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Const. I & II

THE REVISION OF THE JAPANESE CONSTITUTION

I. THE PRE-WAR JAPANESE STATE

When, on 3 November 1946, the Shin Kampo -- the new or Showa Constitution of Japan -- was formally promulgated, a complete reconstruction of the Japanese State was thus accomplished. A solid framework of organic law was thereby established to support the entire structure of the body politics. For the first time in Japanese history, a citizen of Japan could read in plain language the rules which guide and control the actions of every agency of his government. For the first time formal legal limitations were imposed upon the acts of government. For the first time the citizen was given a Bill of Rights.

The story of the steps by which this reconstruction was brought about makes a colorful chapter in the history of the Occupation. But its true significance cannot be understood without a preliminary examination of the old structure. It would, of course, take volumes to present a critical and authoritative picture of the Japanese state prior to the occupation, a project far beyond the capacity of this work. All that can be done is to highlight the most important features, leaving to the student and historian the uncovering and interpretation of the intricate details.

A distinction must be made at the outset between the Constitution of the Japanese State and the so-called Meiji Constitution or Constitution of 1889. The actual constitution of the Japanese State was a formless mass of laws, rescripts, customs and traditions, of which the written law of the Constitution of 1889 was but one part. The situation in Japan was thus somewhat analogous to the British Constitution, based as it is on laws and customs having the force of law surrounding and controlled by a central time-honored

constitution, hoary with age, and wielding absolute authority -- the Parliament. In Japan, the counterpart was the Imperial Institution -- Tenno -- the Emperor of Japan.

The Meiji Constitution itself was drafted by a small group of Japanese leaders headed by Prince Ito, after a thorough study of modern western constitutions, particularly that of Prussia, which it most closely resembles. The men who prepared it knew exactly what they were doing. They were the key men of the movement that had brought about the Meiji Restoration, representing no popular movement but rather a small group of feudal lords who were determined to retain the power they had won to control Japan's destinies and to put Japan into a position wherein she could meet and treat with the western powers on a basis of equality. As Reischauer says, the Meiji Revolution "did not, like those in 17th century Europe, boil up from below. It was carefully planned by the top and forced upon the people by a relatively small but extremely vigorous group in control of the movement."#

The constitution was but the culminating step in a series of reforms which resulted in the establishment of what was to all outward appearances a modern state. Actually, the whole structure was little more than a set for a puppet show. The men who moved behind the scenes, who operated the wires, retained the thinking, the ambitions, the traditions of feudal Daimyo and samurai, the robes of which (haori hakama) they had previously worn.

Ito himself, in the preface to the Third Edition of his Commentaries on the Constitution, says: "The Imperial House Law is an expansion of the

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#Reischauer "Japan, Past and Present" Knopf, New York, 1946, p. 117

institutions bequeathed by the sacred Imperial ancestors of successive ages, and is intended to be a guide to posterity for all time to come. The Constitution of the Empire of Japan is a collection of the fundamental rules of the State, and lays down clear definitions of the relations that ought to mutually exist between the sovereign and His people."

Between 1868 and 1890, a series of political reforms were put through, starting with the so-called Charter Oath of 1868 and closing with the promulgation of the Imperial Constitution of 1889. The edicts or laws which accomplished these changes, together with the traditions that still surrounded the exercise of the Imperial prerogative, constitute the basic law of Japan. These include reorganization of the central government, establishment of prefectures, cities and towns, modernization of the police, the fiscal system, establishment of a postal system, etc. Prefectural assemblies were created in 1879 and a national assembly was in 1881 proposed for 1890. The Imperial House Law, the Imperial ordinance concerning the House of Peers, the Law of the Houses and the Law of Sinecure were all promulgated simultaneously with the Constitution and had equal force. The Privy Council had already been established as well as the extra constitutional bodies exercising fundamental authority and supported by state funds.

Both the Imperial oath on the occasion of the promulgation of the Constitution and the preamble and the Constitution itself contain significant statements. The former declares:

"In consideration of the progressive tendency of the course of human affairs and in parallel with the advance of civilization, We deem it expedient, in order to give clearness and distinctness to

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*Ito, Hirobumi, "Commentaries on the Constitution of the Empire of Japan, Tokyo, Ed. 1931

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the instructions bequeathed by the Imperial founder of the House and Our other Imperial ancestors, to establish fundamental laws formulated into express provisions of law so that, on the one hand, Our Imperial posterity may possess an express guide for the course they are to follow, and that, on the other, Our subjects shall surely be enabled to enjoy a wide range of action in giving Us their support, and that the observance of our laws shall continue to the remotest ages of time. We will thereby give greater firmness to the stability of Our country and promote the welfare of all the people within the boundaries of Our dominions, and We now establish the Imperial House law and the Constitution. These laws come to only an exposition of grand precepts for the conduct of the government..."

The preamble to the Constitution stated:

"Having, by virtue of the glories of Our Ancestors, ascended the Throne of a lineal succession unbroken for ages eternal; desiring to promote the welfare of, and to give development to the moral and intellectual faculties of Our beloved subjects, the very same that have been favoured with the benevolent care and affectionate vigilance of our Ancestors; and hoping to maintain the prosperity of the State, in concert with Our people and with their support, We hereby promulgate, in pursuance of Our Imperial Rescript of the 12th day of the 10th month of the 14th year of Meiji, a fundamental law of State, to exhibit the principles, by which We are to be guided in Our conduct, and to point out to what Our descendants and Our subjects and their descendants are forever to conform.

"The rights of sovereignty of the State, We have inherited from Our Ancestors, and We shall bequeath them to Our descendants. Neither We nor they shall in future fail to wield them, in accordance with the provisions of the Constitution hereby granted."

The Law of the Constitution sketched in outline form the framework of the structure and purported to give it legal authority. It did no more than formalize the pattern. Its disassociation from the actual operation of government is clearly shown by the fact that it was never amended and never questioned. Indeed, no forum existed with jurisdiction to hear challenges on the grounds of constitutionality, although in practice the Privy Council performed the function of making certain that no action not in full conformity to the basic principles of national policy would be undertaken.

The first chapter treated of the Emperor. His dynasty was confirmed (Arts. 1 & 2). He was placed above the law (Art. 3). Sovereignty was reposed in him (Art. 4). "The Emperor exercises the legislative power with the consent of the National Diet" (Art. 5). He gave sanction to laws and orders (Art. 6). He might himself have issued ordinances and orders to carry out the laws, preserve peace and order, and deal with national emergencies and situations arising when the Diet ~~is~~ was not in session (Arts. 8 & 9). He "determined the organization of the ... administration, and salaries of all civil and military officers and appoints and dismisses the same" (Art. 10). The remainder of the chapter related to the exercise of specific powers such as declaring war, making peace, conferring titles of nobility, ordering amnesty, etc.

It was in this chapter made quite clear that the source of all political power and legal authority was the Emperor and that the administration of government was carried out in his name and by virtue of limited delegations. Law was the Emperor's word, expressed in one way or another, and a statute enacted by the National Diet was but one form of that expression. Ito said:

> "The so-called executive power is not confined to the execution of the provisions of law. Now, in private life a pre-determined purpose alone will prompt the general direction of an individual's actions; while, in facing the ever varying phases of life, it is necessary, if he is to be saved from falling into error, that he exercises his thinking faculties to meet the requirements of the moment. Similarly, though the law is competent to lay down general rules for guidance in ordinary matters, it can not be expected that it shall point out in every case the expeditious course to be taken in relation to every one of the multifarious forms of social activity. Were the executive confined to the execution of the law, the State would be powerless to discharge its proper functions in the case of absence of a law. Accordingly, ordinances are not only means for executing the law, but may, in order to meet requirements of given circumstances, be used to give manifestation to some original idea."[1]

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[1] Ito, Hirobumi, "Commentaries on the Constitution of the Empire of Japan, Tokyo, Ed. 1931 ~~Ibid, pp. 19-20~~

B. Chapter II dealt with the "Rights and Duties of Subjects". At first glance, this chapter would seem to contain those basic guarantees of civic and civil liberty which constitute the very foundation of every western democracy. But instead of an outright guarantee -- the fixing of an absolute right -- each separate provision contained a limiting or conditioning clause which rendered the guarantee worthless, as many a Japanese subject and alien within Japan have found to their sorrow. Thus, Article 19 provided: "Japanese subjects may, according to qualifications determined in laws or ordinances, be appointed to civil or military or any public office equally." Article 23: "No Japanese subject shall be arrested, detained, tried or punished unless according to law." Article 26: "Except in the cases mentioned in the law, the secrecy of the letters of every Japanese subject shall remain inviolate." Article 29: "Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meeting and associations."

C. The term "according to law" and similar phrases are not the equivalents of "due process of law" as used in the United States. The law here referred to was no more than the expression of the Emperor's will, unhampered by any legal stricture, required to conform to no known standard. The true scope of this chapter was well stated by Ito to be "for the purpose of cherishing and of broadening the beautiful results of the Restoration as well as bearing witness thereto to all eternity."#

D. The third chapter was concerned with the Imperial Diet. A bicameral system was established, with the composition of the House of Peers fixed "by Imperial Ordinance". The House of Representatives was to be composed of "Members elected by the people, according to the provisions of the Law of Elections."

#Ibid. p. 36.

No other qualifications or standards were fixed in the constitution. The chapter dealt in loose terms with organization and internal administration rather than jurisdiction and authority and the only significant provisions are those which establish clearly that it existed, could be convoked, could be dissolved and undertook action only at the will of the Emperor. The cabinet was not responsible to or even answerable to the Diet.

16. On the contrary, it appears from Chapter IV, "The respective Ministers of State shall give their advice to the Emperor, and be responsible for it." The only other provisions of this chapter, entitled "The Ministers of State and the Privy Council" are two articles, one of which required the countersignature of a Minister of State on laws, imperial ordinances and imperial rescripts, and the other of which provided that "The Privy Councillors shall, in accordance with the provisions for the organization of the Privy Council, deliberate upon important matters of State, when they have been consulted by the Emperor." Certainly, this left the whole subject in a most flexible condition.

17. Chapter V, dealing with "The Judicature", made it quite clear that there was no independence of the judiciary in Japan. Judges were appointed, served, and were disciplined "according to law." There were no provisions defining the jurisdiction or authority of the courts, save one which required that "no suit at law, which relates to rights alleged to have been infringed by the illegal measures of the administrative authorities ... shall be taken cognizance of by a Court of Law." In this connection, it is of interest to note what Ito had to say, pp. 111-112:

> "By the expression 'illegal measures of the administrative authorities', it must be understood that no suit can be brought against those measures that have been carried out in conformity with law or with the functionary power of the office in question.

> No one, for example, shall be allowed to institute a suit touching a measure, which is in conformity with a law placing restriction upon the right of property for the sake of the public good. The expression 'rights alleged to have been infringed' points to the evident conclusion, that mere damage to one's interest, though it can become the ground of a petition, begets no right of bringing an administrative litigation. When, for example, administrative authorities shall have fixed the course of a line of railroad, according to an established process, the local inhabitants may remonstrate, thinking that it would be more advantageous for them to have its course fixed in some other direction. Such a remonstrance would relate to interest and not to right. So the inhabitants may petition the competent authorities, but will not be allowed to bring an action before the Court of Administrative Litigation."

Under Chapter VI, matters of public finance were dealt with. Although several of the provisions introduced innovations in Japanese administrative procedures, the loopholes were many and large. Article 62 provided that the imposition of a new tax or the modification of the rates of an existing one must be by law but "all administrative fees...shall not fall within the category of the above clause." Furthermore, "the raising of national loans and the contracting of other liabilities to the charge of the national treasury, except those that are provided in the Budget, shall require the consent of the Imperial Diet." It was provided that an annual budget shall be presented to the Diet, but of this Ito said, p. 121: "There is one thing that demands explanation in this place, and that is the fact that in most countries a Budget is regarded as a law. A Budget is simply a sort of gauge to be observed by the administrative officials for a current year. Thus a Budget requires the consent of the Diet on account of its special character and is not properly speaking a law. Therefore a law has precedence over a budget, which has no power to change a law."

This same chapter provided for sufficiently broad escape clauses to nullify any restrictions seeingly imposed upon the executive. Expenditures in excess of budget appropriations had to receive subsequent Diet approval -- an implied authorization to exceed, rendered all the broader by the absence, in

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be fully understood to appreciate the true significance of constitutional revision. The Meiji Restoration brought into power in Japan the leaders of several divergent groups whose common meeting ground was opposition to the age-hardened ways and thinking of the Tokugawa Shogunate and adherence to the aim of moulding Japan into a strong, unified national state. The adherents of the young Emperor, the rebellious young samurai, the elder statesman who saw both the advantages and dangers of Western Culture and the threat of Western imperialism, and the recently risen merchant class which foresaw immense wealth and influence in achieving such a goal -- all banded together. Their aims were accomplished with spectacular success. A series of legal and constitutional reforms were put through, the most outstanding of which, though by no means the final one, was the so-called Meiji Constitution. Every measure was carefully planned and skillfully executed.

22. The result was a state that gave all the appearances of a constitutional monarchy in the European style, with a representative national legislative assembly, codified laws, what appeared to be a constitutional Bill of Rights, a centralized system of national and local administration based upon law. Uniformed officials appeared throughout Japan, exercising a control over the life of every community that inspired awe in Western eyes, where the ideals of keeping the peace, maintaining public health, providing for public welfare tended to outweigh spiritual values.

23. The formal structure of the Japanese State satisfied the most exacting requirements of the Western World, and the growth to maturity of Japan within the course of half a century was considered miraculous. Japan, by the start of the Twentieth Centruy, had achieved the enviable status of a modern state and was welcomed into the council chambers of the great powers. But, true though it may be that in the fifty-odd years following the Meiji Restoration,

Japan underwent an amazing transformation from an isolated, primitive, feudal autocracy, essentially agrarian in character, into a modern industrial totalitarian oligarchy, the changes in the political field at least were more ostensible than real.

On the record, Japan was governed by a Cabinet of Ministers of State acting for and in the name of the Emperor, whose chief spokesman was the Lord Keeper of the Privy Seal and whose official council was the Privy Council, a national representative legislative assembly divided into a senior House of Lords, representing the aristocracy and vested interests, and a junior House of Representatives, elected on the basis of a limited male franchise. While centralized to the highest degree, the administration of government was carried out through several echelons feeding out of the national ministries (see chart attached, ~~Plate I~~ APPENDIX B). A complete and functioning system of courts existed, under the control of the Ministry of Justice, it is true, but nevertheless, adjudicating the laws, which had been almost entirely codified.

In point of fact, the real nature of the Japanese State had been little altered. The Law of the Constitution was little more than window dressing. Not only were several important official agencies of state entirely extra-constitutional, but all operations of government were administered by clique and counter-clique, by family group and military cabal and through all the hidden channels of intrigue, duress, bribery and seduction. The four great ruling groups were, of course, the Aristocracy, the Military, the Zaibatsu and the Bureaucracy. The oldest and most exalted was unquestionably the Aristocracy, representing the actual Imperial Family. The Knights of the Round Table -- the Defenders of the Faith -- were the Military, closely allied

by ties of blood kinship and marriage with the Aristocracy. While the Imperial Household itself was in practical effect the greatest of the "Money Gang," the ten great financial families provided the support, the sinews and the life-blood for the rulers and they too were closely intertwined by marriage and blood and bound to allegiance by heritage, for they were the descendants of the greatest of the local barons. The operators, the administrators, were the members of the Bureaucracy. Many served from time to time in Zaibatsu firms. Some ascended to the peerage. All the groups were closely tied together by the iron bonds of mutual necessity for one could not long survive without the other; and they were united in their loyalty to the Imperial Institution and their ambitions for Japan.

Within this inner circle, the field was honecombed by cells representing clique and counter-clique, conspiring, sabotaging, bickering, contending for favor, exercising duress, but always united in two basic aims, perpetuation of the system and support of each other from assaults from without and from below. The real government operated behind closed doors and entirely outside the law. The Japanese Government has been notorious for its failure to engage in actual operations. Under the Japanese system, the national government to a very large degree and the various lower echelons to a proportionately lesser degree, did not handle directly the normal functions and operations of government. The job of a government official was to supervise. He sat at a desk and gave or withheld approval. Operations were and are carried out by private or semi-private organizations subsidized by the government and frequently officered by governmental officials. Thus, in the labor field, ~~indeed actually,~~ we have the vicious labor boss or contract labor system. In every municipality, licenses were issued and fees collected usually through the Oyabun, which itself made a contribution to the city. Public welfare was administered by

private institutions receiving lump sum subsidies. Economic controls were handled through control associations. In fact, the only public agency operating directly and through a fully developed official organization was that of the police.

27. Under this system, and indeed one of the underlying reasons for its perpetuation, the diffusion of responsibility became so great as to make it well-nigh impossible to pin down the real actor. While this situation may not have been so observable at the village level, where practical necessities required direct intervention, the further you got from the village, the wider the separation between government and the people became and the larger grew the field in which a species of political middlemen operated. It is this feature which is so completely contrary to democratic principles. The government is insulated from the people and can at one and the same time disclaim responsibility for corruption and oppression and secretly participate in the illegal benefits which may accrue. Public officials, furthermore, enjoying the support and protection of their sponsors or superiors, are secure and can ignore the outcries and demands of the plain people. The prime example is, of course, the position of the man who wears the Imperial Chrysanthemum. As the agent -- the representative of the Emperor, his actions could not be questioned, for that would reflect upon His Imperial Majesty. Of course, that was no protection from the lightning which struck from above. As a result, every official and employee so conducted himself as to remain in the good graces of his superiors, official or otherwise.

28. It has been stated that the basis of all political authority is the acquiescence of the individual member of the state. However obtained, it is the vital ingredient. It is the people who, in the last analysis, determine

what form their government takes. The rulers of Japan were well aware of this. The knowledge of that basic truth guided their conduct and influenced their every action. It was because of this knowledge that they enlarged Shinto into a State religion that glorified the Japanese State as symbolized by the Emperor and portrayed the sublimity of unquestioning obedience to an ever-loving and ever-watchful temporal and spiritual ruler, the divine parent of an earthly family, by this means deepening and strengthening the already powerful unifying force of Emperor worship. It was because they were afraid that acquiescence might be withdrawn that they developed a police system which inquired into every intimate detail of the private life of every subject, that watched, regulated and oppressed, that acted swiftly and summarily whenever danger to the State appeared to threaten -- acted without regard for human rights and with no concern for law. It was because of this knowledge that they fed the people's minds with grandiose schemes of world conquest and the promise of all the abundance of land and goods which that would bring.

29. This, then, was the Japanese State, wherein the individual was completely submerged, wherein the entire authority of government was claimed by and exercised by a self-selected and self-perpetuating few, a state, the basic philosophy of which was the glorification of an institution from which an individual could claim no rights, to which an individual owed complete allegiance. The Imperial Japanese Government arrogated unto itself the positions of guides of the people's morals, keepers of the people's conscience and arbiters of the people's destinies. The people were not consulted.

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II THE BASIS FOR REVISION

CHAPTER II. THE BASIS FOR REVISION

~~36~~. The surrender of Japan and its occupation by the forces ~~of the United States, representing~~ the victorious Allied Powers presented a new problem in international law. The surrender was, of course, total, but no

annexation or destruction of the country was contemplated. On the contrary, the existing government was left in power, to operate under and subject to the control of the occupant, for the purpose of accomplishing certain political and economic reforms that would ensure a peaceful Japan once the military forces had been withdrawn.

A familiar incident of military occupations of the past has been either the outright annexation of the country occupied or the establishment of a regime regarded as sympathetic toward the occupant. Particularly was this so with the advances of the Axis Powers, where puppet governments were invariably set up, manned by native "quislings". In no case, however, did this involve major organic changes imposed by the occupant. Even during the First World War, although legal conflicts were many, the basic domestic laws of the occupied country were left untouched. Article 43 of the Hague Rules provides that:

> "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore and ensure, as far as possible, public order and safety, <u>while respecting, unless absolutely prevented, the laws in force in the country.</u>"

It has very generally been accepted that the military occupant exercises military authority over the occupied country but does not have full rights of sovereignty.* How far total surrender, made with full knowledge of the intentions of the victors, would operate to change this rule has never been established. Notwithstanding, there existed very valid reasons why constitutional revision by military fiat was highly undesirable. In the first place, any such attempt would be certain to rouse the opposition of the people of the conquered country, no matter how beneficient the proposed changes might seem. In the second place, on more than one occasion, the Allied Powers had pledged their

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*Hackworth, Digest of International Law, Vol. VI, Ch. XX, p. 400.

adherence to the principle of self-determination. It would indeed have been strange if the principal proponents of democracy -- inherent in which is the right of free choice of one's own form of government -- had undertaken to impose their own system of government upon the conquered country.

29. The basis for governmental reform -- constitutional revision -- in Japan by the Japanese people, was laid in the Potsdam Declaration, announced by the principal Allied Powers at Potsdam, Germany, in July, 1945. This instrument declared that:

> "There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world."

And that:

> "We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.
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> . . . . . .
>
> "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."

30. In other words, it was clearly stated at the outset that the Allied Powers expected the Japanese people to undertake their own reforms. Pursuant to this clear declaration, the United States Government prepared an initial post-surrender policy directive for the guidance of General MacArthur in his occupation of Japan as Supreme Commander for the Allied Powers. This document stated:

"The ultimate objective of the United Nations with respect to Japan is to foster conditions which will give the greatest possible assurance that Japan will not again become a menace to the peace and security of the world and will permit her eventual admission as a responsible and peaceful member of the family of nations. Certain measures considered to be essential for the achievement of this objective have been set forth in the Potsdam Declaration. These measures, include, among others, the carrying out of the Cairo Declaration and the limiting of Japanese sovereignty to the four main islands and such minor islands as the Allied Powers determine; the abolition of militarism and ultra-nationalism in all their forms; the disarmament and demilitarization of Japan, with continuing control over Japan's capacity to make war; the strengthening of democratic tendencies and processes in governmental, economic and social institutions; and the encouragement and support of liberal political tendencies in Japan. The United States desires that the Japanese Government conform as closely as may be to principles of democratic self-government, but it is not the responsibility of the occupation forces to impose on Japan any form of government not supported by the freely expressed will of the people.

. . . . . .

"Where action is necessary in order to carry out the surrender, you have the right to act directly from the outset. Otherwise, subject always to your right as the Supreme Commander to take direct action in the event of the unwillingness or failure of the Emperor or other Japanese authority to act effectively, you will exercise your supreme authority through the Emperor and Japanese governmental machinery, national and local. The policy is to use the existing form of government in Japan, not to support it. Changes in the direction of modifying the feudal and authoritarian tendencies of the government are to be permitted and favored. In the event that the effectuation of such changes involves the use of force by the Japanese people or government against persons opposed thereto, you as Supreme Commander should intervene only where necessary to ensure the security of your forces and the attainment of all other objectives of the occupation. You may, as circumstances require, exercise your supreme power and authority in the fullest measure including the imposition of direct military government. If it becomes necessary to impose direct military government in any part of Japan, you will immediately thereafter advise the Joint Chiefs of Staff. You will not remove the Emperor or take any steps toward his removal without prior consultation with and advice issued to you through the Joint Chiefs of Staff.

. . . . . .

"By appropriate means you will make clear to all levels of the Japanese population the fact of their defeat. They must be made to realize that their suffering and defeat have been brought upon them by the lawless and irresponsible aggression of Japan, and that only when militarism has been eliminated from Japanese life and institutions will Japan be admitted to the family of nations. They must be told that they will be expected to develop a non-militaristic and democratic Japan which will respect the rights of other nations and Japan's international obligations."[1]

35. Although, some time subsequently, two informal papers relating to governmental reform in general and the Emperor in particular were forwarded to the Supreme Commander for his information, no further instructions were issued from Washington. The Far Eastern Commission, organized under the terms of the Moscow Agreement of December, 1945, took no action, formal or otherwise, until after the first formal draft of a new constitution had been adopted by the Japanese Government. The activities of the Far Eastern Commission in this regard will be considered in a subsequent chapter.

36. Given the major responsibility of encouraging the development of democratic institutions, the Supreme Commander was faced with two alternative methods of going about it. He clearly recognized at the outset that no political reform that did not encompass revision of the constitution would be worth serious consideration. The problem was whether to permit and encourage the slow growth of local democratic institutions and political maturity and at some later time to advise the development of an organic law that would merge and reflect the new institutions, or to promote the early and drastic overhaul of the basic law and then build on that new foundation. Too early and too drastic a change might well carry the stamp of alien rule and as well stunt the growth of native institutions. On the other hand, the slow natural growth of native political institutions and the gradual development of political maturity in the Japanese people would require an occupation lasting certain-

[1] See Appendix B "Memoranda for the Supreme Commander", Feb. 46 entitled "Constitutional Reform"

long enough for the generation then in primary school to grow to manhood. While in September, 1945 it appeared reasonably certain that the occupation would be maintained until the Allied Powers had determined that the conditions of the Potsdam Declaration had been complied with, no one could be sure what changes in thinking would take place. Balancing all the factors, it seemed much the wisest course to urge upon the Japanese Government the prime importance of immediate constitutional revision.

The great advantage of immediate revision of the basic law was that it would give to the Japanese people a goal at which to shoot, as well as a solid foundation on which to build. Under conditions existing in September, 1945, there could be no assurance that a reactionary cabinet, privy council or Emperor would not, overnight, wipe out all the gains that might be achieved. Precisely, this had been done in the early thirties, bringing to a sharp and bitter close the nearest approach Japan had made to political liberalism. This compelling reason alone made the decision of General MacArthur an eminently wise one.

During the course of the first four months, the Supreme Commander conveyed to the Japanese Government his concern in the matter on several occasions, taking care in accordance with his firmly established policy of minimum interference to make it clear that he was not directing but advising. It was his basic conception of the Occupation Mission that to the fullest possible extent the Japanese should be permitted and encouraged to do the work and undertake the reforms themselves, under the general guidance and supervision of the Occupation Forces. This concept, certainly a new and liberal one in the annals of military occupations, arose out of his firm

belief that that which was imposed by authority of superior military force not only bore the taint of oppression but would be the antithesis of true democracy as well. In September, then, Prince Higashi-Kuni, Prime Minister of the so-called Surrender Cabinet, was informed that the Supreme Commander regarded revision of the constitution as a matter of first importance. Shortly thereafter, Prince Konoye, then Minister without portfolio in the Higashi-Kuni Cabinet, had occasion to meet General MacArthur and sought advice from him on the subject of governmental reform. This brief meeting was followed by an informal conference between the late George Atcheson, Jr., United States Political Adviser to the Supreme Commander, and Prince Konoye, at which the matter of revision of the Constitution was explored in some detail. At this conference, Ambassador Atcheson outlined for the Japanese those points which SCAP considered to be basic. These were:

a. Extension of the authority of the House of Represnetatives, particularly over the budget.

b. Removal of the veto power of the House of Peers.

c. Establishment of the principle of parliamentary responsibility.

d. Democratization of the House of Peers.

e. Abolition of the veto power of the Emperor.

f. Curtailment of the Emperor's authority to legislate by means of Rescript and Ordinance.

g. Provision for an effective Bill of Rights.

h. Establishment of an independent judiciary.

i. Provision for impeachment and recall of public officials.

j. Obliteration of the influence of the military in the government.

k. Abolition of the Privy Council.

revision, but made no formal contacts with the Japanese Government and prepared no detailed plan of action.

5. Since it has been apparent throughout the whole period of revision that there existed no basic disagreement among the Allied Powers with respect to the basic principles that such revision must encompass, it might be well to discuss these principles before proceeding to a study of the record of what actually took place. It has already been pointed out that the so-called Meiji Constitution provided none of the safeguards or the guarantees customarily found in the organic law of a modern state. The Japanese State, as has so often been pointed out, operated as a government of men rather than of laws. All authority stemmed from the top -- a supreme ruler upon whom every Japanese subject depended, to whom he looked, for whom he lived. The agents of that ruler governed with complete despotism. Their authority could not be challenged for two excellent and eminently practical reasons. There was no forum sufficiently exalted to assume jurisdiction, for that would be to permit questioning His Imperial Majesty, and there were no laws in the Western sense of the word to define in clear and unequivocal terms the relationships between the subject and his government.

6. The basic ingredients of government in a democratic society are well established. There must be a body of rules readily available to and easily understood by all, equally applicable to all and adopted and altered according to procedures which assure full opportunity for participation by all members of the community and which are sufficiently rigid to guarantee reasonable stability of those rules. There must be a body of administrators chosen by and from among the individual members of society and answerable to them. The right of every individual freely to choose and freely to retire his

agents of government is an absolute and inalienable one in a democracy. There must be an independent and impartial tribunal for the trial of disputes between individuals and between individuals and their government. And there must be effective guarantees against those threats to individual freedom, to human existence and to the public welfare which human society has come to recognize as threats to civilization itself.

B. The state -- the body politic -- has neither existence nor authority nor justification beyond the collective hopes and desires of the individual members. The citizen -- the participating member of the society -- owes no duty or allegiance to the state as a separate entity but only to society as the aggregate of its individual human members -- as the projection of himself. Neither the government nor its agents can be immune to his challenge. At every point in the administration of government at which the individual considers that his rights or his liberties have been infringed, he is entitled as of absolute right to ask: "By what authority is this done?"; he is entitled to seek redress or remedy through the channels provided by law -- the ballot box or the court of justice.

C. The sovereignty of the people, the supremacy of law, the absolute guarantee of basic rights and liberties, the independence of the courts, the recognition of the individual -- these must of necessity be the fundamental requirements. Through what machinery they are provided, how they are to be obtained and assured, presents a problem, the solution of which may differ widely among men. Institutions cannot be transplanted in toto but must either be developed or modified to fit the conditions, the understanding, the capacities of the people they are to serve. It is, perhaps, most fortunate

that, here in Japan, the ground had already been prepared, to some extent. The history of modern Japan is one of a steady, if disorganized and inarticulate, pressure from the Japanese people toward greater participation in their government. The pressure was in part responsible for the Meiji Restoration itself and the semblance of parliamentary government which resulted from it. It forced the subsequent adoption of restrictive and oppressive measures again and again and yet, notwithstanding those measures, it brought Japan to the verge of a responsible parliamentary form of government in the ~~Twenties~~ nineteen-twenties. No one who has dealt with the Japanese Government during the course of the Occupation, or who has come to know anything of the Japanese people, could help being impressed by their tremendous urge for and the widespread knowledge of the institutions of popular government. This in itself augured well for the future of constitutional revision.

45. Of course, one serious problem loomed large -- the treatment of the Emperor and the Imperial Institution. Kokutai -- national polity -- means, to the Japanese, the unity of people and Emperor in a family relationship that is immutable and indestructible. The doctrine is not to be found expressed in its entirety in any document. It is not a concept of law though it might be considered one of sovereignty. The Japanese man in the street cannot conceive of a state without the Imperial Institution. It gives lustre to the nation and binds all parts together. It is not a question of the divinity of the Emperor. Actually, he was never considered "divine" in the Western sense, but rather as the spiritual as well as the temporal ruler of the people. In an "Interpretation of the New Constitution", written by ~~SHUTO, Hideo~~ Hideo Shuto; ~~SATO, Tatsu~~ Tatsu Sato; ~~WATANABE, Yoshihide~~ Yoshihide Watanabe; ~~SATO, Isao~~ Isao Sato; and ~~YAMAURA, Kanichi~~ Kanichi Yamaura; with the blessing of the Yoshida Cabinet and published in October, 1946, it was said:

"The expression 'National polity' can be interpreted in various ways, but it is adequate to define it as the fundamental characteristics of the nation. Interpreted in this way, the national polity is the basis of the existence of the State and the national polity shares the destiny of the State. Therefore, if the national polity is changed or lost, the State loses its existence at once. Even if a new State is established, it must be recognized that the old and the new States will be different. Considering the national polity of our country in that light, the fundamental peculiarity of our country throughout her existence in the reliable part of her history is the unshakeable, solemn fact, forming the basis of the existence of JAPAN, that the relation between the Emperor and the people is deeply rooted in the hearts of the people. The people have the Emperor as a focal point of adoration and are united through him."

E. This concept of the position of the Emperor -- the understanding of which is basic to a proper understanding of the old Japanese Constitution -- presented grave difficulties of draftsmanship for anyone attempting to define the legal position of the Emperor under a new constitution based upon democratic principles. It must be remembered that the language -- the legal phraseology -- with which we are accustomed to describe the meaning and offering of democracy has been fashioned and colored by time and usage to convey precise pictures we can easily recognize. The words and characters used by the Japanese to portray the same ideas themselves have meanings peculiar to Japanese culture and ideology and, thus, are only with great difficulty adaptable to these new uses. Furthermore, by time-honored custom, the Japanese used a written law as a precept merely -- a statement of principle, to be given implementation and meaning by those charged with its application or interpretation.

F. Another consideration was the question of legal continuity. It was obvious that substantial revision, if not complete substitution, would be necessary in order to establish the legal basis for democracy in Japan. At first blush, this would seem to require something more than mere amendment

of the Meiji Constitution, which could be accomplished only through the initiative of the Emperor and consent of the Diet. Since the Potsdam Declaration required a government to be established through the "freely expressed will of the Japanese People" and since it was generally accepted that the existing constitution permitted no opportunity for freely expressed popular approval, somewhat of a dilemma was presented. At the same time, from a purely legalistic point of view, no machinery existed for complete revision within the framework of existing organic law and the establishment of such machinery could well be considered improper interference by the military occupant in violation of the Hague Rules.

This question was given serious consideration by both the Supreme Commander and the Japanese Government, as the actual revision progressed. It was resolved by the Japanese Government in favor of action by the Emperor in proposing an imperial project for amending the existing document, as provided in Article 73. Legalists might argue that this method prevented amendment of the Imperial Proposal in the Diet and restricted the authority of the Diet to approval or disapproval, but this view was discarded. No attempt to amend the Meiji constitution had ever been made and no precedents existed. It was considered that it was for the Diet to establish its own rules in this matter.

It is of interest to note that this method of constitutional revision through the device of amending the old is not unknown in the United States. Within recent years, the State of Georgia undertook complete revision of its constitution under the leadership of Governor Arnall. The method used

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*See Appendix A for detailed consideration of problem of continuity.

was to call a committee of experts together to prepare a draft of a completely new constitution. When this had been prepared and reviewed, it was presented to the state legislature as an amendment to the existing constitution and adopted as such. The legality of this procedure has not been brought into question.

[redacted]. Before taking up the actual work of revision, as undertaken by the Japanese Government and assisted by SCAP, it seems appropriate to consider for a moment the various private and unofficial proposals for revision of the Meiji Constitution, for these proposals are of considerable value in indicating the trend of Japanese thinking as well as the nature of the influences bearing upon the government itself. It has already been pointed out that the subject acquired early [redacted] widespread popularity, and there can be no doubt that the discussion of this subject throughout the length and breadth of Japan did much to prepare the Japanese people for the actual and official draft.

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CHAPTER III. UNOFFICIAL PROPOSALS FOR REVISION*

1. Preliminary Discussions

The most striking feature of the early stages of constitutional revision was the extent to which sweeping changes in the way of liberal and democratic reforms were proposed by the newly formed political parties as well as by private groups and organizations. Every party had its own draft for a revised constitution and all of the newspapers contained long and serious discussions not only of the need for revision but of the new provisions considered necessary as well. Not even the Imperial Institution - the Emperor System - was omitted from consideration, though most people approached this subject somewhat timidly. Nevertheless, the size of the group favoring a republican form of government was by no means small or entirely recruited from radical ranks.

In discussing the various proposals for revision that appeared during the early months of the occupation, it must be remembered that we are dealing with concepts and principles rather than exact statutory provisions. The Meiji Constitution itself was conceived to be little more than a statement of guiding principles.[1] The proposals put forth were invariably limited to a set of general rules, and frequently the language used was so vague as to admit of several and contradictory interpretations. The submergence of the individual in the group, the close personal relationship between master and servant, the patriarchal nature of all Japanese society made it inevitable that greater reliance should be placed on the spoken words and obvious actions of the ruler

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* Much of the material for this chapter is taken from Robert A. Fearey's excellent Comparative Analysis of Recent...Unofficial...Revision Plans, POLAD 291, 7 March, 1946.

1/ See Chapter I, pp 3 & 4.

than on exact written words. The widespread illiteracy and the extremely difficult written language made this result even more certain. Thus, even today, many a Japanese is prone to regard the exact, specific language of his new Constitution as no more than a precept to be interpreted and applied for his benefit according to the wishes and intention of the officials in power.

. One particular problem bothered nearly everyone who tried his hand at constitutional revision. National Polity, or Kokutai - it is sometimes translated National Policy - is considered by the Japanese to be a peculiar Japanese concept.

> "The present trend of thought appears to demand worship of, and submission to, things simply because they are peculiar to Japan. Such claim can never stand scientific tests."
> Suzuki Yasuzo, Tokyo, 1937.

It is rare indeed that any two Japanese will agree on the meaning of the term. It appears almost impossible of explanation in language familiar to the lawyer or political economist. Says Fujii:

> "In this way of the Tenno is found innate the sacredness of the Tenno, who his subjects look up to in adoration as divine Sovereign. Their faith is that the Tenno, being a descendant of the Sun Goddess, is a living god-- a man-god --and that therefore he practices the way of the Tenno, i.e. the Way of the Sun Goddess. Such a Tenno is indeed sacred, if ever there was anyone sacred. The Japanese Constitution has in Article III: 'The Tenno is sacred and inviolable.' This certainly points out, as in the Western fashion, the great principles of the inviolability of the sovereign power and the non-responsibility of the sovereign, but further than that, it confirms more strongly than ever the immutable fact of the sacredness of the Tenno for the reason already dwelt upon.
>
> "Now we turn to the great spirit of the unity of Sovereign and subject, together with the facts which bear testimony to it...All

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4/ See ~~Annex A~~ Appendix C for a discussion of the Konoye draft constitution.

this is but natural, since, in Japan, as already reiterated, the successive Tenno, who are divine descendants of the Sun Goddess, the Founder, and therefore living gods, have each without interruption succeeded to the sacred and inviolable Imperial Throne, and have exercised bountiful benevolence over the people through all ages in their ever-illustrious rule over the land, i.e. the way of the Tenno." Chapter III, pp 47-49, The Essentials of Japanese Constitutional Law, ~~FUJII~~ Fujii, Shinichi, Tokyo, 1940.*

The problem was to draft an organic law that would provide legal and political security for the individual and still not upset the traditional concept of the unity of the Emperor and the people and the inviolability of the Emperor. The problem was solved most easily by the official group, which proposed initially no change that would impair the Emperor's prerogatives or encroach upon his authority.

But the independent groups were, for the most part, more courageous. In this, as in other issues, they either attempted a modification or boldly jettisoned the doctrine of national polity in favor of a more democratic principle. So, again, the legal position of the Emperor gave trouble, with proposals ranging all the way from retention of the Emperor as the actual chief of State to abolition of the Emperor system. The Privy Council gave no trouble. There was complete unanimity in favor of its abolition. Abolition of the peerage was generally favored. The legislative power was to be vested in the Diet, with the weight of authority thrown to the House of Representatives and a complete overhauling of the House of Peers. In this connection, it is interesting to note the trend toward a corporate or functional upper house, a point that was raised and seriously debated in connection with the adoption of the official draft.

Independently

2. The Progressive Party's Proposals

Most conservative of all the proposals for revision, the Progressives' draft offered few startling changes but nevertheless showed a wholesome leaning

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*See also "Interpretation of the New Constitution" by ~~SHUTO~~ Shuto, Hideo and others, Tokyo, 1946, quoted in Chapter II, p 25.

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toward liberalization. Sovereignty remained in the Emperor, to be exercised by him with the consent of the Diet, the Cabinet and the Courts. A functional House of Councillors would replace the House of Peers, but the House of Representatives would exercise the real power, being authorized to override the upper house. The Diet would fix its own sessions, with a Standing Committee to act during recess periods. The Emperor would appoint the Prime Minister after consultation with the Presidents of both houses, and both Prime Minister and Cabinet would be responsible to the Diet. The proposals for guarantees of civil liberties excepted the measures necessary to maintain peace and order, while no mention at all was made of economic or judicial protections. However, judicial independence was suggested, with the whole judicial power vested in regular courts of law and, interestingly enough, the power of judicial review given to the Supreme Court. No other unofficial draft contained this proposal. Limited budgetary controls were suggested, with a provision for a three months' executive budget based on the previous year's appropriations, in the event of the failure of passage of the annual budget. Amendments are initiated by the Diet.

8. Briefly, then, the Progressives proposed many structural changes without a basic organic alteration of the existing Japanese State. The sources of all authority, the heart and center of the structure was still the Imperial Institution. The machinery for the administration of government and for the protection and participation of the people, under the benevolent protection of the Emperor, was modernized and given a more Anglo-American than Continental appearance. Certainly, greater flexibility was proposed and greater opportunities for the growth of true parliamentary government. What was lacking, however, was any clear guarantees either of individual liberty or of the democratic

process. Most outstanding was the proposal for exercise of the power of judicial review by the Supreme Court.

3. The Liberal Party's Proposals

The Liberals were more ambitious, though on the primary question of sovereignty and the exercise of the rights thereof, they sided with the Progressives. Sovereignty, they said, would reside in the Japanese State, and the Emperor would combine in himself the rights of sovereignty. However, the prerogatives of the Emperor would be substantially curtailed, he would act only with the "assistance" of his Ministers of State and he would have neither legal nor political responsibility. The House of Councillors would be a stabilizing agency composed of men of learning and experience, but the balance of power would rest with the House of Representatives, which would be given ~~prior~~ primacy in budget discussions. A Standing Committee was recommended for periods of recess. The Progressives made no mention of the Prime Minister but did propose that the Cabinet System be provided for in detail in the Constitution. Civil Liberties would be established by law, with some suggestion of economic freedoms guaranteed as well. The independence of the judiciary would be assured. The Diet ~~should~~ could initiate constitutional amendments.

Most significant of the Liberal proposals was the recommendation that the Emperor be divorced from all legal and political responsibility. It must be pointed out, however, that this was a two-edged sword. It signified not only that the Emperor would not exercise the powers of government but that he would not be answerable through legal or political process. Aside from this proposition, the Liberal platform differed little from that of the Progressives.

Indent only 5 sps.

4. ~~Socialist~~ Social Democratic Party's Proposals

~~6.~~ Here we see substantial progress toward the secure establishment of popular government. Sovereignty would reside in the State ("the National Community including the Emperor"), but the rights of sovereignty would be exercised mostly by the Diet and only in part by the Emperor. The Imperial Prerogatives would be purely ceremonial. A functional House of Councillors would be established but be inferior to the House of Representatives. The Diet would never be closed but a special body was recommended for periods of recess. The Diet could be dissolved by popular plebiscite. The Prime Minister would be appointed by the Emperor after consultation with the Presidents of both houses, and the Cabinet would be responsible to the Diet. An extensive Bill of Rights, including some economic guarantees, was provided for. Judicial independence was proposed. The Diet would amend the constitution by majority vote with a two-thirds quorum.

~~7.~~ Here we have emerging the shape and structure of a government of the people, with recognition of the place of the individual. The Diet becomes the supreme organ of state power. Civil liberties are to be guaranteed absolutely. The Emperor is removed from the exercise of political power. The balance of power has here been shifted.

Indent only 5 spaces

5. ~~The~~ Communist Proposals

~~8.~~ The Communists left unanswered many questions, preferring to rest upon a strong position on general principles. Sovereignty would be reposed in the people, to be administered by the Diet. The Emperor system would be abolished. The Diet would be responsible to the people and would select the members of the ~~government (The Cabinet?)~~ cabinet which itself would be answerable to the Diet. An extensive Bill of Rights was recommended, with particular attention to economic guarantees.

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6. Private Groups' Proposals

In general, private groups favored reposing sovereignty in the people to be exercised by the "cabinet" or the "government". The function of the Emperor would be to perform rituals and ceremonies. A functional upper house was generally favored, with the balance of power in the House of Representatives. Here, as with the political parties, there was a strong leaning toward extended Diet sessions, with the Diet determining when it should convene and recess and with some sort of standing committee provided for during periods of recess. Generally, the Prime Minister would be appointed upon the recommendation of the presidents of both houses, though one man (Dr. Takano) proposed an elected president. Takano appears to have been the only person favoring the American system, for all other groups and individuals recommended a cabinet jointly responsible to the Diet. Only with the private groups were there detailed and extensive recommendations for absolute guarantees, social, political and economic. All recommended an independent judiciary. Financial controls were generally neglected, although one group specifically urged Diet control of Imperial Household expenditures. As for constitutional amendments, the proposals ranged from legislative enactment to popular plebiscite.

Most striking omission from all the private and unofficial proposals was any provision for guarantees against unreasonable searches and seizures or any of the other protections thrown about the individual in connection with accusations of and prosecution for crimes. There are probably two reasons for this. No presumption of innocence has ever existed in Japan - or in any other Oriental country. The individual who became involved with the State took his chances. There might be security against his involvement, but once the involvement ~~and~~ had occurred, he had no standing. One avoided open

conflict, whether with one's neighbors or with the authorities. Again, it was probably felt that the provisions of independent judges would result in improved trial procedure and additional protection for the parties to the trial.

C. Another curious omission was any suggestion either of the extension of the suffrage or the admission of women to equal political status with men. In September, 1945, only males over 25 could vote. Only one private group proposed that the suffrage should be extended to all adult men and women, while in all of the proposals for extension of civil, social and economic freedoms, the ~~release of women from their bondage~~ removal of the constitutional and legal disabilities under which women suffered was not once mentioned.

D. Another notable omission was any recommendation for local autonomy. This is not easily understood. The heavy hand of the Home Ministry had long been felt throughout the prefectures. It was common experience that no community was too small to escape the interference of the national government in its local affairs. While it is unthinkable that any form of state, i.e. prefectural sovereignty should be established, nevertheless it is difficult to conceive how so important a matter could have escaped the consideration of those interested in reform and reorganization. Perhaps the answer is that they were too deeply indoctrinated with the idea of centralization or it was considered that local self-government was no more than a detail that could be left to the National Diet.

E. Of the points emphasized by Ambassador Atcheson in his conference with Prince Konoye[1], all but four covered in a reasonably satisfactory fashion

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[1] Chapter II, pp 20-21, supra. The Atcheson-Konoye conversation ~~was never~~ had not been published in Japan.

by the unofficial groups. The four on which no proposals had been made were: Curtailment of the Emperor's authority to legislate by means of rescript and ordinance, provision of initiative and recall of public officials, obliteration of the influence of the military, and provision for constitutional amendment by initiative and referendum. Even then, the first two of these four were at least touched on, if not fully provided for. In sharp contrast to these progressive proposals in unofficial circles, the Shidehara Cabinet was making heavy weather of the question.

The New Constitution of Japan

OK JR
Final
Draft

CHAPTER IV - THE MATSUMOTO DRAFT

The Constitutional Problem Investigation Committee was established under the chairmanship of Dr. Joji Matsumoto by Prime Minister Shidehara in October 1945 and at once took up its task.[1] It was given no instructions by the Cabinet, the leadership of State Minister without Portfolio Matsumoto being counted upon to promote the work. The Committee worked steadily for three months, consulting frequently with the Cabinet. Although the deliberations of the Committee have never been made public, there is reason to believe that no clear-cut agreement was ever reached. Dr. Matsumoto, a thoroughgoing conservative who believed most fervently in the maintenance of the Emperor System and the doctrine of National Polity, unquestionably dominated the work. Early in January, he proposed two drafts, which were then debated in detail and voted on, article by article. On February 1, 1946, Mainichi Shimbun reported that tentative agreement had been reached in the Committee on January 26, and published what was purported to be the draft plan. Subsequently, two documents were informally submitted to the Supreme Commander, one entitled "Gist of the Revision of the Constitution" and the other "General Explanation of the Constitutional Revision drafted by the Government".[2] No formal submission of a detailed draft was ever made.

The "Tentative Plan", the "Gist" and the "Explanation" when studied together, throw a clear light on the political views of the Matsumoto Committee. The proposals for revision do not go beyond the most moderate of modifications in the language of the Meiji Constitution. The basic nature of the Japanese

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1/ See Annex D for membership of Committee.

2/ See Annex E for draft.

state is left unchanged. As the "Explanation" itself says:

> "The fundamental spirit of the present draft revision of the Constitution is therefore to render the Constitution more democratic and to facilitate complete attainment of the object of Paragraph 10 of the Potsdam Declaration above-mentioned."

The proposed revision lags far behind even the most conservative of the unofficial drafts. It is quite apparent that what was hoped was that liberalization of the language of the Meiji Constitution would be acceptable to SCAP, leaving the real constitution in its loose and flexible form, open to such application and interpretation as the ruling groups might see fit to apply.

The comment of Mainichi Shimbun on March 3 is ~~worth quoting~~ illuminating:

> "Since the formation of the Cabinet, the Government, led by Minister of State Matsumoto, has very carefully investigated Constitutional revision, and at several Cabinet meetings there has been deliberation on the matter. However, since Matsumoto and the various Cabinet Ministers have been unable to reach any fundamental agreement, Constitutional revision has reached an impasse...various Cabinet Ministers openly stated their opinions. Matsumoto, opposed to them, refused to give an inch on the two pet theories he holds. They are:
>
> "1. While Article 1 to 4 may be changed more or less in wording, basically they are to remain the same.
>
> "2. Perogatives are exercised in accordance with Constitutional provisions, and the Constitution will be basically changed by democratizing other articles and leaving Article 4 alone."

Reconciliation between the various proposals being reported appears impossible, Comment will therefore be restricted to the "Gist" and the "Explanation", with only such reference to the other proposals as seems pertinent. Says the "Explanation":

> "In the task of drafting a revision of the Constitution on the basis of the fundamental spirit mentioned in the preceding paragraph, the first problem encountered is the question as to whether the so-called 'Emperor System' should be retained or abolished. Considering the fact that Japan has been reigned over by a line of Emperors unbroken from the very beginning of our national history, there is no room for doubt but that an overwhelming majority of our people are strongly desirous of retaining the system. This is the reason why the draft revision proposes to maintain a system

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wherein the Emperor exercises sovereign power, rather than to adopt a republican form of government with a president at its head, or so-called 'presidential democracy'."

Whatever the reasons, the Emperor System was retained ~~in all its glory.~~ intact.

Proposed changes in Chapter I of the Meiji Constitution (The Emperor) affect eight of its seventeen articles. The empire is still to be reigned over by a line of emperors unbroken. Succession to the imperial throne is still to be governed by an Imperial House Law not under the Constitution. The Emperor becomes supreme and inviolable rather than sacred and inviolable. Articles ~~IV~~ 4, ~~V~~ 5 and ~~VI~~ 6, which repose sovereignty in the emperor and provide for the exercise by him of the rights of sovereignty, remain unchanged. Article ~~VII~~ 7, authorizing the convocation and dissolution of the Diet by the Emperor, is changed only to provide that he cannot dissolve the Diet twice for the same cause. Article ~~VIII~~ 8, authorizing urgent Imperial Ordinances, would require "reference" to a Permanent Committee of the Diet. Article ~~IX~~ 9 is reworded without change of meaning. Article ~~X~~ 10 is left untouched (The Emperor determines the organization of the different branches of the administration, etc.). In Articles ~~XI~~ 11 and ~~XII~~ 12, "Army and Navy" become "armed forces" and their peacetime composition is to be determined by law. The war and treaty making authority of the Emperor under Article ~~XIII~~ 13 is made subject to Diet consent save in urgent circumstances, when only the Permanent Committee needs be consulted. Article ~~XV~~ 15, relating to the conferring of titles of nobility, etc., is changed to authorize conferring marks of honor only. Articles ~~XIV~~ 14, ~~XVI~~ 16 and ~~XVII~~ 17 remain unchanged.

It is significant that the authority and the powers of the Emperor are not altered or weakened in any real way. Such changes as are here proposed relate to procedure only. The Imperial Institution remains unimpaired. More-

over, it still operates under an Imperial House Law which is not required to be enacted by the Diet.

Chapter ~~II~~ 2 of the Meiji Constitution dealt with the Rights and Duties of the People. This was supposed to be a Bill of Rights, but such rights as were defined were not guaranteed, but made subject to necessary provisions of law. The Matsumoto Draft, if anything, reduces the rights and increases the duties of the people. No absolute guarantees whatsoever are provided. The "Explanation" offers a curious confusion.

> "Although there are provisions in the laws currently in force which are calculated to afford considerable protection...in practice not only were they (the people's rights) not duly respected but at times seriously infringed upon. Such a situation was due to the enactment of evil laws....
>
> "In the draft revision, therefore, it is proposed to insert a general provision to the effect that...no restrictions of whatever nature may be imposed upon the freedom and rights of Japanese subjects except by law."

The changes in Chapter ~~III~~ 3 affecting the Diet are minor except for the substitution of a House of Senators for the House of Peers. A provision which shows clearly how serious an effort was being made to accomplish any real liberalization is that which empowers the House of Representatives to override the House of Senators by enacting a bill three times in succession by at least two-thirds vote of all the members. So, too, with Chapter ~~IV~~ 4 - the Cabinet. Provision is made for a responsible Cabinet but only to the extent of individual or several responsibility. No mention is made of how the Prime Minister is to be appointed nor is any attempt made to define the jurisdiction or authority of the Cabinet. Other than requiring that the organization of the Privy Council shall be determined by law, nothing is said of this most important organ of government.1/

1/ See Part V of the "Explanation".

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The Meiji Constitution provisions relating to the judiciary are left untouched except for one progressive recommendation - that jurisdiction of litigations involving administrative matters be transferred from the Court of Administrative Litigation to the courts of law. In notable contrast to the recommendations of the several political parties and many of the unofficial groups, no effort has been made to provide for the independence of the judiciary.

More attention has been paid to financial matters, but even here the improvement is more apparent than real. The House of Senators may not increase a budget item passed by the House of Representatives. Expenditures of the Imperial Household, other than those of the Imperial Court shall require the consent of the Diet annually. The Diet may reject or reduce budget items relating to powers exercised by the Emperor under the constitution even without the consent of the "government". Expenditures from the Reserve Fund shall be referred to the Permanent Committee of the Diet, as must emergency financial measures. Where, under the Meiji Constitution, in the event of the failure of the Diet to adopt the budget, the government could operate under the budget of the preceding year, the proposal is put forward to permit the government to prepare a tentative budget and operate under it until the regular budget has been approved.

Under the Meiji Constitution, constitutional amendments could be introduced by the Emperor alone. The Matsumoto proposal broadens this provision to permit the introduction of amendments by any member of either house with the concurrence of one-half the members thereof. The Emperor is required to sanction such an amendment when enacted by the Diet.

Lacking from the Matsumoto draft are two important provisions. There is no mention whatsoever of local self government - no suggestion of assurance that the people of the several communities will be given any measure of participation in their own local political affairs. Furthermore, there is no provision making the Constitution the supreme law of the land. This omission is, of course, fatal, since it leaves the real Japanese state exactly as it was, and excludes from the operation of law the various extra-constitutional agencies which have been so characteristic a feature of the Japanese political structure.

The "Explanation" is an illuminating document. It illustrates clearly the Japanese approach toward problems which involve the possible alteration of a state of affairs heretofore found good. Faced with the issue of actual, comprehensive revision of the Meiji Constitution, the Matsumoto Committee took refuge behind a few vague and substantially meaningless changes in phraseology coupled with an elaborate attempt at justification of their failure to go further, One quotation will, ~~I think,~~ suffice:

> "The words 'army' and 'navy' will be struck out of the Constitution and they will read simply 'armed forces'.
>
> "Even if the time should arrive when, upon completion of Allied Occupation, Japan is permitted to rearm, the armed forces would be of a very limited scope such as are necessary for the maintenance of peace and order in the country. Moreover, the nation on its own part should harbor no intention of having again any army or navy such as it had before. Accordingly it is proposed to drop the words 'army' and 'navy'."

The situation that obtained at the end of January, 1946, with respect to revision of the Meiji Constitution was to a large degree a reflection of the general political picture. The Supreme Commander had determined to leave in the hands of the Japanese the fullest possible responsibility for accomplishing reorganization and liberalization of their government and establish-

ment of the beginnings of a democratic state. The government and the people had been fully advised of their responsibilities. The people, through informal and unofficial channels, had shown a heartening response to these changes. On the other hand, the Government, failing completely to respond to the obvious desires and demands of the people of Japan, confirmed in their allegiance to the traditional principles and time-honored customs of the past, indicated little desire to undertake the work, and attempted to resolve the issue with a show of words and a bow in the direction of the West. That they understood the problems involved cannot for a moment be questioned. Their skill in fashioning facades involving no structural remodeling was notable.[1]

1/ On February 3rd the Nippon Times contained this statement. "Thus, it is seen that all drafts made by political parties and others are demanding the democratization of the Constitution, but the Government Plan, drafted by Dr. Matsumoto, has shown no intention to democratize it. There, if the Government insists upon the adoption of the Matsumoto draft, public opinion will rise against it, Kyoto reports."

CHAPTER V - ~~PREPARATION OF THE CABINET DRAFT~~ SCAP'S ANSWER TO MATSUMOTO DRAFT

General Headquarters became aware, through various informal channels, that the debate of a draft was reaching a crucial stage in the Matsumoto Committee by mid-January. On January 28, the Nippon Times published, in a front-page box, the report that the Committee had given approval to a draft for revision of the Constitution. On February 1, the Mainichi published its version of the "Tentative Draft" with the comment that "The Government is speeding up its decision to submit the draft of the revised constitution to the Allied Headquarters and the Far East Committee (Far Eastern Commission), and urgently introduced it to the extraordinary Cabinet meeting with State Minister Matsumoto's explanation article by article on January 30. Ministers expressed their opinions actively and debated on it at the extraordinary Cabinet meeting on 31 January."

That same day (February 1) the informal "Gist" and "Explanation" were submitted to the Supreme Commander and Foreign Minister Yoshida requested of the Chief, Government Section, an informal conference to consider the proposals for Tuesday, February 5. On the night of February 1, Wataru Narahashi, Chief Secretary of the Cabinet, publicly denied that the Mainichi draft represented the work of the Matsumoto Committee.[1] On February 2, a representative of the Foreign Office requested postponement of the conference Yoshida had asked for. A postponement was granted for one week. It was made clear that any discussion would be on a purely informal and off-the-record basis,

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1/ According to both Kyodo and the Nippon Times, Dr. Matsumoto discussed proposals for revision in language strikingly similar to that of the Mainichi Draft.

but in the light of the sharp public reaction against the alleged Matsumoto draft, it was deemed necessary to re-orient the Cabinet on the principles which the Supreme Commander deemed basic.

On February 1, upon being informed of the tentative conference set for February 5, General MacArthur instructed Brigidier General Whitney, Chief, Government Section, to prepare a detailed answer rejecting the Matsumoto draft, for submission to the Japanese Government at the conference. The work of preparing this rejection was undertaken by Governmental Powers Branch that afternoon. Further consideration, however, was given the matter on the 2nd and 3rd by the Supreme Commander and he finally came to the conclusion that the most effective method of instructing the Japanese Government on the nature and application of these principles he considered basic would be to prepare a draft consitution embodying those principles. This decision he communicated to Brigidier General Whitney the same day, advising him that while he extended full discretion to Government Section he wished three major points to be incorporated in the draft. These were: 1/

I

"The Emperor is at the head of the state.

"His succession is dynastic.

"His duties and powers will be exercised in accordance with the Constitution and responsive to the basic will of the people as provided therein.

II

"War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are now stirring the world for its defense and its protection.

"No Japanese Army, Navy or Air Force will ever be authorized and no rights of belligerancy will ever be conferred upon any Japanese force.

1/From General MacArthur's own notes.

KK

III

"The feudal system of Japan will cease.

"No rights of peerage except those of the Imperial family will extend beyond the lives of those now existent.

"No patent of nobility will from this time forth embody within itself any National or Civic power of government.

"Pattern budget after British system."

This decision was communicated by General Whitney to the three officers of his Section responsible for constitutional and legal reform, Col. Charles L. Kades, Chief, Public Administration Division; Lt. Col. Milo E. Rowell, Chief, Legal Branch; and Comdr. Alfred R. Hussey ~~the writer~~. These three met that evening in the Dai Iti Hotel and, during the course of a long session, explored the subject and the problems presented and outlined plans for carrying forward the work. A tentative organization was agreed to, consisting of a steering committee and a series of special committees, each assigned the task of preparing a specific section for report to and discussion with the steering committee.

The tentative plans were presented to General Whitney on Monday, February 4, and approved by him. Immediately thereafter a meeting of the Section (exclusive of the Korean Division) was called. Opening the session with the words "ladies and gentlemen, we will now resolve ourselves into a constitutional convention", General Whitney conveyed to the assembled group the instructions of the Supreme Commander and directed that the work be undertaken at once, with precedence over all else. The doors to Government Section were to be closed and the strictest secrecy was imposed. It is noteworthy that no suggestion of the nature of the work was divulged during the full month of operations.

The organization having been completed[1], the work was started. Certain

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[1] See ~~Appendix F~~.

general problems were discussed and tentatively decided upon. It was agreed to use Japanese terminology and forms wherever possible and to resort to the phraseology of Anglo-Saxon law only when necessary to make the meaning clear. The question of whether to follow the British system of the supremacy of the legislature or the American system of checks and balances was discussed, with the sense of the meeting leaning toward the British system, it being closer to the Japanese pattern. The power of judicial review came up for consideration. Here there became evident a decided split in opinion, a large group favoring a limited power of review, with the Diet having the authority to override the Supreme Court. Although such a provision would be more consistent with true parliamentary system, the majority favored granting to the Supreme Court the absolute power of review over questions of constitutional interpretation.

At the first meeting, it was made known that General MacArthur favored a unicameral legislature and the general opinion was strongly in support of this position, primarily because it was felt that the House of Peers should be done away with, and nothing should be established that in any way resembled it. Furthermore, there was strong objection to any form of a functional or corporate upper house, a favorite proposition of the Japanese. No one felt, however, that this was a basic principle.

Two related questions proved troublesome. It was suggested that establishing the independence and elevating the authority of both the Diet and the Courts of Law would weaken the Executive to the point of impotence, particularly in the case where the Diet had passed a vote of no confidence and forced the Cabinet to resign. It was agreed, however, that some provision should be made to the effect that the government-in-being should continue to

operate until a new Diet had been elected or until a new Cabinet had been chosen. The selection of a Prime Minister should be made the first order of new business, but current and pending matters should continue to be disposed of to prevent a complete breakdown. Some suggestion was made looking toward writing into the document a detailed specification of the powers of the Executive and how they should be exercised, but this was not agreed to.

That the Meiji Constitution would be followed in general structure, chapter headings and the like was well understood. It was unaninously agreed, however, that the pattern of that Constitution in defining with precision and particularity the powers, rights and authority of the Emperor should be completely reversed. Sovereignty should be reposed squarely in the people, to be exercised by the three branches of government as the agents of the people. The Emperor's role would be that of a social monarch, no more. General Whitney then advised that while no explicit mention need be made of the United Nations Charter, its principles should be borne clearly in mind in drafting the new Constitution.

There was little difficulty over the provisions relating to the Emperor, the discussions between the Steering Committee and the special committee drafting the proposals being generally concerned with details. A proposal giving the Emperor the right to "confirm the judgments of the Court of Law" was striken. The word "reign" was deleted on the ground that in Japanese it carried the connotation of "govern". Specific reference to designated Imperial Officers was deleted.

The Committee on Constitutional Amendments recommended a provision restricting the right of amendment for ten years on the ground that there was grave danger that the document would be completely emasculated were the

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reactionaries to come into power. The Steering Committee ruled, however, that the writing of a liberal constitution must be premised upon the existance of a responsible electorate and that, to the greatest extent possible, the Japanese should be given the right to develop their own institutions. This provision was substantially liberalized in the final draft.

Impeachment caused some little debate, but it was finally decided by the Steering Committee that impeachment should be restricted to removal of members of the judiciary. It was agreed that impeachment as a general technique for the dismissal of public officials was cumbersome and time-consuming, that the Prime Minister should be removable by a vote of non-confidence, that he should be able to remove his State Ministers at will, that civil servants should be removable according to processes established by law, that the Diet should be able to eject its own members and that elected officials might be recalled. It was recommended that the Chapter on Local Government include a provision for the forfeiture of office by a local official convicted of a serious crime.

The draft of the Bill of Rights caused considerable debate. The Committee on this subject proved staunch defenders of the individual and his right to life, liberty and the pursuit of happiness. The differences, however, were not of opinion on principle but of the legal practicality or effectiveness. One provision resulted in a deadlock that was finally resolved by General MacArthur, who ordered its deletion from the final draft. This was an article prohibiting an amendment to the constitution impairing or altering the provisions of the Bill of Rights. An article providing for the compensation of persons suffering loss through illegal official action was stricken after some discussion. A prohibition on political activity by

religious organizations was deleted as dangerous in the way of giving the government the right to interfere. The Steering Committee and the Committee on Civil Rights differed sharply on the extent to which social guarantees should be included, the latter standing firm for a detailed specification. General Whitney eventually resolved the issue in favor of a general statement.

The proposals of the Committee on the Diet met with few objections. Some discussion developed over the lack of an executive veto, but it was finally decided that under the parliamentary system, the Diet must have the decisive power. Several matters of detail were discussed at length, but the general principles established by this Committee were agreed to by the Steering Committee.

The draft prepared by the Committee on the Executive met no such easy sailing. There was irreconcilable disagreement in the Committee itself, a minority holding out for vesting the power of appointment of a Prime Minister in the Emperor and for vesting the executive power in the Prime Minister rather than in the Cabinet collectively. Basically, the argument was for a strong executive, responsible to the Diet it is true, but with the authority to dissolve the Diet in the event of disagreement. The Steering Committee finally ruled that while the Prime Minister should be empowered to appoint and dismiss Cabinet Ministers at will, the Cabinet should be collectively responsible to the Diet and in the event of a vote of non-confidence should either resign or dissolve the Diet. The problem of disagreement in the Diet over the selection of a Prime Minister was discussed at length, but no solution reached. Some concern was expressed over the provision authorizing the Cabinet to issue cabinet orders, but it was agreed that the restrictive nature of the wording was sufficient to prevent abuse or arrogation of power.

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The provisions with respect to the judiciary caused some discussion within the Steering Committee, one member considering it unwise to make the courts too independent. He viewed with some concern the danger of a judicial oligarchy. It was ruled, however, that the provision inserted which gave the Diet the power of reviewing decisions on constitutional questions by two-thirds vote, except where the Bill of Rights was affected, provided the necessary safeguard. Election and recall of judges was proposed, but it was finally decided to go no further than provide for popular review of Supreme Court appointments at regular intervals. It was agreed that it was necessary to repose the whole rule-making power in the Supreme Court to preserve its independence from the executive.

Considerable debate ensued over the necessity for extensive budgetary controls. A provision that appropriations should not be permitted in excess of available income was strongly opposed but eventually accepted. A provision for a temporary budget was deleted. In its place, a reserve fund was provided, which could be drawn upon to cover unforeseen contingencies. Furthermore, it was felt that the pressure of need of funds to run the government would tend to force settlement of disputes. A provision was inserted prohibiting the subsidization of religious and other similar activities and also prohibiting the subsidization of educational and benevolent enterprises not under public control.

The report of the Committee on Local Government was debated at length and finally extensively revised, the major objection to the Committee's draft being that it established a form of local sovereignty with residuary powers reserved to local public entities. It was felt that Japan was too small to permit any form of state sovereignty and that the Diet and the Courts

could be trusted to protect local communities.

In all of these discussions those working on the problem had to bear in mind constantly that they were dealing not only with the abstract problem of writing a democratic constitution but that they were proposing the most far-reaching political reforms for an entire nation and that, to the greatest extent feasible, the provisions and institutions should be designed to fit the Japanese political picture. The document was to serve as a model or pattern, was to be presented as a statement of general principles but in such form that their application could be readily understood. Uhless, however, the statement bore some relationship to the existing state of things, it was obvious that it would not serve its purpose.

Working steadily, the Public Administration Division completed its work on February 10, and the prepared draft was submitted to the Supreme Commander for his approval, accompanied by an explanation of the principles underlying the operation. Approved with only one significant change by General MacArthur, the draft was mimeographed on February 12 and the following morning General Whitney, accompanied by Col. Kades, Lt. Col. Rowell, and the Comdr Hussey writer, met with Foreign Minister Yoshida, Dr. Matsumoto, Mr. Hasegawa of the Foreign Office and Dr. Yoshida's secretary. General Whitney informed the Japanese representatives that the proposals of the Matsumoto Committee were totally unacceptable, that they fell short of that broad and liberal reorganization of the Japanese governmental structure along democratic lines which the Allied Powers could regard as significant evidence that Japan had learned the lessons of war and defeat and was prepared to act as a responsible member of a peaceful community. He then stated that the Supreme Commander had caused to be prepared a detailed statement of those principles he deemed

basic, that the statement was being presented to the Japanese Government in the form of a draft constitution, and that the Government was advised to give it the fullest consideration and use it as a guide in its renewed efforts to prepare a revised constitution. The Japanese were told that there was no compulsion upon them to take further action but that the Supreme Commander was determined that the constitutional issue should be brought before the people well in advance of the general election and that they should have full opportunity to discuss freely and freely express their will on constitutional reform. Failing action by the Cabinet, General MacArthur was prepared to lay the issue before the people himself.

The only discussion that ensued involved the question of a unicameral legislature, which Dr. Matsumoto questioned. The Japanese appeared visably surprised and disturbed and said they would have to consider the matter and discuss it with the Cabinet before any definite answer could be given.1/

1/ For an interesting and frank commentary on this conference, see the letter from Jiro Shirasu to General Whitney, dated February 15, attached as Appendix G.

CHAPTER VI - PREPARATION OF THE CABINET DRAFT

The action of the Supreme Commander in rejecting the Matsumoto draft and presenting to the Cabinet a large-scale chart for their guidance was received with a distinct sense of shock. The Shidehara Cabinet had unquestionably hoped that the Matsumoto proposals might be made the basis of discussion and compromise out of which some vestiges of the old system might be salvaged. The most cursory glance at the SCAP paper on Constitutional revision killed any such hopes, as was apparent from the reactions of those present at the conference on February 13. Nevertheless, the efforts continued. On the 18th of February, Dr. Matsumoto submitted a "Supplementary Explanation concerning the Constitutional Revision". This paper attempted to liken the situation in Japan to that in Germany under the Weimar Republic. It was argued that only native institutions slowly developed over the years and tested by time and experience would survive. It suggested that "a juridical system is very much like certain kinds of plants, which transplanted from their native soil, degenerate or even die. Some of the roses of the West, when cultivated in Japan, lose their fragrance." The paper then argued that no reform or democratization of the government could succeed unless the people understood and accepted their responsibilities and that, therefore, no such democratization or reorganization was practicable or advisable, since the people had not changed. Dr. Matsumoto claimed that his committee had made no real alteration in the terms of the Meiji Constitution quite deliberately, believing that "...if...fundamental or (too) radical a constitution revision has to be effected suddenly at this time, it would only shock the moderates too severely,

and cause them to assume an antagonistic attitude toward democracy itself."[1]

A crisis immediately developed in the Cabinet which was evenly split between those who supported the Matsumoto plan for token revision and those who saw the need for thorough-going liberalization. The conflict was over the single fundamental issue of whether or not the Meiji Constitution and National Polity should be left unimpaired. Foreign Minister Yoshida spearheaded the standpatters supporting Matsumoto. The Prime Minister, Shidehara, tended to support the liberal group but sought to achieve a compromise. Several efforts were made informally to learn just how far SCAP considered all of its proposals to be basic. Finally, the Prime Minister called on General MacArthur to seek his advice. The Supreme Commander declined to intervene. On the 22nd, as a last recourse, the Prime Minister, accompanied by Yoshida and Narahashi, consulted the Emperor. Hirohito did not hesitate. He advised Shidehara that he fully supported the most thorough-going revision, even to the point of depriving the Emperor himself of all political authority.

The audience with the Emperor took place in the morning. In the afternoon, Dr. Matsumoto and Mr. Yoshida called on General Whitney. Dr. Matsumoto opened the conference, at which were present the four members of the Government Section Steering Committee, by saying: "We have accepted the ideas set forth in the draft of the new Constitution, but we are not sure that it presents a workable form." He and Yoshida then made one last effort to use the Meiji

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1 An over-tender regard for the so-called "moderates" and a veiled warning against a shift to the extreme left are characteristic of the argument used time and again during the past three years by the ultra-conservatives against establishment of any form of popular representative government.

Constitution as a working basis for revision. This failing, they sought to argue that there was no legal way of securing a democratic revision. Dr. Matsumoto then suggested that a functional upper house be created. He and Yoshida sought to preserve the autonomy of the Imperial Household. It was quite apparent that this conference represented the last attempt to secure support for the Matsumoto proposals.

On the 25th, Narahashi, Chief Secretary, and Ishiguro, Chief of the Bureau of Legislation, both of them proponents of liberal revision, were made Ministers of State without Portfolio, thereby strengthening the grip of the liberal element in the Cabinet. Several informal conferences were thereafter held with General Government Section and finally, on March 4, a new draft was presented to ~~this~~ Headquarters for unofficial review. This new draft represented a major improvement over the weak and ineffectual attempt of the Matsumoto Committee. The new draft was presented in Japanese. In a session lasting without break from ten o'clock that morning until five-thirty the next afternoon, members of Government Section and a select group of Japanese officials translated the draft into English, settled on acceptable English phraseology and re-translated it into Japanese that would fairly and satisfactorily convey the [redacted] intent of the English translation. The final draft was approved by the Cabinet on the morning of the 6th and immediately thereafter the Chief Secretary, in the presence of Commander Hussey, certified the English version as the exact and official translation of the original Japanese.[1]

That afternoon, following the publication of an Imperial Rescript announcing the adoption of the draft, General MacArthur issued a press release giving the draft his unqualified approval.

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[1] See Appendix ~~H~~ F for Cabinet Draft.

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"It is with a sense of deep satisfaction that I am today able to announce a decision of the Emperor and Government of Japan to submit to the Japanese people a new and enlightened constitution which has my full approval.

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"The Japanese people thus turn their backs firmly upon the mysticism and unreality of the past and face instead a future of realism with a new faith and a new hope."

Once the Cabinet had grasped the idea that nothing short of thorough-going revision would be acceptable, little conflict over basic issues developed. There were few officials among the Japanese who, however much they disliked the idea, did not understand what was required to establish a representative and responsible government. Such disagreements as did arise were due in most cases to the complete difference in training and approach between Oriental and Occidental. True to the traditional legislative practice in Japan, it was considered sufficient to state a principle in general terms, leaving detailed implementation to be worked out by statute, ordinance and regulation. Time and again the effort was made to avoid an express limitation or prohibition, to hedge a specific guarantee. Great difficulty was encountered over the choice of appropriate language. The legal language used in the Meiji Constitution was archaic, stilted and inelastic and could not be read, much less understood by the ordinary man. It was considered undignified if not impossible to use the vernacular in a constitution.[1] The Emperor could not be referred to in language which implied a prohibition or restraint upon His Imperial Majesty since that would impair his dignity. He could be charged with a responsibility, but no more. The phrase "advice and consent" came out "advice and assistance" in Japanese in referring to the relationship between the Emperor and the Cabinet.

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1 Early in the discussions an attempt was made to work entirely in the vernacular, but the Japanese vigorously protested the impossibility of such a procedure. Their protests lost their force when a draft in simply readable Japanese of the original Government Section proposals was discovered among some papers left after an early conference.

The principal issues with which the opposing factions in the Japanese Government had to contend were few in number. The primary one was, of course, the position and authority of the Emperor. The liberal element, following the general consensus ~~of opinion~~ outside of official circles, sought to repose sovereignty squarely in the people, to be exercised through the machinery of government established by the constitution. The conservatives, on the other hand, made every effort to preserve the National Polity, with sovereignty reposing in the Nation as symbolized by the Emperor, to be exercised by the Emperor for his subjects through His Majesty's Government. This would have left the Emperor the residue of authority and the power of participating in governmental affairs.

A Bill of Rights which gave absolute guarantees to the people proved another stumbling block. Many officials were fearful lest the people abuse their liberties and apprehensive of a breakdown of governmental administration unless some legal method of checking or controlling excesses was provided. There was no objection to providing the most detailed and specific protection for persons accused of crimes, for the defendant in a criminal trial. But there was strong support for vesting in the Diet the authority to restrict or impair the exercise of basic liberties in case of "urgent necessity". Throughout the discussions within the government and with SCAP, there was a well-defined tendency to support the theory of state supremacy rather than individual supremacy. Many an effort was made to write into the Chapter on the Rights and Duties of the People the strongest kind of a charge upon the people to support the state and promote the public welfare, using language which could at some future time be used as a basis for new thought control or other suppressive measures.

The nature and composition of the Diet proved productive of vigorous debate. The idea of a unicameral legislature was toyed with but never received widespread support. A functional or corporate upper house was greatly favored and, indeed, would have been provided for had not SCAP overruled the idea. There were many who desired an appointive or semi-appointive upper chamber, in order that the "best brains" - "men of character and integrity" - could be secured. There was no dispute over making the lower chamber fully representative and more powerful, although some suggestion was made that the lower house should be required to enact a bill three times to overcome the veto of the upper chamber. Then again, the conservatives favored omitting language which specifically vested the legislative authority in the Diet, preferring to leave in the executive a measure of authority to legislate by Cabinet Order or Ordinance.

Finance proved another stumbling block. The theory of complete budgetary control by the Diet was acceptable to all, but the conservative element saw very practical reasons why the hands of the executive should not be tied altogether. It was felt very necessary to provide for a reserve fund which the Cabinet could draw on, not only in emergencies but to provide for unforeseen situations and "necessary" expenditures not considered at the time the budget had been passed. Subsequent approval by the Diet of such withdrawals could be provided for, but the executive should be left free to act on its own within reasonable limits. Furthermore, this same group argued for some form of tentative or carry-over budget which the executive could follow in the event that the Diet reached a deadlock over the regular budget or rejected the Cabinet's recommendations. The thought that such action would provoke a cabinet crisis resulting in its resignation or dissolution of the Diet was not given much weight.

As a matter of fact, one of the major points of argument proved to be the problem of what powers the executive should have to act while the Diet was in recess. An executive that was fully answerable to the legislature appeared beyond the comprehension of many officials. Time and again the problem of national emergencies was raised. It did not appear enough that the Diet had ample power to authorize the Cabinet to do thus and so under any particular set of circumstances, It was felt that the Cabinet's authority should be drawn directly from the Constitution.

All of these problems were eventually resolved, but not without heated debate in the Cabinet and frequent consultation with this Headquarters. It was, of course, quite true that, as Nihon Keizai reported on March 1; "The Shidehara Cabinet...is actually the champion of conservatism, and (they) are carrying on the revision of the constitution in such a manner as to maintain the national policy (Polity)." Nevertheless, honest efforts were being made and much of the difficulty arose out of a general inability to cope with an issue rather than an intransigent attitude toward democratic revision.

CHAPTER VII - REVISION BECOMES A FACT

Public reaction to the Cabinet draft was almost universally favorable. Great surprise was shown at the very democratic and progressive nature of the draft particularly as it had been produced by a cabinet acknowledged to be heavily weighted with conservatism. That SCAP must have had a hand was generally conceded, but although this probability was openly discussed, there was a complete absence of reaction against the draft on that account. Asahi commented "In all probability the Shidehara Cabinet alone was not capable of drafting it single-handed. It must have been made possible by a strong advice of SCAP, especially the American side." But many papers ~~also~~ felt that the pressure of public opinion also had played a part. This is unquestionably true. The Cabinet was well aware that they were being watched closely and held answerable not merely by SCAP but by the Japanese people as well.

There was some fear that the draft represented an accomplished fact and was not open to debate or change. Said the Nippon Times: "Of course, in so far as general approval represents genuine support of the laudable principles which underlie the draft constitution, it is to be welcomed. But in so far as this ready approval represents an uncritical and unquestioning acceptance of anything which bears the sanction of authority, it signifies a regrettable misunderstanding of the very spirit of democracy which the draft constitution is intended to promote. Paradoxical as it may seem at first glance, the true aims of the draft constitution may well be better advanced by a healthy and vigorous questioning of this document than by a too docile and unanimous approval."

SCAP early made it quite plain that there was to be no ban on free discussion, and emphasized to the Cabinet the importance of informing the people

that at the forthcoming General Election they would be choosing those representatives who would work on revision of the Constitution, who would have the responsibility for enacting the draft into law. On March 14, the government announced that it would submit the draft to the new Diet at a special session to be called immediately after the elections. The press welcomed this announcement but was inclined to be critical of the chances of full and free debate and there were many suggestions of a constitutional convention. There was universal demand for the fullest freedom of debate and action by a fully representative body.

The Communists were almost alone in voicing strong opposition to the draft. They objected to the presentation of such a draft by the Shidehara Cabinet, alleging that it was nothing more than an attempt to preserve the Tenno system within a gloss of democracy. They also protested attempting to revise the Constitution before the country had become democratized, arguing that the people were in no position to make their own decisions as yet and, therefore, could not freely judge and fairly enact so important a measure.

Suggestions for additions to or revisions of the draft were numerous. In general, they revolved around the following points:

1. Simplification of language.
2. A clear statement that "sovereignty is vested in the people."
3. Further limitations on the functions and prerogatives of the Emperor, with some suggestions for complete abolition of the system.
4. Precise definition of the character and composition of the House of Councillors.
5. Immediate abolition of the peerage.
6. Continuous session of the Diet.

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7. More explicit guarantees of workers' rights.
8. Guarantees of social security.
9. Restrictions on private ownership.
10. Prohibition of anti-social monopolies.
11. Provision for gradual nationalization of industry.
12. Guarantees of equitable taxation.
13. Definition of a Japanese citizen.
14. Election of judges.
15. Provision for a jury system.

Throughout the Spring, discussion of the draft continued, both within and outside ~~of~~ the government. Government officials were in constant touch with Government Section, polishing the draft, proposing slight alterations here and there and, at times, seeking to modify the draft in the direction of weakening the authority of the Diet and increasing the independence of the executive and improving the position of the Emperor. Unfortunately, the group charged with responsibility for putting the draft in shape for submission to the Diet, the Board of Legislation, had among its members some of the most reactionary bureaucrats still in the government service. ~~The Matsumoto movement was dying hard.~~

On the 15th of April, the Chief Secretary of the Cabinet submitted to SCAP a revised version of the cabinet draft, with a certified English copy. The Chief Secretary stated that the draft would be submitted in this form to the Privy Council for deliberation and, following that, would be presented to the Diet on or after the middle of May. Actually it was not until June that the draft reached the Diet. Upon its submission to the Diet, the Supreme Commander issued a statement in which he said:

"With the submission to the Diet of a proposed revision of the constitution, the Japanese people face one of the vital moments in the life of Japan. The fundamental charter of their existence will be determined by the action taken on this monumental question. In its solution, it has been and continues to be imperative (a) that adequate time and opportunity be allowed for the full discussion and consideration of the terms of such a charter; (b) that the procedure followed assures complete legal continuity with the constitution of 1889 now existing; and (c) that the manner of adoption of such a charter demonstrates that it affirmatively expresses the free will of the Japanese people.

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"In the course of legislative action upon this matter, it is incumbent upon the Diet that it assure to all members the free, fair and untrammelled right of discussion and debate, and that it give thoughtful consideration to every suggestion offered by its membership, regardless of strength or party affiliation. If it approaches its task with that high sense of duty, it will serve the nation well, as on the issue of a democratic constitution rests the well-being of the Japanese people and the future course of destiny for Japan."

The Diet that met to consider the question of revision of the constitution consisted ~~composed~~ of a House of Representatives, 466 members strong, and all newly elected, and a House of Peers to which had been appointed a substantial number of men of learning in the law. The House of Representatives had been returned in the first genuinely free general election in Japanese history, on the basis of universal suffrage and with the prospect of constitutional revision in view. Although preponderately conservative, with 102 Liberals and 70 Progressives, it was by no means overwhelmingly so. ~~375~~ Three hundred and seventy-five members were entering the Diet for the first time, including the astonishingly large number of 38 women. The people of Japan were unquestionably adequately represented.

The Yoshida Cabinet, which had in May replaced that of Shidehara as a result of the election returns, designated Minister of State without Portfolio TOKUJIRO Kanamori to shepherd the Constitution through the Diet. Discussions took place in plenary session until mid-July, with Kanamori subject to almost daily

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interpellation. The revision was then referred to a special committee under the chairmanship of Dr. Hitoshi Ashida to prepare and recommend amendments.

The debates in the House of Representatives centered around the Imperial Institution and National Polity. While there appeared little disagreement with the provisions relating to the Emperor as a matter of law, there was great concern over whether the age-old doctrine of National Polity - whether the fundamental relationship between the Emperor and the people had been changed. Kanamori was at first vague on this question, seeking to leave the impression that there had been no fundamental change. It is important to remember, however, that the question related to the nature and intent of the document and not to the specific provisions.

On August 24, 1946, the House of Representatives adopted the new Constitution by a vote of 421 to 8, the opposition consisting of two independents and six Communists. To the draft proposed by the Cabinet, two new articles had been added, one had been deleted and 22 had been amended. The draft was then sent to the House of Peers, which took a little over a month to consider and approve it, making only a few minor changes. Enacted by a vote of 298 to 2 in the House of Peers, the final version was approved in the lower House on October 7th by 342 to 5. The revision then went to the Privy Council which, after considerable debate, approved it on October 29 at a special session attended by the Emperor. November 3, the birthday of the Emperor Meiji, was fixed as promulgation date, with the new Constitution becoming effective six months thereafter.

With the adoption of the new Constitution, the government launched an ambitious plan for publicizing and popularizing it. A semi-official organization known as the Society for the Popularization of the New Constitution was formed under the presidency of Dr. Ashida. This society caused a pamphlet 6f

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to be printed containing the text of the Constitution and a brief explanation of its significance and distributed copies to every household in Japan at the time of the general elections in April. At least two moving picture films were sponsored, one of which achieved wide popularity. A series of lectures for training purposes was held in Tokyo, forums were then set up in the eight regional centers and thereafter courses conducted in every prefecture. In addition, a series of simple posters depicting the important changes in organic law was designed by Governmental Powers Division of Government Section, executed by Civil Information and Education Section, and used by the Society as posters, slides and film strips throughout Japan. The Society even issued a copy of its pamphlet in Braille.

During all of the time that the Diet was considering the proposed revision, SCAP ~~held a watching brief~~ watched the proceedings without actively interfering. Consultations were carried on almost continuously, and all proposed amendments were checked with Government Section, but only on one occasion did the Supreme Commander instruct the Japanese Government to take any specific step. During the course of the summer, the whole subject of Constitutional Revision had been under discussion in the Far Eastern Commission. A general statement of principles had been made in the form of a policy decision in the late Spring, but in no way did this general statement diverge from those forming the basis for the Japanese proposals. However, in late Summer, at the insistance of British Commonwealth representatives, the Commission voted to require that the Constitution provide that (1) all Ministers of State be civilians, (2) a majority of the Ministers of State be members of the Diet and (3) the Constitution state clearly that sovereignty rested with the people. The third condition had already been complied with and ~~although~~ the Diet was more than willing to insert the other two provisions.

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CHAPTER VIII - THE SIGNIFICANCE OF THE NEW CONSTITUTION

The surrender of Japan, involving acceptance of the Potsdam Declaration, required the Japanese Government to "remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people" and to establish "freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights." That Declaration provided that the occupying forces of the Allied Powers would be withdrawn when the above objectives had been accomplished and there had been "established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government." These, of course, represent basic tenets of democracy. They are the goals of the Occupation because the Allied Powers believe that the surest guarantee of peace for the world is to repose the authority of state and the powers of government in the hands of those upon whom the burdens and the sufferings must fall. They are the goals of this Occupation because these powers believe, as well, that the ills, the cancers that drive men to crime and nations to war can be cured through the free, responsible cooperation of free people, first in the management of their own affairs and second in the management of world affairs. It is in the guarantee of freedom of opportunity and the right of participation in the determination of his own destiny, it is in the recognition of the individual as the basic significant element in political society, it is in the belief that man, in full possession of the facts and relieved from the pressures that warp or subdue his judgment, will assume his responsibilities and discharge his duties to society with justice and integrity that we place our faith.

These principles are poles apart from traditional Japanese political philosophy. Clearly there existed no soil for planting such ideas or chance for fruitful growth under the Japanese political system. Even though the

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acquiescence of the people was a basic element of strength in that system, the Japanese people, completely borne down by the crushing weight of feudal tradition, almost completely denied the free interchange of ideas with the rest of the world and free access to its progress, material and spiritual, allowed only the most pitiful semblance of participation in their own government, forced to live in a state of semi-poverty, watched over, ruled over, oppressed and intimidated by the civil and military police, schooled in the doctrine that elder brothers, parents, elder statesmen, men of rank and prestige knew what was best for them -- these people had little opportunity [redacted] to do aught but acquiesce.

At the same time, there were forces operating beneath the surface, not only the dissident groups that had tired of war and wearied of destruction, not only the liberals of the professional and upper classes, but among the plain people. The urge of the common man toward freedom from oppression, toward self-government, toward a richer, fuller life, toward equality of opportunity and equality of justice, had not been stifled. On the contrary, that urge became almost a triumphant shout. In the immense relief from the terrible burden of the war, the Japanese people looked upon the surrender almost as a liberation. If this were not so, then our own tasks would have been made immeasurably more difficult. It was this strong and vociferous demand for action -- this nation-wide and articulate reaction against the ruling classes who had brought destruction and defeat to crown years of unrestrained oppression and servitude--that forced the Japanese Government to undertake a real program of democratization.

The Japanese officials who worked on the new Constitution were, for the most part, experienced bureaucrats or trained professional men. They knew

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and understood the issues involved and many of them were well acquainted with Anglo-American law, both municipal and constitutional. They had been given the most detailed guides. They knew how and why a true parliamentary system had failed to take hold during the nineteen-twenties. They were fully acquainted with the operations of their own system of government and understood well just wherein the existing legal curbs failed to curb. They were under heavy pressure at all times from a far more enlightened public than we or they had any reason to expect. As revolutionary as the changes were, as complete a reorganization as took place, it is not to be looked upon either as a miracle or military fiat. The Japanese Government was told in direct and forthright language that revision of the Constitution was a must if they were to have any hope of meeting the requirements of the Potsdam Declaration. When they failed to make even an honest attempt to liberalize the Meiji Constitution, they were given a primer containing the ABC's of modern representative popular government and told to use it as a guide. They were well aware that the lessons contained in that primer had already been learned by the Japanese public -- they had only to read their own daily papers to discover what the Japanese people wanted. Any fears the government had that complete liberalization would shock the people were dissipated when the revision reached the Diet.

The new Constitution,[1] enacted in the form of an amendment to the Meiji Constitution, transforms Japan into a representative parliamentary democracy, characterized by the supremacy of the legislature over the executive. Its purpose is stated in the Preamble to be:

> "To secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land" and to ensure that "never again shall we be visited with the horrors of war through the action of government." Government is stated to be "A sacred trust of the people, the authority for which is derived from the people, the powers of

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1 ~~Appendix H~~ Appendix I contains the official Japanese drafts of: (1) the March 6 ~~Cabinet Draft~~, (2) the draft presented to the Diet in June, and (3) the new Constitution as promulgated on November 3, 1946.

which are to be exercised by the representatives of the people, and the benefits of which are enjoyed by the people."

The Constitution gives to Japan a single, all-embracing organic law, of the land, a thing which it never had before. All public officials are bound to support and defend the Constitution. There can be neither extra-constitutional political institutions nor officers and no officer of the state can be above the law. This is, in itself, a major change. For the first time in Japanese history, the people can see for themselves not only what their rights and powers are, but what legal limitations are imposed upon the government itself. Significant indeed are the words of the Prime Minister in his speech to the Diet of 1 July 1947 in which he said: "As the first democratic government, the people's government, nay, the public servant of the people...". The Constitution makes that so.

Sovereignty -- the ultimate authority of the state -- is by the Constitution vested in the people, to be exercised only according to the procedures established by that document and the laws enacted thereunder. Amendments are initiated only by the Diet, to be enacted by concurring vote of two-thirds of the members of each house and to be ratified directly by the people. Laws can be enacted only by the Diet, can be administered only by the Cabinet and interpreted only by the judiciary. The Japanese people now have the absolute right to institute government, to reform, to alter, to totally change it, but unless and until they do, all persons and all officials must observe the law of this Constitution.

During the debates in the Diet on the new Constitution, perhaps the most burning question was what happened to national polity -- "Kokutai" -- under the proposed new organic law. National polity is a local concept of sovereignty --

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the proposition that all law, all authority, all unity reposes in the Imperial Institution which itself is everlasting and indestructible. It was argued that under the Constitution, in consonance with this doctrine, the Emperor as the symbol of the state and of the unity of the people remained as the fountain-head of state power. Such a construction is extremely forced and unrealistic. The plain language of the document itself makes it perfectly clear that the Imperial Institution is no longer the source of any authority whatsoever, can exercise no powers, and is certainly not indestructible. The Emperor is now no more than the crowning pinnacle of the structure, bearing no functional relation to the frame itself.

Chapter One makes the Emperor a legal organ of the Japanese State, under and subject to the Constitution. "The Emperor shall be the symbol of the State and of the unity of the people, DERIVING HIS POSITION FROM THE WILL OF THE PEOPLE WITH WHOM RESIDES SOVEREIGN POWER." This language is clear, explicit and unmistakable. Sovereign power reposes in the people -- the whole people -- to be exercised through the legal processes of government established by the Constitution and the laws enacted pursuant thereto. This chapter expressly defines the extent of the Emperor's authority, the limits on his powers. That "He shall not have powers related to government" is stated in Article 4. He has no discretion. His acts of appointment, attestation, promulgation, et cetera, are nothing more than the confirmation of the acts of the representatives of the people, a confirmation he cannot withhold, he must give.

Chapter Two is truly a landmark in constitutional history. Through the renunciation of war and the prohibition of armed forces, the power and influence of a military establishment within Japan has been destroyed and the burden of armament lifted from the Japanese people. Furthermore, the threat

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of belligerency as an instrument of diplomacy is discarded. Here is a pledge of good faith offered to the world, a self-imposed and legal bar to aggression which must of necessity operate to induce the adoption by Japan of peaceful methods for the settlement of disputes with other countries.

Chapter Three is entitled the "Rights and Duties of the People." It is a charter of freedom for the individual in Japan. This is essential to a democracy. Herein are defined the fields of individual action into which government may not move. Where the preservation of society makes it necessary, the police power may be exercised but only through established procedures and subject to judicial supervision. Redress is provided against the state for wrongs committed. Basic rights in social, political and economic fields are guaranteed. The people are now free to discuss, to exchange ideas, to criticize and to oppose. They are free to seek gainful work. They are free to worship as they please, nor can they be compelled to support by public funds any private institution. They are free to bargain collectively (with their employers). The equality of all persons before the law is assured. Their inalienable right to choose and to dismiss public officials is established. The responsibility of public officials to the people is recognized. The people are assured that one of the objects of government is the betterment of the living and working conditions of the people. Members of the family are brought into a position of equality. In other words, the civil liberties of the individual are guaranteed in the broadest of terms as the true basis for democracy.

This chapter brings about another major change in the Japanese state, a change which is definite enough on paper but which will take years to make itself felt in Japanese life. By the insertion of a comprehensive and specific guarantee of the civil liberties of the individual, a guarantee that in many

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cases goes far beyond the guarantees of our own Constitution -- a complete break with the past has been made. The individual is recognized in law as the significant element in political society. In the place of rules and regulations imposed to dignify and implement the power of the state, controls are imposed upon the state itself. Heretofore, every guarantee or privilege pretended to be enjoyed by the subject was limited in fact by the consideration of the welfare of the state. The extent and nature of such consideration were determined by government officials and there could be no appeal from such a determination. Today, the individual is given specific vested rights which may not be abridged — the exercise of which may not be interfered with -- without his consent.

Chapter Four opens with the statement that "The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State." Under the Meiji Constitution the National Diet played but a minor part in state affairs. It represented but a small segment of the population, the lower house was powerless to override the House of Peers or to check the executive and according to legislative ~~practice~~ practice, the laws that were enacted were but loose statements of general principles. The real legislation was effected by Imperial Ordinance or ministerial ordinance, prepared and promulgated by Privy Council and Cabinet. This is no longer true. The whole legislative power is reposed in a national Diet composed of two houses fully representative of all the people. The House of Councillors, with half of its members elected every three years for fixed six-year terms, is the senior body, with little legal power but enjoying the means of slowing down measures and thus securing more sober consideration. The House of Representatives can override the House of Councillors on all ordinary legislation by means of a two-thirds vote. In the case of disagreement on the

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election of a Prime Minister, on the budget or on treaties, the vote of the lower house prevails after the lapse of a stated period. Under the implementing legislation, the right of the Cabinet to issue cabinet orders is strictly limited to express delegations by law. The law--the regulations--which are required for the government of society can only be enacted by the people through their chosen representatives.

This is perhaps one of the most basic changes, that in the concept of law itself. Law, in traditional Japanese political philosophy, represented the edict of the ruler. Its force -- its raison d'etre - was the will of that ruler. It bore no direct relation to either the wishes or the beliefs of the people. The basic theory of law under the new Constitution is that of a body of rules adopted by the chosen agents and representatives of the people according to established procedures for the purpose of fixing standards of conduct and authorizing the doing of acts in the name of the public. It is the expression of the will of organized society and it represents, in a democracy, a social decision on a matter of public interest affecting the public welfare.

Chapter Five treats of the Cabinet. It is vested with executive power but made fully responsible to the National Diet. The Prime Minister is elected by the Diet and both he and a majority of his ministers must be members of the Diet. All must be civilians. The Prime Minister appoints and dismisses his ministers in the free exercise of his discretion, but if the Cabinet loses the confidence of the Diet it must either resign or dissolve the Diet and call a general election of the House of Representatives. It executes the laws and administers the government under the Constitution, but it is but one of three equal branches of government, with no authority over either the legislature or the courts. In all its activities, it is bound by the law. It cannot act unless the authority has been delegated to it or charged to it by the Constitution

under Article 73, or by the Diet in the exercise of its legislative authority. This is a far cry from the old system, wherein the Prime Minister and the Ministers of state were appointed by the Emperor, were the creatures of the ruling cliques and administered the entire affairs of state for them and under their direction, controlling courts and legislature as well.

The device of parliamentary responsibility procures the answerability of the executive branch of the government to the people through their duly elected representatives. In the United States this responsibility is enforced through direct election of the President and Vice-President. In England and the continental democracies, the pattern is similar to that of Japan. In either case, the result is the same. The executive branch of government has no legal authority, excuse or justification for acting in defiance of the mandate of the people. Every public officer, every public employee is the agent and servant of the people.

The third great branch of government, the Courts of Law, ~~is dealt with under~~ deals with Chapter Six. There are two methods of assuring the freedom of the individual within the state. His right of participation in the affairs of government and the absolute responsibility of every agent and official of government to him must be established and maintained. Through the exercise of his right to choose and dismiss his agents and to procure the enactment and amendment of the laws, he protects himself. But, in addition to this, he must be assured of a forum to which he may turn for the settlement of disputes and the redress of grievances. That forum must be free from interference by any other branch of government. Its judges must be independent, that they may administer justice without fear or favor. Under the traditional system, the courts of Japan were

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subservient to and legally under the executive branch of government. This, in itself, is serious. But, far more grave, the people had no resort to those courts against their own government. No law established legal limitations upon the authority of government and no court could enforce legal liability for wrongs committed. Under the new Constitution, an independent judiciary is assured -- independent of all else but the mandate of the people. To that independent judiciary has been granted the whole judicial power, including the specific power of constitutional reviews. As a check both upon the executive and the legislative branches of government, the national judiciary is now given the right to determine whether any law or other enactment or official act conforms to the Constitution. This provision gives to every citizen who has a legal interest the right to challenge the validity of any official act of his government as measured by the terms of the organic law he has helped bring into force. This is essential. It gives life to the Bill of Rights. In the same way that the device of parliamentary responsibility makes the executive politically answerable to the people, through the courts it becomes legally answerable.

Chapter Seven deals with Public Finance. The controls exercised by the executive under the Meiji system were many and different, but nearly every one was hidden behind a shield of legitimacy to which the legalistically minded Japanese officials could point in answer to levied criticism. Particularly was this so in the field of public finance. For one thing, an annual budget was prepared by the Cabinet and submitted to the Diet. This was required by law and by law the Cabinet could expend only the moneys provided for by the annual budget. But in considering the budget, the Diet could only approve or disapprove, it could not alter. Most items in the

budget were fixed by separate law which required an annual appropriation. As for other items, if the Diet refused to appropriate, the Cabinet was authorized to spend the amount specified in the budget of the year before. Military and naval appropriations, funds for the Imperial Household and other extraordinary expenditures were outside the scope of the budget altogether. And a reserve or contingent fund upon which the Cabinet could draw without Diet approval was always available.

It is a principle of democratic government that the public controls the purse strings and that no one session of the legislature bind absolutely succeeding sessions. The new Constitution has provided for this, requiring that no money shall be expended nor shall the state obligate itself except as authorized by the Diet, by requiring an annual budget, by requiring that expenditures for unforeseen deficiencies be subsequently approved by the Diet, by requiring a complete Audit every fiscal year, by requiring that all expenses of the Imperial Household be appropriated by the Diet, and by insisting upon annual reports to the Diet and the people on the state of the national finances.

Chapter Eight, on Local Self-Government, adds new and far-reaching principles to Japanese organic law. The reason for this is obvious. It is on the local level that the individual citizen gains his experience in participating in public affairs. It is on the local level that he most directly comes in contact with his government. Heretofore, local government in Japan was controlled by the national executive whose authority was neigher limited nor defined by law. Under the new Constitution, local public entities are guaranteed the right to elect their chief public officials, the members of their assemblies and other public officials. The controls necessary for coordination and standardization are hereafter to be applied by law, and within that law, local public entities are guaranteed the

right to manage their property, affairs and administration and to enact their own regulations.

Of the remaining two chapters, Nine provides the method of amending the Constitution, while Ten establishes its supremacy. Article 98 provides that "This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity." Article 99 provides that "the Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution." This sets the final stamp of completeness on the organic law. No officer or agent of the government, no agency or office of state can exist outside of the terms of or not subject to the provisions of the Constitution.

The new Constitution is as yet no more than a new set of rules, devised in committee and communicated to the players, but in which the players have as yet little familiarity or confidence. It will take time and experience before they know the rules well enought to play by them. The game is not entirely new and different, however. The cultural influences of the West have been seeping into Japan for over three hundred years. The social revolution that took place in Europe was felt in Asia. During the past seventy-five years, the economic modernization of Japan - the growth of a large industrial laboring class, the establishment of an easily handled and converted medium of exchange, the freedom that came with the establishment of business enterprises large and small throughout the country, the increased contacts and experience with all the impedimentae of western social life

[redacted] -- all of this had its effect in creating an interest in and urge for individual as well as political expansion. The people acquired a measure of economic freedom before they secured any political freedom, but that soon followed. Social freedom came as a natural outgrowth. Needless to say, nothing approaching that enjoyed by Western peoples was secured, but the beginnings were enjoyed and appreciated, and formed fertile soil for the growth of a native popular movement.

This same phenomenon has been observed in almost every Asiatic country. Indeed, too often the mistake is made of labeling the battle against the Kuomintang as "communist". Communist led - it is; communist inspired - it was not, and today it represents, as it did in the days of Sun-Yat-Sen, the revolt of the people against a State that had become a graft-ridden, self-perpetuating, life-sucking tumor on the body politic. The danger that exists today is that, too often, the forces and followers of Soviet Russia have taken or will take advantage of this revolt. The fight against Communism can only be won by searching out the reasons for dissatisfaction with and revolt against the existing order and seeking to eradicate those reasons and persuade the people that their hope for the future lies in development of new institutions and new practices within the body politic rather than destruction of it in the vain hope of building something out of the ruins.

In Japan, the people exhibited a native trait of conservatism. The popular movement, strong as it was, took the form of increased pressure on the government for reform, for release from oppression. Any means by which this pressure could be amplified, any means by which the demands of the people could be more clearly voiced were seized upon. Thus it was that the reform of the fundamental law, under the Occupation, whereby the government of Japan became more directly answerable to and responsible for the people, was accepted with considerable public acclaim and no trace

of opposition. The great mass of the people do not, as yet, have ~~any~~ a deep understanding of the power now resting in their hands, but they do appreciate that great changes have taken place and they do welcome those changes and intend to make the best of them.

The danger does not lie in leaving the reins of government in the hands of the Japanese people. The great danger today lies in permitting to return to positions of influence and authority the representatives of the old regime, the political and economic reactionaries who kept the people in a state of misery and slavery and who deliberately planned and encouraged war as a means of self-aggrandizement. Once the people of Japan know how to use the new machine, they themselves will not permit its misuse. With enlightened support and encouragement from the West, they can secure their gains and become a responsible and peaceable contributing member of international political society.

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APPENDIX A

GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS
Government Section

25 August 1946

MEMORANDUM FOR THE CHIEF, GOVERNMENT SECTION.

SUBJECT: POWERS OF THE DIET WITH REGARD TO CONSTITUTIONAL AMENDMENTS UNDER THE MEIJI CONSTITUTION.

I. INTRODUCTION.

The fundamental political transformation which Japan is undergoing as a consequence of her defeat and occupation has been fittingly characterized as "induced revolution." While it is true that the element of violence usually connected with the notion of revolution is absent, the collapse of the powers of the past and the acceptance of the Potsdam Declaration by the Japanese Government has been followed by a period of transition in which, under the direction and guidance of SCAP, social and political innovations materialize of such scope and with such a speed that the resemblance of certain features of the present development to conditions of a revolutionary nature cannot possibly be denied.

However, the constitutional lawyer is more concerned with the legal forms under which the political pattern of a nation changes than with the evaluation of the actual dynamics of such changes. He may still be satisfied that what has happened in Japan within the last year and what is happening at the present time does not constitute a breach of the constitutional continuity regardless of whether the historian retroactively might characterize it as revolutionary. Indeed, the retention of the Tenno institution has facilitated the legal fiction that the new Constitution submitted by the Emperor to the Diet is the legitimate successor of the Meiji Constitution. This fiction to which not only the Japanese Government, but also FEC and SCAP, adhere has resulted in the approach that not a completely new basic law, but an amendment of the Meiji Constitution is in the making. The political advantage of this construction is obvious, since it might become a safeguard against subsequent attempts to invalidate the new Constitution on the basis of legalistic arguments.

II. PURPOSE OF MEMORANDUM AND ANTICIPATED CONCLUSION.

The consequence of this legal situation is that the new Constitution must be enacted under the forms required in the Meiji Constitution for constitutional amendments. The main rules with regard to such amendments are contained in Article 73, which reads:

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"When it has become necessary in future to amend the provisions of the present Constitution, a project to that effect shall be submitted to the Imperial Diet by Imperial Order.

"In the above case, neither House can open the debate, unless not less than two-thirds of the whole number of Members are present, and no amendment can be passed, unless a majority of not less than two thirds of the Members present is obtained."

The problem with which this Memorandum will deal is closely connected with the interpretation of this Article and may be formulated as follows:

When a project for a constitutional amendment has been submitted to the Diet by the Emperor, has the Diet the power to modify the project and enact additions to it, or may the Diet solely either adopt the project as a whole or reject it? This Memorandum comes to the conclusion that the Diet may enact such modifications and additions.

Although the analysis of this question was the primary task of the present Memorandum, the study of the constitutional literature as well as discussions with Japanese scholars revealed the existence of an even more important problem which arises with respect to the draft of a new Constitution. This problem concerns the scope of the initiative power of the Emperor regarding constitutional amendments and particularly the question whether the Emperor may submit to the Diet an amendment project which is designed to alter the fundamental principles of Japanese government or "the national polity." The discussion of this question had to be included in the Memorandum which otherwise would have been incomplete. The conclusion at which this writer arrives is that under the Meiji Constitution no limitations on the initiative power of the Emperor with regard to the change of the national polity exist.

III. OPINIONS AND LITERATURE

There are no precedents available for the procedure applied in connection with constitutional amendments. Since the Meiji Constitution has been in force, not a single amendment has been enacted. Robert Luce recalls the habit of men in all ages to think their institutions incapable of substantial betterment and the fact that authors of written forms of government appear to have been particularly confident that their work was the best possible achievement and certain to endure. 1) It goes without saying that this attitude prevails more than anywhere else in Japan where the Constitution is thought of as Kokutai, a phrase which expresses "the national polity under the unbroken line of succession." The Constitution, regarded as a gift of the Emperor Meiji to his "subjects", has somehow partaken of the Emperor's sacred character. 2)

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1) Robert Luce: Legislative Principles, Boston, New York, 1930, p. 144

2) Harold S. Quigley: Japanese Government and Politics, New York, London, 1932, p. 46

It is not surprising, therefore, that discussions concerning the procedure with regard to constitutional amendments, and particularly with respect to the powers of the Diet have been relatively meager in Japanese legal literature. It is significant to note that even Prince Ito, usually considered as the father of the Meiji Constitution, does not touch on the first question with which this Memorandum is concerned. In his Comments he merely points out that when a project for the amendment of the provisions of the Constitution has been submitted to the deliberation of the Diet, the latter cannot take a vote on any matter other than that contained in the project submitted to it. 3)

c. Initiative Power of the Emperor.

Insofar as could be traced, there is unanimity among the Japanese legal experts that the sole power of initiating constitutional amendments rests with the Emperor. But here the other problem is involved which is closely connected with the whole issue of continuity. Although the Meiji Constitution does not contain any provisions restricting his initiative power, most writers hold that even the Emperor is subject to certain limitations when initiating changes of the Constitution. In their opinion, he cannot propose the abolition of those fundamental principles on which the Constitution is based. To do so would be political suicide, as Professor Miyazawa, expert on constitutional law at Tokyo Imperial University, expressed it in a conversation with the undersigned. It appears that these fundamental principles are identical with Kokutai or with the "national polity", which requires the unbroken line of imperial rulers. It becomes now clear what Minister Muramori had in mind when he emphasized in the Diet that the national polity has remained unaltered. Ito takes up the point in the following remarks in his Comments:

> "The Constitution has been personally determined by His Majesty the Emperor in conformity with the instructions transmitted to Him by His Ancestors and He desires to bequeath it to posterity as an immutable code of laws, whose provisions His present subjects and their descendants shall obey forever. Therefore the essential character of the Constitution should undergo no alteration.
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> "But law is advantageous only when it is in harmony with the actual necessities of society. Thus, although the fundamental character of the national polity is to continue unaltered for all ages to come, yet it may become necessary at some time in the future, to introduce more or less modifications in the less important parts of the political institutions, so as to keep them in touch with the changing phases of society." 4)

This view is shared by Professor Tatsukichi Minobe who holds that the contents of the amendment proposed by the Emperor cannot be such as to nullify or abolish the entire Constitution. The fundamental rule of the nation, which

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3) Prince Hirobumi Ito: Commentaries on the Constitution of the Empire of Japan. (translated), p. 142.

4) Ibid., p. 140

is identical with the national polity must, in his opinion, be continued unaltered, and he defines this fundamental rule as the principle laid down in Article 1 of the Constitution, which provides that the Empire of Japan shall be reigned and governed by a line of Emperors unbroken for ages. 5) He interprets the words "reigned over and governed" as meaning that the Emperor and his throne combines in himself the sovereignty of the state and the government of the country and of his subjects. 6)

Professor Miyazawa, a student of Minobe, maintained that in normal times, say in 1938, the Emperor would not have had the power to submit the draft of a completely new Constitution such as the present draft to the Diet, because the proposed reforms of the system of government would have been in conflict with the national polity. When asked who could have prevented him from doing so, Miyazawa answered, probably nobody, however then the change would not have been constitutional, but revolutionary in character. The situation is, according to his opinion, different now because the national polity has been basically changed in consequence of the acceptance by the Japanese Government of the Potsdam Declaration. There exists now a quasi-revolutionary situation so that the Meiji Constitution is alive only insofar as it is not in conflict with the Potsdam Declaration.

b. Powers of the Diet.

With regard to the question whether and to what extent the Diet has the power under Article 73 of the Meiji Constitution to modify the amendment project of the Emperor or to enact additional provisions, three schools of thought might be distinguished. The "orthodox theory" supported by the majority of writers, denies such power completely. Representative of this theory is N. Matsumoto who in a textbook in the English language makes the following remark on the subject:

> "The Imperial Diet cannot modify the project because the modification of the project is the introduction of a different project and thus interferes with the initiative power of the Emperor; the Diet is only to give or refrain from giving its consent to the project. 7)

An opposite view with respect to modifications is taken by Minobe and his students. Their theory is that the revision of the Constitution is also a function of the legislature and that "the procedure is merely a more respectful method than that used for ordinary legislation". While the Diet is denied the power of initiating constitutional amendments, it must deliberate and approve them. The right of approval, however, necessarily includes the right of modification. On the other hand, Minobe holds that the addition of modifications of

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5) Tatsukichi Minobe: Commentary on the Constitution, p. 722

6) P. 3, see also Article 4 of the Meiji Constitution

7) N. Matsumoto: The Japanese Constitution and Politics, Tokyo, 1940, p. 62

articles which are not included in the original draft or the addition of new articles by the Diet would constitute an assumption of the initiative power which the Diet is denied. To support this opinion, Minobe refers to the Comments of Ito who emphasizes that the Diet cannot take a vote on any matter other than that is contained in the project submitted to it. 8)

Minobe also fights the idea of the Emperor-granted Constitution, and some of his students go even so far as to maintain that under the Meiji Constitution the sovereignty is vested in the Emperor and in the Diet. This view was expressed to the undersigned by Ken Miyazaki, an official of the Bureau of legislation.

A third school, while denying the Diet the power of modification, is concerned with the case when a revision draft of two or more articles of the constitution is submitted to the Diet and examines the question whether the two items may be considered separately. Here a distinction is made between the case that the two articles are closely related, for instance a general principle and exceptions thereto, and the case when no mutual relationship exists. In the first case they must be passed upon together, while in the second case the Diet could adopt one article of the proposed revision and reject the other. 9)

IV. REGRESSION

a. Continuity and National Polity

Legal continuity is maintained according to constitutional theory by simultaneous abrogation of the old Constitution and coming into force of the new Constitution, both acts being accomplished by the same instrument. However, it is understood that amendments are subject to the rules set forth in the old Constitution. That is also true of the enactment of a completely new Constitution, which the present draft actually represents. Historical precedents according to which new Constitutions come to birth without a revolutionary situation are naturally rare, but in some instances the attempt has been made to camouflage the actual revolution behind a strictly legal procedure under the existing Constitution. The fundamental changes in the basic law of France in the summer of 1940, when Petain assumed dictatorial powers, is a good illustration of this phenomenon. The constitutional changes necessary to destroy the foundations of the Third Republic were voted on by the National Assembly in conformance with the Constitution of 1871. Even Hitler when coming to power in 1933 never gave up the fiction that he built up the Third Reich on the legal basis of the Weimar Constitution, by making ample use of the emergency power of the Reich President.

The Meiji Constitution itself does not indicate that the basic law of Japan could not be changed completely. The preamble uses the phrase, "when

. . . . . .

8) op. cit. p. 722

9) see Shindan, Yosa: On the Constitution, National Laws, p. 201 and
Dr. Hakujiro Sato: Lectures on the Imperial Constitution, 1942, pp 368-370.

in the future it may become necessary to amend any of the provisions of the present Constitution", and Article 73 reads, "when it has become necessary in the future to amend the provisions of the present Constitution". No limitation regarding the scope and the contents of such amendments is included in these provisions. The idea that the national polity must remain unaltered however has been interpreted into the Constitution subsequent to its passage and belongs to the realm of legal theory. It has its origin in the pious wish of the interpreters to retain the Tenno system in its traditional form and in the awe which most people, and particularly the Japanese, feel toward their Constitution. In this connection it appears significant that Ito did not actually consider illegal amendments of the Constitution which affected the fundamental principles of Japanese government. His comment on this point is very cautiously worded. It reads:

"The essential character of the Constitution should undergo no alteration."

If the framers of the Constitution had intended to impose such important limitations on the initiative power of the Emperor, they would have seen to it that the Constitution contained an explicit and unequivocal statement to that purpose, as did the Tokugh Constitution of 1871 which provided that the republican form of government could not be changed in future. But apparently they did not go so far as to consider their constitutional pattern as designed for eternity, and, on the other hand, their respect for and subservient devotion to the Emperor would not have allowed them to limit his initiative power.

If this opinion is not approved, the position should be taken that the national polity has been affected by events other than formal amendments of the Constitution. To deny that the acceptance of the Potsdam Declaration by the Japanese Government has basically altered this national polity would come pretty near to an admission that the objectives of the Occupation cannot be achieved. It must be remembered that the national polity, according to Ito, is formulated in Art 1 of the Constitution, which proclaims that the Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal. This means that the Emperor combines in himself the sovereignty of the state (Art 4) and the government of the country and of his subjects. The situation, however, as it exists in fact and as it will be legally fixed in the new Constitution, is exactly characterized by the transition of the sovereignty from the Emperor to the people. As far as the new role of the Emperor is concerned, it might be defined by the French phrase "le roi reigne, mais il ne gouverne pas."

While it cannot be denied, consequently, that the acceptance of the Potsdam Declaration has altered the national polity, this does not necessarily mean a break of legal continuity. The impact of international developments and treaties cannot be separated from the political life of a nation and must be taken into account when appreciating the evolution which this nation has undergone. The Meiji Constitution itself followed the restoration of the Emperor, which was brought about by the pressure of international events. There is no complete stability of governmental institutions, and changes are not exclusively effected by constitutional amendments. No Constitution can forever forbid

future generations to adapt its interpretation to changed conditions unforeseeable by its fathers. The opinion of Professor Kawashima that the Meiji Constitution is alive only insofar as it does not conflict with the Potsdam Declaration might not be accepted as a generalization, but there is no doubt that under the impact of international and domestic developments the interpretation of the unalterability of the national polity has become untenable.

b. Modification of the Amendment Draft by the Diet.

The language of Article 73 of the Meiji Constitution does not give any clue regarding limitations of the Diet in its legislative function of deliberating constitutional amendments and voting on them. No explicit provision is included that the Diet has only the alternative of adopting or rejecting the revision project as a whole. Here, again, it has been a matter of subsequent interpretation to impose such limitation on the legislative branch of the government. The main argument is that any modification or addition to the proposed revision would impair the initiative power of the Emperor. This argument is, however, not convincing. The rule that constitutional amendments cannot be initiated by the Diet, but must be submitted to it by the Emperor establishes merely a distribution of powers, according to which the initiative belongs to the Emperor and the deliberation as well as the vote belongs to the Diet. As soon as the revision project has reached the Diet, it has passed the stage of initiation and entered that of legislative action, since constitutional amendments under the Meiji Constitution are part of the legislation. The right to vote modifications cannot be denied the Diet, because it is inherent in the very nature of legislation. To deny the Diet this right and compel it to vote either yes or no would mean to deprive it of its essential functions. To be sure, Art 5 of the Meiji Constitution states that the Emperor exercises the legislative power with the consent of the Imperial Diet; but this formulation does not imply that the Diet should not be free in the determination whether and to what extent it gives its consent. Modifications must be allowed the Diet even at the risk that the contents of the original project are considerably altered and the innovation might appear as a "different project." In this case it has become a different project when it was no longer in the stage of initiation.

If the theory which imposes limitations on the functions of the Diet is in part motivated by the apprehension that modifications of the Imperial project would be an expression of disrespect against the Emperor, it should be pointed out that the complete rejection of his project is even a greater shock to his prestige.

As to additions to the project, the question is, indeed, more doubtful than with regard to modifications. Although the borderline between the two is frequently not clearly definable, it would appear reasonable to require that additions are connected with the project and that they are not completely new amendments of the Constitution. However, this problem does not arise in the case of the present revision draft. The latter, being a comprehensive draft of a new Constitution, the distinction between modification and addition becomes meaningless, since the project itself is not limited to individual items. Therefore any addition is related to the project.

PURSUANT TO THE EXEC. ORD. 9066 SEC. 5(E) AND 5(F) OR (G) NARA

It is interesting to note that the Diet itself obviously shares the view presented in this Memorandum, as it has without reluctance assumed the right to modify individual articles, to strike out one article and to add four new articles.

If all the preceding arguments should be invalid, the Diet would, indeed, lack the right to vote on modifications or additions, and its decisions, insofar as that right was exercised, would have to be considered as defective. But are they incurably defective? The writer does not believe so, but holds that the defect can be remedied if and when the Emperor gives his sanction to the constitutional amendment as revised by the Diet. According to Art 6 of the Meiji Constitution, the Emperor gives sanction to laws - and the Constitution is the supreme law of the nation - and orders them to be promulgated and executed. Since the argument against the power of modification is based solely on the assertion that it would interfere with the initiative power of the Emperor, any possible defect can be remedied if the Emperor, whose rights are assertedly impaired, himself sanctions the resolutions of the Diet. As the political situation actually is, he will undoubtedly sanction and promulgate the Constitution as passed by the Diet.

V. CONCLUSIONS

This Memorandum arrives at the following conclusions:

1. The power of the Emperor to initiate constitutional amendments is unlimited. He is not bound to retain the fundamental principles of Japanese government, usually referred to as the national polity, because:

a. the Meiji Constitution does not contain such limitation, which has been introduced by subsequent interpretations; and

b. even if such limitation was recognized before, the acceptance of the Potsdam Declaration has altered the Japanese national polity.

2. The Diet has the power to modify and supplement the amendment project of the Emperor, because:

a. Article 73 of the Meiji Constitution does not contain limitations with regard to the scope of deliberation and voting by the Diet;

b. Only the initiative belongs to the Emperor, but as soon as the project is submitted to the Diet, the latter is free to vote on it as on any other law;

c. The right to change and supplement drafts is inherent in the legislative assembly and constitutional amendments are part of the legislative functions; and

d. Even if the right of modification and addition should be denied [illegible] the Diet's revisions could be remedied [illegible] revised by the Diet.

Noted: CLK

/s/ ALFRED C. OPPLER
Chief Legal Officer
Governmental Powers Division

APPENDIX B

COPY

GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS
Government Section

2 February 1946

MEMORANDUM FOR THE SUPREME COMMANDER.

SUBJECT: Constitutional Reform.

1. The question of constitutional reform of the Japanese governmental system is rapidly approaching a climax. Several proposed revisions of the Japanese constitution have been drafted by governmental and private committees. Constitutional reform may well be a cardinal issue in the coming election campaign.

In these circumstances, I have considered the extent of your power as Supreme Commander to deal with fundamental changes in the Japanese constitutional structure, either by approving or disapproving proposals made by the Japanese government or by issuing orders or directives to that government. In my opinion, in the absence of any policy decision by the Far Eastern Commission on the subject (which would, of course, be controlling), you have the same authority with reference to constitutional reform as you have with reference to any other matter of substance in the occupation and control of Japan.

2. You have authority from the Allied Powers to proceed with constitutional reform. In accordance with the agreement among the governments of the US, USSR, UK and China, the President of the United States designated you as Supreme Commander for the Allied Powers to "take such steps as you deem proper to effectuate the surrender terms". (Par. 5 of Designation). By the Instrument of Surrender, the Japanese Government accepted the provisions of the Potsdam Declaration. (Par. 1 of Instrument). The Potsdam Declaration requires the Japanese government to "remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people", and the establishment "in accordance with the freely expressed will of the Japanese people of a peacefully inclined and responsible government". (Pars. 10 and 12 of Declaration.)

To achieve this alteration in the nature of Japan's governmental institutions requires fundamental changes in the Japanese constitutional structure; and such alteration is essential to the execution of the Potsdam Declaration. Therefore, your authority to effectuate constitutional reform designed to develop a form of government responsible to the people is implicit in the terms of your designation by the Allied Powers as Supreme Commander for the purpose of enforcing the surrender terms.

3. You have authority from the Joint Chiefs of Staff to proceed with constitutional reform. The Joint Chiefs of Staff have directed that you "examine your authority as you deem proper to carry out your mission." (Cable No. WX 60933 dated 7 September 1945). Your mission as set forth in the basic

occupation directive for Japan (JCS 1380/15) includes: (a) carrying out measures for "The strengthening of democratic tendencies and processes in governmental, economic and social institutions", (b) permitting and favoring "changes in the direction of modifying the feudal and authoritarian tendencies of the government," and (c) informing the Japanese that "they will be expected to develop a non-militaristic and democratic Japan", (Pars. 3a, 3c, and 4a of Directive).

It is clear that you cannot accomplish these aspects of your mission without effecting fundamental changes in the Japanese constitutional structure. Since the development of a democratic Japan has been explicitly made a part of your mission, you have ample authority from the Joint Chiefs of Staff to approve or order constitutional reform designed to achieve the desired results.

4. Your authority to make policy decisions on constitutional reform continues substantially unimpaired until the Far Eastern Commission promulgates its own policy decisions on this subject. The Charter of the Allied Council for Japan requires you to consult and advise "with the Council in advance of orders on matters of substance" but your "decisions upon these matters shall be controlling", (Par. 5 of Charter). The sole limitation imposed upon your authority to effect constitutional reform exists in case a member of the Council disagrees with a proposed order "regarding the implementation of policy decisions of the Far Eastern Commission on questions concerning fundamental changes in the Japanese constitutional structure" (Par. 6 of Charter). In such event your order would be referred to the F.E.C. to determine whether it properly implemented the F.E.C. policy decision.

In the absence of any F.E.C. policy decision, however, there is no restriction upon your executive authority except (a) insofar as the obligation for advance consultation with the Allied Council limits the manner in which your authority is exercised, and (b) insofar as the F.E.C. may review any action you may take. Under its charter, the F.E.C. may, at the request of any member, review any directive issued to you or any action taken by you. (Par. II, A, 2, of Charter). Similarly, no directive may be issued to you by the Joint Chiefs of Staff or any other agency of the United States Government "dealing with fundamental changes in the Japanese constitutional structure" without "the attainment of agreement in the Far Eastern Commission", (Par III, 3). Neither of these provisions, however, precludes your taking action pursuant to existing directives to approve or direct constitutional reform.

5. Should the F.E.C. eventually promulgate a policy directive involving changes in the constitutional structure, your decision in the issuance of directives (orders) thereon would not be controlling if any member of the Allied Council for Japan objected. It is my opinion that the word "order" in the charter of the Allied Council is used in the sense of compulsion and would not embrace a mere approval by you of constitutional reform measures submitted to you by the Japanese government, although your action in approving the same would be subject to review by the F.E.C. under the general review authority of its charter.

6. To recapitulate, I am of the opinion (a) that you now have the unrestricted authority to take any action you deem proper in effecting changes in the Japanese constitutional structure -- the only possible restriction being upon action taken by you toward removal of the Emperor, in which case you

are required to consult with the Joint Chiefs of Staff; (b) should the F.E.C. issue a policy directive dealing with the matter of constitutional reform, then and in such event the issuance of any constitutional reform directive (order) upon the Japanese government would be subject to objection by any member of the Allied Council for Japan and your decision would not be controlling.

7. The above opinion represents the composite view of all officers of the Government Section who have examined this question.

COURTNEY WHITNEY
Brigadier General, U.S. Army
Chief, Government Section.

APPENDIX C

LIST OF MEMBERS OF SO-CALLED MATSUMOTO COMMITTEE

Position	Name	Principal Position (at that time)	Career	Present Position
Chairman	MATSUMOTO, Joji	State Minister without portfolio	1. Professor of Law, Tokyo Imperial University. 2. President, Board of Legislation. 3. Member, House of Peers. 4. Minister of Com. & Ind.	Lawyer
Advisor	MINOBE, Tatsukichi	Professor Emeritus, Tokyo Imp. University.	1. Professor of Law, Tokyo Imp. Univ. 2. Member, House of Peers. 3. Privy Councillor 4. Chairman, National Election Management Commission.	(Dead)
Advisor	SHIMIZU, Toru	Vice-Chairman, Privy Council.	1. Privy Councillor. 2. Vice-Chairman, Privy Council. 3. Chairman, Privy Council.	(Dead)
Advisor	NOMURA, Junji	Professor Emeritus, Tokyo Imp. Univ.	1. Professor of Law, Tokyo Imp. University.	None
Member	KAWAMURA, Hatsuoka	Professor, Kyushu Imp. Univ.	1. Professor of Law, Tohoku Imp. Univ. 2. Professor of Law, Kyushu Imp. Univ. 3. Judge, Supreme Court	Judge, Supreme Court.

Member	KIYOSEIYA, Shiro	Professor, Tohoku Imp. Univ.	1. Professor of Law, Keijo Imp. Univ. 2. Professor of Law, Tohoku Imp. Univ.	Professor, Tohoku Univ.
Member	MIYAZAWA, Toshiyoshi	Professor, Tokyo Imp. Univ.	1. Professor of Law, Tokyo Imp. Univ.	Professor, Tokyo Univ.
Member	KOBAYASHI, Jiro	Chief Secretary, House of Peers	1. Secretary, House of Peers. 2. Chief Secretary, House of Peers. 3. Secretary General, House of Councillors.	Secretary General, House of Councillors.
Member	OKE, Makoto	Chief Secretary, House of Representatives.	1. Secretary, House of Representatives. 2. Chief Secretary, House of Rep. 3. Secretary General, House of Rep.	Secretary General, House of Representatives.
Member	NARAHASHI, Wataru	President, Board of Legislation	1. Lawyer. 2. Advisor of Tokyo City. 3. Member, House of Representatives. 4. President, Board of Legislation. 5. Chief Secretary of Cabinet.	Lawyer.
Member	ISHIGURO, Takeshige.	Chief Sec'y. Privy Council.	1. Sec'y., Ministry of Agriculture & Forestry. 2. Chief, Economic Rehabilitation Dept, Ministry of Agr. & For. 3. Governor, Yamagata Pref. 4. Director, Textile Bureau, Ministry of Com. & Ind. 5. Dir., Trade Board, same Ministry.	None

			6. Director, Price Board, same Ministry. 7. Vice-Minister of Agr. & Forestry. 8. Chief Sec'y. Privy Council. 9. President, Board of Legislation. 10. Member, House of Representatives.	
Member	HIROHASHI, Hoboru	Chief Sec'y, Privy Council.	1. Secretary, Privy Council. 2. Chief Sec'y, Privy Council. 3. Member, House of Peers. 4. Chief, Legislative Dept., House of Representatives. 5. Auditor, Board of Audit.	Auditor, Board of Audit.
Member	ITIE, Toshio	Vice-President, Board of Legislation.	1. Councillor, Board of Legislation. 2. Vice-President, same Board. 3. President, same Board. 4. Member, House of Peers. 5. Senior Specialist, National Diet Library.	Senior Specialist, National Diet Library.
Member	SATO, Tatsuo	Councillor, Board of Legislation.	1. Councillor, Board of Legislation. 2. Vice-President, same Board. 3. President, same Board. 4. Legislative Assistant to the Attorney General.	Legislative Assistant to the Attorney General.

Member	OHMYO, Hamichi	Director, Civil Affairs Bureau, Ministry of Justice.	1. Judge. 2. Director, Civil Affairs Bureau, Ministry of Justice. 3. Litigation Assistant to the Attorney General.	Litigation Assistant to the Attorney General.
Member	NAKAMURA, Tateki	Director, Budget Bureau, Ministry of Finance.	1. Secretary Ministry of Finance. 2. Sec'y. Planning Board. 3. Sec'y. Ministry of Finance. 4. Navy Civilian Administrator General. 5. Director, Budget Bureau, Ministry of Finance.	None
Member	UODA, Uichi	Director, Budget Bureau, Ministry of Finance.	1. Sec'y, Ministry of Finance. 2. Director, Foreign Funds Bureau, Ministry of Finance. 3. Director, Budget Bureau, same Ministry. 4. Director General, Monopoly Bureau, same Ministry. 5. Vice-Minister of Finance.	Vice-Minister of Finance.

APPENDIX D-1

(A) TENTATIVE REVISION OF THE CONSTITUTION

By Joji Matsumoto

(January 4, 1946)

(1. The present draft gives only the Articles that have been revised, or deleted.

Parts, amended or added, are underlined. Articles with no underlined part indicate that they are unchanged but for certain omission or omissions.

2. In order to facilitate comparison the original numbers for Articles are retained as far as possible, such numbers for additional Articles as XXX-ii or LV-ii are used simply for the purpose of indicating where they belong.

3. When all the Articles are properly renumbered by numbering up some and numbering down other, the entire text of the revised Constitution will consist of 75 Articles.)

Article II. The Emperor is exhalted and inviolable.

Article VII. The Emperor convokes the Imperial Diet, opens, closes, and prorogues it.

The Emperor dissolves the House of Representatives; but he may not dissolve it over again for the one and same reason.

Article VIII. The Emperor, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not sitting, Imperial Ordinances in the place of law. But in so doing, he shall consult the Diet Standing Committee in advance, according to the provisions of the Diet law.

Such Imperial Ordinances are to be laid before the Imperial Diet at its next session, and when the Diet does not approve the said Ordinances, the government shall declare them to be invalid for the future.

Article IX. The Emperor issues or causes to be issued the Orders necessary for executing the laws, or for accomplishing administrative aims. But no order shall in any way alter any of the existing laws.

Article XI. The Emperor has the supreme command of the armed forces. The organization and peace standing of the armed forces shall be determined by law.

Article XII. The Emperor declares war and makes peace, with the advice and approval of the Imperial Diet.

As regards the provision of the preceding paragraph, in the case of emergency when the conditions at home and abroad allow no time for convocation of the Imperial Diet, prior consultation with the Diet Standing Committee as provided by law shall suffice. But in such a case, the action shall be laid before the Imperial Diet for approval at its next session.

Article XIII. The Emperor concludes various treaties, provided that in order to conclude treaties such as concerns the matters that must be determined by law, or that may place a serious burden on the State Treasury, he shall obtain prior approval of the Imperial Diet.

As regards the above provision, in case of emergency similar to that mentioned in paragraph 2 of the preceding Article, the provision of the said Article shall apply.

Article XV. The Emperor awards honors.

Article XX. Japanese subjects are amenable to military service, according to the provisions of law.

Article XXVIII. Japanese subjects shall, within limits not prejudicial to peace and order, enjoy freedom of religious belief.

Article XXXI. All rights and liberties of Japanese subjects, besides those mentioned in the preceding several Articles, shall not be impaired in all circumstances except by law.

Article XXXII. Delete.

Article XXXIII. The Imperial Diet shall consist of two Houses, a House of Councillors and a House of Representatives.

Article XXXIV. The House of Councillors shall, in accordance with the provisions of the House of Councillors law, be composed of members elected, or appointed by the Emperor.

Article XXXIX. A Bill which, after having been passed three times in succession of the House of Representatives by majority of more than two-thirds, is sent to the House of Councillors shall be considered as disapproved by the Imperial Diet regardless of whether or not it is adopted by the House of Councillors.

Article XLII. A session of the Imperial Diet shall last during a period, not less than three months, as is provided for by the Diet Law. In case of necessity the session may be prolonged by Imperial Order.

Article XLIII. When urgent necessity arises, an extraordinary session may be convoked, in addition to the ordinary session.

The duration of an extraordinary session shall be determined by Imperial Order.

The members of both Houses may, with the concurrence of more than one-third of the total members of their respective Houses, may apply for convocation of an extraordinary session.

Article XLIV. The opening, closing, prolongation of the Imperial Diet, shall be effected simultaneously by both Houses.

In case the House of Representatives has been ordered to dissolve, the House of Councillors shall at the same time be closed.

Article XLV. When the House of Representatives has been ordered to dissolve, members shall be caused by Imperial Order to be newly elected, and the Imperial Diet shall be convoked within three months from the day of dissolution.

Article XLVIII. The deliberations of both Houses shall be held in public. The deliberations may, however, by decision of the respective Houses, be held in secret sitting.

Article LIII. Members of both Houses shall, during the session, be free from arrest, unless with the consent of the House, except in cases of flagrant delicts, or of offences connected with internal commotion or foreign trouble. Any member who has been arrested prior to the session shall upon demand of the House be released for the duration of the session.

Article LV. The respective Ministers of State shall render assistance and advice to the Emperor, and be responsible to the Imperial Diet with respect to all affairs of the state.

All Laws, Imperial Ordinances and Imperial Rescripts relating to the affairs of the State require the countersignature of a Minister of State. The same provision shall apply to those relating to the Supreme Command of the armed forces.

In case the House of Representatives has passed a vote of non-confidence against a Minister of State, he shall not remain in office except in the case the House has been dissolved.

Article LV-ii. The Cabinet shall be composed of the Ministers of State.

The organization of the Cabinet shall be determined by law.

Article LVI. The Privy Councillors shall deliberate upon important matters of State, when they have been consulted by the Emperor.

The Organization of the Privy Council shall be determined by law.

Article LVII. The Judicature shall be exercised by the Courts of Law according to law, in the name of the Emperor.

The organization of the Courts of Law shall be determined by law.

All cases of administrative litigation shall be under the jurisdiction of the Courts of Law, as provided for separately by law.

Article LXI. Delete.

Article LXV. The Budget shall be first laid before the House of Representatives. A Budget passed by the House of Representatives shall not be amended by the House of Counsillors for any increase thereof.

Article LXVI. The expenditures of the Inner Court of the Imperial House shall be defrayed every year out of the National Treasury, according to a fixed amount for the same, and shall not require the consent thereto of the Imperial Diet, except in case an increase thereof is found necessary.

Article LXVII. Such annual expenditures as may have arisen by the effect of law, or that appertain to the legal obligation of the Government, shall be neither rejected nor reduced by the Imperial Diet, without the concurrence of the Government.

Article LXIX. In order to supply deficiencies, which are unavoidable, in the Budget, and to meet requirements unprovided for in the same, a Reserve Fund shall be provided for.

In case any disbursement is to be made from the Budget to requirements unprovided for in the Budget, the Diet Standing Committee shall be consulted in advance according to the provisions of the Diet Law.

In case disbursements are to be made outside the Budget in order to supply deficiencies, which are unavoidable, in the Budget, or to meet requirements unprovided for in the same, the provisions of the preceding Paragraph shall also apply.

Article LXX. In case of urgent need for the maintenance of public safety, the Government, when the Imperial Diet cannot be convoked owing to the external and internal condition of the country, may take all the necessary financial measures through an Imperial Ordinance, provided that the Diet Standing Committee shall be consulted in advance according to the provisions of the Diet Law.

In the case mentioned in the preceding Paragraph, the matter shall be submitted to the Imperial Diet at its next session, and its approval thereon shall be obtained.

Article LXXI. When the Imperial Diet has not voted on the budget, or when the budget has not been brought into actual existence, the Government shall compile a provisional budget carried out according to the provisions of the Account Law, and carry it out until the regular budget is brought into existence.

In the case mentioned in the preceding Paragraph, the Imperial Diet, if not in session, shall be speedily convoked, and the Provisional Budget shall be submitted to it for approval.

Article LXXIII. When it has become necessary to amend the provisions of the present Constitution, a project to that effect shall be submitted to the Imperial Diet by Imperial Order.

Members of both Houses may with the concurrence of not less than one half of the total numbers of their respective Houses, propose deliberation on the project.

In the case mentioned in the preceding two Paragraphs, neither House may open the debate, unless not less than two-thirds of the whole number of Members are present; and no amendment may be passed, unless a majority of not less than two-thirds of the Members present is obtained.

The Emperor approves the amendments to the Constitution passed by the Imperial Diet, and orders the promulgation and enforcement thereof.

Article LXXV. Delete.

Supplementary Rules

The Orders currently in force, which specify matters to be determined by law under the provision of the present constitution, shall remain valid until they are repealed or revised.

Of the present amendments to the Constitutions, those under Articles VIII, XII, XIII, XVIII, XXIV, XXVIII, XLII, XLIV, LV-II, LVI, LVII, LXI, LXV, LXX, LXX, and LXXI, shall not come into effect until the necessary laws and orders are promulgated and enforced, and the provisions of the old laws shall meanwhile remain in force.