constitutionality of the SDF or the justiciability of the issue.

Opponents of the SDF continue to seek judicial condemnation of the SDF. The Tokyo and Osaka District Courts have both dismissed actions brought to have SDF participation in UNPKO

⁵¹ *Itô*, *supra* note 37.

⁵² *Hyakuri Base*, *supra* note 37, affirming 1004 Hanrei jihō 3, HT CD-ROM Case ID No. 27431916 (Tokyo High Ct., July 7, 1981); 842 Hanrei jihō 22, HT CD-ROM Case ID No. 27441813 (Mito Dist. Ct., Feb. 17, 1977).

declared illegal.⁵³ In the Tokyo case, the District Court handed down a consolidated judgment dismissing lawsuits brought by 286 plaintiffs seeking injunctive relief and damages, as well as judicial confirmation of the illegality of the Japanese government’s dispatching SDF units in aid of UNPKO in Cambodia in 1993. It first dismissed (*kyakka*) the claim for damages for a violation of constitutional rights on procedural grounds for failure to present a legally cognizable claim. The other suits were dismissed on the merits (*kikyakku*) for lack of a legally protected interest for the remedy sought.

Suits have been similarly brought and dismissed against government decisions to provide funding, humanitarian aid and SDF naval vessels to assist the U.S.-led military operations in the first Gulf War.⁵⁴ Most recently, Noboru Minowa, a former Liberal Democratic Party (LDP) member of the House of Representatives, whose political career also included service as posts and telecommunications minister as well as parliamentary vice-defence minister, filed suit in the Sapporo District Court on 28 January 2004 to halt dispatch of the troops to Iraq.⁵⁵ Typical of these suits was the group of consolidated administrative actions brought in the Osaka District Court against the Murayama cabinet for revocation of its decision to dispatch SDF naval forces to the Persian Gulf and confirmation of the unconstitutionality of these actions.⁵⁶ The Court dismissed the actions for failure to state a judicially recognizable claim in the case of the declaratory judgment and lack of prerequisite “interest” for the action to be sustained.

Despite lack of an affirming Supreme Court decision, the Mito District Court opinion in *Hyakuri Base* case continues to express the prevailing view. The establishment of the SDF

⁵³ *Aoki v. Japan*, 1619 Hanrei jihō 45, HT CD-ROM Case ID No. 28030102 (Tokyo Dist. Ct., Mar. 12, 1997); *Handa v. Japan*, 1592 Hanrei jihō 113, HT CD-ROM Case ID No. 28020641 (Osaka Dist. Ct., May 20, 1996).

⁵⁴ *Aoki v. Japan*, 927 Hanrei taimuzu 94, HT CD-ROM Case ID No. 28011360 (Osaka Dist. Ct., Mar. 27, 1996); *Ôtsu v. Murayama*, 900 Hanrei taimuzu 171, HT CD-ROM Case ID No. 28010176 (Osaka Dist. Ct., Oct. 25, 1995) [*Persian GulfDeployment*].

⁵⁵ “Ex-posts Minister Sues over SDF Dispatch to Iraq, Demands 10,000 yen” *Japan Times* (30 January 2004), online: Japan Times <<http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20040130a8.htm>>.

⁵⁶ *Persian Gulf Deployment*, *supra* note 54.

was not unconstitutional but the size, kind, and use of the force pose potential constitutional issues that the courts should leave undefined unless and until a judicially determined line is crossed and the outer limits of constitutionally acceptable action are transgressed. Within these still-undefined parameters – what the justices in the *Sunakawa* case referred to an unmistakably “clear” violation – the courts were to leave these issues to the Diet and the cabinet for political decision, which, in effect, left them to the interpretation of the Cabinet Legislation Bureau.

In all of these cases, including the Supreme Court’s *Eniwa* and *Hyakuri Base* decisions and recent district court decisions dismissing actions for lack of standing or an interest to sue, the courts have at least tacitly reaffirmed their ultimate authority not only to construe the constitution but also to define under the constitution their own competence for judicial review. No judges question their ultimate authority to adjudicate the issue, but they have allowed the constitutionality of the SDF and their role to remain undetermined. By abstaining, they defer to the Diet and the cabinet, permitting the government – and, above all, the Cabinet Legislation Bureau – to define constitutionally permissible defence policy, but only within the outer parameters judges themselves have established. The prevailing principle that emerged from *Sunakawa* confirms both the competence of the judiciary to construe article 9, but also permits the political branch significant discretion to set defence policy. In other words, the Diet and cabinet are permitted to act only to the extent that the judiciary considers their actions acceptable. The judiciary continues to have final say as to the legality of the SDF and their role. In effect, both the courts exercising their constitutionally explicit authority of judicial review, as well as the political branches of government, have separate spheres of authority that in practice produce a shared competence. So long as the courts defer to the political branches, the issue might be viewed as left to political decisions, and thus to potentially fluctuating constructions. In practice, however, the Cabinet Legislation Bureau’s interpretation of what article 9 permits has become the controlling authority.

IN THE SHADOW OF THE CABINET LEGISLATION BUREAU

The lack of a ruling by the Supreme Court on the constitutionality of the SDF on the merits, or even a decision as to whether the *Sunakawa* approach applies, has left a vacuum, filled by disparate voices. Without a definitive Supreme Court decision on the constitutionality of the SDF, or even the reviewability of the issue, these issues have remained contentious, sustaining repeated conservative demands for revision of article 9.⁵⁷ The legal vacuum left by the Court also produced demand for alternative authority, thereby empowering individuals and agencies most effectively claiming competence to render an authoritative opinion. In the end, the Cabinet Legislative Bureau emerged as the single most influential actor.

Political ideology and aspirations aside, as a matter of policy, every government since 1952 – including the Social Democratic-Liberal Democratic coalition government (1994-1996) – has affirmed the legality of Japan’s security arrangements and the SDF. They have all done so with supporting advisory opinions from the Cabinet Legislation Bureau in hand.

The Bureau’s most significant pronouncement was made in 1960 in response to opposition to the revised U.S.-Japan Security Treaty. In answer to questions raised by opposition party leaders, the Bureau affirmed the Kishi cabinet’s position. The *Sunakawa* decision had been handed down in December 1959, determining the basic issue of the constitutionality of the Treaty. As then-Director Shūzō Hayashi later recalled, most of the questions related to the role of U.S. Forces in the region and the extent to which the Japanese government had to approve, or at least be notified, of such deployment.⁵⁸ These issues were to

⁵⁷ For a recent call for revision, see Shūgiin Kempō Chōsakai (House of Representatives Constitution Investigation Commission), *Interim Report* (November 5, 2002), online: House of Representatives <<http://www.shugiin.go.jp>>.

⁵⁸ Hayashi Shūzō, “Hōsei kyoku jidai no omoide — Hōsei kyoku no katsudō to anpo jōyaku no koto (Recollections of My Time With the Legislation Bureau — Legislation Bureau Activities and the Security Treaty)” [Shūzō] in Naikaku Hōsei Kyoku Hyakkunenshi Henshū Finkai, ed., *Shōgen: Kindai hōsei no kisek i — Naikaku Hōsei Kyoku no kaisō* (Testimony: The Locus of Legislation in the Modern Era — Reflections on the Cabinet Legislation Bureau) (Tokyo: Gyōsei, 1985) 9.

become quite critical in the mid-1960s during the Vietnam War, but they were largely resolved by the end of the decade. Of more lasting significance were views expressed that Japan could only engage in combat activities independently (*kobetsu-teki ni*), and only when directly attacked or at least threatened. Article 9 did not permit Japan to otherwise participate in mutual security operations.⁵⁹

Article 9, as construed, could possibly allow separate or independent (*kobetsu*) military action in defence of Japan. And such construction still might permit Japan to coordinate an erstwhile “independent” military action with another state. But “in defence of Japan” could mean only in the event of a direct armed attack or, perhaps construed more broadly, to include military action in the region against, for example, North Korea, even in response to less imminent but real threats to Japanese security and, perhaps even preemptive action. Each of these views could still restrict Japan’s capacity either to maintain its own military forces or to participate with such forces in any direct combat engagement not directly related to the defence of Japan, or both. Moreover, to the extent that military forces could possibly be used for both aggressive and defensive actions, or autonomously, it could be argued, an as-yet tacit line demarcating the parameters of article 9 would have been transgressed.

The formally expressed views of the Bureau may have left unresolved many soon-to-become-critical issues, but they did provide needed legitimacy for policies pursued by successive cabinets. In some instances, the Bureau also provided political cover. In June 1994, for example, Tomiichi Murayama, long-time leader of the Social Democratic Party (SDP, prior to 1991 the Socialist Party) became prime minister, forming an LDP/SDP coalition cabinet. Questioned in the Diet about how, as SDP leader, he could disavow one of his party’s ideological pillars – that the SDF and, indeed, the U.S.-Japan Security Treaty were unconstitutional – Murayama replied that as prime minister, he was

⁵⁹ Nakamura Akira, *Sengo seiji ni yureta kenpō 9-jō: Naikaku Hōsei Kyoku no jishin to tsuyosa* (The Impact of Constitution Article 9 on Postwar Politics: The Confidence and Strength of the Cabinet Legislation Bureau) (Tokyo, Chuo Keizai Sha, 1996) at 180-82, quoting statements made by Bureau Director Hayashi in March 1960 [Akira].

now compelled to adhere to the opinion of the Cabinet Legislation Bureau.⁶⁰

The Bureau’s official views have established parameters for government policy that have also been very difficult to alter and thus have enduring influence. A small agency with only a handful of core staff consisting almost entirely of career personnel assigned from other ministries to serve in the Bureau for extended periods of time,⁶¹ the Bureau has become an elite agency within the bureaucratic hierarchy. Transfer to the Bureau represents a plum assignment for young officials with strong legal credentials. This prestige reinforces respect within other ministries for the legal expertise of the Bureau, which in turn contributes to the deference given to its opinions on proposed legislation as well as its interpretative pronouncements. The Bureau also shares organizational orientations with these other elite bureaucracies, which produces remarkable cohesion and continuity.⁶² All key positions in the First Department, the division responsible for advisory opinions on the constitutionality of proposed legislation, including Japan’s defence policies, are, presently at least, held by graduates of the University of Tokyo Faculty of Law.⁶³ All members of the department’s key staff thus have a common educational background and presumably share, within limits, general perspectives on law and the constitution. The general tendency within any agency to defer to past positions is thus compounded where career affiliations create even greater cohesion. Moreover, senior Bureau officials inculcate internal values that reinforce agency ideology as a politically autonomous, professional agency. It claims legal expertise and authority second only to the judiciary. And some within the Bureau are said to view their product – expert opinions interpreting legislation and the constitution – as even more legally authoritative than judicial

⁶⁰ *Ibid.* at 1-3.

⁶¹ For a series of essays — mostly reminiscences by former directors and staff — that provide instructive insight on the Bureau, its functions and its values, see Naikaku Hōsei Kyoku Hyakkunenshi Henshū Iinkai, *supra* note 58.

⁶² For analysis of the organizational features of Japan’s most elite bureaucracy and their consequences, see John O. Haley, “The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust,” online: Washington University of St. Louis Faculty Working Papers <law.wustl.edu/Academics/Faculty/Workingpapers/TheJapaneseJudiciary10_03.pdf>.

⁶³ *Seikan yōran* (Civil service directory) (Tokyo: Seisakushū Ai.Bi, 2003) at 603-604.

precedents.⁶⁴ Thus, Bureau views, particularly its statutory and constitutional interpretations, have exceptional influence and endurance. For the Bureau to disavow, or even modify, any long-standing legal interpretation also exposes it to political pressures that undermine its sense of autonomy as well as public trust in its neutrality and professionalism. As a result, the Bureau's interpretation of article 9 has not only politically bound successive governments, it is also exceedingly difficult for even the Bureau itself to alter. As a recent director of the Bureau is quoted as having stated, "[c]abinets may change, [our] constitutional interpretations do not."⁶⁵

On the two most basic issues – the constitutionality of mutual security arrangements with the United States and the SDF – the Bureau's opinions pose few problems, except for the few who continue to insist that either or both are unconstitutional. The Bureau's interpretations reflect and buttress official government views, which have been broadly, if not universally, shared at least since the Commission on the Constitution (1957-1964)⁶⁶ issued its final report and the single most authoritative non-judicial construction of article 9. In the report, nearly all of the commissioners agreed that:

Under Article 9 as it stands, the system of defence, including the Self-Defence Forces, entry into the United States, and the security treaty with the United States,

is both acceptable and not unconstitutional.⁶⁷

Those who disagreed, the report continued, argued that article 9 should be revised to make Japan's defence system constitutional, with a majority supporting revision at least for the sake of clarification.⁶⁸

Official and public acceptance of this interpretation has allowed Japan to steadily increase financial and operational responsibility for its own defence and progressively expand its military capability since 1952. Under the 1957 Basic Policy for National Defence and the Japan-U.S. Security Treaty as revised in 1960, Japan continued to provide infrastructural support and territory for U.S. bases in Japan in return for U.S. military protection. During what some characterize as a period of "flexible interpretation,"⁶⁹ all postwar governments expanded the capacity and role of the SDF. Although in 1976 the Miki cabinet limited defence spending to 1 percent of the GNP, given the size of the Japanese economy, this limitation still enabled Japan to maintain the third or fourth largest defence budget of any single nation on the globe.⁷⁰

The revisions to the U.S.-Japan Mutual Security Treaty in 1960 expanded territorial scope for military consultation and cooperation to include threats to international peace and security throughout East Asia.⁷¹ Cabinet Legislation Bureau opinions, however, stated that despite treaty language, Japan could only participate in so-called collective security arrangements independently to defend against direct threats to Japan.⁷² This opinion remains the politically controlling interpretation of article 9. Successive governments continue to reject domestic as well as overseas calls for active SDF combat participation in UNPKO as well as collective security operations.

⁶⁴ Narita Yoshiaki, "Gakusha no me kara mita Naikaku Hōsei Kyoku" in Naikaku Hōsei Kyoku Hyakkunenshi Henshū Iinkai, *supra* note 58 at 269.

⁶⁵ Quoted in Akira, *supra* note 59 at 3.

⁶⁶ The Commission, chaired by University of Tokyo Professor of Law, Kenzō Takayangi, was established by statute (Law No. 140) in 1956 to study the constitution and make recommendations to the cabinet. The Socialist Party denounced the Commission and refused to participate in its deliberations despite repeated efforts. Nevertheless, the Commission's report can be viewed as the most authoritative study of the postwar constitution, including problems of interpretation and application. For an English-language treatment of the Commission and its work, including translation of its Final Report, see John M. Maki, *Japan's Commission on the Constitution: The Final Report* (Seattle: University of Washington Press, 1980). In January 2000, a similar effort to review the constitution was initiated by the lower house of the Japanese Diet. It issued an interim report in November 2000. Although it included calls for revision, this report did not itself make such a proposal. See *ibid.*

⁶⁷ *Ibid.* at 271.

⁶⁸ *Ibid.* at 271-72.

⁶⁹ See Auer, "Article Nine," *supra* note 32 at 74.

⁷⁰ As of 2000, in terms of U.S. dollars, only the defence budgets of the United States, China (estimates), and France exceed Japan's.

⁷¹ See Treaty of Mutual Cooperation and Security between the United States of America and Japan, 19 January 1960, U.S.-Japan, 11 U.S.T. 1632, art. IV.

⁷² See Shūzō, *supra* note 58.

Since 1960, two significant formal developments occurred in U.S.-Japan bilateral security relationships. The 1978 Guidelines for Japan-U.S. Defence Cooperation⁷³ dealt primarily with what is euphemistically referred to as “burden-sharing,” or Japan’s perceived duty to share an increased proportion of the costs of mutual defence, notably for U.S. bases in Japan. These guidelines were renegotiated under the Clinton administration, resulting in the 1997 Guidelines for U.S.-Japan Defence Cooperation,⁷⁴ which clarified Japan’s military role in the event of actions in the region. Iraq’s 1990 invasion of Kuwait, and the ensuing crisis and military engagement in the Persian Gulf, forced the issue. Under severe political pressure from the United States, Prime Minister Kaifu dispatched four minesweepers for cleanup operations in 1991 and his successor, Prime Minister Miyazawa, sent army engineers as peacekeepers to Cambodia in 1992. Forced with having to make a decision, they articulated what has become the prevailing view: article 9 prohibits any deployment of combat forces for collective security measures in the absence of a direct threat to Japanese security. Otherwise, opinions in the early 1990s varied. Some would have allowed non-combat forces to participate in UN peacekeeping operations. Others argued that constitutional amendment is necessary, and still others opined that the SDF could participate as UN forces without constitutional amendment.⁷⁵ By the mid-1990s a series of proposals for constitutional revision had been put forward.⁷⁶ The new century began in Japan with the appointment in January 2000 of a House of Representatives Research Committee to study the issue of constitutional revision once more.

The attacks of 11 September 2001, the ensuing “war on terrorism,” and the renewed use of military force against Iraq resulted in renewed U.S. pressures on Japan to expand military participation in collective security arrangements. The Koizumi government responded to the 9/11 attacks with enactment on 29 October 2001 of the Anti-Terrorism Special Measures Law,⁷⁷ after an extensive three-week debate. Legislation was also enacted amending the 1954 SDF Law,⁷⁸ allowing Japan to commit forces to U.N. peacekeeping operations. All measures require prior Diet approval of any deployment outside of Japanese waters and airspace where combat is taking place.⁷⁹ Without prior legislative approval, the SDF may use force only in the event of “an unavoidable and cause” to protect SDF lives and safety.⁸⁰ Under this legislation, at the request of the U.S. government in November 2002, Japan deployed in the Indian Ocean a number of support vessels for refueling, as well as escort destroyers, including, as noted, missile-mounted Aegis destroyers with advanced radar capability. These measures reflected the concern that, absent a credible direct threat to Japanese national security, the use of force even in the context of the collective security measures would violate article 9.⁸¹ The government’s response was to allow such use for force only with specific legislative approval. Perceptions of a more direct threat by North Korea have intensified the debate. In June 2003, the Diet enacted emergency amendments to these three statutes. The changes are to provide greater flexibility for SDF participation in collective security and “anti-terrorist” military actions, as well as to enable more rapid SDF response to potential direct military threats to

⁷³ See Japan Defence Agency, “Guidelines for Japan-U.S. Cooperation (1978),” in *Defence of Japan 1979 (White Paper)* (Mainichi Daily News, 1979) at 187.

⁷⁴ U.S.-Japan Security Consultative Committee, *The Guidelines for U.S.-Japan Defence Cooperation*, (23 September 1997) 36 International Legal Materials. 1621. For an analysis in English, see Chris Ajemian, “The 1997 U.S.-Japan Defence Guidelines Under the Japanese Constitution and Their Implications for U.S. Foreign Policy” (1998) 7 *Pacific Rim Law & Policy Journal* 323.

⁷⁵ Auer, *Postwar Rearmament*, *supra* note 9 at 79, citing Masashi Nishihara, *Emergency Military Roles for Japan* (New York: MacEachron Policy Forum, 1993) at 4-6.

⁷⁶ For detailed analysis from an ardently progressive ideological perspective with translations of the most significant proposals, see e.g., Glenn D. Hook & Gavan McCormack, *Japan’s Contested Constitution: Documents and Analysis* (London and New York: Routledge, 2001).

⁷⁷ *Heisei jūsanen kugatsu jūichinichi no Amerika gasshūkoku ni oite hassei shita terorisuto yoru kōgeki nado ni taiō shite okowareru kokusai rengō kenshō no mokuteki tassei no tame no shogaikoku no katsudōmni taishite wagakuni ga jissei suru sochi oyobi kanren suru kokusai rengo ketsugi nado ni motozuku dōteki sochi ni kansuru tokubetsu sochi hō* (The 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 that Occurred on 11 September 2001 in the United States of America as well as Humanitarian Measures Based on Relevant Resolutions of the United Nations), Law No. 113 (2001).

⁷⁸ *Jieitai hō*, (Self-Defence Forces Law), Law No. 65 (1954) as am. by Law No. 115 (2001).

⁷⁹ See e.g., Anti-Terrorism Special Measures Law, *supra* note 77, art. 5.

⁸⁰ See e.g., *ibid.*, art. 12(1).

⁸¹ See e.g., Editorial, *Japan Times* (21 November 2002); Editorial, *Asahi Shinbun* (20 November 2002)

Japan, including, some have suggested, the use of preemptive strikes.⁸² Then in January 2004, again in response to U.S. requests for Japan to send military forces to Iraq, the cabinet proposed and the Diet enacted legislation authorizing the dispatch of troops.⁸³ Without constitutional amendment or a permissive Supreme Court decision, however, the Koizumi cabinet, like others, has been forced to justify its defence policies within the verbal parameters established over three decades ago by the Cabinet Legislation Bureau – combat activity in a collective security operation against a state that has not attacked or posed a direct threat to Japan’s own security is not allowed under article 9. Thus, the dispatch of 500 GSDF personnel to Iraq in February 2004 was justified as a humanitarian mission to aid in Iraq’s reconstruction.⁸⁴ However, the 2003 White Paper on Defence Policy contains a subtle change in wording. Every White Paper on Defence Policy since 1981 had disallowed any dispatch of forces abroad “for the purpose of using force” (*buryoku kôshi no mokuteki o motte* as officially translated).⁸⁵ The 2003 White Paper, as noted by Hitotsubashi University Professor Ichirô Urata, slightly rephrased the statement to reject the dispatch of forces with “the use of armed force as its purpose” (*buryoku kôshi o mokuteki to shite*).⁸⁶ Any difference in meaning, at least as translated, seems slight, but there is a possible nuance in the more recent statement that incidental, as opposed to intentionally planned, use of force is constitutionally permissible.

Having once justified policy on the basis of the Bureau’s interpretations successive governments have, in effect, become politically bound to follow the Bureau’s pronouncement. The Bureau itself is even less able to change what it set forth as a politically neutral, expert opinion. As Bureau Counselor Kazuhirô Yagi recently noted, quoting the preexisting language of the official

defence policy statement on the illegality of dispatching SDF forces abroad with an intent to use armed force, it is difficult to set out a persuasive interpretation that in effect eradicates one that has prevailed for half a century.⁸⁷ The resulting political inflexibility sustains pressures to amend the article. Yet the Japanese people appear to approve the current structure of rather ill-defined, yet durable constraints on Japan’s capacity to wage war.

Both electoral results and public opinion polls have long revealed what most observers have viewed as a paradox if not a contradiction. By significant majorities, the Japanese people appear to oppose any revision of article 9, but support the SDF and their deployment with legislative sanction. The seemingly antithetical aspects of these views can be reconciled if one accepts the proposition that the public is willing to allow an armed force but only within parameters that are still ill-defined. So long as article 9 remains, the government is constrained by the need for legislative approval and at least potential judicial objection. Thus, by gradual evolution, a consensus seems to have emerged allowing the maintenance of armed forces, but limiting their use to non-combat roles that also have explicit legislative approval. In a sense, the Japanese have transformed a constitutional provision designed to protect Japan’s neighbors from militaristic nationalism into one that protects the Japanese people from the burdens of war. Whether the public would support blanket legislative approval of military forces and their use in combat operations remains to be seen. At some point, the courts could still step in, reasoning that the legislature had overstepped the bounds of its supremacy by approving measures in “unmistakable” contravention of article 9.

The current debate over SDF deployment and the legal capacity to engage in combat in collective security and “anti-terrorist” actions also implicates the long-standing understanding that whatever the allowance for “defensive” weaponry, article 9 prohibits the maintenance of “aggressive” military armaments. Thus, for article 9 to be meaningful as construed, a viable distinction has

⁸² See e.g., Alan Boyd, “Awakening Japan’s sleeping defence giant” *Asia Times Online* (28 May 2003), online: *Asia Times Online* <www.atimes.com/atimes/Japan/EE28Dh01.html>.

⁸³ *Iraku shien tokubestu sochi hô* (Iraq Assistance Special Measures Law), Law No. 137 (2003).

⁸⁴ See e.g., online: *Asahi* <<http://www.asahi.com/politics/update/0202/004.html>>.

⁸⁵ See online: Japan Defence Agency <<http://www.jda.go.jp/e/top/main.htm>>.

⁸⁶ Urata Ichirô, “Sengo kenpô seiji9 ni okeru 9 jô no igi (Meaning of Article 9 in the Context of Postwar Constitutional Politics)” (2004) 1260 *Jurisuto* 50 at 54.

⁸⁷ Yagi Kazuhirô, “Kenpô 9 jô ni kansuru seifu no kaishaku ni tsuite (Concerning the Government’s Interpretation of Article 9 of the Constitution)” (2004) 1260 *Jurisuto* 68 at 74.

to be made both between “aggressive” versus “defensive” wars, as well as, in technological terms, the “aggressive” or “defensive” nature of “war potential.” If no distinctions on these grounds can be reasonably made, then article 9, as construed, becomes irrelevant. Either, as Prime Minister Shigeru Yoshida may have feared, Japan could constitutionally justify any military engagement (or maintain any sort of military weaponry, including nuclear weapons in the name of “self-defence”) or, because of possible aggressive use, no “war potential” of any sort could be maintained. As noted above, Kades himself admitted that, in drafting the original version of article 9, concern over American perceptions that Japan could justify a revival of militarism and return to armed adventurism led him to exclude any explicit reference of the right of self-defence and to leave unlimited its broadly worded renunciation of war and prohibition of war potential.

However difficult a distinction between “aggressive” and “defensive” military action may seem, a military establishment can be reasonably characterized as offensive or defensive in terms of capability. James Auer thus makes a persuasive case that Japan’s contemporary military establishment is, as a matter of capability, essentially defensive.⁸⁸ In Auer’s view, Japan “has sincerely endeavored to live within the spirit of Article 9...in building a meaningful but limited defence capability, clearly *complementary* to rather than *autonomously separate* from U.S. military power.”⁸⁹ Current statistics confirm Auer’s assessment of Japanese military capacity. Japan’s defence budget in 2000 was 45.6 billion U.S. dollars. The GSDF (army) had 148,500 active personnel, divided into twelve combat divisions, with 1070 tanks, and ninety attack helicopters, with additional artillery/air defence guns and missiles. The Maritime Self-Defence Force, on the other hand, had 42,600 active personnel with sixteen SSK submarines, fifty-five principal surface vessels, thirty-one minesweepers, and nine carriers with a 12,000-person marine air arm with eighty combat aircraft and eighty armed helicopters. Finally, in 2000, the Air Self-Defence Force had 44,200 active personnel, 331 total combat aircraft with supporting air defence guns

and missiles. With less than one-third of Japan’s population, South Korea is reported to have about 560,000 army personnel, 2,250 tanks, 4,850 pieces of field artillery, 2,300 armored vehicles, 150 multiple rocket launchers, thirty missiles, and 580 helicopters. The South Korean navy has 67,000 personnel, 200 vessels, including submarines, and sixty aircraft. The South Korean air force has approximately 63,000 personnel and 780 aircraft, including KF-16 fighters.⁹⁰

North Korea, in contrast, is estimated to have 700,000 active military personnel, 2000 tanks and 1600 military aircraft, and navy of over 800 ships.⁹¹ In sum, in terms of personnel, Japan has the smallest military establishment in East Asia. However, in terms of budget and technology, it has the most costly, advanced and well-equipped armed forces in the region, one whose defensive capacity is second only to the United States but whose ability to project military power beyond its shores is relatively weak.

In light of both the inherent difficulty in distinguishing between “offensive” and “defensive” weaponry and the military strength of neighboring states, Japan’s current political consensus that the SDF should be allowed but their activities restricted has a commonsense appeal. The potential threat to Japanese security in the region is real. Moreover, to the extent that the underlying concern informing the prohibition contained in article 9 is Japan’s capability to wage an aggressive war, limiting the SDF to non-combat functions in any collective security action seems to strike an appropriate balance. It is at least one that has obvious appeal to the Japanese public, who have good reason to support the existence of the SDF but, given the memory of wartime suffering, prefer to avoid putting Japanese soldiers, sailors, and airmen in harm’s way unless necessary for Japan’s vital interests. Yet, reliance on a four-decade-old bureaucratic interpretation of

⁸⁸ Auer, “Article Nine,” *supra* note 32 at 69-86.

⁸⁹ *Ibid.* at 83 [emphasis in the original].

⁹⁰ See “National Defense Program Guidelines for FY 2005 and After” (approved 10 December 2004), online: Japan Defense Agency <http://www.jdo.go.jp/e/index_.htm>. For 2003 and comparative figures see *The Defense Monitor* 32:5 (November/December 2003), online: Centre for Defense Information <<http://www.cdi.org/news/defense-monitor/dm.pdf>>.

⁹¹ U.S. Department of Defense, *2000 Report to Congress, Military Situation on the Korean Peninsula* (12 September 2000), online: U.S. Department of Defense <<http://www.defenselink.mil/news/Sep2000/korea09122000.htm>>.

article 9, pronounced in a political context far removed from the present, makes less sense. A more permissive constitutional interpretation, one that would permit legislative action, would seem better. A legislative direction would allow more flexible responses to changing international and regional developments that may affect Japanese security but still ensures a democratic check on the use of force. And were the legislature to go beyond limits set by a judicially perceived “sense of society,” the Supreme Court might speak at last.

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