

Japan's Proposed National Security Legislation, Destruction of the Rule of Law?

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Image: Three constitutional scholars—from left: Yasuo Hasebe, Setsu Kobayashi and Eiji Sasada—attend a session of the Lower House Commission on the Constitution on June 4. ([The Asahi Shimbun](#))

Champagne in Washington

Japan is facing a constitutional crisis. The ruling coalition seeks to pass legislation that would overturn the nation's longstanding prohibition of "collective self-defense." Expert opinion is nearly unanimous that these proposals violate Article 9, the peace provision of Japan's Constitution. As of June 12, 225 constitutional scholars had signed a public declaration condemning the bills as unconstitutional.¹ The list includes faculty members from every respected Japanese university. But never mind. Prime Minister Abe and his friends in Washington claim to know better.

Mr. Abe was the toast of the town in Washington in late April, when he was feted at a state dinner in the East Room of the White House with 200 guests. He also addressed a rare joint session of the Congress. The business end of Abe's visit included discussion of the Trans-Pacific Partnership and final agreement on a new set of guidelines governing joint U.S.-Japan joint defense operations. The new defense guidelines were lauded by American leaders in and out of the government. Defense Secretary Ashton B. Carter described the new guidelines as "a very big change from being locally focused to being globally focused."² The pre-existing version was geared exclusively toward the defense of Japan. The big change was the elimination of any geographic restriction, ostensibly committing Japan to join U.S. operations anywhere in the world.³ In other words, Mr. Abe agreed to commit Japan to "collective self-defense."

To fulfill this commitment, Abe must either revise Article 9 of the Constitution or act in defiance of its longstanding restraints. In his every word and gesture on the topic, he expresses his determination to take the latter course. In view of popular opposition and the unified position of Japan's legal community, this action may cement Mr. Abe's reputation as a dangerous ultranationalist unrestrained by the law.

In the words of Professor Kobayashi Setsu of Keio University, enactment of the proposed legislation "would be the beginning of tyranny, that is a destruction of the rule of law."⁴ In this article we will explore the grounds for the opinions of Professor Kobayashi and other scholars and the response of leaders of Japan's ruling coalition.

....a Bitter Brew in Tokyo

Is Japan's national policy decided in Tokyo – or Washington? The Prime Minister made his deal in Washington *before* submitting legislation to Japan's national Diet. This seemed a minor detail at the time. The ruling coalition holds thumping majorities in both houses of the Diet, so passage of the national security bills would be a mere formality. Or so he thought.

The coast was clear when the Abe Cabinet submitted its package of bills to the Diet on May 15.⁵ These proposals would amend the Self-Defense Forces Act and make other changes that would authorize the deployment of Japan's Self-Defense Forces on missions outside of Japan and exercise military force in concert with foreign militaries even in cases where Japan is not under attack.

However, a lightning bolt struck on June 4 when three constitutional scholars appeared as expert witnesses before a Diet "constitution study" committee appointed to examine Abe's plans to amend the Constitution. This committee was operating separately from the special committee appointed to consider the national security bills. Opposition Diet members naturally asked the experts to comment on the national security bills, the hottest constitutional issue of the day. The three men, professors of Waseda and Keio, generally regarded as Japan's most prestigious private universities, all testified that the proposed legislation violates Article 9.⁶

Abe Administration leaders were blindsided. Prime Minister Abe himself was in Germany at G-7 Summit talks. When his second in command, the usually unflappable Chief Cabinet Secretary Suga Yoshihide was asked to respond to the professors' remarks, he blurted out "there are many other famous constitutional experts who support the government position."⁷ As the nation would soon learn, Suga's statement was patently false.

The scholarly community lined up solidly behind their three colleagues. A formal declaration condemning the defense bills was issued at a press conference on June 3, the day before their testimony, with the names of 176 constitutional law professors attached.⁸ This number has gradually increased since and numerous bar associations and citizens groups have issued similar declarations.⁹

The opposition of the experts made headlines and has remained a top news story since. Among the major news media, the popular nightly news television program *Hodo Station* attracted much attention with its independent survey of constitutional scholars. During its June 15 broadcast, *Hodo Station* announced the results. *Among the 151 responses received, 127 scholars stated that the bills are unconstitutional; 19 said there are grounds to believe the bills may be constitutional, and only 3 said there is no constitutional violation.*¹⁰

The Right Hand Knows Not...

Every news report on the June 4 testimony of the three scholars emphasized that one of them had been selected by members of the Prime Minister's own political party. This is Professor Hasebe Yasuo, a prolific scholar who served as a professor of constitutional law at the University of Tokyo from 1993 through 2014. Hasebe is so highly respected that when *Todai* launched its professional law school in 2004, he was appointed Dean. Hasebe

joined Waseda University in 2014. If the LDP Dietmembers were seeking a solid professional opinion on the constitutionality of their proposals, they made a good choice.¹¹

Hasebe was joined by Professors Sasada Eiji, also of Waseda, and Kobayashi Setsu, a constitutional law specialist who has taught at Keio University since 1974 and attained emeritus status in 2014. As reported by the Japan Times, in his June 4 testimony Hasebe said that “Allowing the use of the right of collective self-defense cannot be explained within the framework of the basic logic of the past government views” of the Constitution, and that the government’s reinterpretation of Article 9 “considerably damages legal stability and violates the Constitution.” Sasada and Kobayashi made similar statements. Ironically, their appearance had no direct connection to the defense bill debate.

Throughout his career, Prime Minister Abe’s highest priority has been his campaign to roll back the 1947 Constitution. He and his closest followers see the Constitution as a national humiliation, imposed on a defenseless Japan by foreign military forces in the immediate aftermath of World War II.¹² Since taking office in December 2012, Abe has repeatedly declared his intention to push this constitutional agenda forward, but the Diet has yet to receive an actual amendment proposal.

In preparation for this historic step, both houses of the Diet have appointed “constitution study” committees charged with discussing revision proposals. The lower house committee held its first meeting since the December 2014 election on May 7 under the chairmanship of veteran Diet member Funada Hajime. (Funada also serves as chair of the LDP headquarters on constitutional revision.) His assignment is to find common ground with opposition parties by putting forth uncontroversial proposals, such as adding constitutional protection for the environment, in order to prime the pump of constitutional change.¹³

Mr. Funada was expected to step softly, avoiding controversial topics — especially collective self-defense. Public opinion polls show large majorities are opposed. For example, a recent Nippon Television survey showed 62.5% of respondents were opposed to the exercise of collective self-defense and 63.7% were against the enactment of the legislation in the current session of the Diet.¹⁴ Directing the people’s attention in this direction was anathema. Apparently, the hapless Mr. Funada did not foresee that committee members from opposition parties might not follow his script. In the aftermath of the June 4 incident, he announced that there will be no further meetings of the committee for the foreseeable future.¹⁵

The Scholars’ Declaration

The Abe administration’s first act in this drama played in July 2014, when a Cabinet resolution declared a new interpretation of constitution Article 9 that would allow collective self-defense.¹⁶ Scholars, bar associations, opposition politicians and others attacked the Cabinet resolution, but the controversy faded into the background until the scholars’ explosive testimony on June 4.

The first paragraph of Article 9 states that Japan “forever renounces war...and the threat or use of force as a means of settling international disputes.” The second paragraph states that “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.”¹⁷

Throughout the postwar era, successive Cabinets have consistently interpreted these words to mean that Article 9 strictly limits the use of military force to its own self-defense. For example, in a statement to the Diet in 1973, Prime Minister Tanaka Kakuei said the government may use military force only when three conditions are present: “(1) Japan itself is under ongoing or imminent, unlawful attack emanating from abroad, (2) to terminate the attack, use of force is necessary, and (3) the extent of the use of force is proportionate to the end to be achieved.”¹⁸ Until July 1, 2014, all administrations rigorously held the line that Article 9 does not allow collective self-defense.

The scholars’ June 3 declaration attacks both the procedure through which the Abe administration acted and the substance of the bills it has placed before the Diet. Drafters of the declaration sought to present a few basic points in a manner that would attract the largest number of signatories. Accordingly, the declaration is brief and avoids detailed discussion of specific statutory language.

Regarding procedure, the scholars tell us that for more than sixty years successive Japanese governments have held the position that collective self-defense is prohibited by Article 9. They express outrage that a single Cabinet would presume to overturn this longstanding constitutional principle without Diet deliberations or thorough engagement with the Japanese people. They also point to the April 27 U.S.-Japan agreement on defense guidelines. According to the scholars, this purports to establish a “global U.S.-Japan alliance” which exceeds the bounds of the current U.S.-Japan Security Treaty. The Treaty itself contemplates military action only in cases of “armed attack against either Party in the territories under the administration of Japan.”¹⁹ Moreover, on April 29, Prime Minister Abe told the joint session of the U.S. Congress that legislation would be passed “by the end of summer.” According to the scholars, such tactics “trample” on the principle of popular sovereignty and treat the Diet, identified as the “highest organ of state power” in Constitution Article 41, as if it were nothing more than Abe’s servant.

Of course, the true procedure for amending the Constitution is set forth in Article 96. So far Mr. Abe, in recognition of strong popular opposition, has disdained to follow the constitutional procedure.

Regarding the substance of the bills, the declaration homes in on three points.

First, according to the longstanding government position, Article 9 strictly limits the use of force to the defense of Japan. Among other things, the Abe proposals would authorize the exercise of military force under “conditions that threaten Japan’s existence” (*sonritsukikijitai* 存続を脅かす状況). The scholars argue the legislation would replace the longstanding limitation with a standard that is vague and abstract, with no clear boundaries. Because the result could be exercise of military force that goes far beyond self-defense, they say the legislation violates Article 9.

Second, they condemn the bill’s authorization of logistical or “rear support” (*kōhōshien* 後援) for foreign military forces. They say this would enable SDF units to become components of a unified fighting force (*ittaike* 一体). Any such operations not strictly in the defense of Japan would violate Article 9. They further note that the legislation would authorize such operations even in the absence of a United Nations resolution and that the Self-Defense

Forces might take part in military operations that violate international law. Undoubtedly, the authors had the U.S.-led invasion of Iraq and other operations in the Middle East in mind.

Finally, they condemn language that would enable Self-Defense Forces to participate in an “allied army” (連合軍) structure even in times of peace. They say that amendments to the Self-Defense Forces Act would enable the SDF to participate in joint patrolling and military exercises with U.S. and other foreign forces. Such “allied army” operations could lead to increased tensions with other countries and even to accidental confrontations that bring the risk of military escalation. Moreover, entrusting decisionmaking to military commanders on site at such confrontations would constitute the abdication of political responsibility. (The scholars say that Article 9 requires that disputes over territory and oceans be settled through diplomacy and the use of police action rather than military force.)

This declaration has attracted the signatures of more than two hundred constitutional law professors. Needless to say, each and every one has particular thoughts about Article 9 and the proposed legislation. We can expect such thoughts to appear in many forms in the weeks to come. Their declaration is just a listing of points on which they all agreed in rapid fashion.

For the scholars, the answer is very clear. As it is presently written, Article 9 does not allow Japan’s participation in the collective self-defense operations contemplated by the proposed legislation or by the new U.S.-Japan security guidelines. In order to lawfully authorize such action, the text of the Constitution itself must be revised.

The Government Response

In the aftermath of the scholars’ attacks, government spokesmen have scrambled to find counter-arguments.

Their first assignment was to find support for Mr. Suga’s comment that “many famous scholars” are aligned with the government. After a search proved largely fruitless, Mr. Suga abandoned this position. In an appearance before Mr. Funada’s constitution study committee on June 10, he confessed that only ten scholars who support the government position had been found. He disclosed three names: Momochi Akira, a professor at Nihon University, Nagao Kazuhiro, professor emeritus of Chuo University, and Nishi Osamu, professor emeritus at Komazawa University.²⁰ Like Prime Minister Abe, these three men are all members of the ultranationalist group *Nippon Kaigi*, which advocates repeal of Article 9 and takes the position that Japan’s imperial armies acted to protect China from western imperialists and other positions that glorify Japan’s imperial history.²¹

A second response was delivered in the Diet the following day (June 11) by LDP Vice President Komura Masahiko, a senior LDP politician who has filled important Cabinet roles, including Minister of Foreign Affairs, and is himself a lawyer. Komura made a two-pronged attack: first, the opinions of scholars are irrelevant, and second, the opinions of scholars cannot be trusted.²²

On the first count, he stressed that binding interpretations of law are issued by judges, not scholars. Therefore, constitutionality of the government proposals must be considered in light of court precedent, not scholarly opinion. Unfortunately, there is only one Supreme

Court precedent that addresses national defense, the 1959 *Sunagawa* decision. Although Komura sought to construct an argument in favor of collective self-defense based on this precedent, all parties are forced to concede that the *Sunagawa* decision did not address collective self-defense at all. We'll examine the *Sunagawa* precedent below.

As for the overall legitimacy of scholarly opinion, Mr. Komura reminded his listeners that back when the SDF was formed in the early 1950s and through much of its history, most scholars claimed the existence of the SDF itself violates Article 9. Komura scoffed at such ivory tower thinking. Important issues of national policy must not be entrusted to such dreamers. Today the SDF enjoys solid support among the Japanese people and obviously serves a most critical role in Japan's national defense.

Circumstances have changed

The strongest argument in favor of the government's national security bills has nothing to do with law; it is a political argument. Prime Minister Abe and his seconds have ceaselessly repeated the refrain that Japan is in dangers. Threats may emanate from North Korea, or China, or unidentified global terrorists, or somewhere else, but there is no time to be lost. To protect Japan from these threats, Japan must follow through on the promises made in Washington and pass legislation that confirms a national commitment to collective self-defense.

In order to support its legislative proposals, the Abe administration released a formal opinion (*kenkai* 懇談) on June 9 that argues collective self-defense is justified because *attacks on other countries* may threaten the security and even the existence of Japan. This opinion recognizes that another formal opinion issued by the Tanaka administration in 1972 reaches precisely the opposition conclusion: Article 9 prohibits collective self-defense. LDP spokespeople even attempt the Houdini trick of reconciling the two opposite conclusions.

The only apparent way to do so is to loudly declare that circumstances have changed and the Constitution must change with them. In the words of the government's June 9 opinion,

“the national security environment surrounding Japan has fundamentally changed due to changes in the power balance and the rapid development of technological breakthroughs, the threat of weapons of mass destruction and other factors...”²³

Of course, this may be true. But the Constitution is the supreme law of the land²⁴ and the words of Article 9, that the Japanese people “forever renounce war...and the threat or use of force as a means of settling international disputes,” remain unchanged. The interpretation that these words prohibit collective self-defense is very deeply entrenched. If the Abe administration's assessment of the threats and the appropriate response are correct, perhaps those words should be revised.²⁵

The *Sunagawa* Judgment - A Red Herring

When LDP Vice-president Komura presented his defense on June 11, perhaps he was unaware that the head of the Cabinet Legislation Bureau (CLB), generally viewed as the most authoritative voice in the government on constitutional issues, had shot this down the day before. In response to questioning from an opposition party Diet member on June 10, CLB Chief Yokobatake Yusuke had agreed that the *Sunagawa* judgment “does not touch

upon collective self-defense.”²⁶

The *Sunagawa* decision itself was born of a constitutional crisis of another day. That case involved the prosecution of protesters who broke through fencing at a U.S. military base on the western outskirts of Tokyo in 1957. One charge against the protesters involved a special statute which applies only to trespass on U.S. military bases. Defense lawyers argued that this charge should be dismissed because the statute itself was unconstitutional. Why? Because the presence of U.S. military forces in Japan constitutes “war potential” prohibited by Article 9 and therefore, both the U.S.-Japan Security Treaty and the special statute are unconstitutional.

Government prosecutors were stunned by a March 1959 Tokyo District Court judgment that agreed with this reasoning and dismissed charges filed under the special statute. With this decision, Chief Judge Date Akio earned a secure place in Japan’s legal history. The court’s action will forever be known among Japanese lawyers as the “Date Judgment.”

Of course, the decision was appealed. But it was the midst of the Cold War and the Date Judgment struck at the core of Japan’s defense policy and the U.S. military strategy in Asia. The case required special care.

Government lawyers bypassed the ordinary appellate court, filing a special appeal directly with the Supreme Court. Many years later, documents preserved in the U.S. National Archives would reveal that Chief Justice Tanaka Kotaro consulted with U.S. government officials in deciding how to manage the case.²⁷ Ultimately, Tanaka persuaded his colleagues to go along in a judgment issued just nine months later that overturned the District Court.

The Supreme Court’s majority opinion expressed two separate grounds for its decision. First, the Court said that the prohibition on “war potential” in the second paragraph of Article 9 applies only to Japan’s own forces; it does not prohibit the presence of foreign military forces in Japan that are not under the “command and supervision” of Japan. Second, the Court created a “political question doctrine.” The presence of U.S. military forces in Japan is authorized by the U.S.-Japan Security Treaty. The District Court reached its judgment by declaring the Treaty and therefore criminal prosecutions under the special statute unconstitutional. The Supreme Court held that the Security Treaty “is featured with an extremely high degree of political consideration,” and therefore “unless the said Treaty is obviously unconstitutional and void,” decisions concerning its constitutionality should be left to the Cabinet and the Diet and “ultimately to the political consideration of the people, with whom rests the sovereign power of the nation.”²⁸ The Court has not employed this political question doctrine since.

The current fight over the government’s national security bills has nothing to do with the grounds for the Supreme Court’s 1959 decision. Instead, it concerns the Court’s statement that “there is nothing in Article 9 which would deny the right of self-defense inherent in our nation as a sovereign power.”²⁹ This is generally accepted as the only occasion on which the Court has expressly declared that Article 9 allows Japan to engage in self-defense.

Although the facts of the case did not concern “collective self-defense” and the Court’s published opinion said nothing about it, this is the language seized upon by Mr. Komura and other LDP spokesmen who have laid claim to the *Sunagawa* decision as the foundation for

the national security bills and the U.S.-Japan guidelines.³⁰

Washington's Power Over Japan's National Security Policy

The genesis of Article 9 is found in the post-war occupation. Occupation authorities insisted that Japan's new Constitution include an anti-war clause. Final language was approved by Japan's Diet in 1946 and took effect the following year. It has never been changed.

By 1950, the U.S. was at war in Korea and American leaders had second thoughts about this anti-war provision. From that point until the present, the U.S. government has continuously applied pressure on Japan to put aside Article 9 and join U.S. military operations abroad. Most famously, as President George W. Bush launched war in Iraq, Deputy Secretary of State Richard Armitage insisted to his Japanese counterparts that they "put boots on the ground."³¹ Then-Prime Minister Koizumi Junichiro complied, ordering a small force to Iraq despite complaints about the constitutionality of such action.

Another unprecedented court decision addressed the constitutionality of Mr. Koizumi's action. This was a 2008 judgment of the Nagoya High Court. Although the Court decided it was obliged to dismiss the case for lack of standing,³² it nonetheless took the occasion to deliver its opinion on the constitutionality of SDF actions in the Iraq War theater. The Court was concerned not with the heavily-publicized humanitarian activities at Samawah, but instead with Air Self-Defense flights carrying armed forces in and out of Baghdad. In the Court's words, "In modern warfare, supply activities, such as transport, are an important part of combat activities. ASDF airlifts of armed soldiers in the multinational force to the Baghdad combat zone were acts that could be identified as being involved in the use of force by other nations and the ASDF could be said to have conducted use-of-force actions itself."³³ In the Court's opinion, these actions violated Article 9. These are precisely the kinds of "rear support activities" proposed by LDP spokesmen and identified as unconstitutional by the scholars' declaration of June 2015.³⁴

The guidelines agreed in Washington on April 27, 2015 comprise the latest chapter in the saga of American interference in Japan's constitutional processes. The invitation to Mr. Abe to make his proclamation in Washington rather than Japan's own capital shows a disturbing callousness and disregard for Japan's sovereignty. It were as if the Washington mandarins were acting out the very script set out in Gavan McCormack's "Client State" and other writings that describe the extreme servility of LDP politicians to American keepers.³⁵ Regarding security policy and the rule of law, McCormack writes, "The world's most democratic constitution was put in place, but in practice was subordinate to the security treaty with the U.S."³⁶ In this case, on April 27 Abe and his American friends went even *beyond the treaty* by making a deal that it does not authorize.

Constitutional Crisis

We are witnessing a severe test for constitutional democracy in Japan. Given the clarity and near-unanimity of the experts' opinions, it seems highly unlikely that the Abe administration can make any compelling legal argument to support its position. If Abe goes ahead, the message that his action defies the constitution will be pounded home ceaselessly in lecture halls and articles published in all forms of the media. Abe's legacy as the man who

abandoned the rule of law will be fixed.

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Notes

¹ The text of the scholars' declaration and list of signatories is available [here](#).

² See Julie Hirschfeld Davis and Michael R. Gordon, ["Japan and US set new rules for military cooperation"](#), The New York Times, April 27, 2015.

³ The text of the guidelines are available [here](#).

⁴ Remarks at a press conference, Foreign Correspondents Club of Japan, June 15, 2015.

⁵ See [here](#).

⁶ See [here](#) and [here](#).

Professor Setsu Kobayashi of Keio University scoffed, "There are hundreds of constitutional scholars in Japan. There are about two or three who would say the law is constitutional."

Asahi Shimbun, June 5, 2015, p. 4, Japanese edition. (Translated by Lawrence Repeta)

⁷ Asahi Shimbun, June 11, p.2.

⁸ The text of the scholars' declaration and list of signatories is available [here](#). Individual scholars can be expected to blast the government proposals at every opportunity. E.g., (more scholars say bills are unconstitutional). See [here](#).

⁹ A declaration by the Japan Civil Liberties Union was released on June 12. It is available [here](#).

¹⁰ The scholars' declarations have been followed by similar statements from bar associations and citizen groups all over the country. A statement opposing the bills was issued by the national bar association on May 14, the day the bills were approved by the Cabinet. Text (in Japanese) available [here](#).

¹¹ The LDP also selected Professor Hasebe to testify on behalf of the State Secrets Act in 2013. He supported the bill.

¹² The most comprehensive statement of the LDP plan for an “autonomous Constitution” free of the taint of foreign influence appears in a document issued by the Party on April 28, 2012, a date selected to commemorate the sixtieth anniversary of the end of the postwar occupation. See Lawrence Repeta, [“Japan’s Democracy at Risk – The LDP’s Ten Most Dangerous Proposals for Constitutional Change.”](#) The Asia-Pacific Journal, Vol. 11, Issue 28, No. 3, July 15, 2013.

¹³ [“LDP sets out constitutional amendment strategy; DPJ, Komeito preach caution.”](#) May 08, 2015.

¹⁴

Linda Sieg, [“Abe’s support rate lowest since taking office in 2012.”](#) Thomson Reuters, June 15, 2015.

¹⁵ [\[unreadable\]](#) June 19, 2015; [\[unreadable\]](#) “[unreadable]” 2015.6.16 19:09

¹⁶ Martin and Wakefield, [here](#).

¹⁷ An English text of the Japanese Constitution is available here: add URL. And give J text URL too.

¹⁸ Prime Minister Kakuei Tanaka’s statement to the Diet on Sept. 23, 1973, English text from Hasebe Yasuo, “A memorandum for the Foreign Correspondents Club,” distributed on June 15, 2015.

¹⁹ TREATY OF MUTUAL COOPERATION AND SECURITY BETWEEN JAPAN AND THE UNITED STATES OF AMERICA, Article 5, available [here](#).

²⁰ [\[unreadable\]](#)

[\[unreadable\]](#) 2015 06 10 23 05 [\[unreadable\]](#) 06 11 11 18

²¹ According to a 2014 US Congressional Research Service Report, positions advocated by *Nippon Kaigi Kyokai* include “Japan should be applauded for liberating much of East Asia from Western colonial powers, that the 1946-1948 Tokyo War Crimes tribunals were illegitimate, and that the killings by Imperial Japanese troops during the 1937 ‘Nanjing massacre’ were exaggerated or fabricated.” CRS, “Japan-U.S. Relations: Issues for Congress,” Feb. 20, 2014, available [here](#). Quoted in Norihiro Kato, [“Tea Party Politics in Japan — Japan’s Rising Nationalism,”](#) The New York Times, Sept. 12, 2014. According to the Economist, *Nippon Kaigi* members “applaud Japan’s wartime ‘liberation’ of East Asia from Western colonialism; rebuild the armed forces; inculcate patriotism among students brainwashed by left-wing teachers; and revere the emperor as he was worshipped in the good old days before the war,” [“Right side up,”](#) *The Economist*, June 6, 2015, and [here](#).

²² See [here](#).

²³ Summary of Opinion (*kenkai*) of Japan Government, June 9, 2015, Asahi Shimbun, June 10, 2015, p.7.

²⁴ Constitution, Article 98.

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