

# AMERICA GIVETH, AND AMERICA TAKETH AWAY: THE FATE OF ARTICLE 9 AFTER THE FUTENMA BASE DISPUTE

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## RENUNCIATION OF WAR

*Article 9. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.<sup>1</sup>*

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1. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9 (Japan), available at [http://www.kantei.go.jp/foreign/constitution\\_and\\_government\\_of\\_japan/constitution\\_e.html](http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html).

## INTRODUCTION

On its face, the above declaration, Article 9 of the Constitution of Japan, seems quixotic and vague. How can a people “forever” renounce war? Were there not at least some Japanese people who refused to renounce war, who still believed in the validity of force as a means of settling international disputes? How can one generation speak for and bind future generations with such an extreme provision? Can a people truly believe that armed forces or war potential will *never* be maintained? In light of these questions, which imply their answers, Article 9 would seem to have been set up for failure. An ideal, however noble, is still an ideal: an imagined state of unrealizable perfection. But what to do with an ideal that is codified in law? And not just any law, but the constitution itself: a document that provides the skeleton for all other laws? What to do, in other words, with formative law that is impossible to sustain?

Politicians and other commentators have been chipping away at Article 9 for years.<sup>2</sup> In the wake of the American-led War in Iraq, however, Article 9 underwent heightened and unremitting challenge.<sup>3</sup> With the exception of current prime minister Naoto Kan, all of Japan’s prime ministers since the Iraq War—Junichiro Koizumi,<sup>4</sup> Shinzo Abe,<sup>5</sup> Yasuo Fukuda,<sup>6</sup> Taro Aso,<sup>7</sup> and Yukio Hatoyama<sup>8</sup>—have at some time called for the revision, if not the

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2. See Kendrick F. Royer, *The Demise of the World’s First Pacifist Constitution: Japanese Constitutional Interpretation and the Growth of Executive Power to Make War*, 26 VAND. J. TRANSNAT’L L. 749, 770-97 (1993); see also Akio Sugeno, *The Japanese Pacifist Constitution is in Danger*, 64 GUILD PRAC. 184 (2007).

3. See generally Tomohito Shinoda, *Japan’s Top-Down Policy Process to Dispatch the SDF to Iraq*, 7 JAPANESE J. OF POL. SCI. 71, 71-91 (2006).

4. *Koizumi Calls for Article 9 Revision*, DAILY YOMIURI (Tokyo), Sept. 14, 2003, at 1; Peter Alford, *Koizumi Selects Allies to Back Military Push*, WEEKEND AUSTRALIAN, Oct. 9, 2004, at 16; Reiji Yoshida, *Koizumi Urges LDP-DPJ Effort to Revise Constitution*, JAPAN TIMES, Jan. 15, 2004, <http://www.japantimes.co.jp/text/nn20040115a3.html>.

5. *Abe Calls for a ‘Bold Review’ of Japanese Constitution*, N.Y. TIMES, May 3, 2007, <http://www.nytimes.com/2007/05/03/world/asia/03iht-japan.1.5546774.html>.

6. Shinichi Murao & Shozo Nakayama, *Debates on Constitution May Intensify*, DAILY YOMIURI (Tokyo), May 4, 2006, at 3.

7. *Japan Says it Could Build a Nuclear Bomb*, WASH. POST, Nov. 29, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/29/AR2006112901641.html>; see also *Officials Stay Calm over Aso’s ‘Collective Self Defense’ Remark*, JAPAN TODAY, Oct. 3, 2008, <http://www.japantoday.com/category/politics/view/officials-stay-calm-over-asos-collective-self-defense-remark>; see also Craig Martin, *The Fatal Flaw in Trying to Impose a New Interpretation on Article 9*, JAPAN TIMES, Oct. 5, 2008, <http://search.japantimes.co.jp/cgi-bin/ed20081005a2.html>.

8. *Opposition Leader Says Constitution Should Include Right to Wage War*, BBC SUMMARY OF WORLD BROADCASTS (Oct. 17, 2000), at part 3; see also *Doing Battle over Article 9*, JAPAN TIMES, May 3, 2000, <http://search.japantimes.co.jp/cgi-bin/ed20000503a1.html>; see also Tetsushi Kajimoto, *Hatoyama’s Proposed Amendment*

complete overhaul, of Article 9.<sup>9</sup> The Obama administration has fortified this trend in remilitarization by mounting pressure on recent Japanese administrations to step up the role of the Japanese military in Asian affairs.<sup>10</sup> At the same time, the Obama administration has remained mostly unyielding about the maintenance of the U.S. air station known as Futenma on the island of Okinawa.

This Article considers how the Obama administration's policies toward Japan implicate Article 9. More specifically, it argues that the Futenma base dispute (as it has come to be known) jeopardizes the very existence of Article 9 by threatening to render it moot and by expanding the already expansive interpretations of Article 9. Part I provides a brief history of the Futenma base dispute during the Obama years, and Part II explains the effects of the Futenma base dispute on Article 9. More specifically, Part II contextualizes the Futenma issue by way of the legislative and judicial history of Article 9 and suggests that the intermingling of Japanese people and resources with the U.S. military allows Japan to circumvent Article 9 without massive public outcry. The fact of the matter is that Japan is relying on American troops to perform actions (maintaining combat troops and weapons, conducting military exercises and operations, and establishing armed defensive zones) that Japan could not do on its own because of constitutional restraints. Japan is permitting and in some cases encouraging the U.S. military to carry out actions that Japan is forbidden by its constitution to carry out.

One thing this article does not do is suggest that Japan should or should not amend Article 9. Issues of internal Japanese politics are not the concern of this piece; the concern of this piece is the U.S. military presence that threatens to undermine the constitution of a sovereign nation. A secondary concern is for the people of Okinawa who want the U.S. troops off their island. The *obiter dictum* of this article suggests that not just the Futenma air station but all U.S. forces on Okinawa should be withdrawn from the island not only because the U.S. military jeopardizes the import and impact of Article 9, but also because the people of Okinawa generally oppose the presence of U.S. troops in their territory. The recent court decision in *Mori*

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*Acknowledges the SDF is a Military*, JAPAN TIMES, Feb. 4, 2005, <http://www.japantimes.co.jp/text/nn20050204a4.html>.

9. Some of these calls for revision were made before these men were prime minister, and even, in some cases, before the Iraq War.

10. See Allen Mendenhall, *Base Maneuvers*, LIBERTY, Aug. 2010, at 11-12; Allen Mendenhall, *Okinawa Occupied*, CHRONICLES: A MAGAZINE OF AMERICAN CULTURE, Sept. 2010, at 20-22, available at [allenmendenhall.com/wp-content/uploads/Okinawa-Occupied.pdf](http://allenmendenhall.com/wp-content/uploads/Okinawa-Occupied.pdf); Allen Mendenhall, *Obama Out of Okinawa*, ANTIWAR.COM (Dec. 22, 2010), <http://original.antiwar.com/mendenhall/2010/12/21/obama-out-of-okinawa/>; Allen Mendenhall, *The Latest Happy Face of the Ruling Class*, COUNTERPUNCH (Dec. 27, 2010), <http://www.counterpunch.org/mendenhall12272010.html>; and Allen Mendenhall, *How Long Must Okinawans Wait*, TAKI'S MAGAZINE, (Jan. 11, 2011), [http://takimag.com/article/how\\_long\\_must\\_okinawans\\_wait/print](http://takimag.com/article/how_long_must_okinawans_wait/print).

v. *Japan* provides Okinawans with a constitutional argument for challenging the presence of U.S. bases like Futenma. That decision established a concrete “right to live in peace” that, to be actionable, must bear a “legal relationship” to military activity that violates Article 9.

Despite the attention that the Futenma base dispute has generated in Japan, relatively little scholarship in English has addressed Futenma and its effects upon Article 9, perhaps because the issue remains unresolved. Without purporting to offer a definitive resolution to this longstanding conflict, this Article attempts to fill that lacuna in scholarship while synthesizing several English-language sources on Futenma and contextualizing these sources within the broader meaning and history of Article 9. The Futenma base dispute is far from over; it is probably just beginning. The irony (or paradox) of the Futenma base dispute is that America spearheaded the pacifist provisions of Article 9 after World War II, but because of Futenma and other American policies in Asia, America might bring about the apparent violation of the very clause that it made possible.

#### I. A BRIEF HISTORY OF THE FUTENMA BASE DISPUTE

The Futenma base dispute springs out of a long and complex relationship between Japan and the U.S. The U.S. military officially occupied Okinawa from the end of World War II until 1972.<sup>11</sup> The decision to plant U.S. troops on Okinawa probably had to do with Japanese discrimination against Okinawans in addition to joint Japanese and American efforts to modernize Okinawa.<sup>12</sup> U.S. troops have remained on the island since 1972. As of 1998, Okinawa hosted over half of the U.S. forces in Japan.<sup>13</sup> At that time, U.S. forces took up 10% of all land on Okinawa.<sup>14</sup> In 1995, three U.S. servicemen gang-raped a 12 year old girl, sparking furious protests that caused President Bill Clinton to express national regret over the soldiers’ actions.<sup>15</sup> This event brought about an enormous rift between local Okinawan officials and the Japanese government over the issue of U.S.

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11. U.S. GEN. ACCOUNTING OFFICE, GAO-98-66, OVERSEAS PRESENCE: ISSUES INVOLVED IN REDUCING THE IMPACT OF THE U.S. MILITARY PRESENCE ON OKINAWA 2 (1998) [hereinafter OVERSEAS PRESENCE].

12. On this score, see Masamichi S. Inoue, *We Are Okinawans But of a Different Kind*, 45 CURRENT ANTHROPOLOGY 85, 92 (2004).

13. See OVERSEAS PRESENCE, *supra* note 11, at 2.

14. *Id.*

15. Mary Jordan & Kevin Sullivan, *Americans Charged With Rape Turned Over to Police; Japanese Indictment of Three U.S. Servicemen in Okinawa Means Conviction Likely*, WASH. POST, Sept. 30, 1995, at A24; see also Op-Ed., *Questions of Justice in Okinawa*, N.Y. TIMES, Oct. 28, 1995, § 1, at 20, available at <http://www.nytimes.com/1995/10/28/opinion/questions-of-justice-in-okinawa.html?src=pm>; see also Kevin Sullivan, *3 Servicemen Admit Roles in Rape of Okinawan Girl*, WASH. POST, Nov. 8, 1995, at A1.

forces on the island.<sup>16</sup> This event also transformed the U.S. troops on Okinawa into “an element of the utmost importance in the formulation of the Joint Declaration on Security toward [*sic*] new era.”<sup>17</sup>

After the rape incident, the U.S. and Japan established the Special Action Committee on Okinawa, better known by its acronym SACO. The mission of SACO was to “reduce the burden on the people of Okinawa and thereby strengthen the Japan-U.S. alliance.”<sup>18</sup> At the behest of SACO, the U.S. and Japan established the Futenma accord in 1996. This agreement maintained that the U.S. military would return base and communications properties to private landowners and the prefecture, relocate helicopter landing zones, release Marine training areas, consolidate U.S. housing districts, terminate artillery live-fire training, relocate parachute drop trainings, implement noise reduction initiatives, and transfer Navy and other military aircrafts, among other things.<sup>19</sup> The release of the agreement did not finalize specifics about the implementation of various provisions within the agreement because, as Hitoshi Tanaka, then Deputy Director-General of the North American Affairs Bureau (1996-98), explained,

we have to formulate concrete ideas for the development and use of returned land, work out the costs involved and arrange for the required financial resources. Where facilities are to be relocated, we also need to get approval from local communities around relocation sites and then build the actual facilities.<sup>20</sup>

Tanaka stated quite presciently that “although we have taken the utmost care to select the least problematic relocation sites, criticism, particularly from residents around the sites, is still unavoidable.”<sup>21</sup> Finally, he noted, “[i]t will be no easy task to persuade those people,” by which he meant the Okinawans.<sup>22</sup> Tanaka was right to anticipate criticism. Shortly after the agreement was memorialized, a seemingly irritated Okinawa Governor Masahide Ota remarked, “[i]t’s painful to ask some areas in and out of

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16. *Okinawa Rape Case Brings Rift in Government*, YOMIURI SHIMBUN (Japan), Oct. 16, 1995, at 2.

17. HITOSHI TANAKA, ET AL., JAPAN-U.S. SECURITY ALLIANCE FOR THE 21<sup>ST</sup> CENTURY: CORNERSTONE OF DEMOCRACY PEACE AND PROSPERITY FOR OUR FUTURE GENERATIONS 5 (1996).

18. Ministry of Foreign Affairs of Japan, *The Special Action Committee on Okinawa (SACO) Final Report* (Dec. 2, 1996), available at [http://www.state.gov/www/regions/eap/japan/rpt-saco\\_final\\_961202.html](http://www.state.gov/www/regions/eap/japan/rpt-saco_final_961202.html).

19. *Id.* See also Ministry of Foreign Affairs of Japan, *The Japan-U.S. Special Action Committee (SACO) Interim Report* (Apr. 15, 1996), available at <http://www.mofa.go.jp/region/n-america/us/security/seco.html>; see also *The SACO Final Report on Futenma Air Station (an integral part of the SACO Final Report)* (Dec. 2, 1996), available at <http://www.mofa.go.jp/region/n-america/us/security/96saco2.html>.

20. Tanaka, *supra* note 17, at 8.

21. *Id.*

22. *Id.*

Okinawa to bear the burden” because “Okinawans hate to see their own pain and agony passed to others.”<sup>23</sup>

After years of false starts, delays, and setbacks, the Futenma accord received renewed media attention in 2006 when the U.S. and Japanese governments agreed to relocate the Futenma air station to a less populated area near Camp Schwab in Nago (which is also on Okinawa) and gradually to redeploy 8,000 U.S. military personnel and their families to new facilities on Guam.<sup>24</sup> The relocation was a major issue in the 2006 Okinawa gubernatorial campaigns that resulted in Hirokazu Nakaima’s victory.<sup>25</sup> Nakaima had argued that the best option for Futenma would be “relocation outside the Okinawa Prefecture,” but he tempered that position over the course of his campaign by refocusing on economic and tourist initiatives rather than on the U.S. military.<sup>26</sup> By 2010, when he faced and won reelection, Nakaima took a harder stance against the Futenma base, and at that time he referred to base relocation out of Okinawa as the “fast” option.<sup>27</sup> The Futenma accord has since been called the “most problematic bilateral issue that has surfaced since the Hatoyama Cabinet was inaugurated.”<sup>28</sup> Yukio Hatoyama was the Prime Minister of Japan from September 2009 to June 2010.

Notwithstanding the rape incident in 1995, several key factors motivated the 2006 accord that called for a reduction in U.S. troops and a change in base geography. Reporting to the U.S. Congress in June 2010, Emma Chanlett-Avery, William H. Cooper, and Mark E. Manyin suggested the following about the goals of the accord:

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23. Kiyotaka Shibasaki, *Shift in Okinawa Base Burden Causes Opposition to Mount*, DAILY YOMIURI (Japan), Apr. 16, 1996, at 2.

24. See Hidemichi Katsumata, *Futenma Issue Looms over Okinawa Poll*, DAILY YOMIURI (Japan), Oct. 31, 2006, at 4; see also Tatsuya Fukumoto & Takashi Imai, *Document Seen as Alliance Road Map; Relocation Plan Hailed for Easing Hosting Burden on Okinawa Pref.*, DAILY YOMIURI (Japan), May 3, 2006, at 3; see also *Okinawa Gov. OK’s Base Plan Inamine Expresses Broad Agreement with Futenma Shift*, DAILY YOMIURI (Japan), May 12, 2006, at 1; see also *Politics must not delay Futenma relocation*, DAILY YOMIURI 4 (September 4, 2006); see also Op-Ed., *Futenma Relocation Agreement*, JAPAN TIMES, May 18, 2006, <http://search.japantimes.co.jp/cgi-bin/ed20060518a1.html>; see also Kiroku Hanai, *U.S.-Dependent to What End?*, JAPAN TIMES, June 16, 2006, <http://search.japantimes.co.jp/cgi-bin/eo20060626kh.html>.

25. Takashi Oda, *Political Pulse; Voters Failed to Touch Base*, DAILY YOMIURI (Japan), Nov. 23, 2006, at 4.

26. *Id.*

27. See *Nakaima Calls Futenma Relocation Outside of Okinawa ‘Fast’ Option*, JAPAN TODAY, Dec. 28, 2010, <http://www.japantoday.com/category/politics/view/nakaima-calls-futenma-relocation-out-of-okinawa-fast-option>; see also *Okinawa Governor Re-elected in U.S. Base Dominated Poll*, BBC MONITORING ASIA-PAC.–POL (Nov. 19, 2010), <http://www.bbc.co.uk/news/world-asia-pacific-11858992>.

28. EMMA CHANLETT-AVERY ET. AL., CONG. RESEARCH SERV., RL 33436, JAPAN-U.S. RELATIONS: ISSUES FOR CONGRESS 1 (2010).

The reduction of Marines on Okinawa seeks to quell the political controversy that has surrounded the presence of U.S. forces in the southernmost part of Japan for years. [ . . . ] Though constituting less than 1% of Japan's land mass, Okinawa currently hosts 65% of the total U.S. forces in Japan. The current controversy reflects a fundamental tension in the relationship between Okinawa and the central government in Tokyo: while the country reaps the benefit of the U.S. security guarantee, the Okinawans must bear the burden of hosting thousands of foreign troops. Although the host cities are economically dependent on the bases, residents' grievances include noise, petty and occasionally violent crime, and environmental degradation stemming from the U.S. presence.<sup>29</sup>

I quote at length because the authors make several important points. Part of what makes the Okinawa issue so complicated, the authors seem to suggest, is the Tokyo-Washington alliance. Elsewhere I have proposed that this Tokyo-Washington alliance is like governmental collusion that has effectively disenfranchised Okinawans, who do not have the political clout or muscle to challenge a single massive central government, let alone two such governments.<sup>30</sup> In saying this, I have echoed the criticisms of others. Glenn D. Hook and Richard Siddle explain, for example, that for Japan, "the 'Okinawa problem' is one to be solved through economic blackmail or heavy-handed political tactics."<sup>31</sup> These commentators point to "the continued use by the Japanese state of economic carrot-and-stick methods to placate Okinawans over the bases."<sup>32</sup> The use of these methods indicates "a profound lack of imagination among Japan's political leadership and an unwillingness to let localities practise any meaningful form of autonomy."<sup>33</sup>

Because the island of Okinawa is culturally, ethnically, and historically distinct from Japan proper, and because Okinawans continue to have their interests slighted or suppressed by the Japanese government in Tokyo, experts like Doug Bandow have remarked that the Tokyo-Washington alliance smacks of collusion and colonialism.<sup>34</sup> Others have likewise called

29. *Id.* at 7.

30. See Mendenhall, *Okinawa Occupied*, *supra* note 10, at 20; see also Allen Mendenhall, *Don't Forget Okinawa*, THEMENDENHALL.COM (Mar. 4, 2011), <http://themendenhall.com/2011/03/04/dont-forget-okinawa/>. Asian historian and political activist Chalmers Johnston also refers to the Washington-Tokyo relationship as "collusion." CHALMERS JOHNSTON, *BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE* 57 (Henry Holt & Co. 2004) (2000).

31. JAPAN AND OKINAWA: STRUCTURE AND SUBJECTIVITY 244 (Glenn D. Hook & Richard Siddle eds., 2003).

32. *Id.*

33. *Id.*

34. See Doug Bandow, *Freeing Okinawa*, KOREA HERALD, May 18, 1999 available at [http://www.cato.org/pub\\_display.php?pub\\_id=5127](http://www.cato.org/pub_display.php?pub_id=5127); see also Doug Bandow, *Okinawa and the Problem of Empire*, HUFFINGTON POST (March 25, 2010, 2:59 AM), [http://www.huffingtonpost.com/doug-bandow/okinawa-and-the-problems\\_b\\_512610.html?bandow/okinawa-and-the-problems\\_b\\_512610.html?](http://www.huffingtonpost.com/doug-bandow/okinawa-and-the-problems_b_512610.html?bandow/okinawa-and-the-problems_b_512610.html?) ("Today

Okinawa a “dumping ground”<sup>35</sup> for U.S. bases and have suggested that Okinawans are treated as “second class” citizens in Japan.<sup>36</sup>

The Tokyo-Washington alliance was temporarily unsettled when the leaders of the U.S. and Japan took on new faces and personalities, first in Obama, who was elected in 2008, and then in Hatoyama, who was elected in 2009. Under Hatoyama’s leadership, the Democratic Party of Japan (DPJ) gained power over the Liberal Democratic Party (LDP), which had more or less enjoyed political supremacy for the last 60 years. The election results bothered Washington and the Obama administration because the

both U.S. and Japanese government officials cheerfully conspire against Okinawans.”); *see also* DOUG BANDOW, *FOREIGN FOLLIES: AMERICA’S NEW GLOBAL EMPIRE* 141 (2006) (“Washington and Tokyo continued to collude against the island.”). For further reading on Okinawa and colonialism, see Darrell Y. Hamamoto, ‘*Soft Colonialism*’: A *Nikkei Perspective on Contemporary Okinawa*, 3 *OKINAWAN J. OF AM. STUD.* 28 (2006) (describing the various incarnations of soft colonialism still present in Okinawa).

35. Andrew Daisuke Stewart, *Kayano v. Hokkaido Expropriation Committee Revisited: Recognition of Ryukyuan as a Cultural Minority Under the International Covenant on Civil and Political Rights, An Alternative Paradigm for Okinawan Demilitarization*, 4 *ASIAN-PAC. L. & POL’Y J.* 382, 384 (2003) (“Okinawa, Japan’s poorest and one of its smallest prefectures, has been a dumping ground for American bases since the end of World War II.”).

36. Post-war history reveals that Japan has consistently used Okinawa as a valuable bargaining chip in its dealings with the United States. Over the past fifty years, Japan has wagered the Okinawan people’s lives, lands, and future, in negotiating the terms of surrender, independence, and reversion. This strategy has succeeded in minimizing the number of U.S. bases in Japan and has kept its main islands free of nuclear weapons. The popular perception—the scenario that the Japanese government would most likely desire to perpetuate—is that Okinawa’s condition has been the result of a vanquished country being forced to acquiesce to the demands of a victorious foreign power. On the contrary, Japan has not been merely a passive bystander, but a willing participant in the process of designing Okinawa’s fate. While the Allies provided Japan with a level of self-determination in shaping its future, neither the United States nor Japan has ever consulted the Okinawan people or given them a voice as to what should become of them and their homeland. Little or nothing has been done so far to address or alleviate Okinawa’s numerous problems that stem from the excess proliferation of U.S. bases. Even the recent steps that have been taken through the formation of SACO have not brought about a difference in the everyday living conditions of the island’s inhabitants.

It has been over a century since Okinawa was a Japanese colony and the Japanese government no longer officially designates Okinawa’s inhabitants as second-class citizens. Today, the people of Okinawa are citizens of the Japanese nation-state, legally entitled to the same protection and privileges as all other Japanese. In reality, however, the hierarchical power structure that has defined the relationship between the *Wajin* and the Ryukyuans is still firmly in place. Whether it was the feudal era policy to separate and distinguish Ryukyuans from the *Wajin*, or the Meiji government’s attempts to eliminate all traces of Ryukyu culture, Japan has always determined Okinawa’s path. It is in this historical framework that people must view the current ‘Okinawa Problem.’ The fact that a disproportionate share of U.S. bases in Japan are located in Okinawa is due to the Japanese government’s view of the Okinawan people as “different,” and the current situation builds upon the historical treatment rooted in this perception. Notwithstanding the government’s official position of impartiality and equality with regard to Okinawa, the base situation in Okinawa is nothing but partial and unequal. *Id.* at 428-29.

defiant Hatoyama seemed unwilling to toe the Washington policy line.<sup>37</sup> Obama officials met with Japanese leaders on December 4, 2009 to express concern about Hatoyama's policies, but the meeting was a failure.<sup>38</sup> Japanese and American officials used the meeting to wrangle over the 2006 accord.<sup>39</sup> The particularly divisive issue at that meeting was not the accord generally but more specifically the role of the Futenma air base<sup>40</sup> that had sparked recent protests by Okinawans, who preferred that the base be moved completely out of Okinawa, and possibly out of Japan.<sup>41</sup>

Comments by U.S. Ambassador John Roos, who claimed that the Obama administration expected Japan to resolve the base dispute "expeditiously,"<sup>42</sup> set the stage for an argumentative meeting, as did similar comments by Defense Secretary Robert Gates, who, in a visit to Japan in October of that year,<sup>43</sup> lectured his Japanese hosts.<sup>44</sup> Gates informed his hosts, for instance, that the U.S. would not transfer 8,000 troops from Okinawa to Guam and would not surrender parcels of land belonging to Okinawans if Japan refused to honor the 2006 accord.<sup>45</sup> Gates's aggressive attitude toward the Japanese earned him the nickname "Grumpy Gates."<sup>46</sup>

Meanwhile, Hatoyama triggered media attention for his response to Gates's call for expedition: "We are not discussing this on the premise that it has to be decided by the end of the year."<sup>47</sup> Hatoyama had other political difficulties brewing at this time, especially with his party struggling to

37. See John Pomfret, *U.S. Concerned About New Japanese Premier Hatoyama*, WASH. POST, Dec. 29, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/28/AR2009122802271.html?hpid=topnews>; see also John Pomfret & Blaine Harden, *U.S. Struggles to Keep Step with Japan's Shifting Foreign Policy*, WASH. POST, Dec. 5, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/04/AR2009120401033.html>.

38. Pomfret & Harden, *supra* note 37 ("The meeting ended with no apparent agreement.").

39. *Id.*

40. See Eric Talmadge, *Futenma Dispute Strains Ties with Japan*, AIR FORCE TIMES, Dec. 29, 2009, [http://www.airforcetimes.com/news/2009/12/ap\\_japan\\_futenma\\_122909/](http://www.airforcetimes.com/news/2009/12/ap_japan_futenma_122909/); see also Pomfret & Harden, *supra* note 37.

41. Isabel Reynolds, *Thousands of Japanese Protest U.S. Base Plan*, REUTERS, Nov. 8, 2009, available at <http://www.reuters.com/article/idUSTRE5A70IG20091108>.

42. See Pomfret & Harden, *supra* note 37.

43. Robert Lloyd Parry, *Robert Gates Moves to Keep US Troops on Japan Soil*, TIMES (London), Oct. 22, 2009, available at <http://www.timesonline.co.uk/tol/news/world/asia/article6884982.ece>.

44. Araminta Wordsworth, *Obama Faces Yet Another Military Problem, This Time with Japan*, NAT'L POST (Toronto), Nov. 12, 2009, <http://network.nationalpost.com/NP/blogs/fullcomment/archive/2009/11/12/a-lesson-in-saving-face-in-the-inscrutable-east.aspx>.

45. See Pomfret & Harden, *supra* note 37.

46. Peter J. Brown, *Gates Gets Grumpy in Tokyo*, ASIA TIMES ONLINE, Oct. 28, 2009, <http://www.atimes.com/atimes/Japan/KJ28Dh01.html>.

47. See Pomfret & Harden, *supra* note 37.

adjust to its new leadership responsibilities.<sup>48</sup> In fact, the problems facing Hatoyama were so intense that DPJ leaders worried about losing their majority in the upper house.<sup>49</sup> One Tokyo-based analyst announced with apparent sarcasm “Hatoyama thinks the United States should be kind enough to wait on the base issue until this political problem is solved.”<sup>50</sup> The Japanese were not the only ones frustrated with the stalemate over the base issue or the Obama administration’s heavy-handedness in dealing with Hatoyama. Former U.S. Assistant Secretary of Defense Joseph Nye took to the pages of *The New York Times* to complain that “we need a more patient and strategic approach to Japan. We are allowing a second-order issue to threaten our long-term strategy for East Asia.”<sup>51</sup>

Despite this increasing attention to the Futenma base dispute, the Obama administration continued to pressure Hatoyama and the Japanese leadership even as Hillary Clinton met with Japanese leaders to try to defuse the tension.<sup>52</sup> The Obama administration, for its part, struggled to make sense of the messages that Hatoyama was sending about Futenma. Foreign Minister Katsuya Okada at one point told the Japanese media that the Hatoyama administration was suspending talks about the Futenma base relocation,<sup>53</sup> and then, a few weeks later, Hatoyama informed Obama that he (Hatoyama) had postponed his decision about Futenma until 2010.<sup>54</sup> Resolution of the Futenma base dispute was put off until 2011 (although at this writing resolution has yet to materialize).

Rather than moving towards Obama’s stated interests in 2010, Hatoyama moved away from them, going so far as to announce that the Japanese navy would no longer support the U.S.-led Afghan War.<sup>55</sup> In discussions with Japanese Foreign Minister Katsuya Okada in Hawaii,<sup>56</sup> Hillary Clinton tried to alleviate the situation by talking about the longstanding “U.S.-Japanese

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48. *Id.*

49. *Id.*

50. *Id.*

51. Joseph S. Nye, *An Alliance Larger than One Issue*, N.Y. TIMES, Jan. 6, 2010, <http://www.nytimes.com/2010/01/07/opinion/07nye.html>.

52. Jacob M. Schlesinger, *U.S. Seeks to Defuse Sense of ‘Crisi’ in Japan Alliance*, WALL ST. J., Jan. 13, 2010, [http://online.wsj.com/article/SB126325931200925649.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB126325931200925649.html?mod=googlenews_wsj).

53. Blaine Harden, *Report: Japan Suspends Talks About U.S. Air Base*, WASH. POST, Dec. 9, 2009, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/08/AR2009120801050.html>.

54. Pomfret, *supra*, note 37.

55. Martin Fackler, *Japan: Navy Ends Mission in Support of Afghan War*, N.Y. TIMES, Jan. 15, 2010, available at <http://www.nytimes.com/2010/01/16/world/asia/16briefs-Japan.html>.

56. See Andrew Quinn, *Clinton to Talk Bases, Security on Pacific Swing*, REUTERS, Jan. 11, 2010, available at <http://www.reuters.com/article/idUSTRE60A00320100111?type=politicsNews>; see also John Brinsley, *Clinton Urges Japan’s Okada to Resolve Air Base Issue*, BLOOMBERG (Jan. 12, 2010), <http://www.bloomberg.com/apps/news?pid=20601101&sid=aaumVRsOZekc>.

alliance”<sup>57</sup> and the need for “stability for the region.”<sup>58</sup> Clinton’s measured vocabulary and cautious rhetoric recast the Futenma base dispute to portray American interests as compatible with Japanese interests and as protective of Japan. “It is much bigger than any one particular issue,” she announced.<sup>59</sup>

After U.S. Senators Daniel Inouye (D-Hawaii) and Thad Cochran (R-Mississippi) met with Hatoyama in January 2010, the two countries reasserted their commitment to one another and downplayed the gravity of the Futenma dispute.<sup>60</sup> If this event signaled progress, then Clinton’s claims shortly thereafter that the U.S. would “exercise influence”<sup>61</sup> in Asia for the next 100 years—to say nothing of the strangeness of this prophesy—signaled a serious setback. Commenting on the ongoing feud between the Obama and Hatoyama administrations, Gavan McCormack, emeritus professor at Australian National University and coordinator of *The Asia-Pacific Journal*, used words like “paternalistic,” “colonial,” “anti-democratic,” and “intolerant” to refer to U.S. policy.<sup>62</sup> He mocked Obama’s campaign slogan by applying it to the situation in Okinawa: “Yes we can—but you can’t.”<sup>63</sup> Chalmers Johnson put it even more strongly:

The U.S. has become obsessed with maintaining our empire of military bases, which we cannot afford and which an increasing number of so-called host countries no longer want. I would strongly suggest that the United States climb off its high horse, move the Futenma Marines back to a base in the United States (such as Camp Pendleton, near where I live) and thank the Okinawans for their 65 years of forbearance.<sup>64</sup>

In April 2010, Japanese public support for Hatoyama sank to below 30%;<sup>65</sup> the Futenma base dispute was a key factor in the poll. During the same month, a Tokunoshima-based group collected 24,000 signatures for a

57. See Schlesinger, *supra* note 52; see also Clinton, *Okada begin talks on disputed US base in Japan*, FRANCE 24 (Jan. 12, 2010, 23:38), <http://www.france24.com/en/20100112-clinton-okada-begin-talks-disputed-us-base-japan>.

58. See Lachlan Carmichael, *Clinton Starts Asia Tour Amid Concerns Over Japan Ties*, ABS-CBN NEWS (Jan. 11, 2010, 2:16PM), <http://www.abs-cbnnews.com/world/01/11/10/clinton-starts-pacific-tour-amid-concerns-over-japan-ties>.

59. *Id.*

60. Chisa Fujioka, *Japan, U.S. Vow to Expand Ties Despite Base Feud*, REUTERS, Jan. 19, 2010, available at <http://www.reuters.com/article/idUSTRE60I14C20100119?type=politicsNews>.

61. Quinn, *supra* note 56.

62. Gavan McCormack, *The Battle of Okinawa 2009: Obama vs. Hatoyama*, ASIA-PAC. J., Nov, 16, 2009, at 5.

63. *Id.*

64. Chalmers Johnson, *Another Battle of Okinawa*, L.A. TIMES, May 6, 2010, <http://articles.latimes.com/2010/may/06/opinion/la-oe-johnson-20100506/2>.

65. Kyoko Hasegawa, *Support for Japan Sinks Below 30%*, AGENCE FRANCE PRESSE, Apr. 12, 2010, <http://www.google.com/hostednews/afp/article/ALeqM5hHfoyr2FVZTYLwLGtpFdNgNFgJ0g>.

petition opposed to the transfer of U.S. facilities to the island.<sup>66</sup> If those numbers can be considered representative, then 80% of Tokunoshima residents opposed hosting the U.S. base on their island.<sup>67</sup> It is not surprising, then, that Okinawans were upset by the DPJ stance on Futenma.

Three mayors on the island of Tokunoshima rejected the DPJ appeal to host the base, citing concerns about noise and security.<sup>68</sup> They drafted a letter to Obama in which they protested against the Futenma base relocation,<sup>69</sup> and they scheduled a rally to make abundantly clear the extent of their opposition to Futenma.<sup>70</sup> One mayor, Akira Okubo, said that he would send photos of the rally to the American president.<sup>71</sup> Another mayor, Susumu Inamine, staged a sit-in at the Diet in Tokyo.<sup>72</sup>

Hatoyama's stance did not translate into political success. He became more controversial among Japanese and Americans alike even as his resistance to Obama began to bring about results in the form of U.S. concessions, such as the returning of three significant sites to Japan: the bombing ranges on two nearby islands (Kumejima and Torishima) and the water area east of Okinawa.<sup>73</sup> At the same time, media outlets began challenging the widely accepted notion that U.S. Marines were indispensable to the safety of the region.<sup>74</sup> In the face of these seeming victories for Hatoyama, Obama undertook a publicity campaign of his own, questioning whether he could "trust" Hatoyama to "follow through," a comment that sounded more like a challenge than a regret.<sup>75</sup> One commentator called Obama's remarks "extraordinarily harsh."<sup>76</sup> At any rate,

66. *80% of Tokunoshima Residents Oppose Hosting U.S. Base*, JAPAN TIMES, May 6, 2010, <http://search.japantimes.co.jp/cgi-bin/nn20100506a2.html>.

67. *Id.*

68. *Japan Islanders to Reject US Base in Okinawa*, AGENCE FRANCE PRESSE, Apr. 13, 2010, <http://www.google.com/hostednews/afp/article/ALeqM5h04HtS77a3nSqi07n6Bjc0bIajDA>.

69. *Id.*

70. *Id.*

71. *Id.*

72. *See Okinawa's Mayors, Citizens Stage Sit-in to Call for U.S. Base Relocation*, GLOBAL TIMES (China), Apr. 27, 2010, <http://world.globaltimes.cn/asia-pacific/2011-04/526537.html>; *see also Okinawa Mayors Stage Sit-in at Diet to Seek U.S. Base Removal*, JAPAN TODAY, Apr. 27, 2010, <http://www.japantoday.com/category/politics/view/okinawa-mayors-stage-sit-in-at-diet-to-seek-us-base-removal>.

73. *U.S. Floats Modified Plan on Futenma*, JAPAN TIMES, Apr. 17, 2010, [<http://search.japantimes.co.jp/cgi-bin/nn20100417a2.html>].

74. Yutaka Yoshida, *Okinawa Marines Said Dispensable: Analysts Say Force Levels Have Been Greatly Reduced and Question Their Role as a Deterrent*, JAPAN TIMES, Apr. 16, 2010, <http://search.japantimes.co.jp/cgi-bin/nn20100416f4.html>.

75. *President Asked Hatoyama One Key Question: Can You 'Follow Through?'*, JAPAN TIMES, Apr. 19, 2010, <http://search.japantimes.co.jp/cgi-bin/nn20100419a2.html>.

76. *Obama Asked PM to Follow Through on Futenma Issue*, JAPAN TODAY, Apr. 3, 2010, <http://www.japantoday.com/category/politics/view/obama-asked-pm-to-follow-through-on-futenma-issue>.

neither Obama nor Hatoyama seemed to gain political leverage on the issue of Futenma. The base was simply too controversial.

Polls released on April 19 showed that more than half of Japanese voters wanted Hatoyama to step down if he could not resolve the base issue.<sup>77</sup> On April 20, Hatoyama's administration tried but failed to set up meetings with the three mayors on Tokunoshima;<sup>78</sup> the mayors gave the administration the cold shoulder. Despite the resistance in Tokunoshima, Hatoyama reiterated his pledge to resolve the base dispute by the end of May,<sup>79</sup> and Tokunoshima remained the Japanese government's favorite option for the relocation.<sup>80</sup> The U.S., however, rejected the proposal to relocate to Tokunoshima.<sup>81</sup>

Katsuya Okada, then Minister for Foreign Affairs, allegedly presented John Roos with a proposal on April 23 that some read<sup>82</sup> as a broad acceptance of the 2006 accord. Yet the proposal did not totally conform to U.S. designs. It called for altering a new runway in the town of Henoko, for instance, and for transferring parts of the Marine facility away from Okinawa.<sup>83</sup> *The Washington Post* broke the story of these supposed concessions. But Okada's proposal may not have existed. Just a day after *The Washington Post* story, Media Monitors Network (MMN) questioned the credibility of the Okada account,<sup>84</sup> which Hatoyama himself denied outright. MMN's Gordon Arnaut railed against *The Washington Post*: "It boggles the mind that a flagship U.S. newspaper could get a major story so wrong. Not just off by a little bit, but exactly opposite to the actual truth. And timed, cynically, to coincide with a huge demonstration against the

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77. *Poll Puts Pressure on Japan PM over U.S. Base Plan*, AGENCE FRANCE PRESSE, Apr. 18, 2010, <http://www.google.com/hostednews/afp/article/ALeqM5hcOLwYjZO8nkIYN2q7TePbxgU2Ow>.

78. *Tokunoshima Mayors Rebuff Base Overture: Feasibility of Hatoyama Plan Questioned by Kitazawa*, JAPAN TIMES, Apr. 21, 2010, <http://search.japantimes.co.jp/cgi-bin/nn20100421a1.html>.

79. Yoko Kubota, *Japan PM Says End-May Remains Deadline on Base Feud*, REUTERS, Apr. 21, 2010, <http://www.reuters.com/article/2010/04/21/us-japan-politics-idUSTRE63K1G920100421>.

80. *Tokunoshima Still Eyed for Base Relocation*, JAPAN TIMES, Apr. 22, 2010, <http://search.japantimes.co.jp/cgi-bin/nn20100422a4.html>.

81. *U.S. Rejects Idea of Moving Futenma Facility to Tokunoshima*, PEOPLE'S DAILY ONLINE (China), Apr. 22, 2010, <http://english.peopledaily.com.cn/90001/90777/90851/6960277.html>.

82. John Brinsley, *Japan Broadly Accepts U.S. Plan to Move Okinawa Base*, *Washington Post* Says, BLOOMBERG (Apr. 24, 2010), <http://www.bloomberg.com/apps/news?pid=20601101&sid=at3bAzysLeOk>.

83. John Pomfret, *Japan Moves to Settle Dispute With U.S. over Okinawa Base Relocation*, WASH. POST, Apr. 24, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/23/AR2010042305080.html?hpid=topnews>.

84. Gordon Arnaut, *Credibility of the U.S. Media*, MEDIA MONITORS NETWORK (Apr. 25, 2010), <http://usa.mediamonitors.net/content/view/full/73765>.

base.”<sup>85</sup> The disputed article from *The Washington Post* is no longer available online.

Ohisa, one of the three mayors on Tokunoshima, informed Hatoyama that he (Hatoyama) was not welcome to visit Tokunoshima.<sup>86</sup> Despite this remark, Hatoyama met with all three of the dissenting mayors, who, rather than capitulating, handed Hatoyama their petition signed by residents opposed to the Futenma base.<sup>87</sup> Protestors numbering 5,000 marched while the three mayors took their stand against Hatoyama.<sup>88</sup> The mayors’ refusal to consent to Hatoyama’s requests put Hatoyama in the position of having to go forward with the base plans despite the wishes of Tokunoshima residents, to leave the base where it was on Okinawa, or to split the base into two parts: one on Tokunoshima and one where it already existed on Okinawa.

On May 8, six DPJ lawmakers traveled to Saipan, part of the Northern Mariana Islands, a U.S. territory, as a last-ditch effort to relocate the Futenma base entirely outside of their country.<sup>89</sup> American leaders in Saipan had expressed interest in hosting the U.S. troops, but Obama has remained silent about this option.<sup>90</sup> During the lawmakers’ trip, reports by Japanese news agencies suggested that Hatoyama would make his final decision in two days.<sup>91</sup> “We are putting the finishing touches to a government proposal right now,” Hatoyama said.<sup>92</sup> In light of the foregoing, the six Japanese lawmakers probably intended their Saipan visit to make a symbolic point about America’s insistence on occupying foreign territory despite the fact that a relatively nearby U.S. territory was a viable option for base relocation.

On May 17, Okinawans, in their own attempt at symbolism, formed a 17,000 person chain around the U.S. Marine air base.<sup>93</sup> The chain was eight

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85. *Id.*

86. *Japan Mayors Rebuff PM Hatoyama’s Okinawa Alternatives*, BBC NEWS (May 7, 2010), <http://news.bbc.co.uk/2/hi/asia-pacific/8668705.stm>.

87. *Tokunoshima Mayors Reject Futenma Relocation Plan*, NIKKEI.COM (May 7, 2010), <http://e.nikkei.com/e/fr/tnks/Nni20100507D07JF794.htm>.

88. *Japan’s Kagoshima Stages Rally to Protest U.S. Base Relocation*, XINHUA NEWS AGENCY (China) (May 08, 2010) [http://news.xinhuanet.com/english2010/world/2010-05/08/c\\_13283079.htm](http://news.xinhuanet.com/english2010/world/2010-05/08/c_13283079.htm).

89. Haidee V. Eugenio, *6 Japanese Lawmakers to Visit CNMI*, SAIPAN TRIBUNE (Northern Mariana Islands) (May 8, 2010) <http://www.saipantribune.com/newsstory.aspx?newsID=99444&cat=1>.

90. *Id.*

91. Yoko Kubota & Alex Richardson, *Japan to Decide on U.S. Base Plan Monday: Report*, REUTERS, May 9, 2010, available at <http://www.reuters.com/article/idUSTRE6480KG20100509?type=politicsNews>.

92. *Japanese PM: Decision on Futenma to be Made Soon*, CHINA DAILY, Apr. 27, 2010, [http://www.chinadaily.com.cn/world/2010-04/27/content\\_9779739.htm](http://www.chinadaily.com.cn/world/2010-04/27/content_9779739.htm).

93. *U.S. Air Base Surrounded by Human Chain of Protestors*, JAPAN TIMES, May 17, 2010, <http://search.japantimes.co.jp/cgi-bin/nn20100517a1.html>.

miles long.<sup>94</sup> On May 23, Hatoyama issued his final decision: the 2006 provisions of the Futenma accord would remain in effect. Obama got his way. Hatoyama resigned shortly thereafter—just eight months after taking office. Despite Obama’s victory, the Futenma base dispute has not been settled. By the time this article goes to print, there will have been several updates on the Futenma base dispute during the tenure of the Kan administration. I doubt that the dispute will have been resolved. Only time will tell how the story of Futenma will end.

## II. EFFECTS OF THE FUTENMA BASE DISPUTE ON ARTICLE 9

Emma Chanlett-Avery says that “[a]lthough the current DPJ government has officially endorsed the plan to build the replacement facility in Nago, local opposition remains strong and the central government has limited political capital to push forward with implementation.”<sup>95</sup> Like I, Avery seems to believe that the future of Futenma remains unclear. One point, however, is clear: unless U.S. bases like Futenma are removed from Japanese territory altogether, they will undermine the authority of Article 9 and force Japanese politicians to cut away at the already endangered principle of constitutional pacifism. That is because the Futenma accord pushes the limits of circumscribed military power and directly and proximately moves Japan in the direction of remilitarization: *directly* because the intermingling of Japanese people and resources with active U.S. military facilities allows the Japanese government to rely on another military to carry out activities that would implicate Article 9 if done by the Japanese, and *proximately* because the U.S. has pressured Japan to enhance her military size and prowess as a condition for minimizing the U.S. military presence in the country. Part II is organized to address first the recent militarization trends implicating Article 9, and second the Futenma base dispute that seems to have emanated from those trends.

After the atomic bombings, the U.S., in the person of General Douglas MacArthur, and the Japanese, in the person of Prime Minister Kijuro Shidehara, constructed Article 9.<sup>96</sup> These two leaders were instrumental to the passage of this provision. They met and discussed the proposed

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94. *Okinawa Residents Protest at U.S. Air Base*, AGENCE FRANCE PRESSE, May 16, 2010, <http://www.google.com/hostednews/afp/article/ALeqM5gp7MbtOMcsGooUr1wbdDGYdbVugQ>.

95. EMMA CHANLETT-AVERY, CONG. RESEARCH SERV., RL 33740, THE U.S.-JAPAN ALLIANCE 8 (2011).

96. *See generally* JOHN W. DOWER, EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II 346-73 (1999). For a first-person account, see DOUGLAS MACARTHUR, REMINISCENCES (1964).

constitution at length; they remained mostly cordial.<sup>97</sup> MacArthur shared classified documents with Shidehara, expressed concern over the future role and office of the emperor, and gave the impression that he (MacArthur) understood the best interests of the Japanese and was willing to distance himself from positions held by the Allies.<sup>98</sup> On one position, though, MacArthur was unwavering: “Japan must respect the views of foreign countries” when it came to renouncing war because a “constitutional provision permitting military forces and armaments would convince other countries that Japan was determined to rearm.”<sup>99</sup>

The legislative history of Article 9 is extensive and arguably hazy,<sup>100</sup> but it suggests that the role of U.S. officials was dispositive to the promulgation of Article 9 because “the United States had to show the world that Japanese militarism would never revive and Japan would never be a threat to others, to Asia in particular.”<sup>101</sup> Article 9 first appeared as one of two provisions outlined in General MacArthur’s notes before it became the hallmark of the Japanese constitution by explicitly renouncing the use and maintenance of Japanese military forces;<sup>102</sup> the clause forbids Japan from resorting to war to resolve foreign conflict (see the epigraph above). According to Okubo Shiro, Article 9 originally appeared in the preamble and only later got transferred to the body of the document.<sup>103</sup> During deliberations over the prospective constitution, Japanese conservatives agreed to the provisions of Article 9 in exchange for the preservation of the tenno system, which was a hierarchical ruling tradition that held up the emperor as the ultimate and symbolic head of the nation.<sup>104</sup> The original meaning of Article 9 “was clearly intended to be a flat denial of every kind of war and of any development of war potential in Japan in order to prevent the possibility of Japanese aggression in Asia and elsewhere.”<sup>105</sup> This meaning is based on the plain language of the article and agreed upon by “most mainstream Japanese

97. See, e.g., RAY A. MOORE & DONALD L. ROBINSON, *PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR* 112-13 (2002).

98. *Id.*

99. *Id.* at 113.

100. For a succinct rundown of the legislative history, see *THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS* 695 (Malcolm D. H. Smith & Hideo Tanaka, eds. 1984). Rather than “hazy,” Karen Piotrowski uses the noun “confusion” to refer to the legislative history of Article 9. See Karen Piotrowski, *Keeping Pace with the Progress of the World: Article 9 of the Japanese Constitution*, 83 *WASH. U. L.Q.* 1653, 1662 (2005) (“confusion surrounds the exact origins of Article 9”).

101. Okubo Shiro, *Japan’s Constitutional Pacifism and United Nations Peacekeeping*, in *JAPAN’S QUEST: THE SEARCH FOR INTERNATIONAL ROLE, RECOGNITION, AND RESPECT* 102 (Warren Hunsberger & Richard B. Finn, eds., 1996).

102. *Id.*

103. See Piotrowski, *supra* note 100 at 1662-63 (citing KOSEKI SHOICHI, *THE BIRTH OF JAPAN’S POSTWAR CONSTITUTION* (Ray A. Moore trans., 1998)).

104. Shiro, *supra* note 101, at 102.

105. *Id.* at 103.

constitutional law scholars.”<sup>106</sup> Concerns about the breakdown of Article 9 and the expansion of Japanese war powers have been on the rise for several years—indeed, it was not until the Cold War that Japan began to interpret Article 9 as allowing self-defense forces<sup>107</sup>—but such concerns gained traction during the Gulf War in the early 1990s.<sup>108</sup>

Although in 1990 Prime Minister Toshiki Kaifu proposed a bill to allow Japanese Self Defense Forces (SDF) to participate in U.N. peacekeeping activities, the bill was overwhelmingly rejected by Japanese politicians and the Japanese people.<sup>109</sup> The Gulf War, however, demonstrated that Japan could get around Article 9 while sending civil service members and eventually the SDF to the Persian Gulf,<sup>110</sup> even if Japan refused to partake in that war as a coalition member. Part of the reason that Japan joined with Western powers had to do with its obligation to the greater U.N. community.<sup>111</sup> The U.N. Charter requires member nations, as a condition of membership, to “accept the obligations contained in the present Charter” and to be “able and willing to carry out these obligations,”<sup>112</sup> including, if necessary, the compliance of member states with U.N. requests for armed assistance in international conflicts.<sup>113</sup> This U.N. mission and similar activities have made the “self-defense” mantras of the SDF seem misleading. Because of the apparent contradiction between SDF activities and the meaning of the signifier “self-defense,” one author has accused Japan of engaging “in semantic contortions to downplay its military capabilities and activities.”<sup>114</sup>

In 1997, the U.S. and Japan renegotiated their military roles for the region in and around Asia. The two countries established guidelines that marked “not only an increased level of defense burden sharing for Japan, but also a move toward taking greater responsibility for its own defense.”<sup>115</sup> The guidelines called specifically for Japanese cooperation in Asian conflicts, search and rescue or evacuation assistance, battlefield rear area

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106. Mark Fenwich, *Japan's Response to Terrorism Post-9/11*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 339 (Victor V. Ramraj et al., eds., 2005).

107. Mark A. Chinen, *Article 9 of the Constitution of Japan and the Use of Procedural and Substantive Heuristics for Consensus*, 27 MICH. J. INT'L L. 55, 59 (2005).

108. See, e.g., Royer, *supra* note 2.

109. *Id.* at 790-92.

110. See Robert B. Funk, *Japan's Constitution and U.N. Obligations in the Persian Gulf War: A Case for Non-Military Participation in U.N. Enforcement Actions*, 25 CORNELL INT'L L.J. 363, 383-89 (1992).

111. *Id.* at 389-95.

112. U.N. Charter, art. 4, para. 1.

113. See generally Funk, *supra* note 110.

114. Zachary D. Kaufman, *No Right to Fight: The Modern Implications of Japan's Pacifist Postwar Constitution*, 33 YALE J. INT'L L. 266, 267 (2008).

115. Chris Ajemian, *The 1997 U.S.-Japan Defense Guidelines under the Japanese Constitution and their Implications for U.S. Foreign Policy*, 7 PAC. RIM L. & POL'Y J. 323, 324 (1998).

support, and actual implementation of the guidelines.<sup>116</sup> Some scholars considered the constitutionality of the guidelines vis-à-vis the three branches of government (judicial, executive, and legislative) that have interpreted Article 9 in different ways.<sup>117</sup> Even scholars could not reach definitive conclusions and could not offer clear or immutable policies as tests for constitutional validity.

The guidelines appear to have passed constitutional muster, but only by way of a liberal reading of Article 9. As one commentator put it, “Japan’s current situation is not consistent with the wholehearted renunciation of war reflected in Article 9” because the SDF, “consisting of the Ground Self Defense Forces, the Maritime Self Defense Forces, and the Air Self Defense Forces, has one of the largest budgets in the world, and its navy has more destroyer-sized warships than the British Navy.”<sup>118</sup> This commentator also notes that “Japan’s preeminent economic status,” coupled with its “reliance on a stable world situation to maintain that status,” makes Japan an ideal military partner for other countries, which increasingly have pressured Japanese administrations and the Japanese Diet to relax their interpretations of Article 9.<sup>119</sup> Ultimately and practically, these guidelines represented only a minor escalation of Japan’s military role,<sup>120</sup> but such escalation “eroded” Article 9 and “further opened the door to Japanese rearmament.”<sup>121</sup> All of this happened long after the U.S. had already precipitated the “destruction of the ideological motivations of Article 9.”<sup>122</sup>

Some have suggested that Japan has *already* violated Article 9—if not by maintaining SDF forces, then by deploying special envoys to assist U.S. efforts in Afghanistan,<sup>123</sup> dispatching naval troops to the Indian Ocean,<sup>124</sup> or

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116. *Id.* at 338-342. For an extensive analysis of the guidelines, see Robert A. Fisher, *The Erosion of Japanese Pacifism: The Constitutionality of the 1997 U.S.-Japan Defense Guidelines*, 32 CORNELL INT’L L. J. 393, 401-07 (1999).

117. See Fisher, *supra* note 116 at 418-21.

118. Matthew J. Gilley, *Japan’s Developing Military Potential within the Context of its Constitutional Renunciation of War*, 14 EMORY INT’L L. REV. 1681, 1684 (2000).

119. *Id.* at 1684.

120. Ajemian, *supra* note 115, at 350.

121. Michael Panton, *Japan’s Article 9: Rule of Law v. Flexible Interpretation*, 24 TEMP. INT’L & COMP. L.J. 129, 141 (2010).

122. *Id.*

123. *Japan Appoints Special Envoy to Afghanistan, Pakistan*, BBC MONITORING ASIA PAC—POL. (Mar. 1, 2009), available at LEXIS, BBC Monitoring: Int’l Rep., Asian Pac. Stories.

124. See also Takeo Kumagai, *Japan Extends Naval Presence in Indian Ocean*, 86 PLATTS OILGRAM NEWS, Dec. 15, 2008, at 2; see also *Japan Ruling Parties Approve Extending Iraq, Indian Ocean Missions*, BBC MONITORING ASIA PAC.—POL. (June 10, 2008) available at LEXIS, BBC Monitoring: Int’l Rep.—Asian Pac. Stories (stating Japan extended refueling support in the Indian Ocean to help with the reconstruction and antiterrorism mission).

aiding the U.S. in the construction of a missile defense system.<sup>125</sup> Traditionally, though, Japanese interpretations of Article 9 have not engaged in what American jurists might refer to as “textualism” or “originalism” as qualified and formalist mechanisms for understanding constitutional meaning. Japan’s approach has been, for want of a better word, more pragmatic.<sup>126</sup> The question of whether Japan has violated Article 9 has not turned on the reduction of that provision to definite and fixed principles. Nevertheless, Japanese interpretation has transformed Article 9 into what at least one legal analyst has called a paradox:

The paradox of Article 9 is evident when comparing the aspirational language and the reality of Japan’s military forces. The divergence originated at the onset of the Korean War, and grew dramatically during the Cold War as the SDF continued to evolve in terms of capabilities and numbers. The rapid growth soon made plain that Article 9 is irreconcilable in its present form with the realities of today.<sup>127</sup>

As the following representative cases in Part II (Subsection A) will show, Japanese courts have dealt with Article 9 mostly in the domestic sphere and have remained generally deferential to legislative action.<sup>128</sup> Matthew J. Gilley casts some light on this judicial penchant: “When a domestic decision is involved, Japanese courts operate under a high presumption that the government’s action is valid. Rights claimed by individuals under Article 9 . . . do not limit the government’s conduct in these domestic contexts. Instead, the courts’ standard seeks to avoid these questions of constitutionality and directs them to the political arena for resolution.”<sup>129</sup> The result is that powers of interpretation have been left in the hands of the electorate and polity that use public opinion to mobilize politicians in one direction or another regarding Article 9.<sup>130</sup> Post-9/11 events and political agendas concerning terrorism and national security, however, took some of this power back out of the hands of the electorate or

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125. See also *China warns US, Japan Against Pushing Missile Defence System*, THE INDEPENDENT, Sept. 24, 1998; see also *Russia Concerned at Japan’s Plans to Deploy Missile Defence System*, BBC SUMMARY OF WORLD BROADCASTS (Dec. 24, 2002), available at LEXIS, BBC Monitoring: International Rep.—Asian Pac. Stories.

126. For a reading of Article 9 from an originalist-like perspective, see Kenneth L. Port, *Article 9 of the Japanese Constitution and the Rule of Law*, 13 CARDOZO J. INT’L & COMP. L. 127 (2005).

127. Michael A. Panton, *Politics, Practice, and Pacifism: Revising Article 9 of the Japanese Constitution*, 11 ASIAN-PAC. L. & POL’Y J. 163, 178 (2010).

128. *Id.* at 1693-1703. See also Edward J.L. Southgate, *From Japan to Afghanistan: The U.S.-Japan Joint Security Relationship, the War on Terror, and the Ignominious End of the Pacifist State?*, 151 U. PA. L. REV. 1599, 1624 (2003) (“In contrast to the U.S. Supreme Court—activist or otherwise—the Japanese Supreme Court has pursued a policy of extreme deference to the legislature in exercising judicial review.”)(internal footnote omitted).

129. Gilley, *supra* note 118, at 1703.

130. *Id.*

polity and arguably transferred that power into the hands of the American executive and legislative branches that have continued to pressure Japanese politicians into compliance with American foreign policy interests.

#### A. Judicial History of Article 9

Japanese courts have addressed Article 9 repeatedly. A few decisions bear mentioning because they serve as illustrative examples of how Japanese courts analyze and ultimately rule on Article 9 cases. These cases demonstrate the deference that Japanese courts usually allow the political branches regarding Article 9. These cases also raise jurisprudential questions about legality. For instance, if a constitution explicitly forbids a thing from happening, but allows that thing to happen in practice, does the constitutional ban have any constructive effect at all, or is the ban purely symbolic? If a constitution forbids the wearing of green, but a legislature takes actions that cause or enable people to wear green, and the courts rule that the legislature has acted properly, is the ban on wearing green a law or an ideal? Given the same hypothetical, what if the people wear just touches of green, or colors of off-green or almost green, and the legislature endorses those outfits despite the constitutional ban on green—would that make the wearing of green still illegal? The point is that the strict and plain language of Article 9 forbids, without exception, the use and maintenance of Japanese military force and arms, but an expansive legislative interpretation of force, given credence by Japanese courts, which have refused to revise or overturn these legislative interpretations, has led to a situation in which Article 9 means whatever the legislature says it means—which is to say that it means nothing or anything at all. As Carl F. Goodman puts it:

However one views the terms of Article 9, it appears clear that what you get is something other than what at first glance—and perhaps even after searing examination—you see. This seeming contradiction between terms and actual practice is a reflection of a more general approach to constitutional interpretation in Japan.<sup>131</sup>

From the following cases, it seems apparent that Article 9 does not serve its intended function to eliminate the military activities in and of Japan; nor is Article 9 void of all purpose or utility, however, because it continues to constrain Japanese foreign policy by forcing Japanese leaders to “get around” Article 9.

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131. CARL F. GOODMAN, 2 *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* 235 (2008).

### 1. *Sakata v. Japan, or "The Sunakawa Case" (1959)*

The Sunakawa case was the first judicial attempt to determine the constitutionality of certain activities vis-à-vis Article 9. The case arose when the defendants (or appellants) were prosecuted for trespassing on an American military base in Sunakawa.<sup>132</sup> The defendants argued that the very existence of the American base offended Article 9.<sup>133</sup> Judge Akio Date, Judge Shunzo Shimizu, and Assistant Judge Ichiro Matsumoto handed down the decision, which reasoned principally that Japan could pursue military activity for self-defense purposes.<sup>134</sup> Put another way, the court sidestepped the issue of the SDF's legitimacy and instead authorized Japan's abstract right to self-defense. The case inaugurated not only a precedent for upholding a Japanese right to self-defense, but also a precedent for judicial equivocating about Article 9, particularly with regard to the SDF. Such equivocation has come to be known as the "doctrine of avoidance."<sup>135</sup>

### 2. *The Naganuma Nike Missile Site Cases (1973)*

The Naganuma Nike Missile Site Cases refer to litigation initiated by Hokkaido residents against the Ministry of Agriculture, Forestry and Fisheries and carried out at multiple levels of appeal.<sup>136</sup> Naganuma I appeared before the Sapporo District Court, Naganuma II before the Sapporo High Court, and Naganuma III before the Supreme Court of Japan. The residents challenged the construction of a base site in Naganuma that would require the transfer, flooding, and damage of forest lands.<sup>137</sup> The residents also challenged the constitutionality of the SDF. The District Court held that the SDF was unconstitutional because the SDF constituted an "armed force."<sup>138</sup> In addition, the District Court invalidated the land transfer because, according to the court, the transfer did not serve the public interest.<sup>139</sup> On appeal, the Sapporo High Court reversed the District Court decision, which the Supreme Court of Japan affirmed on the grounds that the residents lacked standing to bring suit.<sup>140</sup> The residents were deemed to

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132. Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, 1959(A) No. 710, 13 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 3225 (Japan).

133. *Id.*

134. *Id.*

135. Panton, *supra* note 127, at 212.

136. [Sup. Ct.] Sept. 9, 1982, 36 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1679 (Japan), *translated in* LAWRENCE W. BEER & HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990* 122-23 (1996) [hereinafter *Uno v. Minister of Agric., Forestry & Fisheries*].

137. *See id.*

138. *Id.*

139. *Id.*

140. *Id.* at 129.

have had no standing because they did not suffer direct harm.<sup>141</sup> The constructive effect of the case was to narrow the class of people who could bring suit under Article 9.

3. *Ishizuka et. al. v. Japan et. al, or “The Hyakuri Air Base Case” (1989)*

The Hyakuri Air Base Case involved a plot of land that the SDF sought to purchase to facilitate the construction of a military base.<sup>142</sup> The Court in this case extended the doctrine of avoidance.<sup>143</sup> Reasoning that under Article 9 the use of force for self-defense purposes was constitutional, the Mito District Court found for the SDF and used the political question doctrine to avoid formative resolutions about the constitutionality of the SDF.<sup>144</sup> The Tokyo High Court affirmed this decision without clarifying the role of the SDF vis-à-vis Article 9. This case demonstrates that the doctrine of avoidance has become a hallmark of judicial practice regarding Article 9 and also that the political question doctrine repeatedly has offered other branches of government wide latitude to carry out projects related to self-defense and the SDF.

4. *Mori v. Japan (2008)*

In *Mori v. Japan*, over 5,700 appellants and 800 attorneys challenged their country’s deployment of the SDF to the Middle East during the Iraq War.<sup>145</sup> In 2003, during the height of the U.S.-led invasion of Iraq, Japan contributed not only SDF personnel but also three transport aircrafts for mobilizing troops and supplies.<sup>146</sup> The appellants argued that Japan’s involvement in Iraq violated their right to “live in peace.”<sup>147</sup> They claimed that Article 9 granted them such a right.<sup>148</sup> For remedies, appellants sought an “injunction against the deployment, a confirmation that the deployment was unconstitutional, and ¥10,000 each (approx. US\$100) in damages.”<sup>149</sup> Appellants contended that the right to live in peace was actionable; the government contended that such a right was merely abstract and therefore

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141. *Id.*

142. Saikō Saibansho [Sup. Ct.] June 20, 1989, 43 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 6, 385 (Japan) *translated in* Lawrence W. BEER & HIROSHI ITOH, *THE CASE LAW OF JAPAN, 1970 THROUGH 1990* 132 (1996) [hereinafter *Ishizuka v. Japan*].

143. *See* Panton, *supra* note 127, at 213.

144. *Ishizuka v. Japan*, *supra* note 142, at 131.

145. *See* *Mori v. Japan: The Nagoya High Court Recognizes the Right to Live in Peace*, 19 PAC. RIM. L. & POL’Y J. 549 (2010) (Hudson Hamilton trans.).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Mori v. Japan*, *supra* note 145, at 549-50.

that appellants lacked standing.<sup>150</sup> The Nagoya District Court ruled in favor of the government, and the Nagoya High Court affirmed.<sup>151</sup> In effect, the principle handed down from this decision was that the right to live in peace exists but was not implicated on these facts.<sup>152</sup> This holding means that elements of the SDF forces were unconstitutional but that remedies were not available to these plaintiffs. The court reasoned that the “integration of the SDF’s air transport activities with the use of force by coalition forces in an international military conflict constituted the use of force by the SDF in violation of Article 9.”<sup>153</sup>

The Nagoya High Court’s decision was never appealed, so it remains binding in Nagoya and persuasive precedent elsewhere in Japan to the extent that it is not overruled. The court appears to have enunciated a standard couched in language about a “right to live in peace,” which “can be called a compound right that can be expressed as a freedom right, a social right, or a political right, depending on the circumstances.”<sup>154</sup> The right to live in peace is a new human right in Japan.<sup>155</sup> To invoke this right in a court of law, plaintiffs must demonstrate a “legal relationship” between the right and the military activity that violates Article 9.<sup>156</sup> Okinawans could cite the “right to live in peace” standard and the *Mori* case to challenge the constitutionality of Futenma and other bases on Okinawa. Finding Okinawan plaintiffs who have suffered direct harm from the bases should not be difficult. Moreover, courts could interpret the Japanese support of, and financial contributions to, U.S. bases on Okinawa as reaching an actionable level of Japanese integration with military activities that use force.

Unlike the three cases discussed earlier, *Mori v. Japan* suggests that Japanese courts will not always defer to other branches of government on matters pertaining to self-defense and the SDF. Courts usually defer to such branches by invoking the political question doctrine or by limiting standing to plaintiffs who suffered actual harm (the *Mori* court claimed that the plaintiffs could not establish a “legal relationship” between their right to live in peace and the war activities in question). These two elements—the political question doctrine and actual harm—together make up the cornerstone of the “doctrine of avoidance” whereby Japanese courts shy away from definitive conclusions about Article 9. Even though the plaintiffs were not eligible for a remedy in *Mori v. Japan*, Okinawans could rely on the decision in *Mori* to seek a constitutional remedy. Okinawans would have to cite the court’s standard about a “right to live in peace” and

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150. *Id.* at 550.

151. *Id.*

152. *Id.*

153. *Id.* (This language comes from a summary of the translation.).

154. *Mori v. Japan*, *supra* note 145, at 561.

155. *Id.* at 550.

156. *Id.* at 561.

demonstrate how that right bears a “legal relationship” to the military activities taking place in and around Okinawa.

### B. Japan and Military Activity

Since 9/11, Japan has stepped up her military role on a global scale. The Japanese Diet passed the Antiterrorism Special Measures Law in 2001,<sup>157</sup> a measure that muddled the already confused commitment that Japan owed to both the U.N. and her national Constitution.<sup>158</sup> The Antiterrorism Special Measures Law lapsed in 2007, but it led to a similar successor law, and its effect was once again to water down the explicit terms of Article 9 and to categorically commit Japan to U.S. political and military interests abroad. According to the law, Japan could offer security forces in the Iraq War, but in principle it could do so only if the forces were limited to humanitarian assistance.<sup>159</sup> Despite the apparent meaning of the law, “it is suspected that in reality the SDF performed war-participation acts that could be construed as cooperation in prosecuting the war.”<sup>160</sup> Indeed, the law threatened the viability and credibility of Article 9 more than any statutory measure, political scheme, or partisan event up to that point. Scholars of the Japanese constitution have described the law in the following way:

The intent [of the law] is to conduct “cooperation and support activities” including supply, repairs, servicing, medical care, and the transport of weapons, ammunition, and personnel, but assuming that the use of force is impossible without such help, this support is an essential part of military action, and is therefore clearly participation in war. This would be the first participation in the use of force by Japan’s military apparatus in the postwar years, and would clearly violate Article 9 of Japan’s Constitution.<sup>161</sup>

In spite of such objections by scholars and activists, Japan reaffirmed the contributory role of the SDF in 2003 with passage of the Anti-Terrorism Special Measures on Humanitarian and Reconstruction Assistance in Iraq.

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157. Anti-Terrorism Special Measures Law, Terotaisaku Tokubetsu Sochi Hō, Law No. 113 of 2001, available at [http://www.kantei.go.jp/foreign/policy/2001/anti-terrorism/1029terohougaiyou\\_e.html](http://www.kantei.go.jp/foreign/policy/2001/anti-terrorism/1029terohougaiyou_e.html) (in English).

158. For more on this dilemma, see Craig Martin, *Japan’s Antiterrorism Special Measures Law and Confusion over U.N. Authority*, JAPAN TIMES, Oct. 8, 2007, <http://search.japantimes.co.jp/cgi-bin/ao20071008a2.html>.

159. See *id.*

160. Kenji Urata, *The Universal Spirit of the Japanese Constitution: Re-Reading Article 9*, 3 PEACE & CONFLICT REV. 1, 2 (2008).

161. See Southgate, *supra* note 128, at 1604 (citing *An Urgent Appeal from Japan’s Constitutional Scholars*, JAPAN COMPUTER ACCESS (Oct. 9, 2011), [http://www.jca.apc.org/~kenpoweb/appeal\\_eng.html](http://www.jca.apc.org/~kenpoweb/appeal_eng.html)) (doubting the constitutionality of the Anti-Terrorism Special Measures Law).

This law was “highly specific and strictly limited in purposes and duties” and aimed to “implement the measures of assistance in Iraq.”<sup>162</sup>

Scholars have labored to contextualize, synthesize, and assess the judicial holdings and political debates concerning the Anti-Terrorism Special Measures law in relation to Article 9.<sup>163</sup> In brief, the law has not been interpreted as violating the Japanese Constitution because of the law’s specifications against the use of force or combat, as well as its precautionary stipulation entitled “Use of Weapons,” which allows the SDF to use weapons but only in expressly limited instances.<sup>164</sup> According to this stipulation, the SDF would not be able to engage in a hostage rescue operation in Iraq since that might entail combat and thus exceed the scope and reach of Article 9.<sup>165</sup> In this sense, Article 9 constrained the activities of the legislative and executive branches even though the judiciary has deferred judgments about Article 9 to those branches.

The plain language of Article 9, however, is explicit about banning military troops and activity, and the reformulated role of the SDF flies in the face of the plain language of Article 9. Edward J. L. Southgate put it well when he said, “The Anti-Terrorism Special Measures Law invests the SDF with the responsibility of carrying Japan’s burden of collective self-defense. Although the law was carefully tailored by the Koizumi cabinet to avoid deviation from Article 9, the reality is that the expanded operational abilities, both geographic and military, materially diverge from the spirit of the ‘no war’ clause.”<sup>166</sup> It is clear, then, that whatever Article 9 signifies today, it is more than just the plain meaning of the plain language. Literalists or formalists might argue that with a historically significant and sensitive provision like Article 9, there is no meaning outside the plain language of the provision. By this logic, Japan has invalidated Article 9 already because of its actions in Iraq, Afghanistan, and the Indian Ocean, and especially because of its role in engineering a missile defense system in conjunction with the U.S. But Japan has not taken a literalist or formalist approach to interpreting Article 9.

Many Japanese politicians and citizens have called for not only reinterpreting but also revising Article 9 so that Japan can maintain fidelity to the constitution as well as investment in SDF activities abroad. “There appears to be a consensus among segments of Japanese society,” explains Mark A. Chinen,

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162. Mika Hayashi, *The Japanese Law Concerning the Special Measure on Humanitarian and Reconstruction Assistance in Iraq: Translator’s Introduction*, 13 PAC. RIM L. & POL’Y J. 579, 581 (2004).

163. See, e.g., Southgate, *supra* note 128 at 1619-33.

164. Hayashi, *The supra* note 162, at 582 (translating the Law concerning the Special Measures in Iraq, Art. 2, ¶ 2, among other provisions).

165. *Id.* at 583.

166. Southgate, *supra* note 128, at 1633.

that a confluence of trends—Japan’s emergence as an economic power, its greater participation in Pacific and world affairs, its aspiration to a more important role in the United Nations, the severe criticism it received when it did not participate directly in the Persian Gulf War, pressures from the United States to expand its security relationship by putting SDF personnel in harm’s way, developments on the Korean peninsula, the emergence of China as an economic and military force, and 9/11—could well require Japan to take steps that, if it wishes to remain true to a constitutional form of government, might involve far more than just a reinterpretation of Article 9.<sup>167</sup>

But so far Japan has not revised Article 9. If anything, Japan has taken steps that suggest that Article 9 is an ideal, not a practical reality that substantial revision would definitely impact. Besides her commitment of troops for humanitarian purposes in Iraq, for instance, Japan has dispatched envoys to Afghanistan to aid the U.S. War efforts there,<sup>168</sup> pledged to help the U.S. develop a missile defense system,<sup>169</sup> deployed forces to the Indian Ocean,<sup>170</sup> and, with the exception of prominent individuals like Hatoyama,

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167. Chinen, *supra* note 107, at 65.

168. *Japan to Send Envoy to Take Part in US Review of Afghan Strategy*, BBC MONITORING ASIA PAC.—POL. (Feb. 25, 2009); *see also Japan Envoys to Meet USA’s Holbrooke on Afghanistan 9 March*, BBC MONITORING ASIA PAC.—POL. (Mar. 6, 2009), available at LEXIS, BBC Monitoring: Int’l Rep.—Asian Pac. Stories (noting Japan’s envoys to Afghanistan meet with U.S. representatives to show support for the United States’ military shift to Afghanistan).

169. Calvin Sims, *U.S. and Japan Agree to Joint Research on Missile Defense*, N.Y. TIMES, Aug. 17, 1999, at A4; *see also* Calvin Sims, *U.S., Japan Join Forces on Missile Defence System*, GAZETTE (Montreal), Aug. 17, 1999, at B1; *see also Protecting Japan—Part IV; Missile Defense to Cost 30 Tril. Yen*, DAILY YOMIURI (Japan), Sept. 25, 2004, at 4; *see also North Korean Institute Denounces US, Japan Theatre Missile Defence Plans*, BBC MONITORING ASIA PAC.—POL. (Mar. 8, 1999), available at Factiva, Doc. No. bbccapp0020010901dv3800nph; *see also Russian Defence Chief Restates Criticism of Japan-US Missile Defence Plans*, BBC SUMMARY OF WORLD BROADCASTS, Asia-Pacific (Nov. 29, 2000), at part 3; *see also Japan to work on missile defenses*, ST. PETERSBURG TIMES, Aug. 17, 1999, at 1A.

170. *See* Howard W. French, *Threats and Responses: Japan’s Role; U.S. Applauds Tokyo’s Dispatch of Warship to the Indian Ocean*, N.Y. TIMES, Dec. 10, 2002, at A22, available at <http://www.nytimes.com/2002/12/10/world/threats-responses-japan-s-role-us-applauds-tokyo-s-dispatch-warship-indian-ocean.html?src=pm>; *Japan to Dispatch Three MSDF Vessels to Indian Ocean*, XINHUA (China), Nov. 8, 2001; *see also Japan Dispatches Another Warship to Indian Ocean to Assist US Mission*, BBC SUMMARY OF WORLD BROADCASTS (Nov. 26, 2004) available at LEXIS, BBC Monitoring: Int’l Rep.—Asian Pac. Stories (stating Japan has dispatched four Marine Self-Defense Force Aegis warships to the Indian Ocean to support U.S. operations); *see also* P. S. Suryanarayana, *Japan to Extend Anti-Terror Mission in Indian Ocean*, HINDU (Chennai), Apr. 24, 2005, <http://www.hindu.com/2005/04/24/stories/2005042401730900.htm>; *see also Japan to Extend Forces Indian Ocean Support Operations*, BBC MONITORING ASIA PAC.—POL. (Apr. 13, 2005); *see also Japan Extends Missions in Iraq, Indian Ocean Until 2009*, BBC MONITORING ASIA PAC.—POL. (June 13, 2008), available at LEXIS, BBC Monitoring: Int’l Rep.—Asian Pac. Stories.

encouraged and sustained the maintenance of U.S. bases on Okinawa. Japan supports these bases insofar as Japanese citizens work on and fund the bases. In effect, the bases allow Japan to rely on the U.S. military to do what Japan is forbidden to do by Article 9. The most important of these developments, for the purposes of this paper, is of course the Futenma base dispute, which represents an intermingling of Japanese and U.S. military powers at the expense of a small group of islanders.

### C. Intermingling of Japanese People and Resources with the U.S. Military

Chinen underscores the critical role that the U.S. has played in diluting Article 9 of its constructive meaning. That role is magnified in the case of Futenma because Japan pays large sums of money to support this base and allows Japanese citizens to work on the base. For example, the Japanese government “used the politics of compensation as [a] strategy to pacify strong anti-base opposition,”<sup>171</sup> and to that end it “allocated 7.5 billion yen to each local district hosting U.S. military bases,”<sup>172</sup> distributed large endowments “to communities that accepted bases slated for relocation within Okinawa,”<sup>173</sup> and “offered 100 billion yen over a seven-year period for projects proposed under the Informal Council on Okinawa Municipalities Hosting U.S. bases.”<sup>174</sup> Add to these numbers the fact that Okinawans work menial jobs on the base<sup>175</sup> and Futenma begins to look like an operation of the Japanese as much as of the U.S. In short, the American Futenma base and other American bases and troops on Okinawa offer the Japanese government a loophole to avoid violating Article 9. That is because Japan supports the bases almost as if they were its own, and the bases purportedly exist to service the interests of the Japanese as much as the interests of Americans.

Japan has combined its interests with American military interests by sharing in the funding of U.S. military bases, subsidizing certain military base activities, discouraging Okinawan demonstrations against the military bases, and incentivizing the maintenance of military bases in local communities—in part because these bases play a role that the SDF cannot play without clearly violating Article 9. In effect, the Futenma base and bases like it remilitarize Japan notwithstanding that these bases belong to Americans and that Japanese workers on the bases do not participate in

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171. ANDREW YEO, *ACTIVISTS, ALLIANCES, AND ANTI-U.S. BASE PROTESTS* 83 (2011).

172. *Id.*

173. *Id.*

174. *Id.* at 83-84.

175. See, e.g., *Futenma Divides Okinawa's Expats*, JAPAN TIMES, June 8, 2010, <http://search.japantimes.co.jp/cgi-bin/fl20100608zg.html> (statement of interviewee) (“I still want Futenma though, because there are a lot of people still working there. Not just Filipinos but Okinawans too who’d lose their jobs in the restaurants and movie theaters if it closed.”).

active combat. This impression is made stronger by the fact that the Japanese Maritime Self-Defense Forces (MSDF) have begun to cooperate with U.S. forces on and around the bases—so much so that “U.S. Navy officials have claimed that they have a closer daily relationship with the MSDF than with any other navy in the world, with over 100 joint exercises annually.”<sup>176</sup>

It is not necessarily the case that, by itself, a U.S. base in Japan constitutes the exercise of war powers in violation of Article 9; it is that Futenma and other bases on Okinawa are supported by Japan, both financially and rhetorically, and that every year the number of Japanese citizens employed by the bases seems to increase.<sup>177</sup> Japan of course does not exert control over the bases the way the U.S. executive and upper-level U.S. military officials do. But, Japan has heavily influenced policy regarding the U.S. bases, which could not exist without Japanese support. As Part I of this article demonstrated, Japanese politicians and officials such as Hatoyama can have an enormous impact on U.S. foreign policy in general and the U.S. bases on Okinawa in particular. Part of the reason is that without Japanese political and financial support, the U.S. bases on Okinawa probably would not remain solvent or viable.<sup>178</sup> Japan does not

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176. EMMA CHANLETT-AVERY, CONG. RESEARCH SERV., RL 33740, THE U.S.-JAPAN ALLIANCE 12 (2011).

177. According to Reginald L. Fun:

Japan pays part of the cost of the U.S. forces stationed in its country with annual burden-sharing payments that totaled about \$4.9 billion in fiscal year 1997. The annual payments fall into four categories. First, Japan paid about \$712 million for leased land on which U.S. bases sit. Second, Japan provided about \$1.7 billion in accordance with the Special Measures Agreement, under which Japan pays the costs of (1) local national labor employed by U.S. forces in Japan, (2) public utilities on U.S. bases, and (3) the transfer of U.S. forces' training from U.S. bases to other facilities in Japan when Japan requests such transfers. Third, USFJ estimated that Japan provided about \$876 million in indirect costs, such as rents foregone at fair market value and tax concessions. Last, although not covered by any agreements, Japan provided about \$1.7 billion from its facilities budget for facilities and new construction which included new facilities under the Japan [*sic*] under the Japan Facilities Improvement Program, vicinity improvements, and relocation construction and other costs.

U.S. Gov't Accounting Office, GAO/NSIAD-98-66, Overseas Presence: Issues Involved in Reducing the Impact of the U.S. 16 (1998).

178. I say this in light of America's mounting debt crisis, economic downturn, and financial crisis, as well as the sheer costs of maintaining the bases that America would bear if Japan and the Okinawans did not already bear it. On this last point about America bearing the costs of the bases, consider the following:

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The overall U.S.-Japan security relationship requires a U.S. basing presence. U.S.-Japanese defense relations are governed by a uniquely one-sided security treaty and also by Japan's postwar constitution (put into place under heavy U.S. pressure and guidance) that prohibits Japan from creating a military organization with offensive capabilities. While provisions of the pacifist Article 9 of the Japanese constitution have been reinterpreted over time to allow Japan to create well-armed self-defense forces, Japan still relies on the United States to come to its defense, while maintaining that it is constitutionally prohibited from returning this favor for the United States or for American allies like South Korea. Consequently, the United States provides Japan with a security guarantee, and in return, the Japanese state contributes over 57 percent of the annual direct stationing costs of the United States Forces Japan (USFJ). This means that Japan is an inexpensive place for U.S. bases to be located.

Second, the nature of the political relationship that governs the U.S. bases in Okinawa is trilateral, as opposed to bilateral. The United States, the Japanese mainland government, and the Okinawa prefectural government constitute three distinct actors, each with separate identifiable interests. The quid pro quo arrangements in other U.S. basing cases are usually bilateral, between Washington and the host government. Here, in contrast, the key compensatory relationship is not between Washington and Okinawa, but between Tokyo and Okinawa. The Japanese government effectively externalizes the permanent U.S. military presence on its territory by foisting it onto Okinawa, which provides 75 percent of the territory for USFJ installations despite being only one of forty-seven Japanese prefectures (and despite having an overall land mass only about the size of metropolitan Tokyo). The main Okinawan island hosts thirty-eight major installations covering 23,500 hectares, or about 18 percent of Okinawa's land mass. All four U.S. military services—including the huge facilities of the Third Marine Expeditionary Force and the Kadena Air Force Base—are represented on the island. The number of U.S. military personnel on the island at any one time is about 25,000 (around a quarter of the entire U.S. presence in Asia), and the combination of their dependents and U.S. civilian contractors brings the total American defense-related presence up to 50,000. Compounding this sense of bearing an unfair basing burden, Okinawa remains relatively underdeveloped compared with mainland Japan. Its per capita income is about 75 percent of the Japanese average, making it the least wealthy Japanese prefecture.

In exchange for asking Okinawa to bear this 'special' or 'unequal' burden, the Japanese central government offers public works projects and budget subsidies to Okinawa's prefectural and municipal governments and selective incentives to certain of Okinawa's economic sectors. Taken together, these economic payoffs are sufficient to sustain Okinawan acquiescence for the U.S. military presence.

Alexander Cooley & Kimberly Martin, *Base Motives: The Political Economy of Okinawa's Antimilitarism*, 32 *ARMED FORCES & SOC'Y* 566, 571-72 (2006) (explaining in much further detail additional financial incentives and burdens borne by Japan and Okinawa).

control the U.S. bases, but it affects them in decisive ways and even keeps them operational with her financial support. Quantifying its degree of control over the bases is difficult and, in light of confidential military information, arguably impossible for the “outside” or nonmilitary observer. But it is safe to say that Japan’s efforts make bases like Futenma more sustainable than they would be if only America provided their support and resources.

To preemptively counteract criticisms about the Japanese role in sustaining U.S. bases, or about American occupation of Okinawa in the face of widespread and longstanding local resistance to U.S. bases, American leaders, including Obama, have pushed Japanese leaders to expand Japan’s military role in international affairs.<sup>179</sup> It is as if these American leaders have urged Japanese leaders to offend or discard Article 9 so that America can stop offending Article 9 on Japan’s behalf. One wonders how the U.S. bases on Okinawa would stand up to judicial scrutiny because Okinawans seem to be a narrow enough class to have standing to sue under Article 9, and because the U.S. bases do not make up the SDF but instead rely on Japanese money, people, and resources to sustain themselves.<sup>180</sup> An Article 9 suit might allow Okinawans to circumvent some U.S.-Japanese agreements that have prevented Okinawans from exercising jurisdiction over certain criminal actions occurring in their territory or from litigating matters against the U.S. military.<sup>181</sup> Although most suits under Article 9 have yet to yield positive results for those seeking a strict and rigid

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179. See, e.g., Gavan McCormack, *Deception and Diplomacy: The US, Japan, and Okinawa*, 9 ASIA-PAC. J. 21 (2011), available at <http://japanfocus.org/-Gavan-McCormack/3532>; see also Gavan McCormack, *Japan, through the US looking glass*, ASIA TIMES ONLINE, June 26, 2008, <http://www.atimes.com/atimes/Japan/JF26Dh01.html>; see also Gavan McCormack, *Remilitarizing Japan*, 29 NEW LEFT REV., Sept.-Oct. 2004, at 29, available at <http://www.newleftreview.org/?view=2525>.

180. The issue would seem to turn on sovereignty itself insofar as the issue would implicate Article 9 of the Constitution vis-à-vis Japan’s duty to the U.S. under treaties, etc. See Toni M. Bugni, *The Continued Invasion*, 21 SUFFOLK TRANSNAT’L L. REV. 85, 110-11 (1997): “Although Japanese and U.S. officials need to recognize these problems [of Okinawan safety and resistance to U.S. bases] and work toward implementing feasible solutions to the problems caused by the bases on the island, the United States is legally able to continue holding its bases on Okinawa. Under the Treaty of Mutual Cooperation and Security, the United States has the right to station troops in Japan; Japan has the duty to provide land for U.S. military facilities. This agreement has not lapsed but has been updated and reaffirmed several times since its initial signing. Both countries recognize the validity of the treaty and its related agreements.” The issue is whether the treaty itself offends Article 9 and, if so, which authority trumps the other, or alternatively the issue might be redefined if the U.S. military is intermingled with the Japanese government and citizenry. Some of these questions might be resolved by courts if Okinawans were to bring suit under Article 9.

181. See, e.g., Hiroshi Fukurai, *People’s Panels vs. Imperial Hegemony: Japan’s Twin Lay Systems and the Future of American Military Bases in Japan*, 12 ASIAN-PAC. L. & POL’Y J. 95, 117-23 (2010). See also Ian Roberts McConnel, *A Re-examination of the United-States-Japan Status of Forces Agreement*, 29 B.C. INT’L & COMP. L. REV. 165 (2006) (discussing the U.S.-Japan Status of Forces Agreement (SOFA)).

interpretation of the article's plain language, *Mori v. Japan* seems to have provided Okinawans with a plausible basis for bringing suit on the grounds that they have "a right to live in peace" that bears a direct legal relationship to the harm they have suffered from Japanese support of military activities.

If Japan wants to amend Article 9, that is Japan's business. America should not play a dispositive role in the process. If the Japanese leadership wants American troops to remain in Japan, as some individuals and groups frequently have claimed,<sup>182</sup> then the American military and American leaders should take pains to disclaim any determinative influence in the textual adaptation or nullification of Article 9. Revising or adapting Article 9 probably will not resolve the problems of Futenma or benefit Japan in the long-term; a "policy of constitutional transformation will upset the balance of power within Japan's government and tarnish Japan's legitimacy as a constitutional democracy," and the "expansion of Japan's military operations outside of its borders facilitated by a policy of constitutional transformation will further deteriorate Japan's already tenuous relations with neighboring states."<sup>183</sup> This claim assumes that Japanese courts will persist in their deference to the Diet and that serious revision to Article 9 would send a threatening message to other Asian countries.

Okinawans should look to *Mori v. Japan* at least to gain political leverage. America should withdraw its troops from Okinawa so that Japan can decide the fate of Article 9 for herself. At this rate, the likely demise of Article 9 will be blamed on the U.S. military and U.S. leadership, and it may be too late to convince anyone otherwise. But by withdrawing U.S. troops from Okinawa, America can at least ensure that it does not finally decide the outcome of Article 9 for the Japanese, even if it will have played a causative role in draining Article 9 of meaning and practical import. The death of Article 9 would signify much more than the failure of one country's unique and noble legal experiment; it would signify the failure of allegedly universal principles—*jus ad bellum*—to prove useful or practical as opposed to merely abstract and speculative.<sup>184</sup> The impending death of

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182. See, e.g., *Japan Wants U.S. Marine Base to Stay on Okinawa*, ASIANCORRESPONDENT.COM (Oct. 23, 2009), <http://asiancorrespondent.com/21557/japan-wants-us-marine-base-to-stay-on-okinawa/>.

183. David McArthur, *Constitutional Transformation and its Implications for Japanese Pacifist Democracy*, 7 SANTA CLARA J. INT'L L. 197, 198 (2009).

184. For context on this point, Craig Martin argues:

[I]f this account is accurate, that is, if it can be shown that Article 9 was designed to implement principles of *jus ad bellum* as a pre-commitment device to prevent the use of force, and that those principles successfully operated to later constrain government policy with respect to the use of force, then the Japanese experience provides evidence that it is feasible to use constitutional design for the purposes of incorporating and implementing in the domestic legal system the international law norms on the use of armed force.

Article 9 will mean that similar articles and provisions will be unlikely to appear in the future constitutions of other countries.

#### CONCLUSION

Some have argued that the bases on Okinawa obstruct economic growth on the island:

[T]he U.S. bases in Okinawa impede economic development of the prefecture. U.S. military bases comprise 20% of the land area of Okinawa[;] consequently, they obstruct plans for roads and industrial development. Furthermore, although the United States agreed to return the wharves at Naha to Okinawan control twenty-three years ago, the U.S. Army still controls them. The Okinawans would like to transform those docks for commercial use to help bolster the local economy; they remain empty, however, except for the one military vessel that docks there once a month.<sup>185</sup>

On the other hand, many observers, including Alexander Cooley and Kimberly Zisk Martin, argue that the Okinawa bases boost the local economy, provide thousands of local jobs, keep small businesses afloat, and spawn rent payments and public works money.<sup>186</sup> If Cooley and Martin mean that Okinawa generates more revenue with the U.S. military presence than without, then they are probably right. But no one can say for sure. The problem with hypothetical statistics is that they are hypothetical. Perhaps tourism would have been stronger in Okinawa without U.S. soldiers running around. Or perhaps Japan could have found a better use for the island. At the end of the day, all we have is conjecture. What we *can* say with some degree of certainty is that feelings about the base are mixed, both on and off the island, both in Japan and in America, and that other viable alternatives to Okinawa are available, as evidenced by an unanimous vote<sup>187</sup> in the Senate of the Commonwealth of the Northern Mariana Islands to welcome the U.S. Marines currently stationed in Japan. One wonders why Obama will not transfer the Futenma troops and base to Tinian, an island that wants

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Craig Martin, *Binding the Dogs of War: Japan and the Constitutionalizing of Jus Ad Bellum*, 30 U. PA. J. INT'L L. 267, 268 (2008).

185. Bugni, *supra* note 180, at 97-98.

186. Alexander Cooley & Kimberly Zisk Marten, *Lessons of Okinawa*, N.Y. TIMES, July 30, 2003, <http://www.nytimes.com/2003/07/30/opinion/30ZISK.html?pagewanted=1>.

187. David Allen, *Tinian Island Makes a Push to Host Futenma Operations*, STARS AND STRIPES (Apr. 21, 2010), <http://www.stripes.com/article.asp?section=104&article=69453>.

the troops and base,<sup>188</sup> rather than forcing the troops and base upon a population that, with a few notable exceptions, despises the American military.

Lieutenant General Terry Robling, who commands the U.S. Marine bases in Japan, has a different argument for the presence of the U.S. military in Okinawa: “We provide the Japanese government with a credible deterrence force—a highly effective, highly trained and very mobile force that is very strategically located.”<sup>189</sup> Robling adds that “the stability of the region has been caused by our presence here. Over 50 years now there’s been relative peace in the Asia region.”<sup>190</sup> The problem with this argument is that it is analogous to claiming that a lack of new terror attacks on U.S. soil is evidence that George W. Bush’s anti-terror policies worked; the problem, in other words, is that there is no evidence—or, rather, that the evidence is in the absence of evidence. Ultimately, there is no proof. Not only is there no proof, but there is no way of knowing what might have been if circumstances were different—if Japan instead of the U.S. had maintained control over Okinawa.

Robling might be correct. The U.S. probably deterred some conflict. To what extent, however, is unquantifiable. Also unquantifiable is the amount of harm that the U.S. military presence caused over time. Even if the U.S. military has made Japan safer from outside forces, it has endangered many people on the island. According to Defense Ministry data, U.S. military personnel were responsible for 7,277 accidents and criminal cases dating back five years from March 2009.<sup>191</sup> Of these, 6,180 occurred while U.S. personnel were off-duty.<sup>192</sup> Furthermore, the U.S. presence may have triggered a resurgence in nationalism among countries like North Korea or China that have unstable relations with Japan. These countries have good reason to be skeptical of the nearby U.S. military. The point, in any event, is that because we cannot know what Japan would have been like without U.S. forces on Okinawa, we cannot say that Japan is better or worse off because of Americans. True, there are no easy answers to the Futenma base dispute,<sup>193</sup> but the most reasonable solution—the one that would please Okinawans and would have pleased the Hatoyama administration—is to withdraw American troops from Okinawa. Whether Okinawans bring suit

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188. Haidee V. Eugenio, *House Relocation Urges U.S., Japan to Consider Tinian as Futenma Relocation Site*, SAIPAN TRIBUNE (Northern Mariana Islands), May 3, 2010, <http://www.saipantribune.com/newsstory.aspx?newsID=99294&cat=1>.

189. Alastair Leithead, *No Easy Answers in Okinawa*, BBC NEWS (Mar. 30, 2010, 15:05GMT), <http://news.bbc.co.uk/2/hi/asia-pacific/8574208.stm>.

190. *Id.*

191. *Bad Memories of U.S. Bases Linger*, JAPAN TIMES, Apr. 29, 2010, <http://search.japantimes.co.jp/cgi-bin/nn20100429f1.html>.

192. *Id.*

193. Leithead, *supra* note 187.

under the premises established in *Mori v. Japan* is outside the control of American leaders and activists. But troop withdrawal is another matter.

Only by U.S. troop withdrawal will Japan be left to decide for herself whether the provisions of Article 9 remain viable in the rapidly developing and globalized world. Only by U.S. troop withdrawal will Japan retain her complete sovereignty and Okinawa her regional integrity. Only by total U.S. troop withdrawal, finally, will Okinawans be afforded the opportunity to produce a sustainable infrastructure and to shift resources to more socially and culturally beneficial uses. The Futenma base dispute has left Okinawa in a state of fear and uncertainty. That is not fair to Okinawans. That is not diplomacy. That is something else. What, exactly, is difficult to say.