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Robert A. Fisher*

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Introduction

On September 23, 1997, the United States and Japan unveiled the new Guidelines for U.S.-Japan Defense Cooperation. The Guidelines, which define the scope of the two countries' security arrangement, represent a startling change in the existing relationship by calling for Japan to adopt a greater military role. In the future, Japan will provide mine sweepers, help enforce U.N. embargos, and assist in communications and surveillance. More importantly, the Guidelines will allow Japan to support U.S. troops involved in conflicts in "areas surrounding Japan." Thus, Japan may assist in military conflicts for the first time since World War II.

Initial responses to the new Guidelines have been mixed. In the United States, some commentators believe the new arrangement strikes the proper balance between U.S. and Japanese commitments, while others believe that Japan does not contribute enough on behalf of its own defense. Internationally, the new Guidelines have also met with mixed reactions. While Taiwan has praised the Guidelines as a stabilizing force in

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4. See generally Robert Karniol, Japan Promotes Regional Security With US Accord, JANE'S DEF. WKL., Oct. 1, 1997, at 15 (viewing a Japanese role in operations such as humanitarian aid and refugee evacuations as a stabilizing force in the region); Caspar W. Weinberger, Commentary: Expanding the U.S.-Japan Security Alliance, FORBES, Nov. 3, 1997, at 37 (arguing that the Guidelines successfully create an expanded security role for Japan without jeopardizing the renunciation of war clause of its Constitution).

5. See Ted Galen Carpenter, U.S.-Japan Defense Accord Preserves Old Inequities, BALT. SUN, Oct. 23, 1997, at 17A (commenting that "[t]here is something grotesquely unfair about expecting U.S. military personnel to risk their lives to repel an act of aggression that threatens the security of East Asia while Japan merely provides such things as fuel, spare parts, medical supplies, and body bags for American casualties.").
the region,⁶ other Asian states have been far less receptive to the new accord.⁷ At the heart of this debate is to what degree Japan should provide for its own defense and contribute to regional security given its military aggression during World War II.

As Japan begins the difficult process of debating the implementation legislation,⁸ the question should not be whether the Guidelines should be enacted, but whether they are legal. Article 9 of the Constitution of Japan (Nihonkoku Kenpō) severely limits Japanese defense policy. It states:

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

2. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The

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⁶ See Lee Teng-hui Praises New Japan-U.S. Defense Accord, YOMURI SHIMBUN, Oct. 19, 1997, available in 1997 WL 12802862. Taiwan’s support is hardly surprising considering that it stands to gain from the new framework. A potential crisis with mainland China over Taiwan’s survival could now result in intervention by both Japan and the United States. See Karniol, supra note 4, at 15.

⁷ See North Korea Raps New U.S.-Japan Defense Guidelines, AGEcE FRANCE-PRESSE, Oct. 1, 1997, available in 1997 WL 13405373. Rodung Sinmun, the newspaper of North Korea’s ruling party, has characterized the guidelines as “the strategic plan and target of the U.S. and Japanese reactionaries to invade and dominate Asia. The first target of their attack is the DPRK [North Korea].” Id. The People’s Republic of China has expressed concern that the agreement could “touch off instability,” because it is unclear how the new guidelines affect the status of Taiwan. See Joseph Coleman, China, N. Korea Reaction Show Why U.S.-Japan Deal Boosts Ties, Irks China, N. Korea, DAYTON DAILY NEWS, Oct. 26, 1997, at 8A. Even South Korea, a country that could benefit from the new security relationship, has already said that Japanese troops would not be allowed on South Korean territory in response to a regional conflict and that it expected to be consulted before any military activity under the new Guidelines. See S. Korea Rejects Japanese Military Operation on Its Territory, XINHUA ENG. NEWSWIRE, Oct. 22, 1997, available in 1997 WL 5978840. If other Asian countries adopt South Korea’s cautious approach, Japan’s role in a regional security operation could be severely curtailed. Arguably, these reactions illustrate the difficulty of trying to create a regional security framework bilaterally. Excluded countries perceive the Guidelines not as a regional security arrangement but as a military alliance targeted against them. See Weinberger, supra note 4, at 37, for the view that the arrangement is and should be an alliance against threats posed by China.

right of belligerency of the state will not be recognized.  

As in the United States, the Constitution is the supreme law of the land and a contrary law has no legal force.  

By allowing Japan to participate in regional conflicts, the Guidelines are potentially unconstitutional. However, the judiciary tends to defer to the executive and legislative branches in defining the scope of Article 9. The government, in turn, tends to redefine Article 9 as it sees fit. These trends imply that passage of the implementing legislation of the Guidelines will further undermine the purposes of Article 9 by allowing the Self-Defense Force(s) (SDF) to engage in conduct beyond mere territorial self-defense. This suggests that the model of a constitutionally mandated pacifism is unworkable in the face of real political and security concerns. Since Japan is unable to abandon Article 9, the only practical and constitutional solution for the Diet is to reject the Guidelines, at least in part, as unconstitutional.

Part I of this Note explores the development of the two key legal frameworks that underlie the problem — Article 9 of the Constitution and the U.S.-Japan Security Treaty. It considers both the purposes of each and the political circumstances existing at the time of their drafting. Part II outlines the major provisions of the Guidelines and their constitutionality in light of Article 9 as originally intended. Part III examines the differing interpretations, based on the concept of constitutional transformation, that the judiciary, executive branch, and legislature have given to Article 9. Part IV analyzes the constitutionality of the Guidelines in light of this framework. Part V assesses the practical and legal implications of adopting the Guidelines regardless of the constitutional scheme and explores possible alternatives to this dilemma. This Note concludes that in order to preserve some semblance of pacifism, Japan should reject the Guidelines.

I. Background

A. The Inception of Article 9

Japanese pacifism, as embodied in Article 9, was the product of negotiations between the U.S. occupation forces and the Japanese government at the end of World War II. General Douglas MacArthur, Supreme Commander for the Allied Powers, had two goals for Japan before the Occupation could end. First, he wanted to eliminate any chance of future Japanese

9. KENPO [Constitution], art. 9 (Japan). Scholar Chalmers Johnson argues that the phrase “war potential” is a mistranslation of the word senryoku which actually means fighting power or strength. See Chalmers Johnson, Omobe (Explicit) and Urn (Implicit): Translating Japanese Political Terms, 60 J. JAPANESE STUD. 89, 114 (1980).

10. See KENPO, art. 98.

11. See Tomosuke Kasuya, Constitutional Transformation and the Ninth Article of the Japanese Constitution, 3 GENDAI HOTETSUGAKU 41 (S. Tanaka ed., Paul Stephen Taylor trans., 2d ed. 1984), reprinted in 18 LAW IN JAPAN 1, 1 (1986). The core idea of transformation or hempo hensen is that constitutional change is brought about by reinterpretation while keeping the formal language intact. This theory allows for a constitutional provision to take on a meaning outside of its original scope without being considered unconstitutional. See id.

militarism through disarmament and demilitarization. Second, he wanted to establish a democratic system of government to extinguish the feudalistic aspects of Japanese society that the United States perceived as being responsible for Japanese militarism. Although other practical measures were taken to further both goals, a new constitution was necessary to legally impose a pacifist and democratic new order. Frustrated with the Japanese attempts at drafting the new constitution, MacArthur ordered his staff to help the Japanese in drafting a document that after some modification became the Constitution of Japan.

1. Early Interpretations of Article 9

Article 9 went through several revisions prior to the Constitution's adoption. Originally, MacArthur submitted three principles to Prime Minister Shidehara that he considered fundamental to the future constitution. The second principle, the precursor to Article 9, stated:

War as a sovereign right of the nation is abolished. Japan renounces [war] as an instrumentality for settling its disputes and even for preserving its own security . . . . No Japanese Army, Navy or Air Force will ever be authorized and no rights of belligerence will ever be conferred on any Japanese force.

Later drafts deleted the phrase "even for preserving its own security," suggesting that self-defense was constitutionally permissible. However,

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13. See id. The hope was that by eliminating the war potential of Japan and destroying ultranationalist elements within the Japanese elite, Japan could become a peaceful member of the world community. See id. For the complete text of the U.S. policy directive, see Edwin M. Martin, The Allied Occupation of Japan 122-50 (1948).


15. In response to the military threat, two million men had to be demobilized and over three million had to be repatriated from overseas. An international tribunal convicted Japanese political and military leaders for committing atrocities and conducting an unjust war. See id. at 213-16. In the political realm, bureaucrats connected to the old order were purged from government posts and new political parties were created. Jailed dissidents of the old order were granted amnesty. See id. at 216, 217-18.


18. Id. (quoting Osomu Nishi, The Constitution and the National Defense Law System in Japan 73 (1987)). While there is some debate about whether the renunciation clause was the idea of MacArthur or Prime Minister Shidehara, its submission by MacArthur as a fundamental principle suggests that he supported and believed in it. See id. at 71. There is evidence that Shidehara denied that he was the architect of Article 9. See Leslie Wolf-Phillips, Commentary, in Constitutions of Modern States: Selected Texts and Commentary 105 (Leslie Wolf-Phillips ed., 1968); Hiroyuki Hata & Go Nakagawa, Constitutional Law of Japan 21 (1997).

19. See Auer, supra note 17, at 71. MacArthur claimed at the beginning of the Korean War that Article 9 did not prevent Japan from preserving "the safety of the nation." See MacArthur, supra note 16, at 304. This shift more likely reflects the change in U.S. policy with the onset of the Cold War.
Prime Minister Yoshida, successor to Shidehara, explained that under Article 9, "maintenance of security has to be through the Occupation Army even when attacked since we are not allowed armament." Subsequently, Ashida Hitoshi, chair of the Constitutional Amendment Committee, introduced the phrases "aspiring sincerely to an international peace based on justice and order" and "in order to accomplish the aim of the preceding paragraph." The public explanation for these changes was Japan's sincere desire for a policy of pacifism.

The official interpretation of the final draft of what is now Article 9 was that Japan had the right to self-defense under international law, but had waived it under the language of the second paragraph. Japanese law schools taught this interpretation. Every Cabinet until 1952 also claimed that Article 9 prohibited any SDF. Article 9 was intended to be an absolute prohibition rather than a flexible standard, and the Japanese government presented this to the public. A Japanese military force was constitutionally impermissible even in the face of aggression.

This original interpretation was short-lived as U.S. priorities changed from preventing the rearmament of Japan to preparing for the Cold War. Shortly after the outbreak of the Korean War, MacArthur directed Prime Minister Yoshida to create a 75,000 man National Police Reserve. Prime Minister Yoshida continued to insist publicly that any form of rearmament, even defensive, would require a change in the Constitution, but he later differentiated war-making potential from potential for self-defense. Similarly, Ashida argued in 1953 that his intention in amending Article 9 was to allow rearmament for self-defense through the language of the amend-

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21. Id. at 73. Observers believe that Ashida's real intent was to introduce language that would in the future allow for self-defense forces. Ashida himself claimed in 1953 that, contrary to the official government position, the new language permitted defensive forces. Legislators who adopted the amendment most likely did not support this interpretation. See Robert B. Funk, Note, Japan's Constitution and U.N. Obligations in the Persian Gulf War: A Case for Non-Military Participation in U.N. Enforcement Actions, 25 Cornell Int'l L.J. 363, 374-75 (1992).

22. See id. Funk claims that the use of the term "renounced" rather than "abolished" suggests a softening of the anti-war sentiment. See Funk, supra note 22, at 374. This seems difficult to reconcile with the official government policy. A better explanation of the use of the word "renounced" is that it reflects a waiver of a sovereign right.

23. See Auer, supra note 17, at 74. In addition to an insistence on rearmament, the Korean War served as the impetus to negotiate a peace treaty and end the U.S. occupation. See Beasley, supra note 12, at 224.

24. See Auer, supra note 17, at 74.

25. See id.

26. See id.

27. See id. Over the next few years, a maritime element was added, and the Defense Agency, the precursor to the SDF, managed the combined force. See id. at 74-75. In addition to an insistence on rearmament, the Korean War served as the impetus to negotiate a peace treaty and end the U.S. occupation. See Beasley, supra note 12, at 224.
ment. Finally in 1964, the Commission on the Constitution agreed that while Article 9 was a worthwhile ideal, it did not prohibit Japan from providing for its own defense, participating in the United Nations or entering into the security relationship with the United States. The absolute prohibition of Article 9 was replaced with a more flexible interpretation that allowed a force for self-defense purposes.

2. The Ambiguity of the Language of Article 9

One possible reason for this shift in interpretation is that the language of Article 9 is ambiguous. A Japanese scholar, Naoki Kobayashi, argues that there are two primary theories of what is permissible under Article 9, which he labels Theories A and B. He explains that, under Theory A, the clause renounces any kind of war since a war, even for self-defense, presupposes an international dispute. He then splits Theory B into two subtheories reflecting differing views as to the meaning of paragraph two. Under B-1, Japan does not renounce a right to self-defense under the first paragraph, but the denial of the right to belligerency and to maintain war potential under the second paragraph effectively extinguishes Japan’s right to protect itself. Under B-2, paragraph two does not act to renounce self-defense. If the original absolutist intent is ignored, each theory is credible under the language of Article 9. Despite the intent of the drafters, the language of the provision has created legal room for some reinterpretation.

B. The U.S.-Japan Security Treaty

The legal ambiguity in Article 9 allowed for the creation of the U.S.-Japan

29. See id. at 73. See also Funk, supra note 22, at 374-75; supra notes 22-23 and accompanying text.
31. One possible explanation for the Japanese change of heart could have been that by 1952, Japan had regained its sovereignty. Under the U.S. occupation, Japan would have been more likely to interpret the clause in a fashion that was politically more palatable to the United States. The timing of the change, though, suggests that the main impetus was the Korean War and the onset of the Cold War. See Auer, supra note 17, at 74-76.
32. Two phrases of Article 9 are typically considered to be ambiguous. In paragraph one, the phrase “the Japanese people forever renounce war . . . and the threat or use of force” does not specify whether all war or only offensive war is prohibited. In paragraph two, the phrase “land, sea and air forces, as well as other war potential, will never be maintained” does not clearly prohibit a defensive capability. Kenpō, art. 9.
34. See id. at 699. Theory A differs from the original absolutist view in that it is a textual construction argument instead of an intent argument. It is based on the renunciation of war phrase in paragraph one and does not depend upon the meaning of the war potential clause of paragraph two.
35. See id. This view is consistent with the official explanation given prior to 1952. See supra notes 20-21 and accompanying text.
36. See Kobayashi, supra note 33, at 699.
37. See id.
Security Treaty, the basis of the Guidelines. When the treaty went into effect in 1952, the United States had three principal goals: “(1) to prevent communist expansion and domination . . . ; (2) to maintain U.S. access to and through the region; and (3) to foster the spread of market-oriented economies and liberal democratic political systems.” Thus, Japan served as both a political and economic bulwark against Communism and as an Asian foothold for U.S. forces. In turn, Japan recognized that it was too weak to defend itself and was concerned about the growing instability in the world. Thus, Article I of the Treaty provided that the United States would come to the defense of Japan if attacked in exchange for U.S. military bases on Japanese territory.

This security arrangement proved problematic. In 1960, when the agreement was revised into the Mutual Security Treaty, only a minority in Japan supported the arrangement, reflecting the pacifist sentiment in Japan and the fear that the treaty was really a military alliance. Another problem was Cold War politics since the United States and Japan had differing threat perceptions from the communist powers. Japan was able to work around this issue by following a policy of seikei bunri, a separation of politics and economics. Japan supported U.S. Cold War policies while

40. See id.
41. See id. The perception of Japanese weakness was as much economic as it was military. The Japanese government believed that a prerequisite to self-defense was economic recovery. A continued U.S. presence allowed Japan to rebuild. See Beasley, supra note 12, at 226.
42. See Security Treaty, supra note 38, art. 1. Article I states:
Japan grants, and the United States of America accepts, the right, upon the coming into force of the Treaty of Peace and of this Treaty, to dispose United States land, air and sea forces in and about Japan. Such forces may be utilized to contribute to the maintenance of international peace and security in the Far East and to the security of Japan against armed attack from without, including assistance given at the express request of the Japanese Government to put down large-scale internal riots and disturbances in Japan caused through instigation or intervention by an outside power or powers.
Id. See also Levin, supra note 39, at 72 (discussing the current treaty between the United States and Japan). Levin cautions, however, that the agreement is not just a swap of protection for bases. He argues that the Treaty is an expression of the common values that underlie the Japan-U.S. relationship in all areas. See id. at 73.
44. See Mike M. Mochizuki, Japan and the Strategic Quadrangle, in The Strategic Quadrangle 107, 119 (Michael Mandelbaum ed., Council on Foreign Relations Press, 1995). On the other hand, Japanese conservatives viewed the relationship with resentment, since Japan was dependent upon U.S. security guarantees. See Beasley, supra note 12, at 237.
45. See Levin, supra note 39, at 73-74.
46. See Mochizuki, supra note 44, at 111. The essence of the policy was that Japan supported the political goals of the United States but pursued economic relations with the communist powers. The result of this is still felt today as the United States tries to match Japanese investment and exports to former communist states. See, e.g., John Bresnan, From Dominoes to Dynamos 29-52 (1994) (commenting that “[t]he belief is
establishing economic relations with the communist bloc.

Another strain on the relationship has been U.S. pressure on Japan to share the cost of its defense. In order to broaden public support for the U.S.-Japan Security Treaty, the Japanese government has limited its defense spending to one percent of the GDP, which means that in absolute size Japan still has one of the largest defense budgets in the world.\footnote{See Mochizuki, supra note 44, at 119-20. According to the White Paper Defense of Japan 1995, the SDF consists of 151,000 ground troops; a maritime force of 43,000 troops and 160 vessels; and an air force of 45,000 troops and 510 planes. See Hata & Nakagawa, supra note 18, at 180.} By the early 1980s, there were indications that the one percent of GDP ceiling was not as sacrosanct as it once was.\footnote{See Tsuneo Akaha, Japan's Nonnuclear Policy, 24 ASIAN SURVEY 852, 859 (1984).} Additionally, Japan has increased its patrol of sea lanes to a distance of 1000 nautical miles.\footnote{See Levin, supra note 39, at 74.} It has also taken up much of the financial burden of the U.S. defense commitment. Japan contributes about $3 billion a year to support U.S. forces, which is seventy-five percent of the nonlabor costs of the U.S. presence.\footnote{See id.} Thus, Japan has expanded the size and scope of its self-defense force and has taken on much of the financial cost of the security arrangement in response to U.S. demands for increased burden sharing.\footnote{External factors such as the resurgence of the Cold War in the early 1980s must also be considered a factor in Japan's large defense spending.}

Despite these strains, the success and longevity of the agreement are a result of its flexible nature. It is shaped around common values that underpin the relationship rather than a detailed defense arrangement against a specific threat.\footnote{See Levin, supra note 39, at 71-73. Flexibility, however, may not be appropriate given the limitations imposed by Article 9 of the Constitution.} The parties have relied upon the Guidelines to allocate the share of responsibilities vis-a-vis common threats.\footnote{See Joint Statement of the SCC, supra note 1, at 1623-24.}

Thus, the two changes — the dilution of the absolutist nature of Article 9 and the growing military relationship with the United States — have led to results that conflict with the original intent of Article 9. "Due to these changes, Japan's status as a strong military power in Northeast Asia is beyond question."\footnote{Mochizuki, supra note 44, at 120.} Upon the urging of the United States, Japan has become a military power despite the constitutional prohibition to the contrary. With the adoption of the 1997 Guidelines, the constitutional controls over the scope of Japan's military role within the U.S.-Japan arrangement have further eroded.

II. The Guidelines

The Guidelines constitute a review of the previous 1978 Guidelines which sought to create a comprehensive framework for defense cooperation widespread that the Japanese are 'taking over' the economies of Southeast Asia or, at the least, are acquiring a dominant position that threatens to reduce significantly the economic role of the United States.\footnote{See id.}
against the communist bloc. President Clinton and then Prime Minister Hashimoto initiated this review in response to changes in East Asia following the end of the Cold War and reductions of U.S. troops deployed in the region. The new Guidelines continue to promote greater defense cooperation between the United States and Japan, but the focus has changed from containing communism to ending regional instability and preparing against direct attacks on Japanese territory.

A. The Text of the Guidelines

The Guidelines are divided into five main parts: I. The Aim of the Guidelines; II. Basic Premises and Principles; III. Cooperation Under Normal Circumstances; IV. Actions in Response to an Armed Attack Against Japan; and V. Cooperation in Situations in Areas Surrounding Japan. Part I explains that the goal of the Guidelines is "more effective and credible U.S.-Japan cooperation." Underlying this stated purpose are Japanese concerns about China and instability on the Korean Peninsula. Publicly, however, the Japanese government has explained that the Guidelines are purely about self-defense. The United States also maintained this position as U.S. Secretary of Defense William Cohen agreed that the Guidelines were not aimed at any particular state. The purpose of the Guidelines likely reflects both stated and underlying reasons. With the end of the Cold War, the U.S. role and, subsequently, the security relationship has

55. See Joint Statement of the SCC, supra note 1, at 1623.
56. See Joint Declaration, supra note 1, at 1002-03.
58. See Guidelines, supra note 1, at 1621. Part VI discusses the mechanics of implementing the above sections and developing common practices and procedures. This part is less important for the present discussion since it contains no substantive principles. Part VII allows for future review of the Guidelines when changes relevant to the security relationship occur. See id. at 1622.
61. See Hackett, supra note 60, at A17.
changed, and the nature of the threats posed have shifted to more regional concerns.

1. Basic Premises and Principles

Part II of the Guidelines, Basic Premises and Principles, establishes the legal underpinnings of the defense cooperation. The most important is clause 2 which states that Japan will act within the “limitations of its Constitution” and according to its “defense oriented policy.” The language of the clause, however, does not expressly name any specific constitutional limitation. The second part of the clause suggests that Japan’s defensive posture is a government policy rather than a constitutional mandate. Minister Kyuma, then Director General of the Japan Defense Agency, stated that the “Guideline Review is not going to alter the interpretation of the Japanese constitution.” The impression created is that the force of clause 2 is dependent upon the government’s interpretation of the Constitution. It is not clear from the Guidelines themselves what clause 2 actually limits.

One possible interpretation is suggested by clause 3 of Part II. That clause says that all actions taken by both states will be in accordance with international law including the Charter of the United Nations. The Charter of the United Nations states that members must refrain from the threat or use of force against the territorial or political integrity of another state. Thus, at the very least, acts of aggression are not permitted under the Guidelines.

This interpretation of clause 2 is highly unlikely since such an interpretation would render Article 9 meaningless. If that was the only limitation placed on Japan, there would be no debate. This limitation exists on every other member of the United Nations, yet no other state faces a dilemma like Japan about how much and what types of force are permissible. Additionally, clause 2, despite its vagueness, implies that Japan has greater limitations on the use of force than the United States. In order to reduce redundancy and illogic, clause 2 must mean something more than a prohibition against the threat or use of force.

63. See Guidelines, supra note 1, at 1624-25.
64. The clause states that “Japan will conduct all its actions within the limitations of its Constitution and in accordance with such basic positions as the maintenance of its exclusively defense-oriented policy and its three non-nuclear principles.” Id. at 1625 (emphasis added).
65. Press Briefing of Secretary of Defense Cohen and Director General Kyuma (Sept. 24, 1997) <http://www.usia.gov/regional/ea/easec/cohnkyum.htm> [hereinafter Cohen Press Briefing] (emphasis added). This comment came in response to the following question from the press, “Minister Kyuma, might we ask you, that any expanded use of Japanese forces even under your constitution is very controversial in your country is it not?” Id.
66. See Guidelines, supra note 1, at 1625.
68. Clause 2 is directed at Japan alone, while Clause 3 applies to both countries. This suggests that the constitutional limitations are more expansive than the U.N. Charter’s prohibition against the use of force in an aggressive manner. See Guidelines, supra note 1, at 1625.
2. Cooperation Under Normal Circumstances

Part III of the Guidelines, Cooperation Under Normal Circumstances, is the least controversial. It provides for information sharing, security cooperation, such as arms control, disarmament, and humanitarian relief, and bilateral programs such as joint exercises and training. Its most interesting aspect is Japan's obligation to maintain capabilities necessary for self-defense. Part III continues the Cold War view that Japan is constitutionally permitted to maintain a self-defense force, but goes further by requiring Japan to have more than a nominal defense force.

3. Actions in Response to an Armed Attack Against Japan

Part IV, Actions in Response to an Armed Attack Against Japan, also suggests that Japan is constitutionally permitted to provide for its own defense. When an armed attack occurs, Japan has the primary responsibility to repel the attack. This is one of the main changes instituted in the Guidelines. Under the old Cold War arrangement, Japan was a military dependent of the United States with only a small but growing SDF. Now, U.S. forces are limited to supporting Japanese actions and providing reinforcements. This change is the practical consequence of a reduced willingness on the part of the United States to bear the financial and personnel costs of defending its allies, including Japan.

Part IV raises the difficult question of whether Japan is constitutionally able under Article 9 to provide for its own defense. The existing Self-Defense Act provides that the SDF are permitted to engage in the following activities: (1) defense mobilization; (2) mobilization for the maintenance of public peace; (3) operation for sea guard; (4) action against violence in the territorial air space; and (5) mobilization for other activities. Two
new functions of the SDF illustrate how large a change has occurred under the Guidelines. First, the Guidelines recognize that a situation abroad may develop into an armed attack against Japan. Thus, situations abroad may require preparations and responses in the name of the defense of Japan. The extent of the permitted responses or preparations is unclear. Second, the SDF, in conjunction with U.S. forces, will have the responsibility of protecting sea lanes and the surrounding waters. While Japan has already given its maritime forces the power to patrol 1000 nautical miles from its territorial sea, the Guidelines are unclear as to the degree of authority given to Japanese forces. In terms of Article 9, to what extent is this power constitutionally permissible? For example, could Japan legally take military action in the future in order to protect sea lanes? Assuming that Article 9 permits self-defense, an interpretive problem arises whenever the action is somewhere between defensive and offensive action. These examples show that Japan's potential role under the Guidelines is much more constitutionally ambiguous than under the old system.

4. Cooperation in Situations in Areas Surrounding Japan

Part V of the Guidelines is even more troubling from a constitutional perspective. In this Part, the United States and Japan agree to take “appropriate measures” in response to “situations in areas surrounding Japan that will have an important influence on Japan's peace and security.” These situations are neither defined nor based upon any geographic boundaries, and the phrase “areas surrounding Japan” is left purposefully

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76. The link between an armed attack and a regional situation is established in Section IV (1): “Recognizing that a situation in areas surrounding Japan may develop into an armed attack against Japan, the two governments will be mindful of the close interrelationship of the two requirements: preparations for the defense of Japan and responses to or preparations for situations in areas surrounding Japan.” Guidelines, supra note 1, at 1627.

77. Linking the defense of Japan to situations abroad automatically broadens the definition of Japanese self-defense. The clause means that self-defense is not just limited to a direct attack against Japanese territory, but also includes conflicts in areas surrounding Japan. See id. Arguably, the broader scope of involvement provides a tenuous legal basis for Japanese actions abroad.

78. The Guidelines call for both countries to “bilaterally conduct operations for the defense of surrounding waters and for the protection of sea lines of communications.” Id. at 1628.

79. See Weinberger, supra note 4, at 37.

80. This could be a potential problem in the case of the Spratly Islands. Five Asian states (not including Japan) lay claim to the islands and sporadic fighting has occurred. See Five-Handed Poker in the Spratlys, ECONOMIST, May 21, 1988, at 36. The area is also the major conduit for Middle Eastern oil destined for Japan and the Pacific. See id. The Guidelines suggest that Japan could police those waters in order to keep the sea-lanes open. See Guidelines, supra note 1, at 1628.

81. Id. at 1630-31.

82. Instead, the focus is situational. See id. at 1630. There are two possible reasons for this. First, any geographic description is automatically limiting. Second, the states may have feared that any geographic description might lead third parties to perceive the Guidelines as targeting them specifically. See Albright Press Briefing, supra note 62. Prime Minister Obuchi explained to the Diet that the concept is situational because the geographic scope of the Guidelines “cannot be determined in advance.” Obuchi Reiter-
ambiguous. As a result, in this area of the Guidelines, the provisions for a regional security arrangement are vague and open-ended.

The Guidelines do not establish limits on Japan as to what constitutes "appropriate measures." Instead, the Guidelines split appropriate responses into two categories of activities: (1) Activities Initiated by Either Government and (2) Japan's Support for U.S. Forces Activities. Under the first category, either government may conduct certain activities at its own discretion. These include relief activity, search and rescue missions, evacuations of noncombatants from a third country to a safe haven and enforcement of economic sanctions. The Guidelines do not clarify how much force Japan can use in any of these scenarios.

The second category deals with Japan's role when the United States engages in combat operations that influence the peace and security of Japan. Japan's obligations are divided into three types of activity. First, Japan will, in case of need, provide additional facilities such as civilian airports and ports for temporary use by U.S. and Japanese forces. Second, Japan will provide rear area support to U.S. forces. This support will be conducted from areas away from combat such as Japanese territory or

83. See Review of Government Alliance a Must, YOMIURI SHIMBUN, Oct. 5, 1997, available in 1997 WL 12802594. At the time of the Guidelines' release, the ruling Liberal Democratic Party (LDP) and Social Democratic Party (SDP) were unable to agree on a definition of "areas surrounding Japan." Id. In particular, the SDP demanded the express exclusion of Taiwan from this definition, so that Japan would not have to join the United States in defending that island in the event of a Chinese attack. See id. As a result, the concept is vague and broad. For example, a 1999 edition of a Japanese textbook explained that President Clinton and Prime Minister Hashimoto had "agreed to expand the scope of the Japan-U.S. security treaty from East Asia to Middle East and Africa." 5 School Textbooks Get Rewrite of Japan-U.S. Security, YOMIURI SHIMBUN, Oct. 5, 1997, available in 1998 WL 8031874. This phrase was rewritten upon the request of government censors. See id.

84. See Guidelines, supra note 1, at 1631-32.

85. See id.

86. For example, could Japan under the new Guidelines use force to evacuate its nationals from an unsafe neighboring country? The international community has generally accepted this type of use of force. See generally Louis Henkin, Use of Force: Law and U.S. Policy, in RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 4 (1989). Japan, though, may have waived this right under Article 9 of its Constitution.

87. See Guidelines, supra note 1, at 1632-33. The government has provided non-exclusive examples of logistical support. First, private companies would be expected to provide transport and weapons to U.S. forces. Second, municipalities would be required to provide access to local ports and airports. Third, public and private hospitals would be made available to treat injured U.S. troops. See Government Lists Support Areas for U.S. in War, MAINICHI DAILY NEWS, Feb. 7, 1999, available in 1999 WL 7538447.
international waters. Third, Japan will conduct intelligence gathering, surveillance, and minesweeping to support U.S. combat forces. Thus, during a military operation that threatens the peace and security of Japan, Japanese forces will assist the U.S. forces but avoid any direct combat.

As part of these new responsibilities, Japanese forces could be deployed overseas. However, South Korea has already declared that no Japanese SDF will be permitted to operate on its sovereign territory in the case of conflict on the Korean Peninsula. The South Korean government fears that Part V of the Guidelines revises the constitutional limitation by permitting Japan to project its power abroad. Although Prime Minister Hashimoto said that Japan could not use military force abroad and the SDF would not participate in U.N. operations that involve the use of force, he did not rule out the possibility that Japanese forces could be sent overseas to support a U.S. combat effort. This is a substantial change in policy for Japan since to date it limited its overseas involvement to U.N. peacekeeping operations.

Taken together, the Guidelines represent a major change in Japanese defense policy and the distribution of responsibilities between U.S. and Japanese forces. Japan is now primarily responsible for its own defense and has discretion to take action in some situations. In more combative situations, Japanese support could entail deployment abroad and substantial support activities. Although the Guidelines claim to be written within the limits of the Constitution, they undeniably expand the role of the SDF.

B. The Guidelines in Light of the Original Meaning of Article 9

The drafters of Article 9 did not intend it to be a principle to aspire to without legal force. In fact, the Japanese and Americans specifically debated this point in a meeting between Dr. Matsumoto, General Whitney, and Commander Hussey:

Matsumoto: [The renunciation of war clause] would be less unsuitable if it were written in the Preamble. It is unusual to have this principal stated in the body of the Constitution rather than in the Preamble.
Commander Hussey: You mean, Dr. Matsumoto, that you would prefer to have it stated merely as a principle.
Matsumoto: Yes, that is so.

88. See Guidelines, supra note 1, at 1632-33.
89. See id. at 1633.
91. See id.
92. See Hashimoto: No Change in Criteria for Use of SDF, YOMIURI SHIMBUN, Oct. 14, 1997, available in 1997 WL 12802782. While this is the current official position, Ozawa, the leader of the New Frontier Party, believes that Japan's international role should be broader, particularly in U.N. peacekeeping operations. 
93. In 1992, Japan participated in UNTAC, the U.N. military operation in Cambodia. However, Japan deliberately sent only civilian police officers rather than combat personnel. See Schlesinger & Kanahayashi, infra note 162, at A10. Japan has also participated in U.N. peacekeeping operations in Mozambique.
94. See T. Takayanagi et al., Nihon-koku Kempo Setai no Katei, reprinted in THE JAPANESE LEGAL SYSTEM, supra note 33, at 697-98.
Commander Hussey: While we appreciate that position, we feel that the renunciation should be incorporated in the basic law itself, that this would give it real force.

General Whitney: The enunciation of this principle should be unusual and dramatic. We made it in Chapter II rather than Chapter I of the Constitution in deference to the Emperor and his place in the hearts of the Japanese people. For my own part, and in terms of its decisive importance, I should prefer the Renunciation of War to be in Chapter I of the new Constitution. 95

Both the United States and Japan wanted Article 9 to be an absolute legal prohibition against the maintenance of any military potential. 96 Even the SDF were illegal under a strict interpretation of Article 9.

Considering the original intent of Article 9, the Guidelines are unconstitutional. The maintenance of the SDF even before the implementation of the Guidelines has been outside the framework of Article 9, since defense forces constitute land, sea, and air forces, which are precluded by Article 9. By extension, if the SDF are in themselves unconstitutional, then their expanded role under the Guidelines must likewise be unconstitutional.

III. The Judiciary, Executive and Legislative Branches' Interpretations of Article 9

Despite its original intent, since the 1950s, the interpretation of Article 9 was transformed from an absolute prohibition to something else. Much of this change can be attributed to the roles played by the judicial, executive, and legislative branches in defining and applying Article 9. Each branch of government has altered the meaning of "renunciation of war" and the prohibition in paragraph 2 against maintenance of land, sea, and air forces. Each branch has also created its own framework for analyzing Article 9 questions. Whether each framework is useful depends upon its ability to answer the following questions: (1) Does Article 9 constitute a renunciation of the right to self-defense? (2) If it does not, does Article 9 permit increased military conduct under the Guidelines, including Japanese support of a U.S. war?

95. Id.
96. Prime Minister Yoshida explained the provision in this manner:
   The article concerning the renunciation of war . . . does not directly deny the right to legitimate defense, but since its second paragraph suppresses all rearmament and every right of belligerence that the state may have, the result is that the Constitution has renounced all sorts of war, even those undertaken as operations of legitimate defense, and equally renounces all forms of belligerence. The recent wars were undertaken on the pretext of legitimate defense . . . Some claim that war undertaken in the name of legitimate defense is just, but I consider that such a viewpoint is dangerous.

YOSUHIKO NODA, INTRODUCTION TO JAPANESE LAW 193-94 (1976). The normative force behind the clause is best seen in the statement by Prime Minister Shidehara that "the best way to assure peace is to completely and voluntarily suppress all rearmament and to renounce war instead of having an imperfect and useless military establishment." Id. at 194. The justifications given by the prime ministers for Article 9 show how the clause had moral and legal force and reflect an underlying cultural value of pacifism.
A. The Judiciary

The approach of the Judiciary in Japan is pragmatic and deferential, rather than legal, to the policies of the Executive. The case law implies that the SDF is at least de facto constitutional. The Supreme Court in particular is unwilling to make a direct ruling on Japanese defense policy. While the lower courts have developed some tests for judging the constitutionality of a military policy, deference by the Supreme Court to the Executive has muddied the normative force of Article 9.

1. The "Sunakawa Case"

The Constitution of Japan states in Article 81 that the Supreme Court has the “power to determine the constitutionality of any law, order, regulation or official act.” The prevailing view is that this clause permits judicial review of statutes and orders concerning defense in terms of Article 9. The Supreme Court held that it did have the power to review defense policy in Sakata v. Japan, known generally as the “Sunakawa Case.” The case, though, is more important for determining the legality of the security arrangement between the United States and Japan.

The Sunakawa incident began when seven local villagers were arrested for trespassing on a U.S. installation, the Tachikawa air base. The Tokyo District Court determined that the seven accused were not guilty, since the charge of illegal entry was enacted as part of the Security Treaty of 1951, which the District Court held to be unconstitutional. The court nullified the effect of the treaty because it called for troops to be stationed on Japanese soil. The treaty, according to the District Court, contravened the prohibition against land, sea, and air forces in Article 9.

—97. KENPO, art. 81. Some scholars believe that when the Supreme Court declares a law unconstitutional, the law is either invalidated but still recognized or null and void in the future and retroactively. See HIROSHI ITOH, THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES 108-10 (1989). One author, however, believes that the effect is limited to the actual parties. See Nobushige Ukai, The Significance of the Reception of American Constitutional Institutions and Ideas in Japan, in CONSTITUTIONALISM IN ASIA: ASIAN VIEWS OF AMERICAN INFLUENCE 119-20 (Lawrence W. Beer ed., 1979). Thus, it is unclear what happens when the Supreme Court declares a law unconstitutional. See id. at 119.

98. See Masami Ito, Kempô Nyûmon, reprinted in THE JAPANESE LEGAL SYSTEM, supra note 33, at 704.

99. See Sakata v. Japan, 13 KENSH0 3225 (1959), reprinted in THE JAPANESE LEGAL SYSTEM, supra note 33, at 709. Ultimately, the Court took the position that the literal words of Article 81 of the Constitution did not permit it to review treaties and it deferred instead to the judgment of the Executive. See id. This created a narrow exception similar to that of the political question doctrine which would dominate Article 9 litigation from then on. See id.

100. Japan and the United States had agreed to extend the runway at Tachikawa which meant that private property had to be expropriated. When the Japanese government attempted to survey the land, local villagers opposed to the plan rioted and entered the base. See id.

101. See id.

102. The Tokyo District Court took the traditional, absolutist view of Article 9 that the clause prohibited any war potential on the territory of Japan. See id. While the decision was consistent with the intent of the drafters, it was potentially embarrassing, since it invalidated the Mutual Security Treaty and called into question the legality of the SDF.
The Supreme Court disagreed, stating that Article 9 did not prohibit Japan from gaining security guarantees from another country.\(^3\) The Court held that war potential prohibited by the second paragraph of Article 9 was limited to that over which Japan can exercise command and control but did not proscribe the use of foreign troops, even if stationed on the territory of Japan.\(^4\) The Court qualified this command and control test in the following passage:

> the said article renounces what is termed therein war and prohibits the maintenance of what is termed war potential; naturally, the above in no way denies the inherent right of self-defense, which our country possesses as a sovereign nation. The pacifism of our Constitution has never provided for either defenselessness or nonresistance.\(^5\)

This dicta has led many to argue that by making self-defense an exception to the command and control test, the Court legalized the SDF.\(^6\)

Consequently, the Sunakawa case limits Article 9 in two main respects. First, Article 9 has no bearing on the U.S. presence in Japan, so long as Japan does not exercise command and control over the forces. Under the Court's reasoning, Japan can contract out its defense requirements yet stay within the constitutional framework. Second, the Court explicitly stated that Japan has an inherent right to self-defense. However, the court did not hold that this right extends to the maintenance of the SDF.\(^7\)

2. Later Cases Interpreting the Sunakawa Dicta

Other courts have grappled with the constitutionality of Japan's defense policy. In Ito et al. v. Minister of Agriculture, Forestry and Fisheries, known as the "Naganuma Nike Missile Site Case I,"\(^8\) plaintiffs challenged the government's decision to construct a Nike anti-aircraft base in a forest

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103. See id. at 711. Since the Supreme Court found a technical resolution to this question in the language of Article 81 of the Constitution, these findings were legally unnecessary, suggesting that the Court was concerned about the constitutional questions raised by the lower court.


105. Id. at 710. Note that the language of the court is strikingly similar to Kobayashi's Theory B2 which differentiated between war potential and potential for self-defense. See Kobayashi, supra note 33, at 698-700; supra notes 34-37 and accompanying text. The Sunakawa case may resolve some of the ambiguity about Article 9 and the command and control test may be the limit as to how far Japan can go. However, it fails to account for the intent of U.S. and Japanese drafters of the clause.

106. In the Eniwa case before the Sapporo District Court, the prosecution argued that the right to self-defense established in Sunakawa meant that the SDF were constitutional. In Eniwa, two ranchers were charged with cutting telephone lines to a local SDF base. The Sapporo District Court ignored the Article 9 question by determining that the telephone lines were not military property. See Hideo Wada, Decisions Under Article 9 of the Constitution - The Sunakawa, Eniwa and Naganuma Decisions, 9 Law in Japan 117, 123-25 (1976).

107. See Funk, supra note 22, at 380-82.

One claim by the plaintiffs was that the existence of a military base violated Article 9. The District Court first determined that acts of state such as the creation of the SDF were not beyond the realm of judicial review simply because of its "highly political nature." The court then determined the constitutionality of the SDF:

"The SDF is a military force, since it is clearly "an organization of men and material which has as its purpose combat activity involving physical force against a foreign threat." Accordingly, the Ground, Maritime, and Air SDF correspond to the "war potential" of "land, sea and air forces," maintenance of which is forbidden by Article 9, 2 of the Constitution."

Attempting to be consistent with the Sunakawa decision, the court explained that the right to self-defense was not directly related to military power. Instead, the right to self-defense addressed domestic concerns about the social, economic, and political welfare of the country and international concerns regarding its world position and diplomacy. The court reasoned that to maintain a distinction between military force for defensive versus aggressive purposes would render the phrase "war potential" objectively meaningless.

This decision was overturned on appeal to the Sapporo High Court. In the Naganuma Nike Missile Site Case II, the court determined that the plaintiffs lacked standing to sue on non-constitutional grounds. In dicta, however, the court expressed its view on the constitutionality of the SDF. The court expressed two basic theories of interpretation of the second paragraph of Article 9, a positive theory and a negative theory:

- the positive theory is based on the view that the Constitution makes pacifism . . . the ideal for which we risk our existence, and that this is possible even under the present conditions of international society.
- the negative theory is based on the view that the Constitution makes pacifism . . . the ideal for which we risk our existence, and that this is possible even under the present conditions of international society.

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109. See id.
110. See id.
111. Id. at 93-94. Here the court was distinguishing the narrow political question exception created by the Sunakawa court for treaties. The issue here was the constitutionality of the SDF which was created by statute. Since laws are under the review power of the courts under Article 81, the court could determine the constitutionality of the law that created the SDF. See id.
112. Id. at 111. The court seems to be embracing Kobayashi's Theory B1 that the prohibition of war potential encompasses defensive forces. See Kobayashi, supra note 33, at 698-700; supra notes 29-33 and accompanying text. In so doing, the court is indirectly contradicting the theoretical underpinnings of the Sunakawa decision.
114. See id.
115. See id. at 97-98. This language again seems to be a rejection of Theory B2 and the Sunakawa reasoning despite its attempt at reconciling the two decisions. See Kobayashi, supra note 33, at 698-700.
117. The court held that the substitute facilities created upon the loss of the forest reserve compensated the local farmers and villagers for any loss. See id. at 114.
The court did not decide which theory best explains the language of Article 9. This indecision validates the constitutionality of the SDF, since the court found the second paragraph to be ambiguous. Not only did this legalize the ambiguity of the language, but it ignored the original absolutist intent.

The Sapporo High Court also created its own political question theory about when a court can review defense policy. The court explained that if the purpose of the SDF was not clearly aggressive, it could not be reviewed since it pertained to an act of state. Under this standard, the Guidelines would have to be on their face aggressive in purpose to be judicially reviewable.

3. The Emergence of a Policy of Avoidance

Since Sunakawa, the Supreme Court has avoided resolution of any Article 9 issues. On appeal of Nike II to the Supreme Court, the court decided the narrow issue of whether the plaintiffs had standing. The Court did not comment upon the lower courts' contradictory views of Article 9. The Supreme Court chose not to decide whether the SDF were constitutional.

In the Hyakuri Air Base case, the Supreme Court again avoided deciding this constitutional conflict. Appellants sued Japan and Fujioka, a private individual, for rescission of a contract for the sale of land. The land

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118. *Id.* at 121.
119. The court's definition of the negative view seems analogous to Theory B-2. However, the positive view seems like a combination of both Theory A (self-defense presupposes war; war is renounced; thus it is illegal) and Theory B-1. It is significant that the court seems to be adopting Kobayashi's thesis that neither theory is particularly strong and arguments can be made for either interpretation. *See* Kobayashi, *supra* note 33, at 698-700. It also seems to undercut the theoretical underpinnings of the Sunakawa case by putting all three theories on even footing.
120. *See* Minister of Agriculture, *supra* note 116, at 1175, translated and reprinted in BEER & ITOH, *supra* note 16, at 121. The court relies on Sunakawa for this general political question doctrine, but it seems inconsistent with the logic of the Supreme Court. In effect, the court is avoiding the issue: not only is Article 9 ambiguous, but it is also too politically sensitive for the court to handle.
123. *See id.*
was subsequently sold to the SDF for the creation of a military base.\textsuperscript{125} The Court circumvented the constitutional claim by determining that Article 9 is not designed to apply directly to private law such as a breach of contract claim.\textsuperscript{126}

The Supreme Court has yet to address the constitutionality of the SDF.\textsuperscript{127} One interpretation of this policy of avoidance is that the constitutionality of the SDF is implied in Japan's inherent right to self-defense.\textsuperscript{128} Alternatively, this approach could be viewed as an attempt by the Court to avoid constitutional issues by focusing on more technical grounds for decision.\textsuperscript{129} The Court's reticence may also reflect its unwillingness to lay down a general rule about Article 9 until more cases and opposing views are considered.\textsuperscript{130} Regardless of the underlying reasons, the practical effect is the continued existence of the SDF and unfettered power by the Cabinet and the Diet to determine defense policy.

4. Political Question Doctrine

On a broader level, judicial deference may reflect the belief that defense policy is a political question and not capable of judicial resolution.\textsuperscript{131} The implications of this are twofold. First, the Supreme Court is able to adjudicate the cases while avoiding any political backlash.\textsuperscript{132} Second, by ignoring Japan's evolving defense policy, the Court can avoid delineating what is and is not constitutional. The only attempt at line drawing is the High Court's rule in Nike II: unless the purpose is clearly aggressive, there is no judicial review.\textsuperscript{133} The District Court, however, correctly points out in Nike I that the distinction between aggressive and nonaggressive military

\textsuperscript{125} See id. at 130-31.
\textsuperscript{126} See id. at 135.
\textsuperscript{127} See Funk, supra note 22, at 381. Funk observes this trend of the Supreme Court in the Eniwa case, the Uno case, and a case known as Suzuki. See id. at 381-82.
\textsuperscript{128} See id. at 382. This would be consistent with the B2 theory and would avoid the tightrope decision making seen in Nike I. This may resolve the question of the existence of the SDF, but it fails to address the Guidelines.
\textsuperscript{129} See id. at 382, n. 127. However, Funk seems to discount this interpretation, arguing instead that the Supreme Court could have struck down the SDF as unconstitutional. See id. Another interpretation is that the Supreme Court acted in this manner to avoid the legal ramifications of upholding the SDF in light of Article 9's language.
\textsuperscript{130} See Ukai, supra note 97, at 127.
\textsuperscript{131} This can be seen in the Nike Missile Case II and also in Sunagawa. In Sunagawa, the Supreme Court was unwilling to declare a treaty unconstitutional, believing instead that the "matter must be entrusted to the decision of the Cabinet . . . and of the Diet . . . and it ultimately must be left to the political review of the sovereign people." Sunagawa v. Japan, 13 KEiSHO 3225 (Sup. Ct., G.B., Dec. 16, 1959), translated and reprinted in Beer & Itoh, supra note 16, at 93.
\textsuperscript{132} The judiciary is reluctant to decide politically-charged issues since: 1) the Liberal Democratic Party has nearly dominated Japanese politics since World War II, so most of the judges identify with this party's philosophy; and 2) judges on the Supreme Court are subject to review by the electorate every 10 years, so they are far from immune from politics. See Funk, supra note 22, at 383.
\textsuperscript{133} See Minister of Agriculture, supra note 116, at 1175, translated and reprinted in Beer & Itoh, supra note 16, at 121.
forces is untenable, and the standard has yet to be accepted by the Supreme Court. Even if one assumes that the SDF is constitutional, it does not necessarily follow that deployment abroad of those forces is constitutional. Yet the lack of a clear judicially-created framework and the tendency of the Supreme Court to avoid addressing constitutional issues means that many decisions about Japanese defense policy, including the Guidelines, will pass unchallenged.

5. Constitutional Transformation

Another explanation for the Supreme Court’s avoidance of a direct ruling on the constitutionality of defense forces is constitutional transformation. This theory has been used by Japanese scholars to explain how the Constitution has survived without amendments. Under constitutional transformation, particular articles are reinterpreted while keeping the text intact. Not all types of interpretations are constitutional transformations. A change within the framework of the constitutional norm is constitutional interpretive change, while a change outside the framework is constitutional transformation. Constitutional transformation can take place if two conditions exist. First, the normative function of the provision must become purely superficial, i.e. its effectiveness is lost. Second, some other meaning must have replaced the original meaning.

Kasuya argues that the effectiveness of the Renunciation of War clause in Article 9 has been forfeited over a long period of time. However, this, by itself, is not transformation. Instead, there must be popular belief as to some new normative meaning of Article 9. Conclusive evidence of transformation would exist if the Supreme Court were to deliver a direct opinion recognizing the constitutionality of the SDF.

The application of constitutional transformation theory to Article 9 can explain why the Supreme Court avoided a direct ruling on the constitutionality of Japanese militarism. First, the Court may fear the application of constitutional transformation theory. It may not be prepared to give a new meaning to Article 9 which is outside the original framework of the

135. See Kasuya, supra note 11, at 1.
136. See id. See also Ford, supra note 121, at 58.
137. See id. at 15. See id. at 16.
138. See id. at 20. Unlike Kobayashi who is looking at the textual arguments that can be made, see Kobayashi, supra note 33, at 698-700, Kasuya emphasizes the normative intent of the language. See Kasuya, supra note 11, at 20.
139. See id. at 20. Kasuya argues that the battle in the lower courts is evidence of the constitutional transformation phenomenon, but consensus on the new meaning of Article 9 has not been achieved. See id. at 26. Combining the two theories (textualist and constitutional transformation), the following matrix emerges: At its inception, the normative force of Article 9 was absolutist and the only consistent textual theories were A and B1. The case law and changing political landscape suggest that the normative force has changed, but no consensus exists as to a new meaning. Now all theories have equal force in explaining the textual meaning of Article 9.
provision’s norm. Alternatively, the Court may believe that it lacks the political consensus to make such a ruling. Again the practical effect is that the SDF continue to exist. The legal effect is that Article 9 cannot be interpreted literally. However, no alternative meaning clearly exists. Thus, the SDF and the Guidelines are somewhere in the margins of constitutionality.

Regardless of the rationale at work, the Supreme Court appears unwilling to address defense issues. While recognizing a right to self-defense in Sunakawa, the Court has provided no framework for the lower courts when dealing with SDF constitutionality challenges. If a test case did arise, the most likely outcome would be judicial deference to policymakers.

This is problematic for Japanese constitutionalism. Unlike the rest of the democratic world, Japan’s defense policy not only involves political issues but is also a constitutional question. The judicial framework has the benefits of ease and at least de facto recognition of the constitutionality of the SDF. However, as a consequence, Article 9 loses much of its normative power and the constitutional aspects of defense issues are undermined.

B. The Executive

Judicial deference has led various prime ministers and the cabinets to view restrictions upon the deployment of Japanese troops as a matter of government policy rather than a legal necessity. This approach has been prevalent for nearly forty years. Without fear of judicial nullification, the government has been free to establish a security relationship with the United States in response to Cold War threats.

This view of defense as a government policy issue developed gradually. First, the Cabinet officially recognized Japan’s right to self-defense four and a half years prior to Sunakawa despite the large public debate on the subject. Later, the government explained that Japan had never rejected its right to self-defense and, thus, justified its increased expenditure on the SDF. In the 1980s, Prime Minister Nobosuke explained that while the government’s policy barred nuclear weapons, the Constitution did not prohibit some weapons for self-defense. In 1994, then-Prime Minister Tomiichi Murayama declared that the SDF were constitutional “in

141. See Auer, supra note 17, at 76.
142. See supra Part III.A.1.
143. This is illustrated by the official Cabinet policy statement on Article 9 released in June of 1955:

The Constitution while denouncing war, has not denounced war for self-defense . . . To check armed attack in event such an attack from outside is self-defense itself, and is entirely different from settling international disputes. Hence, the case of military power as a means of defending the nation when the nation has been attacked by military power is not counter to the Constitution.

Auer, supra note 17, at 76.
145. See Auer, supra note 17, at 76. Japan’s non-nuclear principles were announced as a self-imposed limitation rather than as any constitutional prohibition. See generally Akaha, supra note 48, at 859.
light of the changing international situation and the people's growing understanding." 146 This is a vastly different statement than the one made earlier, saying that the Constitution would have to be amended to allow for the SDF. 147 The Executive branch's policies suggest that Japanese pacifism was a political tactic rather than a constitutional mandate.

An example of the Cabinet's treatment of constitutional challenges can be seen in its response to the public outcry against the Vietnam War. The Japanese people demonstrated against the war primarily because Japan was a "silent partner" in America's war. 148 Okinawa served as a major staging ground for U.S. bombing missions, and many U.S. troops and equipment first passed through Japan. 149 The Japanese government sold arms to the United States and issued propaganda against the Viet Cong. 150 As a result, various Japanese organizations, especially religious and student groups, regularly demonstrated against the war and Japan's involvement. 151 One Japanese protestor accused Japan and the Japanese people of being guilty of complicity in the war. 152

The Japanese government did not reevaluate the U.S.-Japanese security relationship as a result of popular discontent. Instead, Prime Minister Sato struck a deal with President Nixon. They agreed that the security relationship would continue with Japan as the "silent partner" in exchange for the return of Okinawa which had been held by the U.S. since World War II. 153 In effect, Japan bought political concessions for its continued complicity in the Vietnam War.

The Guidelines may be similar to the U.S.-Japan deal regarding the Vietnam War. The expanded role of the SDF may be a tradeoff for some U.S. concessions. The Joint Declaration explains that the Guidelines review is only one part of a larger bilateral security agreement which includes a study on ballistic missile defense, exchange of fighter plane technology, and, most importantly, a reduced U.S. presence in Okinawa. 154 If so, the Guidelines represent a political compromise between the United States and the Cabinet. Therefore, the Guidelines may be a new example of the Cabinet determining the scope of Article 9 and using the constitutional limit as a means of obtaining U.S. political concessions. 155

146. O'BRIEN, supra note 144, at 175.
147. See id. at 175-76.
149. See id. at 84-106.
150. See id. at 128.
151. See id. at 115-22. Protesters held teach-ins at schools and community centers. See id.
152. See id. at 120. Others expressed similar sentiments through "a regular pattern of appeals, demonstrations, letter-writing and forums." Id.
153. See id. at 199-204.
154. See also Joint Declaration, supra note 1, at 1003-04. The Okinawa provision is a result of the large public outcry against U.S. military bases after the rape of Japanese girl by several U.S. servicemen. See id.
155. See supra notes 144-49 and accompanying text.
However, the Cabinet is not unfettered in determining defense policy. Protests against the Vietnam War illustrate that the Executive is held accountable to public opinion on defense issues. During the Gulf War, Prime Minister Kaifu attempted to introduce legislation that would allow for the SDF to participate in the U.N. coalition against Iraq. Over 20,000 people protested against the plan and, ultimately, widespread public belief that the law was unconstitutional killed the bill. Nevertheless, judicial deference on the issue means that the Executive is institutionally unchecked.

C. The Diet

The Diet also expanded the role of Japanese forces. Although efforts to pass a U.N. participation bill during the Gulf War failed, the Diet did pass a law enabling Japan to participate in the U.N. peacekeeping operation and election monitoring in Cambodia (UNTAC). The Diet passed the U.N. Peace Cooperation law in June 1992 which allowed for SDF participation in peacekeeping operations. Under this law, Japanese forces can engage in peace-enforcing operations since "Article 9 prohibits Japan to resort to 'the threat or use of force.'" This language is similar to that used by the U.N. Charter. As a result, the new law implicitly reduced the meaning of Article 9 to the same limitation imposed upon every other state in the world by the United Nations.

This law enabled Japan to send 600 civilian police officers to Cambodia. Consequently, many Japanese reacted strongly against the new law when the Khmer Rouge killed two Japanese officers. The public urged the government to withdraw from the mission or to ask UNTAC to deploy Japanese forces only in safe, noncombat areas. Some Japanese argued that, comparable to World War II, wayward leaders had once again led Japan down a militarist path. However, Japanese forces remained in

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156. See Funk, supra note 22, at 383-87.
157. See id. at 388.
158. See Auer, supra note 17, at 79.
160. Law Concerning Cooperation for U.N. Peacekeeping Operations and Other Operations, supra note 159, at 215. However, Japanese participation is contingent upon the existence of a ceasefire, consent of the disputants, and the strict adherence to impartiality. If any of these conditions are not met, the Japanese forces must leave. In addition, SDF peacekeepers are limited to using weapons necessary to protect their lives. See Hisashi Owada, Japan's Constitutional Power to Participate in Peace-Keeping, 29 N.Y.U. J. INT'L L. & POL. 271, 278 (1997); see also Akiko Shibata, Japanese Peacekeeping Legislation and Recent Developments in U.N. Operations, 19 YALE J. INT'L L. 307 (1994).
161. See U.N. CHARTER art. 2, para. 4.
163. See Blustein, supra note 162, at A15.
164. See Schlesinger & Kanahayashi, supra note 162, at A10.
Cambodia and have served as peacekeepers elsewhere. The Diet's ability to use this new law as a means of advancing defense policy may be limited by public opinion in a similar fashion to the Cabinet, but it is not clear whether public opinion alone is strong enough to keep the SDF from going overseas.

IV. Constitutionality — The Three Frameworks

Each of the three branches has created their own framework of analysis for Article 9 issues. The first, the Judiciary, is legally framed but is the least helpful of the three. The second and third, the Executive and Legislative, explain official Japanese policy but assume its legality. While the legal precedent and past practice indicate that the SDF are constitutional, none of the three branches offer any clear legal guidance as to how to evaluate the Guidelines.

Notably, none of the three institutions attempt to preserve the original intent of Article 9: an absolute prohibition against maintaining war potential.165 Since the Guidelines allow a defense force capable of repelling an armed attack and authorize Japanese forces to participate in regional conflicts, a strict interpretation of Article 9 is likely to render them illegal. The Guidelines constitute war potential for Japan and thus are unconstitutional.

A. The Likely Judicial Approach to the Guidelines

The Supreme Court and the lower courts have offered a limited framework for analysis. First, the Nike II case suggests that the Guidelines are unconstitutional only if their stated purpose is military aggression.166 This "aggressive purpose test" for judicial scrutiny is a difficult hurdle to meet, since the Guidelines state that the objectives in implementing them are defense and regional security. There is nothing patently aggressive about the Guidelines despite the expansion of SDF power.167 If this test is the legal standard, it is very likely that the Guidelines would survive this type of scrutiny, and the Judiciary would defer to the judgement of the Cabinet.

Similarly, if Sunakawa provides at least tacit approval for the SDF, then perhaps the Guidelines are constitutional under certain limitations. Such a conclusion is uncertain since Sunakawa and the later cases do not define what is a permissible military aim beyond the point of "pure" self-defense.168 One possible means of line-drawing is the command and con-

165. This corresponds to Kobayashi's Theory B1: war potential includes both offensive and defensive forces. See Kobayashi, supra note 33, at 698-700. The strength of this position is that it fits neatly with the original normative intent of the provision.

166. See Minister of Agriculture, supra note 116, at 1175, translated and reprinted in BEER & ITOH, supra note 16, at 121.

167. The language of the section headings (phrases such as "cooperation," "actions in response to an armed attack against Japan" and "important influence on Japan's peace and security") implies that the Guidelines favor the status quo and are meant to apply only in response to some external threat. See Guidelines, supra note 1, at 1624.

168. Sunakawa recognized Japan's inherent right to self-defense despite the constitutional requirement of pacifism. However, the court offered no guidance as to what it meant. See Sunakawa, supra note 99, reprinted in THE JAPANESE LEGAL SYSTEM, supra note
trol test.\textsuperscript{169} This would require a case-by-case definition of whether the particular operation goes beyond the right to self-defense.

This approach is problematic for several reasons. First, it requires a level of judicial scrutiny of defense issues that Japan has never experienced. Second, even if a court is willing to address the Article 9 question, it forces the court to adjudicate on the legality of a specific, possibly ongoing activity. This could potentially embarass the Cabinet and the United States. The result justifies the use of political question theory and exposes a fundamental flaw in the Japanese constitutional scheme. It is unreasonable to expect a court to nullify military action taken under the Guidelines when Japanese security and defense are at stake.

This problem is also apparent when one considers the application of constitutional transformation to Article 9. Constitutional transformation theory implies that the public's perception of what is permissible has changed since Sunakawa.\textsuperscript{170} Article 9 may be construed more liberally today. The linkage provision of the Guidelines which connects Japanese self-defense to regional stability suggests, under constitutional transformation, some broader views of self-defense.\textsuperscript{171} The difficulty emerges when the courts are left to determine the extent to which the "transformed" Article 9 permits self-defense, especially given the Supreme Court's unwillingness to decide Article 9 questions.

By avoiding the issue in the past, the Judiciary has few options if confronted by a challenge to the Guidelines. It has enabled the Cabinet to denigrate Article 9 to nothingness. Most likely, the Judiciary is left powerless to confront the constitutionality of the Guidelines. Thus, it is possible that the courts will avoid any challenge to the Guidelines, resulting in, at least, tacit constitutionality.

B. The Approach Taken by the Cabinet

The Hashimoto Cabinet submitted three bills to the Diet in April 1998 designed to implement the Guidelines. The government continues to maintain that the Guidelines are constitutional because they are consistent with its interpretation of Article 9.\textsuperscript{172} This pragmatic approach allows Japan to respond to changes in the world. It is not, though, a legal approach. While governments often offer their own interpretation of a constitutional provision, the Japanese government has not explained the scope of Article 9 in any useful way.

The most troubling aspect of the Guidelines is the provision that allows the United States to use Japanese airfields and ports to conduct a


\textsuperscript{170} See Kasuya, supra note 11, at 20.

\textsuperscript{171} See supra notes 90-92 and accompanying text.

\textsuperscript{172} See Cohen Press Briefing, supra note 65.
regional war.\textsuperscript{173} This raises the spectre of Japan's complicity in the Vietnam War and may trigger widespread public protest.\textsuperscript{174} However, a public outcry against the Guidelines is unlikely. In the case of Vietnam, the public reacted to a war being fought from Japanese territory. In contrast, the Guidelines are only plans for some future, hypothetical contingency. This lack of immediacy means that the public reaction will not occur when the implementing legislation is debated in the Diet.\textsuperscript{175} Thus, the public may not exercise the same sort of checks in this instance as it has in the past, since the Guidelines are not a response to any particular crisis. Even if the public demonstrates against the passage of the Guidelines, the Vietnam example shows that a demonstration is probably not enough to prevent their enactment into law.\textsuperscript{176}

C. The Likely Approach by the Diet

Since the Judiciary is unlikely to affirm a challenge to the constitutionality of the Guidelines and the Cabinet has passed three implementing bills, only the Diet is likely to consider the legality of the proposed legislation. However, the Diet's view of Article 9, as evidenced by the U.N. Participation Law, is very broad. The sole limitation on Japanese military forces is that they cannot threaten or undertake aggressive military action. In this light, the Guidelines are facially constitutional. Only actual conduct that would constitute the threat or use of force would be questionable. Thus, even the Diet is unlikely to challenge the constitutionality of the Guidelines.

However, passage of the Guidelines in the Diet will not be a mere endorsement of the Cabinet's defense policy. Although the Liberal Democratic Party (LDP) still represents the majority in the Diet, the 1998 elections have given rise to a strengthened opposition. The opposition parties, Democratic Party of Japan and Komeito, have argued that if the concept "areas surrounding Japan" is not defined, it could be contrary to Article 9.\textsuperscript{177} It appears that this charge, though, is designed only to gain leverage in the debate, and U.S. experts do not expect any changes to the broad and

\textsuperscript{173} See Guidelines, supra note 1, at 1632-33.

\textsuperscript{174} See generally Havens, supra note 148. The difference now is that Japan is no longer a "silent partner" in an U.S. War.

\textsuperscript{175} The examples of the Gulf War and Cambodia support this. When the bill for Japanese participation in the Gulf War was introduced, the legislation was in response to a very real crisis. See Funk, supra note 22, at 384-87. In the case of Cambodia, the decision to participate came after the law. Public outcry did not occur until Japanese forces were already deployed. See Schlesinger \& Kanahayashi, supra note 162, at 10.

\textsuperscript{176} It is much more likely that public protest and dissatisfaction would lead to further negotiations with the United States about the security relationship rather than a public debate about the Article 9 implications. Consider the case of the September 1995 abduction and rape of the 12 year old Okinawan school girl by three U.S. servicemen. Public calls for the removal of U.S. forces were ignored, but gave Japan leverage to renegotiate the security relationship. See, e.g., Joint Declaration, supra note 1, at 1004.

vague scope of the Guidelines.\footnote{178} In fact, the deal that is beginning to be formulated in the House of Representatives avoids the constitutional issue altogether. A tentative amendment would obligate the government to withdraw SDF units if a majority of both the House of Representatives and the House of Councillors voted for withdrawal.\footnote{179} While there is still discussion about whether the principles of the Guidelines also apply to Japanese support of U.N. enforcement operations,\footnote{180} the tenor of the debate suggests that the Diet will not vote down the Guidelines as unconstitutional.

V. Implications of the Constitutionality of the Guidelines

Each branch of the Japanese government is most likely to determine that the Guidelines are constitutional despite their inconsistency with the original intent of the Article. Holding them constitutional can have dangerous ramifications for Japan. First, it potentially has a destabilizing effect on domestic politics in the long run. Second, the original constitutional scheme of checks and balances is weakened as the meaning of Article 9 is watered down. Lastly, the assumed constitutionality of the Guidelines may undermine the notion of Japan as a pacific state.

A. Domestic and Institutional Consequences

There are several implications of the assumed legality of the Guidelines. First, Japan is able to effectuate a major change in defense policy without having a serious national debate about the proper role of the SDF.\footnote{181} This allows Japan to maintain the spirit of Article 9 without examining the limitations it imposes on Japan's defense policy. In addition, the nearly continuous dominance of the LDP has insured that no real defense debate occurs.\footnote{182} This lack of debate and the current alliance structure of the Cabinet threatens to undermine the present government. Prior to the resignation of Prime Minister Hashimoto, the ruling alliance of the LDP, the Social Democratic Party (SDP), and the Pioneers had been unable to agree on any limitations to the Guidelines.\footnote{183} Further, the current majority coalition of the LDP and the Liberal Party disagree on security issues since the Guidelines' implementing legislation is a product of the old alliance of the LDP and the SDP without the involvement of the Liberal Party.\footnote{184} Trying
to implement the Guidelines without a debate leading to a consensus on their limits can unravel the alliance or leave Japan impotent on security issues.185

There are also two related institutional implications of the supposed constitutionality of the Guidelines. First, judicial deference has given the Cabinet an unfettered ability to interpret Article 9.186 The Cabinet’s policy on the Guidelines reveals that Article 9 is only an ideal rather than a legal limitation.187 Second, the Diet’s explanation of the clause in the U.N. Participation Law suggests that even as an ideal, Article 9 goes no further than the current minimal standard in international law. Under the Diet’s interpretation, Article 9 is only a superficial concept that commits Japan to nothing more than what is legally imposed on all members of the United Nations. Together, these two changes mean that constitutional checks on defense policy no longer exist. Broadly, the Guidelines, if passed, may not appear to be the product of constitutional checks and balances, but rather a reflection of the power of the LDP.

The only apparent check on Japanese defense policy is public opinion. Public opinion, though, has changed steadily since 1950. Now, ninety percent of the population supports the maintenance of the SDF.188 In the future, public consensus could allow for complete constitutional transformation of Article 9 from the intentions of its drafters.

B. Japan as the Model of the Pacifist State

There is a larger implication to these changes in Article 9. While shifts in public opinion and judicial deference reflect the pragmatic need to “adjust” Article 9, it undermines and possibly destroys Japan’s claim to being a constitutionally-mandated pacifist state. A key principle of the Preamble of the Constitution demonstrates that much of the Japanese national conscience surrounds this notion of pacifism: “We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world.”189 This principle of pacifism is the most distinctive feature of the Japanese Constitution and is clearly expressed in Article 9.190

Practically speaking, Japanese foreign policy can best be explained by self-interest rather than an ideological commitment to peace. The constitutional prohibition in Article 9 prevented Japan from taking on greater responsibility for its defense during the Cold War and served as a justifica-

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185. Implementing the Guidelines to its fullest may also be premature for the general public. The Japanese peoples' reaction to the death of police officers in Cambodia strongly indicates that Japan is unprepared for the downside of being a global leader. See Schlesinger & Kanahayashi, supra note 162, at 10.
186. See Pyle, supra note 73, at 105.
187. See, e.g., Cohen Press Briefing, supra note 65.
188. See Auer, supra note 17, at 83.
189. KENPO, preamble.
190. See NODA, supra note 96, at 194, 195-96.
tion in avoiding pressure from the United States for a greater military role. This is not to say that the Japanese government was insincere in these constitutional sentiments, but rather that the constitutional limitation became a means to other goals such as economic development. However, the examples of the Vietnam War, the Gulf War and Cambodia demonstrate that the Japanese public still believes that pacifism is an important part of Japan's national identity and cannot be easily discarded.

The Japanese government, though, has been acting as a rational, self-interested state rather than a pacifist state. Arguably, the Guidelines represent a new reflection of self-interest in response to the post-Cold War system. In terms of a balance of power in the region, Japan may be better able to achieve peace by maintaining a reasonably strong military than by prohibiting all types of war potential on its territory. In this light, the Guidelines may be the best way to balance the ideal of pacifism against Chinese interests and regional instability.

The Guidelines, however, do more than continue the trend away from pacifism. The development of the SDF and the establishment of the security arrangement with the United States can be justified as necessary for territorial self-defense. The Supreme Court's decision in Sunakawa clarifies that both the SDF and the U.S.-Japan arrangement are at least de facto legal. When one considers this precedent and practice in light of the inherent ambiguity in the language of Article 9, some less-than-absolute notion of pacifism can coexist with Japan's past efforts to provide for its defense.

In contrast, the Guidelines, under the guise of self-defense, call for a broader, regional role for the SDF which may also include preemptive

191. See Pyle, supra note 73, at 104-05. Pyle explains that the Japanese desire to negotiate in terms of "comprehensive security" was a means to deflect emphasis from military concerns. See id.


193. See Part IV.B.

194. Kenneth Waltz explains that a state will necessarily act in its own self-interest in light of the anarchic conditions of the international system. No controls on the use of force exist at the international level, so states must depend on themselves to protect their national interest. See KENNETH WALTZ, MAN, THE STATE AND WAR 238 (1954). But see PETER J. KATZENSTEIN, CULTURAL NORMS AND NATIONAL SECURITY: POLICE AND MILITARY IN POST-WAR JAPAN 129 (1996) (arguing that the realist focus on "rational, unified states that compete in an anarchic system through balancing... disregards the effects of institutionalized norms.").

195. Waltz argues that a state may desire peace, but the balance of power system requires that no state become too strong or too weak relative to the other states in the region or system. See id. at 222.

196. See supra notes 25, 39-42 and accompanying text.

197. See supra notes 110-12 and accompanying text.

198. See supra notes 31-35 and accompanying text.
action.\textsuperscript{199} Further, the Guidelines permit the Japanese to engage in military conduct abroad in support of a U.S. war.\textsuperscript{200} This type of conduct is much harder to reconcile with the language of Article 9. Rather than mere constitutional interpretation, the conduct permitted under the Guidelines can potentially transform Article 9 into an entirely new norm — perhaps outlawing only wars of aggression.\textsuperscript{201} Pacifism may become a superficial legal restraint, and the original normative force would be lost.

The Japanese experience demonstrates the problem with one state adopting a pacifist legal culture. Pragmatic concerns and political self-interest are easier policies to pursue than pacifism. One criticism is that pacifism fails if the rest of the international system does not also follow it. The Guidelines demonstrate Japanese feelings of insecurity — both of a direct attack on Japan and a regional conflict — that pacifism cannot provide assurance of protection.\textsuperscript{202}

Those who sought the elimination of war through pacifism have offered two types of proposals. One group of intellectuals who argued that the anarchic system is to blame for war sought to create a world government that monopolizes the use of force. The other group of scholars sought to reform human morality at the individual level.\textsuperscript{203} Neither group advocated that individual states should attempt to establish pacifism unilaterally by imposing it upon themselves. The Japanese model of pacifism failed because, although well-meaning, it did not eradicate and account for Japanese insecurity.\textsuperscript{204} Under the constitutional limitation of Article 9, Japan had been unable to protect its own interests, including achieving peace.\textsuperscript{205}

\textsuperscript{199} See supra notes 77-79, 81 and accompanying text. While the Guidelines do not expressly permit preemptive military action, the linkage of Japanese self-defense to situations abroad may serve as a justification for such conduct. See Guidelines, supra note 1, at 1627, 1630-31.

\textsuperscript{200} See Guidelines, supra note 1, at 1632-33; supra notes 83-85 and accompanying text.

\textsuperscript{201} But see \textsc{Toward A Difference: Restructuring U.S.-Japan Security Relations} 196-98 (Mike Mochizuki ed., 1997) (arguing that Japan should interpret its constitution to allow it to engage in collective self-defense).

\textsuperscript{202} See Guidelines, supra note 1, at 1624.

\textsuperscript{203} See \textsc{Seyom Brown, The Causes and Prevention of War} 139-40 (2\textsuperscript{nd} ed. 1994).

\textsuperscript{204} But see \textsc{Lawrence W. Beer, Peace in Theory and Practice under Article 9 of Japan's Constitution}, 81 Marq. L. Rev. 815 (1998). Beer argues that:

Japan now provides an anti-militarist example of what is not only desirable but now possible and advisable for many nation states. Japan's record shows that peace, security and great power status need not depend heavily on military power, and that war or quick belligerent responses to foreign provocations in violation of international law is not a common sense necessity for national security.

\textit{Id.} at 815-16. Beer admits that the Cold War and the bilateral security arrangement enabled Japan to pursue a policy of what he calls quasi-pacifism. See \textit{id.} at 815-16. Beer does not address how the changes in the bilateral relationship instituted in the Guidelines affect Japan's status as a pacifist state and its usefulness as a model for the world.

\textsuperscript{205} This is not to say that Japan's experience with Article 9 has been without success. Lawrence Beer argues that Article 9 is responsible for 50 years of peace, limited military build-up and maintaining civilian control of the government. See Lawrence W. Beer, \textit{The Influence of American Constitutionalism in Asia}, in \textsc{American Constitutional-}
Given the problems inherent in Article 9, adopting the Guidelines would arguably be constitutionally inconsequential. This conclusion could be bolstered by the origins of Article 9 and the Constitution itself. As the Constitutional Commission explained, "[t]he present Constitution was not enacted on the basis of the freely expressed will of the Japanese people," but instead was "an expression of Allied occupation policy for Japan." Under this interpretation, Japan's process of constitutional transformation of Article 9 and the adoption of the Guidelines may be excusable, if not justified.

There are three main problems with this argument. First, it ignores the importance of pacifism in Japanese society. Whatever may have been the Japanese view of pacifism at the end of World War II, the Japanese people today embrace pacifism as part of their national identity. This is primarily a result of decades of education through the mass media and in the school system. Another key reason is the collective memory of the devastation from the war. While there is a vocal group that views the war and Article 9 as a continuing humiliation, the majority in Japan is strongly attached to pacifism. The effect of the attachment is not just respect for Article 9, but an abhorrence of war altogether. Thus, despite the problems of living with Article 9, the Japanese people are generally committed to its preservation.

The second criticism is that the argument ignores Japan's perception of the Constitution. Although the Commission on the Constitution suggested that Japan enact a new Constitution that reflects the will of the people, Japan's Constitution, as Lawrence Beer explained, "has fit the country's politico-legal culture, natural needs, and popular desires, and . . . many Japanese have been vigilant in its defense." Despite U.S. influences, the Japanese people strongly support the central role of the Constitution and have embraced the document as their own.

Finally, given the Japanese support for their Constitution, respect for Article 9 is important for the preservation of constitutionalism. Although one scholar has argued that a great deal of Japanese law is exercised extraconstitutionally, Commentators agree that Japan recognizes the
value of law and constitutionalism. Even the Commission on the Constitution has recognized that a written constitution is intended to establish written limits. If it is interpreted and applied too broadly, it may ultimately be negated. A clear U.S. legacy upon the Japanese political and legal system is the “commitment to the principle of the supremacy of the law of the constitution. . . .” The Constitution is designed to limit the powers of the government. In order to respect this role and supremacy of the Constitution, Japan cannot ignore the language of Article 9.

C. Japan’s Alternatives

As the Diet debates the implementing legislation of the Guidelines for passage, it is caught in a legal quagmire. The Guidelines offer greater security, but their implementation will erode Japan’s constitutionally-mandated pacifism. Japan has three possible alternative ways to deal with these competing interests: it may (1) amend Article 9 to permit the expansion of SDF powers under the Guidelines; (2) pass the Guidelines legislation without any other explicit change in law; or (3) reject the Guidelines as unconstitutional in whole or in part.

1. An Amendment to Article 9

First, Article 9 could be amended to explicitly allow self-defense and set limits on its use. At the very least, paragraph 2 should be amended to read “land, sea and air forces, as well as other war potential, will never be maintained except for forces solely for the purpose of self-defense.” This amendment would explicitly legalize the existence of the SDF and justify judicial deference to the executive as to what is necessary for self-defense. The language would create the legal space for the Guidelines to be constitutional without relying on the theory of constitutional transformation.

216. See Maki, supra note 30, at 380. The Commission believed that the Constitution warranted revision precisely because Japan had gone beyond its limits. See id. Cf. Larry Alexander, Introduction, in CONSTITUTIONALISM 5 (Larry Alexander ed., 1998) (commenting that “[i]f on the other hand, we make our acceptance of the Constitution’s authority dependent on its squaring perfectly with our present political and moral views, the Constitution’s stability – its raison d’etre – will be undermined.”).
217. Lawrence W. Beer, Introduction to CONSTITUTIONALISM IN ASIA, supra note 97, at 19.
218. See, e.g., S.E. Finer et al., COMPARING CONSTITUTIONS 2 (1995) (commenting that “constitutions are otiose: If the powerholders exercise self-restraint, the written constitution is unnecessary, and if they do not then it is useless.”).
219. Royer argues that the time is right for an amendment to Article 9 due to the influence of the bureaucracy, conservative parties and industry combined with international pressure for an expanded Japanese role in the region. See Royer, supra note 191, at 801.
220. The conservative newspaper Yomiuri Shimbun proposed a more drastic amendment in 1994. It argued for the repeal of Article 9 and expressly allowed for “an organization for self-defense to secure Japan’s peace and independence and to maintain its safety.” The newspaper also renamed the SDF as Japan’s Armed Forces. See O’Brien, supra note 144, at 177.
At first glance, an amendment to Article 9 seems to be the optimal solution. The Guidelines would be constitutional. An amendment would resolve some of the conflict between pacifism and practical security concerns. While this conflict may be resolved, the solution signals the death of Japanese pacifism. An amendment to Article 9 would be official recognition that Japan cannot trust in the “justice and faith of the peace-loving peoples of the world” to protect its own security. Self-interest rather than pacifism would be the guiding force behind Japanese security policy.

The chance of passing such an amendment through the legislature is also extremely unlikely. Japan has never amended the Constitution, and the process of amendment is fairly difficult. First, Article 96 of the Constitution requires an amendment to be passed by two-thirds of each house of the Diet. Then, the proposed amendment must be approved by a majority of the Japanese people in a referendum. There is also no precedent for constitutional amendment in Japan.

There are also psychological obstacles to passage of an amendment to Article 9. The Japanese people view Article 9 as the most distinctive feature of the Constitution. More importantly, the principle of pacifism espoused in Article 9 is central to the Japanese national identity. This alternative then would come at very high political and social costs to Japan.

Finally, even if these obstacles did not exist, some parts of the Constitution are arguably immune from amendment. The language of Articles 11 and 98 of the Constitution explain that fundamental human rights are inviolate, thus implying that they are unchangeable. There is serious doubt whether fundamental principles of the Japanese Constitution including pacifism can be amended. Thus, even if there was a desire to amend Article 9, it may not be permissible under the Constitution.

2. Implementation of the Guidelines Without any Change of Law

The second alternative is to implement the Guidelines without any change in law, essentially “business as usual” for the Japanese Cabinet and Diet. The government simply assumes that the Guidelines are constitutional as a matter of policy and can be fully implemented. The advantage of this
choice is that it is the easiest in the short term. It avoids a public debate on
defense policy and forecloses any legal challenges in the Japanese courts.
The Japanese Cabinet can expand the role of the SDF while the courts
remain unwilling to challenge an ongoing military action when implemented.

This alternative is problematic since it erodes the meaning of Article 9
into, at best, an intangible ideal and at worst, outright hypocrisy. If the
Diet and Cabinet reevaluate the Guidelines twenty years into the future in
the face of some changing security dynamic and further withdrawal by the
United States, Article 9 may lose all of its original normative force. Dis-
turbingly, under this policy of ignorance, the Guidelines are not be the
product of real constitutional democracy but rather the pragmatic needs of
the governing elite who lack the political consensus to amend the
Constitution.

This is not to suggest that Japan is likely to become a military power in
the future. It is a mistake to believe that Japan may eventually bring its
political and military interests to bear on the world like a new United
States. Japan is still a trading state rather than a burgeoning political and
military superpower. The problem with tacit acceptance of the Guide-
lines is that it undermines a constitutional form of government. Under its
original intent, Article 9 restrains Japanese militarism and reassures
Japan's neighbors. Adopting the Guidelines without any change of laws
undermines this constitutional scheme and leaves the Cabinet relatively
unfettered in defense policy.

3. Rejection of the Guidelines in Whole or in Part

The third alternative is to reject the Guidelines in whole or in part as
unconstitutional. While the Guidelines are a pragmatic answer to growing
regional instability and a decreasing U.S. presence, they only hurt the nor-
mative force of Article 9. By rejecting them, Japan sends a message that
Article 9 still imposes some real restrictions.

However, it may not be necessary for Japan to reject the Guidelines
completely to preserve Article 9. It would be unrealistic to believe that the
original absolutist intent of Article 9 can ever be reestablished, since the
SDF have been in existence for over forty years. The objective instead is to
set limits on Article 9 that would serve as constraints on the Cabinet.

One possible compromise between pacifism and security concerns is
to eliminate the regional security provisions while recognizing the U.S.-
Japan alliance and Japan's right to self-defense. This would entail the

229. See Richard Rosencrance, The Rise of the Trading State: Commerce and Con-
quest in the Modern World xi (1986). Rosencrance argues that Japan represents a new
model in the international system called a "trading state." The trading state does not use
political or military power to achieve its ends, but relies instead on economic coopera-
tion. See id.

230. See supra notes 12-13 and accompanying text.

231. The rejection of the Gulf War bill illustrates that the Diet and the Cabinet have
been willing to sacrifice short-term political goals for Article 9 at least in response to
negative public sentiment. See supra note 151 and accompanying text.
implementation of the Guidelines without the section on Cooperation in Situations in Areas Surrounding Japan. The Japanese public seems unprepared for Japan to play such a regional role, so this measure has the benefit of being consistent with public sentiment, yet still allows for self-defense. Japan may be only a quasi-pacifist state, but it maintains a semblance of the original constitutional framework.

Overall, this position is the most tenable if Japan seeks to preserve Article 9. However, this alternative may not be pragmatic. It serves to undermine the balance achieved by the Guidelines and damages the U.S.-Japan security relationship. The pragmatic approach, though, is also problematic for several reasons. First, it assumes that the constitutional constraint of Article 9 could and should be balanced by other values. Until Japan has a national debate on what is appropriate military policy, this assumption seems premature. Second, rejection of the Guidelines is not a rejection of the security relationship between the United States and Japan. It would result in only a return to the status quo and does not preclude future discussion. By rejecting part of the Guidelines under Article 9, any future negotiations would occur within established constitutional limits.

Further, the ultimate goal of the Guidelines is peace. While the objective of the Guidelines is regional stability, this is not the intention behind Article 9's pacifism. Adoption of the Guidelines on this justification denigrates Article 9 to being only an aspiration. Not only is this not the original intent, it is not the view of the Japanese people today.

Rejection of the Guidelines, even only a portion, will result in some political costs both at home and with the United States. However, these costs seem bearable compared to the process of constitutional amendment. Furthermore, these are short-term costs. In the long run, rejection of the Guidelines will serve as a symbol of constitutional limits both to future Cabinets and the United States.

Conclusion

The Guidelines may represent the future of Japanese security, but they are fundamentally inconsistent with a notion of a pacifist state. While the Japanese people truly believe in their pacifist identity, the reality is that Japan

233. See Chris Ajemian, Comment, The 1997 U.S.-Japan Defense Guidelines Under the Japanese Constitution and Their Implications for U.S. Foreign Policy, 17 Pac. Rim L. & Pol'y, 323 (1998) (arguing that the Guidelines are constitutional and are necessary for the establishment of Japan as a self-sufficient state and regional power); see also Weinberger, supra note 4, at 37. For the view that the Guidelines do not go far enough, see Carpenter, supra note 5, at 17A (arguing that the Guidelines do not establish Japan as a self-sufficient state and regional power).
234. See Guidelines, supra note 1, at 1625. See also Joint Declaration, supra note 1, at 1003; Joint Statement of the SCC, supra note 1, at 1623.
235. See supra note 101 and accompanying text.
236. See notes 205-08 and accompanying text. While 90% of the Japanese people support the existence of the SDF, see Auer, supra note 17, at 83, the Japanese people have remained wary of any external use of those forces. See, e.g., Funk, supra note 22, at 388.
does not exist in a vacuum. Japan has a difficult choice to make when it
decides whether to pass legislation implementing the new Guidelines. It
can amend the Constitution, do nothing at all or reject the Guidelines as
they are currently written. The optimal choice is to reject the Guidelines in
favor of something less expansive. Sadly, the judiciary is unlikely to make
this choice since it has deferred all defense issues to the executive branch.
Thus, it is left to the Diet or perhaps the new Obuchi Cabinet to either
reject the agreement or instill some new meaning into Article 9. These
choices may modify the original absolutist intent of Article 9, but they
ensure that pacifism is not just an ideal, but a constitutional requirement.