

## Reasoning Revision: Is Japan's Constitution Japanese?

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This article addresses a somewhat provocative but nonetheless fundamentally important question: Is Japan's constitution Japanese? In other words, is the foundational legal institution of postwar Japan sufficiently the product of Japanese actors in terms of how the institution is understood and practiced? To answer this question, the claim that the postwar constitution was imposed on Japan by the U.S. is evaluated in comparison with the competing claim that the constitution was the result of American and Japanese collaboration in the drafting and ratification stages. This analysis is then extended by considering how subsequent developments in constitutional practice have contributed to the localization of the document. To focus this analysis, developments in an issue fundamental to the postwar constitution is examined in detail: the exercise of the right of collective self-defense. The article concludes that, although the imposition claim has some merit with regard to the drafting and ratification of the postwar constitution, there was substantial and meaningful input from Japanese actors at these early stages. Coupled with the enormous weight of post-independence interpretations made by Japan's courts and, especially, the executive branch, it is argued that the assertion at the center of the imposition claim, namely, that the postwar constitution is not Japanese, cannot be sustained.

### I. Introduction

Since ratification by both houses of the Japanese Diet in 1946, the Constitution of Japan (hereafter "postwar constitution" or "constitution") has never been formally amended. However, over that same period, the creation and ratification of this document has been widely viewed as forced upon Japan by the United States. Although this "imposition" claim arose originally as a rallying cry among conservative politicians in favor of constitutional revision in the 1950s, it has also been supported by the research of several American and Japanese historians of the period. A competing claim, which also emerged from the political maelstrom of the 1950s revision debate and has been supported by more recent scholarship, holds that the ratification decision was the result of "collaboration" between U.S. Occupation authorities, successive Japanese governments of the time, and private sector actors. With the passage of the public referendum law in 2007, which formalized the last institution necessary for formal constitutional revision to occur, the publication by the now-ruling Liberal Democratic Party (LDP) of a comprehensive constitutional revision proposal in 2012, and the election in 2012 and 2013 of a Diet in which both chambers overwhelmingly support constitutional revision, the possibility that

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the postwar constitution will be revised is greater now than at any time since its ratification.<sup>2</sup>

Cast against these recent developments, a reexamination of the long-standing argument for revision based on the claim of foreign imposition is in order. This article will thus address a somewhat provocative but nonetheless fundamentally important question: Is Japan's constitution Japanese? In other words, is the foundational legal institution of postwar Japan sufficiently the product of Japanese actors in terms of how the institution is understood and practiced? To answer this question, the article will evaluate the imposition claim by first considering its relative merits in comparison with the collaboration claim with regard to the drafting and ratification of the postwar constitution and then extending this analysis by considering how subsequent developments in constitutional practice have contributed to the localization of the document. To focus the analysis, developments across the postwar era in an issue fundamental to the postwar constitution will be examined in detail: the exercise of the right of collective self-defense (as relates to Article 9 of the postwar constitution). The article concludes that, although the imposition claim has some merit with regard to the drafting and ratification stages, there was substantial and meaningful input from Japanese actors at both these early stages. Coupled with the enormous weight of post-independence interpretations made by Japan's courts and, especially, the executive branch, it is argued that the assertion at the center of the imposition claim, namely, that the postwar constitution is not Japanese, cannot be sustained.

The article proceeds as follows. The next two sections introduce the imposition and collaboration claims, respectively. The fourth section examines the historical evidence to evaluate the relative merits of these two claims. The fifth section considers Japan's postwar constitutional development using the "living constitution" understanding of constitutional change. The sixth section briefly applies this framework to explore changes in constitutional understandings of the right of Japan to act in collective self-defense. The final section brings together the key findings of the previous sections to conclude that foreign imposition is not a compelling reason for revision at this point in the life of the postwar constitution.

## II. "Imposition" Claim<sup>3</sup>

Given that the postwar constitution was framed, ratified and enacted under the less than auspicious conditions of foreign military occupation, it is not surprising that the most widely accepted explanation of its origin involves coercion. Advocates of this view argue that the U.S. imposed the postwar constitution upon the government of Japan. More specifically, the imposition claim asserts that U.S. Occupation authorities, through a program of systematic interference in the Japanese constitutional revision process, determined both the content of the new constitution and the procedure of its ratifica-

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<sup>2</sup> The LDP constitutional revision proposal can be accessed at: <https://www.jimin.jp/activity/colum/116667.html> (November 30, 2013); For polling data on Diet members' views, see *Asahi Shimbun*, January 28; 2013; *Asahi Shimbun*, July 23, 2013.

<sup>3</sup> For scholarly accounts of this view, see the following: Maki, 1980, pp. 221-223; Stockwin, 1975, pp. 172-177; Kawai, 1960, pp. 51-70; Ward, 1956, pp. 980-1010.

tion. *In short, the imposition explanation asserts that the Diet's decision to ratify the postwar constitution was simply a public acquiescence to specific U.S. demands.*

In addition to this basic claim of coercion, the imposition view makes another key assertion: Occupation authorities engaged in a massive cover-up to keep knowledge of the constitution's imposition from both the Japanese people and the other Allied Powers. The motives behind this alleged cover-up were two-fold. First, American occupation authorities feared that public knowledge of foreign imposition would destroy the legitimacy of the new constitution among the Japanese. Second, Japan's acceptance of the Potsdam Declaration at the end of World War II is cited as a key background condition affecting the actions of occupation administrators and the Allied Powers. The Potsdam Declaration requires the Japanese government to institute democratic reforms and establish respect for human rights (Section 6), but also states that a new government is to be established "in accordance with the freely expressed will of the Japanese people" (Section 12).<sup>4</sup> Advocates of both the imposition and collaboration claims essentially agree that Section 6 required some form of constitutional revision, while Section 12 required the occupation authorities to respect, within limits, the will of the Japanese people in making these revisions. Imposition advocates offer Section 12 as a key support for their assertion of a cover-up. Since the U.S. occupation was legally committed to ensuring that the new constitution was a product of the "freely expressed will of the Japanese people," it was forced to attempt to conceal its dominance of the revision process from both domestic and international audiences.

In addition to the Potsdam Declaration, there are other key background conditions at work in the imposition explanation. First, imposition advocates note that the U.S., exercising indirect rule by issuing orders through the existing Japanese government, clearly had the capability to determine completely both the content and the method of the constitutional revisions. Second, they note that occupation authorities were in direct control of all media and emphasize this power as the key resource in their cover-up efforts. Third, the imposition claim cites the establishment of the Far Eastern Commission (FEC) as an important background condition prompting the imposition strategy. The FEC, an Allied decision-making body in which the Soviet Union held veto power, was established and granted jurisdiction over Japanese constitutional revision as a result of the Moscow Agreement in December 1945. Imposition advocates assert that the U.S. imposed its quick constitutional solution because it feared a longer collaborative process would have allowed the infant FEC greater opportunity to assert its jurisdictional authority and gain control of the revision process. Thus, at the heart of this explanation is the claim that the U.S., motivated by geopolitical concerns, imposed the postwar constitution in a quick and decisive manner that precluded the participation of the Japanese government and people.

Although the imposition claim has long roots in the debate over constitutional revision in Japan, it is still cited by revision advocates today. For example, at an opening session of the 185<sup>th</sup> Diet on October 16, 2013, Ishihara Shintarō, head of the Japan Restoration Party and long-time supporter of compre-

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<sup>4</sup> The Potsdam Declaration, reprinted in Moore and Robinson, 1998, Document RM473.

hensive constitutional revision, rose to address the prime minister and uttered the following words:

As an effective means of [dismantling Japan in the name of occupation rule], occupation authorities made excellent use of this historically-illegitimate constitution to produce profound results. That is, with this new constitution as a starting point, American rule over postwar Japan began. As a means of achieving this dismantling rule, they unilaterally forced on us a quickly-produced constitution with a preamble spelled out in hideously-poor Japanese that we obediently received and thus to this day spend our days smothered in America's embrace.<sup>5</sup>

In this short passage, all the key elements of the imposition claim are present. First, Americans wrote the constitution. Second, they forced it on a defeated Japan. Finally, the purpose of this coercion was to dismantle the true Japan to facilitate foreign rule, the ultimate effects of which continue until this day. To Ishihara and other imposition advocates, the constitution is thus not Japanese and should be changed for at least this reason alone.

### III. "Collaboration" Claim<sup>6</sup>

Supporters of this view argue neither that the postwar constitution was produced completely by the Japanese government nor that the U.S. occupation was irrelevant in its framing. Instead, they claim that the content of the constitution was the product of compromises reached between numerous actors, including Supreme Commander of the Allied Powers (SCAP) General Douglas MacArthur and the staff of the Government Section (GS) of his General Headquarters (GHQ)<sup>7</sup>; the FEC; the cabinets of Shidehara Kijūrō and Yoshida Shigeru; the Liberal, Progressive, and Socialist Parties in the Diet; cabinet bureaucrats; Japanese legal scholars (particularly the Constitution Research Association); the media and a teachers lobbying group. Although collaboration advocates admit that the formal procedure by which constitutional revision occurred was heavily influenced by the U.S. occupation, they assert that the above-listed actors all had a hand in determining the final content of the constitution adopted by the Diet. *In this view, the ratification of the new constitution by the Diet represented a genuine acceptance of the document as a product of significant compromise.*

As with the imposition claim, collaboration advocates cite Japan's acceptance of the Potsdam Declaration as a key background condition. Although agreeing that MacArthur's concern with Section 12 led him to use his control of the media to hide SCAP's involvement in constitutional revision, they

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<sup>5</sup> Ishihara Shintarō, Japan Restoration Party, General Session, House of Representatives, October 16, 2013. Accessed at: <http://kokkai.ndl.go.jp/> (November 30, 2013).

<sup>6</sup> For accounts of this position, see the following: Takayanagi, 1968; Koseki, 1997, pp. 1–5; Maki, 1980, pp. 223–225; Moore and Robinson, 2002, pp. 3–20.

<sup>7</sup> In this paper, General MacArthur is referred as either MacArthur or SCAP (Supreme Commander of the Allied Powers), while GHQ (General Headquarters) staff/officers or U.S. Occupation authorities refer to MacArthur's Government Section (GS) subordinates.

also argue that this should not necessarily have led to the censorship of Japanese critics of SCAP's favored revision positions. In addition, the establishment of the FEC is also cited as a key background condition for two reasons. First, it created a major player that directly influenced later stages of the revision process. Second, collaboration advocates argue that the strong anti-Emperor stance taken by members of the FEC provided a key motivation for compromise between MacArthur, who wanted to preserve the imperial institution to help stabilize the country, and the conservative cabinet and Diet members, who revered the Emperor and sought to protect him from the war crimes tribunal. Collaboration advocates thus argue that the establishment of the FEC helped create fertile ground for compromise between MacArthur and successive conservative governments in the Diet.

Largely the product of work by constitutional scholars and historians, the collaboration claim is today most prominently advanced by the scholar Koseki Shōichi. Of the drafting and ratification process that produced the postwar constitution, he concludes:

In the Japanese Constitution there are provisions, for example, that were merely products of compromise, inserted without sufficient discussion; other provisions that are vestiges of the Meiji Constitution that Japanese legal bureaucrats, unnoticed by the Americans, succeeded in retaining; completely new provisions, not in the American draft, that Japanese officials or Diet members inserted; and provisions that, even though they were important in retrospect, ran counter to the trend of the times and disappeared at the early drafting stage. In short, the Japanese Constitution had the appearance of a mosaic.<sup>8</sup>

Here, it is also important to note what collaboration advocates are not claiming. Namely, that the Japanese constitution was solely the product of Japanese actors. Even those offering the most sweeping forms of the collaboration claim, such as the constitutional scholar Takayanagi Kenzō, concede extensive American involvement: "All legislation for the democratization of Japan during the occupation was guided and supervised by the SCAP. No legislation was enacted by the 'free will of the Japanese' in the sense that the enactment was accomplished 'without any outside interference.'"<sup>9</sup>

#### **IV. Drafting and Ratification of the Postwar Constitution: Imposition or Collaboration?**

Were the members of the last Imperial Diet forced to ratify an American-authored constitution against their will? Imposition claims regarding the American role in determining the content, adoption procedure, and media coverage of the new constitution lead to some clear predictions about how events should have unfolded. In addition, the imposition argument implies a further prediction regarding the level of U.S. flexibility shown during interactions with the Japanese side. These predictions are tested against the historical record below.

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<sup>8</sup> Koseki, 1997, pp. 3-4.

<sup>9</sup> Takayanagi, 1968, p. 77.

*Prediction#1: If imposition took place, the U.S. side should have articulated specific demands to the Japanese government regarding the content and adoption procedure of the new constitution.*

There is strong evidence that the U.S. made specific demands regarding both the content and the adoption procedure of the new constitution. First, although GHQ adopted a “hands-off” policy towards the Shidehara cabinet’s efforts to develop a revision proposal in late 1945, this passive stance changed suddenly after the advisory committee to the cabinet submitted its first draft proposal in early February 1946. On February 3, MacArthur issued a memorandum ordering his staff to prepare a “model” constitution in accordance with three fundamental principles: preservation of the Emperor “at the head of state,” but responsible to the will of the people; the renunciation of war as a sovereign right of the nation; and the abolition of the peerage system of noble titles granted by the state.<sup>10</sup> The GS staff complied and submitted their completed draft constitution (hereafter referred to as the U.S. draft) to the Shidehara cabinet’s representatives during a meeting on February 13. At this meeting, GS Chief General Courtney Whitney rejected the Japanese government draft and presented the U.S. draft as an example of “the principles which the Supreme Commander and the Allied Powers are willing to accept in Japan.”<sup>11</sup> With the Emperor’s approval, the Shidehara cabinet accepted the U.S. draft to serve as the basis of a new government draft that was prepared over the next month.<sup>12</sup>

There is also evidence that MacArthur had a direct hand in determining the procedure used to adopt the new constitution. The postwar constitution was adopted as an amendment to the existing Meiji Constitution (which it effectively replaced) by the last Imperial Diet. In January 1946, SCAP authorized a general election for the lower house of the Diet to be held in the last week in March (later changed to April 10).<sup>13</sup> In mid-March, the Shidehara cabinet published a version of the new government draft and announced that it would be submitted as a bill in the post-election Diet. The draft constitution was thus positioned as a key election issue. Although there is no evidence that MacArthur directly ordered the Shidehara cabinet to adopt this revision procedure, it is clear that SCAP encouraged its adoption over other options, such as the election of a special constituent assembly to revise the constitution.<sup>14</sup>

The imposition explanation passes this important test. Since the imposition claim rests heavily on this prediction, a failure here would have seriously weakened its explanatory power. However, as American involvement in these matters is also predicted by the collaboration claim, the imposition claim gains only a little support from passing this test.

*Prediction#2: If imposition took place, the U.S. should have tried to conceal its actions because imposition was forbidden by the Potsdam Declaration and public knowledge of SCAP’s involvement would damage the legitimacy of the new constitution.*

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<sup>10</sup> This memorandum is reprinted in Moore and Robinson, 1998, Document RM141.

<sup>11</sup> McNelly, 2000, p. 9.

<sup>12</sup> Koseki, 1997, pp. 98-109.

<sup>13</sup> Colonel Charles Kades’ recollection of this appears in Moore and Robinson, 1998, Chronology Section.

<sup>14</sup> This is apparent in MacArthur’s correspondence with the FEC. See Koseki, 1997, pp. 146-161.

Although the occupation authorities began censorship of the Japanese media in September 1945, it apparently did not limit debate on the constitutional issue during the first six months of the occupation. This is demonstrated by the large and varied constitutional proposals and drafts published during this period by legal scholars and political parties, including even the Communist Party.<sup>15</sup> In fact, multiple scholars argue that a constitutional draft by the Constitutional Research Association, a private group of legal scholars, likely had a major influence on the GS staff in its preparation of the U.S. draft and is thus an important element of domestic Japanese input into the postwar constitution.<sup>16</sup> However, following the March 6 publication of an outline of the new government draft, the occupation authorities actively positioned the draft as a pure product of the Japanese government. According to Theodore McNelly, MacArthur's Civil Censorship Detachment simply "forbade" any references in the Japanese press to SCAP involvement in the creation of the new government draft.<sup>17</sup> MacArthur's correspondence with the increasingly skeptical FEC also reveals blatant attempts to portray the new government draft as a purely Japanese document.<sup>18</sup>

The imposition claim passes this second test. However, since the collaboration claim also specifies the Potsdam Declaration as an important background condition, it too predicts that SCAP should be less than forthcoming about its input in the new government draft. The test thus provides relatively weak support for the imposition claim.

*Prediction#3: At the heart of the imposition claim is that U.S. coercion denied the Japanese government a role in the creation and approval of its own constitution. Thus, if imposition occurred, there should be no evidence of U.S. concessions in response to cabinet or Diet members' specific demands regarding constitutional revision.*

If the U.S. draft is taken as a baseline for the U.S. position, then it is clear that the occupation authorities made numerous concessions and responded positively to many cabinet and Diet requests for changes. These concessions came in two phases. First, during the Shidehara cabinet's efforts to create the Japanese language for the new government draft (February–March 1946), GS officials allowed some important changes requested by the cabinet and its bureaucrats. For example, although the U.S. draft called for a unicameral legislature, GS staff immediately conceded to a cabinet member's request for a bicameral legislature.<sup>19</sup> In another concession, American officials honored a cabinet bureaucrat's

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<sup>15</sup> *Ibid.*, pp. 26–49.

<sup>16</sup> *Ibid.*, pp. 35, 47–48; McNelly, 2000, pp. 98–104.

<sup>17</sup> McNelly, 2000, p.11.

<sup>18</sup> *Ibid.*, p. 12. In a reply to an FEC request to delay the April election, MacArthur referred to the proposed constitution as "the work of men from many [Japanese] groups and affiliations."

<sup>19</sup> Koseki, 1997, p. 103. This concession, in particular, indicates that occupation authorities believed their interactions with the Japanese government were a proper negotiation. Colonel Kades, the GS officer who drafted the unicameral provisions, has since claimed he included it because it "might be useful in negotiating with the Japanese." Although this diminishes the significance of the change as a concession, Kades' forethought initially to include inflated demands in order to strengthen SCAP's negotiating position is strong evidence that occupation officials did not believe they were simply "imposing" their draft on the Shidehara cabinet.

request to eliminate an article that granted foreigners the same legal protections as Japanese citizens.<sup>20</sup> They also agreed to the Shidehara cabinet's complete revision of the chapter detailing local government.<sup>21</sup> In addition, in the creation of the Japanese translation of the original U.S. draft, Japanese participants also, sometime inadvertently, made changes to the constitution in its Japanese form, including subtle changes in the rendering of freedom of religion and the dignity of the individual that conformed more to their traditional values than to the original American concepts.<sup>22</sup>

During the Diet deliberation (June–October 1946) phase of the revision process, GHQ proved even more flexible, approving major changes in sections relating to the definition of citizenship, the right to education, and women's rights.<sup>23</sup> It is interesting to note that these important amendments were all proposed by Diet members who were not members of the cabinet or ruling parties. In addition, the education article, which extended compulsory education to include middle school, was largely the result of teachers' efforts to lobby both GHQ and the Diet. Koseki notes this as the sole example of a GHQ concession in which "the voices of the people were directly reflected."<sup>24</sup> These cases are all examples of the widening circle of participation that became possible during this late stage of the revision process. In the end, GHQ even allowed an important wording change in the war renunciation article (Article 9), which was one of MacArthur's three fundamental principles mentioned above.<sup>25</sup> As Moore and Robinson conclude, "[T]he constitution ultimately approved by the Diet was far from being a literal translation of the SCAP's model draft."<sup>26</sup>

The imposition claim fails the above test. At face value, U.S. intransigence seems both a relatively certain and a relatively unique prediction of the imposition claim. Viewed in this light, the imposition claim in its strongest form, namely that U.S. authorship and subsequent coercion were complete or nearly complete, appears invalid as an explanation for the drafting and ratification of the new constitution. Although the imposition claim might still be applied in softened form, the wide scope and significance of amendments and changes allowed by occupation authorities does appear to provide strong evidence against its unmodified application.

Was the ratification of the postwar constitution the result of the input and compromises of numerous domestic and foreign actors? Two key tests of collaboration claims involve the new constitution's durability and SCAP's tolerance of dissenting opinions. In addition, the collaboration explanation also provides a prediction about the effectiveness of domestic actors' efforts to impact the revision process that is particularly important in comparing the relative strengths of the two competing claims.

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<sup>20</sup> *Ibid.*, p. 129. As Koseki notes, this change had tremendous significance in limiting the rights of the hundreds of thousands of Koreans who have been permanent residents in Japan since the Korean colonial period.

<sup>21</sup> *Ibid.*, p. 117. This revision had the effect of completely negating SCAP's original draft ideas regarding local government.

<sup>22</sup> Inoue, 1991.

<sup>23</sup> *Ibid.*, pp. 181–191.

<sup>24</sup> *Ibid.*, p. 184.

<sup>25</sup> *Ibid.*, pp. 192–211. This wording change would later be used by conservative politicians to justify Japanese re-armament and the existence of the Japanese Self Defense Forces.

<sup>26</sup> Moore and Robinson, 2002, p. 332.

Prediction#4: *If collaboration occurred, the Diet should not make extensive revisions to the new constitution in the face of immediate future opportunities to do so.*<sup>27</sup>

One of the most startling aspects of the postwar constitution's story is its durability. Over sixty years after its enactment, it has yet to be amended even though there have been numerous opportunities to do so. For example, in January of 1947, MacArthur offered to the Yoshida cabinet an open invitation from the Allied Powers (FEC) to "the full and continuing freedom of opportunity to reexamine, review, and if deemed necessary amend the new constitution."<sup>28</sup> The Yoshida Cabinet chose not to pursue this offer, and personal letters from the time reveal that Yoshida himself was apparently satisfied with the ratified constitution.<sup>29</sup> The postwar constitution also survived unscathed serious revision attempts in the 1950s and 1960s.<sup>30</sup> According to collaboration advocates, this durability, especially during the early years after Japan regained its independence, is evidence that the constitution and the Diet's decision to ratify it were the products of compromises among the relevant actors rather than of the imposition of one actor's view on all others.

The collaboration claim predicts with fair certainty that extensive constitutional revisions should not occur in the face of immediate opportunities to do so because the ratified constitution was already the product of compromises between major domestic and foreign political actors. Although it does not necessarily predict that absolutely no revisions will take place, their complete failure to occur in the years immediately following ratification and even after the end of the occupation provides an unusually strong passage for this test.

Prediction#5: *If collaboration occurred, SCAP should have allowed relevant actors to express public criticisms of U.S.-favored positions in the constitutional revision process.*

This prediction is similar to that of Prediction #2 above, only in this case, the censorship examined focuses on attempts to silence critics of SCAP's favored positions. Although the evidence is not entirely consistent, it is clear that occupation authorities engaged in efforts to silence critics of the new government draft, suppressing "all except laudatory comments in the Japanese media."<sup>31</sup> In addition, SCAP overtly monitored many of the Diet constitutional deliberation sessions, a fact that likely induced some self-censorship among the debaters.<sup>32</sup> The argument here is that this censorship runs counter to the spirit of a collaborative process and therefore may be indicative of SCAP intransigence.

The collaboration claim fails this test somewhat miserably. Although this is far from fatal for the claim as a whole, it does point to the need for further research in the area of occupation censorship strategies and their relationship to SCAP's constitutional revision policy.

<sup>27</sup> This prediction can be restated as a further prediction of the imposition explanation: *If imposition occurred, the Diet should make extensive revisions to the new constitution in the face of future opportunities to do so.*

<sup>28</sup> *Ibid.*, p. 243.

<sup>29</sup> Dower, 1979, pp. 328–329.

<sup>30</sup> Maki, 1980; Ward, 1965.

<sup>31</sup> Kawai, 1960, p. 52. The author also reports that some of his own critical editorials were suppressed by occupation censors. See also Moore and Robinson, 2002, p. 150.

<sup>32</sup> Moore and Robinson, 1998, Front Matter Section.

Prediction#6: *If collaboration occurred, there should be evidence that the input of domestic actors was included in the ratified constitution.*

Since the amendments and changes requested by domestic actors outlined in the discussion of Prediction #3 above did in fact become part of the postwar constitution, it remains here only to buttress this evidence with an account of whether domestic actors themselves believed they had an impact on the final product. The actors' beliefs are important here because they provide evidence against the possible counterclaim that "SCAP concessions" were pre-ordained by SCAP to give the revision proceedings the false air of a serious deliberative process. This does not appear to be the case. For example, writing years after the end of the occupation, Satō Tatsuo, a cabinet bureaucrat involved with the preparation of the new government draft, wrote of the Diet constitutional deliberation sessions:

They [GHQ staff] granted many of our points and objections about other parts of the draft [other than the Preamble and the chapter on the Emperor]...the GHQ applied hardly any direct pressure on the Diet's deliberations on the constitution. Indeed, they seemed to have great respect for the Diet as the supreme representative of the people. With the revisions as well, they needed SCAP's approval, but 80 or 90 percent of our changes were allowed to stand.<sup>33</sup>

Further evidence that domestic actors believed their input was being included in the constitution became available through the Diet's 1996 release of the transcripts from the House of Peers subcommittee's deliberation on constitutional revision (September 1946). Since these transcripts were not monitored by SCAP or released to the public during the occupation, they provide particularly candid support that Diet actors believed they were taking part in a collaborative process.<sup>34</sup>

The collaboration explanation passes this test. Like Prediction #3, Prediction #6 is a certain and fairly unique prediction. The collaboration view's passage here is thus a relatively decisive affirmation of its explanatory power.

Although both claims fail some of the tests of their predictions about the historical record, it is the imposition claim that fails the most decisively: There is evidence of U.S. concessions throughout the process, including on some articles relevant to SCAP's central demands. The collaboration claim, while failing to account for occupation censorship of views critical of the new government draft, nevertheless passes its most important test: there is extensive evidence of input from Japanese actors in the final constitution and that these actors believed that they were involved in a genuinely collaborative process in which they made a difference in the final product. However, although the collaboration claim can be

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<sup>33</sup> Ward and Sakamoto, 1987, p. 124.

<sup>34</sup> For example, at the opening of the third session, Yoshida cabinet State Minister Kanamori Tokujirō provides a list of articles under review and candidly names which articles originated from GHQ, which originated from the Diet parties and which were collaborations. Moore and Robinson, 1998, RM473.

called superior based on the above six simple tests, it is also important to note some of the overall flaws this exercise reveals about both claims.

First, the imposition explanation's failure in Prediction #3 stems from its overemphasis on parsimony. Concentrating the analysis at the state level, imposition advocates present the Diet's ratification decision as a simple example of the domination of one state by another. Viewing the case through this state-centric lens, they often simply cite successful fulfillment of Predictions #1 and #2 and then conclude their analysis in favor of the imposition claim.<sup>35</sup> This approach tends both to ignore the diversity of the actors who contributed to the constitutional revision process and to disregard the later stages of the revision process (last-minute revisions of the new government draft and the amendments resulting from Diet deliberations), when many of the significant changes were made. The imposition claim's failure to account for the input of many of these non-state (non-cabinet) actors stems from its strict adherence to a narrow initial assumption that states are the only actors in the constitutional revision story that matter.

In contrast, the collaboration claim dispenses with the "black box" of unitary state analysis and instead makes an effort to account for the impacts of many non-state actors (opposition parties, the teachers lobby, the media, etc.) and even individual persons (Satō Tatsuo, etc.) in the revision process.<sup>36</sup> Through this level of detailed analysis, collaboration advocates cast a wide net and have been able to identify the contributions of diverse types of actors. However, although this focus on actors both within and outside of the state is largely responsible for the collaboration claim's passage of the key test in Prediction #6, it also points to an area for further research for collaboration advocates. If so many individual actors contributed to the constitutional revision processes, how does one gauge the relative importance of each actor's input on the overall drafting and ratification process? Although beyond the scope of the treatment here, developing a method to assess the relative impacts of the various relevant actors is an important next step to fully understanding the drafting and ratification of the postwar constitution.

The above analysis will no doubt frustrate imposition advocates who hold that any foreign involvement in constitution-making, no matter how major or minor, is unacceptable and its undeniable presence in this case is thus sufficient reason in and of itself to revise the postwar constitution. In other words, evidence of collaboration reveals the postwar constitution to be "historically-illegitimate." Setting aside complicated disputes over the extent of power granted in this area to foreign organizations such as the FEC and the U.S. occupation authorities by the Potsdam Declaration, one can respond to this form of the imposition claim by simply considering the major existing alternative from the perspective of the principle of popular sovereignty, a principle to which the Japanese government was clearly committed under the Potsdam terms. The Shidehara cabinet established a committee to

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<sup>35</sup> Kawai and Ward are particularly guilty of excessive reliance on nation-state centric analysis. See Kawai, 1960, pp. 51–70; Ward, 1956, pp. 980–1010.

<sup>36</sup> Koseki, 1997, pp. 111–211.

study constitutional problems, chaired by politician and legal scholar Mastumoto Jōji, which eventually prepared the original government draft rejected by the GS staff. A version of this government draft was published by *Mainichi Shimbun* just prior to the government submitting its first draft to the GS staff. Although it was slightly different from the draft submitted, both drafts “were based on the Meiji Constitution, with nothing more than a few modifications” and public reaction to the published draft has been characterized as “extremely unfavorable.”<sup>37</sup> In addition, it bears remembering that this draft emerged from a committee appointed by a government of officials who were either appointed to their offices or elected in the extremely undemocratic Diet election held in 1942. Whatever its origins and the impact media censorship and GHQ interference had on its ratification, the postwar constitution was deliberated on and ratified by a Diet in which at least one chamber was elected through universal suffrage in the lower house election of 1946. While it is clear that participants in the Diet debate were aware that Americans had been involved in the preparation of the draft constitution and that GHQ was intensely following their deliberations, it is also apparent that they believed the final product would have major implications for Japan’s short-term and long-term political future.<sup>38</sup> It is thus not so easy to dismiss the result of these deliberations as illegitimate in comparison with an alternative that would perhaps have been more completely the product of Japanese actors but would certainly have been less the product of deliberation by and consent of the wider population of Japanese people who were to be citizens of the new constitutional order.

For those still unconvinced of the “Japaneseness” of the postwar constitution, the next section first places the postwar constitution within a larger framework of modern constitutional systems and then considers how Japanese courts, politicians and government bureaucrats can affect real and meaningful change in constitutional practice without formal amendment of the constitution. The sixth section will then provide an important illustrative example.

## V. The “Living” Postwar Constitution

In modern constitutional systems, constitutions can be changed via two processes, formal amendment and interpretation. In Japan, as per Article 96 of the postwar constitution, formal amendment requires a two-thirds majority vote in both Diet chambers and a simple majority in a public referendum. As of this writing, the postwar constitution has never been formally amended. However, this does not mean that important changes have not been made to the postwar constitutional order. Indeed, as will be illustrated below, interpretation and reinterpretation have made extensive changes in understandings of the postwar constitution that have important effects on its operation. And all of these changes have been made by Japanese hands and minds, including some that were at odds with the demands of Japan’s American ally.

The understanding of how constitutions can change short of formal amendment is sometimes re-

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<sup>37</sup> Koseki, 1997, p. 61; Moore and Robinson, 2002, p. 93.

<sup>38</sup> Moore and Robinson, 2002, p. 334.

ferred to as the “living constitution” approach, which emphasizes that each living generation will contribute to the development of constitutional practice by interpreting constitutional statutes according to their social understandings and normative inclinations.<sup>39</sup> In its formal sense, a constitution is a legal text or texts outlining the rules of government, while the real constitution refers to the policies and institutions of the state as they actually operate.<sup>40</sup> Comparative studies of constitutional systems have identified factors that affect the divergence between the formal and real constitutions. First, the *lex superior* principle argues that constitutional change warrants a special method different from the process of ordinary lawmaking.<sup>41</sup> The popularity of this principle has led most modern constitutional states to adopt procedures for *formal amendment*—revising or replacing the constitution according to a method explicitly specified in the document—that are more difficult than those required to pass normal legislation. High levels of difficulty in this procedure may thus encourage the use of interpretation and thereby increase the divergence between the the formal and the real constitutions. Second, the principle of separation of powers opens avenues of constitutional change that often widened the gap between the formal and real constitutions. In regulating power relations between the branches of government, constitutions frequently provide each branch a role in interpreting and implementing constitutional articles.

Adherence to the separation of powers principle usually spawns two forms of interpretive change: *judicial review* and *executive/legislative interpretation*. Judicial review is the legal process by which the judicial branch of government renders a judgment regarding the constitutionality of the actual or proposed actions of other branches of government (e.g. national or local statutes, executive or administrative orders, etc.).<sup>42</sup> Executive/legislative interpretation occurs when the executive or legislative branches offer constitutional interpretations in executive statements and orders or legislative resolutions and statutes. In either case, constitutional change results when one such interpretation survives or avoids inter-branch challenges.

One robust finding from empirical research on constitutional systems is that constitutions with relatively difficult amendment procedures tend to see more change through informal means such as reinterpretation than constitutions that are more easily amended.<sup>43</sup> As a result, the observed level of divergence between the formal and real constitutions is generally higher in constitutional systems with stringent amendment procedures. This finding is of particular relevance because Article 96 of Japan’s postwar constitution establishes an amendment procedure that is difficult by international standards.<sup>44</sup> Emphasizing the difficulty of this amendment procedure, one comparative constitutionalist has char-

<sup>39</sup> Ackerman, 2007.

<sup>40</sup> This distinction is highlighted in Lane, 1996.

<sup>41</sup> *Ibid.*, p. 8; Lutz, 1994, pp. 355–357.

<sup>42</sup> The right of judicial review in its broadest sense includes the exercise of both abstract and concrete norm control as well as the power to issue court orders requiring the faithful implementation of judicial interpretations. See Venter, 2000, pp. 79–80.

<sup>43</sup> Lutz, 1994.

<sup>44</sup> According to Lutz, Japan’s amendment procedure is rated 8<sup>th</sup> out of 32 constitutional systems in level of difficulty. *Ibid.*, pp. 360–362.

acterized Japan's constitutional design as "a recipe for the variance of constitutional reality from the literal meaning of the actual provisions of the Constitution."<sup>45</sup> Thus, any assessment of the postwar constitution must pay special attention to the role of change through informal means—judicial review or executive/legislative interpretation.

Japan's postwar constitution also incorporates the principle of separation of powers. Specifically, the constitution grants authority to interpret constitutional provisions to all three branches of Japan's parliamentary government: executive (cabinet and bureaucracy); legislature (upper and lower houses of the Diet), and the judiciary (supreme and lower courts).<sup>46</sup> What is unusual about Japanese constitutional institutions, however, is the meager role the judicial branch has played in constitutional development. Despite being granted the explicit power of judicial review by the postwar constitution, the Supreme Court has frequently avoided making constitutional interpretations by focusing on the narrower statutory elements of constitutional cases. On the whole, the judicial branch has failed to establish a tradition of activism. In particular, the Supreme Court has been reluctant to challenge the constitutional judgments of the executive and legislative branches. In its first fifty years of existence, the Supreme Court found acts of the other branches of government unconstitutional on only five occasions.<sup>47</sup> By way of comparison, the U.S. Supreme Court declared nearly sixty acts of Congress to be unconstitutional in the half-century between 1939 and 1989. Although this low level of judicial independence likely stems from several factors, what is important for the investigation here is its impact on the development of post-ratification interpretations of the postwar constitution.<sup>48</sup>

Due to the limited role of judicial review, assessing changes in the postwar constitution requires focusing on executive and legislative interpretation. With regard to interpretation, decades of one-party dominance strengthened the executive branch's constitutional hand vis-à-vis the legislature by placing both branches of government under the control of the Liberal Democratic Party (LDP). The executive branch has largely assumed the role of interpreting the constitution often performed by the judiciary in other constitutional systems, and the cabinet has become the dominant institutional interpreter of the constitution, usually in the form of statements by cabinet officers and bureaucrats during Diet testimony.

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<sup>45</sup> Venter, 2000, p. 215.

<sup>46</sup> The cabinet is charged with enacting orders "to execute the provisions of this Constitution" (Article 73); the Diet is declared the "highest organ of state power" (Article 41); and the Supreme Court is granted the "power to determine the constitutionality of any law, order, regulation, or official act (Article 81). In addition, all branches are required to implement the provision of the constitution as the "supreme law of the nation" (Article 98).

<sup>47</sup> Luney and Takahashi, eds., 1993, p. 145; Venter, 2000, p. 89.

<sup>48</sup> The low level of judicial independence in Japan likely stems from three factors. First, relatively young courts are generally concerned with enhancing their own legitimacy. Historically, this concern has tended to blunt judicial activism. For example, the US Supreme Court struck down only two congressional acts as unconstitutional in its first sixty-eight years of existence. Second, Japanese judicial traditions, adopted from Europe in the 19<sup>th</sup> century, have never favored judicial activism. Finally, and perhaps most importantly, the Constitution gives the cabinet total discretion in the appointment of Supreme Court judges, who in turn have the power to nominate lower court judges. This system of appointment, along with the LDP's long run as the ruling party, has tended to promote judicial conservatism from the top down. For more on Japan's judiciary, see Luney and Takahashi, eds., 1993 and Beer, 1984.

In postwar Japan, a small group of political appointees (usually Diet members serving in ministerial or deputy ministerial posts) and a large number of career bureaucrats comprise the executive branch. Among politicians, it seems clear that the prime minister has been the most involved in constitutional interpretation. Particularly in the early postwar years, Prime Minister Yoshida provided the impetus for and made the final approval of significant constitutional reinterpretations. However, one prominent view of Japanese politics argues that the social prestige and expertise of career bureaucrats, among other factors, have allowed them a unique level of influence on policy decisions and implementation.<sup>49</sup> Although the exact scope of bureaucratic authority in Japan has been hotly debated, there is general consensus that bureaucrats form a major power center within the executive branch.<sup>50</sup> With regard to constitutional matters, bureaucratic power has emanated from the small, little-known Cabinet Legislation Bureau (CLB).

The CLB has played a major part in Japan's constitutional development. It has drafted all unified government interpretations (*tōitsu kenkai*) of the postwar constitution since its re-establishment in 1952. In addition, the CLB extended its constitutional profile by serving as the secretariat to the Commission on the Constitution, a government advisory panel set up to make recommendations for constitutional revision during the late 1950s and early 1960s.<sup>51</sup> The CLB's competency in constitutional matters is also apparent in its organizational chart: The CLB division responsible for rendering legal opinions includes the government's only permanent constitutional research staff.<sup>52</sup> In addition, one of the major duties of the CLB director-general is to respond to questions about government positions during Diet deliberations.<sup>53</sup> In the course of discharging this duty, CLB director-generals have directly participated in numerous Diet debates on constitutional issues over the years. Finally, for most of the CLB's history, prime ministers have refrained from intervening in the CLB's system of internal promotion.<sup>54</sup> Although this appears to have changed with the most recent appointment of a CLB head that has no previous experience with the bureau, it is fair to say that understanding constitutional change in postwar Japan requires considering the inputs of both prime ministers and their appointed CLB bureaucrats.<sup>55</sup> As a full discussion of the many and varied constitutional impacts of this activity is beyond the scope of an article-length treatment, the next section will focus on how efforts by executive branch interpreters have affected constitutional practice in an area that began as central demand from the occupation authorities.

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<sup>49</sup> Johnson (1982) is the most influential statement of what may be called the bureaucratic dominance model of Japanese politics.

<sup>50</sup> Many scholars have challenged the scope of Johnson's claims. For example, subsequent studies have emphasized the limitations of bureaucratic power vis-à-vis private sector actors (Samuels, 1987), the judiciary (Upham, 1987); and politicians (Ramseyer & Rosenbluth, 1993).

<sup>51</sup> *Themis* (March 2002), p. 24.

<sup>52</sup> Nishikawa, 2000, pp. 74–75.

<sup>53</sup> The importance of this role is underscored by the fact that the CLB director-general was exempted from a late-1990s reform banning bureaucrats from answering questions on behalf of ministers during Diet deliberations. Nishikawa, 2000, p. 90.

<sup>54</sup> Nishikawa, 2000, p. 87; Nakamura, 2001, p. 11.

<sup>55</sup> *Asahi Shimbun*, August 2, 2013.

## VI. Interpreting Article 9 and Collective Self-Defense

The “Japaneseness” of the postwar constitution becomes clearer when one considers how individual articles have been interpreted and implemented in the period since the end of the occupation in 1952. To emphasize the significance this process has played in constitutional development in postwar Japan, the focus here will be on an element crucial to one of MacArthur’s three fundamental principles for the postwar constitution: that Japan was to renounce war as a sovereign right.

Article 9 is both a two-paragraph constitutional article and a complex set of interpretations, most of which were not formalized until after Japan regained independence.<sup>56</sup> During the postwar constitution’s first decade, a range of differing views among conservative leaders, intense structural pressures, and a volatile electoral situation combined to produce a “period of flexible interpretation” in which the government position on Article 9’s meaning remained fundamentally ambiguous.<sup>57</sup> While continuing in society at large for decades, the debate over the principle at the heart of Article 9 was largely settled within the executive branch in 1954. The resulting interpretation, a product of a political compromise, argues that Japan, as a sovereign nation, retains the right of self-defense and can legally exercise that right under Article 9. However, the right of self-defense is narrowly defined. Japan can use force to defend itself only under three conditions: 1) It is facing an imminent and illegitimate act of aggression; 2) there is no other means of countering this act; and 3) the use of force in self-defense is limited to the minimum necessary level.<sup>58</sup> Second, the concept of self-defense is itself narrowly defined. The government position states that Japan may not utilize force in any way to resolve international disputes, defined here as any potential conflict not directly related to the defense of national territory.<sup>59</sup>

With these two definitions, the government interpretation fell midway between the state non-aggression interpretation of the article favored by MacArthur and the GS staff and state non-violence interpretation favored by the Japan Socialist Party (JSP) and some intellectuals.<sup>60</sup> Since force was sanctioned only for self-defense in the narrowest sense—to defend the nation against attack—the interpretation constituted a *de facto* ban on Japanese participation in collective self-defense arrangements.<sup>61</sup> The resulting position thus imposed two major constraints on security policy: 1) limitations on *force levels* (to the level sufficient for self-defense, narrowly defined); and 2) limitations on the *use of*

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<sup>56</sup> Article 9 reads: Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

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

<sup>57</sup> Auer, 1990, p. 176.

<sup>58</sup> Nakamura, 2001, p. 142. The CLB reinforced this position by defining the “right of belligerency” (*kōsenken*) renounced in Article 9. In this view, this concept included not only internationally accepted wartime rights, such as the right to seize enemy ships or to govern occupied territory, but also the right of the nation to pursue a wartime strategy of obliterating the enemy homeland in order to prevent any future threat. The renunciation of these rights thus limited Japan’s defensive use of force to the “minimum necessary level.” See *Ibid.*, pp. 145–146.

<sup>59</sup> *Ibid.*, p. 147.

<sup>60</sup> For a fuller treatment of these interpretations, see Boyd and Samuels, 2005.

<sup>61</sup> Kataoka, 1991, p. 118–120.

*force* (limited to self-defense, narrowly defined). In addition, since the nation's right to use and possess force was limited to the purpose of self-defense, this interpretation implicitly denied the right to use force in order to protect the security of an allied country. In this way, a third major constraint followed logically from the preceding two: 3) a ban on participation in *collective self-defense* arrangements.<sup>62</sup>

It should be noted that this interpretation, as well as the interpretive process leading up to it, did not sit well with the U.S. officials, nor was the 1954 interpretation consistent with the final consensus view of MacArthur and his GS staff. In particular, it differed in the view that Japan could not enter into alliance arrangements that required it to exercise the right of collective self-defense, a commitment that U.S. negotiators very much wanted from Japan throughout the decade of the 1950s and beyond. A famous and public example of the frustration felt by U.S. officials over this and related issues occurred when then-Vice President Richard Nixon was dispatched to Japan in November 1953 and publicly declared Article 9 a "mistake" after facing its repeated invocation in objection to his demands for Japan to do more for its own defense.<sup>63</sup>

Unable to use force for purposes other than defense from attack, Japan's right to extend aid to an ally under attack by a third party has thus been understood to be circumscribed since the establishment of the Self Defense Force (SDF), which also occurred in 1954. This understanding was fortified during the Diet debate over revising the U.S.-Japan Security Treaty in 1960. During these negotiations, the administration of Kishi Nobusuke, which had adopted unchanged the 1954 interpretation of Article Nine, was forced to deal with its implications for alliance policy. Under unrelenting Diet questioning, CLB Director-General Hayashi Shūzō followed the reasoning of 1954 to its logical conclusion in the following interpretations: 1) "Collective self-defense" is the act of defending another nation as if defending one's own nation; 2) The activity of engaging in collective self-defense is understood narrowly as the *use of force* on the behalf of an ally and thus does not include other types of wartime cooperation, such as the leasing of bases or the extension of economic aid; and 3) The exercise of the right of collective self-defense, while granted under Article 51 of the United Nations (UN) Charter, is denied Japan under Article 9 of the constitution.<sup>64</sup> Bolstered by the Supreme Court's reticence in the Sunakawa decision of December 1959, Prime Minister Kishi and Hayashi adhered to the above interpretations throughout the treaty debate in early 1960. The lack of mutuality in the resulting treaty is thus directly attributable to Japanese interpretations of Article Nine not favored by Japan's American partners.

Following the treaty's passage, the collective self-defense corollary of the 1954 interpretation took root over the next four decades.<sup>65</sup> In 1972, the CLB repeated that the use of force by Japan on the behalf of an ally under attack by a third party was unconstitutional.<sup>66</sup> Here, collective self-defense was

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<sup>62</sup> Kataoka, 1991, p. 136. This is hereafter referred to as the "1954 interpretation."

<sup>63</sup> Hook & McCormack, 2001, pp. 13–14.

<sup>64</sup> Nakamura, 2001, pp. 181–185.

<sup>65</sup> For a brief summary of the development of this aspect of the government interpretation from the CLB's point-of-view, see the interview with former CLB Director-General Tsunoda Osamu in *Sankei Shimbun*, December 29, 2001.

<sup>66</sup> Nishikawa, 2000, p. 44.

again narrowly defined as the use of force on behalf of an ally, a position that freed Japan to engage in other forms of security-related cooperation, such as the extension of economic aid or participation in economic sanctions regimes. In 1975, reiterating an argument first made during the 1960 security treaty debate, a CLB statement to the Diet maintained that Japan's right of individual self-defense (*kobetsuteki jieiken*) allowed it to use force as required by Article 5 of the US–Japan Security Treaty in the event of an attack on territories under its administrative control.<sup>67</sup> Finally, in 1981, the CLB restated the legal argument that Japan retained the right of collective self-defense under international law, but was forbidden from exercising that right by Article 9.<sup>68</sup> Both the narrow definition of collective self-defense and the interpretation that Article 9 bars the exercise of Japan's sovereign right in this key area of security policy remain the government's position to the present day.<sup>69</sup>

In practice, the ban on collective self-defense has had significant implications for Japanese security policy. First, as noted above, Japan has been party to an unequal security arrangement with the U.S. for over sixty years, and the lack of mutuality in the U.S.–Japan security relationship has from the start been rooted in constitutional interpretation. Although the executive branch's definition of collective self-defense was not clarified until the early 1970s, the Japanese government has been consistent in its argument that the use of force on behalf of a third party is unconstitutional and has repeatedly cited Article 9 as the reason why Japan cannot reciprocate U.S. security guarantees. This position hardened in the face of Prime Minister Kishi's attempt to revise the security treaty in the late 1950s.

In recent years, the government has revised the guidelines for the operation of the U.S.–Japan security treaty. In the form finally passed by the Diet in 1999, the new guidelines allowed the SDF to provide certain types of support to U.S. forces dealing with a situation that although impacting the security of Japan is located in “areas surrounding Japan” (*shūhen jittai*). Although viewed as a violation of the ban on collective self-defense by some critics, this assertion should be tempered by the following considerations. First, under this law, Japanese support was confined to non-combat roles and did not even include the transportation of weapons. Second, these support activities were confined to the “rear area” (*kōhō*), or regions where combat is not ongoing. Third, both of these stipulations followed a long-standing CLB interpretation, first offered by Director-General Hayashi in 1959, that joint activities during a military emergency are unconstitutional only when the activities are so close to the battlefield and so integrally related to the act of combat that Japanese forces would be viewed as having “become one” (*ittai ka*) with the ally's attacking force.<sup>70</sup> Although modern warfare often makes the distinction between front-line and rear areas a moot point, these limitations, while reducing the range of the collective self-defense ban, still retained the central force of the government interpretation—Japan could not use force to aid a third party under attack.

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<sup>67</sup> Asakumo Shimbunsha, 1998, p. 538.

<sup>68</sup> Asakumo Shimbunsha, 1998, pp. 538–539. This argument was originally made in a statement to the Diet by Prime Minister Kishi in April 1960. See Nakamura, 2001, p. 181.

<sup>69</sup> Japan Defense Agency, 2001, p. 64.

<sup>70</sup> Nakamura, 2001, pp. 188–189.

Following the terrorist attacks on the U.S. of September 11, 2001, the administration of Prime Minister Koizumi Junichirō sponsored and passed a bill allowing the dispatch Marine Self Defense Force (MSDF) ships to provide intelligence, water and fuel to allied operations in the Indian Ocean. Although this triggered several constitutional debates—the deployment of AEGIS-equipped destroyers was initially denied to avoid the appearance of coordinated behavior under possible combat conditions—it was nonetheless renewed multiple times after its original passage. Although not violating the core tenets of use of force or collective self-defense interpretations, Koizumi’s anti-terror policy further reduced the range of the collective self-defense ban by allowing non-combat participation in an on-going military action by an international force other than a UN peace-keeping operations (PKO), an extension that was further solidified by his deployment of the SDF to Iraq in 2004. By increasing the venues in which SDF deployments are considered constitutional, Koizumi reduced the range of constraint on the collective self-defense ban.

Although Koizumi’s actions did not directly challenge the collective self-defense tenet of the 1954 interpretation, they have opened the possibility of future changes that may do just that. Prime Minister Abe Shinzō has long shown an interest in reinterpreting Article 9. He established advisory councils in both of his two administrations that have recommended changes in the interpretation be made to loosen the restriction on the exercise of the right of collective self-defense.<sup>71</sup> As noted above, in September 2012, Prime Minister Abe appointed a former ambassador who had never worked in the CLB to head the organization, in a move the media has speculated is due to the former ambassador’s approval of changing the interpretation to allow for some exercise of this right.<sup>72</sup> If the Abe administration does change the interpretation in this way, it will open up yet another chapter in Article 9’s constitutional development, and this time, as in so many times in the past, the hand turning the page will again be Japanese.

## VII. Conclusion

The case examined in the previous section shows that through informal means the postwar constitution has been and continues to be changed in both major and minor ways by successive generations of Japanese leaders. Although one may reject the “living constitution” approach in favor of some form of “originalism,” this is a normative judgment. Any objective analysis of the historical record of the postwar development of the Japanese constitution reveals that Japan, as is the case with other constitutional democracies with difficult amendment procedures, has altered its constitution largely through changes in interpretations. Although the passive role played by the judiciary and the relative importance of CLB bureaucrats in this process may distinguish Japan’s postwar constitutional development, it is impossible to argue that major changes, such as the interpretation that Japan could not exercise its inherent right of collective self-defense, were the product of the U.S. occupation. Indeed, in the case of

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<sup>71</sup> *Asahi Shimbun*, June 24, 2008; *Asahi Shimbun*, August 10, 2013.

<sup>72</sup> *Asahi Shimbun*, August 27, 2013.

collective self-defense, the current interpretation has long been used in security policy negotiations with the U.S. to win concessions and to keep Japan from shouldering burdens its leaders (and often the general populace) did not want to bear.<sup>73</sup> In fact, if the Abe administration does change the current interpretation to allow for some form of limited exercise of the right, it may open him up to criticism that he is simply bowing down to U.S. pressure. It also seems likely that whatever interpretive changes are made, some form of restriction on the exercise of the right will remain. If so, Article 9 will continue to give Japanese negotiators some measure of leverage in security cooperation talks with the U.S.

One of the ironies of the current debate over constitutional revision is that many proposed changes, though by no means all, simply formalize what is already informal practice established through interpretation (i.e. the real constitution). For example, the 2012 LDP constitutional revision proposal adds the word “*genshu*” or “head of state” to Article 1 of Chapter 1, which establishes the position of the Emperor vis-à-vis the state. Especially in the early postwar period, there was considerable debate over whether the constitution should be revised to make the Emperor head of state. However, these debates included those who sought to invest various degrees of political power in the Emperor and thus limit or eliminate popular sovereignty.<sup>74</sup> By the mid-1960s, however, the view of the Emperor as a “symbolic head of state” had taken hold and Chapter 1 had been reinterpreted to allow the Emperor to commit a category of public acts, those based on his position as the symbol of the nation such as tours of the country, receiving foreign dignitaries, etc., that is nowhere specified in the postwar constitution.<sup>75</sup> In this way, although popular sovereignty was retained, the Emperor’s status was clarified as one not dissimilar from that of the British monarch. The LDP’s proposal merely formalizes this existing understanding. In the draft, the Emperor is declared “*genshu*” and then immediately referred to as the “symbol of Japan and the Japanese people’s unity.” The next line then affirms that sovereignty rests in the people. Coupled with other proposed changes to Chapter 1, these revisions, if enacted, would largely only formalize the current interpretive status quo. It is also interesting to note that the LDP’s draft language for Article 9 would allow Japan to exercise the right of collective self-defense, something that Prime Minister Abe is currently considering allowing through reinterpretation.

The above discussion is not meant to imply that constitutional revision should never be implemented in Japan nor that the LDP proposal does not contain significant changes that would likely have wide-reaching effects on Japan’s constitutional order. The Japanese people should change their constitution as they think best through procedures of their own choosing. The LDP proposal would grant vast new emergency powers to the prime minister, expand the role of the military in foreign policy, place limits on individual rights that may conflict with the needs of “public order,” and add new duties to the responsibilities of citizens.<sup>76</sup> It is a profoundly conservative proposal that would fundamentally

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<sup>73</sup> Boyd & Samuels, 2005.

<sup>74</sup> Ruoff, 2001, pp. 73–75.

<sup>75</sup> Ibid., pp. 51–66, 76–84.

<sup>76</sup> For a critical assessment of the LDP proposal, see Repeta, 2013.

change the postwar constitutional order. If such ideas resonate with the Japanese people, then a major remaking of Japan's constitution is in order. However, this remaking should not be justified by claims that the current constitution is a foreign imposition. Born of a collaborative, if imperfect, process, the postwar constitution has been open to revision and reinterpretation by the Japanese people for nearly seventy years. That they have chosen to reinterpret some areas, respect others, but not formally revise any part is partially a result of the difficulty of the amendment process but also clearly attributable to the popular will. If the popular will should change, then calls for revision should be based on new visions of what Japan should be, not old claims of foreign imposition.

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