

FUTURE RELATIONS BETWEEN THE UNITED STATES AND JAPAN: ARTICLE 9 AND THE REMILITARIZATION OF JAPAN

*D. Bradley Gibbs**

I.	INTRODUCTION	138
II.	BACKGROUND: HOW AND WHY THE “NEW” CONSTITUTION OF JAPAN WAS ADOPTED	139
	A. <i>An Overview</i>	139
	B. <i>The Adoption Process</i>	141
III.	THE REINTERPRETATION OF ARTICLE 9 AND THE REMILITARIZATION OF JAPAN.....	145
IV.	BOTH SIDES OF THE ARGUMENT FOR REMILITARIZATION ..	151
	A. <i>Arguments in Favor of Remilitarization</i>	151
	B. <i>Arguments Opposing Remilitarization</i>	155
V.	THE FUTURE OF ARTICLE 9	157
	A. <i>Debate and the Possibility of Constitutional Amendment</i>	157
	B. <i>A Historic Shift in Politics: The Future of Article 9 Under the Democratic Party of Japan</i>	164
VI.	U.S.–JAPAN RELATIONS: NOW AND IN THE FUTURE.....	166
VII.	CONCLUSION.....	174

*D. Bradley Gibbs will receive his J.D. in 2011 from the University of Houston Law Center, where he is specializing in oil and gas law, environmental law, and international law. He is a graduate of Texas State University. This comment received the 2010 Adams & Reese Writing Award for an Outstanding Comment on a Topic in International Law and was inspired by the author’s three-year tenure as an English teacher in Wakayama Prefecture, Japan. He would like to thank his family for their love and support, and Boards 34 and 35 of the Houston Journal of International Law.

I. INTRODUCTION

In response to the recent threats emanating from China and North Korea, as well as the ongoing war in Afghanistan, the United States is urging Japan to rebuild its long-dismantled military forces.¹ In 2009, following a historic political shift within Japan's government, the controversial topic of amending Article 9 of Japan's Constitution emerged once again.²

The irony of U.S. support of Japanese "remilitarization" is that the United States designed and wrote the framework for Japan's post-WWII pacifist Constitution (sometimes called the "Peace Constitution"), which expressly prohibited Japan from ever again maintaining an offensive military.³ Since WWII however, the United States has dramatically changed its stance on the Japanese military because of Japan's economic strength and the strong U.S.–Japan bonds that have developed.⁴ The ideological shift toward remilitarization has been met with mixed opinions both in Japan and abroad.⁵

This comment will examine Article 9's history, the possibility of amendment under the Democratic Party of Japan, changing interpretations of Japan's constitutional potential for

1. See Asia for Educators, Foreign Policy and Defense: Article 9 and the U.S. Japan Security Treaty—Essay: An Overview of Japan's Postwar Defense Policy, <http://afe.easia.columbia.edu/japan/japanworkbook/fpdefense/artnine.htm> (last visited Oct. 3, 2010).

2. See Liu Jianguo, *Hatoyama Victory a Watershed in Japanese Postwar History: A View on the Japanese Election from China*, EAST ASIA FORUM (Sept. 26, 2009), <http://www.eastasiaforum.org/2009/09/26/hatoyama-victory-a-watershed-in-japanese-post-war-history-a-view-on-the-japanese-election-from-china/> (noting the shift from the Liberal Democratic Party to the Democratic Party of Japan).

3. Nihonkoku Kenpō [KENP] [CONSTITUTION], art. 9 (Japan) [hereinafter KENP]; Susan W. Brenner & Anthony C. Crescenzi, *State-Sponsored Crime: The Futility of the Economic Espionage Act*, 28 HOUS. J. INT'L L. 389, 406–07 (2006). There is some debate about the definition of "offensive," however. See Brenner & Crescenzi, *supra*, at 406–07 (noting the uncertainty surrounding the deployment of cyber weapons).

4. See James E. Rogers, Comment, *Going Too Far Is Worse than Not Going Far Enough: Principle-Based Accounting Standards, International Harmonization, and the European Paradox*, 27 HOUS. J. INT'L L. 429, 448 (2005) (noting that "the United States' closest competitor for pure scale of economy and raw production power is Japan").

5. Asia for Educators, *supra* note 1.

war, both sides of the remilitarization debate, and the implications on U.S.–Japan military and economic relations, both now and in the future.

I propose that Article 9 be amended and remilitarization allowed in Japan. Japan is well aware of its aggressive military history, and although the Japanese people tend to support Japan's post-WWII pacifist stance,⁶ the time has come for Japan to take greater responsibility for its own defense. The United States has not formally “occupied” Japan for quite some time, but it continues to bolster Japan's military resources by providing potential offensive capabilities should the need arise.⁷ I further propose that remilitarization has already become a reality and that legal and political semantics are distracting attention from this truth.

I will also examine the question of whether it is politically and economically feasible for the United States to continue to provide the level of military support it has been providing since WWII. In my opinion, the answer to this question is a resounding no, and a limited allowance for Japanese military buildup is the only realistic option at this point.

II. BACKGROUND: HOW AND WHY THE “NEW” CONSTITUTION OF JAPAN WAS ADOPTED

A. *An Overview*

Japan's Peace Constitution came into effect on May 3, 1947 and is uniquely pacifist in nature.⁸ Article 9 renounces war, but has been interpreted to allow Japan *Jieitai* (自衛隊), which translates to “Self-Defense Forces” (SDF), a broad designation that includes the Air SDF, Maritime SDF, and Ground SDF.⁹ The Peace Constitution is also sometimes referred to as the “MacArthur Constitution,” because it was heavily influenced by General Douglas MacArthur, Supreme Commander for the

6. *Id.*

7. Sayuri Umeda, *Japan: Article 9 of the Constitution*, LAW LIBRARY OF CONGRESS, 13 (2006), <http://www.loc.gov/law/help/JapanArticle9.pdf>.

8. *Id.* at 1.

9. *Id.*

Allied Powers.¹⁰ After U.S. occupation of Japan began, MacArthur was instrumental to the architecture of Article 9, which was designed to ensure that Japan would never go to war again: Japan was to remain disarmed, and Japan's postwar military policies were to be subject to strict U.N. oversight.¹¹

Japan's new Constitution reflected significant changes in the views of the post-WWII international community, and was revolutionary at its inception.¹² At the time of its promulgation, nations began to accept a new philosophy that centered on the basic premise that war is illegal, and "the Japanese Constitution created what amounts to a kind of experiment in which one nation, Japan, explicitly manifested the aforementioned process of change."¹³

The Japanese Constitution and the interpretation of Article 9 in particular have given rise to much controversy between scholars of international law and scholars of constitutional law.¹⁴ It is best viewed in the modern context of international relationships and the U.N. Charter.¹⁵

The fundamentals of the Japanese Constitution of Japan are built on the principles of "popular sovereignty, respect for human rights, and pacifism."¹⁶ The pacifist principle is particularly important in the international context.¹⁷ Article 9, the so-called "no-war" clause, is "basically a mutual pledge between [the international community] and the people of Japan that the State will never again use force as an instrument of national policy, and that the [Japanese] people will not be made

10. Asia for Educators, *supra* note 1.

11. *Id.*

12. KAZUKO HIROSE KAWAGUCHI, A SOCIAL THEORY OF INTERNATIONAL LAW: INTERNATIONAL RELATIONS AS A COMPLEX SYSTEM 140 (Shigeru Oda & Yuji Iwasawa eds., 2003).

13. *Id.*

14. *Id.* at 142.

15. *See id.* (discussing the conflict between constitutional scholars, who tend to disregard international relationships and view a constitution as an independent body of law, and international law scholars, who tend to view a constitution's status and function in the context of international relationships and the U.N. Charter).

16. *Id.*

17. *See* Yamaguchi Jiro, *The Gulf War and the Transformation of Japanese Constitutional Politics*, 18 *J. JAPANESE STUD.* 155, 156, 165 (1992).

to go to war against their will.”¹⁸ One factor that contributed to the general acceptance of such a revolutionary document was the avoidance of harsh reparations such as those imposed on Germany after World War I, which was one of the causes behind Germany’s decision to wage war a second time.¹⁹

Another factor that makes Japan’s Constitution unique is that it puts Japan distinctively under the control of a world government, namely, the United Nations.²⁰ Kazuko Hirose Kawaguchi, a social theorist and professor emeritus at Sophia University, sums up these external aspects of the Peace Constitution by asserting that Japan’s pacifism has always been tacitly supported by a system (the United Nations or the international community) that received it and made its existence possible, and the Peace Constitution officially declared its pacifism to the world.²¹ I interpret Kawaguchi’s analysis to mean that although Japan is a pacifist nation by law, it is still uniquely dependant on the rest of the world for protection, but is limited in its ability to involve itself in the military struggles of its political allies. This global military dependence is an ongoing point of tension and debate within Japan, the United Nations, and the international community.²² It is time for Japan to accept a greater amount of responsibility for its own protection and to continue the process of cautious remilitarization.

B. *The Adoption Process*

It should come as no surprise that the Japanese Constitution went through a series of changes before it was ratified.²³ It is more surprising that, in more than fifty years, the Japanese Constitution has never been amended.²⁴ This lack of amendment has not, however, kept constitutional interpretation rigid over time.²⁵

18. *Id.*

19. *Id.*

20. *Id.* at 144.

21. *Id.*

22. *Id.* at 145.

23. *See infra* notes 36–43 and accompanying text.

24. Umeda, *supra* note 7, at 29.

25. *See infra* Part II.

The Constitution's pacifist intent is reflected in its Preamble:

We, the Japanese people . . . determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government²⁶

We . . . desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all the peoples of the world have the right to live in peace, free from fear and want.²⁷

We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations.²⁸

We . . . pledge our national honor to accomplish these high ideals²⁹

This eloquent and lofty language embodies Japan's sincere desire to make amends for past wartime actions and to avoid the sort of horror that followed nuclear bombings of Hiroshima and Nagasaki.³⁰ In a famous opinion, the Japanese Supreme Court

26. KENP Pmbl.

27. *Id.*

28. *Id.*

29. *Id.*

30. See *Sakata v. Japan*, 13 KEISH 3225 (Sup. Ct., Dec. 16, 1959), available at <http://www.courts.go.jp/english/judgments/text/1959.12.16-1959-A-No.710.html> (popularly known as the "*Sunakawa* case") [hereinafter *Sunakawa*]. The Supreme Court of Japan stated that the people of Japan had a "sincere desire for lasting peace," and that Japan had "firmly resolved that never again shall [it] be visited with the horrors of war" and that Article 9 "reflect[ed] upon the errors of militaristic activities committed by the government in the past." *Id.*

acknowledged as much: “[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.”³¹ This sentiment is still widely held by the Japanese people, as is evident from the general reluctance to remilitarize.³²

However, because of the Preamble’s abstract language, it is not generally thought to be legally binding. ³³ Instead, it is used primarily to guide interpretation of various articles of the Constitution—including Article 9.³⁴ The Article’s language is more concrete:

[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 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.³⁵

Finalizing this language was no small feat, and the drafting process is illustrative of the Constitution’s unusual legislative history. An understanding of the drafting process also helps to put the subsequent evolution of constitutional interpretation in context.

Upon surrendering at the end of WWII, Japan accepted the terms of the Potsdam Declaration.³⁶ Among other things, the Potsdam Declaration called for an end to the “authority and influence of those who have deceived and misled the People of

31. *Sunakawa*, *supra* note 30 (holding that U.S. security forces in Japan are foreign troops and are not a war potential in violation of article 9); KENP art.98, para. 1—2 (stating that the Constitution is the supreme law of the land, and that treaties concluded by Japan and established laws of the nations shall be faithfully observed).

32. *Asia for Educators*, *supra* note 1.

33. *Umeda*, *supra* note 7, at 2.

34. *Id.*

35. KENP art.9.

36. *Umeda*, *supra* note 7, at 4.

Japan into embarking on world conquest,” established the Allied occupation, removed obstacles to a Japanese democracy, and expressed an intent to end the occupation once these goals had been accomplished.³⁷

MacArthur had a famously forceful personality, and he was the major catalyst behind the new Constitution.³⁸ After several failed attempts at amending the then-current Meiji Constitution to comport with the terms of the Potsdam Declaration, MacArthur directed his staff to draft a new Japanese Constitution.³⁹ Despite opposition to an entirely new Constitution drafted by foreigners,⁴⁰ Japan’s unconditional surrender gave it little choice in the matter.⁴¹ The idea of forever renouncing war was met with particular skepticism.⁴² Nevertheless, the final draft of Article 9 was submitted to the Diet (Japan’s bicameral legislature) for debate on March 5, 1946 and was ultimately accepted.⁴³

37. *Id.*

38. *Id.*; see Mark A. Chinen, *Article 9 of the Constitution of Japan and the Use of Procedural and Substantive Heuristics for Consensus*, 27 MICH. J. INT’L L. 55, 90 (2006) (noting the “mythic quality” of MacArthur’s personality).

39. Umeda, *supra* note 7, at 5.

40. See M. Ulric Killion, *Post-WTO China and Independent Judicial Review*, 26 HOUS. J. INT’L L. 507, 519–20 (2004) (noting that Western ideas are often met with resistance in Eastern cultures and that “Western ideas of . . . constitutionalism . . . often have little resonance in . . . Japanese . . . [culture]).

41. Umeda, *supra* note 7, at 6; see also Thomas F. Farr et al., *Religious Liberties: The International Religious Freedom Act*, 31 HOUS. J. INT’L L. 469, 492 (2009) (noting that MacArthur unilaterally enacted a major land redistribution program in Japan, and “the Japanese Diet did not have much choice in the matter”); Cassandra Jeu, Comment, *A Successful Permanent International Criminal Court . . . “Isn’t It Pretty to Think So?”*, 26 HOUS. J. INT’L L. 411, 415–16 (2004) (noting that MacArthur not only single-handedly created the Tokyo tribunal charged with prosecuting Japanese military leaders for war crimes, but also “decided the Tribunal’s substantive and jurisdictional law, chose its chief prosecutor, and even had the power to select its president and judges” without Japanese input).

42. Umeda, *supra* note 7, at 7 (noting that Charles L. Kades, the Deputy Chief of the government section of SCAP, thought that it was unrealistic to renounce war “for preserving [Japan’s] own security” was unrealistic).

43. *Id.* at 8.

III. THE REINTERPRETATION OF ARTICLE 9 AND THE REMILITARIZATION OF JAPAN

The Japanese Constitution forbids any sort of traditional military forces, but before it was adopted, Japan had maintained a powerful military with lavish military spending in addition to a paramilitary police force under the partial direction of the Home Ministry.⁴⁴ The Constitution forced Japan to shift to the other extreme and became a fully demilitarized state.⁴⁵ The only exception is the SDF, whose stated mission is to protect the Japanese mainland.⁴⁶

The Japanese government has interpreted Article 9 of the Constitution in a manner that allows the SDF to be considered constitutional, although many believe that it is not.⁴⁷ This more liberal interpretation of Article 9 has mirrored a similar change in U.S. attitudes toward Japan's defense. The original ideal of Japan existing peacefully under the supervision of a world government, i.e. the United Nations, changed rapidly. Because of general unrest and communist activity in the Far East, U.S. policymakers came to see Japan as very important to the defense of U.S. interests and democracy in Asia.⁴⁸

As a result, the United States became one of the largest sources of pressure for post-occupation rearmament while the Japanese government continued to resist the idea in the name of the U.S.-inspired Constitution.⁴⁹ Japan finally agreed to the creation of a "National Police Reserve," which was, in effect, a paramilitary force that existed to defend Japan.⁵⁰ Shortly

44. CHRISTOPHER W. HUGHES, JAPAN'S REMILITARISATION, 21 (Tim Huxley ed., 2009); Lee Hudson Teslik, *Japan and Its Military*, COUNCIL ON FOREIGN RELATIONS (2006), <http://www.cfr.org/publication/10439/>.

45. HUGHES, *supra* note 44, at 22.

46. Teslik, *supra* note 44.

47. Umeda, *supra* note 7, at 1.

48. Asia for Educators, *supra* note 1 (noting that Chiang Kai-shek, America's wartime ally in China, was defeated by the communists and fled to Taiwan in 1949; another one of America's wartime allies, the Soviet Union, quickly came to be seen as the biggest postwar threat to democracy; and in 1950 the Korean War pitted communist forces in the Far East against a U.N. force made up largely of U.S. soldiers).

49. *Id.*

50. *Id.*

thereafter, in 1952, the U.S.–Japan Peace Treaty went into effect, formally terminating the U.S. military occupation and restoring Japan’s independence.⁵¹ The Peace Treaty stated:

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 Nations⁵² and . . . may voluntarily enter into collective security arrangements.⁵³

Simultaneously, the United States ratified the “U.S.–Japan Security Treaty” and agreed to maintain its armed forces in and around Japan to deter armed attacks.⁵⁴ The United States made this agreement “in the expectation, however, that Japan [would] itself increasingly assume responsibility for its own defense against direct and indirect aggression.”⁵⁵ That expectation seems to reflect an understanding that Japan would eventually be allowed a limited power to remilitarize; The time has come for it to do so.

After the ratification of the Peace Treaty and the Security Treaty, the presence of American soldiers in Japan began to provoke public and political unrest.⁵⁶ This unrest pitted the moderate conservatives⁵⁷ and the nationalists⁵⁸ against the

51. Umeda, *supra* note 7, at 13.

52. U.N. Charter art. 51.

Nothing in the present Charter shall impair the inherent right of individual or collective [self-defense] if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of [self-defense] shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.

53. Treaty of Peace with Japan, Sep. 8, 1951, 3 U.S.T. 3169, T.I.A.S. 2490 (internal footnote added).

54. Umeda, *supra* note 7, at 13.

55. *Id.*

56. Asia for Educators, *supra* note 1.

57. *Id.* (noting the moderate conservatives represented the business, rural, and bureaucratic sectors, which made up a majority of the country). The moderate conservatives supported the creation of modest SDFs but preferred to entrust primary

labor unions and the socialist and communist parties, who felt that military association with the United States might lead to Japan being drawn into conflicts that did not directly involve Japanese interests.⁵⁹

Opposition to the SDF and other moves toward remilitarization led to a number of governmental and judicial decisions interpreting Article 9 and limiting Japan's self-defense rights.⁶⁰ The Japanese government has stated that there are three requirements which must be met in order to invoke the right to 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 force used to defend Japan is limited to the minimally necessary amount.⁶¹ The Japanese Supreme Court has not decided the constitutionality of the SDF, although the issue has been raised and the Supreme Court has the power to determine constitutionality.⁶²

The Supreme Court also has proven highly reluctant to render any sort of opinion on Article 9 of the Constitution. For example, in the "*Constitutionality of the National Police Reserve*" case, the court dismissed the cause of action on the grounds 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."⁶³ In what is popularly known as the "*Naganuma*" Case, the Sapporo District Court held that the SDF was

responsibility for military security of the country to the United States so that Japan could focus on military recovery. *Id.*

58. *Id.* The nationalists supported military alliance with the United States, but favored stronger political posture and independence in foreign affairs. *Id.*

59. *Id.*

60. *Sunakawa*, *supra* note 30; *Ito v. Minister of Agriculture, Forestry and Fisheries*, 712 HANREI JIH 24 (Sapporo D. Ct., Sept. 7, 1973) (popularly known as the "Naganuma case") [hereinafter, *Naganuma I*].

61. 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); *Umeda*, *supra* note 7, at 15.

62. KENP art. 81 ("The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation, or official act.").

63. Keisatsu yobitai iken soshō, Saikō Saibansho [Sup. Ct.] Oct. 8, 1952, 6 SAIK SAIBANSHO MINJI HANREISHI [MINSHI] 9, (Japan).

unconstitutional, but the judgment was reversed by the Sapporo High Court on procedural grounds.⁶⁴ The High Court stated, in dictum, that the constitutionality of the SDF was outside the scope of judicial review due to the high level of political judgment required.⁶⁵

Throughout the 1960s and 1970s, there were a number of treaty revisions, as well as popular opposition to Japan's military alliance with the United States.⁶⁶ By the 1980s the opposition had dwindled and there was general support for the U.S.–Japan alliance.⁶⁷ The “collective defense” (or “collective security”) issue rose to prominence in the 1990s, however, and continues to be important.⁶⁸ The original Security Agreement read:

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 recognized 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.⁶⁹

64. *Naganuma I*, *supra* note 60; *Naganuma*, Saik *Saibansho [Sup. Ct.] Oct. 8, 1952*, 36 *SAIK SAIBANSHO MINJI HANREISHI [MINSHI] 1679*, (*Japan*) [hereinafter *Naganuma II*].

65. *Naganuma II*, *supra* note 64.

66. See Umeda, *supra* note 7, at 20; see also Leonard Schoppa, *Japanese Domestic Politics: The Challenge of Turning off the Cruise Control*, presented at the Foreign Policy Research Institute program: Teaching Japan (Oct. 19–22, 2003), <http://www.fpri.org/education/teachingjapan/schoppa.domesticpolitics.html> (last visited Oct. 3, 2010).

67. See *id.*; see also Sook-Jong Lee, *Japan's Changing Security Norms and Perceptions Since the 1990's*, 31 *ASIAN PERSP.* 125, 128–30 (2007) (after the Gulf War, the United States sought to reinstate its political ties with East Asian countries through “the Nye initiative . . . [which] emphasized strengthening alliances in the regions, particularly with Japan”).

68. Umeda, *supra* note 7, at 22.

69. Security Treaty Between the United States and Japan, U.S.–Japan, pmb., Sep. 8, 1951, 3 U.S.T. 3329.

The U.S. Department of State describes the U.S.–Japan Treaty (as revised in 1960)⁷⁰ as one whereby both the United States and Japan recognize that an armed attack against either party in the territories under the administration of Japan would be dangerous to its own peace and safety.⁷¹ The treaty goes on to declare that both countries should act to meet the common danger in accordance with Japan’s constitutional provisions and processes.⁷² This treaty replaced the security treaty signed September 8, 1951.⁷³

The treaty’s language indicates that a threat against Japan is a threat against the United States, but that any reciprocal military action by Japan must comport with the constitutional provisions of Article 9. The Japanese government has interpreted the U.S.–Japan Treaty to mean that it is an act of individual self-defense when Japan defends itself against an attack by a foreign country.⁷⁴ What this means, effectively, is that in the event that a U.S. military base in Japan is attacked, the United States will act in a collective self-defense capacity, and Japan will defend itself based on an individual self-defense right.⁷⁵

In 1954, the Diet established the Self Defense Agency, and the National Police Reserve was converted into the Air, Ground, and Maritime SDF.⁷⁶ Over time, the allowable SDF has

70. 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. Article 5 of the new Security Agreement reads:

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 . . .

Id.

71. U.S. Department of State, *U.S. Collective Defense Arrangements*, <http://www.state.gov/s/l/treaty/collectivedefense/> (last visited Oct. 3, 2010).

72. *Id.*

73. *Id.*

74. Umeda, *supra* note 7, at 19.

75. *Id.*

76. Asia for Educators, *supra* note 1.

expanded from 150,000 troops to 270,000, illustrating greater liberalization in interpreting Article 9.⁷⁷ As mandated by the 1954 laws establishing the SDF, all the troops in the SDF are technically civilians.⁷⁸ There are, however, significant restraints on the various branches of the SDF that keep them from qualifying as an offensive military in violation of Article 9 and U.N. constraints.⁷⁹

In recent years, better communication and coordination has developed among the branches that some say will increase the SDF's efficiency.⁸⁰ Others say it could foreshadow a shifting of funds from ground forces to improve naval and air forces, a development that would flirt with the notion of an offensive military.⁸¹ From the 1960s to the 1980s, there was gradual development involving the SDF and Article 9, but since the Gulf War in the 1990s, there has been much more activity, both within Japan and abroad.⁸² Japan has already made great strides in remilitarization, albeit in a somewhat obtuse manner.⁸³ The only barriers separating Japan from an offensive military are semantic restraints and euphemistic titles such as the "Self-Defense Forces."⁸⁴ Allowing Article 9 amendment and Japanese remilitarization will do little more than illuminate a reality that already exists.

77. *Id.*

78. Teslik, *supra* note 44.

79. *Id.* (noting that the navy is not allowed to have "offensive weaponry" such as nuclear submarines or aircraft carriers).

80. *Id.*

81. *See id.*

82. Umeda, *supra* note 7, at 20.

83. Teslik, *supra* note 44.

84. *See* Mark R. Shulman, *The Proliferation Security Initiative and the Evolution of the Law on the Use of Force*, 28 HOUS. J. INT'L L. 771, 790 (2006) (noting a situation in which the Japanese government "insisted that the Coast Guard play a more prominent role than the Navy in an apparent effort to emphasize the law enforcement aspects of the operation" while it downplayed the operation's military aspects).

IV. BOTH SIDES OF THE ARGUMENT FOR REMILITARIZATION

A. *Arguments in Favor of Remilitarization*

With the recent threats of North Korea⁸⁵ and China⁸⁶ and the seemingly never-ending disputes in the Middle East, Japan has begun to suffer heightened scrutiny and pressure for its pacifist role.⁸⁷ This scrutiny has come from a variety of sources both within Japan and in the international community.⁸⁸ There has even been grumbling within the U.N. Security Council that Japan has not been “pulling its weight” globally.⁸⁹ Within

85. Since the late 1990s, North Korea has sporadically sparked international concern by showing off its long-range missile technology. *Infra* notes 91–94 and accompanying text. Further, North Korea has continued to pursue nuclear weapons despite near-universal condemnation in the international community. Andrew T. Park, Comment, *Incremental Steps for Achieving Space Security: The Need for a New Way of Thinking to Enhance the Legal Regime for Space*, 28 HOUS. J. INT’L L. 871, 890–91 (2006). Its continued development of nuclear technology represents a twofold threat: (1) unpredictable—or even accidental—nuclear deployment, and (2) lax security allowing terrorist groups access to nuclear materials. Winston P. Nagan & Erin K. Slemmens, *National Security Policy and Ratification of the Comprehensive Test Ban Treaty*, 32 HOUS. J. INT’L L. 1, 51–52 (2009).

86. China is “considered to be one of the greatest nuclear threats to the United States,” and it is thought to be extensively involved in espionage against U.S. targets. Nagan & Slemmens, *supra* note 85, at 41; Brenner & Crescenzi, *supra* note 3, at 399; Randall W. Schwartz, Comment, *Are Corporate Information Assets, in the Midst of Dynamic Technological and Infrastructural Advances, Best Secured by Legal or Self-Help Remedies?*, 26 HOUS. J. INT’L L. 163, 175 n.69 (2003). In addition to the threat China poses directly, it is indirectly responsible for the continued threat posed by North Korea. Shulman, *supra* note 84, at 800. If it were so inclined, China could quickly and easily put an end to North Korea’s nuclear program. *See id.* at 804 n.102. Likewise, China may offer similar protection to dictatorships in developing countries in exchange for access to oil. Carlos J. Moreno, Comment, *Oil and Gas Exploration and Production in the Gulf of Guinea: Can the New Gulf Be Green?*, 31 HOUS. J. INT’L L. 419, 427 n.49 (2009).

87. Teslik, *supra* note 44.

88. *See infra* notes 109, 132 and accompanying text.

89. Jason Miks, *Japan’s Hatoyama Signals Foreign Policy Shift*, WORLD POLITICS REVIEW (Sept. 29, 2009), <http://www.worldpoliticsreview.com/article.aspx?id=4375> (quoting Peter Mauch, assistant professor of international history at Ritsumeikan University in Kyoto in describing the possibility of Japan’s permanent membership on the U.N. Security Council: “It would seem strange . . . to have a nation contributing to decisions about the use of force in the world’s trouble spots, when the nation itself declines to make a sustained and meaningful contribution to U.N. peacekeeping forces”).

Japan, there is concern about Japan's "rough neighborhood" that leads many to support military buildup.⁹⁰

For example, on August 31, 1998, North Korea launched a multi-stage rocket that passed over Japanese territory.⁹¹ It was thought at the time to be a test of Pyongyang's long-range *Taepo Dong-1* ballistic missile, though later intelligence seemed to confirm that it was a failed attempt at putting a satellite into orbit.⁹² The rocket was thought to have consisted of a No Dong first stage and a Scud second stage, with a solid rocket motor and a small satellite as the payload—stated plainly, an advanced missile technology that could be devastating in the wrong hands.⁹³

Regardless of whether it was a satellite or a ballistic missile, the launch made Japan and the United States understandably nervous because it demonstrated how far North Korea had come with respect to its long-range missile capabilities. In 2006, North Korea launched seven missiles into the Sea of Japan, including a failed test of Pyongyang's *Taepo Dong-2*, which some U.S. intelligence reports have estimated as being capable of reaching the United States.⁹⁴ I was living in Japan at the time of this missile test, and recall how, even in the rural area where I was located, people were extremely apprehensive about the implications of these "tests."

The U.N. Security Council unanimously condemned the launches and called on Pyongyang to return to multilateral talks with China, Japan, Russia, South Korea, and the United States.⁹⁵ These talks were designed to resolve the crisis surrounding the country's nuclear weapons program.⁹⁶ The other countries in the multilateral talks had repeatedly warned

90. Teslik, *supra* note 44.

91. Howard Diamond, *N. Korea Launches Staged Rocket That Overflies Japanese Territory*, ARMS CONTROL TODAY (Aug./Sept. 1998), http://www.armscontrol.org/act/1998_08-09/nk1as98.

92. *Id.*

93. *See id.*

94. Paul Kerr, *Security Council Condemns N.K. Missile Tests*, ARMS CONTROL TODAY (Sept. 2006), http://www.armscontrol.org/act/2006_09/NKMissileTest.

95. *Id.*; *see* S.C. Res. 1695, ¶6, U.N. Doc. S/RES/1695 (July 15, 2006).

96. Kerr, *supra* note 94.

North Korea against nuclear proliferation and other acts of aggression.⁹⁷

The missile launch was in violation of North Korea's voluntary moratorium on flight-testing longer-range missiles, and in response, Tokyo imposed sanctions such as barring North Korean officials and a North Korean passenger ferry from entering Japan.⁹⁸ International incidents such as these missile tests and the sinking of a North Korean spy boat in 2001 led to a shift from the pacifist ideology embodied in the Constitution.⁹⁹

Lee Hudson Teslik of the Council of Foreign Relations has provided a concise synopsis of some of the arguments for allowing Japan to remilitarize.¹⁰⁰ He points out that, aside from rogue missile testing, North Korea continues to use its nuclear program to provoke the international community.¹⁰¹

China is another menace lurking in Japan's "rough neighborhood."¹⁰² It has substantial nuclear capabilities,¹⁰³ and its "explosive economic growth" has disguised its underlying instability.¹⁰⁴ Under the surface, "China is a political matchbook ready to ignite at a moments notice."¹⁰⁵ It has also exacerbated North Korea's continued disdain for international opinion; and as North Korea's "principal patron," China has protected North

97. *Id.*

98. *Id.*

99. See Teslik, *supra* note 44. The boat involved in this incident was rigged as a fishing boat, but armed and able to move at high speeds. Japanese patrol boats chased the boat, which did not stop until sustaining a direct hit on the hull. This incident marked the first occasion in 48 years the Japanese Coast Guard attacked a foreign ship operating illegally in their national waters. Marcus Warren, *Japan Sinks 'North Korean Spying Ship'*, TELEGRAPH.CO.UK (Dec. 24, 2001) <http://www.telegraph.co.uk/news/worldnews/asia/northkorea/1366227/Japan-sinks-North-Korea-spying-ship.html>.

100. Teslik, *supra* note 44.

101. See *id.*

102. *Id.*

103. Nagan & Slemmens, *supra* note 85, at 41.

104. Ian Bremmer, *Managing Risk in an Unstable World*, HARV. BUS. REV., June 2005, at 54.

105. Colleen Walsh Schultz, Comment, *To Offshore or Not to Offshore: Which Nations Will Win a Disproportionate Share of the Economic Value Generated from the Globalization of White-Collar Jobs?*, 29 HOUS. J. INT'L L. 231, 266 (2006).

Korea from the brunt of the international reaction to its continuing nuclear program.¹⁰⁶

Additionally, Japan–China relations have been particularly chilled in recent years because Japanese officials—including former Prime Minister Koizumi—have made formal visits to the Yasukuni Shrine, where several Japanese war criminals are enshrined and commemorated.¹⁰⁷ The relationship between the two countries has been further strained by an ongoing disagreement over Japanese history textbooks that China argues gloss over Japanese military atrocities.¹⁰⁸

There are increasing concerns within Japan about U.S. dedication to its role as Japan’s protector. Yuko Nakano, a research associate at the Center for Strategic and International Studies, exemplified this sentiment by noting that “when there was a [North Korean] *Taepo Dong* missile launch in 1998, a conspiracy theory appeared in the Japanese press that the United States was aware of the launch but didn’t inform Japan in a timely fashion.”¹⁰⁹ Such accusations reveal Japanese skepticism about just how far the United States will go in its role as Japan’s protector.

The United States, however, has been in favor of remilitarization for some time.¹¹⁰ American military resources are spread thin, and U.S. officials have encouraged Japan to take a more robust military position.¹¹¹ As U.S. resources continue to dwindle, Japan must realize that the United States can no longer offer the level of protection that it has in the past. Japan must begin to shoulder a greater portion of its defensive burden.

106. Shulman, *supra* note 84, at 800.

107. Timothy Webster, Note, *Sisyphus in a Coal Mine: Responses to Slave Labor in Japan and the United States*, 91 CORNELL L. REV. 733, 745 n.100 (2006) (noting that a Koizumi visit to the shrine in 2005 incited protests in China).

108. *Id.* at 745 n.99. China, along with the rest of continental Asia, was especially incensed when a Japanese court ordered phrases like “Japanese military atrocities” and “Korean resistance” to be deleted from the textbook. *Id.*

109. Teslik, *supra* note 44.

110. *Id.*

111. *Id.*

A final argument in favor of remilitarization is that there is a general sentiment that all countries have the sovereign right to govern their own militaries.¹¹² Japan is unique in that it was forcefully stripped of this sovereign right to some extent,¹¹³ but it has proven to be a trustworthy ally.¹¹⁴

The United Nations should remain open to the prospect of remilitarization. There comes a time when the past must be left behind, and Japan should be allowed to look beyond past war crimes and join the world's military forces again.

B. Arguments Opposing Remilitarization

There are three main arguments against remilitarization: (1) Japan “seeks to distance itself from [WWII] guilt rather than take responsibility for its actions”;¹¹⁵ (2) Japan, as “the first true merchant state,” must focus on maintaining its economic power—a task made more difficult by the current global economy;¹¹⁶ and (3) Japan's remilitarization could destabilize the region and provoke an arms race in Asia.¹¹⁷

Japan is notorious for its wartime atrocities, including the coercion of women for use as “comfort women” (military prostitutes).¹¹⁸ The United Nations estimates that the Japanese

112. See Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 997 (2005) (noting the concept that a sovereign was responsible for developing its own army, and the prevalence of this concept since the medieval era).

113. Asia for Educators, *supra* note 1.

114. See Roger Cohen, *Obama's Japan Headache*, N.Y. TIMES (Dec. 10, 2009), http://www.nytimes.com/2009/12/11/opinion/11iht-edcohen.html?_r=2.

115. Michael A. Panton, *Politics, Practice and Pacifism: Revising Article 9 of the Japanese Constitution*, 11 ASIAN-PAC. L. & POL'Y J. 163, 198 (2010).

116. See Panton, *supra* note 115, at 197. But see Jessie S. Lotay, *Subprime Carbon: Fashioning an Appropriate Regulatory and Legislative Response to the Emerging U.S. Carbon Market to Avoid a Repeat of History in Carbon Structured Finance and Derivative Instruments*, 32 HOUS. J. INT'L L. 459, 485–86 (2010) (contrasting Japan's “rapid economic growth” with the general “slow economic growth [many countries are experiencing] amidst the recent financial crisis”).

117. See Panton, *supra* note 115, at 211.

118. *Former Sex Slave Cries out for Justice*, TORONTO STAR, Oct. 3, 2010, at A4; see Steve Kuan, *Alien Tort Claims Act—Classifying Peacetime Rape as an International Human Rights Violation*, 22 HOUS. J. INT'L L. 451, 455 (2000) (referring to comfort women as “sex slaves” and noting that they were subject to “repeated daily rapes”); see

military forced 200,000 women to be comfort women, but China claims that number leaves out another 200,000 women forced into prostitution during Japan's occupation of China.¹¹⁹ Japan has never made a public apology for its past atrocities.¹²⁰ Former Prime Minister Shinzo Abe even went as far as to say that the "comfort women' voluntarily worked as prostitutes and were better paid than the soldiers."¹²¹ Public apologies and reparations for atrocities like this could bolster domestic and foreign support for amending Article 9.¹²²

There are a number of groups both in Japan and around the world that not only oppose the amendment of Article 9 of the Japanese Constitution, but also champion the Article as a model for world peace. Prominent among these groups is the Global Article 9 Campaign, an initiative of the Global Partnership for the Prevention of Armed Conflict.¹²³ The Campaign strives to create awareness of the global significance of Article 9.¹²⁴ It attempts to demonstrate the "active value" of Article 9 and ways to realize its potential by linking it to the United Nations and other institutions.¹²⁵

also Han, *supra* note 188, at 672 (noting that South Korea continues to search out those who led or offered Korean women to the Japanese army as comfort women).

119. *Former Sex Slave Cries out for Justice*, *supra* note 118.

120. *Id.*; see Kuan, *supra* note 118, at 456 (noting that Japan did not even acknowledge its use of comfort women until it came under substantial international pressure to do so—about forty years after WWII ended).

121. *Id.* (quoting Joseph Wong, founder of The Association for Learning and Preserving the History of World War II in Asia).

122. See Canon Pence, Comment, *Reform in the Rising Sun: Koizumi's Bid to Revise Japan's Pacifist Constitution*, 32 N.C. J. INT'L L. & COM. REG. 335, 336 (2006) ("[P]acifism also served as an effective apology that aided Japan in its post-war relations with its East Asian neighbors who were victimized by the Japanese army through horrible wartime atrocities.").

123. *About Campaign*, GLOBAL ARTICLE 9 CAMPAIGN, <http://www.article-9.org/en/about/index.html> (last visited Oct. 3, 2010).

124. *Id.* ("In a world where the chain of violence and war continues unbroken and militarization is gathering speed, the existence of Japan's Article 9 provides encouragement to those who work [toward] a peace that does not rely on force. Article 9 gives hope—hope that an other [sic] world is possible.").

125. *Id.*

Groups such as these consider Article 9 to be an “international peace mechanism.”¹²⁶ They urge the international community to adopt the “No War, No Military” message, and they consider themselves to be a logical extension of the U.N. Charter’s goal to save future generations from the scourge of war.¹²⁷

Within Japan, groups such as the YWCA of Japan warn against engaging in military operations prohibited by Article 9.¹²⁸ They urge the Japanese government not to disregard and distort the Constitution but rather to promote its value.¹²⁹ In fact, the YWCA goes so far as to argue the existence of the SDF is already a violation of Article 9.¹³⁰

These arguments adhere to the Constitution’s high ideals, but they are impractical in light of modern circumstances. Even without remilitarization, Asia’s stability has been threatened by North Korea’s actions and the potential threat of China. Japan’s deployment of troops to the Middle East decisively ended a policy allowing Japan to maintain its pacifist stance by focusing solely on providing financial support to the U.S. military.¹³¹ Finally, although Japan’s pacifist ideals set an excellent example for the rest of the world, Japan is unfortunately not in a position to continue setting such an example.

V. THE FUTURE OF ARTICLE 9

A. *Debate and the Possibility of Constitutional Amendment*

Since the Gulf War in 1990, there have been dramatic changes in the general interpretation of and public sentiment regarding the rearmament of Japan. Japan provided huge

126. *Id.*

127. *See id.* (noting that these “international peace mechanisms” act to reduce military spending, promote nuclear-weapon-free zones, end violence against women, support conflict prevention, and mitigate the negative environmental impact of the military).

128. *YWCA of Japan Urges Government to Promote Peace in Somalia*, WORLD YWCA, <http://www.worldywca.org/en/Member-Associations/Regions/Asia/YWCA-Japan-Somalia> (last visited Oct. 3, 2010).

129. *Id.*

130. *Id.*

131. *See infra* note 133 and accompanying text.

amounts of money to support the Gulf War, but felt unappreciated in the international community.¹³² In 1990, Japan passed the Law Concerning Cooperation for U.N. Peace Keeping Operations and Other Operations (PKO Law).¹³³ Under the PKO Law, SDF troops could be dispatched to foreign soil but were subject to rigid restrictions.¹³⁴ In 1999, Japan enacted the Law Concerning Measures in Order to Secure Peace and Safety of Japan in Situations in Areas Surrounding Japan, which allowed the SDF to engage in “operations in the rear area”—a term that encompassed actions within Japan’s territory and the surrounding public sea, as long as there are no acts of aggression ongoing or expected in the area.¹³⁵

An even more overt step toward constitutional amendment occurred in 2001: Junichirō Koizumi, who was elected Japan’s fifty-sixth prime minister, stated publicly that the Constitution should be amended to allow Japan to act on a collective defense right.¹³⁶

After the terrorist attacks of September 11, 2001, Japan immediately passed the Anti-Terrorism Special Measures Law, which allowed the SDF to operate on foreign soil for the first time, though it required prior consent from the relevant governments.¹³⁷ SDF troops could provide noncombatant and humanitarian support, including the transport of weapons and ammunition, to U.S. forces.¹³⁸ The Diet continued in this vein by enacting three war-contingency laws in 2002.¹³⁹

In 2003, the SDF’s military abilities were further expanded with the passage of the four-year Iraq Special Measures Law.¹⁴⁰

132. Umeda, *supra* note 7, at 20; *see also* Panton, *supra* note 115, at 184 (noting that criticism of Japan’s “checkbook diplomacy” “brought great shame upon Japan”).

133. Umeda, *supra* note 7, at 20.

134. *Id.* (“The SDF troops would not be under U.N. command and would conduct only activities in which use of force would not be expected, *e.g.* medical care and support goods delivery in non-combat areas, and in non-combat (post-conflict) roles.”)

135. *Id.* at 21.

136. *Id.* at 22.

137. *Id.* at 22–23.

138. *Id.*

139. *Id.* at 24–25.

140. *Id.* at 25.

This law took the step of allowing deployment of SDF troops to an occupied country where small-scale fighting continues.¹⁴¹ SDF members could use weapons only in very limited defensive circumstances—a restriction that resulted in a need for foreign troops to act as protectors for the SDF.¹⁴² After Iraq was liberated in 2004, the dispatched SDF were placed under U.N. control.¹⁴³

The Anti-Terrorism Special Measures Law, which allowed Japanese navy oilers to refuel American war ships in the Indian Ocean, expired on November 1, 2007.¹⁴⁴ Prime Minister Yasuo Fukuda's cabinet submitted a new refueling bill to “[fulfill a responsibility to] the international community.”¹⁴⁵ This sparked a great deal of debate within Japan, particularly between the Democratic Party of Japan and the Liberal Democratic Party.¹⁴⁶ Fukuda was forced to defend the policy before by asserting that “[t]he area in which the [SDF] is operating is limited to a non-combat zone by the framework of the law, and therefore the mission does not go against Article 9 of the Constitution.”¹⁴⁷ “Such are the contortions and tortured arguments that Japan's leaders have to try to use to square their pacifist Constitution—which pretty plainly prohibits Japan from possessing any armaments—with its perceived international obligations as a major power and ally of the [United States].”¹⁴⁸

It is absurd that Japan must utilize such roundabout means and empty rhetoric in order to fulfill its desire to participate in global conflicts and politics. Article 9 of the Japanese Constitution, particularly paragraph 2, has outlived its usefulness and is ripe for amendment. It has become a relic of idealistic fancy that does not take into account the harsh reality

141. *Id.* at 25–26.

142. *Id.* at 26.

143. *Id.* at 26–27.

144. Todd Crowell, *Japan's Refueling Debate Reheated*, ASIA SENTINEL (Oct. 29, 2007), http://www.asiasentinel.com/index.php?option=com_content&task=view&id=802&Itemid=31.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

that the political turbulence of the Far East shows little sign of subsiding.

Recent developments in Japanese space law provide an excellent illustration of the convoluted political process that Japanese laws must undergo in order to comport with Article 9. The National Space Development Agency of Japan (NASDA) was founded in 1969, and the Diet contemporaneously adopted a resolution stating that Japan's space programs were exclusively for peaceful purposes, consistent with Article 9 of the Constitution.¹⁴⁹ This principle of peaceful use of space was stipulated in the 1969 resolution as having four purposes: 1) to advance science, 2) to improve people's lives and promote the welfare of mankind, 3) to contribute to the development of industrial technology, and 4) to foster international cooperation.¹⁵⁰ Despite these noble ideals, the militarization of Japan's space activity began as early as the mid-1980s.¹⁵¹

In 1985, the SDF was given the power to utilize commonly used satellites under a "generalization theory."¹⁵² This allowed the Maritime Self Defense Force (MSDF) to buy receiving equipment, which gave them the ability to obtain information from a U.S. military satellite.¹⁵³ In 1988, reconnaissance spy satellites were introduced but were referred to by the euphemism "information gathering satellites" (IGS) to avoid constitutional problems.¹⁵⁴ Throughout the 1980s and 1990s, NASDA continued to work closely with the Japanese military, and finally, on May 28, 2008, the Basic Law on Space was passed.¹⁵⁵ The law reinterpreted the term "peaceful" as applied to the space program to mean "non-aggressive" instead of "non-military"—which had been the previous interpretation.¹⁵⁶

149. Maeda Sawako, *Transformation of Japanese Space Policy: From the "Peaceful Use of Space" to "the Basic Law on Space"*, ASIA-PAC. J. (Nov. 2, 2009), available at <http://japanfocus.org/-Maeda-Sawako/3243>.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

Policy changes such as these have indirectly encouraged amendment of Article 9 as an alternative to jumping through semantic and bureaucratic hoops.¹⁵⁷ In 2009, the Council on Security and Defense Capability published a report emphasizing that “we should decide the basic principles [based] on national security policy,” in place of “the exclusively defense-oriented policy.”¹⁵⁸

Yet another area of tortured debate is centered on the constitutional limitations of Japan’s involvement in fighting high-seas piracy.¹⁵⁹ That debate reveals a fundamental misunderstanding of the relationship between Article 9 of the Constitution and the relevant principles of international law.¹⁶⁰

The issue is whether Article 9 prohibits the deployment of naval forces, or their use of weapons, to protect shipping lanes from pirates in international waters.¹⁶¹ The debate is predicated on a permanent anti-piracy law, the content and interpretation of which are both heavily influenced by Article 9.¹⁶² Regardless of their outcomes, these debates exemplify the excruciating detail involved with any decision involving the SDF.

Opposition to the bill centers on details such as (1) whether the MSDF would be allowed to assist foreign ships, (2) what degree of relationship with Japan would be necessary to justify MSDF intervention, (3) and under what circumstances weapons could be employed against pirates.¹⁶³ Should Japan make the decision to combat piracy, it will be forced under Article 9 to subject itself to an absurd level of scrutiny and specificity.

The International Court of Justice has designated pirates the enemy of all mankind and declared that any nation may

157. See Umeda, *supra* note 7, at 32–33.

158. See Umeda, *supra* note 7, at 32–33; see also Danielle Demetriou, *Japan to expand defence force*, DAILY TELEGRAPH (London), Sept. 22, 2010, at 18 (noting a Japanese plan to increase the SDF by 13,000 troops beginning in 2011).

159. Craig Martin, *Piracy and the Constitution*, JAPAN TIMES ONLINE, Mar. 26, 2009, <http://search.japantimes.co.jp/cgi-bin/eo20090326a1.html>.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

capture and punish those engaged in piracy.¹⁶⁴ However, Article 9 mandates that Japan “renounce. . . the threat or use of force as a means of settling international debates.”¹⁶⁵

Though these conflicting ideals may seem difficult to resolve, the use of force against pirates in international waters is not technically the use of military force for the purpose of settling international disputes.¹⁶⁶ Combating piracy does not involve such suspect elements as the use of force against agents of another state, the engagement in armed conflict with the forces of another state, or any other act of war.¹⁶⁷

Some argue that the piracy debate actually falls outside the scope of Article 9, and, therefore, the constitutionality of the fight against high seas piracy should not be called into question.¹⁶⁸ This argument illustrates the level of creative interpretation of the language of Article 9 that must often be harnessed in order for Japan to involve the SDF in any sort of offshore deployment. Constitutional amendment would be a valid means of tailoring Japan’s approach to the SDF.

In spite of the lack of actual amendments to the Japanese Constitution, the interpretation of Article 9 continues to expand in favor of remilitarization.¹⁶⁹ This seems particularly true in regard to the MSDF: The MSDF recently announced its plans to build a helicopter destroyer to counter China’s naval buildup and improve responses for “contingencies.”¹⁷⁰ The helicopter carrier has a noticeable number of similarities to an aircraft carrier, though Japan’s Defense Ministry insists that the ship is

164. *Id.* The international community has long agreed that piracy was a universal crime. Shulman, *supra* note 84, at 810–11 (citing the 1856 Paris Declaration as “when the major maritime powers forever renounced privateering and effectively made piracy a universal crime”). Individual nations have been advocating that view for even longer, some of them since the eighteenth century. *See id.* at 791.

165. Martin, *supra* note 159.

166. *Id.*

167. *Id.*; *see* Shulman, *supra* note 84, at 810 (“If [a ship] has [the protection of a state], then it *cannot* be labeled a pirate ship.”) (emphasis added).

168. Martin, *supra* note 159.

169. *See* HUGHES, *supra* note 44, at 27, 112.

170. *See* Takateru Doi, *New Helicopter Destroyer to Widen MSDF Range*, ASAHI SHIMBUN (Tokyo, Japan), Nov. 23, 2009.

necessary only for Japan's defense.¹⁷¹ The Ministry claims that a high capacity helicopter carrier is necessary to respond to China's recent advances in its sea-to-sea attack capabilities, to respond to the expected increase in emergency assistance missions,¹⁷² and to be used as a transport, supply, and refueling ship.¹⁷³

The government was forced to take this somewhat scattershot approach to justifying the new helicopter carrier in order to reconcile the project with past statements and Article 9 implications.¹⁷⁴ A high-ranking officer of the MSDF attempted to mollify the public by stating, "We hope to gain the understanding of the public by not only constructing the necessary ships, but also showing that we are ready to decrease equipment that can be eliminated."¹⁷⁵

The government has had to go to excessive lengths to circumvent Article 9 restrictions for far too long. It is blatantly obvious that a helicopter carrier has offensive war potential. Instead of amending Article 9 outright to reflect a more honest assessment of the current state of military affairs in Japan and the Far East, it seems many would prefer to continue testing the elasticity of the language of Article 9.¹⁷⁶ Article 9 served its purpose for a number of years, but constitutional amendment is becoming increasingly necessary in order for Japan to keep up with the volatility of its neighbors.

171. *Id.*

172. *Id.* Participation in international peacekeeping activities was upgraded to a primary task of the SDF, opening the path for more dispatches both in Japan and abroad. *Id.*

173. *Id.*

174. In 1988 the government issued a statement that said, "Because offensive aircraft carriers exceed the war potential needed for a minimum level of self-defense, possession of such ships is prohibited by the Constitution." *Id.*

175. *Id.* (referring to the MSDF's promise to decommission four other destroyers).

176. Ted Galen Carpenter, *Paternalism and Dependence: the U.S.-Japanese Security Relationship* 4 (Cato Inst., Working Paper No. 244, 1995) at 4, available at <http://www.cato.org/pubs/pas/pa-244.html>.

B. A Historic Shift in Politics: The Future of Article 9 Under the Democratic Party of Japan

In 2009, Japan experienced a remarkable political shift. Yukio Hatoyama of the Democratic Party of Japan (DPJ) was elected prime minister, which marked the first time the DPJ had held power in Japan.¹⁷⁷ The Liberal Democratic Party (LDP) had governed the country for nearly half a century.¹⁷⁸ The election followed in the wake of a fierce debate between the LDP and the DPJ regarding the amendment or outright removal of Article 9.¹⁷⁹

In 2007, former Prime Minister Abe cleared a major hurdle to revising the Constitution by passing the National Referendum Law, which took effect in May 2010.¹⁸⁰ The referendum allows the creation of a council to deliberate on constitutional amendment, and went into effect during Hatoyama's ministry.¹⁸¹ Hatoyama, immediately after becoming the DPJ president, stated that "it is okay to begin discussion" on constitutional revision in the Deliberative Councils on the Constitution.¹⁸² Both the LDP and the DPJ have recommended deleting the provision that renounces Japan's war potential from paragraph 2 of Article 9, and Hatoyama went as far as to say that clause 2 is the "most self-deceiving part of the current Constitution."¹⁸³

Despite his seemingly strong stance prior to the 2009 election, Hatoyama's post-election policies on defense and Article 9 remained frustratingly opaque. Hatoyama did not

177. *Hatoyama Elected Prime Minister of Japan*, CNN.COM/ASIA, Sept. 16, 2009, <http://www.cnn.com/2009/WORLD/asiapcf/09/16/japan.new.pm/index.html>; Sachiko Sakamaki & Stuart Biggs, *Japan DPJ Election Win Brings 'Bloodless Revolution'*, BLOOMBERG.COM (Aug. 30, 2009), <http://www.bloomberg.com/apps/news?pid=21070001&sid=a.fAAwrxY6J0>.

178. *Hatoyama Elected Prime Minister of Japan*, *supra* note 177.

179. *See LDP and DPJ Compete to Remove Article 9*, AKAHATA (Japan) (June 10, 2009), available at http://www.japan-press.co.jp/2009/2626/politics_5.html.

180. Masami Ito, *Diet Clears Path to Referendum on Constitution*, JAPAN TIMES ONLINE (May 15, 2007), <http://search.japantimes.co.jp/cgi-bin/nn20070515a1.html>.

181. *See* Japan Ministry of Defense, *Defense of Japan (Annual White Paper)*, at 110 (Mar. 31, 2008), available at http://www.mod.go.jp/e/publ/w_paper/2008.html.

182. *LDP and DPJ Compete to Remove Article 9*, *supra* note 179.

183. *Id.*

outwardly condone remilitarization, but he stated that Japan wished to get the most out of its defense spending.¹⁸⁴ However, in October 2009, the Hatoyama government decided to delay the National Defense Program Guidelines (NDPG) until 2010, even though they were supposed to be released in December.¹⁸⁵ The NDPG delay accompanied a delay in the release of defense spending plans.¹⁸⁶ In December 2009, while carefully skirting the debate on Article 9, Hatoyama proclaimed his willingness to move forward with a plan to amend the Constitution in line with his party's drive to transfer power to local governments, proving that he was not shy when it came to constitutional amendment in general.¹⁸⁷

In contrast to the post-election silence on the revision of Article 9, the Hatoyama government was progressive in dealing with the North Korean threat. Hatoyama met with South Korean President Lee Myung-bak, and both countries set aside historical differences, to share a united stance against North Korea.¹⁸⁸ Both countries agreed that North Korea must dismantle its nuclear programs, and both shared their discomfort with recent large-scale aid supplied to North Korea by China.¹⁸⁹ This public and high profile united front proved

184. Tobias Harris, *Japan: The Hatoyama Government Will Delay on Defense Policy*, EAST ASIA FORUM (Oct. 22, 2009), <http://www.eastasiaforum.org/2009/10/22/japan-the-hatoyama-government-will-delay-on-defense-policy/>.

185. *Id.*

186. *Id.*

187. *DPJ Eyes Changing Constitution: Hatoyama Says Amendment Would Enable Transfer on Power to Local Governments*, JAPAN TIMES ONLINE (Dec. 27, 2009), <http://search.japantimes.co.jp/cgi-bin/nn20091227a3.html>.

188. Lee Jong-Heon, *Lee, Hatoyama Stand Firm Against North Korea*, UPI ASIA, Oct. 9, 2009, http://www.upiasia.com/Politics/2009/10/09/lee_hatoyama_stand_firm_against_north_korea/6622/; see Sang Wook Daniel Han, *Transitional Justice: When Justice Strikes Back—Case Studies of Delayed Justice in Argentina and South Korea*, 30 HOUS. J. INT'L L. 653, 665 (2008) ("It has been more than sixty years since Korea gained independence from Japan's colonial rule[,] [y]et legacies of Japanese colonial past still haunt today's South Korean society") (citation omitted); see also Stephen E. Blythe, *The Tiger on the Peninsula is Digitized: Korean E-Commerce Law as a Driving Force in the World's Most Computer Savvy Nation*, 28 HOUS. J. INT'L L. 573, 576 (2006) (noting that Japan's thirty-five-year occupation of Korea continues to be a strong influence on Korean culture).

189. *Id.*

that Hatoyama was not afraid to show political strength and was well aware of Japan's key political and military role in counteracting the current volatility of the Far East.

More recently, on June 2, 2010, Hatoyama resigned as Prime Minister of Japan.¹⁹⁰ The official reason for his resignation centered on his "broken campaign promise to move [the Futenma] U.S. Marine base off the southern island of Okinawa."¹⁹¹ The DPJ has managed to maintain its hold on the Japanese government through the election of new Prime Minister Naoto Kan who, at the time of this writing, has not publically stated his stance on the possible amendment of Article 9.¹⁹²

VI. U.S.–JAPAN RELATIONS: NOW AND IN THE FUTURE

Since WWII, the United States and Japan have enjoyed excellent diplomatic relations, and Japan has been chief among America's economic allies.¹⁹³ Japan has taken advantage of military protection from the United States, and the United States has maintained its military bases on Japanese soil.¹⁹⁴ U.S. President Barack Obama and others have stressed that the unprecedented prosperity that Japan and other parts of Asia have enjoyed since WWII is a direct result of the U.S. alliance with Japan.¹⁹⁵ 2010 marks the fifty-year anniversary of the

190. Mari Yamaguchi, *Japan Prime Minister Yukio Hatoyama Resigns*, HUFFINGTON POST, June 1, 2010, http://www.huffingtonpost.com/2010/06/01/japan-prime-minister-yuki_n_597009.html.

191. *Id.*

192. Martin Fackler, *Naoto Kan is Elected Prime Minister in Japan*, PAC. FREEZE (June 4, 2010), <http://pacificfreeze.ips-dc.org/2010/06/naoto-kan-is-elected-prime-minister-in-japan/>.

193. Kelly C. McKinney, Comment, *The Patent Reform Act of 2007 and International Patent Law Harmonization*, 31 HOUS. J. INT'L L. 125, 153 (2008) (noting Japan's role as "a key trading partner of the United States"); Jorge A. Vargas, *Privacy Rights Under Mexican Law: Emergence and Legal Configuration of a Panopoly of New Rights*, 27 HOUS. J. INT'L L. 73, 78 n.3 (2004) (noting that Mexico had recently overtaken Japan as the second-most important U.S. trading partner); see Editorial, *Japan-U.S. Alliance*, ASAHI SHIMBUN (Tokyo, Japan), Jan. 1, 2010 [hereinafter *Japan-U.S. Alliance*].

194. *Japan-U.S. Alliance*, *supra* note 193.

195. *Id.*

alliance, which is predicated on an unusual balance of military and economic power.¹⁹⁶

Recently, however, there have been a number of disputes between the United States and Japan regarding both foreign policy on the treatment of China and North Korea, and a domestic Japanese dispute involving the Futenma U.S. Marine Corps Air Station in Okinawa.¹⁹⁷ The turmoil in Okinawa is the result of a number of problems for local residents, created by the overwhelming concentration of U.S. military bases, and little has been done to alleviate these problems.¹⁹⁸ There is currently intense scrutiny focused on the possibility of moving the Futenma base to a location outside of Okinawa.¹⁹⁹ However, Japanese “footdragging” and botched handling of the issue caused considerable tension between the Hatoyama government and the Obama administration, eventually leading to Hatoyama’s resignation as Prime Minister.²⁰⁰

The increasing tensions are further illuminated by a recent Kyodo News Survey, which found that all Japanese prefectures except Okinawa showed reluctance to accept U.S. military facilities or host training exercises by U.S. forces.²⁰¹ This attitude indicates the U.S. military may have overstayed its welcome, yet Japan is ostensibly defenseless without U.S. help. Controversies such as these could be useful as catalysts for a long-overdue look at constitutional amendment.

196. *Id.*

197. See *id.*; Michael Auslin, *U.S. and Japan: A Chilly Atmosphere*, ENTERPRISE BLOG (Oct. 22, 2009, 5:13 PM), <http://blog.american.com/>.

198. *Japan–U.S. Alliance*, *supra* note 193; Auslin, *supra* note 197 (noting the recent controversy surrounding the legal status of children born to Japanese mothers and American fathers). Accusations of rape and murder by U.S. military personnel, such as an alleged gang rape of a 19-year-old in Hiroshima by four Marines, are commonplace. Travis J. Tritten, *Marine Pleads Not Guilty in Alleged Gang Rape*, STARS AND STRIPES (May 8, 2008), <http://www.stripes.com/news/marine-pleads-not-guilty-in-alleged-gang-rape-1.78563>.

199. *Japan–U.S. Alliance*, *supra* note 193.

200. Auslin, *supra* note 197; Yamaguchi, *supra* note 190.

201. *Governors Reluctant to Accept U.S. Military Facilities*, JAPAN TODAY, Dec. 29, 2009, <http://www.japantoday.com/category/politics/view/governors-reluctant-to-accept-us-military-facilities>.

This is a critical time for the U.S.–Japan alliance, which has served as a foundation for Japan’s economic growth by guaranteeing access by Japan’s companies to the U.S. market in the postwar era.²⁰² However, the value of U.S.–China trade has surpassed that of U.S.–Japan trade, and Japan must broaden its economic perspectives in order to survive.²⁰³ This broadening of perspectives can only be achieved through careful cooperation with the United States, particularly as long as Japan maintains its current level of dependence on U.S. military protection.²⁰⁴

The Hatoyama government declared its intent to conduct an “autonomous” foreign policy and manifested a desire for a close and equal alliance with the United States.²⁰⁵ This seemed to go directly against what has been described as the “inherently asymmetric” U.S.–Japan relationship, and has some commentators worried about the implications of such an “equal” alliance.²⁰⁶

Soeya Yoshihide, an expert on U.S.–Japan relations,²⁰⁷ notes that, when it comes to equality, the United States, for its part, would have to demand that Japan play a greater role in the alliance.²⁰⁸ If this were to happen, Japan’s dependence on the United States could be brought into sharper relief.²⁰⁹ Further, there are questions as to how Japan would appear in the eyes of the Asian people if it were to demand equality with the United States.²¹⁰ Yoshihide argues that the Association of Southeast Asian Nations’ (ASEAN) wariness regarding Prime

202. *Japan–U.S. Alliance*, *supra* note 193.

203. *Id.*

204. Leszek Buszynski, *Hatoyama and the US Alliance*, EAST ASIA FORUM, Nov. 27, 2009, <http://www.eastasiaforum.org/2009/11/27/hatoyama-and-the-us-alliance/>.

205. *Id.*

206. Soeya Yoshihide, *DPJ’s Foreign Policy Raises Hopes . . . and Worries*, Nov. 18, 2009, EAST ASIA FORUM, <http://www.eastasiaforum.org/2009/11/18/dpjs-foreign-policy-raises-hopes-and-worries/>.

207. Research Institute of Economy, Trade and Industry Fellows: Soeya Yoshihide, http://www.rieti.go.jp/users/soeya-yoshihide/index_en.html (last visited Oct. 3, 2010) (noting Professor Yoshihide’s expertise in politics and security in the Asia–Pacific region, U.S.–China–Japan relations, and Japan’s external relations and diplomacy).

208. Yoshihide, *supra* note 206.

209. *Id.*

210. *Id.*

Minister Hatoyama's idea of an East Asian community stems from the "immaturity of a foreign policy driven by the urge to seek 'equality' with the United States."²¹¹

In the spirit of equality, Hatoyama himself pressed for the removal of the Futenma Air Station.²¹² The problem is that this goes directly against a 2006 agreement with the United States, which called for the relocation of the base to Camp Schwab in Northern Okinawa instead of complete removal.²¹³ This proposition was met with immediate opposition from the Obama Administration, which made it clear it was not interested in renegotiating the Futenma agreement.²¹⁴ The LDP, not the DPJ, which is currently in power, approved the 2006 agreement, and some have questioned the validity of an agreement born out of the unique U.S.-LDP relationship.²¹⁵ However, the Hatoyama government showed a willingness to compromise when it softened its stance on Futenma considerably, by backing away from the position that the Futenma replacement facility should be outside of Okinawa.²¹⁶ Regardless of the eventual outcome of the Futenma debate under new Prime Minister Kan, by antagonizing the United States on any level, Hatoyama placed Japan in a precarious political position.²¹⁷

211. *Id.*

212. Buszynki, *supra* note 204.

213. *Id.*

214. Tobias Harris, *Gates Rules Out Renegotiation of Okinawa Deal with Japan*, EAST ASIA FORUM, Oct. 24, 2009, <http://www.eastasiaforum.org/2009/10/24/gates-rules-out-renegotiation-of-okinawa-deal-with-japan/> ("Gates stated that 'Our view is clear. The Futenma relocation facility is the lynchpin of the realignment road map. Without the Futenma realignment, the Futenma facility, there will be no relocation to Guam. And without relocation to Guam, there will be no consolidation of forces and the return of land in Okinawa. This may not be the perfect alternative for anyone, but it is the best alternative for everyone, and it is time to move on. We have investigated all of the alternatives in great detail and believe that they are both politically untenable and operationally unworkable.'").

215. *Id.* ("As much as Gates and the Obama administration would like to turn the page, their Japanese counterparts—the first government in a half-century based on a parliamentary majority for a party other than the LDP—cannot simply accept what it views as the product of the 'abnormal' US-LDP alliance.").

216. *Id.*

217. Buszynki, *supra* note 204.

The question remains of just how Japan will assert its newly sought equality with the United States. Richard Halloran authors a weekly column, "The Rising East," about security in Asia and general U.S.–Asian relations²¹⁸ and has compiled an excellent list of ten things Japan could do to assert its equality.²¹⁹ Japan could (1) take full responsibility for its own defense by amending Article 9, (2) emphasize naval forces and assume more responsibility for defending its sea lanes, (3) revise the Japan–U.S. security treaty to oblige Japan to come to the defense of the United States just as the United States is obliged to come to the defense of Japan, (4) quadruple its defense spending to bring it up to the same percentage of the GNP as the United States, (5) enlarge the SDF to an equal proportion of the population as that in the United States, (6) expel most or all of the U.S. military forces from Japan,²²⁰ (7) remove the U.S. nuclear umbrella from Japan, (8) take over the development of missile defense and the responsibility of monitoring North Korean missile technology, (9) establish a department like the U.S. Central Intelligence Agency or Britain's MI-6 to bolster military intelligence,²²¹ and (10) take the initiative in international negotiations and shoulder some of the diplomatic risks the United States has taken on Japan's behalf.²²²

Some of Halloran's recommendations are far-fetched, but they emphasize the current inequality of the U.S.–Japan alliance.²²³ Hatoyama made allusions to his perception that U.S.

218. Asia Pac. Ctr. for Sec. Studies, Richard Halloran: Adjunct Professor, <http://www.apcss.org/core/BIOS/halloran.htm> (last visited Oct. 3, 2010).

219. Richard Halloran, *Japan Equality*, REAL CLEAR POLITICS, Dec. 13, 2009, http://www.realclearpolitics.com/articles/2009/12/13/japan_equality_99539.html.

220. *Id.* ("Jitsuro Terashima, a close adviser to Hatoyama, advocates having the [United States] move its forces to Guam and Hawaii.")

221. Halloran, *supra* note 219. This would necessarily involve an expansion of Japan's small formal intelligence organization. See Brenner & Crescenzi, *supra* note 3, at 405. It would also involve a sea change in the information Japan is seeking; Japanese actors have traditionally engaged almost exclusively in economic espionage—the theft of intellectual assets and proprietary information. *Id.* at 390, 406. That tradition notwithstanding, the SDF has recently invested in establishing a "cyberforce," which likely falls under the "military intelligence" category. *Id.* at 406–07.

222. Halloran, *supra* note 219.

223. See Yoshihide, *supra* note 206.

hegemony is declining and China is poised to be the next world power, and that Japan's equality could create a "bridge" between the two countries.²²⁴ By looking at the amount of change required to approach any sort of equality, it becomes apparent just how dependant Japan is on the United States. Japan should begin following the advice of commentators like Halloran and shouldering a larger portion of its military burden in order to achieve equality and to alleviate some of the U.S. military burden.

The Hatoyama administration was widely seen as heralding a new era in Japanese politics.²²⁵ At the end of 2009, its approval rating in Japan was more than seventy percent.²²⁶ However, the approval rating subsequently plummeted over the Futenma fiasco.²²⁷ Hatoyama's initial popularity seemed to reflect a rising desire among Japanese voters to play a greater role in international politics.²²⁸ However, Hatoyama's dedication to the alliance came under intense scrutiny when he suggested that Japan discontinue the refueling mission in the Indian Ocean in support of the United States in Afghanistan.²²⁹

Questions regarding general U.S.–Japan relations are relevant to the Article 9 debate because they illustrate changing attitudes toward military relations. The three major issues affecting the current state of U.S.–Japan diplomacy are (1) whether Japan will, in fact, quit the refueling mission in Afghanistan; (2) the renegotiation of the Futenma Airbase; and (3) whether Japan will attempt to renegotiate the Japan–U.S. Status of Forces Agreement (SOFA).²³⁰ These emerging issues

224. Halloran, *supra* note 219 ("Once the equality that Hatoyama seeks has been reached, he says Japan could be a bridge between what he sees as a rising China and a tottering America. That may be presumptuous as neither President Hu Jintao in Beijing nor President Obama in Washington has given any sign that he feels a need for a bridge to the other.").

225. Tsuneo Watanabe, *A New Direction for Japan's Security Policy?*, TOKYO FOUNDATION (Dec. 14, 2009), http://www.tokyofoundation.org/en/articles/2009/copy2_of_a-new-direction-for-japan2019s-security-policy.

226. *Id.*

227. Yamaguchi, *supra* note 190.

228. Watanabe, *supra* note 221.

229. *See id.*

230. *Id.*

prove that Japan is ready for major changes in military policy and the possible amendment of Article 9 of the Constitution.²³¹

Hatoyama was by no means the first prime minister to support the amendment of Article 9. His grandfather, Ichirō Hatoyama, who served as prime minister from 1954 to 1956 proposed amending the Japanese Constitution and rearmament.²³² Former Prime Minister Junichirō Koizumi made a historic decision when he sent troops to Iraq in 2003, though his decision carried with it a great deal of political risk.²³³ The recent emergence of the DPJ government could be a new beginning for Japanese remilitarization, but Article 9 remains the biggest obstacle.²³⁴

An early issue under the Hatoyama ministry was how President Obama and Prime Minister Hatoyama would find common ground. There were many political similarities between the two, but that did not prevent them from getting off on the wrong foot in dealing with each other.²³⁵ Both leaders' campaign platforms were built on an ideal of "change," both relied heavily on middle class support in the wake of falling incomes and job security, and both were the leaders of countries who are trying to adjust to the perceived erosion of their power.²³⁶ President Obama took his time making military decisions regarding Afghanistan, and should not have begrudged Hatoyama for taking time to work out the complexities of Japan's political dilemmas.²³⁷ The United States should afford Japan some patience as the newly elected Prime Minister Kan seeks to find a diplomatic solution in Futenma. This could benefit both countries while maintaining the strategic imperative binding the United States and Japan.²³⁸

231. *See id.*

232. *Id.* (noting that another powerful DPJ leader, party Secretary General Ichiro Ozawa, published a book in 1994 in which he advocated Japan as having the same rights as a "normal" nation).

233. *Id.*

234. *Id.*

235. *See* Cohen, *supra* note 109.

236. *Id.*

237. *Id.*

238. *See* Hitoshi Tanaka, *The US–Japan Alliance: Beyond Futenma*, EAST ASIA

Unlike Germany, Japan has the very real threats of China and North Korea preventing its move toward post-WWII political independence.²³⁹ Hatoyama was still seeking his political equilibrium in the wake of the LDP's political dynasty, and it can only be assumed that Kan will have a similar experience.²⁴⁰ Akihisa Nagashima, Japan's vice minister of defense asserts that Japan will continue to take the U.S.–Japan alliance seriously.²⁴¹ He refers to the alliance as the heart of Japan's foreign policy even though Hatoyama had expressed an interest in an alliance without permanent U.S. bases.²⁴² Nagashima notes, however, that Hatoyama seemingly had a change of heart, and did not think Japan should “kick out” U.S. troops at all.²⁴³

Starting with the Bush Administration, the United States has increased pressure for Japan to bolster its military power.²⁴⁴ Bush conducted a series of Security Consultative Committee meetings (SCC) between U.S. and Japanese foreign and defense ministers to outline plans to expand Japan's role in the alliance.²⁴⁵ Other than the relocation of Futenma, the SCC discussed a reduction in the number of U.S. marines in Japan, an X-Band radar missile defense system, expanding bilateral cooperation in training and intelligence, and the possibility of a nuclear-powered aircraft carrier at the Yokosuka Naval Base.²⁴⁶ Also, Japan has signed a series of bilateral security partnership agreements with other democracies such as Australia, India, and Singapore, paving the way for a broader network of military alliances.²⁴⁷

INSIGHTS, Feb. 2010 at 2, 4.

239. *Id.*

240. *See id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. SEE EMMA CHANLETT-AVERY ET AL., CONG. RESEARCH SERV., RL 33436, JAPAN-U.S. RELATIONS: ISSUES FOR CONGRESS 12 (2009).

245. *Id.*

246. *Id.*

247. *Id.* at 15.

VII. CONCLUSION

The move toward remilitarization in Japan has been gaining momentum for some time now. The noble intent and spirit of Article 9 of the Japanese Constitution should be preserved as far as possible, but the reality is that Japan must begin to assume a greater degree of military potential.

Japan can initiate a guarded remilitarization process by taking full responsibility for its defense. It can do that by amending Article 9 to allow for more direct military involvement in world affairs. In particular, paragraph 2 of Article 9 could be removed in its entirety; it has already been interpreted so broadly as to render it virtually meaningless. Alternatively, the language in paragraph 2 stating that “land, sea, and air forces, as well as other war potential, will never be maintained” could be amended to allow for Japan to maintain some war potential while preserving its enjoinment from “belligerency of the state.”²⁴⁸ This would allow Japan to more easily participate in collective defense efforts such as those agreed to by the U.N. Security Council in the Gulf War.²⁴⁹

Further, the Japan–U.S. security treaty could be revised to reciprocally oblige Japan to come to the defense of the United States just as the United States is obliged to come to the defense of Japan. This would allow the United States some breathing room in the Far East while allowing Japan a measure of its much sought-after equality. Japan could also raise its amount of military spending to ease the U.S. burden, as well as take over missile defense development and the responsibility of monitoring North Korean missile technology.

U.S. policymakers in recent years have urged Japan to shoulder a greater burden in ensuring its security, despite the fact that it was the United States that insisted Japan constitutionally renounce its war potential.²⁵⁰ Article 9 of the Constitution continues to complicate a number of policy issues,

248. KENP, art.98, para. 1–2.

249. See Chuck Marsh, *Japanese Air Defense Forces begin U.N. Missions*, U.S. CENTRAL AIR FORCES-FORWARD PUBLIC AFFAIRS, Sept. 8, 2006, <http://www.af.mil/news/story.asp?storyID=123026778>.

250. Miks, *supra* note 88.

2010]

THE FUTURE OF U.S.-JAPAN RELATIONS

175

including Japan's candidacy as a permanent member of the U.N. Security Council.²⁵¹

U.S. forces and budgets are already stretched thin with the ongoing conflicts in the Middle East,²⁵² and the looming threats of China and North Korea can no longer be ignored. Japan should amend Article 9 of its Constitution, drop the self-defense façade, and openly embrace remilitarization.

251. *Id.*

252. See John Lyman, *U.S. Military: Stretched too Thin?*, Jan. 30, 2010, FOREIGN POLICY DIGEST, <http://www.foreignpolicydigest.org/News/Global-Conflict-Update/current-capabilities-of-the-united-states-military-broadly-analyzed.html>.