

Testimony of

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Testimony of Naoyuki Agawa
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On
The Making of the Japanese Constitution in 1946

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Introduction

Chairman Cornyn, and Chairman Chafee, and members of the subcommittees. It is a distinct honor to testify before your subcommittees on the making of the Japanese Constitution in 1946.

On August 15, 1945, Japan announced the acceptance of the Potsdam Declaration. That ended three and a half years of war between the United States and Japan. General MacArthur stepped onto Japanese soil 15 days later. Thus the occupation of Japan started and lasted approximately seven years. During that time, the United States together with other members of the Allied Powers undertook many measures to do away with the country's military control and revive Japan's democracy. Among them was the making of the new Japanese Constitution.

Almost 60 years later, the United States and its coalition partners are again finding themselves in charge of the occupation and democratization of Iraq. Among the tasks to be undertaken there in due course, I understand, is the making of the new Iraqi Constitution.

I would like to inform you of the making of the new Japanese Constitution in 1946 in the hope that that extraordinary story may assist you in thinking about how the United States wants to guide the constitutional future of Iraq. More specifically, I would like to give you examples of the American ideas incorporated into the Japanese Constitution, how they were incorporated, and which of these proved to be successful and which were not.

Please note that the views I express today before your subcommittees are strictly my own and do not in any way reflect the views of the government of Japan. I am testifying before your subcommittees strictly in the capacity of a constitutional scholar who has taught this subject at Keio University in Japan, the University of Virginia Law School

and Georgetown University Law Center; therefore, I do not appear today sharing my views as a minister of the Embassy of Japan.

The History of the Making of the Japanese Constitution

In order to grasp the time, place and manner in which the new Japanese Constitution of 1946 (the "1946 Constitution") was written, it is perhaps useful briefly to narrate the history surrounding that event in chronological order.

Many believe that the writing of the 1946 Constitution started with the acceptance of the Potsdam Declaration, which presented the conditions for Japan's "unconditional surrender" to the Allied Powers. The Declaration, among other things, stated that "until there is convincing proof that Japan's war-making power is destroyed, [Japan] shall be occupied . . ." Further, it stated that "the Japanese government shall remove all obstacles to the revival and strength[en]ing of democratic tendencies among the Japanese people" and that "freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established." Lastly, the declaration stated that "the occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government." Thus the Potsdam Declaration not only set Japan's surrender terms, but it also set the condition for the termination of the occupation, i.e., the demilitarization and democratization of Japan.

The General Headquarters of the Allied Powers (the "GHQ"), the occupation authority headed by General MacArthur, the Supreme Commander of the Allied Powers, did not initially embark on the making of a new Japanese Constitution. It was initially busy physically disarming the Japanese military establishment, arresting war criminals, freeing political prisoners and taking care of other such pressing matters. In fact, it was only in October 1945 that General MacArthur first suggested to then Prime Minister Kijuro Shidehara that the Japanese government consider necessary constitutional changes. Please note that the GHQ ruled Japan indirectly through the existing Japanese cabinet and the bureaucracy.

The Shidehara cabinet thereupon formed a committee to study the constitutional matters. This committee became known as the Matsumoto Committee, because it was headed by Dr. Matsumoto, a member of the cabinet who was also a noted legal scholar. The Matsumoto Committee was of the impression that (1) the GHQ was not in a particular hurry to make the constitutional changes and (2) the committee could deliberate the necessary constitutional changes free from the influence of the GHQ. Thus, The Matsumoto Committee began to study possible revisions to the existing Constitution promulgated in 1890 (the "1890 Constitution") in order to make it more democratic and accountable to the people without determining any concrete timetable for the actual revisions to take place.

This situation suddenly changed during the first week of February 1946. The Matsumoto Committee's drafts of the revised 1890 Constitution were leaked to and reported by a Japanese newspaper. General MacArthur's staff read these newspaper articles and found these proposed revisions to be inadequate for Japan's democratization. The principle of popular sovereignty, for instance, was not clearly set forth. Upon learning of these facts from his staff, General MacArthur asked the Government Section of the GHQ itself to start drafting a new Japanese Constitution. On February 3rd, the General gave the Government Section lawyers and others a one page note outlining a few of the most important principles to be included in the draft Constitution. This famous "MacArthur Note" included, among other things, a provision to retain the Emperor and another provision for the abolishment of war and armed forces, even for self-defense purposes. The Government Section secretly started its draft on February 4 and finished the task on February 10. This draft was approved by General MacArthur and officially became the GHQ Draft on February 12. The GHQ Draft was in English.

The GHQ Draft was shown to Dr. Matsumoto and a few other representatives of the Japanese government on February 13. Assuming that the American side intended to comment on the Committee's own draft Constitution that had been submitted to the GHQ a few days earlier, the Japanese delegation was stunned at the liberal tone of the GHQ Draft and declared that they were not ready to accept it. General Whitney, General MacArthur's deputy, stated in return that the acceptance of the GHQ Draft might be the only way for the Emperor to survive and for the current Japanese government to remain in control.

After several rounds of exchanges between the GHQ and the Japanese government, including a meeting between Prime Minister Shidehara and General MacArthur, the Japanese cabinet reluctantly agreed to prepare a new draft in Japanese, based on the GHQ Draft. This new round of drafting started on February 27 and was completed on March 2. The Japanese government lawyers submitted this new draft to the GHQ on March 4. The GHQ found this new draft was still inadequate. An all-night session to conform it to the GHQ Draft pursued, and this task was completed on March 5 with MacArthur's approval. On March 6, the Japanese cabinet approved this new draft and publicly released it as the Government Draft.

The Government Draft was submitted to the Diet and the Privy Council, the Emperor's advisory body, in accordance with the revision procedures of the 1890 Constitution as set forth therein. After lively debates and a fair number of revisions, the final Government Draft was adopted and proclaimed as the 1946 Constitution on November 3, 1946, effective May 3, 1947.

On September 8, 1951, Japan concluded a peace treaty in San Francisco with the United States and other Allied Powers. The peace treaty became effective on April 28, 1952 after its ratification by a majority of the signatories to the treaty. Thus Japan's occupation ended and the country regained its full independence.

Has the 1946 Constitution Been Successful?

I believe that the 1946 Constitution has been largely successful. This assessment is based on several factors.

First and foremost, despite initial oppositions to some of the new ideas incorporated in the GHQ Draft and the Government Draft, the 1946 Constitution has functioned as the basic law of the land for the past 57 years. In fact, when the Government Draft was made public on March 6, 1946, the majority of the Japanese people favorably received it. Its pacifist and democratic character together with its emphasis on fundamental human rights suited the mood of the Japanese people who were tired of years of war and military control. It is fair to say, therefore, that the 1946 Constitution set the cornerstone for Japan's post-war democratization.

More specifically, Article 1 of the 1946 Constitution incorporated the revolutionary notion of the Emperor as the "symbol of the State and of the unity of the people." This provision has worked remarkably well. On the one hand, it secured the Emperor's position constitutionally, thus allowing the ancient tradition to survive the post-war turmoil. On the other hand, it democratized the Emperor by depriving him of all political powers and by adding the new notion that his position is derived from the "will of the people with whom resides sovereign power." Under the 1890 Constitution, in theory the Emperor retained all the rights of sovereign and reigned over and governed the Empire of Japan. Although the conservatives in Japan strongly resisted the idea of turning the Emperor into a mere figurehead, the Emperor as the spiritual symbol of the nation and not a political power actually conformed well to Japan's age-old political tradition and thus has functioned well. In my view, maintaining the Emperor tradition in Japan is MacArthur's greatest achievement in connection with the 1946 Constitution. It assured the peaceful and gradual democratization of Japan both during and after the occupation.

Article 9 of the 1946 Constitution incorporated another revolutionary notion of the renunciation of war. This provision also served its purposes particularly well for Japan's first 30 to 40 post-war years. In order to smoothly return to the international community, the Japan that was perceived in the 1930's as an aggressor in the Asia-Pacific region had to project the image of a born-again, peace-loving country. Article 9 proclaimed Japan's renunciation of war and its decision not to maintain armed forces. This helped to alleviate the fear of the resurgence of Japan's adventurous militarism, a feeling shared at the time by many countries and peoples surrounding Japan. It also made the Japanese sincerely aspire to become a truly peace-loving nation. The result is a Japan today that promotes peace worldwide largely through non-military means.

Also importantly, Chapter III of the 1946 Constitution lists a variety of fundamental human rights. As a matter of concrete policy, the Japanese found some of them difficult to implement immediately because they were so idealistic and because the Japanese government had little resources to realize them. However, many of these "rights" provisions have functioned as the goals of the nation. The Japanese aspired to achieve these goals and to rebuild a country that is based upon and respects these fundamental human rights. For instance, Article 24 of the 1946 Constitution promulgated the equality of the sexes. Japanese women had not been treated as equals to men for

historical and cultural reasons throughout most of Japanese history, and were inspired by this provision. Since then, they have significantly improved their social standing in Japan. It is perhaps fair to say that post-war Japan has respected people's "life, liberty and pursuit of happiness" and "equal[ity] under the law" to the greatest extent possible as provided in Articles 13 and 14 of the 1946 Constitution.

In addition, the 1946 Constitution maintained the parliamentary (the Diet) system without substantial changes made to the one under the 1890 Constitution. This assured the continuity of government. There were some important changes in this area, too. For instance, the 1946 Constitution specifically made the Cabinet directly responsible to the Diet, thus reviving and strengthening the 1920's democratic tradition that thrived in Japan before the military took control of the country. The 1890 Constitution had no express provision for the Cabinet's accountability to the Diet although by the 1920's it had become customary for the Cabinet to resign at the displeasure of the Diet. Also, the Prime Minister was given the authority to appoint and remove members of his cabinet. Nevertheless, the parliamentary system as a whole was not materially changed from the pre-war model. The drafters of the GHQ draft could have tried to institute a more American style of government by establishing clearer separations of power and creating a more independent executive branch of the government. However, these Americans knew and respected the Japanese' pre-war democratic experiences and traditions. Therefore, these drafters left the existing system intact. That worked well for Japan's needs.

Similarly, while the 1946 Constitution made the Japanese judiciary more independent and encouraged it to be more "rule of law" oriented in order to protect the fundamental human rights of the Japanese people, it respected and retained the basic structure of the pre-war judiciary system. Thus, the Japanese judiciary continued to be based largely upon the civil law tradition that was originally introduced from Germany and France. In fact, the person who worked on the reform of the Japanese judiciary system within the GHQ was Judge Opler, a naturalized American citizen who was a former judge in pre-Nazi Germany. He advised the GHQ not to introduce too much of the American judicial system, such as the election of judges. This suggestion has also worked well for Japan.

Lastly, the American drafters provided for the procedures for the revisions of the 1946 Constitution in Article 96. Some of the American drafters maintained that the provisions for fundamental human rights in Chapter III should be made non-amendable lest the Japanese people not be deprived of these rights after the Americans left Japan. However, others argued and prevailed that the American drafters should not bind the future generations of the Japanese to what the Americans thought to be the most important constitutional principles. Thus, the Japanese have retained the freedom to amend the 1946 Constitution partly or in its entirety in accordance with the procedures set forth in Article 96. Interestingly, the 1946 Constitution has never been amended. Constitutional scholars have debated why the Japanese are so reluctant to amend the Constitution. Nevertheless, the insertion of the amendment procedures has given the Japanese people the option and freedom to change it in the future. It therefore weakens the argument that this Constitution was imposed on the Japanese by the Americans.

Certain Aspects of the 1946 Constitution That Are Less Successful

Several aspects of the 1946 Constitution have been less successful or totally unsuccessful.

First, some Japanese continue to believe that the 1946 Constitution was "imposed" by the Americans on the Japanese people and that it therefore lacks legitimacy. They still find offensive that the first draft of the 1946 Constitution was prepared in English by a group of Americans, and furthermore that it was done in an extremely short period of time and in complete secrecy. Those Japanese do not recall themselves "proclaim[ing] that sovereign power resides with the people" and "firmly establish[ing] this Constitution" as the Preamble to the 1946 Constitution states. Some believe that the 1946 Constitution is badly written as a matter of Japanese prose because the original draft was in English. In fact, a top secret directive from Washington to General MacArthur issued on January 7, 1946 entitled SWNCC 228 (the State-War Navy Coordinating Subcommittee for the Far East directive number 228) specifically stated that "[o]nly as a last resort should the Supreme Commander order the Japanese Government to effect the [constitutional changes], as the knowledge that they had been imposed by the Allies would materially reduce the possibility of their acceptance and support by the Japanese people for the future." However, some Japanese had strong counter-arguments to this position. For instance, some scholars argue that because the Diet debated and amended the Government Draft in a relatively free fashion in the latter half of 1946, the Japanese people did have an opportunity to express their will in the making of the 1946 Constitution through their representatives. Scholars also argue that the Japanese have so far chosen not to amend the 1946 Constitution, indicating that the nation as a whole

has approved of it and liked it. Also, the GHQ Draft was prepared in haste for several good reasons, for example, among other things, General MacArthur's wish to avoid Soviet Russia's intervention in his occupation policy, in order to prevent communist-led insurgency in Japan and to protect the Emperor from indictment as a war criminal. Nevertheless, because the first draft of the 1946 Constitution was prepared by a group of Americans without participation of any Japanese, I believe that this factor has harmed the legitimacy of the 1946 Constitution to a certain degree.

In addition, certain substantive ideas incorporated into the 1946 Constitution by the American drafters tended not to function well or became outdated after a while. The foremost of this example is in Article 9. General MacArthur was perhaps very keen on demilitarizing Japan and perhaps sincerely believed in a harmonious post-war international order. As a result, he was adamant that the Japanese people forever renounce war and do away with all armed forces. Given the impracticality of rebuilding its war potential at the time, the Japanese obliged. The American policy makers, including General MacArthur, quickly regretted inserting this provision in the 1946 Constitution and tried to persuade the Japanese to rearm when the Cold War heated up and the Korean War began. However, the Japanese refused to rearm, quickly citing Article 9 and pointing out that it was the United States that originally insisted on the insertion of this provision. The Japanese people have liked Article 9 and post-war Japan has become a pacifist country. This is all good and well. However, some believe that the Japanese government's exceedingly restrictive interpretation of Article 9 has prevented Japan from becoming a full-fledged ally of the United States and from fully participating in international military actions involving use of force necessary to maintain peace, such as the first Gulf War. In addition, the lack of any provision in the 1946 Constitution setting forth the war and emergency power of the government has hindered Japan from preparing for any war or other emergencies, such as terrorist attacks. Here lies a lesson, perhaps, that a radical, substantive constitutional provision may, in the long run, not work.

Similarly, some of the fundamental human rights provisions incorporated in Chapter III of the 1946 Constitution seem to reflect too many of American liberal ideas of the 1930's. It is a known fact that the three American drafters of Chapter III were liberally-oriented non-lawyers and that they were eager to add everything that the United States Constitution did not have. (For that matter, only one member of the American drafting team was Republican.) The ideas included by the drafters are: the freedom to choose residence and occupation, and to divest nationality (Article 22); academic freedom (Article 23); marriage based only on the mutual consent of both sexes and the essential equality of the sexes pertaining to marriage and family (Article 24); the right to maintain the minimum standards of wholesome and cultured living and the State's obligation to promote social welfare, security and public health (Article 25); the right to receive an equal education (Article 26); the right and obligation to work (Article 27); and the right of workers to collectively organize, bargain, and act (Article 28). While these provisions are all for good causes, some of them proved to be difficult to implement as a matter of concrete policy and have functioned more as desirable standards. Also, some have criticized these provisions as too strongly oriented towards rights, freedom and individualism (individual liberty). The dissenters believe that the American drafters failed to incorporate some of the more traditional Japanese values such as family, community, seniority, and the nation therefore allowing the post-war Japanese generation to become more selfish and less public-minded.

Chapter VI of the 1946 Constitution, concerning the judiciary, is another area in which some of the American ideas did not work particularly well. While the 1946 Constitution strengthened the Japanese judiciary and made it more independent, the American drafters were concerned about the possibility of judicial tyranny because of their recent experiences with the "old horsemen" of the United States Supreme Court during the New Deal Era. Accordingly, in the 1946 Constitution the drafters added measures such as term limits for the judges (Article 80); the mandatory retirement ages for the judges of the Supreme Court as well as of lower courts (Articles 79 and 80); and even the performance review and recall of the Supreme Court judges by the people through ballots every ten years (Article 80). Also, the American drafters omitted the word "property" after "life and liberty" from Article 31 of the 1946 Constitution, setting forth the due process principle lest the property rights not be abused by the Supreme Court as was the case in the United States in the late 19th and early 20th centuries. These provisions proved to be more or less irrelevant. For historical and other reasons, the Japanese judiciary never became as powerful as the American judiciary. No Japanese Supreme Court judge has ever been removed by the ballot because the average age of their appointment to the Supreme Court is 64, their mandatory retirement age is 70, and therefore no one remains on the bench at the next round of review ten years later. For that matter, the Japanese Supreme Court has exercised its judicial review power very sparingly. The American drafters incorporated the doctrine of *Marbury v. Madison* in Article 81 of the 1946 Constitution in the hope that the Supreme Court would function as a check against the Diet and the Cabinet nullifying the laws, orders and regulations it finds to be unconstitutional. The Japanese Supreme Court has,

however, held the statutes unconstitutional only about five times in the past 55 years. It has a tendency to defer to the legislative will of the Diet, which is defined as the "highest organ of state power" in Article 41. This is not necessarily a bad result. Some scholars in the United States may envy the judicial restraint exhibited by the Japanese courts. It is simply that the Japanese judiciary did not behave as the American drafters hoped or feared. All in all, provisions for the judiciary in the 1946 Constitution have had mixed results. The provisions have created a more independent judiciary, but did not create as strong and influential a system as the United States judiciary.

Conclusion

In summary, the American attempt to democratize Japan after WWII has been remarkably successful. The 1946 Constitution was a major factor in that attempt. More than anything else, it set the benchmark against which the progress of the Japanese democratization was measured. Today, Japan is a thriving free market democracy where basic human rights are protected and the political system accountable to the people is functioning. The Potsdam Declaration's desire to see the establishment of a "peacefully inclined and responsible government" in accordance with the "freely expressed will of the Japanese people" has been fulfilled. The Japanese people owe a lot of this success to the American ideas, including those of the American drafters of the 1946 Constitution. One must also remember, however, that the Japanese had experienced a healthy democracy in the 1920's and that the post-war democracy was based on and grew from that experience.

As noted above, however, not every American-inspired measure worked successfully in post-war Japan. Certain provisions of the 1946 Constitution did not work as expected or became obsolete over time. Many of them were provisions that reflected American constitutional experiences that did not take root in the Japanese soil. Others were the currently popular substantive ideas that were bound to become obsolete over time. It was also unfortunate that the initial drafting of the 1946 Constitution did not allow for any Japanese participation and had to be completed in such a short time.

Nevertheless, the American-drafted 1946 Constitution sowed seeds of democracy in Japan and the Japanese people have lived with (and some have put up with) this Constitution for more than half a century. No constitution is perfect and it is now up to the Japanese people to fix it if and when necessary in accordance again with the freely expressed will of the people.

Chairman Cornyn, Chairman Chafee, and subcommittee members, thank you for your time. I appreciate the honor and privilege of being allowed to express my views today.