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Administrative Guidance: A Tentative Model of How Japanese Lawyers Understand It

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Introduction

Informality in administrative process has been one of the favoured topics in Japanese administrative law. Administrative informality, as discussed in Japan, includes: (1) internal standards such as interpretive rules and discretionary standards; (2) contractual approach to NIMBY (Not-in-my-backyard) facilities;[1] and (3) the well-known "administrative guidance." The concept of administrative guidance itself covers a wide range of communications between the agency and private entities. Courts and commentators have quite often used the word "guidance" as a key to understand legal implications of various conflicts between the government and private entities.

Unlike traditional legal terms such as standing or torts, the word "guidance" has a rather short history of being subject to legal discussion. Once bureaucratic jargon, it became enormously popular through the media in the 1960s and 1970s, especially during the so-called "oil shock" in 1973 —— OPEC's embargo —— when the Ministry of International Trade and Industry (MITI) gave informal directions to major oil companies regarding their pricing and production. Legal academics have tried to give "definitions" to such phenomena since the 1960s, which definitions, with only slight differ-

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* Associate Professor of Law, Kobe University, Faculty of Law. This is a shortened version of my original article written in Japanese, and citations are limited to English language materials except for cases and statutes. For full analysis of the matter, see the original article: Nakagawa, Nihon-ni Okeru Infohmalu-na Gyosei Shuho Ron [Administrative Informality in Japan], 48 Kobe Hogaku Zasshi 443 (1998). The author would like to thank Todd Rakoff, Stephen Sugarman, and Robert Eldridge for their valuable comments on an earlier version of this article.

1 For a general discussion on the contractual approach, see, e.g., J. GRESSER, K. FUJIKURA & A. MORISHIMA, ENVIRONMENTAL LAW IN JAPAN 248-49 (1981); Shibaike (Yeomans trans.), Guidelines and Agreements in Administrative Law, 19 Law in Japan 63 (1986).

ences from each other, have always been quite inclusive with an intention that as many phenomena as possible that can arguably be discussed as guidance should be included for academic discussion. Such academic attention was soon shared by the courts.

Considering the way in which the term was generated and has been used, it might easily be imagined that discussions on administrative guidance would include multiple legal topics. This article makes an argument that, under the single headword of administrative guidance, at least six distinctively different contexts —— thereby, six separate legal treatments to follow —— are being discussed by Japanese lawyers. It also argues that the prevailing approach to administrative guidance, which this article calls a "blanket and functional" approach, has produced no fruitful analysis of the phenomena, and should be replaced with the one that this article proposes.

I. The Argument

Japanese scholars of administrative law took an interest in the guidance phenomena in the 1960s, and tried to give "definitions," the most often cited of which appeared as early as 1966.[2] The Administrative Procedure Law of 1993[3] defines administrative guidance as follows, based on the widely shared understanding of the concept:

> Article 2
> (2) Disposition: A disposition or other forms of exercise of public authority by an authorized agency official.
> (6) Administrative Guidance: Guidance, recommendation, advice, or other forms of act by an agency, which is not a disposition, requesting specific persons to engage in some action or inaction, within the agency's duties and functions, to realize certain administrative purposes.

2 Representative definitions are those of Shiono, Administrative Guidance, in IIAS TOKYO ROUND TABLE ORGANIZATION COMMITTEE (ed.), PUBLIC ADMINISTRATION IN JAPAN 221, 222 (1982) and Narita (Anderson trans.), Administrative Guidance, 2 Law in Japan 45, 46-49 (1968). For an overview of various definitions, see Yeomans, Administrative Guidance: A Peregrine View, 19 Law in Japan 125, 129-37 (1986). See also Young, Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan, 84 Colum. L. Rev. 923, 932-34 (1984). For conventional discussions on the "Statutory Reservation" doctrine regarding administrative guidance, see Yoeman, ib., at 147-58; Narita, ib., at 60-64.

3 Law No. 88 of 1993 [Gyosei-Tetsuzuki-Ho]. For a general discussion, see, e.g., Koedderitzsch, Japan's New Administrative Procedure Law: Reasons for its Enactment and Likely Implications, 24 Law in Japan 105 (1991); Duck, Now That The Fog Has Lifted: The Impact of Japan's Administrative Procedure Law on the Regulation of Industry and Market Governance, 19 Ford. Int'l L.J. 1686 (1996).

The essence of administrative guidance is that it is an action undertaken by a public official to *persuade*, orally or in writing, private entities *to voluntarily cooperate* with a purpose that the guiding agency deems desirable. Two elements are essential for a governmental activity to be qualified as guidance. First, it must be without legally binding effect —— it is simply a request for voluntary cooperation, creating no legal rights or duties. Second, whatever the official may request must stay within the statutorily prescribed "duties and functions" of each agency to which a guiding official belongs. The request can be free from specific moorings of statutory "programs" that the agency is authorized to implement.[4] It is irrelevant whether or not such action is specifically provided for in statutes or local ordinances.[5]

As a category of administrative activities thus defined, guidance is quite

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4 The dichotomy of "duties and functions" and "programs" is a distinction which is generally made in Japanese administrative law between "organizational statutes" and "enabling statutes."

According to the Japanese legislative practice, each Ministry of the national government, for example, must be established through its "organizational statute" such as the Establishment Law of the Ministry of Health and Welfare. A Ministry's organizational statute not only provides for the Ministry's composition, but also comprehensively describes the Ministry's "duties and functions" [shosho-jimu: businesses to be taken care of] for the purpose of jurisdictional distinction from other Ministries. The Establishment Law of the Ministry of Health and Welfare, for instance, provides that the matters to be taken care of by the Ministry shall include "matters relating to water; matters relating to improvement and promotion of public health in constructions." Distinguished from organizational statutes, there are numerous enabling statutes that authorize each agency to execute specific programs. In the case of the Ministry of Health and Welfare, enabling statues include food laws, drug laws, waste disposition laws, and pension laws.

The supposition is that each enabling statute authorizes an agency to implement a statutory program that falls within at least one of the "duties and functions" of the agency that are provided for in its organizational statute. The "duties and functions" provisions are from time to time amended to accommodate a newly enacted enabling statute that authorizes a new type of program. Some limited number of agencies are established under statutes that provide for both agency composition and "duties and functions" on one hand and "programs" to be executed on the other. The Antimonopoly Law which established the Fair Trade Commission is among the examples.

For a general discussion, see, e.g., Narita, supra note 2, at 64 & n. 48; Young, supra note 2, at 927 & n.12; F. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 169 (1987).

5 However, administrative guidance is sometimes "statutorified." There are provisions in statutes or local ordinances to the effect that the agency may issue "recommendation" or "direction" in certain circumstances. If such actions are interpreted not to affect any of the rights or obligations of a private entity, then, their legal nature should be administrative guidance. For example, the Oil Industry Law [Sekiyu-Gyo-Ho, Law no. 128 of 1962] provides for recommendation by the MITI when it finds that the sales price is inappropriately high considering "the soundness of the national economy." In that case, administrative guidance, in the form of statutory recommendation or direction, is engaged in to "enforce" —— but without biding effects —— the policy provided for in the statute. For other examples of statutory administrative guidance, see Yeomans, supra note 2, at 144-47.

an indeterminate and very inclusive concept. Also, many scholars use what this article calls a "blanket and functional" approach. It first tries to encompass all the phenomena arguably within one of the prevailing definitions of guidance. It then tries to divide such phenomena into several subcategories with an eye to "functions." For instance, one of the most widely used categorization divides guidance into three sub-groups: promotional, regulatory, and arrangement-types of guidance.[6] It seems, however, that each sub-group too often overlaps one another, offering little help for legal analysis. Indeed, it is not at all clear, in the first place, what is meant by "function."

This article proposes an alternative approach, a "contextual" approach, on the basis of the author's following dissatisfactions with the current approach. First, to discuss the category of administrative guidance as a whole, a blanket approach, simply seems unnecessary. Not all activities that fall within the definition of guidance have attracted acute attention from lawyers. Some kinds of administrative guidance are controversial but not others. This article will focus, instead, only on such contexts in which Japanese courts and commentators have looked to the guidance as a key to understand legal implications of the problem. Second, emphasis should not be put on analysis of vague "functions" but on analysis of concrete "contexts" in which administrative guidance is undertaken —— by whom, to whom, and for what purpose the guidance is undertaken. Third, administrative guidance is not simply persuasion for voluntary cooperation, but oftentimes is also a form of administrative action through which the agency ties to pursue "extrastatutory" policy goals. By "extrastatutory," this article means such nature of policy choices or values that are 1) made or picked up by the agency without foregoing legislative authorization to do so —— in other words, not part of administrative programs provided for in any existing statutes or local ordinances; but 2) not in obvious conflict with any existing statutes or local ordinances. Thus, the distinction should be made between the implementation aspect and the goal or value aspect of guidance. "Persuasion for voluntary cooperation" shows the characteristically "soft" implementation aspect of all kinds of administrative guidance while the purpose of the guidance is often —— but not always —— "extrastatutory." The latter aspect of administrative guidance, which sounds more problematic when extrastatutory, has escaped due academic attention. The prevailing blanket approach does not make such distinction. It tends to immunize the dubious nature of extrastatutory policymaking under the name of voluntariness of administrative guidance. Fourth, the prevailing approach does not explain why some courts decide appropriateness of a administrative guidance with reference to statutory frameworks while other courts de-

6 Shiono, supra note 2, at 223-25; Narita, supra note 2, at 59-60; Yeomans, supra note 2, at 136.

cide on the same issue outside statutory frameworks, trying to legitimize some sorts of guidance using courts' own extrastatutory frameworks.

To overcome these defects of the prevailing approach, this article argues that six "types" of administrative guidance — six separate legal treatments given to administrative guidance — can be identified from judicial opinions and literature. Each type presents different sets of legal problems, requiring different analytical skills. They are:

Type A Guidance: Agency's Request for Cooperation with Its Extrastatutory Standards
Type B Guidance: Agency's Intervention in Private Conflicts for Negotiated Resolution
Type C Guidance: Agency's Action to Deal With Unexpected Emergencies

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Type D Guidance: Agency's Request for Collaborative Decisionmaking
Type E Guidance: Agency's Expression of Its Discretionary Judgment
Type F Guidance: Agency's Bypassing Statutorily Prescribed Proceedings

<table>
<tr><th colspan="2">Contexts in Which Guidance is Undertaken</th><th rowspan="2">Implementation Aspect</th></tr>
<tr><th>Goals or Values Aspect</th><th>Other Contexts</th></tr>
<tr><td rowspan="3">Extrastatutory Purposes (Not part of specific statutory programs)</td><td>Type A: Request for Cooperation with Agency's Extrastatutory Standards</td><td rowspan="6">Persuasion for Voluntary Cooperation (Creating no legal rights or duties)</td></tr>
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<tr><td rowspan="3">Statutory Purposes (Part of specific statutory programs)</td><td>Type D: Request for Collaborative Decisionmaking</td></tr>
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This is not a comprehensive list of what Japanese lawyers may logically call administrative guidance, but a list of such kinds of guidance that judicial opinions and legal commentators have most intensively addressed so far. Four of them — Types A, B, C, and E — are what can be deduced from Supreme Court decisions, and Types A and B have been the center of attention in the administrative guidance literature.[7]

7 Examples of administrative guidance in literature are typically either Type A or Type B. See, e.g., Shiono, supra note 2 at 221-22 (two examples of administrative guidance: intervention in private conflicts on construction of a high-rise apartment house and a request for shortening broadcasting hours for energy conservation); Young, supra note 2, at 926-32 (two examples: MITI's request for automobile export restriction and guidance in land use planning).

An important distinction should be made among the six types of guidance. Types A, B, and C are guidance undertaken in pursuit of policy goals formulated by the agency *without prior legislative decision to that effect —— agency's extrastatutory policymaking*. There, the agency is formulating substantive policy without legislative mandate, and is implementing the policy through administrative guidance. Thus, the core of legal discussion on these types of guidance is how far, and in what context, the court may allow agencies to proceed this way. Elsewhere, the author described this question as an inquiry for "substantive informality."[8] The "appropriateness" of administrative guidance of Types A, B, and C equals to the appropriateness of such extrastatutorily-formulated policy goals, which is thereby to be judged with reference, not to any existing statutes, but to court-made unique frameworks. The Supreme Court, whenever it dealt with these sorts of guidance, set up such extrastatutory frameworks, responding to contextual uniqueness in each case.

In contrast, guidance of Types D, E, and F is conducted in the process of agencies' pursuit of *statutory goals* —— goals that are part of administrative programs authorized by the legislature to the agency for implementation. Such goals may sometimes be implemented in ways that are not specifically provided for in the statutes —— so-called informal implementation. Japanese lawyers have referred to such informal implementation as administrative guidance as well. Several legal topics can be identified from this use of the term "guidance," and they are the ones that we are much more accustomed to deal with than the legal issues of extrastatutoriness with regard to guidance of Types A, B, and C.

Types A, B, and C, sharing the feature of having extrastatutorily formulated policy as a subject to be implemented, are each situated in three different contexts. And such contextual difference, in my view, should logically lead to different degrees of justification of each type of guidance, bringing about different degrees of permissible coerciveness on the side of the agency, or desirable degrees of voluntariness on the side of the addressee. The Supreme Court has been more sympathetic to some sorts of guidance and less to others. Apparently the contexts of Types B and C guidance have been regarded by the Court as producing stronger excuses for the agency's effective implementation of extrastatutory policymaking than the context of Type A.

In Type B guidance, the agency, without specific legal authority to do so, is interfering in a private conflict. The Supreme Court has found, in a 1985

8 Nakagawa, Administrative Informality in Japan: Activities Without Legal Authority (forthcoming).

decision, a strong excuse for an agency because there was an actual controversy between private parties. The Supreme Court then implied that the addressee of such guidance would have a societal obligation to try to cooperate with it.[9] What is an implicitly important element here is that the agency is basically persuading parties to the conflict to share a certain policy value which necessarily leads to resolution, but, instead of directing how to resolve the conflict, the agency, as in the 1985 case, leaves details of resolution to private negotiation. The agency wants its vaguely formulated extrastatutory policy to be *filled up* by private parties through their negotiation. In Type C, emergencies that have not been expected to occur at the time of legislation are treated as quite a strong excuse for the agency not only to formulate but also effectively implement extrastatutory policies. The Supreme Court, in one of the so-called oil cartel cases, ruled in 1984 that the illegality of cartel agreements among oil producers would be *precluded* if such producers simply followed MITI's informal direction on pricing. The opinion limited the ruling to very exceptional situations of emergency.[10] Type A guidance, however, does not have an excuse like that of Types B or C. The Supreme Court in 1993, apparently representing the absence of any excuse, ruled that total voluntariness is required on the side of the addressee of the guidance.[11]

The remaining three types of guidance —— D, E, and F —— present different sorts of legal questions. Type D guidance is a request asking private parties to take part in cooperative decisionmaking, which methodology is not usually provided for in enabling statutes. It is generally supposed that enabling statutes contemplate, except for specific provisions to the contrary, that the agency should make its decision *by itself*, with or without inputs from outside. Since Type D guidance is the one undertaken for the purpose of cooperative decisionmaking when enabling statutes have no provisions to that effect, the foremost legal topic to be discussed is whether such statutes may be interpreted to allow cooperation. This is controversial not only because enabling statutes usually do not have intention to allow such methodology, but also because cooperative decisionmaking, in some cases, would inevitably cause cartel concerns.[12]

Guidance of Type E refers to the situation as follows: the agency has exercised its statutorily granted discretion and has reached a conclusion; but in some cases, due to the uniqueness of the conclusion, the agency cannot

9 See infra note 24 and accompanying text.
10 See infra note 26 and accompanying text.
11 See infra note 20 and accompanying text.
12 See infra note 29 and accompanying text.

help but express the conclusion in the form of persuasion: administrative guidance. Here the main legal topic to be discussed is whether or not the agency has abused its statutorily granted discretion — one of the regular topics in judicial review.[13] Type F is the agency's avoidance of the use of statutorily prescribed proceedings, so long as a consent is obtained from the addressee. It is generally done in pursuit of statutory purposes for less cost. For example, the agency may bypass formal proceedings for issuing a corrective order if the alleged violator voluntarily follows advice given by the agency. The legal topics to be discussed regarding Type F guidance include: whether or not enabling statutes may be interpreted to allow bypassing statutory procedural protection; legal effects of such informal settlement; and remedial questions arising when private parties, after following the agency's advice, find that the advice was wrong.[14]

II. Informal Implementation of Extrastatutory Policy Goals

Perhaps the best way to explain my tentative model should be by illustration. Bellow follow some examples from the regulatory process of industrial waste disposal facilities, the siting of which is now a major problem throughout the country. The Waste Disposal and Public Cleansing Law[15] deals with solid wastes, both residential and industrial, and addresses waste generation, transportation, and operation of intermediate treatment and final disposal, as well as facilities for such operation. This Law essentially corresponds to the Resource Conservation and Recovery Act of the United States.[16]

Article 15 of the Waste Disposal Law provides for a permit program regarding structural safety of facilities for intermediate treatment and final disposal of industrial wastes. A person who wants to set up such facility must request a permit from a prefectural governor,[17] who is acting in this

13 See infra notes 30-32 and accompanying text.

14 See infra note 33 and accompanying text.

15 Law No.137 of 1970 [Haikibustu-no Shori Oyobi Seiso-ni Kansuru Horitsu]. The Law was substantially amended in 1997, and several siting procedures were introduced. Before the amendment, virtually no statute has attended to the siting of industrial waste disposal facilities. The illustrations in this article are based on the legal system before the 1997 amendment to the Waste Disposal Law. However, not a few commentators argue that the 1997 amendment is still far from satisfactory to deal with such sting problems as will be discussed in text. It is my own projection that the practice of guidance that I exemplify in text would not be much affected by the amendment.

16 42 U.S.C. Sections 6901 et seq. (1988).

17 The local government system of Japan is two-tiered: prefectures (one *To*, one *Do*, two *Fu's*, and 43 *Ken's*) and municipalities (*Shi's*, *Cho's*, and *Son's* — they may be comparable, in a sense, to cities, towns, and villages in the United States). Each local government is composed of its chief executive (governor or mayor) and its assembly, both of which hold publicly elected office. The local government has no judicial power. See generally H. HATA & G. NAKAGAWA, CONSTITUTIONAL LAW OF JAPAN 43-96 (1997).

program as subordinate to the Minister of Health and Welfare of the national government.[18] With regard to final disposal facilities, the same Article further provides: (1) that the application must satisfy such technical standards as are specified in the regulations to be issued by the Prime Minister's Office (PMO) and the Health and Welfare Ministry (HWM); and (2) that the application must be accompanied by a "disaster prevention plan" that is in accordance with the HWM regulations. Article 15 also allows the prefectural governor to issue such permit terms as deemed necessary for protection of human health. It further requires the permitee to maintain and control its disposal facility in compliance with the technical standards required by the PMO and HWM regulations.

Now let's see what guidance might occur when a person applies for the permit.

Type A Guidance: Agency's Request for Cooperation with Its Extrastatutory Standards

If the proposed site is near an underground aquifer that supplies drinking water to surrounding communities, anxieties may be shared by local residents whether the statutory and regulatory technical standards for final disposal facilities are tough enough to prevent contaminant leachate from reaching soils. If contaminants are found to have run off into adjacent soils, and if the owner cannot be counted on for dealing with the situation for reasons of lack of resources or his or her disappearance after the closure of the facility, the local government might be the only party, in practical terms, to do immediate clean-up operations, using enormous amount of taxpayers' money.

This concern for possible cleanup operations is serious enough for local governments to feel obliged to take action before such events occur. Then, the local government, whether a prefecture in charge of the permit program or a municipality that is statutorily unrelated to the problem, might want to make contact with facility permit applicants in advance, trying to persuade them into cooperation with some additional arrangements which are beyond what the Law and the Ministries' regulations require. For example, the local government may ask applicants to install extra-preventive appliances whose quality goes well beyond what the Law and regulations re-

18 There are many authorities of the Ministers of the national government whose implementation is delegated by statutes or cabinet orders to local government agencies, such as governors and mayors. Such delegated functions are subject to the Ministers' control. And local assemblies are not allowed to enact local ordinances affecting those delegated functions. This implementation practice has long been criticized, and is now expected to be abolished in a few years. See generally HATA & NAKAGAWA, supra note 17, at 93 & 96 ("deputed functions of local executive organs").

quire, costing the more accordingly. Or it may also request monetary contributions from applicants to help with a fund which has been, or is planned to be, established by the local government to prepare for possible municipal cleanup operations, even though such fund is not at all referred to in the Law or any other statute.

Here, the local government is virtually formulating and implementing its own extrastatutory policy standards regarding safety and cleanup operations. The policy of extra-safety and burden-sharing has been formulated outside the Law's permit program and without any other legislative authorization. Also, according to the conventional preemption theory of national statutes to local ordinances, it is illegal for the local government to *impose*, by way of enacting local ordinances, installment of such high-quality appliances or payment of money.[19] Thus, the only method that local governments can use is simply to "persuade" the applicants to voluntarily follow more stringent technical standards or to share the burden of possible cleanup operations. This kind of request is called administrative guidance: such request is in any way without any legally biding effect but mere persuasion.

A similar situation was analyzed by the Supreme Court in a 1993 case[20] which dealt with the City of Musashino, near Tokyo, which requested developers to make monetary contributions in order to help with the city's legal obligations to provide for public facilities such as schools and parks. Following the practice prevailing at the time among other local governments, Musashino City formed intra-governmental standards of monetary contributions, called the "Guidance Outline Regarding Residential Development," to undertake the request in a systematic, organized manner. The Outline provided for, among other things, a calculation format for the amount of monetary contributions. In this context, the Court focused on the attitude of public officials who issued the guidance: whether or not officials were asking for truly voluntary cooperation. Unlike the 1985 decision to be discussed later for the purpose of Type B guidance, the Court did not at all mention any kind of societal obligations to follow the guidance on the part of private parties.

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19 As a legacy of the pre-World War II tradition, many statutes have been enacted on the supposition that substantial governmental functions, including public welfare, environmental protection, and even land use control, are predominantly national concerns. There is no counterpart to the home-rule doctrine in Japanese local government law.

And the conventional theory about the relation between national statutes and local ordinances allows a broad interpretation of the former's preemption to the latter. The national statues, having been so comprehensively enacted, are generally interpreted to have preempted most of the important areas of regulation to local governments. Thus, if a local government comes up with a new idea about, say, land use control, it is usually difficult for it to incorporate the idea into local ordinances as a legally enforceable program, since the national land use laws are interpreted to preempt the land use control area so widely.

20 Takahashi Kikue v. Musashino-Shi [Musashino City], 36 MINSHU 727 (Sup. Ct. April 23, 1982). For a detailed analysis, see Nakagawa, supra note 8.

Type A is a straightforward request by public officials asking private parties to follow the agency's concrete policy standards, which have no basis in statute or ordinance. This is perhaps the most well-known type of administrative guidance, examples of which include MITI's request to automakers for voluntary export restraints in the 1980s[21] and the Ministry of Posts and Telecommunications' request to public broadcasters to shorten TV program hours for the purpose of energy conservation in the 1970s.[22] Although Japanese economic regulation by the national government is said to be abundant with this kind of administrative guidance, a substantial judicial opinion is yet to be delivered. Along with the Type B guidance to be discussed below, Type A is among the most discussed types of guidance in the related literature.

Type B Guidance: Agency's Intervention in Private Conflicts for Negotiated Resolution

Suppose that the application is found by the governor to meet all the statutory and regulatory requirements, and that he is legally required to immediately issue the permit. Abutters of the proposed site may still express a strong opposition for reasons such as concerns for natural conservation or aesthetic scenery of the area, or even for a reason that residents in the area prefer to have a hot spring resort rather than a disposal facility. The Disposal Law does not address these interests nor any other statute.

The opponent abutters might first try to negotiate with the applicant, and let's suppose that such negotiation ended up in an impasse. The opponents might opt, before filing a lawsuit against the proposed facility, to bring their concern to local governments —— prefectural or municipal. The angry residents might do so directly, or through assembly members, to the governor's/mayor's office to ask officials to take some action against the permit application. It might then be that officials of the governor's/mayor's office talk to the applicant asking it to meet with opponent residents for an amicable resolution of the conflict. To make this persuasion effective, officials might refuse to, or ask the relevant officials not to,[23] pass on the permit application until the conflict is resolved. Here we see

21 Young, supra note 2, at 926-28. For other examples, see, e.g., Spaeth, Industrial Policy, Continuing Surveillance, and Raised Eyebrows: A Comparison of Informality in Administrative Procedure in Japan and the United States, 20 Ohio N. U. L. Rev. 931, 935-37 (1994).

22 Shiono, supra note 2, at 221-22.

23 Even if the guidance officials do not belong to the office of the prefectural government that takes care of the construction permit program, they can still ask the permitting office to cooperate with them. Cooperation between different sections are likely if both of them belong to the same executive chief such as governor or mayor. It is also not unusual that a prefectural government cooperates with a municipal government which tries to persuade an applicant to talk to opponent residents, even though the municipality legally has nothing to do with the permit program.

communication —— direction, persuasion, request, or whatever it may be called —— between the governmental officials and the applicant about a conflict that occurred between private parties —— the applicant and nearby residents —— regarding the proposed NIMBY facility. This communication may seem nothing more than a request on the part of the government with no legally binding effect, and if government withholds decision on the application, it may appear simply illegal.

Similar communication, generally called administrative guidance, had been subject to judicial scrutiny quite often, and in 1985 the Supreme Court issued a precedential decision.[24] The Court characterized the guidance as an effort on the part of the agency towards conflict resolution between private parties, implying a certain degree of *societal obligations for applicants to cooperate with the guidance.* The Court ruled that such delay in permitting process should be deemed legal (1) until the time when possibilities of the conflict resolution disappeared and (2) until the time when the applicant sent a "clear and sincere" message that it would not cooperate with the guidance any more.

This article calls such administrative guidance Type B: agency's intervention in private conflicts for negotiated resolution. Simply put, it is guidance that seeks to persuade parties to a conflict into an amicable resolution, without any statutory authorization for the agency to do so. It is important to note that the persuasion is not an effort on the side of the agency towards genuine mediation or conflict management —— so-called alternative dispute resolution (ADR) techniques are not utilized here by government officials. It is unlikely that the guiding officials be deemed as neutrals by the applicant whose application process is being stopped by the very officials. The agency involves itself in the conflict rather remotely. First, the purpose of the guidance is to get the applicant to share the idea that such conflicts are socially too serious to be left unresolved. Since it can generally be expected that this sort of intervention or suggestion would occur mostly when conflicts have aroused the policy concerns of the relevant agency, such guidance itself represents the agency's own policy goal. At the same time, such policy goal is the one that has been formulated outside administrative programs authorized by the legislature. Second, the agency itself does not involve itself in details of resolution, but rather leaves them to negotiation among private parties. The content of the policy formulated by the agency itself is quite vague and abstract, to be filled up through private negotiation.

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24 Nakatani v. Tokyo-To [Tokyo Metropolitan Government], 39 MINSHU 989 (Sup. Ct. July 16, 1985). For detailed analysis of the opinion, see Nakagawa, supra note 8.

Type C Guidance: Agency's Action to Deal With Unexpected Emergencies

What if a report is published from a non-governmental institute warning that the technical standards specified in the HWM regulation are not at all appropriate to protect human health, or that a certain chemical with severe adverse effects to human health cannot be prevented, with any known technology, from leaking outside? The prefectural governor's office might well be concerned with such warning. It might tell applicants to wait until the facts become clearer, withholding the permit indefinitely even though the filed application satisfies every existing statutory and regulatory requirements. The Law has no provision to authorize the governor to stop the procedure in such case. Also, let's suppose that the Law has authoritatively been interpreted by the court to forbid the governor to impose an indefinite "waiting-time" provision as one of the permit terms of Article 15. Then, one must say that withholding the permit is simply illegal. If the dissatisfied applicant brings the matter to court, one of the arguments for the defense might be a preclusion of illegality due to emergencies. This is the context in which Type C guidance occurs.

Type C guidance is deduced from a Supreme Court decision which dealt with the MITI's guidance issued to oil producers in the middle of the so-called oil shock of 1973. At that time, in response to the very tight oil market, several oil companies met together and mutually agreed to raise oil prices and to limit its production for a certain period of time "with the consent from the MITI." A criminal prosecution was brought to court against the oil producers whose action allegedly constituted cartels prohibited by the Antimonopoly Law.[25] Ultimately it went up to the Supreme Court, and the Court decided on the oil price issue in 1984.[26] One of the defenses for the oil companies was a claim that the defendants simply followed a direction from the MITI, and the Supreme Court showed a unique ruling on this defense.

The ruling was essentially as follows: even when the agreement among oil companies seems to be against the Antimonopoly Law, if it was entered into for the purpose of cooperating with "legally appropriate" administrative guidance by the MITI, then, illegality of such agreement shall be precluded. (This reasoning should not be confused with a criminal law doctrine that allows defense of private individuals' or firms' reasonable reli-

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25 Law no. 54 of 1947 [Shiteki-Dokusen-no Kinshi Oyobi Kousei Torihiki-no Kakuho-ni Kansuru Horitsu].

26 Japan v. Idemitstu, et al., 38 KEISHU 1287 (Sup. Ct. Feb 24, 1984). See generally, e.g., Sanekata, Administrative Guidance and the Antimonopoly Law, 10 Law in Japan 65 (1977); Ramseyer, Japanese Antitrust Enforcement After the Oil Embargo, 31 Am. J. Comp. L. 395 (1983); UPHAM, supra note 4, at 184-88; Nakagawa, supra note 8.

ance on official's *wrongful* advice.[27]) The Court further ruled that the guidance can be "legally appropriate" only when: (1) its purpose was to deal with emergencies such as the 1973 oil shock, and to help the whole society out of a severe confusion; (2) any other statutory method was not enough to deal with the emergencies; and (3) the guidance was undertaken in an appropriate manner. (The Supreme Court did not actually apply this rule, however, to save the defendants of the case since it was found that the defendants did not simply follow the MITI's direction, but rather engaged in joint decisionmaking on exact pricing within the directed range.)

This ruling dealt with guidance conducted by a public official, without any authorization by the legislature, for the purpose of remedying emergencies or other unexpected situations. Characteristically, the guidance was used as defense to claim immunity for whatever illegal situation that the guidance had caused. This immunity claim —— or a claim for illegality preclusion —— may be made either by the government for its causing prima-facie illegal situations through the guidance, or by private entities for their cooperation with the guidance. This article refers to the guidance that provides for this characteristic defense as Type C guidance.

Due to the radical nature of the claim for illegality preclusion, it is widely believed that the scope of the 1984 Supreme Court decision is quite limited. The author knows of no judicial opinion that has actually precluded illegality in similar contexts. The preclusion rule appeared again, in a rather abstract form, in the 1985 Supreme Court decision which this article has already discussed in regard to Type B guidance.[28] Alongside with the aforementioned rule regarding Type B guidance, which was actually applied to the case, the opinion also mentioned, as dictum, the illegality preclusion rule. It opined that government officials may reserve decision on the application *even in defiance of the applicant's clear opposition to the withholding*, if the situation at issue was such an exceptional one as would make non-compliance by the applicant with the guidance be "against the shared sense of societal justice," after balancing disadvantages suffered by the permit applicant on one side and public necessity of what the guidance was aiming at on the other. In the author's view, this reasoning is a declaration that illegality of agency action which is otherwise a clear violation of the enabling statute may be precluded according to the 1984 Supreme Court ruling.

III. Informal Implementation of Statutory Policy Goals

Type D Guidance: Agency's Request for Collaborative Decisionmaking

Let's go back to the Waste Disposal Law example. The Law imposes,

27 Ramseyer, supra note 26, at 401-05, 410-12.
28 See supra note 24.

with regard to final disposal facilities, that the applicant must prepare an appropriate disaster prevention plan in accordance with the regulations by the PMO and the HWM. The Law also authorizes the governor to issue such permit terms as deemed necessary for human health protection. Without doubt, the governor has wide discretion in exercising its authority regarding disaster prevention plans or permit terms.

Suppose, then, that the governor's office, being concerned with unexpected leak of poisonous chemicals to the environment, wants certain very best programs or appliances, which are *within* the ambit of the Law but quite costly, to be incorporated into disaster prevention plans or permit terms. The conventional view dictates that an agency should make its decision all by itself utilizing the best of its expertise, with or without inputs from outside. However, since it is anticipated that fierce resistence would come from applicants due to the increased cost, the governor's office might want to negotiate with the applicants in search for mutually agreeable solutions —— the best balanced combination of technical superiority and applicants' financial and technical ability —— as to prevention plans or permit terms. If the abutters express fear for contaminants, the governor might also let them take part in such negotiation; and the governor might even practically leave the solution to consensus to be formed between the applicant and the concerned abutters. In any of these cases, it is expected that the consensus, formed either between the governor's office and the applicant or between the applicant and the concerned abutters, would be translated into the prevention plan attached to the application or the permit terms to be issued by the governor.

Here we see collaboration between the government and relevant private entities in search for the best solution of the problem within the ambit of the Law. Agency's request for collaboration, either for reaching consensus between government and applicants, or between applicants and relevant third parties, is usually called administrative guidance in Japan. Here, we see Type D guidance: agency's request to private entities for collaborative or cooperative decisionmaking to reach an accord about how the agency's discretion, granted by statute, should be exercised.

What is pointed out about Japanese regulatory process is that bureaucrats often turn over their statutorily granted authority to consensus among the regulated parties. This practice is best stated by Frank Upham in his tentative model of Japanese regulation, according to which public officials virtually leave their exercise of authority to consensus among relevant individuals or corporations.[29] The practice goes as follows: in a case,

29 Upham, Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective, 20 Ford. Int'l L.J. 396 (1996). See also Young, supra note 2, at 578-88 (discussing governmentally encouraged and structured private ordering).

for instance, of the radio or CATV licensing, enabling statutes require the licensing agency to select, thorough the best of its judgment, the best suitable among several applicants. However, realities often follow a different path. Before the application process begins, the agency talks to all of the potential applicants asking them to negotiate with each other to reach an accord about the one who would actually apply for the status; then, the agency would issue the license to the applicant.

The practice is widely known to Japanese as an example of administrative guidance, but has been paid very little academic attention so far, perhaps due to a lack of related court decisions. Setting aside certain legal problems such as whether the practice may be a violation of the Antimonopoly Law, the most important question to be discussed is how to describe the practice in legal terms. Should it be characterized as the agency's abdication of its statutory duty to private ordering, or can it be described as the agency's legitimate pursuit of the statutory purpose through encouraging consensus among competitors, reserving a review opportunity of the consensus to the agency itself? Though not empirically known how much or less the agency's "review" of consensus occurs or functions, it seems realistic to assume that the practice such as the consensus-based application for CATV licensing could occur in Japan only when the licensing agency is satisfied with every potential applicant and when "outsiders" are not expected to appear in the application process who would not want to take part in the private negotiation. It may also be assumed that, if the consensus among competitors fails to be reached, then the agency would go by the book: it would accept all applications and make its own choice among them.

Type E Guidance: Agency's Expression of Its Discretionary Judgment

Type E guidance is something a bit tricky. There are cases in which an agency can show its discretionary judgment only in the form of administrative guidance. This is frequently seen in Japanese regulatory enforcement process when the agency exercises its prosecutorial discretion in a very weak way. But before discussing this, let's first look at an interesting Supreme Court decision of 1982[30] dealing with an application process under the Road Law.[31]

In Nakano Ward, Tokyo, the construction of a new apartment house was proposed, and abutters opposed it. The conflict became fierce enough to make the chief of Nakano Ward worry about a possible violent clash be-

30 Jurakuen v. Nakano-Ku [Nakano Ward], 36 MINSHU 727 (Sup. Ct. April 23, 1982).
31 Doro-Ho, Law No. 180 of 1952.

tween the opposing forces. When the construction companies applied for a special permission under the Road Law for their oversized trucks to pass on a small road connected to the construction site, the ward chief, fearful of worsening the situation, withheld issuing the permission for as long as five months. During that period of time, the plaintiff, the owner of the apartment house under construction, brought administrative appeals twice. Despite these appeals, the ward chief only issued the permission for the oversized vehicles much later, after he found that the possibility of a clash had disappeared. The plaintiff sued the Nakano Ward government for economic losses allegedly caused by the delay in the permit process.

The lower courts noted that the ward chief had been trying to persuade the applicant so that the clash be avoided before the special permission was issued, and the courts referred to the persuasion as administrative guidance. The Supreme Court showed a very interesting approach: it did not use the term administrative guidance anywhere in its opinion. The Court rather tried to understand the persuasion as a form of expression of the ward chief's discretionary judgment as to when to issue the permit under the Road Law. Behind this reasoning lies a rather broad —— and thereby often criticized —— interpretation of the Road Law: the Court interpreted the Law that the chief ward, as an agency authorized to implement the special permission program, is granted discretion to be exercised in individual cases, and the chief may even consider matters such as a possibility of a violent clash on the public road in issuing the permission. The opinion found that, despite the length of five months in the withholding of permission, it was a rational exercise of such discretion in terms of avoiding a serious clash on the road.

It is undeniable that there was administrative guidance undertaken by the ward chief even though the Supreme Court did not use the term. The Court's opinion might be best understood as a mixture of statutory discretion and administrative guidance. First, the ward chief had exercised its discretion under the Road Law and *reached* a conclusion that the special permit should be issued as soon as the clash possibilities disappeared. This is exactly what the Supreme Court said in its opinion. Second, the ward chief *expressed* its conclusion in the form of guidance: it tried to persuade the applicant to resolve the conflict with abutters so that it could issue the permit. This guidance was in fact a notification as to the timing when the ward chief would issue the permit.

It is in this way that this article understands the 1982 Supreme Court decision as an example of Type E guidance. This 1982 Supreme Court decision must sharply be distinguished from the Supreme Court's abovementioned 1985 decision of the reserved construction permit case.[32] To be

32 See supra note 24.

sure, both cases dealt with a permit delay, but there was an important difference. The Court in the 1985 case interpreted the Construction Standard Law to allow the Building Inspector to consider nothing but technical matters relating to construction while it legitimized administrative guidance with reference to the Court-invented extrastatutory framework. In contrast, in the 1982 case, the Road Law, as shown above, was interpreted as broadly as to allow the ward chief to consider more than just technical matters, and the administrative guidance was adjudged legal with reference to the Road Law.

Type F Guidance: Agency's Bypassing Statutorily Prescribed Proceedings

Public officials give applicants advice, and sometimes even persuade them to drop an application or not to apply in the first place. In the industrial waste disposal facility permit program, it is easily imagined that the governor's office would inform applicants of internal review standards before they actually submit application documents. By doing so, the governor's office may possibly bypass repetitive procedure: it may be able to avoid refusal-and-reapplication process. The governor's office may also want to advise some applicants, to lessen procedural cost, to drop their applications if the office knows the proposals would in no way be successful because they do not meet critical review standards.

Still another example is as follows: an agency may first want to talk to a regulated party to persuade it into voluntarily fixing its alleged statutory violations, before issuance of, say, an improvement order. Here, the agency is ready to issue an order (otherwise, this is Type E guidance as is already explained), but simply wants to cut administrative costs by way of bypassing the issuance of orders. These sorts of prior communication are generally called administrative guidance, too, and this article specifically calls them Type F guidance. They are in essence a request from the agency to relevant private parties asking for their consent to bypass the statutorily prescribed proceedings.

When "informal enforcement" is discussed in Japan,[33] what is happening is either guidance of Types D, E, or F. Let's see how these three types of guidance occur, sometimes concomitantly, in the enforcement process of the requlation of industrial waste disposal facilities. Article 15-3 of the Waste Disposal Law provides that, in case the governor finds the permitted facility not in compliance with the technical standards set forth in the HWM

33 J. HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 165 (1991) (officials are likely to resort to informal enforcement whenever it is more or equally effective in implementing policy).

regulations, it may revoke the permit, order necessary improvements by a specified date, or suspend the use of the facility for a specified period of time. In this enforcement process, administrative guidance is abundantly seen. There is one statement that is generally made about Japanese regulators: when they find violations, they seldom take formal, statutory actions immediately. They would rather patiently keep talking to offenders to fix the problem. This persuasion is generally called administrative guidance, and in this article's approach, it can be either Types D, E, or F guidance depending on the contexts.

Suppose that the regulator has already made up his/her mind to take formal actions such as the issuance of an improvement order, but is simply trying persuasion to see if the violator would agree to voluntarily fix the problem. This persuasion is Type F (bypass): the regulator is avoiding the burdensome procedure for issuance of a formal, statutory order. Persuasion and other types of communication might also occur between a regulator and a violator in a different setting: they may want to work out the best solution about how to fix the problem through negotiation. Here the regulator is exercising its discretion in a collaborative way. Both parties are cooperating to find out the best possible way to fix the offenses, with an expectation that the consensus to be reached would be incorporated into a formal order. This communication is also generally called administrative guidance, but the bottom line of which should be understood as Type D guidance (request for collaboration).

Neither of them is often the case, however. Recent empirical research in Japan shows that in certain areas of regulation, such as fire prevention, clean water protection, and industrial waste control, bureaucrats have a tendency to issue improvement orders only against exceptionally serious offenses. In all other cases they stop short of issuing legally binding orders: they simply give guidance. Japanese regulators have a deep-rooted tendency to use, and only use, administrative guidance against almost all violators, with no intention to go further to statutory actions. They would rather keep persuading violators almost indefinitely hoping for voluntary compliance. Some researchers demonstrate that such regulatory style, almost wholly dependant on administrative guidance, has not produced satisfactory enforcement outcomes, and many offenses are not properly attended to. Considering that regulators are dealing with statutory or regulatory violations, and that regulators generally have prosecutorial discretion to take adverse statutory actions against violators, it can be argued that Japanese regulators are exercising their prosecutorial discretion in a very weak way, almost to the point of retreatism. What is referred to as administrative guidance in the Japanese requlatory enforcement process is, in fact, an expression of regulators' discretionary judgment. This is what this article calls Type E guidance (expression of discretionary judgment).

Conclusion

Perhaps the most unique characteristics that can be found in the Japanese discussions regarding administrative guidance might be that the courts have allowed agencies to engage in such informal policymaking that would be implemented by way of Types A, B, and C. This means that policy choices may be made by an agency without any prior legislative choice of values. As Michael Young has pointed out, the court "addresses the question of consensus despite the nonexistence of any authoritative legislative or even administrative enactment ..... on the question," such as sunlight and ventilation.[34] He also noted the Japanese courts' willingness to define society's consensus from informal rather than legal sources.[35] However, Japanese academics have not yet paid due attention to problematically informal formulation of substantive policy by the agency. They have rather casually recognized the legitimacy of such extrastatutory policymaking without substantial explanation.

Many different problems have been —— or should be —— discussed under the singe headword of administrative guidance, ranging from substantive policymaking as in Types A, B, and C to cooperative governance as in Type D, regulatory retreatism as in Type E, or procedural shortcuts as in Type F. This mixture of varied legal topics does seem to have hampered our effective analysis of those phenomena comprehensively called administrative guidance. The author hopes that this article's attempt to pick up six distinctively different contexts, thereby different legal treatments, would help our quest for more analytical tools to deal with administrative guidance.

34 Young, supra note 2, at 966.
35 Ibid.