

Change It to Save It : Why and How to Amend Article 9

Craig Martin

(Professor of Law, Washburn University School of Law)

INTRODUCTION

Article 9 of the Constitution of Japan has been the subject of considerable debate since the time of the very drafting of the Constitution in 1946. Factions within the Liberal Democratic Party (LDP) have sought to amend it, in order to weaken and dilute the provision's restrictions on Japan's military power, throughout the more than 60 years it has held power since 1955. A complex dynamic of political and public opposition,¹ however, has until now prevented any such amendment. The opponents of the LDP's efforts to relax the constraints imposed by Article 9 have historically thought that vehement and uncompromising opposition to any amendment of Article 9 was the most effective way to defend the core values of the provision. The underlying fear has been that any concession to some form of minor amendment to any aspect of Article 9 will simply open the flood-gates to the eventual elimination of the provision's constraints altogether. While the political right views amendment as essential to Japan becoming a "normal country", fulfilling its international obligations and developing a defense posture proportionate to increasing regional national security threats, the political left has viewed all such efforts with deep suspicion, and preferred a complete bar to any amendment rather than risk a slide to re-militarization, entanglements in American wars, and possibly even the militarism of the pre-war era.

In this article I suggest that the opponents of amendment can no longer afford to simply oppose all amendment efforts.² I say this as someone who has spent years studying Article 9, who believes it has served Japan well, and is sympathetic to the desire to maintain the core limits on Japanese involvement in armed conflict. But dogmatic adherence to the current provision will fail to preserve the core limits of

Article 9. The political forces are moving in favor of some form of amendment, and thus there is an increasing risk that the "no amendment at any cost" forces will lose. Thus, the champions of Article 9 must develop meaningful and persuasive alternative amendment proposals to put before the Japanese people. If the left has no amendment proposals with which to respond to the LDP's dangerous proposals, then if amendment comes, Japan will have only one alternative to consider. What is more, even if the LDP fails to mobilize sufficient support for amendment in some form, the recent "reinterpretation" of Article 9 may stand the test of time and operate to radically transform the meaning of the provision in any event. In that case, the arguments in favor of amending Article 9, for the purpose of preserving its core limits, become that much stronger.

In this article I lay out an argument for why and how Article 9 should be amended, from the perspective of those who think that the core limits of the provision should be preserved. It is an argument that is both grounded in constitutional law principles, and one that aims to remain loyal to the purpose and spirit with which Article 9 was ratified. It suggests that there are legal reasons why Article 9 ought to be amended, and there are ways in which Article 9 could be amended that would nonetheless remain true to the peaceful and internationalist objectives that animated those who ratified the constitution in 1946. It is an argument that is informed by principles of international and constitutional law that are understood to play a vital role in enhancing the peaceful tendencies of democracies. Such arguments stand in contrast with those proposals to amend Article 9 that are apparently based on purely political and policy considerations, and which are designed to essentially undermine the provision's effectiveness as a

meaningful legal constraint on Japan's foreign policy. In considering "how" to amend Article 9, this article includes an appendix with a specific amendment proposal as the basis for serious discussion about alternatives. It is an amendment proposal that is meant to serve as a starting point for discussion of a more realistic and meaningful alternative than the current position taken by pro-Article 9 advocates, which is simply to reject any and all talk of revision. In laying out this proposal, I will touch on some of the dangers inherent in both the proposals of the LDP, as well as the recent "reinterpretation" effort of the Abe government, but I will also emphasize that simply maintaining the status quo is no longer in the best interest of the constitutional order or the normative power of Article 9 itself.

I – THE MEANING AND OPERATION OF ARTICLE 9

In thinking about both why and how Article 9 ought to be amended, it is necessary to have a baseline understanding of what it means. This is the subject of considerable debate in the political, policy and academic spheres. Moreover, as is well known, the government has recently purported to change the meaning of Article 9 in the absence of any amendment—an issue that will be discussed below. Nonetheless, leaving aside the particulars of that debate, it is helpful to sketch out the broad concepts, as well as explain the formal and long-established government position.

A. *The Established Interpretation of Article 9*

It is perhaps best to begin with the text. Article 9 provides that:

Article 9 – 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.

The provision has three distinct elements: First, in the first paragraph, it prohibits war and the use of force for settling international disputes; second, in the first part of the second paragraph, it prohibits the maintenance of armed forces or "other war potential"; and third, in the final clause of paragraph two, it provides that the rights of belligerency will not be recognized. It is the first and second elements that have proved the most controversial, while the third is typically ignored and very often misunderstood. The first paragraph, what I will refer to as Article 9(1), explicitly incorporates principles from the international law system that govern the use of force by nation states against one another, the *jus ad bellum* regime.³ An interpretation of this provision that was informed by both the meaning of those international law principles, and the drafting and ratification history, would likely conclude that the provision prohibited all use of force, including that employed in self-defense.⁴ However, as will be discussed below, the long-established official interpretation is that it permits the use of force strictly for the exercise of the right of individual self-defense.

The second paragraph, what I will refer to as Article 9(2), is unique and rather odd. The first clause is largely without precedent in any other constitution. The plain meaning of the text, along with a study of the history of the drafting and ratification of the provision, would suggest that the first clause in Article 9(2) prohibits the maintenance of any military forces whatsoever.⁵ But this too has been subject to a more expansive and permissive official interpretation, as will be explained below.

The third element, being the second clause in Article 9(2), is typically ignored and frequently misunderstood in most Article 9 discourse. It constitutes the incorporation of principles of international humanitarian law (or *jus in bello*) to deny individual members of the armed forces of Japan, as a matter of domestic law, the privileges and immunities that they would otherwise enjoy as belligerents in an armed conflict. This constitutional clause would not, of course, have any impact on the rights and obligations of Japanese armed forces as a matter of international law, and it is a curious provision with no parallel in

any other constitution. As I will discuss in more detail below, there is a competing theory that the clause is a redundant restatement of prohibition in Article 9(1), though for reasons I have provided elsewhere, I would suggest that this is incorrect.⁶

While I cannot here review the drafting and ratification history, it is important to note a number of important features of the process. (a process which involved intense debate and revision over the course of more than a year in the Privy Council and each of the two chambers of the Diet).⁷ The Japanese government itself took the position during the revision and ratification process that Article 9 precluded all use of force and maintenance of any armed forces.⁸ The government was, of course, under some pressure from the staff of General MacArthur, which had drafted the provision, but the Diet members who considered it for purposes of ratification, and who were then unaware of the U.S. role in its creation, also embraced this position.⁹ This was not animated solely by a desire to ensure against the militaristic errors that had led to national disaster. In both houses of the Diet and in the Privy Council, members of the government and rank and file Diet members made impassioned speeches about how Japan would, through its adoption of this constitution, come to represent the vanguard of nations in establishing a new and more peaceful international order.¹⁰ It was in this process that Article 9 began to be embraced not only by segments of the political elite (though there were strong opposing forces among these as well, to be sure), but also by the people of Japan. It was the beginning of a process by which Article 9 would become a powerful constitutive norm, providing the legal foundation for a new national identity centered on pacifist ideals.¹¹ This is important in thinking about how to retain the essential purpose and spirit of the provision.

Notwithstanding the early understanding and apparent intent, the first formal government interpretation, established in 1954, was that the first paragraph of Article 9 permits the use of force for the individual self-defense of Japan. This interpretation was based upon an opinion provided by the Cabinet Legislation Bureau (CLB), which not only interpreted the first paragraph as permitting the use of force

for individual self-defense, but also interpreted the second paragraph as therefore only prohibiting a maintenance of armed forces that exceeded the minimum necessary for such individual self-defense.¹² At the same time, while interpreting the provision as permitting individual self-defense, the CLB also entrenched the understanding that Article 9(1) prohibited the use of force for collective self-defense under Article 51 of the UN Charter, and for collective security operations authorized by the United Nations Security Council under Article 42 of the Charter.¹³

The Supreme Court of Japan, which has significant and clear powers of judicial review under the Constitution, and is the primary authority for interpreting the Constitution, has largely abdicated its responsibility for enforcing Article 9. The *Sunagawa* case, decided in 1959 in the midst of negotiations for renewal of the U.S.-Japan Security Treaty, is the only case in which the Court has directly addressed the meaning of Article 9. In *obiter dicta* the majority endorsed the view that Article 9(1) did not prohibit the use of force for individual self-defense.¹⁴ As will be discussed in more detail below, however, the Court invoked the political question doctrine in dismissing the claim that the treaty and the presence of U.S. forces in Japan violated Article 9(2). Moreover, some twenty years later, in a direct challenge to the constitutionality of the Japanese Self Defense Forces (the SDF), the Court narrowed the standing requirements to the point that constitutional challenges of government law or policy for violating Article 9 are now all but impossible.¹⁵

The CLB, however, stepped into the institutional role of maintaining a consistent interpretation of Article 9 over the years, and effectively ensuring government compliance with the provision.¹⁶ It has successfully done so, right down until the “reinterpretation” of 2014. While the clarity of the government’s position, and thus the precise scope of Article 9(1), has been undermined by policy statements such as the U.S.-Japan 1997 Guidelines, and some of Japan’s military deployments since 9/11, as a formal matter this legal interpretation—limiting the permissible use of force to only individual self-defense, and prohibiting collective self-defense and collective security operations

authorized by the United Nations Security Council—has been consistently maintained.¹⁷

It is important to understand the extent to which Article 9(1), and the government's interpretation of it, goes further than the *jus ad bellum* regime in international law, in the sense that it imposes greater constraints on the use of force than does the UN Charter. It was precisely because of this that there was considerable concern among Japanese politicians during the ratification process as to whether Article 9 would make it impossible for Japan to comply with what were then understood as legal obligations under the UN Charter to contribute forces and participate in collective security operations. But given the manner in which the international collective security system has developed,¹⁸ Article 9 does not put Japan at odds with international law. It deprives Japan of rights it would otherwise have under international law, namely the right to use force in collective self-defense or in collective security operations—but there is no legal duty on Japan to engage in such operations. And states, like other legal entities, are always at liberty to waive their own rights. It may be, as Ozawa Ichirō and others have argued, that Article 9(1) constrains Japan in ways that prevent it from contributing to international peace and cooperation to the extent that many would like, or to the degree expected by its allies, but it does not cause Japan to violate the principles of international law. Moreover, the provisions of Article 9(2) do not have, as a matter of law, any relevance to the *jus ad bellum* regime whatsoever, even though they were no doubt conceived to limit Japan's ability to use force, and thus to prevent Japan from violating the principles of that regime.

B. The Operation of Article 9

An important question remains, however, regarding how effective Article 9 has been as a meaningful constraint on national policy. Much of the controversy surrounding Article 9 has been related to the existence and increasing size of the SDF. Japan's defense budget ranks seventh or eighth in the world, it has one of the most sophisticated naval forces in Asia, it is cooperating with the United States in ball-

istic missile defense systems, and is developing increasing force projection capabilities.¹⁹ It is widely argued that such military capability is far in excess of what is permitted by Article 9(2).²⁰ The official interpretation of Article 9(2) relies upon the first sentence of the paragraph, which refers to fulfilling the purposes of Article 9(1), to mean that the clause only prohibits armed forces or other war potential that could be used for the type of force that is renounced in Article 9(1)—that is, any use of force above and beyond individual self-defense.²¹ It is thus understood to prohibit the kind of military capability that could enable not only acts of aggression, but also participation in collective self-defense or collective security operations.

Whether or not one can really make meaningful distinctions between military capability that is strictly for individual self-defense and that which exceeds such requirements is the basis for much criticism.²² As a constitutional constraint Article 9(2) is highly ambiguous and not really capable of enforcement, as I will return to below. But even on the basis of this interpretation, there is a wide and growing chasm between that which is permitted by the constitution, and the reality on the ground. Nonetheless, many have argued that Japanese military capability would have been much greater had Article 9(2) not provided some foundation for political and popular opposition to the SDF and defense spending.²³ It cannot be said that it has not had any effect, but as will be discussed further below, Article 9(2) has not operated as a clear constitutional rule effectively constraining government policy.

In contrast to the ambiguity and ineffectiveness of Article 9(2), however, the government interpretation of Article 9(1) provides much clearer and more enforceable limits, and the provision has operated to effectively constrain government policy over the six decades since its promulgation.²⁴ In the early 1950s Yoshida Shigeru's government used the Article 9(1) constraints as a useful shield against American pressure to contribute more to the alliance and to participate in international peace and security operations. While cynical at the outset, this use of Article 9(1) nonetheless strengthened the normative power

of Article 9(1), and helped reinforce the growing social, political and legal norms that were anchored in the Article 9(1) renunciation of the use of force. Over time, Article 9(1) thus came to comprise a real constraint on policy. This was most clearly illustrated during the Gulf War. The government felt a powerful need to participate militarily in the coalition operations to drive Iraqi forces out of Kuwait, but the Director of the CLB advised that the government's proposed actions would constitute a use of force and thus violate Article 9. When the government proposed legislation for the contribution of non-combat related logistical support, it was defeated in the Diet on grounds that it too would violate Article 9.²⁵ Notwithstanding the enormous pressure from Washington and the deeply felt sense that inaction was causing a major diplomatic crisis for Japan, Article 9(1) mobilized sufficient institutional compliance to prevent government action that would have violated the provision.²⁶

II – WHY AMEND ARTICLE 9?

With this brief introduction to the established meaning and operation of Article 9, we can now turn our attention to the questions of why it should be changed. Some of the important reasons are more political and strategic than legal. This is so because all the indications are that the tide is in the direction of inevitable change. There is growing public concern about increased threats and insecurity in the region, emanating from North Korea and China, coupled with increasing doubts about American commitments to Japan's defense, all of which is leading to an erosion of the traditional public opposition to any amendment of Article 9. At the same time, none of the major political parties sitting in opposition to the LDP are committed to defending Article 9 at all costs the way the old Socialist Party was, and there is no other organized institutional resistance that is likely to prevent LDP amendment initiatives. Finally, there is the increasing likelihood that the LDP will for some time have the two thirds majority in the Diet necessary to initiate constitutional change. All of these developments point to the likely failure of any effort to simply block amendment. So change is likely coming, and the

question is whether the champions of Article 9 will have any proposals ready to shape the nature of that change. But while those reasons provide an important context and impetus for my arguments, in this article I am primarily focused on the legal and constitutional reasons for suggesting that champions of Article 9 develop and support an alternative amendment proposal. These reasons are, in short, that Article 9 suffers from increasing weaknesses that are undermining the normative power of the provision and the constitution as a whole; the LDP amendment proposals are dangerous, and thus demand a viable alternative; and finally, in the absence of any amendment, the "reinterpretation" of Article 9 will fatally erode the core restraints of Article 9(1).

A. Existing Weakness of Article 9

As explained earlier, Article 9(1) has operated consistently and effectively as a relatively clear constitutional rule, prohibiting the use of force for any purpose other than individual self-defense. But the Article 9(2) prohibition on the maintenance of armed forces or "other war potential" has been historically interpreted in such a way that it cannot operate as a clear constitutional rule. It is, at best, an ambiguous standard. This is due primarily to two aspects of the way in which it was interpreted. First, the idea that it permits such levels of military capability that would be necessary for individual self-defense, creates a sliding scale that depends on the perceived external national security threat. The level of armed forces necessary for defense is thus relative to the capability of other countries. Tied to this is the idea that the prohibition only really applies to military capability and weapons systems that are inherently offensive, which in turn depends on the notion that there is some intrinsic difference between offensive and defensive weapons systems or levels of military capability.²⁷

This relative and elastic interpretation of the prohibition on the maintenance of armed forces and other war potential has allowed for Japan's slow but inexorable development of a formidable military force. While most Japanese continue to insist that the SDF is not a military, it is most certainly a military in

all but name. What is more, while the number of troops in the Ground Self Defense Forces is small compared to China or the Koreans, Japan's armed forces comprise one of the best armed and most sophisticated militaries in Asia, with a military budget that ranks Japan in the top seven or eight military spenders in the World.²⁸ While Japan has always insisted that it does not have power projection capability, and thus its military capability is inherently defensive rather than offensive, even those claims are starting to sound hollow in the wake of its launch of a ship that is a small aircraft carrier in all but name.²⁹ In any event, the very notion of a clear distinction between offensive and defensive armed forces or military systems is rather nonsensical.

There are two major problems arising from this situation. The first is that this clause of Article 9(2) is an inherently non-justiciable and unenforceable standard. While there can be little doubt that Article 9(2) has operated over the decades to constrain the development of Japan's military capability, it provides no clear guidelines for government action. It is impossible to determine with any precision if the government has violated the provision. If the courts were ever to consider the merits of a claim that the current size and capability of the SDF violated Article 9(2), they would be unable to meaningfully assess the claim—how is a court to determine whether the size and capability of the SDF is more than is necessary for individual self-defense in relation to current threat levels? It is not a reasonable task for a judiciary, and thus the interpretation of the provision renders Article 9(2) unenforceable and relatively meaningless. That is dangerous for a constitutional provision specifically designed to constrain government action.

Similarly, there is the larger problem posed by the huge and growing gulf between the explicit language and obvious intent behind the first clause of Art. 9(2), and the reality of the SDF being a very sophisticated and powerful military with considerable war-fighting capability. It is indeed this inconsistency that has tended to drive much of the most bitter controversy over Article 9, and to fuel the allegations that the government is violating the provision.³⁰ This

apparent gulf between the stated norm and the reality that it is supposed to govern is acutely dangerous for a constitutional provision. When the very existence and power of a government institution represents proof of the meaninglessness and impotence of a fundamental constitutional norm, there is significant risk that the normative power of the constitution as a whole will be undermined. If Article 9(2) can be so easily disregarded, if it exercises such little control over government action, what confidence should we have that other provisions of the Constitution will respected or enforced? And indeed, in my view, this failure of Article 9(2) has already served to undermine and erode the power and effectiveness of Article 9(1) in many ways. Of course, many of the champions of Article 9 will wholeheartedly agree that the existence and capability of the SDF constitutes a violation of Article 9(2), but will argue that the solution is to either disband or, at minimum, significantly reduce the size and capability of the SDF. But that is simply not a tenable argument. In the current geopolitical and strategic context, it is simply utopian to cling to such proposals. As I will discuss below, the solution has to be found in amending Article 9(2) to bring the Constitution back into alignment with the reality, in order to save the more important constraints imposed by Article 9(1).

A final word should be said about the second clause of Article 9(2), which constitutes the third element of Article 9. This clause, which provides that the right of belligerency will never be recognized, is typically ignored and very frequently misunderstood. As mentioned earlier, there are two different theories in Japanese constitutional discourse on what this means.³¹ I have argued in more detail elsewhere that both the drafting and ratification history of Article 9, and the distinct meaning of the rights of belligerency in international law, make very clear that only one of these theories is correct—that is, that as a matter of Japanese domestic law there will be no recognition or enforcement of the rights of belligerency that are extended to members of Japanese armed forces under international humanitarian law (IHL, also known as *jus in bello*, or the law of armed conflict).³² The rights and privileges of belligerency under IHL include the

authority for lawful combatants in international armed conflict to use lethal force and to destroy legitimate military objectives, and an immunity from prosecution or liability under other legal regimes for such actions.³³

This clause poses two distinct problems, which are grounds for amending it. The first is that there is again some ambiguity and uncertainty as to what it means, which is cause for confusion. This is evidenced by there being two competing and very different theories as to its meaning. This is good enough reason to amend it, if other aspects of Article 9 are being amended in any event. Constitutional provisions that are of uncertain and disputed meaning, and thereby cause confusion, are problematic. But in this case, both possible meanings of the clause call out for amendment, even if we could decide once and for all which one was correct.

On the one hand, if, as I have argued, the clause denies the rights and privileges of belligerence to members of the SDF engaged in armed conflict, that has profoundly problematic implications. If we accept that Article 9(1) permits Japan to use force and thus engage in armed conflict for purposes of individual self-defense, then we must also accept that such armed conflict will be governed by IHL. It seems incongruous that Japanese law would refuse to recognize the rights and privileges under IHL afforded to members of the armed forces engaged in that conflict. To be clear, the members of the SDF would, of course, have all the duties, obligations, rights and privileges under IHL as a matter of international law, and Article 9 cannot have any impact on their status or treatment under international law. But consider the situation of a combatant member of the SDF engaging in lethal operations in the context of an armed conflict. That SDF member would have been authorized by IHL to conduct such action, and would be immunized by international law from prosecution for having caused civilian deaths collateral to those lethal attacks. But Article 9(2) raises the prospect that if such an SDF member were either prosecuted or made the defendant in a civil suit for wrongful death in Japanese courts, he would have that defense denied to him by reason that Article 9(2) provides that such

rights will not be recognized as a matter of Japanese law.³⁴ This seems both an unjust result, and inconsistent with the established interpretation of Article 9(1), and so should be amended.

On the other hand, the second meaning attributed to this clause is that it merely restates in different terms the prohibition in Article 9(1), denying Japan the right to engage in “belligerent” or aggressive uses of force. I have argued elsewhere in detail why this cannot be correct.³⁵ That is not the meaning of the word “belligerent” in international law, nor does Article 9(1) only prohibit the “aggressive” use of force in any event. But leaving aside such arguments, and the drafting history of Article 9, this interpretation suggests that this clause of Article 9(2) is entirely redundant. It is a trite principle of constitutional interpretation that provisions should not be construed as being purely redundant. But if it were true that this clause does no useful work whatsoever, that it is entirely redundant yet nonetheless the cause for confusion, then for that reason alone it should be deleted.

B. Threat of Current Amendment Proposals

As is well known, there has been agitation for the amendment of Article 9 almost since the promulgation of the Constitution. But more recently in just the last decade there have been a number of constitutional amendment proposals published. The most comprehensive and serious of these was that of the LDP, published in 2005,³⁶ and then a revised version of this proposal that was published in April, 2012.³⁷ Earlier this year, as political discussion of constitutional amendment became more intense, there was some suggestion by the LDP that it might not proceed on the basis of the 2012 proposals,³⁸ but it is entirely unclear how genuine such statements were, or what the LDP intentions are. For now, it is the only complete proposal on the table, and it is the proposal that the opposition must address.

In summary, the 2012 LDP proposal provides that Article 9(1) would be revised to clarify that Japan retains a right of self-defense (without specifying whether individual, collective, or both), and the language prohibiting the use of force would be

significantly relaxed. Article 9(2) would be entirely replaced, and it would begin by making explicit the authority to maintain a “national defense military” (*kokubōgun* – the NDM), for the purpose of, among other things, defending the peace and independence of the country, and to engage in “international cooperation activities” (*kokusai kyōchō kastudō*)³⁹ to guarantee the peace and security of the international society.⁴⁰ Moreover, an entirely new Article 9(3) provides that the state, in cooperation with the people, shall protect the land, territorial waters, and air space of the country, together with all resources therein.⁴¹

While the LDP proposal for Article 9(2) does introduce new provisions to establish greater civilian control, placing the NDM under the control of the prime minister, with several of its specified activities being subject to the approval of the Diet, the overall effect of the revisions would be to significantly undermine the constraints that Article 9 currently exercises on the use of force. Not only does the revision to Article 9(1) itself weaken the explicit constraint imposed, but the proposed changes to Article 9(2), and the new Article 9(3) would operate in a manner that would necessarily require a change to the current understanding of Article 9(1).⁴² What is more, these changes are insidiously subtle, so that in the absence of careful analysis it is not immediately obvious how much of a change they would cause to the meaning and operation of Article 9(1).⁴³ Let us, therefore, explore these proposals in more detail, and in order to understand how these changes affect Article 9(1), let us begin with the new Article 9(2) and 9(3).

To give credit where it is due, the deletion of the current Article 9(2) is not only acceptable, but as I explained above and will return to below, it is in my view necessary. So the champions of Article 9 should not take issue with the deletion of paragraph two – this is not where the dangers lie or where the battle should be fought. The LDP draft replaces paragraph two with two new paragraphs, one of which has five sub-sections.⁴⁴ The proposed Article 9(2) (i) explicitly authorizes the maintenance of the NDM, as mentioned above, under the supreme command of the

prime minister, for the purpose of ensuring the peace and independence of the country, and the safety of the state and its people. Article 9(2) (ii) provides that the NDM’s activities will be in accordance with law and the approval of the Diet.⁴⁵ Again, to give credit where due, this is a laudable attempt to create clearer civilian control over the military, and to firmly condition all military activity upon Diet approval, though it arguably does not go far enough.

The mischief begins in the rest of the new provision. Article 9(2) (iii) stipulates that in the NDM’s activities to fulfill its mission in accordance with Article 9(1), it may support the public order and “international cooperation activities” for the purpose of ensuring the peace and security of the international community, as well as being able to engage in operations to defend the life and freedom of the Japanese people.⁴⁶ This new provision, when considered in the context of the new Article 9(1), as I will explain below, is highly significant.

Article 9(2) (iv) provides that the activities of the NDM, as defined in the previous provisions, as well as the organization, control, and protection of the secrecy of the NDM, are all to be determined by law. Article 9(2) (v) provides for the establishment of military courts within the NDM for the purposes of prosecuting NDM personnel, as well as other public officials, for crimes connected to the execution of their duties, or relating to the secrecy of the NDM, though it preserves a right of appeal to the courts.⁴⁷ This authority for military courts, entirely new, requires much further explanation and clarity. The notion that civilian public officials could be prosecuted in military courts for offenses unrelated to national security issues is ominous indeed.

Finally, in the new paragraph three, Article 9(3), the state, in cooperation with the people of Japan, for the purpose of defending the independence and sovereignty of the state, is obligated to preserve the national territory, territorial waters, and airspace, and all resources therein.⁴⁸ This provision too, like Article 9(2) (iii), takes on particular significance when considered in conjunction with Article 9(1), as will be explored below.

Returning then to Article 9(1), the proposed

changes to this clause seem, deceptively, far less radical, and almost inconsequential. But when interpreted within the context of the changes to Articles 9(2) and (3), they turn out to be profound and indeed insidious. This paragraph, in the revised version, is divided into two sub-sections. To take these in reverse order, the entirely new Article 9(1) (ii) provides that the constraints in Article 9(1) (i) do not impede the exercise of the right of self-defense.⁴⁹ This move to clarify explicitly the scope of Article 9 is a step in the right direction, but it is insufficient – the provision does not stipulate whether it is individual self-defense or collective self-defense, or both, that is permitted, and thus rather than resolve the debates surrounding interpretation, will likely exacerbate the conflicts over the scope of permissible activity under Article 9.

Article 9(1) (i) looks little changed from paragraph one of the current Article 9. The words remain virtually the same. Yet the slightest revision that has in fact been made contains the basis for unraveling the binding power of the constraint, like a Trojan horse smuggling in the forces of destruction. It will be recalled that Article 9(1) now reads, in part, “the Japanese People forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.” In contrast, the proposed revision reads: “the Japanese People renounce war as a sovereign right of the nation, and the threat and use of force as a means of settling international disputes will not be used.” For purposes of emphasis it bears repeating this with the revisions illustrated in typical editorial fashion: “the Japanese People ~~forever~~ renounce war as a sovereign right of the nation, and the threat ~~or~~ and use of force as a means of settling international disputes will not be used.”⁵⁰

In other words, the clause “threat or use of force”, which is drawn from Article 2(4) of the U.N. Charter, is no longer subject to the “renunciation” or identified as a sovereign right of the nation. Now only “war” is identified as the sovereign right and only it has been renounced, with the eternal nature of that renunciation having also been deleted. War is no longer used as a legal term in international law, which only pro-

hibits the use of force and governs armed conflict—and there is certainly no “sovereign right” to engage in war under international law. Thus, limiting the renunciation to “war” makes it rather meaningless. But turning to the use of force, the only sovereign rights to use force under international law are for purposes of individual and collective self-defense, and for collective security operations authorized by the U.N. Security Council. But the crucial phrase “threat or use of force” in Article 9 would now be divorced from both the renunciation and the concept of sovereign rights, and it would only be limited by the feeble and passive phrase “will not be used.” Not the mandatory prescriptive language of “shall not,” or “must not,” but merely “will not.” So the non-existent Sovereign right of war is renounced, but the use of force is subject only to a weak statement of intent. Particularly in light of the debates during the drafting in 1946 over the nature of the verbs to be employed in Article 9, this revised provision would likely be interpreted as being merely aspirational or hortatory, and certainly not as creating a binding legal prohibition on the use of force. That would be a radical change from the current provision, which is understood to operate as a legal prohibition, renouncing the use of force as a sovereign right of the nation.

Even the change of the word “or” to “and” in the clause “threat or use of force”—which is part of a clause in international law that is interpreted as prohibiting both the threat of using force and the actual use of force, separately or together—suggests an attempt to undermine the legal force of the clause. It does so by subtly distancing it from its international law origins, and creating ambiguity over precisely what action is subject to the constraint. Is a threat to use force now only prohibited when accompanied by an actual use of force, for instance? Or would a threat of the use of force similarly be subject to the now weak “will not be used”? It is unclear.

What is more, the operation of the revised Article 9(1) would be further hampered once its meaning is considered in the context of the new provisions of Article 9. Not only does the new Article 9(1) (ii) carve out the right of self-defense, perhaps collective as well as individual, but Article 9(3) creates an

affirmative obligation on the state to preserve the nation's territory and natural resources. What if another country is said to be extracting resources from the territorial waters of Japan? That is not a sufficient basis to justify the use of force in self-defense under international law (the use of force being only permissible in response to an actual or imminent armed attack), but here in this new Article 9, in the re-named Chapter on National Security, is an apparent constitutional obligation on the government to preserve the nation's resources, with the implication that it has authority to do so with the use of force if necessary.

Similarly, Article 9(2) (iii) provides that the NDM may support "international cooperation activities" for the purpose of ensuring international peace and security.⁵¹ This sounds potentially like authority to participate in UN authorized collective security operations—which is above and beyond the use of force permitted by Article 9(1). But in actual fact, the clause "international cooperation activities" is not a term with any meaning whatsoever in international law. In contrast to "collective self-defense" and "collective security operations authorized by the U.N. Security Council", which are terms that reflect the two established exceptions to the prohibition on the use of force in the U.N. Charter, this term has no basis in international law. Thus, this ambiguous clause would appear to authorize the NDM to participate in any military operations involving more than one other country, whether such operations are UN sponsored or otherwise, and whether they are lawful or not.

In sum, the LDP proposal for the amendment of Article 9 contains some provisions that at first glance appear to be positive steps towards clarifying the scope of the provision's limits, while legitimating the SDF and imposing some civilian control over the military. Indeed, it will no doubt be argued that the intent was to make such changes while essentially preserving the limits on the use of force. But such arguments are not to be believed. Upon close inspection, it is clear that the operation of the subtle but pernicious changes to Article 9(1), in combination with the new paragraphs in Article 9, would lead to

further conflicts over interpretation, and effectively eviscerate the current constraints on the use of force.

The main point is that this and other proposed amendments to Article 9 would utterly hollow out the provision's constraints on the government's ability to use armed force, and would be a marked departure from the pacifist principle that is thought to be one of the three pillars of the Japanese constitutional order. Yet these are concrete proposals, and it is increasingly likely that they will be the subject of substantive debate as the prospect of amendment becomes more real. Supporters of Article 9 cannot continue to simply stonewall the debate, and refuse to discuss the details of these amendment proposals. They cannot continue to leave the field to the revisionists, and refuse to submit some alternative proposals that are true to the underlying principles of Article 9. They must address the fundamental question: how can Article 9 be amended in a manner that addresses not only the very real security and diplomatic concerns, but also the constitutional law imperatives for amendment, while nonetheless remaining true to the spirit of the provision?

C. Threat Posed by the "Reinterpretation" of Article 9

The dangerous amendment proposals of the LDP are not the only threat to Article 9. Whether or not the LDP can muster the support to amend Article 9 remains uncertain, and some may be thinking that if that effort can be opposed, all will be well. Such thinking is misplaced. Article 9 is under threat regardless of the amendment efforts. The core meaning of the provision is also undermined by the recent efforts of the Abe administration to "reinterpret" Article 9. A great deal has been written on how both the process and substance of the reinterpretation effort was unconstitutional, and why the implementing revisions to the national security laws are in violation of Article 9.⁵² There is not room here to review in detail the nature of the reinterpretation effort and all the ways in which it was illegitimate and unconstitutional. But it is important to understand that unless the courts strike down the revised national security laws, which is quite unlikely, or unless Article 9 is formally

amended, the reinterpretation will over time come to represent the new official, accepted and entrenched meaning of Article 9.⁵³ Understanding how radically inconsistent that reinterpretation is with the accepted and established meaning of Article 9, therefore, should be an important step to accepting that some amendment of Article 9 is necessary in order to preserve its traditional core meaning.

It will be recalled that the so-called reinterpretation was announced in the form of a Cabinet Decision in July, 2014.⁵⁴ The Cabinet Decision purported to unilaterally change the meaning of certain aspects of Article 9. In concrete terms, it purported to address three specific categories of policy for which legislation would be revised, and for which the meaning of Article 9 would have to be changed. It should be noted at the outset that all of these changes relate to Article 9(1), not Article 9(2). The first category related to the use of the SDF in response to “an infringement that does not amount to an armed attack.” Such use of the military is to be permitted in “situations that are neither pure peacetime nor contingencies” (with the word “contingencies” apparently meaning “hostilities”). This would permit the use of force in circumstances that do not involve an armed attack, and would include responses to “infringements” that occur in the areas “surrounding remote islands”, and in circumstances in which the police are not able to effectively respond.⁵⁵

The second category of policy for which new legislation would be required is to further Japan’s contributions to “the peace and stability of the international community.”⁵⁶ This policy development is to permit an expansion of the scope and nature of logistical and rear-area support to foreign armed forces engaged in hostilities. Japan has in the past imposed stringent limits on such support, with the view that extensive logistical support and transport assistance for the armed forces of belligerents may be deemed “integral” to the use of force by such foreign armed forces, and thus prohibited by Article 9. Indeed, in a notorious decision in 2008 the Nagoya High Court opined (in what was extensive *obiter dicta*, in a judgment that ultimately dismissed the claim of the applicants for lack of standing) that Japanese support

for coalition forces during the belligerent occupation of Iraq beginning in 2005, constituted action that was integral to the use of force by coalition forces and was thus a violation of Article 9.⁵⁷ The Cabinet Decision purported to revise the interpretation of these limits, and particularly this concept of integration with the use of force by other belligerents to an armed conflict (known in Japanese as the “*ittaiika*” doctrine). Under the new revised understanding, according to the reinterpretation, Japanese support for the armed forces of other countries would only constitute an integral component of their use of force if the support was provided directly to foreign armed forces actually operating in active theatres of combat. Providing such support for armed forces behind the lines, or on their way to the theatre of conflict, would not constitute a use of force under the new interpretation.⁵⁸

The third category in the Cabinet Decision, the “Measures for Self-Defense Permitted under Article 9”, was the most controversial. Noting that “sufficient responses would not necessarily be possible if the constitutional interpretation to date were maintained,” the Cabinet Decision purported to expand the scope of Article 9 to permit the use of force in the exercise of the right of collective self-defense.⁵⁹ This, of course, makes permissible a form of the use of force that was precisely understood to be prohibited under the long-established interpretation of Article 9. The Cabinet Decision made some effort to justify this move in constitutional terms, by reference to the preamble and Article 13 of the Constitution. The preamble refers to the “right to live in peace”, and Article 13 provides that the people’s “right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and other governmental affairs.”⁶⁰ Thus, the Cabinet Decision argued, “Article 9 cannot possibly be interpreted to prohibit Japan from taking measures of self-defense necessary to maintain its peace and security and to ensure its survival.”⁶¹ It suggested that the only change now was that collective self-defense was deemed necessary, in some circumstances, to maintain peace and security, ensure the survival of Japan, and preserve the people’s right to life, liberty and

pursuit of happiness.⁶²

In accordance with this logic, however, the government developed a concept of collective self-defense that is quite different in scope and contour from the understanding of the concept in international law. The Cabinet Decision qualified the concept by adding certain conditions precedent and apparent limitations, thus creating a *sui generis* concept of collective self-defense for the purpose of the reinterpreted substance of Article 9. Indeed, the Cabinet Decision explicitly stated that “a legal basis in international law and constitutional interpretation need to be understood separately.”⁶³ Thus, the use of force in the exercise of this *sui generis* right of collective self-defense is only permissible in circumstances in which there has been an armed attack against “a foreign country that is in a close relationship with Japan,” and when such an attack is one that “threatens Japan’s survival and poses a clear danger to fundamentally overturn [the] people’s right to life, liberty and pursuit of happiness, and when there is no other appropriate means available to repel the attack.”⁶⁴ The Cabinet Decision also noted that the use of force in response must be the minimum necessary for the defense of Japan. Finally, it specified that the enabling legislation would include the condition that “in principle” the Diet should be required to approve any such use of force.⁶⁵ These limits were subsequently articulated by the government as constituting three clear and distinct conditions precedent to the use of force for collective self-defense, namely: (i) an armed attack on a country with close relations to Japan, and such attack poses a threat to Japan’s survival and the rights of the people to life, liberty and the pursuit of happiness; (ii) there is no other means available to protect against the threat to Japan and its people; and (iii) the use of force is the minimum necessary for such defense and proportionate to the threat.⁶⁶

This limitation of the use of force to situations in which Japan or its people are threatened by the attack on a foreign state was, according to government representatives, designed to make for a narrower or more limited concept than the right of collective self-defense under international law. The latter, of course, permits the use of force against an aggressor

that has attacked a third country, regardless of any threat posed to the state using force under this justification, or the nature of the relationship between the victim and the country exercising the right.⁶⁷ But how the government’s new conception of collective self-defense would operate in practice is unclear at best, and indeed the actual intent of the language itself is open to interpretation.

The Cabinet Decision itself, as well as the statements of Prime Minister Abe and others in the Cabinet, candidly recognized that the reinterpretation constituted a significant change to the long established and accepted meaning of Article 9. These purported changes themselves were never voted upon in the Diet—rather, the changes were merely implemented through changes to national security laws. As is well known, the government in September 2015 passed two bills, which enacted one entirely new law and contained substantial revisions to other existing national security laws, all of which significantly altered Japan’s national security posture and the authority for action of the SDF.⁶⁸ The government openly acknowledged that these national security law changes were only made possible by the so-called reinterpretation. Put another way, this was an acknowledgement that the reinterpretation and the resulting revisions to the national security laws were inconsistent with the established meaning of Article 9—and that the national security laws would be unconstitutional unless the reinterpretation was the accepted meaning of Article 9. Indeed, that was the very purpose of the reinterpretation—to make possible the changes to the national security laws. And indeed, most constitutional law scholars in the country were reported to be of the opinion that the new national security laws were in fact inconsistent with the established and accepted interpretation of Article 9, and for that reason unconstitutional.⁶⁹

The reason for this becomes clear upon a closer analysis of the changes. In order to analyze these, however, we have to consider not only the Cabinet Decision and statements about it by members of the government, but also the reports of the ad-hoc and extra-constitutional body established to advise the Cabinet during the reinterpretation process. It will be

recalled that Prime Minister Abe had first established this committee, the “Advisory Panel on the Reconstruction of the Legal Basis for Security” (the “Advisory Panel”, also known as the “Yanai Committee”) in 2007.⁷⁰ It was re-convened when Prime Minister Abe formed returned to power in 2012. It thus produced two different reports, one in 2008,⁷¹ and one in 2014.⁷² It is not entirely clear what role these advisory reports might play in any judicial or other interpretation of Article 9 subsequent to the “reinterpretation.” Depending on whether the Advisory Panel reports are to be considered as part of the reinterpretation, we have two distinct problems with its validity. On the one hand, if we look at the Advisory Panel reports as being part of the reinterpretation or informing how it is to be understood, then the reinterpretation could be said to render the renunciation in Article 9(1) meaningless, which offends basic canons of constitutional interpretation.⁷³ On the other hand, if we look at just the Cabinet Decision, then there is sufficient ambiguity and vagueness as to make the new interpretation of the provision non-justiciable. I will explore each of these in turn.

Beginning with the 2014 Advisory Panel report, it initially described how the established interpretation of Article 9 has consistently denied and prohibited any use of force beyond that for the exercise of individual self-defense. From there it went on to not only explicitly recommend a reinterpretation that would allow for the exercise of collective self-defense, but also collective security operations authorized by the UN Security Council. Indeed, it recommended a construction that would permit any use of force that would be permitted by public international law. It did so on the fallacious argument that the clause “as means of settling international disputes” in Article 9(1) qualifies and limits the scope of the prohibition on the use of force, in that neither the exercise of individual nor collective self-defense constitutes “a use of force for settling international disputes”. The report goes even further, for good measure, by suggesting that the words “to which Japan is a party” should be simply read into the clause. As such, so the argument went, any use of force for self-defense or UN collective security operations would be permiss-

ible, as it would then not be for the “settlement of international disputes to which Japan is a party.”⁷⁴

The background to this argument is not new, and indeed the Advisory Panel quotes testimony of a former Director General of the SDF to the Diet on the issue.⁷⁵ The claim is often made by conservative proponents of expanding the meaning of Article 9 that this interpretation mirrors the language and accepted meaning of the Kellogg–Briand Pact, but that is entirely inaccurate—not only is the language in the treaty actually quite different, but the relevant clause has never been accepted as having the meaning that Japanese conservatives attribute to it in any event.⁷⁶ What is more, there is simply no foundation whatsoever for the idea that the *jus ad bellum* regime in international law makes a conceptual distinction between different uses of force based on whether they are for “settlement of international disputes” as opposed to for any other purpose. It does not recognize self-defense as being somehow distinct from an international dispute, nor for that matter accept that a state is not “a party to a dispute” if it is acting in self-defense.⁷⁷ What this argument in effect attempts to do, while studiously avoiding the language itself, is to reinterpret the clause “settling of international disputes” as meaning “engaging in acts of aggression”. This harkens back to older reactionary arguments that have been made within conservative circles in Japan, to the effect that Article 9 should be understood as only prohibiting aggressive war—arguments that were rejected with the official interpretation of 1954, and consistently rejected ever since, for reasons that I turn to next.⁷⁸

Leaving aside all of these detailed objections to the basis for the Advisory Report argument, however, a more fundamental constitutional interpretation problem is posed by the broader implication of its argument. If, as the Advisory Panel report argued, Article 9 is to be now understood as permitting all uses of force that are permitted by the *jus ad bellum* regime in international law, or to put it a different way, if Article 9 only prohibits “aggressive war”, then we are left with Article 9(1) renouncing exactly nothing. It will be recalled that the provision states that “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.” It is prohibiting certain uses of force that constitute sovereign rights under international law. While it is true that the English language version of the clause could be construed as identifying only “war” and not “the threat or use of force” as the sovereign rights that have been renounced, the Japanese language version makes it much more clear that it is both war and the threat or use of force that are being renounced as sovereign rights.⁷⁹ But if Article 9 is construed as prohibiting only that which is already prohibited by international law, then it has renounced nothing, and the interpretation renders at least part of the text of the provision meaningless—which offends basic principles of constitutional interpretation. The meaning goes from a clear rule that renounces and prohibits the exercise of certain sovereign rights, to a provision that renounces nothing, and merely confirms in ambiguous terms the country’s adherence to the *jus ad bellum* regime—which is entirely and categorically inconsistent with the original purpose of the provision, precedent, and the consistent understanding and operation of the provision for over sixty-five years.

Such is the problem with the Advisory Panel’s report. If, on the other hand, we consider only the Cabinet Decision as articulating the substance of the reinterpretation, we are presented with a different problem. As discussed earlier, the Cabinet Decision does not go so far as to suggest that all uses of force permitted by international law are to be henceforth constitutional under the new understanding of Article 9(1), and indeed it even creates a *sui generis* conception of collective self-defense. But therein lies part of the problem—this conception of collective self-defense is vague, ambiguous, and non-justiciable, if ever it came to be the basis of a constitutional challenge. Collective self-defense under Article 51 of the UN Charter permits states to use force against an aggressor state in response to an armed attack on any other member of the United Nations, upon notifying the UN Security Council that it is exercising the right.⁸⁰ As explained earlier, the Cabinet resolution purports to limit the use of force in collective self-

defense to responses to an armed attack on a state with which Japan has close relations, and where the armed attack is viewed as a threat to Japan’s survival or its people’s rights to life, liberty and the pursuit of happiness. These additional conditions were provided as a sop to mollify the *Komeitō*, the ruling party’s coalition partner, as they create an impression that the bar for using force is higher, or the right of collective self-defense is narrower, than it is in international law.⁸¹ But, as will be explained below, in reality the conditions and criteria are ill-defined and difficult to either interpret or enforce, they make the concept inconsistent with international law, and the government pronouncements on the subject have further exacerbated the problem.

In discussing the operation and scope of the new right of collective self-defense, Prime Minister Abe and Defense Minister Nakatani have both made comments about the possibility of Japan conducting mine-sweeping operations in the Straits of Hormuz if it were mined by Iran.⁸² If, as they have suggested, the authority relied upon for such action would be this right of collective self-defense as defined (rather than on other international law principles that might authorize the clearing of mines from international straits),⁸³ the comments reveal even greater uncertainty about the meaning of the new standard. They suggest that the armed attack on a country in close relations with Japan (however that relationship might be determined) may be uncoupled from the threat to Japan’s survival and the people’s rights to the pursuit of happiness, such that each is a separate trigger for exercising the right of collective self-defense. Because in Abe’s comments on the issue there has been no reference to how Iran’s mining the straits of Hormuz might even constitute an armed attack, but has instead focused on how such a blockade would pose a threat to the livelihood of the Japanese people, and a threat to the “people’s right to life, liberty, and the pursuit of happiness” in the language of the clause. This not only uncouples the exercise of collective self-defense from an armed attack on another country, but even from a threat to the survival of Japan, and potentially conditions it solely upon a threat to the livelihood of the people of Japan—

however, that might be measured or defined.⁸⁴

Finally, if the ambiguity of these conditions were not enough, representatives of the government have actually stated publicly that not all the conditions for the use of force have been or will be disclosed, thereby quite explicitly suggesting that there are additional secret criteria for the use of force.⁸⁵ Secret conditions for the operation of laws of course flies in the face of fundamental notions of the rule of law. But leaving that aside, this ambiguity and uncertainty in the standard makes it arguably non-justiciable. In the event that the national security legislation that implements this part of the reinterpretation, or some specific deployment authorized by it, is challenged in court as being a violation of Article 9, how is a court to interpret the provision in light of this ambiguous new understanding?⁸⁶ The reinterpretation has the potential of rendering the provision, which was a relatively clear rule capable of enforcement, non-justiciable and thereby unenforceable.

The other problem posed by the reinterpretation as articulated by the Cabinet Decision, is that it is potentially inconsistent with the principles of *jus ad bellum* in international law. It has been argued that because the principles in Article 9(1) were drawn from international law, the interpretation of the provision should be informed by, and be consistent with the principles of *jus ad bellum*.⁸⁷ The Cabinet Decision's articulation of collective self-defense is obviously a marked departure from any requirement to interpret the concepts in Article 9(1) in a manner consistent with the *jus ad bellum*, but the problem is far greater than that. The Cabinet Decision, and the resulting national security legislation, could authorize state action that would result in Japan being in actual violation of the principles of *jus ad bellum*. This is true with respect to the contemplated use of force in collective self-defense as indicated above—a use of force in response to conduct that does not constitute an armed attack on a third country, but is responding to a perceived threat to the future survival of Japan, or even worse, merely to the Japanese people's right to life, liberty, and the pursuit of happiness, would obviously not fall within the accepted exception for self-defense. This is more radical than the infamous

Bush Doctrine of preventative self-defense, which has been roundly rejected in international law.⁸⁸

The reinterpretation does not, however, pose this problem only with respect to the use of force in collective self-defense. A careful review of the other two major elements of the Cabinet Decision reveals that it contemplates other possible uses of force that are also not at all consistent with international law. The most serious of these, is the stipulation that Japan could use force in response to “an infringement that does not amount to an armed attack,” in “situations that are neither pure peacetime nor contingencies”.⁸⁹ The use of force in individual self-defense in international law is permitted under Article 51 of the UN Charter, and customary international law, when either an armed attack has been carried out against the state exercising the right; or, under a more liberal interpretation that is widely accepted, when the launch of such an armed attack against the state is imminent.⁹⁰ Depending on how the Cabinet Decision and implementing legislation is interpreted and acted upon, it could conceivably authorize Japanese military operations that would constitute a use of force in the absence of any armed attack, actual or imminent—circumstances that would not come close to satisfying the international law conditions for the lawful use of force under either Articles 51 or 42 of the UN Charter. The Advisory Panel actually sounded a note of sage caution in this regard, but was apparently ignored.⁹¹

The second major part of the Cabinet Decision deals with the authorization for increased logistical and transportation support for the armed forces of allied forces engaged in armed conflict. The Cabinet Decision suggests that Japan's increased support for the armed forces of belligerents is to be simply deemed as not integral to the use of force by such belligerent forces unless it is within actual theaters of combat,⁹² however that might be determined, and so will not constitute a use of force by Japan in violation of Art. 9.⁹³ In a sense, this is not so much a reinterpretation of Article 9 as it is an attempted reinterpretation of what constitutes support for and involvement in the actions of belligerents so as to attract state responsibility under international law.

This is of course beyond the power and jurisdiction of the government of Japan—it cannot by Cabinet resolution or domestic legislation simply “deem” its actions to be not complicit in the use of force by other nations as a matter of international law. And under international law, certain levels of support for or involvement in the operations of a belligerent state in a given armed conflict, will be sufficient to make the supporting state a belligerent to the conflict as well. It makes no distinction as to whether the support is directly to forces within theatres of combat or not, as the Cabinet Decision suggests. What is more, where the actions of the first belligerent constitute an act of aggression, responsibility for such aggression can be attributed to the supporting state.⁹⁴ As mentioned earlier, the Nagoya High Court in 2008 found that Japanese support for coalition forces in Iraq in 2005 constituted a use of force in violation of Art. 9(1).⁹⁵ Moreover, neither the Cabinet Decision nor the implementing legislation includes any conditions that the belligerents that are benefiting from Japanese support are themselves complying with international law. Thus, such close logistical and transportation support could lead to Japanese operations being integrated not only with a use of force conducted by other countries, but also acts of aggression in violation of international law.

There is nothing, of course, that requires a constitutional provision in general to be consistent with international law. But as mentioned earlier, Article 9(1) was drafted and ratified with the purpose of not only incorporating international law constraints into the Constitution, but also to add further limitations, renouncing sovereign rights that Japan would otherwise have under international law. That purpose and understanding was formalized by the CLB, obliquely confirmed by the Supreme Court in 1959, and complied with and acknowledged by every government for close to seventy years, until 2014. The provision operated to effectively constrain policy in accordance with this understanding. The reinterpretation is a radical departure from that understanding, making permissible precisely that which had long been forbidden, and rendering the renunciation in Article 9 effectively meaningless.

III – HOW TO AMEND ARTICLE 9

Such are the arguments for why champions of Article 9 should develop alternative proposals for the amendment of Article 9. But how, precisely, should Article 9 be amended? What form should such an alternative proposal take? It is of course for Japanese jurists and, ultimately, for the Japanese people to decide how Article 9 should be amended. But in this Part I offer some thoughts on what a preliminary proposal might look like, as a way of starting a conversation on the issue. In the Appendix at the end of this article I have attached actual draft language of a proposal, and it will be noted that I provide various alternative options—requiring a choice, for instance, on whether to permit collective self-defense, and / or collective security operations, or neither. Those are choices for the Japanese people to debate and ultimately decide, but I offer some thoughts on why it is important to have clarity on what is prohibited and what is not. In this Part I develop some arguments for each of the elements of the draft proposal.

A. Clarifying the Permissible Use of Force

Article 9(1) is the most important and effective provision of Article 9. It is at the core of the idea of Japan being a pacifist country, and it has operated to effectively constrain government policy. With the exception of Japan’s marginal involvement in post-occupation Iraq, it has not used military force in *jus ad bellum* terms since the end of World War II, and that is due at least in part to both the direct operation and broader influence of Article 9(1).⁹⁶ That is impressive. Nonetheless, as has been explained, Article 9(1) is not without legal ambiguity. There is tension between the government interpretation and the facial meaning of the language, and the ambiguity inherent in the provision could be the source of considerable mischief depending on how Article 9(2) is amended. The LDP’s amendment proposal is clearly intended to broaden the scope of permissible use of force, while leaving Article 9(1) largely intact, which would merely provoke greater political and legal conflict down the road. In the event that Article 9 is to be amended, Article 9(1) should be revised to provide in

explicit terms precisely that which is prohibited, and that which is permitted.

This would require, of course, some important decisions about the scope of the prohibition that is to be created. Rather than burying or avoiding the issue, a clear amendment proposal will need to explicitly articulate that the use of force for the purpose of the individual self-defense of Japan, pursuant to Article 51 of the UN Charter, is permitted. In addition, it will also have to make clear whether force is permitted for either, both, or neither of, collective self-defense, and collective security operations authorized by the UN Security Council. Part of the debate in Japan has been over precisely this question, with people like Ozawa Ichirō, for instance, arguing that collective self-defense should be prohibited, but UN authorized collective security operations permitted.⁹⁷ On the other hand, collective self-defense is at the core of the U.S.-Japan security arrangement, and there is pressure on Japan from Washington to broaden its ability to more fully contribute to the defense of U.S. interests outside of Japan.⁹⁸ Indeed, the efficacy of the ballistic missile defense system being jointly developed relies upon such commitments.

Given that collective self-defense can be exercised unilaterally, requiring no authorization by the UN, many Japanese are justifiably concerned that permitting it could lead to Japanese involvement in military adventures that were in violation of international law. A constitutional prohibition on the use of force for collective self-defense, while permitting participation in UN collective security operations, would have the benefit of subjecting Japanese use of force (for anything beyond individual self-defense) to external checks, and would ensure it complied with international law.⁹⁹ Of course it would still deny to Japan a right that exists in international law, but, as is currently the case, the denial of the right would not prevent Japan from fulfilling its legal obligations.¹⁰⁰ Such a provision would still bring Article 9(1) into greater conformity with the *jus ad bellum* regime, and allow Japan to better fulfill its perceived international responsibilities. Such a provision would, for instance, have permitted participation in the first Gulf War in 1991, and in the UN mandated operations

in Afghanistan in 2002, but would have prohibited participation in the invasion of Iraq in 2003.

I am not here making a case for any particular position, such as revising the constitution to permit only UN authorized collective security operations, or only collective self-defense, or indeed to permit both. But I am arguing that Article 9(1) ought to be amended to make very clear what is to be permitted and what not, in terms that have specific meaning under international law. Seeking to amend Article 9 without making these hard choices, and trying to fudge the issue with such ambiguous terms as “international cooperation operation”—which has absolutely no legal meaning—is precisely the wrong way to proceed. If the decision is made that Article 9 should permit both collective self-defense and collective security operations, then one option with respect to the actual language would be to simply incorporate generally by reference that which is permitted by the UN Charter and customary international law, so that the constitutional provision would adjust with international law over time.¹⁰¹ (Sample language, with different possible options for a proposed Article 9(1), is provided in Appendix 1).

B. Armed Forces – with Clear Civilian Control

Turning to Article 9(2), I would endorse the LDP proposal’s move to delete the prohibition on the maintenance of armed forces or “other war potential,” as well as the denial of rights of belligerency, and also agree with its proposal to acknowledge the legitimacy of the SDF. Moreover, credit is due for the attempt to add some degree of civilian control. Nonetheless, there need to be stronger and more elaborate constraints adopted in conjunction with these moves to legitimate the existence of a military. This abandoning of the renunciation of armed forces will, of course, be enormously controversial for many supporters of Article 9, while the new constraints will be objectionable to the political right. But as already argued, the left must come to recognize that the existence of the SDF is a reality that cannot be realistically reversed. It is futile to argue for the disarmament of Japan in the current environment. Moreover, the future that was envisioned when the constitution

was ratified, in which UN forces would enforce a collective security system to maintain international peace and security, making the maintenance of national armed forces increasingly unnecessary, has not materialized. And as already argued, the ever growing gap between the reality of Japan's military capability and the prohibition in Article 9(2) is increasingly unhealthy for the constitutional order as a whole. If Article 9(1) is amended to make clear that Japan can use force in individual self-defense, as well as for collective security operations, it will be impossible to meaningfully distinguish between a military capability that is the minimum necessary for such purposes, and that which exceeds the limit. Opaque and unenforceable provisions corrode the effectiveness and normative power of a constitution. It is, therefore, advisable to eliminate the general prohibition on the maintenance of armed forces, and to put in place important constraints that the constitution currently lacks.

The overriding purpose behind the first clause of Article 9(2) was to prevent the possibility of a Japanese military again leading the country into a disastrous war.¹⁰² It was a response to the militarism of the 1930s, and the ruin that a defeated nation suffered as a result. That militarism had been made possible precisely because of fundamental flaws in the Meiji Constitution of 1889.¹⁰³ Among other things, the Meiji Constitution was highly ambiguous on the nature of the executive, it failed to identify the locus of supreme command over the military, and it did not establish civilian control over the military. While the 1947 Constitution of Japan corrected the problems regarding the location and scope of executive power, it was largely silent on the issues of civilian control and supreme command, precisely because it did not contemplate that Japan would have any military at all, or that it would be able to use force. There is only one relevant provision (Article 66(2)), added late in the ratification process, which requires that the prime minister and other cabinet ministers be civilians.¹⁰⁴ Beyond that, there are no provisions regarding supreme command or civilian control. Moreover, there is nothing that provides for legislative oversight. It will be recalled that in the last ten years there have

been significant incidents in which the Diet was misled by the SDF regarding operations in support of coalition actions in Iraq and Afghanistan, and the Diet inquiry into those incidents was handcuffed by its limited power to compel the disclosure of information from the Ministry of Defense and the SDF.¹⁰⁵

Similarly, because Article 9(1) originally contemplated that Japan was to be prohibited from using any force at all, there are no constitutional provisions regarding how decisions are to be made regarding the use of force. Assuming that the decision is to be made by the executive, is it a decision of the prime minister alone, or the cabinet as a whole? Is it a purely executive decision, or must it be also approved by the legislature? Is there some threshold level above which a decision to deploy military forces requires legislative approval? A convention has developed in Japan pursuant to which the Diet is required to pass a law for each deployment of the SDF, but there is no provision of the constitution that requires this process. Beginning in 2007, the LDP government has been working on legislation that would provide the government with permanent authority to deploy the SDF so long as prescribed conditions were satisfied, thereby eliminating this very convention.¹⁰⁶ The recent amendments to the national security legislation introduced differing requirements for Diet approval of SDF action, thus eroding the more general convention.¹⁰⁷

There is a growing trend among constitutional democracies towards the establishment of constitutional or statutory provisions that require governments to obtain legislative approval for decisions to use armed force.¹⁰⁸ As was observed by Immanuel Kant and James Madison over two hundred years ago, such separation of powers with respect to the decision to go to war is an important factor in not only satisfying the requirements of representative democracy, but also in reducing the risk of democracies embarking on military misadventures.¹⁰⁹ When the representatives of those citizens who will be dying and paying for the war participate in the decision-making process, there is less chance that wars will be fought for the benefit of narrow interests. Modern political theory has reinforced our under-

standing of the various ways in which such legislative involvement and oversight, as well as public debate and deliberation within the legislative process, can enhance the decision-making process and reduce the risk of states engaging in ill-advised or illegitimate wars.¹¹⁰

If we accept that Article 9 is to be amended in a manner that contemplates the possibility of some use of force, and formalizes the existence of an armed forces, but also insist that Article 9 nonetheless reflect its pacifist origins, and continues to serve as an *avante garde* model for other nations, I would suggest that any amendment must include some entirely new provisions that address the foregoing problems. First, an entirely new Article 9(2) ought to include provisions that would provide for civilian control and strict neutrality of the military (in place of the current Article 66(2)). Building on the LDP proposal, this could be achieved by establishing that the prime minister is commander in chief, prohibiting the appointment of serving officers of the armed forces as ministers in the cabinet, and limiting other ways in which the military might become involved in politics and policy. As part of both civilian control and legislative oversight, the new Article 9(2) ought to include provisions that would require the establishment of institutions that would monitor military deployments, along the lines of the Armed Services Committee in the U.S. Congress, and the oversight mandated in the German Basic Law.¹¹¹

Second, a new sub-paragraph, Article 9(3), should include provisions that establish the formal separation of powers with respect to decisions to participate in armed conflict or other military operations. As reflected in the draft language in Appendix 1, this would include a requirement that the government obtain approval in both houses of the Diet for decisions to use force or deploy the armed forces for international operations. It would require a supermajority in such votes with respect to decisions to use force in *jus ad bellum* terms, but a simple majority for other operations. The deployment of military forces for UN peacekeeping missions, for instance, will typically not contemplate the use of force, and so ought to be subject to lower thresholds than the dis-

patch of troops for collective security operations under Chapter 7 authority to use force. The provision should include a mechanism for requiring further approval of the Diet in the event that a peacekeeping mission morphs into a full-blown Chapter 7 “peace enforcement” operation, as has happened with operations such as that in Somalia in the 1990s.

This provision would merely build upon and constitutionalize a convention that has already operated in Japan, so in many respects it should not be seen as a radical suggestion. Yet the constitutionalizing of this convention is important, as it protects the current convention from capricious change. Even more significant, such a provision entrenches principles that are increasingly understood to be central to explanations for the democratic peace, and which enhance democratic accountability and deliberation in respect of the most important decision a government can make—that is, the decision to engage in armed conflict.¹¹² It would, moreover, do much to reassure Japan’s neighbors in the region, who will be highly sensitive to the ramifications of these amendments.

Many will of course resist this innovation on the grounds that it makes decision-making cumbersome and time-consuming, and may lead to the Diet actually preventing a contemplated use of force or military deployment, as it did during the Gulf War crisis. But that is of course precisely the point. Engaging in armed conflict should not be easy, and ought to be possible only when the reasons are compelling enough to mobilize the opinions and support of a significant percentage of the polity. Decisions to engage in armed conflict ought to be taken only after serious debate, with the assumptions and reasons of government exposed to interrogation and analysis, and challenged from various perspectives.¹¹³ There will of course be possible scenarios, such as when the state itself is under direct attack, in which the luxury of time for such debate and analysis is impossible. But mechanisms can be developed to deal with such circumstances, permitting the executive to make decisions to use force in an emergency, subject to *ex post facto* approval by the legislature within a defined time frame, as the U.S. *War Powers Act* and the constitutions of several other countries provide for.¹¹⁴

C. Reinforcing the Power of Judicial Review

The final element of the amendment required to fully establish civilian control over the military, and enforce the separation of powers with respect to the decision to engage in armed conflict, would be a provision providing for more specific judicial review of government decisions, actions, or laws that might be in violation of Article 9. The Constitution of Japan already provides for considerable powers of judicial review,¹¹⁵ but the Supreme Court has largely abdicated its responsibility and authority with respect to the interpretation and enforcement of Article 9.¹¹⁶ The lower courts have generally followed the Supreme Court's lead by insulating Article 9 from judicial review through the application of excessively narrow standing requirements, such that virtually no one other than a member of the SDF ordered into combat could establish the narrow legal interest deemed necessary to ground a claim that government action is in violation of Article 9.¹¹⁷

This of course means that Article 9, one of the three pillars of the Japanese constitutional system, is immunized from judicial scrutiny and is largely unenforceable, and that the third branch of government in the Japanese democratic system has opted out of any involvement in the process of ensuring that decisions to use force comply with the constitutional limits. To the extent that one takes seriously the idea that Article 9 is a fundamental component of the constitutional system, and takes seriously the notion that constitutional limits ought to be binding and enforceable, then this situation ought to be considered unacceptable. If we understand one of the roles of constitutions as being to operate as pre-commitment devices, serving to bind future governments to principles and values viewed at the outset as crucial for the polity, then one role of the courts is to ensure that those commitments are enforced.¹¹⁸

Aside from broader constitutional theory, the role of the judiciary is key to ideas that form part of liberal theories regarding the democratic peace. While the separation of powers as between the executive and legislature is central to republican ideas of democratic accountability, and for creating the circumstances in which the benefits of representative

and deliberative democracy will operate to reduce the risk of rash decisions to engage in armed conflict, this alone is not sufficient. It is recognized that there will be times when legislatures too can be carried away in irrational fervor for war. Political theory suggests that this risk is highest for democracies when dealing with illiberal states. There is, therefore, a real need for a further check in the democratic system, a further separation of powers with respect to the decision to use force. The third branch of government, independent and the least susceptible to the political pressure of the day, in the course of constitutional litigation plays a crucial role of monitoring government conduct, disseminating information about such conduct and coordinating public opinion regarding decisions, and finally in actually enforcing the constitutional provisions governing the decisions to use force.¹¹⁹ Over time the very possibility of such judicial review exercises a powerful influence on government conduct, and serves to internalize constitutional norms. Conversely, the removal of any possibility of judicial review for certain constitutional provisions will operate to completely undermine the normative power of those provisions. Judicial review of war powers provisions is yet another but crucial mechanism for moderating the tendency of democracies to engage in illegitimate or unlawful armed conflicts.¹²⁰

As previously mentioned, there are a number of other countries that have constitutional provisions requiring legislative involvement in decisions to use force or deploy armed forces, and several that also have constitutional limits on the circumstances under which the state may engage in armed conflict.¹²¹ Courts have thus been called upon to consider these issues in other countries. While many argue that the domestic courts of many countries do not and ought not to interfere in government decision-making on national security issues, there is increasing evidence of a trend towards courts rejecting the notion that questions relating to national security are somehow non-justiciable or beyond the jurisdiction of the judiciary.¹²² In particular, many courts have not been reluctant to engage in a review of specific questions regarding the extent to which government decisions

relating to national security were made in a manner that complied with clear and unambiguous constitutional conditions, or were made by the branch of government that had the requisite constitutional authority to do so.¹²³ The Constitutional Court of Germany illustrated this most famously with its 1994 decision relating to Germany's involvement in Bosnia, holding that the Bundestag had to approve each and every decision to deploy the armed forces of Germany for international military operations.¹²⁴

I would therefore propose a new clause for Article 9, Article 9(4), which would provide for explicit powers of judicial review with respect to government compliance with the rest of Article 9. This subsection would also establish broad standing for citizens seeking to commence applications to enforce the provisions of Article 9. Such standing would not require existence of a personal narrow legal interest, as currently serves to insulate Article 9 from virtually all judicial review. Rather, employing a standard similar to that established by the Supreme Court of Canada, the Supreme Court of Japan should merely require that there be a serious issue to be determined, that the applicant has a genuine interest in the issue, even if only as a representative of the broader public, and that there would be no more reasonable or effective manner for the issue to be brought before the court.¹²⁵ Such a provision would bring Article 9 back into the realm of enforceable constitutional provisions. In so doing, it would also provide some reassurance that the amendment of Article 9 to permit some use of force would not be the beginning of a slippery slope towards unrestricted participation in military operations of all kinds.

CONCLUSION

The LDP draft amendments and other proposals being developed by those who are essentially hostile to the underlying premise of Article 9, would operate to undermine the constraints that Article 9 has exercised over Japan's use of force over the last sixty five years. As explained above they are potentially dangerous. Similarly, if there are no amendments to Article 9, the illegitimate "reinterpretation" of Article 9 that was implemented in 2015 will over time come to

replace the established meaning of Article 9, and fundamentally alter the constraints imposed by Article 9(1). Thus, those who support Article 9 and the idea of a pacifist Japan can no longer afford to simply reject all talk of amendment. The winds of change are moving against them, and they must develop realistic and feasible alternatives to the proposals being developed by those on the political right. When the debate is finally joined in earnest, and questions of amendment are being developed to lay before the people of Japan, the champions of Article 9 will have to have some meaningful response. There are sound reasons to think that Article 9 ought to be amended, for the good of the constitutional order as a whole, and in the interests of preserving reasonable constraints on Japan's ability to use armed force. I have tried here to provide the outline of some of those arguments, and to provide some revised language that may serve as the starting point for a discussion on what form alternative proposals might take—proposals that would remain true to the spirit and purpose of Article 9.

APPENDIX 1 –PROPOSED AMENDMENTS TO ARTICLE 9

Article 9(1) – (Option One) – Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce the threat or use of force as means of settling international disputes, except for the purpose of individual self-defense of the nation in the event of armed attack, or for the purpose of maintaining international peace and security as authorized by the United Nations Security Council.

Article 9(1) – (Option Two) – Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce the threat or use of force as means of settling international disputes, except in accordance with that which is permissible under the United Nations Charter and customary international law.

Article 9(2) (a) – The government may establish land, sea, and air armed forces for the primary purpose of defending the territorial and political integrity of Japan. In addition to the exercise of individual self-defense, the armed forces of Japan may

only be employed for such purposes as are permitted by the exceptions provided for in the preceding paragraph, and otherwise in accordance with the provisions of the Constitution and other laws of Japan, and international law.

Article 9(2) (b) – The Prime Minister, acting through the Minister of Defense, shall be the commander in chief of the armed forces of Japan. No serving member of the armed forces may be appointed as a minister in cabinet, and no serving officer with the rank of Colonel or higher may serve in any ministry of government other than the Ministry of Defense.

Article 9(2) (c) – No serving member of the armed forces may run for public office, be a member of any political party, actively participate in any political campaign, or otherwise engage in public debate or other activity designed to influence the formulation of public policy.

Article 9(2) (d) – A Committee for the Armed Forces shall be established by law in the House of Representatives and the House of Counselors in the Diet, for the purpose of requesting and receiving reports from the Ministry of Defense and other branches of government, on the deployment and operations of the Armed Forces, otherwise monitoring such operations of the Armed Forces, and generally providing legislative and civilian oversight over the Armed Forces. The Committee for the Armed Forces shall have subpoena power over documents and may compel testimony before it, and shall issue reports of its findings.

Article 9(3) (a) – Any decision by the government to use force consistent with and as permitted by paragraph one of this Article, shall be approved in a formal vote by each of the House of Representative and the House of Counselors, by a minimum of two thirds of votes cast by the members of each House.

Article 9(3) (b) – In the event that the nation is under attack or the government has determined that there is a state of emergency threatening the territorial and political integrity of the state, making prior approval from the Diet impractical, the government may use force in accordance with paragraph one of this Article without such prior approval. In such

event, the government shall immediately provide notice of its decision to each House of the Diet, and it shall obtain approval from each House in accordance with the terms of sub-paragraph (a) of this paragraph within twenty days thereof, failing which the government shall immediately cease such hostilities.

Article 9(3) (c) – Any decision by the government to deploy members of the Armed Forces for participation in peacekeeping operations, to provide logistical support for international collective security operations, or other such activity that does not include the use of force contemplated in paragraph one of this Article, shall be approved by a formal vote of each of the House of Representatives and the House of Counselors, by a simple majority of the votes cast by the members of each House.

Article 9(3) (d) – In the event that the character of any operations in which members of the Armed Forces are participating in accordance with sub-paragraph (c) of this paragraph, should develop such that they will likely require a use of force contemplated in paragraph one of this Article, the government shall obtain further approval for the continuation of such operations according to the terms of sub-paragraph (a) of this paragraph, failing which the government shall immediately discontinue such operations.

Article 9(4) (a) – Any person in Japan may apply to a court of competent jurisdiction to obtain a declaration, injunctive relief, damages, or any other remedy for alleged violation of this Article that the court considers appropriate and just in the circumstances.

Article 9(4) (b) – Any person who has made application under sup-paragraph (a) of this paragraph shall be granted standing by the court so long as the issue raised is a serious issue to be tried, the person has a genuine interest in the issue, even if only as a representative of the general public, and there would be no other reasonable or effective means for the issue to be brought before the court.

Article 9(4) (c) – The Supreme Court has the final authority with respect to the interpretation and meaning of this Article.

Notes

- 1 For a good analysis of these dynamics, see J. Patrick Boyd and Richard J. Samuels, *Nine Lives?: The Politics of Constitutional Reform in Japan* (2005). Please note that Japanese names in the notes to this article are rendered in the traditional Japanese style, surname first, given name second, for all sources, whether originally in either English or Japanese.
- 2 This article is a substantially revised, expanded, and updated version of a chapter published in 2012: Craig Martin, "A Constitutional Case for Amending Article 9," in Bryce Wakefield, ed., *Time for a Change? Japan's Peace Constitution at 65* (2012).
- 3 For my more detailed analysis of the meaning of Article 9, from an international law perspective, see Craig Martin, "Binding the Dogs of War: Japan and the Constitutionalizing of *Jus ad Bellum*" 30 *University of Pennsylvania Journal of International Law* 267 (2008), 309-317.
- 4 *Ibid.*, 309-312; There is, of course, an enormous literature on, and intense debate about, the interpretation of Article 9. A few sources that approach the issue with a greater attention to the international law principles from which Article 9 was drawn, include: Hatake Motoaki, *Kenpō 9 jō: kenkyū to giron no saizensen*, ch. 6 (2006); Fujii Toshio, *Kenpō to kokusai shakai* (2nd ed., 2005), chs. 12-14; Nasu Hitoshi, "Article 9 of the Japanese Constitution Revisited in the Light of International Law," 18 *Journal of Japanese Law* 50 (2004); and Nasu Hitoshi, "Japan's 2015 Security Legislation: Challenges to its Implementation Under International Law," 92 *International Legal Studies* 249 (2016).
- 5 James E. Auer, "Article Nine: Renunciation of War" in Percy R. Luney Jr. and Takahashi Kazuyuki, ed. *Japanese Constitutional Law* (1993); and Kenneth L. Port, "Article 9 of the Japanese Constitution and the Rule of Law," 13 *Cardozo Journal of International & Comparative Law* 127 (2005).
- 6 There are actually two theories as to the meaning of this clause. For an account of both theories, see Hatake, *Kenpō 9 jō*, 87-88; Tamura Shigenobu et al., *Nihon no bōeihōsei* (2008), 15; Ashibe Nobuyoshi, *Kenpōgaku*, Vol. 1 (1992), 283-84; On the rights of belligerency in international law generally, see e.g., Yorum Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (2004), 27-33; for my more detailed analysis of this clause, see Martin, "Binding Dogs of War," 314-17.
- 7 For a very detailed account of the process in English, see Ray A. Moore and Donald L. Robinson, *Partners for Democracy: Crafting the New Japanese State Under MacArthur* (2002); see also Koseki Shōichi, *The Birth of Japan's Postwar Constitution*, (1997). There is a massive literature in Japanese, but see, e.g., Hara Hideshige, *Nihonkoku Kenpō seitei no keifu* [The Origins of the Japanese Constitution] (2004); and Takayanagi Kenzō et al. eds., *Nihon-koku kenpō seitei no katei* [The Making of the Constitution of Japan] (1972).
- 8 Even Prime Minister Yoshida took this position in answering questions during the committee deliberations. See Moore, *Partners for Democracy*, 212; Nishi Osamu, *The Constitution and the National Defense Law System in Japan* (1987), 5, 100-102; but see Yasuzawa Kiichirō, *Kenpō daikyūjō no kaishaku* (1981), 156 and 186.
- 9 Moore, *Partners for Democracy*, 170, 212-216.
- 10 *Ibid.*
- 11 Peter J. Katzenstein, *Cultural Norms and National Security: Police and Military in Postwar Japan* (1996), 4-5, 44, 112; and Martin, "Binding the Dogs of War," 282, 304-305, 355-56.
- 12 The interpretation was provided by Director Hayashi in the House of Representatives Budget Committee deliberations, on December 21, 1954. See Nishikawa Shinichi, *Shirarezaru kanchō: naikaku hōseikyoku*, [The Unknown Agency: The Cabinet Legislation Bureau], (2000), 40; see also Richard J. Samuels, "Politics, Security Policy, and Japan's Cabinet Legislation Bureau: Who Elected These Guys, Anyway?" (Japanese Policy Research Inst., Working Paper No. 99, 2004), available at <http://www.jpri.org/publications/workingpapers/wp99.html>, 6.
- 13 John O. Haley, "Waging War: Japan's Constitutional Constraints" 14(2) *Constitutional Forum* 18 (2005), 28-29, 33; Nishikawa, *Shirarezaru kanchō*, 46.
- 14 *Sunagawa* case, 13 *Keishū* 3225, (Supreme Court, December 16, 1959); for more detailed discussion of this aspect of the case, see Martin, "Binding the Dogs of War," 338-40; and Haley, "Waging War," 24 and 28.
- 15 *Naganuma* case, 36 *Minshū* 1679 (Sup. Ct., Sept. 9, 1982).
- 16 See Nishikawa, *Shirarezaru kanchō*; Nakamura Akira, *Sen-goseiji ni yureta kenpō kyūjō – naikaku hōsiekyoku no jishin tsuyōsa* [Article 9 of the Constitution Rocked by Post War Politics: The Strength and Self-Confidence of the Cabinet Legislation Bureau] ch. 1 (1996); Nishikawa Shinichi,

- Korede Wakatta! Naikaku Hōseikyoku* [Here Understood! The Cabinet Legislation Bureau] (2013); and Sakata Masahiro, *Hō no Banjin: Naikaku Hōseikyoku no Kyōji: Kaishyaku Kaiken ga Yurusanai Riyū* [The Law's Gatekeeper – The Dignity of the Cabinet Legislation Bureau: Reasons Why the Reinterpretation is Unacceptable] (2014).
- 17 The CLB reinforced and elaborated upon its formal interpretation again in 1981; see Samuels, “Who Elected These Guys?,” 8, for the full formulation; on the 1997 Guidelines, see Joint Statement in Review of U.S.-Japan Defense Cooperation Guidelines, U.S.-Japan, September 23, 1997, 36 I.L.M. 1621; For analysis, see Yamauchi Toshihiro ed., *Nichibei shingaidorain to shuhen jitaihō* (1999); and see the sources in note 16.
- 18 In particular, the establishment of a U.N. standing force, to which all members would be required to contribute forces, and the use of such forces in collective security operations, as contemplated by Article 43 of the U.N. Charter, never came to pass. See Yorum Dinstein, *War, Aggression, and Self-Defence*, (4th ed., 2005), 4th ed., ch 10, and Christine Gray, *International Law and the Use of Force* (3rd ed., 2008), ch. 7 and 8; for more on this point in the context of Article 9, see Martin, “Binding the Dogs of War,” 327–28.
- 19 For analysis of Japan’s military capability and national defense policy, see Christopher W. Hughes, *Japan’s Re-emergence as a ‘Normal’ Military Power*, (2006); Christopher Huges, *Japan’s Remilitarisation* (2009).
- 20 See, e.g., Auer, “Article Nine: Renunciation of War,” 5; and Kenneth L. Port, “Article 9 of the Japanese Constitution and the Rule of Law.”
- 21 This is the famous “Ashida amendment” — for my analysis of this as it bears on the official interpretation of Article 9, and some of the myths surrounding its origins, see Martin, “Binding the Dogs of War,” 303–06; see also Moore, *Partners for Democracy*, 248–50, and 275; and Koseki, *Birth of Japan’s Constitution*, 195–202.
- 22 Watanabe Yōzō, *Nichibei Anpotaisei to Nihonkoku Kenpō*, (1991), 129–30.
- 23 Article 9 was the well-spring for such other limiting policies as that which limited defense spending to 1% of GNP, the three non-nuclear principles, and the prohibition on the export of arms. See Kenneth Pyle, *Japan Rising: The Resurgence of Japanese Power and Purpose* (2007), 273–76.
- 24 For a detailed argument to support this assertion, see Martin, “Binding the Dogs of War,” 329–56.
- 25 For more on the crisis, the government’s attempt to respond to it, see Pyle, *Japan Rising*, 290–293; Togo Kazuhiko, *Japan’s Foreign Policy 1945–2003* (2005), 305–307; Katzenstein, *Cultural Norms and National Security*, 125–127.
- 26 Martin, “Binding the Dogs of War,” 346–47.
- 27 This interpretation was provided by Director Hayashi in the House of Representatives Budget Committee deliberations, on December 21, 1954. See Nishikawa, *Shirarezaru kanchō*, 40; see also Samuels, *Nine Lives*, 5, 24–29 (tracing the development of the “minimum necessary force” doctrine). It was further expanded upon by Prime Minister Kishi in the House of Councilors Cabinet Committee on May 7, 1957. See Nishikawa, *Shirarezaru kanchō*, 41.
- 28 See Hughes, *Japan’s Remilitarisation*, 19; also see the SIPRI database, with country military expenditures from 1988–2015, available online at: <https://www.sipri.org/sites/default/files/Milex-constant-USD.pdf>. (the other top countries include the U.S., China, Russia, the U.K., Germany, India, and Saudi Arabia. France spends less than Japan).
- 29 Hughes, *Japan’s Remilitarisation*.
- 30 See Auer, “Article Nine: Renunciation of War.”
- 31 See Sources in and text associated with note 6, *supra*.
- 32 See Martin, “Binding the Dogs of War,” 314–17.
- 33 See, e.g., Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*.
- 34 As I argued elsewhere, this is one reason for supposing that the law governing the deployment of SDF members to participate in the belligerent occupation of Iraq in 2005 was so restrictive—the law essentially limited the individual use of force by SDF members to the right of individual self-defense that was permitted by domestic criminal law. See Martin, “Binding the Dogs of War,” 317, fn. 127. In interviews with lawyers from the CLB in August 2013, it was confirmed to me that the CLB interpretation of Article 9(2) is consistent with the theory explained here.
- 35 Martin, “Binding the Dogs of War,” 314–17.
- 36 Liberal Democratic Party, “*Jiyūminshūtō shinkenpō sōan*,” Kenpōkaigi website (n.d.), <http://www.kenpoukaigi.gr.jp/seitoutou/051028jimin-sinkenpousouan.pdf>. [hereinafter, LDP 2005 Amendment Proporsal]
- 37 “*Jiyūminshūtō shinkenpō sōan*,” Liberal Democratic Party website, April 27, 2012, http://www.jimin.jp/policy/policy_topics/116666.html [hereinafter, LDP 2012 Amendment Proporsal]
- 38 Osaki Tomohiro, “Abe Sidesteps Opposition Grilling on

- LDP's Draft Constitution," *The Japan Times*, Oct. 5, 2016.
- 39 LDP 2012 Amendment Proposal. Paraphrased from the full clause "*kokusai shakai no heiwa to anzen wo kakuhosuru tameni kokusaiteki ni kyochōshite okonowareru katsudō.*"
- 40 Ibid. Also entirely new to the 2012 draft, as compared to the 2005 LDP proposal, is the introduction of a provision in Article 9(2) establishing the authority for a military court to try members of the military and other public officials for offences committed in the performance of their duties, and for crimes relating to the disclosure of military secrets.
- 41 Ibid.
- 42 Reinterpretation of Article 9 was, of course, one of the prongs of prime minister Abe Shinzo's attacks on Article 9, and was the recommendation of the first Advisory Panel Report: Report of the Advisory Panel on the Reconstruction of the Legal Basis for Security, June 24, 2008, available online (in English) at: <http://www.kantei.go.jp/jp/singi/anzenhosyou/report.pdf>. [hereinafter, Advisory Panel Report, 2008].
- 43 This analysis is substantially drawn from an essay I published in 2012: Craig Martin, "LDP's Dangerous Proposals for Amending Antiwar Article," *The Japan Times*, Jun. 6, 2012.
- 44 LDP 2012 Amendment Proposal.
- 45 Ibid.
- 46 Ibid.
- 47 Ibid.
- 48 Ibid.
- 49 Ibid.
- 50 Ibid.
- 51 Ibid.
- 52 For my own analysis of the reinterpretation effort, and the sources I rely on for that analysis, see: Craig Martin, "The Legitimacy of Informal Constitutional Amendment and the 'Reinterpretation' of Japan's War Powers," 41 *Fordham International Law Journal* (2016); and, Craig Martin, "The *Jus ad Bellum* Implications of Japan's New National Security Laws," 14:10 *The Asia Pacific Journal: Japan Focus* (2016); Bryce Wakefield and Craig Martin, "Reexamining 'Myths' About Japan's Collective Self-Defense Change" *The Asia Pacific Journal: Japan Focus* (2014);
- 53 For why this is so, see Martin, "The Legitimacy of Informal Constitutional Amendment." Much of this section of the analysis of the reinterpretation, and its inconsistency with the traditional meaning of Article 9, is drawn from that longer article.
- 54 Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People (provisional English translation) (July 1, 2014), http://www.cas.go.jp/jp/gaiyou/jimu/pdf/anpohosei_eng.pdf. The original Japanese language version is available at: <http://www.cas.go.jp/jp/gaiyou/jimu/pdf/anpohosei.pdf>. [hereinafter, Cabinet Decision]
- 55 Ibid., 3.
- 56 Ibid.
- 57 See Nagoya High Court, 2056 *Hanrei-jihō* 74 (2008) [hereinafter, Nagoya High Court Decision], a translation of which is available in 19 *PACIFIC RIM L. & POL. J.* 3 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1767658.
- 58 Cabinet Decision.
- 59 Ibid., 6.
- 60 The Constitution of Japan, ch. III, art.13
- 61 Cabinet Decision, 6-7.
- 62 Ibid.
- 63 Ibid., 8.
- 64 Ibid., 6-8.
- 65 Ibid., 8.
- 66 See, e.g., Miwa Sachiko, "Diet Debate on Security Bills Starts with Confusion over Limits on Collective Self-Defense," *The Asahi Shimbun*, May 26, 2015.
- 67 "Blurry Limits on SDF Missions," *The Japan Times*, Apr. 24, 2015; Miwa Sachiko, "Conditions for Exercising Right to Collective Self-Defense Open to Interpretation," *The Asahi Shimbun*, May 12, 2015.
- 68 The bills, the short titles of which are *Heiwa Anzenhosei Seibiho* [Law for the maintenance of the peace and security legal system], and *Kokusai Heiwa Shijiho* [International peace support Law], are available online at: http://www.cas.go.jp/jp/gaiyou/jimu/housei_seibi.html. For a preliminary analysis of the legislation, see Hasebe Yasuo, *Kensho - Anpohōan: Doko ga kenpōihanka* [Examined - National Security Laws: Where are they Unconstitutional?] (2015).
- 69 It was reported that as of the week following the testimony of three prominent constitutional scholars in the Diet (Hasebe Yasuo and Sasada Eiji of Waseda University, and Kobayashi Setsu of Keio University), in which they testified that the national security laws were unconstitutional, fully 225 constitutional law scholars had signed a

- joint statement condemning the reinterpretation as unconstitutional: Yoshida Reiji, "Japan Security Bills Reveal Irreconcilable Divide Between Scholars, Politicians," *The Japan Times*, June 12, 2015.
- 70 "Abe Shapes Agenda for Defense Panel," *The Asahi Shimbun*, May 19, 2007.
- 71 Advisory Panel Report, 2008.
- 72 Report of the Advisory Panel on the Reconstruction of the Legal Basis for Security, May 15, 2014, available online at: <http://www.kantei.go.jp/jp/singi/anzenhosyou2/dai7/houkoku.pdf>; and in English, at: http://www.kantei.go.jp/jp/singi/anzenhosyou2/dai7/houkoku_en.pdf. [hereinafter, Advisory Panel Report, 2014].
- 73 The Advisory Panel report probably should play no role whatsoever in interpreting the revised meaning of Article 9, given that it is an extra-constitutional body with no constitutional authority whatsoever. But Abe clearly sought the report to bolster and lend legitimacy to the move, and it could be anticipated that it would form part of the argument in subsequent judicial review, or in interpretations articulated by other branches of government.
- 74 Advisory Panel Report, 2014, 23-24. (page numbers are for English translation- pp.18-19 of Japanese).
- 75 Ibid., (citing Director-General of the Defense Agency Omura Seiichi, answering questions to the Diet, December 22, 1954).
- 76 The language of the Kellogg-Briand Pact was to "condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." General Treaty for Renunciation of War as an Instrument of National Policy, art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57, http://avalon.law.yale.edu/20th_century/kbpact.asp. There were strained interpretations at the time that suggested that wars *not* waged for the purpose of "national policy," such as wars for religious or ideological ends, might thus be legal. This was not, however, the accepted view or interpretation of the provision in international law: *see, e.g.*, Dinstein, *War, Aggression and Self-Defence*, 84. In any event, the language is not the same as that of Article 9(1).
- 77 *See* Dinstein, *War, Aggression and Self-Defence*, and Gray, *The Use of Force*, for sources analyzing the international law principles of *jus ad bellum*.
- 78 For my more extensive analysis and rejection of these arguments, *see* Martin, "Binding the Dogs of War", 312-13, 310 n.114.
- 79 Ibid.
- 80 U.N. Charter, art. 51. *See* Dinstein, *War, Aggression and Self-Defence*; Gray, *The Use of Force*.
- 81 "LDP Set to Limit Use of Collective Self-Defense," *The Yomiuri Shimbun*, Mar. 30, 2014.
- 82 "Operations in Strait of Hormuz to Come Under New Defense Guidelines," *The Asahi Shimbun*, Apr. 9, 2015; Mina Pollmann, "Could Japan Go Minesweeping in the Strait of Hormuz?," *The Diplomat*, Feb. 18, 2015, <http://thediplomat.com/2015/02/could-japan-go-minesweeping-in-the-strait-of-hormuz/>.
- 83 For a review of such principles, *see, e.g.*, Chatham House, *International Law Applicable to Naval Mines* (2014) https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20140226NavalMines.pdf; Sean Henseler, Project 2049 Institute, *Clarifying U.S. - Japan Mine Warfare Roles, Missions, and Capabilities in the Persian Gulf: An Examination of International Legal Issues* (2013) https://project2049.net/documents/countermining_henseler.pdf.
- 84 This discussion is drawn from an earlier essay on this issue: Martin, "Jus ad Bellum Implications of Japan's New National Security Laws".
- 85 Miwa Sachiko "Diet Debate on Security Bills Starts with Confusion Over Limits on Collective Self-Defense," *The Asahi Shimbun*, May 26, 2015.
- 86 This point was dramatically underlined in a decision released just as this article was going to press. In *State of Washington v. Trump*, a case involving the legality of an Executive Order that barred foreigners from certain countries from entering the United States, the government had argued that the Court should understand the Executive Order in issue as not applying to lawful permanent residents of the United States (Green Card holders), notwithstanding the clear language in the Executive Order to the contrary, because the White House Counsel had issued an interpretation of the Executive Order after it had been issued to exclude it from affecting Green Card holders. The Court held that such government guidance to interpretation had no authority, and moreover can change at any time, and so must be ignored by the court. *State of Washington v. Trump*, No. 17-35105 (9th Circ. Feb. 9, 2017), 21-22.
- 87 *See, e.g.*, Fujii [The Constitution and International Society], chs. 12-14 (2d ed., 2005); Sakamoto Masanari, "Buryokukōshi

- ihōka gensoku no naka no kyūjōron*,” [*The Article 9 Debate Within the Criminalization of the Use of Armed Force*] 1334 *JURISTO* 50, 56 (2007); Nasu, “Japan’s 2015 Security Legislation,” and Nasu, “Article 9 of the Japanese Constitution Revisited in the Light of International Law”.
- 88 Eyal Benvenisti, “The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies,” 15 *European Journal of International Law* 677 (2004) (describing the “Bush Doctrine” as an effort to respond to various security challenges but criticizing it as upsetting the existing UN regime and creating other risks to global stability).
- 89 Cabinet Decision, § 1, at 2.
- 90 U.N. Charter, art. 51; DINSTEIN, *War, Aggression and Self-Defence*, GRAY, *The Use of Force. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 *I.C.J.* 14 (June 27).
- 91 Advisory Panel Report 2014, 45 (“Sometimes, the right to take measures against infringements that do not amount to an armed attack is referred to as ‘minor self-defense rights’; however, the use of this term is not advisable as it has not been established in international law, and could invite criticism from at home and overseas that Japan is expanding beyond the concept of the right of self-defense under Article 51 of the Charter”).
- 92 Cabinet Decision, 4 (the precise language is: “the scene where combat activities are actually being conducted.”).
- 93 *Ibid.*, 3-4.
- 94 See generally GRAY, *The Use of Force*; U.N.G.A. Res. 3314 (XXIX) (Dec. 14, 1974); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 *I.C.J.* 14 (June 27).
- 95 Nagoya High Court Decision.
- 96 Martin, “Binding the Dogs of War,” 346-47.
- 97 Ozawa Ichirō, *Nihon kaizō keikaku*, (1993), 114-137.
- 98 Togo, *Japan’s Foreign Policy*, 78-85; Thomas A. Drohan, *American-Japanese Security Agreements, Past and Present* (2007), 61-70, 85.
- 99 For more on the distinction, see Craig Martin, “Collective Self-Defense and Collective Security: What the Differences Mean for Japan,” *The Japan Times*, August 30, 2007. For more on the scope and nature of each concept in international law, see Dinstein, *War, Aggression and Self-Defence*, chs. 9 and 10.
- 100 Though, this proposition becomes somewhat more debatable as Japan increasingly agrees to vaguely worded commitments regarding mutual defense, as in the 1997 Guidelines.
- 101 A number of countries have adopted this approach to the incorporation of human rights principles from international law into their constitutions; see Thomas Buergenthal, “Modern Constitutions and Human Rights Treaties,” 36 *Columbia Journal of Transnational Law* 211 (1997).
- 102 I am here referring to the purpose as contemplated by the ratifiers. The American drafters, of course, had a similar though slightly different purpose of preventing Japan from ever again posing a military threat to the United States and its allies.
- 103 George M. Beckmann, *The Making of the Meiji Constitution: The Oligarchs and the Constitutional Development of Japan, 1868-1891* (1957).
- 104 Article 66(2) provides that “the Prime Minister and other Ministers of State must be civilians.” It was added at the insistence of the Far Eastern Commission during the ratification process, after the Ashida amendment was added to Article 9. There was uncertainty at the time as to how the English word “civilian” should be translated into Japanese, and the word *bunmin* was used, though with little clarity on what its exact scope and meaning would be (would it restrict the appointment of retired officers, for instance, or only serving members of the military?). Moore, *Partners for Democracy*, 306.
- 105 Yoshida Reiji, “MSDF Knew of Oil Error Since '03: Opposition Demands Sworn Diet Testimony by Officials,” *The Japan Times*, October 23, 2007; “Ex-MSDF Officer Snubs Diet Summons in Refueling Snafu,” *The Japan Times*, November 6, 2007.
- 106 Craig Martin, “Permanent SDF Overseas Deployment Law Endangers Democracy,” *The Japan Times*, May 21, 2008.
- 107 The revisions to ten existing national security laws and the enactment of the one new law had the net effect of changing when, and under what circumstances, Diet approval is necessary. The new “International Peace Support Law” (Law No. 77, 2015) requires Diet approval for deployment of forces pursuant to this law, but revisions to the “Self-Defense Forces Law” (Law No. 165, 1954, as amended), the “Resolving Contingencies Law” (Law No. 79, 2003, as amended), and the “Ensuring Security in Situations of Serious Influence to Japan Law” (Law No. 60, 1999 as amended), for Diet approval in various circum-

- stances involving deployment of the SDF. For analysis of the laws see e.g. Hasebe, *Examined - National Security Laws, supra*.
- 108 Wolfgang Wagner, *Parliamentary Control of Military Missions: Accounting for Pluralism* (2006).
- 109 Immanuel Kant, "Perpetual Peace: A Philosophical Sketch" (1795), reprinted in H.S. Reiss ed., H.B. Nisbett trans., *Kant: Political Writings* (2nd ed., 1991); James Madison, *The Federalist No. 41*, 251-60 (James Madison, Clinton Rossiter ed., 1961); I analyze these arguments and develop a normative model for both constitutional incorporation of international law principles on the use of force, and greater constitutional control over such decision-making, in Craig Martin, *Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with International Law*, 76:2 *Brooklyn Law Review* 611-730 (2011).
- 110 On the functions of parliaments in this context, see, e.g., Heiner Hänggi, "The Use of Force Under International Auspices: Parliamentary Accountability and 'Democratic Deficits,'" in Hans Born & Heiner Hänggi eds., *The "Double Democratic Deficit"* (2004); Owen Greene, "Democratic Governance and the Internationalisation of Security Policy: The Relevance of Parliaments," in *The "Double Democratic Deficit"*; on the functioning of deliberative democracy more generally, see Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (2004); for literature on the "democratic peace," (which is huge) see, e.g., R.J. Rummel, *Understanding Conflict and War* (1979); Bruce Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (1993).
- 111 German Basic Law, Article 45b.
- 112 See authorities in notes 109 and 110 *supra*, and my analysis of these issues in Martin, "Taking War Seriously."
- 113 *Ibid*.
- 114 *War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555* (1973) (codified at 50 U.S.C. § § 1541-1548 (2006)); for examples of such mechanisms or other exceptions in the constitutions of other countries, which would include Denmark and Sweden, see Wagner, *Parliamentary Control*.
- 115 Articles 76, 81, and 98, Constitution of Japan, 1947.
- 116 Martin, "Binding the Dogs of War," 337-43; but see Haley, "Waging War," 24 and 28.
- 117 The Supreme Court established this narrow standing re-quirement in the *Naganuma* case, 36 *Minpō Hanreishū* 1679 (Sup. Ct., Sept. 9, 1982).
- 118 Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (1979); See also, Stephen Holmes, "Pre-commitment and the Paradox of Democracy," in Jon Elster and Rune Slagstad (eds.), *Constitutionalism and Democracy* (1988), 195.
- 119 See David S. Law, "A Theory of Judicial Power and Judicial Review," 97 *Georgetown Law Journal* 723-801 (2009).
- 120 Much more could be said about this last assertion—but to the extent the Constitution incorporates principles of international law, adherence to the constitutional limits will help ensure that the state does not use force in violation of international law principles. See "Martin, Taking War Seriously"; on the need for such checks to resist the tendency of democracies to engage in irrational wars with illiberal states, see Michael Doyle, *Ways of War and Peace: Realism, Liberalism, and Socialism* (1997), 251-301.
- 121 See Wagner, *Parliamentary Control*.
- 122 Aziz Z. Huq, "Against National Security Exceptionalism," *Supreme Court Review* 225 (2009); Cass R. Sunstein, "Judging National Security Post - 9/11: An Empirical Investigation," *Supreme Court Review* 269-292 (2008); Kent Roach, "Judicial Review of the State's Anti-Terrorism Activities: The Post 9/11 Experience and Justification for Judicial Review," 3 *Indian Journal of Constitutional Law* 138-167 (2009).
- 123 For the analysis supporting this proposition, see Martin, "Taking War Seriously," 693-704.
- 124 *Bundesverfassungsgericht* [Federal Constitutional Court] July 12, 1994, 106 LL.R. 320 (Ger.); see also Georg Nolte, "Germany: Ensuring Political Legitimacy for the Use of Military Forces by Requiring Constitutional Accountability," in Charlotte Ku & Harold K. Jacobson (eds.), *Democratic Accountability and the Use of Force in International Law*, (2003).
- 125 *Thorson v. Attorney General*, [1975] 1 S.C.R. 138 (Can.); *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265 (Can.); see also, Peter Hogg, *Constitutional Law of Canada*, (5th ed., 2007), 776-80.