

# Recent Japanese Legislation Unconstitutional: Reasons and Consequences

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## Introduction

Article 9 of the Japanese Constitution has undergone many changes in

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terms of its identity as a pacifistic provision and as the representation of the public will.<sup>1</sup> It is known as the law, along with the preamble, that gives the Japanese Constitution its peace-oriented character.<sup>2</sup>

On September 19, 2015, the ruling party, the Liberal Democratic Party (“LDP”), and its party leader and current Prime Minister Shinzo Abe pushed two bills through the Upper House of the Japanese National Diet to implement a reinterpreted version of Article 9, which would effectively allow collective self-defense.<sup>3</sup> The two bills would amend ten currently existing security laws and give legal authority to the Japanese government to deploy the Self-Defense Force (“SDF”) abroad.<sup>4</sup> In effect, Japan would repossess the ability to use force as an instrument of state policy; specifically, it could provide armed and logistical support to close allies who are threatened when Japan is clearly threatened as well.<sup>5</sup>

In this Note, I argue that although the recent legislation is consistent with SDF deregulation patterns since the 1990s, both bills are inconsistent with Article 9 of the Japanese Constitution, despite the cabinet’s reinterpretation of Article 9 in 2014.<sup>6</sup> Furthermore, I assert that the legislation will likely lead to destabilizing effects in East Asia.<sup>7</sup>

First, I argue that the recently passed bills, which implement Abe’s reinterpreted version of Article 9 by allowing the use of military force in international disputes even when the disputes are indirectly related to Japan, are unconstitutional because of democratic principle and prior interpretations of Article 9. Article 9 was traditionally interpreted to limit the Japanese government from resolving international disputes with military force, regardless of a dispute’s relation to Japan.<sup>8</sup> If articles within the Japanese Constitution are malleable to the extent that any law can easily be reinterpreted to advance convenience or a political agenda, the principles of

1. See Matt Ford, *Japan Curtails Its Pacifist Stance*, ATLANTIC (Sept. 19, 2015), <http://www.theatlantic.com/international/archive/2015/09/japan-pacifism-article-nine/406318/> [https://perma.cc/W5HF-ZHEG].

2. See *id.*; Norihiro Kato, *Japan’s Break with Peace*, N.Y. TIMES (July 16, 2014), [http://www.nytimes.com/2014/07/17/opinion/norihiro-kato-japans-break-with-peace.html?\\_r=0](http://www.nytimes.com/2014/07/17/opinion/norihiro-kato-japans-break-with-peace.html?_r=0) [https://perma.cc/VK4M-VV3X].

3. Rupakjyoti Borah, *Japan’s Controversial Security Bills Pass in the Upper House. Now What?*, DIPLOMAT (Sept. 19, 2015), <http://thediplomat.com/2015/09/japans-controversial-security-bills-pass-in-the-upper-house-now-what/> [https://perma.cc/N7QK-364F].

4. Craig Martin, *Media Should Stop Legitimizing Abe’s Article 9 ‘Reinterpretation’*, JAPAN TIMES (June 12, 2015), [http://www.japantimes.co.jp/opinion/2015/06/12/commentary/japan-commentary/media-stop-legitimizing-abes-article-9-reinterpretation/#.WI\\_TdxizN0x](http://www.japantimes.co.jp/opinion/2015/06/12/commentary/japan-commentary/media-stop-legitimizing-abes-article-9-reinterpretation/#.WI_TdxizN0x) [https://perma.cc/WNA3-HJGV].

5. Ford, *supra* note 1.

6. See Nancy Snow, *The Abe Administration’s Arrogance of Power Moment*, JAPAN TIMES (July 16, 2015), <http://www.japantimes.co.jp/opinion/2015/07/16/commentary/japan-commentary/abe-administrations-arrogance-power-moment/#.ViSJ12SrSfU> [https://perma.cc/8KMF-PD97].

7. Borah, *supra* note 3.

8. Ford, *supra* note 1.

constitutionalism and the rule of law will be undermined.<sup>9</sup> Thus, prior interpretation of Article 9 by previous administrations and the Japanese Supreme Court suggests that *stare decisis* should be respected.<sup>10</sup> In addition, Japan is a liberal-democratic order with a representative government. A poll in 2015 found that 61% of Japanese respondents opposed the passage of these bills in the lower house.<sup>11</sup> Notwithstanding this opposition, the political body passed the legislation.<sup>12</sup> Thus, if the polls reflect an accurate depiction of the Japanese sentiment, it seems that the Diet is acting antithetically to democratic principles.

Lastly, I argue that the bills may have destabilizing effects upon East Asia.<sup>13</sup> A militarized Japan will justify increases in military expenditure to provide for security against threatening countries and provoke instability within the East-Asian region.<sup>14</sup> Moreover, Japanese conservatives are indifferent to the bitter, historical residue of World War II; the weight of such history is not recognized as sufficiently relevant in decisions that implicate the security of other nations.<sup>15</sup> Thus, if Japan obtains the capability to go to war, fueled by their fear and nationalism, there may be backlash from other countries.<sup>16</sup> War may not be the outcome, but regional destabilization and weakened regional economic integration may occur.

## I. Legal and Historical Background

### A. Brief History of Article 9

Since 1947, Japan has been constitutionally prohibited from declaring or fighting in a war due to Article 9 of the Japanese Constitution.<sup>17</sup> Paragraph one of Article 9 states that the “Japanese people forever renounce war” and the “threat or use of force as a means of settling international disputes[.]”

9. C.M. Rubin, *Japanese Scholars Say No to War*, HUFFINGTON POST (July 12, 2015), [http://www.huffingtonpost.com/c-m-rubin/japanese-scholars-say-no\\_b\\_7776418.html](http://www.huffingtonpost.com/c-m-rubin/japanese-scholars-say-no_b_7776418.html) [https://perma.cc/9FJS-7WHY].

10. See discussion *infra* Part II(b)(ii).

11. Masaaki Kameda, *Protesters Decry Passage of ‘War Legislation’ by Lower House Committee*, JAPAN TIMES (July 15, 2015), <http://www.japantimes.co.jp/news/2015/07/15/national/outside-diet-protesters-decry-passage-defense-bills-lower-house-committee/#.VdpTx7xVhrU> [https://perma.cc/EZ85-QL2S].

12. See Borah, *supra* note 3.

13. *Id.*

14. See *id.*

15. See Shaun O’Dwyer, *It’s Time for Conservatives of Japan to Get Over the War*, JAPAN TIMES (July 30, 2013), <http://www.japantimes.co.jp/opinion/2013/07/30/commentary/japan-commentary/its-time-for-conservatives-of-japan-to-get-over-the-war/#.WLc4HWQrK8U> [https://perma.cc/9A5J-W2UY]; Masaru Tamamoto, Fellow, World Policy Institute, *U.S.-Japan Relations*, C-SPAN (Nov. 24, 2003), <http://www.c-span.org/video/?179251-1/usjapan-relations> [https://perma.cc/AY64-R7TA] [hereinafter Tamamoto, *U.S.-Japan Relations*].

16. See Borah, *supra* note 3.

17. See *Article 9 and the U.S.-Japan Security Treaty*, ASIA FOR EDUCATORS, [http://afe.easia.columbia.edu/special/japan\\_1950\\_usjapan.htm](http://afe.easia.columbia.edu/special/japan_1950_usjapan.htm) [https://perma.cc/TVD9-G3ZW] (last visited Feb. 21 2017) [hereinafter *Article 9*].

while paragraph two states that “war potential will never be maintained.”<sup>18</sup> Notwithstanding this, and the Japanese reluctance to rearm, the Japanese repossessed instruments of war, such as machine guns and eventually heavy artillery, due to the Korean War and rising communist influence in East Asia.<sup>19</sup>

Since U.S. troops stationed in Japan were moved to Korea, despite the important role fighting communism and preserving American influence in Japan, Japan complied with the U.S. request to create and maintain a Japanese police force for self-defense, named the Self-Defense Force (“SDF”).<sup>20</sup> Japan reconciled this potential contradiction of maintaining armed forces with Article 9’s second paragraph by identifying the SDF as a force without military potential in the modern era.<sup>21</sup> Thus, Japan was able to escape constitutional reinterpretation by classifying its armed forces as militarily impotent.<sup>22</sup> Since the 1990s, SDF restrictions have continually loosened.<sup>23</sup>

In 2014, in furtherance of SDF deregulation, Prime Minister Abe and his cabinet reinterpreted Article 9 to allow for collective self-defense and recently passed legislation that would implement such reinterpretation.<sup>24</sup> Moreover, the United States has continually encouraged Japan to revise Article 9 and rearm due to rising security concerns in Asia in the latter half of the 20th century, such as in Korea, China, and Vietnam.<sup>25</sup>

## B. Legal Implications upon Article 9

In the past decade, Japanese conservatives argued that Japan should become a “normal” state, meaning that Japan should repossess the right to maintain a military and provide armed support to its allies.<sup>26</sup> The Upper House of the Diet recently passed legislation that allows the SDF to provide armed support to its allies, such as being able to shoot down a North Korean missile targeted at the United States if Japan or her people are clearly threatened.<sup>27</sup> Although the first paragraph of Article 9 was historically interpreted to limit SDF capabilities from using military force in support of its allies, the recently passed legislation will implement Abe’s reinterpreted Article 9 to effectively allow collective self-defense, or armed and logistical support to its close allies, as long as the dispute is not directly related to Japan.<sup>28</sup> Thus, the Japanese SDF will be able to give armed support to close

18. *Id.*; NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9 (Japan).

19. *Article 9*, *supra* note 17; Sayuri Umeda, *Japan: Article 9 of the Constitution*, LIBR. CONGRESS (Feb. 2006), [http://www.loc.gov/law/help/japan-constitution/article9.php#\\_](http://www.loc.gov/law/help/japan-constitution/article9.php#_) [https://perma.cc/5HF6-YT4C].

20. *See* Umeda, *supra* note 19.

21. *See id.*

22. *Id.*

23. *See generally id.*

24. *See* Ford, *supra* note 1.

25. *See* Umeda, *supra* note 19.

26. *See* Snow, *supra* note 6; Tamamoto, *U.S.-Japan Relations*, *supra* note 15.

27. Ford, *supra* note 1.

28. *Id.*

allies under the condition that Japan is clearly threatened, but will continue to be disabled in declaring war or striking offensively when the dispute is directly related to Japan.<sup>29</sup>

### C. Brief History of the U.S.–Japan Security Treaty

The U.S.–Japan Security Treaty was first signed in 1951 and was amended in 1960.<sup>30</sup> After Japan regained its sovereignty, the United States created the U.S.–Japan Security Treaty in order to maintain U.S. influence and ensure stability within East Asia.<sup>31</sup> In exchange for allowing continual presence of U.S. bases in Japan, Japan received U.S. military support.<sup>32</sup> This alliance helped Japan maintain its pacifist constitution.<sup>33</sup> However, the alliance has become a reason for revision of Article 9.<sup>34</sup> Japanese conservatives in the past decade have not only argued that Article 9 must be revised in order to establish a “normal” state, but have asserted that the Treaty is unfair towards the United States because Japan is free-riding in terms of regional security.<sup>35</sup> Many conservatives believe that Japan is not providing the same amount of protection as the U.S. regional protection due to the limitations imposed by Article 9, such as the restriction on collective self-defense.<sup>36</sup> Japanese conservatives see this limitation as a potential justification for future U.S. abandonment of Japanese security.<sup>37</sup> Moreover, according to Sayuri Umeda, Japan had the right to collective self-defense through the 1960 revision of the U.S.–Japan Security Treaty, but was unable to exercise this right because of the restriction against collective self-defense enshrined in Article 9.<sup>38</sup>

### D. Implications upon the U.S.–Japan Security Treaty

The recent legislation passed in the Upper House will effectively reinterpret Article 9 by enabling Japan to give armed and logistical support to allies who are threatened, satisfying current security demands from conservatives who believe that the U.S.–Japan Security Treaty is unbalanced.<sup>39</sup> The United States would welcome the reinterpretation and allocate expanded roles to the SDF in performing a wider range of functions

29. *Id.*

30. Umeda, *supra* note 19.

31. *Id.*; *Article 9*, *supra* note 17.

32. *See* Umeda, *supra* note 19.

33. *See* Masaru Tamamoto, Fellow, World Policy Institute, *Post-Containment Stability in the Pacific*, C-SPAN (July 17, 1991), <http://www.c-span.org/video/?19330-1/postcontainment-stability-pacific> [<https://perma.cc/3TWN-K92Y>] [hereinafter Tamamoto, *Post Containment*].

34. *See generally* Tamamoto, *U.S.-Japan Relations*, *supra* note 15.

35. *See id.*

36. *See id.*; Nassrine Azimi, *Flexing the Wrong Muscle*, N.Y. TIMES (Sept. 28, 2012), <http://www.nytimes.com/2012/09/29/opinion/japan-is-flexing-the-wrong-muscles.html> [<https://perma.cc/VV2W-Y3YE>]; Ford, *supra* note 1.

37. *See* Tamamoto, *U.S.-Japan Relations*, *supra* note 15.

38. *See* Umeda, *supra* note 19.

39. *See* Ford, *supra* note 1.

in the U.S.-run joint security operation, or Pax Americana, in the Pacific.<sup>40</sup> Also, authorizing armed support outside of Japan is significant because the Japanese government could no longer avoid U.S. requests to join wars by citing an Article 9 violation as justification.<sup>41</sup>

Furthermore, the idea of rebalancing security concerns within the U.S.–Japan Security Treaty is manifested in the Guidelines for U.S.–Japan Defense Cooperation (“The Guidelines”). The Guidelines were an attempt by both nations to set a structure for emergency defense of Japan and other related security concerns while staying consistent with the fundamentals of the U.S.–Japan Security Treaty.<sup>42</sup> As such, the Guidelines establish a framework of how to achieve the policy objectives and obligations enumerated in the U.S.–Japan Security Treaty.<sup>43</sup> Recently, in 2015, the Guidelines were modified to adapt to new and changing regional security circumstances because of the reinterpretation of Article 9 to allow for collective self-defense.<sup>44</sup> This modification is important because SDF troops will likely play a more significant role in Pax Americana regional security.<sup>45</sup>

## II. Analysis

The passing of this legislation to implement changes reflected from the Abe cabinet’s reinterpretation of Article 9 of the Japanese Constitution is unconstitutional for two primary reasons: 1) democratic principle and 2) prior interpretation of Article 9. After challenging the constitutionality of the legislation, we will examine potential consequences of enacting the legislation within the East-Asian regional context.

40. Borah, *supra* note 3; see Harvery M. Sapolsky, *Managing Global Security Beyond ‘Pax Americana’*, E-INT’L REL. (Jan. 21, 2017), <http://www.e-ir.info/2017/01/21/managing-global-security-beyond-pax-americana/> [<https://perma.cc/TD9H-4G3Q>].

41. See Tamamoto, *U.S.-Japan Relations*, *supra* note 15. Although the Japanese Government gave authorization to the SDF for collective self-defense, the government may still reject the U.S. request to join their war if the government fails to identify the dispute affecting their close allies as a clear threat to Japan and/or her people, the government identifies the dispute as directly related to Japan, or the dispute is not directly related to close allies. In addition, the government must have no appropriate alternative method to deal with the dispute other than military combat. All the conditions are subject to potential leeway, however, because there is no clear and formal example to anchor the meaning of each condition. Moreover, the conditions that the government must meet in order to exercise their right to collective self-defense demonstrates its openness to abuse. See Sachiko Miwa, *INSIGHT: Conditions for Exercising Right to Collective Self-defense Open to Interpretation*, ASAHI SHIMBUN (May 12, 2015), [http://ajw.asahi.com/article/behind\\_news/politics/AJ201505120059](http://ajw.asahi.com/article/behind_news/politics/AJ201505120059) [<https://perma.cc/7ZJ7-548Q>]; Umeda, *supra* note 19.

42. See Ministry of Foreign Affairs of Japan, *The Guidelines for Japan-U.S. Defense Cooperation*, MINISTRY FOREIGN AFF. JAPAN, <http://www.mofa.go.jp/region/n-america/us/security/guideline2.html> [<https://perma.cc/7UEA-85CP>] (last visited Feb. 21 2017).

43. See *id.*

44. See Robin Sakoda, *The 2015 U.S.-Japan Defense Guidelines: End of a New Beginning*, ASIA MAR. TRANSPARENCY INITIATIVE (Apr. 30, 2015), <http://amti.csis.org/the-2015-u-s-japan-defense-guidelines-end-of-a-new-beginning/> [<https://perma.cc/8LRY-8S6Y>].

45. See *id.*

## A. Democratic Principle

### 1. *Tyrannical Use of Executive Power*

When Prime Minister Abe was unable to secure a constitutional amendment to reinterpret Article 9 in 2013, he decided to use the Cabinet Legislation Bureau (“CLB”) as a political chess-piece of the executive.<sup>46</sup> According to Sayuri Umeda, although the Japanese Supreme Court gave deference to the CLB for constitutional and legislative interpretation, which made the CLB seem vulnerable to political interest, the CLB was surprisingly well insulated from political pressures in the past.<sup>47</sup> The CLB has been seen as an effective institution; almost all legal disputes brought to the Japanese Supreme Court regarding interpretation issues ruled in favor of the CLB.<sup>48</sup> Prime Minister Abe, however, decided to use this institution as a method to achieve his policy objective.<sup>49</sup>

Prime Minister Abe first fired the Director-General of the CLB, Tsuneyuki Yamamoto, and put Ichiro Komatsu in his place in 2013.<sup>50</sup> Komatsu was evidently in favor of Abe’s policy objectives and expressed the view that decisions made by the CLB must align with the interests of the Prime Minister’s cabinet members.<sup>51</sup> When Komatsu had to step down because of health issues, he was replaced with Yusuke Yokobatake.<sup>52</sup> Yokobatake was also in alignment with Komatsu’s views. With the CLB under the control of the Prime Minister, the CLB rendered a decision in July 2014 that reinterpreted Article 9 to include collective self-defense.<sup>53</sup> The decision broadened the scope of what fell under self-defense rather than expressly allowing collective self-defense.<sup>54</sup> This side-step was done partly

46. See Umeda, *supra* note 19. Constitutional amendments require a two-thirds supermajority vote instead of a regular majority vote for statutes and other legislation. Prime Minister Abe was unable to secure this supermajority and thus attempted an easier, but less democratic, route towards constitutional reinterpretation. In other words, the Prime Minister reinterpreted the constitution instead of amending it. See Mari Yamaguchi, *Japan Split over Revision to Pacifist Constitution*, ASSOCIATED PRESS (May 4, 2014), <http://bigstory.ap.org/article/japan-split-over-revision-pacifist-constitution> [https://perma.cc/ZM5U-2FF4].

47. See Yamaguchi, *supra* note 46.

48. See *id.*

49. Jeremy A. Yellen, *Shinzo Abe’s Constitutional Ambitions*, DIPLOMAT (June 12, 2014), <http://thediplomat.com/2014/06/shinzo-abes-constitutional-ambitions/> [https://perma.cc/2FNS-RNUM].

50. See *id.*

51. *Id.*

52. Reiji Yoshida, *Abe’s Man in Cabinet Law Office Steps Down*, JAPAN TIMES (May 16, 2014), <http://www.japantimes.co.jp/news/2014/05/16/national/politics-diplomacy/cabinet-law-office-shake-slow-abes-military-drive/#.Vlo7-2SrQ0o> [https://perma.cc/FJ8E-7TM6]; see *Cabinet Legislation Bureau Chief Replaced Due to Ill Health*, ASAHI SHIMBUN (May 16, 2014), [http://ajw.asahi.com/article/behind\\_news/politics/AJ201405160029](http://ajw.asahi.com/article/behind_news/politics/AJ201405160029) [https://perma.cc/P79S-6KCU].

53. Masahiro Akiyama, *Redefining Self-Defense*, TOKYO FOUND. (Sept. 3, 2014), <http://www.tokyofoundation.org/en/articles/2014/redefining-self-defense> [https://perma.cc/7YX2-NLZ8].

54. *Id.*

because Prime Minister Abe wanted to escape the attention put upon the issue of collective self-defense—it was very unpopular from the views of both dissident politicians and the public majority.<sup>55</sup> Pursuant to such agenda, the CLB was able to cloak the essence of collective self-defense by conditioning this right upon the existence of a sufficient threat to Japan and her people, attempting to reconcile the constitution and the reinterpretation of Article 9 by making indirect relations to international disputes directly related.<sup>56</sup>

After the decision was rendered to reinterpret Article 9 of the Japanese Constitution to allow for collective self-defense, Prime Minister Abe took action to implement such interpretation through legislation.<sup>57</sup> However, per professor and constitutional law scholar Yasuo Hasebe of Waseda University, the recently passed legislation, which expands the role and lessens restrictions on the SDF, are unconstitutional because both bills come from Prime Minister Abe's authoritarian use of power.<sup>58</sup> The CLB is the institution that provides government interpretation of the constitution and legislation; therefore, using it as an instrument of the executive after the executive was unable to persuade the public majority and political dissidents within the legislature to amend the constitution not only undermines the separation of powers between the executive and legislature, but also undermines the institution of democracy.<sup>59</sup> Thus, such authoritarian use of power to reinterpret the Japanese Constitution, which gave rise to the recently passed legislation, should support the unconstitutionality of that legislation.

## 2. *Lack of Transparency*

The CLB, albeit responsibly producing “detailed records of the legal screenings” for past constitutional interpretation issues, has been critically opaque with its screening process for the Article 9 revision. The CLB left no record of internal discussions, making it harder for the public to understand the CLB's judgment in its reinterpretation of Article 9.<sup>60</sup> Further, meeting

55. *Id.*

56. *Id.*

57. Borah, *supra* note 3; Bryce Wakefield, Abe's Law: Domestic Dimensions of Japan's Collective Self-Defense Debate 2 (Mar. 5, 2014) (unpublished manuscript), <https://www.wilsoncenter.org/sites/default/files/WakefieldEssay.pdf> [<https://perma.cc/F9HS-GAZN>].

58. See Reiji Yoshida, *Experts' Tongue-Lashing Rekindles Diet Debate on Reinterpreted Constitution*, JAPAN TIMES (June 5, 2015), <http://www.japantimes.co.jp/news/2015/06/05/national/politics-diplomacy/experts-blast-constitutional-reinterpretation-lower-house-session/#.VloJx2SrQ0p> [<https://perma.cc/4GUM-VCHK>].

59. See *id.*; Colin P.A. Jones, *For 'No War' Article 9, Any Reinterpretation Will Do*, JAPAN TIMES (Nov. 20, 2013), <http://www.japantimes.co.jp/community/2013/11/20/issues/for-no-war-article-9-any-reinterpretation-will-do/#.WLdAfmQrK8V> [<https://perma.cc/3PKS-3VLK>]; Watanabe Tetsuya, *Triple Shot: Scholars Say Security Legislation 'Unconstitutional'*, ASAHI SHIMBUN (June 5, 2014), [http://ajw.asahi.com/article/behind\\_news/politics/AJ201506050040](http://ajw.asahi.com/article/behind_news/politics/AJ201506050040) [<https://perma.cc/6PQR-D7PH>].

60. Kyodo, *Government Skipped Recording Debate over Constitutional Reinterpretation*, JAPAN TIMES (Sept. 28, 2015), <http://www.japantimes.co.jp/news/2015/09/28/national/politics-diplomacy/government-skipped-recording-debate-over-constitutional-reinterpretation/#.Vlo7NWSrQ0q> [<https://perma.cc/TH9G-8PGB>].



minutes were not recorded, undermining future investigations into the decision-making process by scholars and the public.<sup>61</sup>

In response, Atsushi Yushita, a lawyer on behalf of the CLB, claimed that there is no legal obligation for the CLB to record and publish meeting minutes.<sup>62</sup> However, Masahiro Usaki, a constitutional law professor at Dokkyo University Law School, contends that the Public Records and Archives Management Law (“PRAML”) compels the production of documents vis-à-vis the decision-making process in an “administrative organ as well as the business performance of such organs” unless the matter is minor.<sup>63</sup> In this case, Professor Usaki asserts that redefining the constitution is no minor matter.<sup>64</sup> Thus, through its lack of transparency, the CLB may have contravened the PRAML during the decision-making process of the Article 9 reinterpretation.<sup>65</sup> Furthermore, after the CLB rendered its decision in 2014, 85% of respondents in a poll believed that the government had not given a clear explanation about the right to collective self-defense, underscoring the lack of transparency.<sup>66</sup>

The recently passed legislation also raised concerns amongst the public regarding the lack of transparency.<sup>67</sup> In May 2015, two months before the legislation passed in the lower house, a survey found that 81.4% of respondents believed that the government had not adequately explained the content of the legislation, in contrast to 14.2% that believed the explanation was sufficient.<sup>68</sup> Such a lack of transparency in both the reinterpretation decision and the details of the legislation undermines the institution of democracy, and should support the unconstitutionality of the recently passed legislation.

### 3. *Majority Will Against Abe’s Plan and Legislations*

In addition to the ignoble origins and process of the reinterpretation’s legitimacy, Prime Minister Abe’s use of power contradicts the polled

61. Katsuhisa Kuramae, *Bureau Kept No Records on Discussing Reinterpretation of Constitution*, ASAHI SHIMBUN (Nov. 24, 2015), [http://ajw.asahi.com/article/behind\\_news/politics/AJ201511240050](http://ajw.asahi.com/article/behind_news/politics/AJ201511240050) [https://perma.cc/NL8R-NQ62].

62. *See id.*

63. *See id.*

64. *Id.*; *See Editorial: Abe’s Collective Self-defense Argument Just Got Shakier*, ASAHI SHIMBUN (Nov. 25, 2015), <http://ajw.asahi.com/article/views/editorial/AJ201511250043> [https://perma.cc/FBD6-KRLM].

65. *See id.*

66. Mataka Kamiya, *Japanese Public Opinions about the Exercise of the Right of Collective Self-Defense*, JAPAN FOREIGN POL’Y F. (Sept. 25, 2014), <http://www.japanpolicyforum.jp/archives/politics/pt20140925231907.html> [https://perma.cc/VE6P-K95M].

67. *See* Kyodo, *Abe’s Security Bills Baffle 81% of the Public: Survey*, JAPAN TIMES (May 31, 2015), [http://www.japantimes.co.jp/news/2015/05/31/national/politics-diplomacy/81-say-state-explanations-controversial-security-bills-insufficient-poll/#.Vq\\_FdRgrLUo](http://www.japantimes.co.jp/news/2015/05/31/national/politics-diplomacy/81-say-state-explanations-controversial-security-bills-insufficient-poll/#.Vq_FdRgrLUo) [https://perma.cc/A4BL-PWTR].

68. *Id.*; *see Japan’s Lower House Approves Changes to Self-defense Law*, BBC (July 16, 2015), <http://www.bbc.com/news/world-asia-33546465> [https://perma.cc/7TFG-ZKDS].

majority consensus of 2013 through 2015, which if accurate, is undemocratic.<sup>69</sup> Moreover, the recently passed legislation is undemocratic because the public majority is consistently and, in fact, increasingly opposed to them.<sup>70</sup>

Before the CLB came out with its decision to reinterpret Article 9, an opinion poll conducted by the liberal and second largest national newspaper, *Asahi*, found that 63% of respondents were against Prime Minister Abe's plan for Article 9.<sup>71</sup> In addition, an opinion poll conducted by a conservative newspaper called *Nikkei* found that its respondents had some reservations about the Prime Minister's plan.<sup>72</sup> There were also unique responses against the revision, such as the formation of a Tokyo-based organization called *Women Who Won't Have Sex With War-mongering Men*, and a Japanese man who denounced revision by self-immolation in public.<sup>73</sup> On top of the domestic protests against the Article 9 revision, the Norwegian Nobel Committee publicly supported the anti-revision cause by strongly considering the *Japanese people who conserve Article 9* as recipients of its peace prize.<sup>74</sup> After the CLB rendered its decision to reinterpret Article 9 silently, a little over 50% of respondents from a poll conducted by *Yomiuri Shimbun* were in favor of Prime Minister Abe's administration, pursuant to a trend of decreasing approval.<sup>75</sup>

Between the passing of the legislation in the lower and upper house, approximately 100,000 to 350,000 student protesters from a student organization called Students Emergency Action for Liberal Democracy ("SEALD") gathered in front of the Japanese Diet to demonstrate against the bills.<sup>76</sup> Such a movement was unprecedented; the last time that students

69. Yellen, *supra* note 49; see Tetsuya, *supra* note 59.

70. See Akiyama, *supra* note 53; Jiji, *LDP Loses Enthusiasm for Article 9 Revision, But Abe Still Determined*, JAPAN TIMES (Oct. 6, 2015), <http://www.japantimes.co.jp/news/2015/10/06/national/politics-diplomacy/ldp-loses-enthusiasm-article-9-revision-abe-still-determined/#.Vlozl2SrQ0o> [<https://perma.cc/SKG5-JESL>].

71. D.MCN., *Keeping the Peace*, ECONOMIST (May 14, 2014), <http://www.economist.com/blogs/banyan/2014/05/japans-pacifist-constitution> [<http://perma.cc/JMP5-JH23>].

72. *Id.*

73. Jake Adelstein & Angela E. Kubo, *Japanese Women Tell Their Men They Have to Choose Between Love and War*, DAILY BEAST (May 14, 2014), <http://www.thedailybeast.com/articles/2014/05/14/japanese-women-tell-their-men-they-have-to-choose-between-love-and-war.html> [<https://perma.cc/LK6K-ZZ6T>] [hereinafter Adelstein & Kubo, *Women Tell*]; Jake Adelstein & Angela E. Kubo, *Suicidal Anti-war Protest Shocks Japan as It Rethinks Pacifist Constitution*, DAILY BEAST (June 30, 2014), <http://www.thedailybeast.com/articles/2014/06/30/burning-with-defiance-at-war-in-japan.html> [<https://perma.cc/7M6D-NXMK>].

74. D.MCN., *supra* note 71; *Nobel Peace Prize 2014: PRIO Director's Speculations*, PEACE RES. INST. OSLO (Oct. 2014), <https://www.prio.org/About/PeacePrize/PRIO-Directors-Speculations-2014/> [<https://perma.cc/SA8X-V5GE>].

75. Kamiya, *supra* note 66.

76. Suvendrini Kakuchi, *Students Vow to Fight on After Security Bills Pass*, U. WORLD NEWS (Sept. 17, 2015), <http://www.universityworldnews.com/article.php?story=20150917142421297> [<https://perma.cc/6Z5A-A659>]; Derek Monroe, *Japan's Constitutional Crisis Spells the End of Democracy*, RUSSIA TODAY (Dec. 3, 2015),

mobilized for a political objective was in the 1970s, when student protesters demonstrated against the Japanese involvement in the Vietnam War.<sup>77</sup> This student protest under SEALD leadership was, historically, the largest demonstration in Tokyo.<sup>78</sup> In addition, twenty-nine organizations started an ambitious campaign to collect twenty million signatures, about a sixth of the population of Japan, for a petition that abolishes the recently passed legislation.<sup>79</sup>

Although Prime Minister Abe won another term during this period, a poll indicated that the majority of Abe supporters reasoned no one else was more competent to take office.<sup>80</sup> In fact, Prime Minister Abe's administration fell to an approval rating of 38.5% in September of 2015, which was the lowest since he took office in 2012.<sup>81</sup> At the same time, Prime Minister Abe's administration reflected a disapproval rating of 41.3%.<sup>82</sup> Based on these movements and poll numbers, the majority of public sentiment demonstrates an objection to Article 9 revision from the period between 2013 and 2015. Ultimately, if the public majority opposes the legislation, the government is acting antithetically to democratic principles and thus, the legislation is unconstitutional.

## B. Prior Interpretation of Article 9

### 1. *Recent Deregulation Pattern, Prior Interpretation, and Stare Decisis*

In response to the United States' request to remilitarize in the late 1940s, Prime Minister Yoshida Shigeru was placed between a rock and hard place.<sup>83</sup> His constituents, who recently went through a devastating and demoralizing war, did not want Japan to rearm and militarize, but the United States pressured the Prime Minister to rearm and assist in combat.<sup>84</sup> The Prime Minister, instead, recalled the limitations of Article 9 and established the line

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<https://www.rt.com/op-edge/324587-japan-constitutional-crisis-democracy/> [https://perma.cc/ZQV3-QQAX].

77. Kakuchi, *supra* note 76; Monroe, *supra* note 76.

78. See Monroe, *supra* note 76.

79. Kyodo, *Security Law Protesters to Kick Off 20-Million Signature Petition Drive*, JAPAN TIMES (Oct. 30, 2015), <http://www.japantimes.co.jp/news/2015/10/30/national/groups-protesting-security-laws-set-20-million-signatures-target/#.Vq8M8xgrKfU> [https://perma.cc/PN64-4MTS].

80. See Jiji, *Abe Cabinet's Approval Rating Falls to 38.5% in Latest Opinion Poll*, JAPAN TIMES (Sept. 11, 2015), <http://www.japantimes.co.jp/news/2015/09/11/national/politics-diplomacy/abe-cabinets-approval-rating-falls-38-5-latest-opinion-poll/#.VlpPkGSrQ0o> [https://perma.cc/5X7V-NFMD].

81. *Id.*

82. *Id.*

83. See Gabriel Dominguez, *Japan's Security Policy Shift: 'A Blow to Ties with East Asia'*, DEUTSCHE WELLE (Jan. 1, 2014), <http://www.dw.com/en/japans-security-policy-shift-a-blow-to-ties-with-east-asia/a-17748656> [https://perma.cc/YBK7-YMTH]; Yoneyuki Sugita, *Yoshida Doctrine is a Myth*, JAPAN TODAY (Apr. 29, 2014), <https://www.japantoday.com/category/opinions/view/yoshida-doctrine-is-a-myth> [https://perma.cc/6NTT-PM8D].

84. See Dominguez, *supra* note 83; Sugita, *supra* note 83.

of argument, which future government administrations would use, that Japan was unable to assist the United States or any ally by sending troops outside of Japan.<sup>85</sup> This exchange was later referred to as the Yoshida Doctrine, which followed the principle of minimal military rights arising from the Japanese Constitution.<sup>86</sup> Japan adhered to the doctrine throughout the Cold War, where the government limited troop deployment, established a near or less than 1% of annual Gross Domestic Product (“GDP”) military spending policy, completely regulated arms transfers, and limited military innovation and equipment development.<sup>87</sup> For the most of this postwar period, Japan upheld their pacifist policy.<sup>88</sup>

After the Cold War ended, however, Japan adapted its strategy to the new international political arena.<sup>89</sup> Japan deployed troops outside of Japan in the early 1990s to countries such as Cambodia and Iraq for non-military peacekeeping operations.<sup>90</sup> Japan became more militarily involved by passing anti-terrorism laws and laws allowing for the refueling of U.S. military ships in Japan in the early 2000s.<sup>91</sup> In addition, during the early 2000s, Prime Minister Koizumi promised President George Bush that Japan would send the SDF to Iraq.<sup>92</sup> This promise was possible due to the public’s anxiety over a successful North Korean missile test, which flew over the island of Japan.<sup>93</sup> The general Japanese public sentiment of SDF deregulation and empowerment during this time was briefly favorable due to the threat posed by the North Korean missile test.<sup>94</sup> Furthermore, the Japanese Coast Guard was empowered, and the Coast Guard even eventually sank a North Korean spy ship.<sup>95</sup> Prime Minister Abe also allowed for certain arms transfers in 2014.<sup>96</sup> These recent movements toward deregulation and empowerment of the SDF present the context for the latest assault on Article 9, which is the

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85. See Dominguez, *supra* note 83; Sugita, *supra* note 83.

86. See Dominguez, *supra* note 83; Sugita, *supra* note 83.

87. See *Defense Budget*, GLOBAL SECURITY, <http://www.globalsecurity.org/military/world/japan/budget.htm> [<https://perma.cc/VA97-PFU5>] (last visited Mar. 14, 2017); Dominguez, *supra* note 83; Martin Fackler, *Japan Ends Decades-Long Ban on Export of Weapons*, N.Y. TIMES (Apr. 1, 2014), [http://www.nytimes.com/2014/04/02/world/asia/japan-ends-half-century-ban-on-weapons-exports.html?\\_r=0](http://www.nytimes.com/2014/04/02/world/asia/japan-ends-half-century-ban-on-weapons-exports.html?_r=0) [<https://perma.cc/GD9P-XADQ>]; Sugita, *supra* note 83; Umeda, *supra* note 19; Marcus Warren, *Japan Sinks ‘North Korea Spying Ship’*, TELEGRAPH (Dec. 24, 2001), <http://www.telegraph.co.uk/news/worldnews/asia/northkorea/1366227/Japan-sinks-North-Korea-spying-ship.html> [<https://perma.cc/H2P7-WSPK>].

88. See Dominguez, *supra* note 83.

89. See Dominguez, *supra* note 83; Umeda, *supra* note 19.

90. See Dominguez, *supra* note 83; Tamamoto, *U.S.-Japan Relations*, *supra* note 15; Umeda, *supra* note 19.

91. See Umeda, *supra* note 19.

92. See Tamamoto, *U.S.-Japan Relations*, *supra* note 15.

93. *Id.*; *Prime Minister Koizumi’s Visit to North Korea*, BROOKINGS INST. (Jul. 2016), [https://www.brookings.edu/wp-content/uploads/2016/07/peninsulaquestion\\_chapter.pdf](https://www.brookings.edu/wp-content/uploads/2016/07/peninsulaquestion_chapter.pdf) [<https://perma.cc/XP4F-Z4XU>].

94. See Tamamoto, *U.S.-Japan Relations*, *supra* note 15.

95. See Tamamoto, *U.S.-Japan Relations*, *supra* note 15; Umeda, *supra* note 19.

96. See Dominguez, *supra* note 83.

reinterpretation to allow for collective self-defense.<sup>97</sup>

Thus, the creation of the right to collective self-defense may have been a part of the recent patterns of deregulation of the SDF and empowerment of SDF capabilities.<sup>98</sup> However, the reinterpretation and, by extension, the recently passed pieces of legislation, may be unconstitutional because of Japan's version of *stare decisis*.<sup>99</sup> Because the Japanese Supreme Court interpreted Article 9 to preclude collective self-defense, the reinterpretation by the CLB violates the principle of *stare decisis* and undermines the stability of the law.<sup>100</sup> Furthermore, the implementation of the reinterpretation of Article 9 is incongruous with the interpretation of past Japanese government administrations.<sup>101</sup> According to Professor Hasebe, “[a]llowing the use of the right of collective self-defense cannot be explained within the framework of the basic logic of the past government views of the Constitution.”<sup>102</sup> Until Prime Minister Abe's second administration, the Japanese government interpreted Article 9 to restrict collective self-defense.<sup>103</sup> Although recent deregulation patterns have suggested that the trend would reach the issue of collective self-defense,<sup>104</sup> the patterns themselves cannot justify reinterpretation.

## 2. *Response to the Justification for Reinterpretation*

Although *stare decisis* can be overlooked if there is sufficient justification, the bases given by Prime Minister Abe and his cabinet are not enough.<sup>105</sup> The government cited two reasons: the threat of China and the fear of abandonment.<sup>106</sup>

These are similar to the grounds that were given by Prime Minister Koizumi to send troops to Iraq.<sup>107</sup> The Japanese government perceived a significant threat and responded to this threat by expanding their defense rights.<sup>108</sup> Thus, this type of reinterpretation may be seen as an adaptation to current security demands.<sup>109</sup> In the early 2000s, legislation that advanced

97. *See id.*

98. *See* Umeda, *supra* note 19.

99. Toshiaki Iimura, et. al., *The Binding Nature of Court Decisions in Japan's Civil Law System*, STAN. L. SCH. CHINA GUIDING CASES PROJECT (June 30, 2015), <https://cgc.law.stanford.edu/commentaries/14-iimura-takabayashi-rademacher/> [<https://perma.cc/72JB-LV33>]. The Japanese Supreme Court is the only court in Japan where *stare decisis* applies to its decisions. *See also* Umeda, *supra* note 19.

100. Kazue Koishikawa, *Japan's Collective Self-Defense: On Arendt, Sovereignty, and Peace*, HANNAH ARENDT CTR. FOR POL. & HUMAN. BARD C. (Jan. 17, 2016), <http://www.hannaharendtcenter.org/?p=17301> [<https://perma.cc/2TCA-9HJK>]; *see* Yoshida, *supra* note 58.

101. Yoshida, *supra* note 58.

102. *Id.*

103. *See* Adelstein & Kubo, *Women Tell*, *supra* note 73.

104. *See id.*; Dominguez, *supra* note 83.

105. *See* Iimura, *supra* note 99.

106. Dominguez, *supra* note 83.

107. *See id.*; Tamamoto, *U.S.-Japan Relations*, *supra* note 15.

108. Dominguez, *supra* note 83; Tamamoto, *U.S.-Japan Relations*, *supra* note 15.

109. Dominguez, *supra* note 83; Tamamoto, *U.S.-Japan Relations*, *supra* note 15.

militarization could be passed without public censure.<sup>110</sup> The reason was the North Korean missile-test in August of 1997, which helped switch public opinion almost instantly.<sup>111</sup> The public was anxious of a North Korean threat, briefly increasing the support of militarization. In contrast, although Japanese public opinion seems to share the government's anxiety over China, public opinion is strongly against the reinterpretation and the recently passed legislation.<sup>112</sup>

Furthermore, the threat of China is less than the threat of Russia. According to Masaru Tamamoto, an International Relations professor at Meiji Gakuin University, there was little perception of any nuclear threat among the Japanese public during the Cold War when the Soviet Union had several hundred nuclear missiles pointed at Japan.<sup>113</sup> At the same time, the Japanese government didn't feel the need to militarize.<sup>114</sup> If China's threat to Japanese security is less than the Soviet Union's threat to Japanese security, notwithstanding China's growing and provocative military, and if Japan was able to live relatively peacefully with the existential Soviet threat without militarization, then China's rise in military and strategic power cannot be the basis for reinterpretation and does not, therefore, overcome *stare decisis*.

The fear of abandonment has been a factor when considering policies that affect the relationship between the United States and Japan in the postwar period.<sup>115</sup> Japanese conservatives are insecure about the relationship and believe that they must balance the security duties within the U.S.–Japan Security Treaty.<sup>116</sup> If Japan fails to do so, the conservatives believe that the United States will leave regional security concerns to Japan.<sup>117</sup> According to Professor Tamamoto, however, the fear of abandonment is irrational because the United States is “not ready to retreat from Asia.”<sup>118</sup> Furthermore, according to Reiji Yoshida, a contributor for *The Japan Times*, some experts argue that the United States needs military bases in Japan in order to take advantage of its geostrategic position and have easier access to Asia in general.<sup>119</sup> Thus, the fear of abandonment is a weak basis for the reinterpretation of Article 9. Historically, Japan has interpreted Article 9 to

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110. See Tamamoto, *U.S.-Japan Relations*, *supra* note 15.

111. See *id.*

112. *Global Opposition to U.S. Surveillance and Drones, But Limited Harm to America's Image*, PEW RES. CTR. (July 14, 2014), <http://www.pewglobal.org/2014/07/14/chapter-4-how-asians-view-each-other/> [<https://perma.cc/ZS5A-FEPD>]; see Jiji, *supra* note 80.

113. See Tamamoto, *U.S.-Japan Relations*, *supra* note 15.

114. See *id.*

115. See *id.*; Joseph A. Bosco, *Entrapment and Abandonment in Asia*, NAT'L INT. (July 8, 2013), <http://nationalinterest.org/commentary/entrapment-abandonment-asia-8697> [<https://perma.cc/BB3F-YMKW>].

116. See Tamamoto, *U.S.-Japan Relations*, *supra* note 15.

117. See *id.*

118. See *id.*

119. See *id.*; Reiji Yoshida, *Basics of The U.S. Military Presence*, JAPAN TIMES (Mar. 25, 2008), [http://www.japantimes.co.jp/news/2008/03/25/reference/basics-of-the-u-s-military-presence/#.Vq\\_UvRgrLUo](http://www.japantimes.co.jp/news/2008/03/25/reference/basics-of-the-u-s-military-presence/#.Vq_UvRgrLUo) [<https://perma.cc/4735-UJ3H>].

renounce collective self-defense, so the principle of *stare decisis* suggests that the recently passed legislation cannot allow for the opposite conclusion to be reached.

### C. Consequences of the Article 9 Revision

When the legislation is enacted, Japan will face the world with the ability to deploy combat troops outside of Japan when the conflict is indirectly related to Japan and is directly related to a close ally.<sup>120</sup> This Note will next examine the political and economic consequences of this legislation.

#### 1. *Political Consequences*

Achieving heightened national security through militarization is a central aspect of Japanese conservatives' vision of a normal Japan.<sup>121</sup> According to Professor Tamamoto, Japanese conservatives do not think about long-term international strategy and instead focus narrowly on short-term policy objectives.<sup>122</sup> Moreover, the Japanese government is faithfully following U.S. requests dating from the 1990s by balancing security duties enumerated in the U.S.–Japan Security Treaty.<sup>123</sup>

##### a. Expanded SDF Capabilities in Regional Security

Recently, since the United States reduced its military budget for East Asian security and the fear of China's military pursuits are growing, President Obama requested the Japanese SDF to assume a bigger role in security over East Asia.<sup>124</sup> In addition, the Guidelines for U.S.–Japan Defense Cooperation (“the Guidelines”) sets new parameters for joint operations between the United States and Japan in the event that Japan's security is threatened.<sup>125</sup> The Guidelines, however, do not provide much detail about joint exercises and other activities around the region, indicating the limitations to exercising its right to collective self-defense outside of national security concerns.<sup>126</sup> This ambiguity in joint coordination outside of a threatened Japan

120. See Jonathan Soble, *Japan Moves to Allow Military Combat for First Time in 70 Years*, N.Y. TIMES (July 16, 2016), <http://www.nytimes.com/2015/07/17/world/asia/japans-lower-house-passes-bills-giving-military-freer-hand-to-fight.html> [https://perma.cc/Y67X-LGA6].

121. See *id.*

122. See *id.*; Yoshida, *supra* note 119.

123. Borah, *supra* note 3; Jeffery W. Hornung, *U.S.-Japan: A Pacific Alliance Transformed*, DIPLOMAT (May 4, 2015), <http://thediplomat.com/2015/05/u-s-japan-a-pacific-alliance-transformed/> [https://perma.cc/882P-UAVW]; see Umeda, *supra* note 19.

124. See Hornung, *supra* note 123; see also Lionel Pierre Fatton, *Japan's New Defense Posture*, DIPLOMAT (July 10, 2014), <http://thediplomat.com/2014/07/japans-new-defense-posture/> [https://perma.cc/GZ36-PVQG]; James L. Schoff, *Navigating a New U.S.-Japan Defense Technology Frontier*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Mar. 10, 2015), <http://carnegieendowment.org/2015/03/10/navigating-new-u.s.-japan-defense-technology-frontier> [https://perma.cc/LPX4-9VDJ].

125. Yuki Tatsumi, *4 Takeaways from the New US-Japan Defense Guidelines*, DIPLOMAT (Apr. 29, 2015), <http://thediplomat.com/2015/04/4-takeaways-from-the-new-us-japan-defense-guidelines/> [https://perma.cc/3LB5-PYPW].

126. See *id.*

demonstrates the limitation of the Japanese government's understanding of the revised Article 9.<sup>127</sup> In the end, when Japan carries out a U.S. request to militarize, it advances the Japanese conservatives' vision of a "normal Japan."<sup>128</sup>

Furthermore, although militarization is unpopular and the Japanese government has stated that the right to collective self-defense is very limited, as demonstrated by the ambiguities left for future negotiations in the Guidelines, Japan is capable of slowly expanding the role of the SDF in regional security.<sup>129</sup> This slow expansion is likely because the Guidelines have already outlined such an expanded function for the SDF, albeit ambiguously, and the United States has constantly pushed for Japanese militarization and their wider role in regional security.<sup>130</sup> This idea is supported by the Japanese adherence to U.S. policy in East Asian and Southeast Asian security in the postwar period, the last twenty of which broadened the scope of SDF capabilities in spite of the unpopularity of militarization.<sup>131</sup> If Japan does expand SDF roles, it is possible that threatened countries will use the enhanced role of the Japanese SDF within the region as justification for increases in military expenditure.<sup>132</sup>

Outside of the responses from other countries, another consequence of the Article 9 reinterpretation is that the right to collective self-defense can be an ever-expanding term.<sup>133</sup> Because the limitations to collective self-defense are vague, critics argue that conservative hawks could use the right whenever they please "under the guise of security."<sup>134</sup> Prime Minister Abe informally stated that sending the SDF to the Strait of Hormuz for a minesweeping operation under the auspices of the United Nations is a proper example of Japan exercising its right to collective self-defense.<sup>135</sup> In such a scenario, he believes that there is a clear threat to Japan's security because 80% of the tankers that supply domestic Japanese oil consumption travel through that strait.<sup>136</sup> If such a circumstance calls for collective self-defense, then the parameters of such a right seem to be wide and open to abuse, further raising the risk of response from threatened countries.

#### b. Scenario Like the Cold War

If the legislation is enacted, threatened countries will likely respond,

127. *See id.*

128. *See Borah, supra* note 3; Tamamoto, *U.S.-Japan Relations, supra* note 15.

129. *See SDF's Expanding Missions*, JAPAN TIMES (Oct. 18, 2016), <http://www.japantimes.co.jp/opinion/2016/10/18/editorials/sdfs-expanding-missions/#.WLdebGQrK8U> [<https://perma.cc/K6C3-UBMW>]; Tatsumi, *supra* note 125.

130. *See SDF's Expanding Missions, supra* note 129; Tatsumi, *supra* note 125; Umeda, *supra* note 19.

131. *See Kato, supra* note 2; Umeda, *supra* note 19.

132. *See Borah, supra* note 3; Tamamoto, *Post Containment, supra* note 33; Umeda, *supra* note 19; Yellen, *supra* note 49.

133. Dominguez, *supra* note 83; *see Fatton, supra* note 124.

134. *See Dominguez, supra* note 83.

135. *See Fatton, supra* note 124.

136. *See id.*



perhaps in contradiction to conservatives' goal of heightened national security.<sup>137</sup> According to Professor Tamamoto, issues of national security are inherently about relations with other countries.<sup>138</sup> Especially in the context where historical memory of Japanese aggression in the first-half of the 20th century still exists in the East Asian and Southeast Asian regions, threatened countries will likely respond to the legislation with tense diplomatic relations.<sup>139</sup> Also, because the Guidelines call for joint cooperation between the Japanese and U.S. military-industrial complexes, the Japanese defense industry will likely receive business opportunities for joint-defense projects and other international enterprises.<sup>140</sup> As a result, Japan should be able to develop their military-grade equipment through international market forces (other countries' willingness to purchase their weaponry or equipment) and state-to-state cooperation (joint public enterprises that would provide lucrative defense contracts or subsidies for research and development).<sup>141</sup>

With the advancement of military technology and equipment, Japan will be able to respond to potentially harsh reactions from threatened countries with more cost-effective military expenditure and competitive military equipment.<sup>142</sup> According to James Schoff, a Senior Associate at the Carnegie Endowment for International Peace, such a defense strategy between Japan and the United States can foster suspicion by threatened countries and cause a spiral of defense spending similar to the United States and the Soviet Union during the Cold War.<sup>143</sup> Although he points out that different outcomes are possible, Mr. Schoff concludes that the spiral outcome would squander political opportunities and economic resources in a significant way.<sup>144</sup> It is possible that joint military cooperation in military technology and redefining military roles within the security forces of Pax Americana would ensure such a leap in military might that countries like China would not see such defense strategy as an existential threat, but as an inefficient and costly invitation to keep up with Pax Americana's defense expenditure.<sup>145</sup> This scenario, however, may not be consistent with reality.

China has been a growing concern for not only the United States, but also the Japanese public.<sup>146</sup> At the same time, the United States and Japan

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137. Borah, *supra* note 3; see Tamamoto, *U.S.-Japan Relations*, *supra* note 15.

138. See Tamamoto, *U.S.-Japan Relations*, *supra* note 15.

139. See *id.*; Borah, *supra* note 3; Tamamoto, *Post Containment*, *supra* note 33.

140. See Tatsumi, *supra* note 125. Because Japan has reformed their regulation over arms transfers in the international community, Japan is looking forward to selling military equipment to other nations. *Id.*; see also Schoff, *supra* note 124.

141. See Schoff, *supra* note 124.

142. See Borah, *supra* note 3; Tatsumi, *supra* note 125.

143. See Schoff, *supra* note 124. Defense spending for the United States during the 1980s soared to 30% of annual GDP, translating to over \$2 trillion. *Id.*; see Tatsumi, *supra* note 125.

144. See Schoff, *supra* note 124.

145. See *id.*

146. See Grace Cheng, *China's Response to a Post-Pacifist Japan*, E-INT'L REL. (Sept. 14, 2014), <http://www.e-ir.info/2014/09/14/chinas-response-to-a-post-pacifist-japan/> [<https://perma.cc/CMV8-MXXX>].

have both become threats to China's political interests.<sup>147</sup> China has particularly criticized Japanese effacement of history, the Yasakuni Shrine visits, and the purchase of islands near Japan.<sup>148</sup> Simultaneously, China and Japan have set up exclusive economic zones in maritime territory that overlap each other, causing further political dispute and anxiety.<sup>149</sup> With the increasing tension between Japan and China, China has increased their provocations against Japan, such as using or patrolling Japan's economic zones.<sup>150</sup> Although China acknowledges that stabilizing their relationship is more desirable than the current status quo, China will likely continue its robust military expenditure in conjunction with security adaptations that will counter the fruits resulting from the Guidelines.<sup>151</sup> Diplomacy between the two countries is preferable, but such an outcome may not happen in the near future considering the problems within their relationship are so deep, complex, and hard to resolve.<sup>152</sup> China will likely not pass up the invitation to militarize and continue its political aims, which will provoke Japan as Japan provokes China.

Even if the Japan–U.S. security forces are far superior in a qualitative sense compared to pre-Guidelines coordination, Mr. Schoff does not seem to indicate that China would ease its provocations or its military expenditure as a result.<sup>153</sup> Japan in such a scenario is arguably less secure. This is because a Japan with enhanced military capabilities may pursue an aggressive course of action as a response to further provocations, which it previously would not have been able to execute if under similar circumstances. With increased confidence in their military might, a more capable Japan may mean a Japan that is more active as it is able to perform wider functions in regional security, while becoming more sensitive to Chinese aggression. Moreover, an emergency situation like a military encounter or other defense concerns, according to Robin Sakoda, a Partner at Armitage International, L.C., is more-than-likely to be encountered in the near future.<sup>154</sup> If an emergency situation is to arise, then a Japan with enhanced military capabilities will provoke more instability because of its ability to respond militarily to the threat.

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147. *See id.*

148. *See id.*; *see also* Barney Henderson, *Why Do Japan and China Have Such A Frosty Relationship?*, TELEGRAPH (Nov. 10, 2014), <http://www.telegraph.co.uk/news/worldnews/asia/china/11221248/Why-do-Japan-and-China-have-such-a-frosty-relationship.html> [<https://perma.cc/SL34-4HFM>].

149. *See* Cheng, *supra* note 146.

150. *See id.*

151. *See id.*

152. Henderson, *supra* note 148.

153. *See* Schoff, *supra* note 124.

154. *See* Sakoda, *supra* note 44.

## 2. *Economic Consequences*

### a. Japan's Economic Development Model

The enactment of the legislation, which will lead to a greater presence of Japanese SDF in the South Asian and Southeast Asian regions, will arguably undermine Japan's most undervalued export: a feasible economic development model, which strongly emphasizes non-military over military spending.<sup>155</sup> In the late 20th century, Southeast Asian countries bought into the design and started to use the Japanese economic model.<sup>156</sup> In contrast to the economic integration patterns of the European Union ("EU") where the European Commission ("EC") headed the endeavor as the institutional political body of the EU, the economic integration pattern of the Association of South East Asian Nations ("ASEAN") occurred without any institutionalization of a political body.<sup>157</sup> The members of ASEAN were able to economically integrate and become interdependent primarily due to market forces.<sup>158</sup> This development occurred without Japan as the institutional political leader despite ASEAN member's implementation of the Japanese economic development model.<sup>159</sup>

Moreover, this arrangement was possible because of the security guarantee afforded by the U.S.–Japan Security Treaty and the American presence in the region, which enabled continued regional East Asian security by the United States. This security incentivized countries to buy into the Japanese model, which emphasized less military spending.<sup>160</sup> In addition, because South-Asian and Southeast-Asian countries see the United States relationship as a check on Japan's aggressive impulses, the arrangement allows for Japan to legitimize its informal economic leadership and effectively attract countries that would not have been attracted to its economic model without the United States' connection to Japan.<sup>161</sup> If the United States decides to provide less military support for regional security and uses the Japanese SDF to fill the space instead, which seems to be the current U.S. strategy, this would lessen regional economic integration.<sup>162</sup> With a

155. See Tamamoto, *Post Containment*, *supra* note 33. This economic development model was derived from the Yoshida Doctrine, which put economic development as the primary focus of government. Such a model was produced to not only rehabilitate the Japanese economy, but to also take advantage of Pax Americana in East Asia. *Id.*; see also Nayana Das, *Japan's 'Yoshida Doctrine' as It Stands Today*, UN, YOU KNOW?!, (July 22, 2015), <https://unyouknow.org/2015/07/22/japans-yoshida-doctrine-as-it-stands-today/> [<https://perma.cc/7HB7-NFKX>] (calling the Japanese economic development model the "Asian Model of Development").

156. See Hornung, *supra* note 123.

157. See Tamamoto, *Post Containment*, *supra* note 33.

158. *Id.*

159. *Id.*

160. The U.S. 7th Fleet is the underlying component of the U.S.-Japan Security Treaty and, thus, regional security. The 7th Fleet brings regional security by integrating the SDF and other allied Asian military forces and coordinating exercises, projects, and obligations arising from treaties. See *id.*

161. *Id.*

162. *Id.*; Borah, *supra* note 3; Hornung, *supra* note 123.

decreased American troop presence and the increased presence of Japanese SDF within the region, the incentive to follow the Japanese model—which is partly about lessening military expenditure—will be undermined for those countries already committed like the members of ASEAN.<sup>163</sup> Furthermore, countries that have not hopped on board will less likely buy into the Japanese economic development model as the regional threat perception of Japan grows.

b. Impact of Military Waste and Policy Recommendation for the United States

As mentioned previously, through the recently passed legislation and thus the Guidelines agreement, Japan will be in joint coordination for the sale and development of military weapons and equipment.<sup>164</sup> The Japanese government may have been persuaded to pursue this objective because of, among other considerations, the economic opportunities arising from lucrative defense contracts and newly opened export markets. If Japan was concerned about economic opportunities and both the United States and Japan desire regional security, the Guidelines will likely not be the remedy. In fact, because of the security concerns arising from the agreement, the Guidelines may undermine not only regional security, but also the fruits from its economic opportunities.<sup>165</sup> If a spiral of military spending occurs between competing countries, the financial benefits arising from the economic opportunities will likely be squandered on wasteful military expenditure.<sup>166</sup>

Instead of the legislation and Guidelines, the United States should incentivize Japan and the rest of the East Asian and Southeast Asian region to decrease military spending.<sup>167</sup> The United States can implement a sizeable reduction in its ground forces, nullifying the ability to invade and occupy other countries.<sup>168</sup> If countries undertake such a consideration, the U.S. military will look like a defensive force, still having the ability to use its air force and navy and thus being able to defend itself from invading forces.<sup>169</sup> The United States, then, can use the extra money saved from significantly reducing the budget of the Army to set a pattern.<sup>170</sup> It can encourage countries like Japan and other Asian countries to follow the United States' lead by conditioning this newly created fund on reducing troop numbers.<sup>171</sup>

If the United States undertakes such an enterprise, Japan will likely follow suit not only because the United States has a huge political force in Japanese government, but because Japan's economic desires would be satisfied. In addition, Japanese security concerns will not be affected by the

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163. See Tamamoto, *Post Containment*, *supra* note 33.

164. See Schoff, *supra* note 124.

165. See *id.*

166. See *id.*

167. See Tamamoto, *Post Containment*, *supra* note 33.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

U.S. plan because the foundation of the U.S.–Japan Security Treaty, and thus regional security concerns, is the U.S. 7th Fleet, which the Japanese SDF Navy and Air Force are closely integrated and a part of.<sup>172</sup> Conveniently, the SDF Army is mostly left out of this close integration, making the reduction of ground troops an easier task in the face of sophisticated joint military coordination.<sup>173</sup> According to Professor Tamamoto, the SDF Army consumes about half of Japan’s military budget.<sup>174</sup> Thus, the extra funds arising from the reduction in ground troops and U.S. financial aid are powerful incentives for the Japanese government, especially if they are concerned with economic opportunities.

## Conclusion

The recently passed legislation should be unconstitutional because of democratic principle and prior interpretation of Article 9. The consequences of the enactment of such legislation will arguably undermine Japanese national security and regional economic integration. As we have seen, because the United States has the power to encourage Japan’s path to either militarize or continue its pacifism, it is in the best interest of both the United States and Japan to choose the latter.<sup>175</sup> The United States will benefit in the long-term because a pacified East Asia will help the United States avoid military and diplomatic costs over time.<sup>176</sup> Although Japan will likely not go to war, negative consequences can result, which could hurt future opportunities for negotiations and diplomacy.

The scars of history are still associated with Japan’s past, which undermine hopes of an organic cooling period in the near future. This is especially true as recent actions by Japan, like the comfort women issue and the Yasakuni Shrine visits, are seen as incendiary by East Asian and Southeast Asian countries. Japan must stop its passive aggression and, after the enactments of the legislation, prevent future active aggression.<sup>177</sup> Although one may attempt to view current Japanese passive aggression as a response to passive aggressive moves by China, this perspective may be incorrect. In a cost-benefit analysis, the political costs, like increasing tension with regional neighbors, seem to outweigh any benefit arising from such incendiary actions if the actions are only a response to Chinese passive aggression.

Moreover, Japanese conservatives must understand that security

172. *Id.*

173. *Id.*

174. *Id.*

175. See Tamamoto, *U.S.-Japan Relations*, *supra* note 15.

176. *See id.*

177. See S.J. Friedman, *Why ‘Comfort Women’ Deal Doesn’t Shut Book on Japan’s Wartime Sex Slavery*, CNN (Dec. 30, 2015), <http://www.cnn.com/2015/12/30/opinions/japan-korea-china-comfort-women/> [<https://perma.cc/3THS-9VN5>]; Madison Park, *Yasukuni Shrine Visits: Japan Honoring The Dead Or Insulting The Neighbors?*, CNN (Dec. 26, 2013), <http://www.cnn.com/2013/10/21/world/asia/yasukuni-japan/> [<https://perma.cc/52TQ-ZEDP>].

concerns are related to historical memory. In fact, Japanese security is dependent upon, among others, the resolution of its history. If Japan wants to take a step towards resolving its security issues, the government should first acknowledge that there is a problem. The Japanese government should then try reconciling its shared history with its neighbors. Japan cannot continue to ignore the past as it has kept pace with the present. To the pain of Japanese conservatives, the past haunts and throws mud on the luster of Japanese nationalism.<sup>178</sup> As we move forward, Japan must resist these conservatives and continue to overcome its challenges against pacifism.

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178. See TSUYOSHI HASEGAWA & KAZUHIKO TOGO, *EAST ASIA'S HAUNTED PRESENT: HISTORICAL MEMORIES AND RESURGENCE OF NATIONALISM* 183 (2008).