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Nakagawa, Takehisa

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ADMINISTRATIVE INFORMALITY IN JAPAN: GOVERNMENTAL ACTIVITIES OUTSIDE STATUTORY AUTHORIZATION

TAKEHISA NAKAGAWA*

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* Professor of Law, Kobe University, Faculty of Law; LL.M., Harvard Law School, 1990; LL.M., University of Tokyo, 1988; LL.B., University of Tokyo, 1986. The author is deeply grateful to Todd D. Rakoff, Carl Goodman, and Stephen Sugarman for their thoughtful and valuable comments on an earlier version of this Article. The author acknowledges financial support from the Ministry of Education, Japan (Scientific Research Grants: Category A - 1999) and from the Itoh Scholarship Foundation. Cited materials in this Article are limited to those written in the English language, except for Japanese cases and statutes. For translation of cited Japanese statutes, consult EHS LAW BULLETIN SERIES (Eibun Horeisha, Inc.).

INTRODUCTION

Lawyers in both the United States and Japan recognize informality in administrative procedure as a vital part of the government process, and as a valuable topic for scholastic inquiries. As early as the 1940s, the United States was associated with the well-known statement that "informal procedures . . . are truly the lifeblood of the administrative process."[1] Japanese administrative law has also extended intensive treatment to administrative informality, apparent in the creation of the concept of "administrative guidance." Despite shared interests, noteworthy differences can be identified in the way "informality" is understood and discussed in Japan and the United States.

First, the terminology of informality is apparently not identical. To be sure, there are some categories of administrative activities that are commonly thought of as informal. Internal, or non-legislative standards, such as interpretive rules and policy statements, do constitute one of such common categories of informality. Administrative guidance as discussed in Japan and its American counterparts is another example of administrative informality in both nations. However, summary actions and application denials without hearings, for example, are considered informal in American administrative law,[2] while they are not considered informal in Japan. Several Japanese statutes explicitly provide for administrative guidance in the form of recommendations, advice, or request by the agency; and such actions are oftentimes characterized as formal administrative guidance. It seems to the author that negotiated decisionmaking in the administrative process is categorically thought of as informal phenomena in the United States, while they are not necessarily so in Japan.

Second, even the overlapping phenomena commonly thought of as informal are often subject to different frameworks of legal analysis. As this Article will demonstrate, some of the legal analyses given to administrative guidance in Japan do not seem to comport with the discussion of its American counterparts. Undoubtedly, the similarities and differences between the two nations' treatment and discussion of administrative informality can be confusing. This Article compares these various similarities and differences in an effort to clarify the differences in informal administrative procedure.

The Article first presents in Part I an outline that demonstrates the differences in the terminology of informality in the United States and Japan.

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1. S. DOC. NO. 77-8, at 35, 59 (1941).

2. *See* FLORENCE HEFFRON & NEIL MCFEELEY, THE ADMINISTRATIVE REGULATORY PROCESS 202-04, 211-13 (1983) (discussing "summary action" and "applications" as examples of informal actions); *see also* S. DOC. NO. 77-8, at 35-42.

Two kinds of understanding of the dichotomy of formality and informality are shown there, based on the author's impression of how lawyers in both nations use the word "formality." The outline is intended to be a tentative one, to help the discussion in this Article, and may be subject to further refinement in the future.

Parts II and III are devoted to explication of legal analyses given to administrative guidance, which constitute the heart of Japan's discussion of administrative informality. In Part II, an overview of the conventional understanding of administrative guidance is given, followed by the author's own appraisal of the concept. The author demonstrates that various legal analyses of administrative guidance that have thus far appeared in judicial opinions and literature should be divided into two groups, in each of which at least three different types (six types in sum) of administrative guidance can be discerned. As far as known to the author, Japanese administrative guidance discussed in English-language materials have often been limited to a small part of the whole; and the purpose of Part II is to show the whole picture of legal discussion on administrative guidance in Japan.

Part III sets forth two representative Japanese Supreme Court decisions on administrative guidance. The two decisions are chosen both because they have formed the core doctrines of administrative guidance, and because they perhaps represent the most Japanese feature among the above-mentioned six types of administrative guidance. As such, they must be looked at from comparative perspectives.

Part IV then presents another tentative map for administrative informality in comparison between the two nations. Three categories of administrative activities are depicted here and are commonly thought as informal. Part IV focuses on a discussion of the degree to which legal analyses given to each category in one nation parallels to those in the other.

This Article concludes with a comment on Professor Rakoff's argument on the choice between formality and informality.

I. JAPANESE FORMALITY AND AMERICAN FORMALITY

The dichotomy of formality and informality seems to be conceptualized differently in Japan and the United States, respectively. Presented here is a tentative model of how lawyers of both nations understand the dichotomy while discussing administrative law problems, setting aside daily — not particularly legalistic — use of the terms.

It may be safely said that in Japan, certain phenomena are considered informal, either in the sense that actions are not what the enabling statute substantively authorizes the agency to do, or in the sense that the actions are not what the relevant statute procedurally imposes the agency to follow, i.e., phenomena that are not the modes, substantive or procedural, of action

provided for in the statutes.[3] Formality refers to nothing more than undertaking action that is legally, or statutorily, provided for, such as filing a lawsuit instead of out-of-the-court settlement efforts, or an agency's issuing an improvement order instead of gently persuading alleged violators to adopt voluntary improvement efforts. Thus, it follows that informality refers to activities that are undertaken outside the scope of statutory programs or outside statutorily prescribed processes; it takes the form of either a pursuit of a policy goal or an undertaking of procedure, neither of which are explicitly or implicitly stated in relevant statutes. From this articulation, though tentative, of Japanese formality and informality, it should easily be understood why Japanese discussion on administrative informality includes administrative guidance, internal agency standards, and so-called "contractual approaches" to Not-In-My-Backyard (NIMBY) facilities.[4] These phenomena are all characterized as informal because of their extra-legality or extra-statutoriality. It should be advised that administrative guidance and contractual approaches are no longer called informal in some limited cases where they are explicitly provided for in statutes.[5]

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3. This use of formality-informality is generally compatible with the word found in English-language literature on Japanese law, though it sometimes seems that the authors also imply American terminology of "formality" and "informality." *See* JOHN HALEY, AUTHORITY WITHOUT POWER 161-63 (1991) (stating, for example, "what distinguishes Japan is the persuasive resort to informal enforcement in contexts that seem to require formal regulation in other industrial states"); FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 22, 168, 173, 198-99, 222-26 (1987); Curtis J. Milhaput, *Managing the Market: The Ministry of Finance and Securities Regulation in Japan*, 30 STAN. J. INT'L L. 423, 445 (1994) (contrasting the United States Securities Exchange Commission's emphasis on the formal, prosecutorial aspect of its mission with the Japanese Ministry of Finance's emphasis on its promotional role and use of a highly informal regulatory stance); Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 967-68 (1984) (indicating lack of reverence for legal process).

4. The contractual approach denotes efforts to reach an agreement between NIMBY facilities and nearby agencies or local governments to the effect that the facilities shall abide by certain conditions, which are not provided for in relevant statutes, regulations, or local ordinances, for the purpose of preventing possible nuisances or harm. Local government has often involved itself with this approach, either as a mediator to settle conflicts between NIMBY facilities and nearby residents towards their making an agreement, or through the local government itself being a party to such agreement. The court recognizes contractual relations and legally-binding effects to be formed from such agreements when stipulations are concrete enough. For a general discussion of contractual approaches, see, for example, J. GRESSER ET AL., ENVIRONMENTAL LAW IN JAPAN 248-49 (1981). *See also* Yoshikazu Shibaike, *Guidelines and Agreements in Administrative Law*, 19 L. JAPAN 63, 76-89 (Russell Allen Yeomans trans. 1986).

5. For examples of administrative guidance that are provided for in statutes, see Yoriaki Narita, *Administrative Guidance*, 2 L. JAPAN 45, 55-56 (James L. Anderson trans. 1968). *See also* Kazuo Yamanouchi, *Administrative Guidance and the Rule of Law*, 7 L. JAPAN 22,

Informal actions have attracted attention from the Japanese legal community because of their practical effects on private individuals and firms. Neither internal agency standards nor administrative guidance have legal effects, but they usually exert practical influence on private entities. Also, there have been shared concerns among academics concerning the legitimacy of governmental activities that are beyond what they are authorized to do. Through practical effects of administrative guidance or internal standards, or through possible legally binding effects of agreements formed out of the contractual approaches, concerns for governance beyond law is thought to be realistic. Thus, occasional disparity between what is legally required and the realities of the administrative process has driven legal commentators to inquire into administrative informality.

Informality as understood this way, then, logically has both a substantive side and procedural side; substantive policy that is not authorized by statute, and the avoidance of certain statutory procedures provided for in statutes. Out of these two phases of informality, the Japanese have focused much more on the former: government activities conducted *outside* specific programs authorized by the legislature. Although some attention is paid to procedural aspects of Japanese informality, most of the discussion on Japanese administrative informality has been focused on the substantive side. The two Japanese Supreme Court decisions analyzed in this Article are examples of substantive informality, if it may be called so, in the sense that administrative agencies are establishing *extra-statutory* policies. "Substantive informality" is an agency's choice among policy preferences *when no legislative authorization for the choice exists.* It should be obvious that such *extra-statutory* policy goals may not violate any existing statutes. The unresolved question is whether an agency's formation and implementation of extra-statutory policy goals can at all be legitimate; and if it can, what

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23-25 (1974); Russel Allen Yeomans, *Administrative Guidance: A Peregrine View*, 19 L. JAPAN 125, 144-47 (1986). For an example of statutorily provided contractual approaches, see Shibaike, *supra* note 4, at 85.

One well-known decision by the Tokyo High Court distinguishes between statutorily provided administrative guidance under the name of "recommendaiton" and its preliminary, de facto administrative guidance. This recommendation is provided for in the Sekiyu-Gyo-Hô [Petroleum industry law], Law No. 128 of 1962, to be conducted by the Ministry of Industry and International Trade (MITI), and a de facto recommendation by the MITI to the same effect, that may be conducted as a preliminary to the statutorily provided recommendation. *See* Japan v. Association of Petroleum Indus., 983 HANJI 22 (High Ct. of Tokyo, Sept. 26, 1980). Professor Meryll Dean quite properly describes the former, statutory recommendation as "formal administrative guidance" and the latter, de facto recommendation, "informal administrative guidance." *See* Meryll Dean, *Administrative Guidance in Japanese Law: A Threat to the Rule of Law*, 1991 J. BUS. L. 398, 401. For another example of the same usage of "formal" and "informal" administrative guidance, see Yamanouchi, *supra*, at 23-25.

other conditions are required for *extra-statutory* policymaking to be legitimate in addition to not being violative of any existing statutes.

On the other hand, in the United States, it seems that informality has almost always been thought of as a lack of *procedural formality* — a lack of the necessary elements to be adversarial. Formality, as is understood by American administrative lawyers, is clearly articulated by Professor Todd Rakoff.[6] He describes formality to have both substantive and procedural aspects: substantive rules set forth in advance, and adversarial procedural protection. Out of the two phases of this American informality, emphasis is put on the procedural phase: the word "informality" more often means *procedural formats* that lack the procedural ingredients of formality. The scope of procedural informality may range from simplified formal procedures (shortened and abbreviated formal adjudication), or procedures that lack the necessary rigor of being adversarial (such as the notice-and-comment rulemaking, usually called informal rulemaking); to alternative techniques inconsistent with the whole idea of procedural formality (such as ADR techniques and the Reg-Neg., which is the negotiation process before the rulemaking process starts). Summary actions and application denials without hearings are thereby considered as another example of informal action.

When American lawyers argue in favor of informality, the bottom line is usually that procedural formality should be alleviated to a reasonable degree, either by reducing excessive procedural requirements or by allowing alternative methodologies (negotiation). It should be noted that procedural informality in the United States deals with governmental activities that are supposedly *within* the scope of statutorily authorized programs. It seems to be a fairly recent occurrence that concerns similar to Japanese substantive informality appear in American informality discussions.

Substantive informality that encompasses policy choices made outside the legislatively authorized programs is the center of concern in Japan. In contrast, in the United States, commentators are usually interested in procedural informality, referring to procedural formats that lack important ingredients of adversarial procedures, which ingredients represent the procedural side of the American version of formality. Doctrine and literature in the two nations have been built upon the different conceptions of formality-informality (see Figure 1). Thus, for example, what Professor Rakoff discusses in terms of a "continuum" from extreme formality down to extreme informality[7] could be confusing at first glance to some Japanese lawyers, as they would never use the words of formality and informality to explain the

6. *See* Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159 (2000).

7. *See id.*

same idea. Likewise, if a statute were to be enacted in Japan that authorizes negotiation similar to the Negotiated Rulemaking Act of the United States,[8] most academics of Japan would not call the negotiated rulemaking procedure an informal one, because such negotiation is a formally — i.e., statutorily — authorized procedure to undertake.

FIGURE 1: CONCEPTION OF INFORMALITY IN COMPARISON
(* INDICATES THE FOCUS OF ACADEMIC ATTENTION)

JAPANESE CONCEPTION OF INFORMALITY	*UNITED STATES CONCEPTION OF INFORMALITY*
Substantive Side*	Substantive Side
A Pursuit Of **Extra-Statutory Policy Goals**	Lack Of **Concrete** Rules Set Forth In Advance
Procedural Side	Procedural Side*
A Pursuit Of Statutory Policy Goals In **Extra-Statutory Methods**	Lack Of **Adversary** Elements Of Procedure

The different conceptualizations of the formality-informality dichotomy should be attributed to the two different understandings of the rule of law in the two nations. In the Japanese administrative law community, the rule of law, or the German-originated Rechtsstattsprinzip, basically entails the substantive requirement that agencies act in accordance with what the constitution and the Diet order through its statutes.[9] On the other hand, procedural implications of the rule of law, or the Rechtsstattsprinzip, have traditionally been dim. Although not a few academics argue for reconstructing the rule of law concept embodied in the Japanese constitution to include procedural protection, what they have in mind is far from trial-type procedure, the ultimate American formality. Quasi-judicial procedure, comparable to the United States Administrative Procedure Act (APA),[10] rarely occurs in Japan.[11]

American formalism, in its procedural connotations, does not exist in the Japanese legal tradition. To demonstrate, a brief look at the Administrative

8. *See* 5 U.S.C. §§ 561-570 (1994).

9. *See* Hiroya Endô, *Administrative Law Theory During Thirty Years After the War: A Reappraisal*, 14 L. JAPAN 82, 84-89 (Lawrence Repeta trans. 1981).

10. 5 U.S.C. §§ 554-555 (1994).

11. *See, e.g.*, Antimonopoly Law, Law No. 54 of 1947, arts. 45 to 70-3, *translated in* BASIC JAPANESE LAWS 421-32 (Hiroshi Oda et al. eds., 1997).

Procedure Law (APL)[12] should be useful. The Constitution of Japan requires some kind of procedural protection of the administrative process, a concept that was also a theoretical background of the APL.[13] The main thrust of the Japanese APL is to keep governmental agencies within statutory frameworks — the Japanese concept of formality. The APL is applied automatically once an agency action falls within the "disposition" category, which is roughly comparable to "orders," "license," "licensing," "sanction," and "relief" in the United States APA.[14] Such automatically-applicable procedures for dispositions are quite simple, and far from adversary. The basic structure of procedural requirements for dispositions as prescribed in the APL is a combination of three procedural ingredients: (1) prior standard setting; (2) a simple opportunity to be heard, which is far from a quasi-judicial procedure;[15] and (3) a concise statement of reason.[16] It may be comparable to the notice-and-comment rulemaking procedure of the American APA as originally contemplated: it consists of a notice of contemplated issuance of a disposition, and an opportunity for the addressee to tell its side of the story.[17] Note that the APL does not provide for a generally imposed procedure for rulemaking.[18]

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12. Gyôsei-Tetsuzuki-Hô [Administrative procedures law], Law No. 88 of 1993. For a general discussion, see Ken Duck, Comment, *Now That the Fog Has Lifted: The Impact of Japan's Administrative Procedure Law on the Regulation of Industry and Market Governance*, 19 FORDHAM. INT'L L.J. 1686 (1996). *See also* Lorenz Ködderitzsch, *Japan's New Administrative Procedure Law: Reasons for its Enactment and Likely Implications*, 24 L. JAPAN 105 (1991).

13. For a constitutional right to be heard under the Constitution of Japan, see, for example, HIROYUKI HATA & GO NAKAGAWA, CONSTITUTIONAL LAW OF JAPAN 139-40 (1997). *See also* MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 194-96 (1999).

14. 5 U.S.C. § 551(b)(8)-(11) (1994).

15. For adverse dispositions such as the suspension of a license, the APL only requires the agency to give the addressee an opportunity to make a written presentation of its case to the charging official. *See* Gyôsei-Tetsuzuki-Hô [Administrative procedures act], Law No. 88 of 1993, arts. 13, 29-31. A more rigorous procedure is required when the agency issues adverse dispositions of a more severe nature, such as license revocation. In such case, the agency must provide an opportunity for an oral hearing before an officer who is different, but not necessarily "separate," from the charging official. The addressee has a right to inspect the agency's files during the hearing. *See id.* arts. 13, 15-28. The second procedural format is not as rigorous as formal procedures in the United States. United States formal procedure counterparts are rare in Japan and include the procedures of the Fair Trade Commission. Actually, it is said that at an early stage of the drafting process of the APL, an understanding was clearly shared among drafters that quasi-judicial procedures should not be incorporated into the new general statute of administrative procedure.

16. *See id.* arts. 5-31.

17. Professor Verkuil once proposed to assimilate notice-and-comment rulemaking procedure into the standard procedural requirements of "informal adjudication." Paul R.

II. ADMINISTRATIVE GUIDANCE IN JAPAN

A. A Brief Guide

The term "administrative guidance," at one time considered bureaucratic jargon, became popular in the 1960s and 1970s, especially through the press coverage of the oil crisis in 1973.[19] The discussion of the phenomenon started before the 1960s by administrative law academics, who had experience working with government officials, and numerous definitions of administrative guidance have been proposed since then. The most widely used definition appeared in 1961.[20] It has also been one of the central topics for observers of Japanese law.[21] Administrative guidance covers a wide range of voluntary communications, and is essentially a denotation for actions undertaken by a public official to persuade, either orally or in writing, specific individuals or firms to behave in a certain manner. This type of persuasion has often been subject to judicial inquiry in actions for damages against the government, particularly the local government,[22] under the

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Verkuil, *A Study of Informal Adjudicative Procedures*, 43 U. CHI. L. REV. 739 (1976).

18. In 1999, however, the Japanese national government has voluntarily (i.e., without legislative mandate) started "public-comment" procedure for its rulemaking. Rules subject to the procedure include not only legislative rules such as Cabinet orders, but also nonlegislative rules and guidance outlines. The public-comment procedure is similar to the notice-and-comment procedure provided in the APA. *See* 5 U.S.C. § 553 (1994).

19. During OPEC's embargo, the MITI gave informal directions to major Japanese oil companies on their pricing and production, and these directions were described as "administrative guidance." The oil companies' conduct under such directions were ultimately brought to the court for alleged anti-monopoly law violations. *See* UPHAM, *supra* note 3, at 184-88; *see also* Mark Ramseyer, *Japanese Antitrust Enforcement After the Oil Embargo*, 31 AM. J. COMP. L. 395 (1983); Kenji Sanekata, *Administrative Guidance and the Antimonopoly Law*, 10 L. JAPAN 65 (1977).

20. *See* Hiroshi Shiono, *Administrative Guidance*, *in* PUBLIC ADMINISTRATION IN JAPAN 221, 222 (IIAS Tokyo Round Table Organization Committee eds., 1982); *see also* Narita, *supra* note 5, at 45, 46-49. For an overview of various definitions, see Yeomans, *supra* note 5, at 125, 129-37. *See also* Young, *supra* note 3, at 923, 932-34.

21. *See generally* MERYLL DEAN, JAPANESE LEGAL SYSTEM: TEXT AND MATERIALS 156-60 (1997); E. KAPLAN, JAPAN: THE GOVERNMENT-BUSINESS RELATIONSHIP 30-40 (U.S. Department of Commerce 1972); HALEY, *supra* note 3, at 160-67; K. PORT, COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 635-690 (1996) (containing excerpts discussing administrative guidance); RAMSEYER & NAKAZATO, *supra* note 13, at 205-11; J. Haley, *Administrative Guidance Versus Formal Regulation: Resolving the Paradox of Industrial Policy*, *in* LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY (G. Saxonhouse & K. Yamamura, eds. 1986); Young, *supra* note 3, at 923. For English-written articles by Japanese scholars on administrative guidance, consult footnotes in the above literature. This Article itself cites some of the important ones.

22. Japan does not have a federal system. The local government system is two-tiered: prefectures (one *To*, one *Do*, two *Fu's*, and 43 *Ken's*) and municipalities (*Shi's, Cho's, and*

Government Tort Liabilities Law of 1947.[23] Such tort actions are typically filed by private entities allege injuries caused by following that administrative guidance, such as a delay in business schedule.[24]

Since the term administrative guidance was first used, academic discussion has centered on administrative guidance issued from agencies, national or local, to specific individuals or private firms. This type of administrative guidance has been incorporated into Japanese APL. The APL defines administrative guidance as "[a] guidance, recommendation, advice, or other

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Son's), comparable to cities, towns, and villages in the United States. A special type of municipality found only in the central part of Tokyo-*To: Ku's*. This Article refers to the government of Tokyo-*To* as the Tokyo Metropolitan Government. Each local government is composed of its chief executive (governor or mayor) and its assembly, both of which hold publicly-elected offices. *See* HITOSHI ABE ET AL., THE GOVERNMENT AND POLITICS OF JAPAN 63-71 (James W. White trans. 1990); HATA & NAKAGAWA, *supra* note 13, at 43-96.

23. Tort liability claims against the government, both national and local, are brought to courts under the Kokka-Baishô-Hô [Government tort liabilities law], Law No. 125 of 1947. The Sovereign Immunity Doctrine, which prevailed during the pre-World War II period, was explicitly denied in Article 17 of the 1946 Constitution of Japan. *See* HATA & NAKAGAWA, *supra* note 13, at 148-49. The Government Tort Liabilities Law provides for comprehensive monetary relief against virtually any wrongful government action. Every aspect of governmental activities has been subject to tort analysis, ranging from brutal deeds by the police, to illegal rejection of a permit, as well as inaction on the side of government agencies to prevent pollution, drug accidents, or natural disasters. *See* Young, *supra* note 3, at 955 n.123.

On the other hand, administrative guidance has not been judicially reviewed in annulment actions (i.e., suits for direct attack) under the Gyôsei-Jiken-Soshô-Hô [Administrative case litigation law], Law No. 139 of 1962. The law provides that only such actions as may be characterized as dispositions that take immediate and imperative effect on private rights or duties are reviewable in annulment actions. Examples of reviewable acts include: firing public employees, issuing construction permits, ordering compliance, denying license applications, and adjudging labor conflicts. *See* HATA & NAKAGAWA, *supra* note 13.

Some argue that such judicial rigidity has hampered administrative guidance from plenary legal discussion. *See* Robert W. Dziubla, *The Impotent Sword of Japanese Justice: The Doctrine of Shobunsei as a Barrier to Administrative Litigation*, 18 CORNELL INT'L L.J. 37 (1985); Peter B. Edelman, *Japanese Product Standards as Non-tariff Trade Barriers: When Regulatory Policy Becomes a Trade Issue*, 24 STAN. J. INT'L L. 389, 434-40 (1988). The author does, however, not agree with the argument. For the same evaluation as the author's, see RAMSEYER & NAKAZATO, *supra* note 13, at 205-12.

24. For an overview of judicial remedies in Japan with regard to administrative activities, see, for example, HATA & NAKAGAWA, *supra* note 13, at 148-49, 161-69; *see also* RAMSEYER, *supra* note 13, at 196-202; Dziubla, *supra* note 23, at 37; Toshiro Fuke, *Remedies in Japanese Administrative Law*, 8 CIV. JUST. Q. 226 (1989); Ogawa, *Judicial Review of Administrative Actions in Japan*, 43 WASH. L. REV. 1075 (1968); Ogawa, *Outline of the System of Administrative and Judicial Remedies Against Administrative Actions*, *in* PUBLIC ADMINISTRATION IN JAPAN (IIAS Tokyo Round Table Organizing Committee ed., 1982). Delay in business is typically caused by withholding an application for a permit or license, for the purpose of undertaking guidance. Agencies often simply withhold applications while they request cooperation from private entities.

forms of action by an agency, but not a disposition, requesting specific persons to engage in some action or inaction, in pursuit of certain administrative purposes which are within the mandates or the duties and businesses of the agency."[25]

The scope of administrative guidance, as defined in the APL, is limited to the agency's persuasive activities addressed to such entities that are private (non-governmental) and specific (not indefinite). Apart from the APL definition, administrative guidance also occurs between different levels of government. Within the Japanese national-local government system, which is often characterized as cooperative or diffused,[26] it is not uncommon for a national government official to issue guidance to local government officials regarding the business of the local government for which the national government has concerns. Such inter-governmental guidance, after a long neglect, is now addressed by a major amendment of the Local Autonomy Law, made in the summer of 1999.[27] Administrative guidance *vis-à-vis* private entities, addressing an indefinite number of people or entities, is often undertaken in the form of an agency's "internal" standards. When the agency thinks it is necessary to issue a guidance in a consistent way to many, or an indefinite number of, individuals or firms, it formulates a manual which describes the standardized contents of the guidance. These manuals are usually made public, and are known as "guidance outlines."[28] Guidance outlines are established so that the entire bureaucracy operates under a uniform interpretation of the policy at issue. It seems that the majority of administrative guidance cases involve guidance outlines. Although the APL does not include guidance outlines in the above-quoted definition of administrative guidance, the APL does recognize both their utility and problems. Article 36 of the APL provides standards of agency conduct to be followed whenever an agency undertakes administrative

25. Gyôsei-Tetsuzuki-Hô [Administrative procedures law], Law No. 88 of 1993. The exempted category of "disposition" is defined as follows in Article 2(2) of the APL: "(2) Disposition: A disposition or other forms of exercise of public authority by an authorized agency head or other officials."

26. *See* HATA & NAKAGAWA, *supra* note 13, at 93-94; *see also* Muneyuki Shindo, *Relations Between National Government and Local Government*, *in* PUBLIC ADMINISTRATION IN JAPAN 125-32 (IIAS Tokyo Round Table Organizing Committee eds., 1982). For an example in the area of land use control, see David L. Callies, *Land Use Planning and Control in Japan*, *in* PLANNING FOR CITIES AND REGIONS IN JAPAN 59-69 (Shapira et al. eds., 1994).

27. Local Autonomy Law, *as amended in* 1999 Chihô-Jichi-Hô [Local autonomy law], Law No. 67 of 1947, *as amended in* 1999 will subject inter-governmental guidance to certain procedural regulations similar to the regulation contained in the APL regarding administrative guidance.

28. *See* Shibaike, *supra* note 4; Young, *supra* note 3, at 931-32.

guidance systematically, i.e., to an indefinite number of individuals or firms: the agencies shall produce and make public guidance outlines.

Two elements are necessary in order to distinguish administrative guidance from other agency actions *vis-à-vis* specific private entities. First, there must be an act by a public official asking for voluntary cooperation. Since the guidance is simply a request for voluntary cooperation from specific entities and does not have any legally binding effects, guidance outlines, characterized as an agency's "internal" standards, are not legally binding on private entities. Second, the request need *not* necessarily be part of a specific administrative program that an enabling statute (or an enabling local ordinance) has authorized an agency to implement.[29] To be sure, for jurisdictional purposes, it is generally thought that administrative guidance should stay within its charter, or the "duties and businesses" of each agency,[30] as is also provided by the APL definition of administrative guidance. Each enabling statute authorizes an agency to implement specific programs that fall within at least one of the agency's "businesses." Thus, business provisions are to be amended to accommodate newly enacted enabling statutes that authorize new types of programs. Enabling statutes and organizational statutes tend to be enacted separately. Only a limited number of agencies are established under statutes that provide both agency composition, "businesses," and programs that should be executed.[31]

The APL provides some substantive principles and procedural regularities regarding administrative guidance. The APL states that public officials

29. It is generally thought, both in judicial opinions and literature, that administrative guidance is not required to have a statutory basis in either substantive or procedural terms: i.e., it is not required that relevant statute or local ordinances, explicitly or implicitly, provide for administrative guidance. This topic is discussed under the title of the "basis in law" question. For an overview of the discussion, see Narita, *supra* note 5, at 60-64 and Yeomans, *supra* note 5, at 147-58.

30. In Japanese administrative law, the "duties and businesses" of an agency are distinguished from the agency's statutorily authorized programs.

As a practice of legislation, each Ministry of the National Government is established through its "organizational statute" such as the Establishment Law of the Ministry of Health and Welfare. Organizational statutes not only provide for the Ministry's composition, but also describe "businesses" to be taken care of, or subject matter jurisdiction, using quite abstract language. The Establishment Law of the Ministry of Health and Welfare, for instance, provides that the Ministry shall take care of matters relating to water; improvement and promotion of public health in constructions, etc. There are numerous enabling statutes, on the other hand, that authorize each agency to execute specific programs. In the case of the Ministry of Health and Welfare, enabling statutes include food laws, drug laws, waste disposition laws, and pension laws. For a general discussion of the distinction between administrative programs and businesses of the agency, see UPHAM, *supra* note 3, at 169. *See also* Narita, *supra* note 5, at 64 n.48; Young, *supra* note 3, at 927 n.12.

31. The Fair Trade Commission under the Anti-monopoly Law is among the examples.

must keep in mind that whenever they issue an administrative guidance, voluntariness on the side of the addressee is always required. It also explicitly prohibits several guidance-related abuses. The abuses that the APL prohibits include unfair, retaliative acts such as: an agency implying that it might (1) otherwise revoke current licenses; (2) delay its action on current applications, or (3) deny some other applications, even though it may not do so under relevant statutes for reasons contained in the agency's administrative guidance. These principles are basically a restatement of judicial opinions regarding administrative guidance that appeared before the enactment of the APL. The APL further creates a procedural right for the addressee to have administrative guidance issued in writing.

B. A Fresh Look

The following examination of the concept demonstrates how the courts and scholars have analyzed contextual differences in which administrative guidance is undertaken.[32] As a tentative model, the author has grouped the Japanese discussion on administrative guidance into two categories, depending on whether the agency, through administrative guidance, pursues extra-statutory policy goals or statutory policy goals. In each category, at least three different types of legal analysis to administrative guidance are discerned from judicial opinions and academic literature. Each type of category represents a set of legal problems arising from a unique context in which a specific legal analysis is undertaken (see Figure 2).

32. *See* Takeshisa Nakagawa, *Administrative Guidance: A Tentative Model of How Japanese Lawyers Understand It*, 14 KOBE U. L. REV. 1 (1998).

FIGURE 2: A TENTATIVE MODEL OF JAPANESE LAWYERS' UNDERSTANDING OF ADMINISTRATIVE GUIDANCE

ADMINISTRATIVE GUIDANCE GROUP A A Request for Voluntary Cooperation in Pursuit of Extra-Statutory Policy Goals	*ADMINISTRATIVE GUIDANCE GROUP B* A Request for Voluntary Cooperation in Pursuit of Statutory Policy Goals
Type I: Intervention in Private Conflicts for Negotiated Resolution	**Type IV**: Request for Consensus-Oriented Decisionmaking
Type II: Action to Deal With Unexpected Extremities	**Type V**: Expression of Discretionary Judgment
Type III: Request for Cooperation with Agency's Extra-Statutory Standards	**Type VI**: Bypassing Statutorily-Prescribed Proceedings

The first group, Group A, represents a collection of guidance that pursue policy goals formulated by the agency, *outside* of legislatively authorized programs, in pursuit of an agencies *extra-statutory* policymaking. This includes any policy judgment, or value of making balance among societal forces, that has not been made by the legislature (the National Diet or local government assemblies), but made solely by the agency, and the agency is attempting to implement such policies by means of a request for voluntary cooperation. Thus, the central question of Group A guidance is whether, how far, and why at all, the agency may formulate and implement its own *extra-statutory* policy goals.

The second group, Group B, denotes guidance undertaken by the agency in pursuit of *statutory goals*. These goals are part of administrative programs authorized by the legislature. Statutory goals are not always implemented formally; i.e., by the methods explicitly provided for in relevant statutes or local ordinances, such as orders, permits, revocation of permits, or rejection of applications. In practice, they are also implemented informally through a request for voluntary cooperation. As Professor John Haley demonstrates, informal implementation in this sense should be seen in all legal systems.[33] Japanese lawyers have also referred to such informal implementation as administrative guidance. It should naturally be inferred

33. HALEY, *supra* note 3, at 162-66.

that Group B guidance vary greatly from Group A guidance. As a matter of phenomenon, one administrative guidance can have both Type A and Type B characteristics;[34] theoretically, however, these two groups are distinguishable, and must be distinguished because they each present different legal problems.

Within Group A, Type I (private conflicts) guidance represent the legal reasoning given to the contextual features of the guidance, as demonstrated in a Supreme Court decision in 1985.[35] The opinion described the contextual uniqueness of the case, in that the local government had interfered in a private conflict by asking for amicable resolution through face-to-face negotiation between the parties to the conflict, without specific legal authority to do so. The Court then implied that the addressee of such a guidance would have a societal, not legal, obligation to try to cooperate with such guidance. This way, the court showed its strong sympathy to the effective implementation of the local governments extra-statutory policy goals to the effect that certain types of private conflicts should be effectively settled.

Type II (extremities) represents extreme reasoning applicable to exceptional situations, such as the Supreme Court decision in *Japan v. Idemitsu*, one of a series of the so-called Oil Cartel cases that occurred out of the oil crisis of 1973.[36] The Court held that even if the petroleum business followed the Ministry of Industry and International Trade's (MITI) informal

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34. Professor Haley quite accurately mentions this cross-over aspect of administrative guidance. *See id.* at 163.

35. *See infra* text accompanying note 42.

36. 38 KEISHU 1287 (Sup. Ct. Decision, Feb. 24, 1984). There is a volume of literature, written in English, on judicial judgments in the Oil Cartel Cases. *See* UPHAM, *supra* note 3, at 184-88; *see also* Matsushita, *The Legal Framework of Japanese Industrial Policy*, 1987 B.Y.U. L. REV. 541, 550-53 (1987); Matsushita, *The Legal Framework of Trade and Investment in Japan*, 27 HARV. INT'L L.J. 361, 377-83 (1986); Ramseyer, *supra* note 19 at 395. For a general discussion on the Japanese Antimonopoly Law itself, see Seita & Tamura, *The Historical Background of Japan's Antimonopoly Law*, 1994 U. ILL. L. REV. 115. *See also supra* note 19.

It should be advised that the Supreme Court decision discussed in the text was handed down on the pricing issue, which included administrative guidance on pricing. Another issue was raised in the series of Oil Cartel Cases in relation to production arrangement among petroleum businesses. The Tokyo High Court decided on this matter in 1980. *See* Japan v. Association of Petroleum Indus., 983 HANJI 22 (High Ct. of Tokyo Decision, Sept. 26, 1980). This case presented a totally different legal analysis of administrative guidance, which from this Article's perspective should be characterized as Type IV (request for consensus) and Type VI (avoidance of statutory proceeding). The High Court decision first denied that the Petroleum Industry Law provides any administrative guidance by which the MITI may request the Association of Petroleum Industry to arrange production quota among member companies. The Court then discussed that the statutory administrative guidance, recommendation in the Petroleum Industry Law, may be bypassed by a de facto, "preliminary" administrative guidance. For the latter ruling, see discussion *supra* note 5.

direction on their pricing, the illegality of cartel agreements among the petroleum companies should be *precluded* in extremities. The opinion described the uniqueness of the situation, in that emergencies existed that were not at all expected at the time the relevant statute was enacted. These contextual characteristics were treated as a strong excuse for MITI, not only to formulate but also to effectively implement its *extra-statutory* policy goal to stabilize consumer prices of oil products. Here, the Court showed even stronger sympathy to Type II (extremities) administrative guidance than Type I (private conflicts). In contrast, the Type III (cooperation requested for extra-statutory standards) guidance, an agency's request for cooperation with its own extra-statutory standards, is the residual category of contexts in which the Supreme Court did not find any special reason to be sympathetic.

In 1993, the Supreme Court presented a Type III analysis that impliedly allowed the agency to make *extra-statutory* policy goals, but did not imply sympathy to the effective implementation of such policy goals. That opinion required total voluntariness on the side of the addressee of the guidance, apparently representing the absence of any contextual excuse.[37]

It is the author's impression that there is a tendency among observers of Japanese law to focus on the administrative guidance at the national level. However, judicial cases on such guidance have been quite scarce, the only notable judicial opinions being the Supreme Court decision and the Tokyo High Court decisions in the Oil Cartel Cases.[38] As long-time experts on Japanese law demonstrate,[39] it is rather the guidance at the local level that has formed the core legal doctrines of administrative guidance, and they are what this Article calls Type I (private conflict) and Type III (cooperation requested for extra-statutory standards) guidance.[40]

Within Group B guidance, Type IV (request for consensus) guidance are an agency's request that private parties take part in consensus formation with regard to the agency's exercise of statutorily-granted discretion. Such consensus-oriented methodology is usually not provided for in enabling statutes. A central issue is whether the statute should at all be interpreted to allow collaboration with private interests. This type of guidance is contro-

37. *See infra* note 57 and accompanying text.

38. *See supra* note 36 and accompanying text.

39. *See, e.g.*, RAMSEYER & NAKAZATO, *supra* note 13, at 205-12; UPHAM, *supra* note 3, at 166-204; Young, *supra* note 3, at 926-32. All of these articles focus more on what this Article calls Type I and Type III guidance.

40. For example, Professor Hiroshi Shiono mentions two instances as representative administrative guidance: the Department of Post and Telecommunication's request for shortening broadcasting hours for the energy conservation purpose and local governments' intervention in private conflicts arising from construction of a high-rise apartment houses. Shiono, *supra* note 20, at 221-22.

versial because enabling statutes usually do not have the intention to allow it; regular statutory interpretation is that, unless there are explicit provisions to the contrary, the agency should exercise its discretionary power *by itself* and should not bargain with private interests.

Consensus-oriented decisionmaking usually takes the form of collaboration between the agency and relevant private interests. For example, it is known that persuasion and similar communications occur between the regulator and alleged violators in negotiation. Here, the regulator proposes to exercise its discretion in a collaborative way. Both parties may discover the best possible resolution to the offenses. There is an expectation in negotiation that the consensus to be reached will be incorporated into a formal order. This communication is considered an administrative guidance in Japan. What makes the methodology even more controversial is that Japanese reality often dictates that the agency does not participate in the collaboration. It virtually leaves the entire matter to private ordering, the idea of collaboration to be dealt with only by the consensus among interested private parties.[41]

Type V (expression of discretionary judgment) guidance refer to the situation in which the agency, after exercising its statutorily-granted discretion, has reached a conclusion that can only be expressed in the form of persuasion; i.e., administrative guidance. Recent empirical research in Japan shows that in certain areas of administrative activities, such as fire prevention, clean water protection, and industrial waste control, Japanese bureaucrats have a strong tendency to only issue improvement orders against exceptionally serious offenses. In all other less serious cases, the government stops short of issuing orders, and instead simply gives guidance. Japanese regulators thus tend to use administrative guidance to address almost all offenses, with no intention to further issue statutorily-authorized orders even when the guidance is not voluntarily complied with. Researchers argue that such regulatory style has produced unsatisfactory enforcement outcomes, and many offenses are not properly attended. Regulators deal with statutory violations and generally have prosecutorial discretion as to whether they will take adverse actions against violators. It can therefore be said that Japanese regulators are exercising their prosecutorial discretion in a very weak way, almost to the point of retreatism. Thus, what is referred to as an administrative guidance in this context is in fact an expres-

41. *See* Frank K. Upham, *Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective*, 20 FORDHAM INT'L L.J. 396 (1996) (emphasizing role of private ordering in the Japanese administrative process). In my argument, private ordering appears both in Type I (private conflict) of Group A guidance and Type IV (collaboration) of Group B guidance.

sion of the regulators' discretionary judgment, and the legal question to be asked is whether the agency has abused its statutorily granted discretion.

Type VI (bypassing statutory proceeding) guidance is used when the agency wants to avoid statutorily-prescribed proceedings. The purpose of guidance is to obtain the same result with less cost. For instance, an agency may, before issuance of a corrective order, first attempt to persuade a regulated party into voluntarily correcting its alleged statutory violations. The attempt to persuade is usually in the form of a discussion between the regulator and the regulated party. If the alleged violator voluntarily follows advice given by the regulator, the regulatory agency can easily bypass statutorily-prescribed, and often resource-consuming, proceedings for issuing a corrective order. This attempt is not legally binding, and is characterized as an administrative guidance. Legal topics related to Type VI guidance, thus include: whether enabling statutes may be interpreted to allow bypassing statutorily-prescribed procedural protection, legal effects of such informal settlement, and remedial questions that arise when private parties, after following the agency's advice, find that the advice was wrong.

When the agency undertakes administrative guidance, it can be analyzed in the following way. As mentioned above, when Japanese regulators find violations, they seldom take formal — i.e., statutory — actions immediately. The agencies would rather patiently keep talking to offenders in an effort to persuade them to voluntarily correct the problem. This persuasion, or administrative guidance, can be analyzed as Type IV (request for consensus), Type V (expression of discretionary judgment), Type VI (bypassing statutory proceedings), or even Type III (request for cooperation with extra-statutory standards) guidance depending on the context. For example, if the regulator discovers the offense is not very serious, and has decided not to issue a statutory corrective order, then the guidance would be classified as a Type V (expression of discretionary judgment) administrative guidance, as the regulator exercised its discretion in a "weak" way, and the sole issue is then whether there has been an abuse of discretion. If, however, the regulator has internally decided to take formal action — such as the issuance of a corrective order — but is attempting persuasion to allow the violator to voluntarily correct the problem, this would be classified as a Type VI guidance (bypassing statutory proceeding). In this situation, the regulator is simply trying to avoid the burdensome procedure for issuing a corrective order, and legal issues include: whether or not the statute can be interpreted to allow such avoidance in terms of procedural protection; whether or not legally binding effects arise from the talk between the regulator and the offender; and what kind of judicial remedies are available to the alleged offender if he later concludes that he has done nothing wrong.

The regulator may also simply want to talk about the details of its contemplated corrective order so that the offender be given an order that is not too difficult to comply with. This talk can be characterized as Type IV (request for consensus) guidance, and follows a legal question if such collaboration may be valid in terms of statutory interpretation or fair exercise of discretion. If the regulator finally issues the corrective order, which incorporates the consensus that has been reached, the talk is simply Type IV (request for consensus) guidance. On the other hand, it may be that based on the negotiation, the offender voluntarily complies with the advice from the agency on how to correct the offense. Then, the negotiation and the final advice, which may not be readily distinguishable from each other in the reality of administrative process, and thus may be seen as one administrative guidance, must be analyzed to be partly Type IV (request for consensus) guidance and partly Type VI (avoidance of statutory proceeding) guidance.

Finally, if the regulator asks for the offender, in such negotiation, to comply with something beyond the statutes, this part of the talk should be characterized as Type III (cooperation requested for extra-statutory standards) guidance, and the legal analysis is to be made accordingly.

Out of these several types of administrative guidance, it should be those in Group A that seem more controversial. To help understand such problematic administrative guidance, two representative Supreme Court decisions will be detailed in the next Part, from which the author has deduced legal analyses respectively named as Type I (private conflicts) guidance and as Type III (cooperation requested for extra-statutory standards) guidance. These decisions represent an overall tendency, among judicial opinions and literature, of positive evaluation of governmental activities outside statutory authorization. As I have emphasized, these two have been the center of attention in the Japanese administrative law literature.

III. TWO REPRESENTATIVE CASES AND THEIR IMPLICATIONS FOR UNITED STATES ADMINISTRATIVE LAW

*A. Supreme Court Decision of 1985 (*Nakatani*)* [42]

1. Background and Facts

In the 1960s, the population in major cities of Japan drastically increased due to an economic surge. Necessary land-use regulation and other related governmental measures could not catch up with the pace of population in-

42. Nakatani v. Tokyo-*To* [Tokyo Metropolitan Government], 39 MINSHU 989 (Sup. Ct. July 16, 1985).

crease. This resulted in mixed land uses in highly populated urban areas. In those areas, problems such as sunlight, noise, and ventilation emerged in the form of private conflicts between real estate developers and abutting residents. Although the National Diet from time to time tried to respond to such social hardships by amending relevant statutes,[43] the amendments were not powerful enough, leaving the problems virtually unattended. Consequently, residents began to rely on local governments to manage the problems.[44]

This type of problem is similar to a private conflict that would arise, for example, from a real estate developer's plan to construct a high-rise apartment building. The regular course to follow for such situations would be a resolution by either a face-to-face negotiation or an injunctive suit in court. In *Nakatani* a third, and perhaps more convenient method was utilized. Instead of using the court system, opponent residents went to city hall and appealed to administrative officers of their local government to attend to their conflicts. There are many advantages, generally speaking, as opposed to using the court system, or a face-to-face negotiation: (1) negotiation can only be successful when both parties share the same concerns; (2) it is unlikely the Court would issue injunctive orders against sunlight deprivation, except for extreme circumstances; (3) civil procedures are costly, in both time and money for most citizens; and (4) residents expect that the local government, which has authority to grant permits to developers for construction work, will have some persuasive power with developers — even with issues not covered by the permit program in the statute.

It should be noted here that municipalities in Japan do not hold plenary legislative power to regulate land use. This is perhaps different from their counterparts in the United States. First, though the municipal government is constitutionally guaranteed to enact local ordinances that may affect private rights and duties, it may do so only when the ordinances do not conflict with existing statutes enacted by the National Diet.[45] In other words, local ordinances may create legal rights or duties only in the areas in which national statutes do not preempt. Second, the Constitution of Japan does set a limitation on the scope of legislative power vested in the National Diet in terms of a guarantee of abstract "local autonomy" between the national and local government relationship.[46] It is generally believed that this guarantee is so vaguely drafted that there are virtually no specific areas or mat-

43. *See* Kenchiku-Kijun-Hô [Building standard law], Law No. 201 of 1950 (amending over 50 laws).

44. For more details, *see* Young, *supra* note 3, at 929-32.

45. *See* KENPÔ, ch. VIII, art. 94.

46. *See* KENPÔ, ch. VIII, art. 92; Chihô-Jichi-Hô [Local autonomy law], Law No. 67 of 1947, as amended in 1999.

ters that are constitutionally reserved for local governments (or their assemblies).[47] Third, based on the foregoing two constitutional provisions, the Diet has continually enacted statutes providing for administrative programs (enforced either by national or local government agencies) that otherwise could have been dealt with by local ordinances. The national statutes are so comprehensively enacted, and the courts are so lenient in interpreting the breadth of statutory preemption, resulting in national statutes preempting local ordinance almost everywhere. Indeed, the local government is virtually unable to deal with new problems as a matter of legal rights or duties through enacting local ordinances. Thus, even if the local government determines that there are certain land use control problems, for instance, and has ideas for solutions, because the national land use laws are usually interpreted to preempt the land use area, it would be difficult for the municipality to incorporate their ideas into local ordinances as a legally-enforceable program. It follows that persuasion is the only alternative left to the local government to implement its own idea of a solution. The local government's lack of legal authority doubtlessly constitutes the institutional background against which administrative guidance of Group A, especially Type I (private conflicts) and Type III (cooperation requested for extra-statutory standards), is issued by local government officials, oftentimes based on guidance outlines. It is important to understand in *Nakatani*, that relevant statutes are generally interpreted to preempt problems such as sunlight conflicts. Thus, the local government lacks power to enact ordinances to deal with the situations as a matter of rights and duties.

The *Nakatani* case involved a real estate developer, who, in contemplation of building an apartment in Shinagawa-ku, Tokyo, applied to the Building Inspector of the Tokyo Metropolitan Government for a building proposal certificate, as provided for in Building Standard Law. The Law requires that before starting construction work, owners of a proposed building must obtain a certificate to demonstrate that their proposals are in compliance with relevant statutes and local ordinances regarding technical requirements on siting, structure, and facilities.[48] Considering the technical nature of the review process, the Law provides that the Inspector shall answer applications within twenty-one or seven days depending on the type of application.[49] It is clearly the intention of the Law that the Inspector shall not consider other, non-technical matters such as opposition from local community.

In this case, however, almost one hundred abutters opposed the construction proposal because of sunlight deprivation and tried to impede con-

47. *See* HATA & NAKAGAWA, *supra* note 13, at 87-88.

48. Kenchiku-Kijun-Hô [Building standard law], Law No. 201 of 1950, art. 6.

49. *Id.* art. 3, no. 3.

struction work from the beginning. Instead of filing a legal action against the developer, the opponents brought the matter to the Tokyo Metropolitan Government; i.e., its local assembly members and the Division of Construction Guidance — a department in charge of various construction-related matters, basically technical matters — within the city hall. An official of the Division phoned Nakatani to ask for an amicable resolution of the conflict, and the developer agreed that during the negotiation, the application for construction would be treated as if it were not officially on file. The Building Inspector was informed of the agreement, and the Inspector agreed to put his decision concerning Nakatani's application on hold.[50] Nakatani held several conferences with the opponent residents, and occasionally informed officials in the Division about the meetings. Four months after Nakatani first submitted his application, the developer was informed that the existing zoning rules would soon be modified by the Tokyo Government and that every future application for a building proposal certificate would include new and more stringent requirements. Since Nakatani's application had been treated as if it were not on file at the time, his application would eventually be reviewed under the new regulation. Thus, a week later, Nakatani, attempted to avoid the new zoning regulation by filing an administrative appeal to the Construction Appeals Committee of the Tokyo Government, alleging illegality of inaction by the Building Inspector on Nakatani's application for a building proposal certificate. Before the hearing, however, Nakatani achieved a compromise with the opponent residents and proposed to drop the charges if the Inspector issued the certificate immediately. A few days later, Nakatani dropped his appeal as promised. In accordance with the compromise, the Building Inspector reviewed Nakatani's application, found that it fulfilled all of the statutory requirements, and issued the certificate. Although Nakatani was permitted to finish the construction, he was not happy with the way the Tokyo Government handled the case.

The developer then filed a tort action against the Tokyo Government, seeking damages under the Government Tort Liabilities Law. Nakatani alleged that the certificate should have been issued much earlier, at the point when the Inspector could have reasonably reviewed the application and could have found that the application was in compliance with relevant requirements. He also asserted that the delay in issuance caused him serious economic injuries. Basically, due to the local government's interference, what was originally a mere private conflict between private entities turned into tortious claims against the government.

50. Although the Inspector and the Division officials were in no position to issue directions to each other, they were both under the supervision of the Governor of Tokyo Metropolitan Government. In this regard, their duties were coordinated.

2. Opinion and Analysis

The Court ruled in favor of Nakatani, using fairly complicated reasoning. The opinion first clarified the core issue of the case: whether delaying a decision on a certificate application, later found to satisfy all of the requirements of the Law and relevant regulations, constitutes a tortious act performed by the local government. The Court held that withholding can be legal (i.e., not tortious) when: (1) the applicant himself voluntarily agrees that the application review process should be suspended (Rule A); or (2) "the circumstances in the case" are such that would "render reservation of decision on the application, rather than the immediate issuance of certificate, a rational choice of action suitable to the societal common sense in light of the intent and purposes of the relevant statutes" (Rule B).

The Court found that Nakatani did not fall within Rule A, noting that, although the developer followed the guidance and conferred with abutters about the construction proposal, the evidence did not establish that the developer actually agreed to the suspension of his certificate application. The Court proceeded to determine whether Rule B applied to the case. When a local government official issues an administrative guidance asking a developer to reconsider the initial construction plan in order to negotiate with abutters, and if an official withholds the certificate issuance for a reasonable period of time to wait for the developer and opposing residents' compromise, the Court found that such suspension *shall not necessarily be illegal.* The opinion further stated that, even though the administrative guidance basically rests on voluntary cooperation, the withholding shall be deemed illegal only if the developer shows in a "clear and sincere" way his unwillingness to cooperate with the guidance and his objection to the suspension of the application.

Under Rule B, the Court focused on how the applicant responded to the administrative guidance, rather than on how the official conducted the guidance. The opinion noted that the following facts were relevant to the decision: (1) Nakatani held conferences with the opposing residents several times in vain, leading to an impasse; (2) Nakatani was informed of the introduction of a new zoning regulation with tougher requirements; and (3) Nakatani, after these events, made an administrative appeal for immediate action concerning his application. From these facts, the Court concluded that the administrative appeal should be interpreted as a "clear and sincere" expression by Nakatani of his unwillingness to further cooperate with the administrative guidance. Nakatani was entitled to recover damages for the injuries to his business that occurred after he filed the administrative appeal, but not for any injuries that occurred before that date.

Readers should be intrigued by Rule B. While Rule A simply takes into account free will on the side of private entities to the delay in their applica-

tion review process, mere voluntariness is not the sole decisive factor under Rule B. To render the delay illegal under Rule B, the applicant must not only say "no" to the official, but also show his disagreement in a "clear and sincere" manner. The applicant can only dissent effectively to the withholding when such dissent is considered to be not only "clear," but also "sincere." The Court opined that tactical or emotional dissent should not be considered "sincere," and implied that dissent shall be judged "sincere" after there is not a substantial chance of resolution. Public officials, on the other hand, may reserve decision on the certificate application for a reasonable time period until chances for conflict resolution actually vanish — as immediate grant of the certificate is likely to destroy any chance for resolution — and until the applicant shows unwillingness to continue to cooperate with the guidance in a "clear and sincere" way. Thus, it appears that Rule B has the effect of transforming the intention of the Building Standard Law into something different than intended. The Law provides that the applicant has a right to have his certificate application reviewed within a relatively short period of time, and that the application shall be reviewed only with reference to technical requirements in relevant statutes.[51] After Rule B, applicants can no longer simply ignore or decline to cooperate with such administrative guidance. In *Nakatani*, the Court illustrated its sympathy to the effectiveness of administrative guidance through the sincerity requirement in Rule B.

One can imagine that the sincerity requirement arose simply from the notion that all conflicts in society need to be resolved, and that parties to conflicts generally have some kind of obligation — certainly not legal, but more likely moral or societal — to try to work together towards an amicable resolution. There are at least two grounds, however, from which a different explanation can be inferred. First, one should note that the Court does not apply its sympathy toward administrative guidance for amicable resolution to *all* kinds of conflicts that occur in society. Sympathy is limited to such conflicts that the municipality has appropriately considered to be serious social problems; the *Nakatani* opinion implicitly demonstrates a concern for the kind of conflicts that the administrative guidance targeted. The Court relies on two statutory provisions: (1) the general purposes of local governments as provided in the Local Autonomy Law, which include the "prevention of pollution and other environmental matters, in addition to the maintenance of public order and the preservation of safety, health and welfare of residents;"[52] and (2) the ultimate purpose of the Building Stan-

51. *See* Kenchiku-Kijun-Hô [Building standard law], Law No. 201 of 1950, art. 6, nos. 2-3.

52. Chihô-Jichi-Hô, Law No. 67 of 1947, art. 2. This provision was deleted, however, in the 1999 amendment of the law.

dard Law is "to protect life, health and properties of the people, and thereby to contribute to the furtherance of public welfare."[53]

Second, the Court did not require the local government official to act as a genuine mediator or a neutral party. As a matter of fact, the negotiation of the administrative guidance at issue is not a genuine conflict mediation or a conflict management for several reasons. It is realistic to expect that municipalities would interfere with such private conflicts that attract their policy concerns. Also, from the viewpoint of the developer in *Nakatani*, the official in the Division of Construction Guidance who issued the guidance could never be considered neutral as he was in a position to successfully ask the Building Inspector to withhold Nakatani's application. Furthermore, the guidance that asked for a compromise was issued only to the developer, while the municipality never urged the opposing abutters to compromise their sunlight argument. After all, the purpose of the guidance in *Nakatani* was not to genuinely mediate a conflict, but rather to persuade the developer to understand the seriousness of the matter, and to alleviate sunlight problems. Behind the administrative guidance requesting amicable conflict resolution, the Tokyo Metropolitan Government had implicitly formulated its own policy that the sunlight conflicts were to be resolved at the burden of developers, even though such value judgment existed neither in statutes nor local ordinances.[54]

At this point, the Court allowed local government agencies to make *extra-statutory* policy goals, with an attempt to explain the legitimacy of administrative agencies making their own policy preferences without specific legislative authorization to that effect, by citing the general purpose of local government and the ultimate purpose of the Building Standard Law.

It remains to be discussed whether the Court has shown enough justification for the extra-statutory actions. The Court simply pointed out that the policy goals contained in the guidance were not in violation of existing statutes. Despite this dubious aspect, the Court's opinion in *Nakatani* has been well received among Japanese lawyers, at least where local government, land use control, and occurrence of a private conflict that was widely considered a serious societal problem, are involved. Another factor that should not be overlooked is that the official avoided giving specific directions on how the conflict should be resolved, and instead left the details of

53. Kenchiku-Kijun Hô [Building standard law], Law No. 201 of 1950, art. 6.

54. *See* Young, *supra* note 3, at 974-75 (discussing Court of Appeals decisions with emphasis on judicial rearticulation of agency mandate from regulating sunlight to settling disputes); UPHAM, *supra* note 3, at 175 ("[T]he developer must bargain reasonably and in good faith. The net result is the creation of a vaguely defined sphere of action . . . within which the city can operate to 'encourage' developer compliance with land use policy that is without any specific legal basis.").

resolution to the parties. The local government allowed its vague policy goals to be organized and developed by private parties through their negotiation. The contextual uniqueness of *Nakatani* should perhaps be interpreted to limit the scope of the ruling, as the opinion only dealt with administrative guidance — simply a request to negotiate towards an amicable conflict resolution between private parties.

These contextual features and the accompanying reasoning in *Nakatani* are what this Article calls Type I (private conflicts) guidance, where the Court allowed administrative policymaking outside statutory authorization and also recognized the effective implementation of such policy goals.

3. *Hypothetical Analogy in United States Administrative Law*

One inquiry remains: whether any analogy to the above-described phenomena and legal approach can be discerned in United States administrative law. Indeed, how would American public officials, at any level of government, respond if asked to interfere in a private conflict that is of social importance, but which has not yet been addressed by the legislature? Moreover, if those officials responded in the same manner as Japanese local government officials in *Nakatani*, how would American lawyers evaluate such behaviors?

Professor Susskind and Mr. Field give insight into these questions in their book on public dispute mediation, which discusses a case study of a regional hospital relocation conflict.[55] The case involved a conflict over building a hospital. Abutters of the proposed site opposed the relocation plan for various reasons, including ambulance noise and a decrease in property value. The authors argue that the hospital should have approached the opposing community, comparing the conventional "decide-announce-defend" approach with what they call a "mutual-gains" approach. The government's role in the conflict resolution is quite intriguing. According to the authors, a state regulatory agency "rejected" the initial proposal, and "urged the hospital to initiate a public advisory process and reconsider its proposal."[56] With some modifications, the hospital relocation case presents the same contextual features as *Nakatani*.

One analysis is to suppose that the regulatory agency may legally refuse, under relevant statues, a relocation plan as a final agency determination for certain designated reasons, such as ambulance noise or property value decreases. With this modification, the "rejection" by the state agency will not equal a formal agency determination, but will amount to the agency's in-

55. *See* LAWRENCE SUSSKIND & PATRICK FIELD, DEALING WITH AN ANGRY PUBLIC 39-40 (1996).

56. *Id.*

formal dissatisfaction toward the initial proposal. Another analysis is to suppose that the nature of the public advisory process urged by the agency was not statutorily required. With this supposition, the agency's insistence to negotiate should be treated as a communication, inspired by the communities' outcry — to ask the hospital to listen to voices of the community. In light of these two analyses, "urging" would be a counterpart to the administrative guidance conducted in *Nakatani*. In this hypothetical relocation case, what would occur if the hospital was not satisfied with any of the new proposals that might emerge from the public advisory process, and eventually wants to abide by its initial proposal? The hospital might think that the delay in their relocation process was caused by the state government's interference in the conflict, and might sue the state for economic injuries — assuming that one can seek tort remedies against the government under the state law involved. Under these circumstances, we can see an exact parallel to *Nakatani*, even though the actuality of these modifications and suppositions remains to be answered.

B. *Supreme Court Decision of 1993 (*Musashino-City*)*[57]

1. *Background and Facts*

Eight years after the *Nakatani* decision, the Court addressed administrative guidance once again in the *Musashino-City* case. This time, the cause of administrative guidance was not a private conflict, but concerned budgetary difficulties within the local government itself. Here, the guidance was much more authoritative in nature. Recognizing these differences, the Court adopted a new framework to evaluate the validity of the guidance. The Court simply declared that, where an agency requests private entities to cooperate with its policy goals formulated outside legislative authorization, total voluntariness is required of the recipient of the guidance.

Similar to *Nakatani*, the background of *Musashino-City* also related to urban life during the steady economic growth of Japan. It became obvious in the 1970s that suburban municipalities within commuting distance from big industrialized cities had difficulty catching up with the abrupt increase in population. These suburban municipalities experienced several problems, including the financial burdens imposed by statutory obligations to provide for public facilities such as public schools, parks, and sewage systems. The municipalities were again without necessary legislative power to resolve the problems, especially since relevant national statutes were inter-

57. Takahashi Kikue v. Musashino-shi [Musashino City], 36 MINSHU 727 (Sup. Ct., Apr. 23, 1993).

preted to preclude municipalities from imposing monetary duties such as exactions or impact fees. Municipalities lacked power to create judicially-enforceable duties through local ordinances, and were unable to deal with their own financial difficulties. Thus, the municipalities had no alternative but to ask developers (who were regarded as responsible for bringing in new residents) to help with the financial burdens. As explained previously, to avoid the national statute preemption problem, relief may not be in the form of legal duties, but can consist of voluntary contributions from the developers.

Many suburban municipalities recognized the need to systematize their officials' conduct in asking for cooperation from private entities, and therefore formulated guidance outlines, often called "Guidance Outlines Regarding Residential Development." Such guidance outlines typically provide for: (1) the formula used to calculate the amount of monetary contributions to be requested, and (2) the petition to obtain consent from nearby residents, regardless of whether there actually exists a conflict concerning construction proposals. These guidance outlines may be characterized as a declaration by the local government of its policy goals that those who cause increased local financial burden should make payments to the municipalities for such costs. This particular policy has not been authorized to any agencies at the local government level by statutes or local ordinances, but is *extra-statutory* policy as formulated and only declared in the outlines.

Outlines on residential development in suburban areas generally worked well until the beginning of the 1990s, when developers easily transferred the increased cost to the buyers because of steady economic growth. Still, disputes took place between municipalities and developers, and some developers asked courts for restitution of money previously paid, or damages alleging tortious acts by government officials. While no case for restitution has been won by the developer-plaintiffs — perhaps due to some technical reasons relating to the restitution doctrine — the Court in *Musashino-City*, declared, for the first time, a possibility for developers to win their tort cases.

The City of Musashino, a suburban municipality in Tokyo, created and made public the "Guidance Outline for Residential Development in the City of Musashino" (Outlines). The Outlines provided that developers proposing a multi-family complex in the city "shall" contribute a certain amount of money to the city for the purpose of assisting the city with its obligation to provide for educational facilities. The plaintiff, who planned to construct an apartment house, was requested by a city official to make a monetary contribution in accordance with the Outlines. The plaintiff, a long-time resident of the city, paid the prescribed amount of money. Later,

however, the plaintiff discovered the city would soon abolish some parts of the Outlines, including the monetary contribution provision. Believing he had been treated unfairly, he sued the Musashino City seeking restitution and damages alleging tortious acts by the city official. Both the District Court and the Court of Appeals denied restitution to the plaintiff on grounds that there was no fraud or duress on the part of the city officials.

2. *Opinion and Analysis*

The Court rejected the restitution claim as well, but ruled in favor of the plaintiff on his tortious claim. Compared to its ruling in *Nakatani*, the opinion of the Court here was much simpler and shorter. The Court made two points: (1) the city government, without any legislative authorization, may set up a policy represented in the Outlines; and (2) that policy may only be implemented by way of a friendly persuasion — asking for truly voluntary payment of monetary contributions.

The opinion first noted that the city had experienced an abrupt increase of construction of apartment houses since 1969, causing not only sunlight deprivation and construction noise, but also had placed severe administrative and financial burdens on the city government. Also, the Outlines received complete support by the city assembly members when they met informally, and were limited in their focus to construction plans that exceeded a certain size.[58] It appears that the Court attempted to rule on the legitimacy of the city government's policymaking, which was manifested by the government in the Guidance Outlines. The Court was content with the purpose, public support, and appropriateness of the informally formulated policy preferences that required developers and future residents to bear the financial costs on the city government.[59]

The Court then ruled on the way the guidance was conducted:

> It shall not be illegal [for a local government] to request by way of administrative guidance that developers make monetary contributions for educational facilities, so

58. This meeting of the assembly members, called Zen'in-Kyogikai, is an informal session of the assembly. As a result, any procedural requirements as provided in the Local Autonomy Law, including the mayor's convention proceeding, open discussion, and record-keeping do not apply to Zen'in-Kyogikai. Thus, it is said that assembly members prefer meeting informally for actual discussion of matters, rendering the formal sessions virtually obsolete.

59. *See* Young, *supra* note 3, at 966-67 (discussing lower court judgments with special attention to Japanese courts' emphasis on their own recognition of societal consensus rather than legally established procedures, such as local ordinances, regarding how societal policy preferences can be shown). For an insightful discussion on societal consensus in Japanese law, see Ramseyer, *The Costs of the Consensual Myth: Anti-Trust Enforcement and Institutional Barriers to Litigation in Japan*, 84 YALE L.J. 604, 640-42 (1985).

long as the request is made in such a manner as not to be coercive nor to impair otherwise the voluntary nature of the actions on the side of the developers.[60]

The Court searched for signs of coercion, and concluded that the city official threatened the plaintiff to make the payment. The Court emphasized the fact that the official suggested to the plaintiff — in general terms — that the city might suspend water supplies to the developers that did not comply with the Outlines; and that the plaintiff's request for a lesser amount of contribution was flatly rejected by the official with a statement that no "precedents" existed. The Court ruled that "the city official in fact coerced the plaintiff to pay," and his attitude was "beyond that of administrative guidance which is simply a request for voluntary contributions." The Court found that the city officials behaved inappropriately, as if the Outlines constituted some kind of binding norms, and concluded that the manner in which the city official conducted administrative guidance — a demand for payment of monetary contribution — constituted a tort.[61]

In contrast to *Nakatani*, the Court looked carefully at the attitude of the officials, and did not mention how the developer responded to the guidance. The Court in *Musashino City* clearly required that guidance must be a friendly persuasion made without coercion, and no special doctrine, such as the one in *Nakatani*, was established to justify the use of administrative guidance. There are at least two ways to understand the discrepancy between the Court's holding in *Nakatani* and *Musashino City*. One possible reading is that the Court simply changed its viewpoint on administrative guidance. The other is that the discrepancy is due to the different factual characteristics of each case. It is easy to understand why the Court ruled differently if the contextual differences between the two cases are emphasized. In *Musashino City*, the local government explicitly made and standardized its own *extra-statutory* policy goals, in terms of payment of a certain amount of money, and the government issued a guidance of a more direct nature. In contrast, in *Nakatani* the official only formulated a vague policy goal to the effect that sunlight deprivation should be appropriately attended by constructors, leaving the details of the conflict resolution to be resolved through private negotiation, thus rendering administrative guidance of less direct nature. Therefore, two different legal analysis to administrative guidance are shown by the Court: *Nakatani* represents a Type I guidance (private conflict), while *Musashino* represents a Type III (cooperation requested for extra-statutory standards) guidance.

60. Takahashi Kikue v. Musashino-shi [Musashino City], 36 MINSHU 727 (Sup. Ct., Apr. 23, 1993).

61 *See id.*

Theoretically, similar situations exist at the national government level as well. While examples of these situations are abundant, they have not reached the court system. An example of similar situations include two actions by the MITI: first, an issuance in 1952 of a recommendation that the total monthly production of cotton yarn should be limited to 150,000 bales, causing yarn manufactures to cut production; and second, a MITI policy to ban oil importation, even though the relevant law at the time did not contain provisions authorizing MITI to restrict oil product importation. This caused the oil company to practically cease its project of importing oil products.[62] These are all examples of the government's pursuit of allegedly *extra-statutory* policy goals, with or without the use of unfair or coercive methods of persuasion.

3. *Hypothetical Analogy in United States Administrative Law*

Recent literature on United States administrative law often discusses such phenomena known as the government's "raised eyebrows" approach,[63] "arm-twisting,"[64] "jawboning," or "friendly persuasion."[65] Examples of situations discussed in these terms involve government officials requesting private entities to cooperate with a certain concrete policy goal. What is relevant in terms of this Article is whether agencies are specifically authorized to pursue such policy goals. If agencies pursue a policy goal that is not authorized, American courts analyze the phenomena in a manner that is comparable to the way Japanese courts deal with Type III (cooperation requested for extra-statutory standards) administrative guidance. If agencies are authorized, then American courts should analyze the phenomenon in a manner comparable to Group B administrative guidance (Type IV (request for consensus) to Type VI (avoidance of statutory proceeding)).

The following is a hypothetical inquiry into how American courts and commentators would respond to a government agency in its pursuit of *extra-statutory* policy goals when the agency does not act in a coercive manner. The Federal Communications Commission's (FCC) drug lyric policy case in the early 1970s is a model for such an inquiry. In the 1970s, the FCC issued a public notice reminding broadcasters of their obligation to act

62. For further details and other arguably similar examples, see Steven M. 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).

63. *See id.*

64. Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 5 WIS. L. REV. 873 (1997).

65. *See* HEFFRON & MCFEELEY, *supra* note 2, at 213-14.

in the public interest, and to question the appropriateness of playing such songs that glorify use of illegal drugs.[66] The comment further suggested that broadcasters should have people in charge of making certain judgments as to whether each song they play potentially promoted drug use.[67] Certain officials at the FCC even provided a radio station with a list of songs which could be interpreted as having drug-oriented lyrics.[68] Unhappy broadcasters sued the FCC over these activities, alleging a First Amendment violation and an illegal avoidance of rulemaking procedure of the APA.[69] A federal court decided the FCC's statement merely required broadcasters to have some knowledge of the songs they play.[70] The court held that there was no First Amendment issue in this case, and a rulemaking procedure under the APA was not required.[71] This holding, in effect, allowed the FCC to formulate an important policy outside the APA's procedural requirements, and commentators strongly opposed the ruling.[72]

Another example of the FCC pursuing an *extra-statutory* policy goal is the FCC's "Family Hour" policy. In the early 1970s, the national Parent Teacher Association (PTA) and other groups brought their concerns about explicit TV programs to the public's attention. In response, the House Appropriations Committee directed the FCC to address the issue. Although the FCC Chairperson was concerned about the legal limitations on the FCC's role in this kind of issue, as well as limitations imposed by the First Amendment and the Federal Communications Act of 1934, the Chairperson eventually responded to the strong call from Congress. He talked to the Vice-Presidents of the three national networks, and encouraged them to set up their own policies, and also suggested that late night scheduling and warnings to viewers should be included in such policies. The networks responded through the National Association of Broadcasters (NAB) by amending the NAB Code for Television Broadcasters to include the "Family Hour" policy. Some producers and directors felt that this impeded their freedom of speech and sued the FCC, the networks, and the NAB.

In discussing the role of the FCC, the district court made two points. First, the Chairperson of the FCC actually "threatened" the networks.[73] Second, the FCC formulated its policy outside APA procedural require-

66. *See* Spaeth, *supra* note 62, at 947.

67. *See id.*

68. *See id.* at 947-48.

69. *See id.* at 947.

70. *See id.*

71. *See id.* at 948 (discussing Yale Broad. Co. v. FCC, 478 F.2d 594 (D.C. Cir. 1973)).

72. *See* Spaeth, *supra* note 62, at 948-50 (noting reaction to federal court ruling).

73. *See* Writers Guild of Am. West, Inc. v. FCC, 423 F. Supp. 1064, 1155 (C.D. Cal. 1976) (finding actions by FCC constituted coercive threats beyond agency's authority).

ments.[74] The Court of Appeals, on the other hand, dismissed the case on the basis of primary jurisdiction.[75] For the purpose of this Article, it is worth noting that the district court emphasized the fact that the FCC created its own policy, without reference to its statutory authority. The court seemed content to limit the "Family Hour" policy to the FCC's power under the Federal Communications Act, the Administrative Procedure Act, and the Constitution. The critical question, from the viewpoint of this Article, is whether the district court would have ruled the same if the request from the Chairperson was not a threat, and was voluntarily accepted by the networks.

The *Musashino City* court discretely formulated a method for dealing with a similar issue. The Court allowed agency policymaking *without specific legislative authorization* as long as the addressees voluntarily agreed to follow the policy. The Court's reference to the informal public support for the content of the policy goal contained in the Outlines, however, indicated that the Court noticed legitimacy questions as to the policy substance and thereby attempted to resolve the issues by resorting to societal consensus. Though it is still unclear if societal consensus may be a justification, it remains to be seen if the same reasoning could apply in the United States.

IV. ADMINISTRATIVE INFORMALITY IN COMPARISON

Now, let's put the observations in Parts II and III in the tentative picture of the formality-informality dichotomy described in Part I. Despite differently conceptualized dichotomy, there are apparently three phenomena in administrative process that are commonly called informal, setting aside how much similar legal analyses given to them. One analogy that can easily be drawn between discussions on administrative informality in the United States and Japan is the agency's internal, or non-legislative standards, such as interpretive rules and policy statements expressed typically in circulars, bulletins, or manuals, which constitute an important part of administrative informality in both nations. As to these standards, it is noteworthy that, in the United States, discussion focuses on avoidance of rulemaking procedure provided for in the APA, while Japan has no such discussion simply because of lack of such general procedural requirements concerning rulemaking.[76] Thus, comparison between legal analyses given

74. *See id.* at 1151-53 (detailing FCC's failure to comply with APA requirements)

75. *See* Writers Guild of Am. West, Inc. v. American Broad. Co., 609 F.2d 355, 362-65 (9th Cir. 1979) (vacating the lower court ruling pending final agency action by FCC).

76. *See, e.g.*, Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like - Should Federal Agencies Use Them to Bind the Public?*, 1992 DUKE L.J. 1311; Robert A. Anthony, *"Well, You Want the Permit, Don't You?": Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31 (1992)

to internal standards in each nation may be skipped in this Article, except for one thing: "guidance documents" issued by the Food and Drug Administration (FDA).[77] Guidance documents are defined in the FDA's Good Guidance Practices as "documents prepared for FDA staff, applications/sponsors, and the public" that relate to submissions, regulated products, the agency's policy and regulatory approach, and inspection and enforcement policies and procedures.[78] Since guidance documents "do not include warning letters, or other communications directed to individual persons or firms,"[79] it follows that the FDA's guidance documents are characterized as the agency's internal standards, rather than American counterparts to Japanese administrative guidance.[80] The FDA's guidance documents, however, are still comparable to Japanese guidance outlines in some limited cases.

One of the FDA's guidance documents, entitled "Recall Policy,"[81] describes how the FDA requests a recall. Though the FDA does not have an explicit statutory authority to *order* a recall, it has, as the document makes clear, authority to confiscate defective products. FDA's request for recall, in this regard, can be characterized as a substitute to the confiscation procedure that obtains the same results but costs less. In this sense, a "Recall Policy" should be regarded as a counterpart to Japanese guidance outlines for Type VI (avoidance of statutory proceeding) within Group B administrative guidance. Consider, on the other hand, the situation where the FDA requests to recall products whose defects are not as serious as may legally authorize the FDA to confiscate; or are not at all of such nature as addressed in relevant statutes, but the nature of the recall is such that society might consider the products to be dangerous. Then, it is comparable to Type III (cooperation requested for extra-statutory standards) guidance or its Outlines. It is not certain whether American courts in those cases would flatly deny such recall requests, even if the FDA asks for a genuinely vol-

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[hereinafter Anthony, *Agency Effort*]; Kevin W. Saunders, *Interpretive Rules With Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346.

77. *See* Rakoff, *supra* note 6.

78. *See* FDA's Development, Issuance, and Use of Guidance Documents, 62 Fed. Reg. 8961 (1997). The genius of the FDA's Good Guidance Practices lies, of course, not in defining guidance documents, but in its declaration that the agency shall follow notice-and-comment type procedure before issuing important guidance documents, and that the agency shall not initially communicate new or different regulatory expectations by other means of communications than issuing guidance documents.

79. *Id.* at 8967.

80. *See* Anthony, *Agency Effort*, *supra* note 76, at 31 (discussing guidance, policy statements, manuals, staff instructions and other nonlegislative issuances, and policy statements, interpretive rules, guidance, manuals, memos to staff, and action levels).

81. This document can be obtained by conducting a search for "FDA Recall Policies" at the following Web site: <http://www.fda.gov/search.html>.

untary cooperation. These standards are perhaps what sparked administrative law academics' interest in problems with administrative informality in the earliest days. It may safely be said that negotiation efforts in the United States' administrative processes bear a substantial similarity to the Japanese administrative guidance of Group B, especially Type IV (request for consensus) and Type VI (bypassing statutorily prescribed proceedings). Some of these negotiation efforts include: the experimental negotiations conducted in the EPA's permit and regulation processes,[82] the alternative methods of conflict resolution as provided for in the Administrative Dispute Resolution Act,[83] and the Negotiated Rulemaking Act.[84]

Also included is the settlement process provided for in section 554(c) of the APA,[85] which calls for preliminary conferences to be held in order to exclude issues that are not in genuine controversy from the adjudicative hearing. Section 554 (c) of the APA provides as follows:

> The agency shall give all interested parties opportunity for-
> (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
> (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.[86]

These provisions are intended to oblige the agency to utilize the formal procedure of adjudication only after issues have been reduced to the ones of genuine differences through consultation.[87] In his lecture in 1941, Professor Walter Gellhorn gave examples of avoidance of procedural formalities, and included: informal settlement procedure in complaint cases; informal deficiency letters; supplemented by equally informal conference in application cases; and informal opportunity for discussion towards consent "under the guidance of an official of the agency" in private cases such as workers' compensation.[88]

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82. *See, e.g.*, RESOLVING ENVIRONMENTAL REGULATORY DISPUTES (Lawrence Susskind et al. eds., 1983).

83. Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified as amended at 5 U.S.C §§. 571-583 (1994 & Supp. IV 1998)).

84. Pub. L. No. 101-648, 104 Stat. 4969 (1990) (codified as amended at 5 U.S.C. §§ 561-570 (1994 & Supp. IV 1998)).

85. 5 U.S.C. § 554(c) (1994).

86. *Id.*

87. *See* S. DOC. NO. 77-8, at 64-68 (1941) (examining present state of federal administrative procedure).

88. WALTER GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 47-60 (1941).

"Arm-twisting" by government employees, as discussed in Professor Lars Noah's recent article,[89] could be American counterparts to Type VI guidance (request for consensus) or Type VI (avoidance of statutory proceeding) guidance, both within Group B, if the agency is pursuing statutory goals in the form of persuasion. If, however, the agency is requested to comply with extra-statutory conditions, arm-twisting is comparable to the administrative guidance of Group A.[90] In this sense, Professor Noah quite appropriately mentions the Japanese regulatory practice of pursuing *extra-statutory* goals in his article.[91] His own understanding of arm-twisting, however, is that there shall be no room for the agency to pursue *extra-statutory* policy goals; thus, this American phenomena should be analogous only to Type IV (request for consensus), or to Type VI (bypassing statutorily proceeding) guidance within Group B. Professor Noah proposes that arm-twisting should be limited through the utilization of the doctrine of unconstitutional conditions doctrine and ultra vires doctrine, as well as through reforming administrative procedure.[92] It seems that he is attempting to limit arm-twisting within each agency's statutory programs, and if the arm-twisting cannot be regarded as part of statutorily delegated programs, such activity should be treated as illegal in the sense that it is not authorized by relevant statutes by resorting to either the doctrine of unconstitutional conditions or ultra vires. His proposal for procedural reform also appears to represent his supposition that arm-twisting must always be within the scope of statutory authorization. It is estimated that Americans may be more concerned with statutory authorizations caused by arm-twisting than with exploring possibilities towards positive evaluation, in certain contexts, of administrative pursuit of extra-statutory policy goals that have no basis, or authorizing provisions, in statutes or local ordinances, but that do not straightforwardly violate any existing statutes or local ordinances.

CONCLUSION

Japanese lawyers would certainly agree with Professor Rakoff's first hypothesis that the half-formal, half-informal procedure is generally regarded

89. Noah, *supra* note 64, at 876-95, 899-908 (arm-twisting in licensing, government contracting, voluntary recalls, adverse publicity, consent decrees, land use exaction, and criminal plea-bargaining); Spaeth, *supra* note 62, at 940-54 (discussing telephone regulation, broadcast regulation, and United States industrial policy).

90. *See* Noah, *supra* note 64, at 896-98 (sketching a typology of arm-twisting in terms of means and ends that are "explicitly authorized," "statutory ambiguity," and "explicitly prohibited").

91. *See id.* at 908-11.

92. *See id.* at 913-16, 929-41 (discussing limitations on agency "coercion").

as the most desirable. It should be noted, however, such a statement would not be made in Japan as an honorable retreat from the idealism of adversarialness, but rather an effort to install more procedural protection in the administrative process. As to Professor Rakoff's second hypothesis, it is sometimes argued in Japan, that lack of substantive rules should be remedied by some kind of procedural requirement. However, it may be that, to realize the second hypothesis, it is necessary to have the strong tradition of legalism that emphasizes adversarial procedural formats as a principal requirement of rule of law. Otherwise, it may be hard to generally require significant procedural substitutions to substantive rules.

In concluding this Article, I feel obliged to point out that there exists an ultimate parallel between the United States and Japan despite different types of thinking in informality discussion and different concepts of rule of law, as has been discussed so far. Both nations are struggling with their ambivalent feelings concerning what each traditionally prefers. Intensive and extensive inquiries into administrative informality by Japanese legal academics can be understood as a representation of Japanese ambivalent feelings towards such informal activities. A positive value of substantive informality in governance is considered to be that the government may be able to provide a quick and flexible way of pursuing public purposes, although fear of erosion of the rule of law and accompanying vagueness can never be denied. Such vagueness not only raises a question of legitimacy, but also can lead to inefficiency and unfairness, rather than flexibility and satisfaction. These ambivalent feelings do exist among Japanese lawyers. As a result, the utility of informality is praised, while informality is argued against as a deviation from the path of the rule of law. A parallel seems to exist in the United States, evident in the fact that Americans have a strong tradition of formalism in governance, but they, from time to time, become critical of the increases in cost and inefficiency caused by over-judicialization.[93]

93. For a similar view in criminal justice, see Jean Choi DeSombre, *Comparing the Notions of the Japanese and the U.S. Criminal Justice System: An Examination of Pretrial Rights of the Criminally Accused in Japan and the United States*, 14 UCLA PAC. BASIN L.J. 103 (1995).