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SOCIALIST BUREAUCRATS?
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FROM JAPAN

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Capitalist Politicians, Socialist Bureaucrats? Legends of Government Planning from Japan

by Yoshiro Miwa & J. Mark Ramseyer*

Abstract: The debate over the role bureaucrats played in the postwar Japanese economy has been the wrong debate. To date, it has been a debate about effectiveness: the government tried to promote growth through interventionist policies, but did it succeed? In fact, the government never tried. Majority voters did not want interventionist bureaucrats, and consistently rejected communist and socialist candidates offering interventionist approaches. Instead, they chose candidates from the centrist, decidedly non-interventionist party. Reflecting those electoral market exigencies, politicians in power seldom gave their bureaucrats the authority to alter market investment and production decisions.

To explore these issues, we first investigate the tools Japanese politicians gave their bureaucrats. We find that bureaucrats lacked the mechanisms they would have needed to shape significantly production or investment. Second, we reexamine the central anecdote behind the legend of Japanese bureaucratic power: the 1965 showdown between Sumitomo Metals and MITI. We find that Sumitomo rather than MITI won the battle. Last, we survey the case law on bureaucratic power, and find that Japanese courts strictly restricted bureaucratic discretion.

There is a broader moral here, and it goes to the perils of relying on secondary research. For obvious reasons, Japanese politicians and bureaucrats encouraged stories that disguised ordinary pork-barrel policies as growth-enhancing intervention. Although the tales they told differed little from the self-serving accounts politicians tell everywhere, in the 1960s most Japanese social scientists were Marxists. Understandably, they had little sense of how markets worked, and no skepticism at all about the powers of governments to plan. Yet it is their accounts on which modern observers rely for their picture of the postwar Japanese political economy. Had modern scholars done more than recount the conclusions in the secondary literature, they would have noticed that they were merely adding academic gloss to political sloganeering. Unfortunately, they never tried.

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Something is wrong with this picture. Japanese voters elected capitalist politicians, yet those politicians hired bureaucrats who implemented a nearly socialist industrial policy. Japanese voters endorsed a half-century of what historian John Dower called “conservative hegemony,”¹ yet those conservatives assigned their hired hands what sociologist Ronald Dore called “developmental state control over the long-term growth and structure of the economy.”²

Such is the standard picture we paint of the postwar Japanese economy, yet something is wrong with it and the standard explanations explain nothing. Some scholars claim Japanese politicians could not control their bureaucrats. They beg the question of why the politicians could not, and why voters would reelect people who cannot run the bureaus they head. Others suggest Japanese voters just liked government intervention. They, in turn, beg the question of why voters picked self-consciously capitalist, non-interventionist politicians over communist and socialist candidates who extolled the virtues of just such intervention.

In fact, the standard picture is wrong, for Japanese bureaucrats never did pursue interventionist policies.³ They never pursued them, because politicians rarely gave them the means to pursue them. Politicians did not give them the means, because voters did not want an interventionist government. Reflecting those preferences, politicians in the majority party instead kept their decidedly capitalist and non-interventionist approach central to economic policy.

That Japanese voters did not want heavy-handed state control should not surprise. From 1950 to 1990 American voters elected Republican Presidents seven out ten times. Why expect rich voters elsewhere necessarily to prefer anything else? Reflecting those capitalist voter preferences, the Japanese government neither successfully promoted growth through an interventionist policy (call it “industrial policy”), nor tried such a policy but failed. It never tried to promote growth through an interventionist policy. Having lived through the war, voters knew the perils of government planning and the risk of corruption that bureaucratic discretion could bring. They wanted none of it, and elected politicians committed to a hands-off-the-economy approach.

¹ John W. Dower, *Peace and Democracy in Two Systems: External Policy and Internal Conflict*, in Andrew Gordon, ed., *Postwar Japan as History* 3, 14 (Berkeley: University of California Press, 1993).

² Ronald Dore, *Flexible Rigidities: Industrial Policy and Structural Adjustment in the Japanese Economy, 1970-80* 25 (Stanford: Stanford University Press, 1986). Dore here echoes Chalmers Johnson.

³ The many references in the political science literature to “market conforming” industrial policy in Japan run afoul of basic logic. Either a policy alters market outcomes or it does not. By definition, the former is not “market conforming.” Equally by definition, the latter is a policy without an effect.

The tales about the growth-promoting Japanese bureaucrats tell us less about Japan than they tell us about ourselves, for at root the tales are academic urban myths: tales that say nothing about what is true, and everything about what we wish were true. Dispensed by politicians eager to disguise pork-barrel handouts, they acquired respectability in Japan through the academic establishment. From the 1950s to the 1980s, Marxists dominated that establishment. Predictably, they showed inimitable skepticism toward everyone in business, and virtually none toward the men and women on the government payroll.⁴

In effect, Marxist professors simply transformed ordinary political pamphleteering into an academic orthodoxy. Through Western observers looking for variously congenial anecdotes, that orthodoxy then emigrated to the U.S.⁵ For those observers, the myth was congenial to a fault. Some used it to push an “industrial policy” domestically. Many saw it as ammunition in their interminable brawls over the cultural relativity of theory. Still others used it to motivate their latest models of “market failure” or “strategic” trade theory.

We begin this study by summarizing the genesis of the legend of Japanese bureaucratic intervention (Section I). We then consider the power bureaucrats actually wielded. We examine both the benefits they could confer (Section II) and the penalties they could impose (Section III).

⁴ Although Marxism permeated social science departments in Japan more fully than it ever did in the U.S., readers should recognize how much U.S. departments have changed. In the 1960s, even economists in the U.S. were far less skeptical of central planning than they are today. After all, Alexander Gerschenkron, *Economic Backwardness in Historical Perspective* (Cambridge: Harvard University Press, 1962), credited central planning with transforming rural Russia into the industrial U.S.S.R. Wassily Leontief thought the U.S.S.R. economy “directed with determined ruthless skill.” See Paul Krugman, *The Myth of Asia’s Miracle*, in *Competitiveness: An International Economics Reader* 63, 66 (New York: Foreign Affairs, 1994). And Kazushi Ohkawa & Henry Rosovsky, *Japanese Economic Growth: Trend Acceleration in the Twentieth Century* 225 (Stanford: Stanford University Press, 1973), could assure their colleagues that “Japan retained some advantages of capitalism, i.e. efficient producers, while reaping certain benefits of socialism, i.e. considerable public control of the economic effort and direction.”

⁵ Ethnic stereotypes may have contributed to this western willingness to believe the legend. In *War without Mercy: Race and Power in the Pacific War* (New York: Pantheon, 1986), John W. Dower finds racism under every figurative war-time rock, and in *Embracing Defeat: Japan in the Wake of World War II*, 217 (New York: W.W. Norton, 1999), claims even “the ‘old Japan hands’ were second to none in belittling the capacity of ordinary Japanese to govern themselves.” The “top of the social structure formulated the purposes and objectives” of the country, he quotes one of the occupation specialists explaining, “and the people down below conformed.” *Id.*, at 218. If these stereotypes differ substantially from their modern counterparts (witness Ronald Dore, *Stock Market Capitalism: Welfare Capitalism* 156 [Oxford: Oxford University Press, 2000]: in Japan, the notion that “government should, and in the proper hands could, be a repository of virtuous and benevolent leadership was an almost universal assumption”), we do not see how.

Nonetheless, if such stereotypes did pervade the occupation, they could well have shaped policy. In reminiscences first published in 1965, Misutaa doji no ban’yu [The Courage of Mr. Dodge], in “Bungei shunju” ni miru Showa shi [Showa History as Seen in “Bungei shunju”] v. 2, 112 (Tokyo: Bungei shunju sha, 1988), Kiichi Miyazawa (then secretary to the Minister of Finance; later the Prime Minister) describes the early occupation bureaucrats (bureaucrats celebrated by academics like Dower, *Japan in War & Peace: Selected Essays* 166 (New York: New Press, 1993), as “fundamentally progressive”) as using almost Soviet-style command-and-control policies. Presumably, bureaucrats would be more likely to think Soviet-style policies would work if they also thought people obediently did as they were told.

In evaluating the penalties, we focus on the central, mythic anecdote behind the tales of bureaucratic power (Section IV): Sumitomo Metal's 1965 battle against MITI. When MITI told Sumitomo to cut production that year, Sumitomo refused. According to the standard accounts, MITI responded by threatening to cut the amount of coking coal Sumitomo could legally import. Sumitomo caved, and the point was clear for all to see -- MITI could and would enforce its vision for the economy. In fact, as widely as this account pervades the literature, it is false: Sumitomo won the dispute, not MITI. Scholars who claim otherwise merely confuse MITI's face-saving press releases for fact.

We conclude by examining the case law on government intervention (Section V). Although the standard accounts claim that courts contributed to bureaucratic power, we show instead that they rigorously limited bureaucratic discretion. As voters did not want a powerful bureaucracy, legislators did not give bureaucrats the power to shape production or investment decisions. Neither did judges facilitate bureaucratic power.

The scope of this subject obviously extends beyond a single article. In a variety of publications, we explore some of the other facets involved. We cite to our other English work when relevant, but urge readers who read Japanese to consult our forthcoming book on Japanese economic regulation.⁶

I. The Legend

A. The Literature:

One would be hard-put to prove where the tales about Japanese growth-promoting bureaucrats began, but if politicians and bureaucrats did not invent them they had every incentive to repeat them.⁷ Politicians transfer rents in all modern democracies, and they transferred them in Japan. They cover their tracks in all modern democracies, and they covered them in Japan as well.

To cover their tracks, Japanese politicians in the ruling party (the Liberal Democratic Party, or LDP) recited the tales of growth-promoting bureaucrats whenever convenient. When the economy doubled in less than a decade, they lost no time taking credit. Had not their prime minister announced his plan to do just that? The top bureaucrat at the Ministry of International Trade & Industry (MITI) even compared his team to Napoleon and Clausewitz. "[I]n the quarter of a century since" World War II, he declared, it had created on Japan's "cramped land area a giant economy that ranks second in the free world."⁸

⁶ Yoshiro Miwa & J. Mark Ramseyer, *Sangyo seisaku ron no gokai: kodo seicho no shinjutsu* [Misunderstandings about Industrial Policy: The Truth about High Growth] (Tokyo: Toyo keizai shimpo sha, forthcoming 2002).

⁷ Given that the elite bureaucrats came from elite universities like the University of Tokyo, they may simply have regurgitated the Marxist theory they learned at school. Those scholars then adopted their students' claims as fact. A self-referential loop if ever there were one, the process resembles that of the perhaps apocryphal Yale law professor who, when told by a law journal that he needed to support his assertion with a footnote, asked a friend at the *New York Times* to make the point in an article, and then cited the *Times* article in his manuscript. For an elaborate inquiry tying the Marxist theory of the bureaucrats to the scholars (albeit an inquiry that treats the theory as truth), see Bai Gao, *Economic Ideology and Japanese Industrial Policy* (Cambridge: Cambridge University Press, 1997).

⁸ Quoted in Philip H. Trezise & Yukio Suzuki, *Social and Cultural Factors in Japanese Economic Growth*, in Hugh Patrick & Henry Rosovsky, eds., *Asia's New Giant: How the Japanese Economy Works* 753, 793 (Washington, D.C.: Brookings Institution, 1976).

Voters are not fools. They know politicians routinely claim credit for bull markets that coincide with their tenure. Just as routinely, they dismiss the claims. Japanese politicians may have announced they would grow the economy, the economy may have grown, and the politicians may have taken credit. Neat it may be, but voters know it is too neat by half. The politicians simultaneously promised to avoid central planning, and voters could tell which promises they kept.

Notwithstanding, in academic circles the legend persists. In truth, academics (and public intellectuals generally) always paid more attention to it than did voters. Take just the accounts in English. In sociology, Ezra Vogel early on discovered a Japanese “bureaucratic elite” that “boldly tr[ie]d to restructure industry, concentrating resources in areas where they think Japan will be competitive internationally in the future.”⁹ Even in 2001 Ronald Dore could list among the “main characteristics of the Japanese economy” a “strong role for the state” in “the promotion of economic growth and national competitiveness.”¹⁰

In political science, Chalmers Johnson famously fashioned his theory of the “plan-rational” “developmental state” on tales from Japan.¹¹ More recently, Brian Woodall found in MITI the “power, in the form of formal legal authorizations and informal ‘administrative guidance,’ to develop whatever industries it deemed critical to the health of the national economy.”¹² And in law, Curtis Milhaupt and Mark West characterized the post-war economic environment as one of “bureaucrat-orchestrated economic management.”¹³

Even many economists towed the line. Kazushi Ohkawa and Henry Rosovsky described Japan as “the only capitalist country in the world in which the Government decides how many firms should be in a given industry, and sets about to arrange the desired number.”¹⁴ Takafusa Nakamura claimed MITI exercised “strong administrative leadership” over firms that enabled them to “make daring investments in plant and equipment.”¹⁵ And Geoffrey Carliner declared that “[w]ithout government guidance and

⁹ Ezra Vogel, *Japan as Number One: Lessons for America* 65, 71 (Cambridge: Harvard University Press, 1979).

¹⁰ Ronald Dore, *Setting Agendas*, in *Anglo-Japanese Academy Proceedings* 19, 23-24 (International Center for Comparative Law & Politics, University of Tokyo, Publication No. 7, 2002); see also, e.g., Ronald Dore, *Flexible Rigidities: Industrial Policy and Structural Adjustment in the Japanese Economy, 1970-80* 25 (Stanford: Stanford University Press, 1986) (“control over the long-term growth and structure of the economy has been highly concentrated in a single ministry, MITI”).

¹¹ Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975* (Stanford: Stanford University Press, 1982).

¹² Brian Woodall, *Japan Under Construction: Corruption, Politics, and Public Works* (Berkeley: University of California Press, 1996).

¹³ Curtis J. Milhaupt & Mark D. West, *Law’s Dominion and the Market for Legal Elites in Japan* 44 (Univ. Mich. Olin Cen. L&E Studies, 02-006, and Columbia L. Sch. Cen. L&E Stud. 206, June 14, 2002).

¹⁴ Ohkawa & Rosovsky, *supra* note, at 223. The passage is reprinted from Henry Rosovsky, *What Are the Lessons of Japanese Economic History?*, in A.J. Youngson, ed., *Economic Development in the Long-Run* 229, 244 (London: Allen & Unwin, 1972).

¹⁵ Takafusa Nakamura, *The Postwar Japanese Economy: Its Development and Structure, 1937-1994* 18, 91 (Tokyo: University of Tokyo Press, 2d ed. 1995).

assistance, it is unlikely that Japan would be as strong as it is in semiconductors, machine tools, telecommunications equipment, or fiber optics.”¹⁶

Given the apparently impeccable academic credentials to the tales, from time to time politically ambitious U.S. intellectuals put them to domestic use. Ira Magaziner and Robert Reich (both would eventually land prominent jobs in the Clinton administration) used Japan to advocate an industrial policy in the U.S. In Japan, they declared, that policy “enhance[s] the creation of wealth by improving the international competitiveness of a number of growing businesses and by easing the transition of declining businesses.”¹⁷

One-time chair of the Council of Economic Advisors Laura D’Andrea Tyson was no less zealous. In “the Japanese variant of capitalism,” she and a co-author announced, “markets are emphasized as a source of growth rather than of short-run efficiency.” As a result, “a primary role of government is to supply incentives to promote growth through markets.”¹⁸

Soon, such became the orthodoxy. In his standard text on the Japanese economy, Takatoshi Ito wrote that “Japan’s rapid economic growth, supported by high productivity growth in many industries, may be seen as evidence of successful industrial policy.”¹⁹ Indeed, even as Paul Krugman battled Magaziner and Reich over domestic programs, he found “no question” that “before the early 1970s the Japanese system was heavily directed from the top, with the MITI and the Ministry of Finance” working “to push the economy where they liked.”²⁰

B. The Issues:

On “improving” upon market outcomes, one might plausibly ask why the Japanese government would have tried. An enormous literature in political science and economics suggests most democratic governments use their regulatory programs to transfer wealth to supporters. Seldom do they use them to “improve” upon market outcomes. If the standard dynamics operate in Japan, the post-war Japanese government should not have been trying to accomplish any of the goals usually attributed to it.

One might properly ask the question, but we table it. Instead, we simply ask whether politicians gave bureaucrats the means. More specifically, we ask whether they gave their employees in the bureaus the tools they would have needed to promote growth.

¹⁶ Geoffrey Carliner, *Industrial Policy for Emerging Industries*, in Paul R. Krugman, ed., *Strategic Trade Policy and New International Economics* 147, 156 (Cambridge: MIT Press, 1986).

¹⁷ Ira C. Magaziner & Robert B. Reich, *Minding America’s Business: The Decline and Rise of the American Economy* 6 (New York: Harcourt Brace Jovanovich, 1982). See also Ira C. Magaziner & Thomas M. Hout, *Japanese Industrial Policy* (Berkeley: Institute of International Studies, University of California, 1981); Robert B. Reich, *Tales of a New America* 231 (New York: Times Books, 1987).

¹⁸ Laura D’Andrea Tyson & John Zysman, *Preface: The Argument Outlined*, in Chalmers Johnson, Laura D’Andrea Tyson & John Zysman, *Politics and Productivity: The Real Story of Why Japan Works* xiii, xvi ([New York]: Ballinger, 1989).

¹⁹ Takatoshi Ito, *The Japanese Economy* 201 (Cambridge: MIT Press, 1992).

²⁰ Paul Krugman, *The Age of Diminishing Expectations: U.S. Economic Policy in the 1990s* 140 (Cambridge: MIT Press, 3d ed., 1997).

The point is crucial, for absent those tools they could not have promoted growth, good intentions or no.

We assume few Japanese firms follow otherwise unprofitable government instructions except under duress. To be sure, western observers -- even economists -- have sometimes suggested the contrary. In the early 1970s (just a few years -- as we explain below -- after the major newspapers plastered their pages with accounts of Sumitomo Metals' insistence that MITI lacked any right to tell it to cut production), Ohkawa and Rosovsky suggested that "no Japanese would dare ask" a MITI bureaucrat what legal basis he had for his instructions.²¹ "Japan is fuzzy kind of society," Krugman more recently declared, where firms behave out of "habits of deference to central authority" rather than by "the hard-edged legalisms that Americans ... expect."²² We find such stereotypes bizarre, and -- perhaps too optimistically -- assume our readers agree.²³

To induce a firm to comply with its instructions, Japanese bureaucrats would have needed either to dispense subsidies lavish enough to make compliance worth the firm's while, or to impose punishments large enough to do the same. As we show in this essay, they rarely controlled either. We briefly survey the subsidies in Subsection II, and focus on the punishments in Sections III through V.

II. Subsidies?

A. Loans:

1. The claims. -- Most western observers rightly note that MITI -- the ministry generally thought central to Japanese "industrial policy" -- never controlled substantial direct subsidies. Those who focus on the benefits it dispensed generally recite instead its influence over either government or private loans (or both). Some observers, for example, claim that it could influence the extension of low-interest loans from the Japan Development Bank (JDB). Thus, Richard Caves and Masu Uekusa cite a U.S.-government "guide for the American businessman" for the proposition that MITI "offers positive inducements through its influence over access to the generous lending facilities of the public Japan Development Bank."²⁴

²¹ Ohkawa & Rosovsky, *supra* note, at 223, reprinted from Henry Rosovsky, What are the 'Lessons' of Japanese Economic History? in A.J. Youngson, ed., *Economic Development in the Long Run* 229, 244 (London: Allen & Unwin, 1972).

²² Krugman, *supra* note, at 139-40. Similar stereotypes are remarkably common among otherwise hardnosed scholars. For example, legal scholars Litt, Macey, Miller and Rubin asserted that: "Open conflict is anathema to [Japanese decision-makers]; they would regard a public challenge to their announced decision as either an insult or a disgrace." David G. Litt, Jonathan R. Macey, Geoffrey P. Miller & Edward L. Rubin, *Politics, Bureaucracies, and Financial Markets: Bank Entry into Commercial Paper Underwriting in the United States and Japan*, 139 U. Pa. L. Rev. 369, 435 (1990). Economist Yamamura claimed that "any discussion of the effectiveness of the ministerial administrative guidance of an industry ... based solely on economic motivations is woefully inadequate." Kozo Yamamura, *Caveat Emptor: The Industrial Policy of Japan*, in Krugman, *supra* note (Strategic), at 169, 170.

²³ Readers in doubt would do well to consider the experience of the Japanese government during the Second World War. Even when popular support for the war was at its height, the government could not direct the economy in ways it wanted. See Yoshiro Miwa, *Seifu no noryoku* [The Competence of the State] (Tokyo: Yuhikaku, 1998).

²⁴ Caves & Uekusa, *supra* note (book), at 150.

Observers argue that MITI also influenced the loan decisions of private banks. Crucially, the argument depends on the claim that Japanese firms in the 1950s and 1960s raised capital in a rationed market. The government capped interest rates at sub-market levels, observers explain. Given the absence of market-clearing interest rates, it could determine bank access by showing or withdrawing support for particular firms. Quoting the government guide again, Caves and Uekusa declare that MITI's "support for the project at hand ... is most helpful in obtaining loans from the commercial banks."²⁵

2. The substance. -- As we explain in detail elsewhere, both of these claims are false.²⁶ First, although the JDB did offer subsidized loans, primarily it loaned to firms in ocean shipping. From 1961 to 1970, the JDB routed them over a third of its entire loan base (an average of 204 billion yen a year). To shipbuilding firms preparing vessels for export, the government routed nearly half its Export-Import Bank loans (a loan base averaging 247 billion yen a year).²⁷

Despite the extensive subsidies embedded in the loans, shipping firms did not find them crucial.²⁸ Through the mid-1970s, the fastest-growing firm in the industry was Sanko Steamship. From 1964 to 1973, its market capitalization climbed from 3.6 billion yen to 514 billion. That growth it financed on its own. To borrow from the JDB, it had to accept terms explicitly binding it to a variety of government controls. Those controls it did not want, so in the mid-1950s it announced it would no longer take government loans. Spurning government loans and flouting government policy, it raised funds privately and grew faster than anyone else in the industry.²⁹

Second, again as we show elsewhere there was no private debt to ration -- for bank loans cleared at market rates.³⁰ The government did not suppress interest rates, and banks loaned funds at market interest rates on the basis of market risk measures. Neither through subsidized government loans nor rationed private credit could MITI have affected the investment decisions firms made.

B. Caveats:

What few benefits Japanese bureaucrats did control, they seldom used to influence production or investment. Given the fungibility of financial subsidies, firms can -- and will -- undo the effect of most nominally "targeted" subsidies with offsetting

²⁵ Id. at 488.

²⁶ Yoshiro Miwa & J. Mark Ramseyer, Directed Credit? The Loan Market in High-Growth Japan, __ J. Econ. & Mgmt. Strategy __ (forthcoming 2003).

²⁷ Miwa & Ramseyer, supra note (Directed), at __. We do not contest the notion that through the subsidies it transferred rents to favored firms. We do contest the notion that those rents altered important decisions at the margin -- a point crucial to claiming that the government could have promoted growth by shaping marginal investment or production decisions. See Yoshiro Miwa & J. Mark Ramseyer, Nihon no keizai seisaku to seisaku kenkyu [Japanese Economic Policy and Policy Research], 52 Keizai kenkyu 193 (2001).

²⁸ Miwa & Ramseyer, supra note (Directed), at __.

²⁹ Miwa & Ramseyer, supra note (Directed), at __.

³⁰ Miwa & Ramseyer, supra note (Directed), at __.

adjustments.³¹ The JDB used its loan program to route subsidies to shipbuilding firms, but seldom in ways that changed their investment calculations on the margin.³² The Ministry of Finance (MoF) did control some tax subsidies, but seldom in ways that altered basic economic decisions.³³ MITI has more recently organized research colloquia, but only in a few industries, and rarely did so before the mid-1970s anyway.³⁴ The point is not that bureaucrats controlled no subsidies. The point is that they controlled only a few, and -- a crucial distinction routinely missed by non-economists -- used the few to transfer rents rather than to alter basic investment patterns by changing a firm's marginal calculations.

III. Penalties?

For most of the industries within its ambit, MITI lacked any statutory basis to punish recalcitrant firms. Even with a statutory basis, it generally would have chosen to act informally, of course. Most regulators in most advanced capitalist countries choose to act informally, and for a simple reason: informality saves costs.³⁵ Yet when MITI regulated informally, in most cases it did so without a formal alternative. It regulated informally because it had no choice.³⁶

Curiously, observers routinely claim that MITI was able to bind the firms through these informal directives despite its lack of statutory power. Logically, this presents a problem: absent a statutory basis for what it did, MITI should not have been able to make firms comply. After all, if a firm decided to flout the directive, it could not credibly have threatened to formalize the directive and enforce it in court.

That logic goes only so far, observers argue. Japan is different. In Japan, even without a legal basis for its acts, MITI could control. And in claiming that MITI could control, no source in English has had more impact than Frank Upham's award-winning 1987 book, Law and Social Change in Postwar Japan.³⁷

To focus our discussion, we take Upham's book as our point of departure (parenthetical page numbers refer to the book). We do not do so because of any peculiar faults, for its faults are not peculiar. Instead, we do so because its faults are common to

³¹ Miwa & Ramseyer, *supra* note (Nihon no keizai).

³² Miwa & Ramseyer, *supra* note (Directed), at ___.

³³ Yoshiro Miwa & J. Mark Ramseyer, *The Legislative Dynamic: Evidence from the Deregulation of Financial Services in Japan* (Harvard Law School John M. Olin Center for Law, Economics & Business, No. 373, July 2002).

³⁴ Ryuhei Wakasugi, *Gijutsu kakushin to kenkyu kaihatsu no keizai bunseki* [The Economic Analysis of Technical Innovation and Research Development] 153-55 (Tokyo: Toyo keizai shimpo sha, 1986).

³⁵ Although much of what MITI did goes in the literature by the idiosyncratic term "administrative guidance," that guidance was never anything other than ordinary informal regulation.

³⁶ A point rightly stressed in John O. Haley, *Administrative Guidance versus Formal Regulation: Resolving the Paradox of Industrial Policy*, in Gary R. Saxonhouse & Kozo Yamamura, eds., *Law and Trade Issues of the Japanese Economy: American and Japanese Perspectives* 107 (Seattle: University of Washington Press, 1986).

³⁷ Frank K. Upham, *Law and Social Change in Postwar Japan* (Cambridge: Harvard University Press, 1987).

the literature more generally. We take it as our point of departure because of its sheer prominence in the field.

In arguing that Japanese firms could not contest informal government directives, Upham makes three distinct (and widely accepted) claims:

- (x) precisely because its informal directives were informal, most of what MITI did was not amenable to judicial review;
- (y) when courts did review MITI's directives, they allowed the ministry extremely broad discretion; and
- (z) consequently, MITI bureaucrats could force firms to comply with a directive by threatening to punish them in a completely unrelated arena.

In the discussion below, we track this argument point by point. To illustrate the power MITI wielded, Upham focuses on an anecdote with legendary status: Sumitomo Metal's 1965 battle with MITI. He then explains the purported outcome of the battle through Japanese case law. In Section IV we reexamine this epic battle, and in Section V turn to the case law. Our conclusion is simple: MITI lost its battle with Sumitomo; courts did review government action; and courts did not enforce directives lacking a statutory basis. More simply, bureaucrats could not necessarily force reluctant firms to comply.

IV. Sumitomo Metals

A. The Legend:

1. Upham. -- (a) The lesson and context of the dispute. To Upham as to virtually all observers of Japanese economic policy, the message of the Sumitomo Metals dispute lay in MITI power. MITI's "legal powers were at their height in the 1960s" (176), explains Upham, and at the foundation of those powers lay the statutes governing foreign exchange and trade. The statutes were broad. "Overriding characteristics" of the statutes involved were "the wide scope of authority delegated to MITI and the vagueness of the standards by which MITI [was] to exercise that authority" (169).

By Upham's account, MITI leveraged its power over foreign exchange and trade into control over fields where it otherwise lacked authority. It used its power over foreign exchange and trade, in other words, to force firms to comply with entirely unrelated directives. The statutes on foreign exchange and trade thus gave it "enormous power over individual firms and whole industries" (176). The courts then broadened that power further still: "the doctrines governing judicial review of administrative action" left MITI "virtually unrestrained legally" (id.).

Seldom did firms challenge MITI's authority, writes Upham, and for good reason: they would have lost. By making an example of Sumitomo Metals in the steel industry, MITI showed any firm with illusions of independence that it could and would manipulate its "abstract legal powers" to "ensure compliance" (176). Graphically and brutally, it showed the business community that it faced "virtually no statutory restrictions on [its] regulation of foreign trade" (179).

(b) The confrontation.³⁸ Consider the battle between Sumitomo Metals and MITI, as recounted by Upham. Through early 1965, Japanese steel makers had faced “a severe decline in the demand for steel” (177). To coordinate their response, they “created a committee to develop strategies” through their trade association, the Iron and Steel Federation (id.). “By May 26 the committee decided that a reduction in production was necessary to maintain appropriate prices.” By the end of the next month “MITI’s Heavy Industries Bureau requested that the Federation immediately organize a production cartel” (id.).

This MITI-coordinated group proposed production restraints. Although most industry members planned to comply with its terms, Sumitomo Metals wanted to produce more. It declared it would ignore its quota. “MITI’s response was swift, harsh, and public,” writes Upham. “On the afternoon of November 19, Vice-Minister Sahashi Shigeru announced that MITI would use its formal legal power ... to limit Sumitomo’s import of coking coal” (178-79). When “Sumitomo responded that such public coercion violated its right as a private company to manage its own affairs and threatened to take legal action” (179), the battle was joined.

(b) The denouement. According to Upham, the battle was one Sumitomo Metals lost. Indeed, it was not even close. “[B]y leaving the system of industrial cooperation, Sumitomo had become a pariah and had to be totally boycotted by the other firms” (179). By December, its president found himself reduced to making the rounds of “the presidents of the major steelmakers to pledge his future cooperation” (181). The firm did convince MITI to include “a wider choice of reference periods for the FY66 quota.” This was but “a minor concession,” however, and “turned out to be of little significance economically because the informal cartel was discontinued in August 1966” (254 n.21).

“Sumitomo Metals’ refusal to cooperate thus threatened,” Upham explains, “the ‘orderly competition’ that is the preeminent norm of the Japanese steel industry” (182). It was a norm MITI actively maintained. “Although the bureaucrats may say that the resolution of intra-industry disputes is up to the industry members themselves,” claims Upham, “it is the relevant MITI bureau that sets limits, facilitates coordination, and approves and enforces the final agreement” (183). Through this “oversight role,” MITI helps “ensur[e] that the final outcome is consistent with [its] perception of the national interest” (id.).³⁹

Given Japanese standards of judicial review, it was a norm Sumitomo could not realistically have challenged. Not until MITI refused its application to import coal could it “have had its day in court” (183). It would have been a day to rue. “At that point, it

³⁸ For background to the regulation in the steel industry, see Yoshiro Miwa, *Coordination within Industry: Output, Price, and Investment*, in Ryutaro Komiya, et al., eds., *Industrial Policy of Japan 475* (Tokyo: Academic Press, 1988); Yoshiro Miwa, *Firms and Industrial Organization in Japan* ch. 9 (Houndmills: Macmillan, 1996).

³⁹ Upham writes that “the substantive norm that underlay the resolution of the Sumitomo incident was not greed, but stability” (181). In more recent writings on other industries, he stresses the way MITI policy has instead served merely to transfer rents by helping to enforce private cartels. E.g., Frank Upham, *Privatizing Regulation: The Implementation of the Large-Scale Retail Stores Law*, in Gary D. Allinson & Yasunori Sone, eds., *Political Dynamics in Contemporary Japan* 264 (Ithaca: Cornell University Press, 1993).

would have had to prove that MITI had used illegal criteria or violated statutory standards in withholding Sumitomo's import permit. Given the lack of clear [statutory] standards ..., such a showing would have been difficult indeed" (id.).

2. Others. -- The tale Upham tells is one with canonical status. Scholars of Japanese regulation routinely cite the Sumitomo Metals dispute, and almost uniformly tell the same story: MITI issued its informal directives; Sumitomo refused to comply; MITI threatened to punish it (or actually punished, in some accounts) through its foreign exchange and trade powers; and Sumitomo caved.⁴⁰

Consider Richard Caves and Masu Uekusa's classic study of Japanese industrial organization:⁴¹

When a 1964 recession led the steel makers to negotiate output quotas among themselves, Sumitomo initially refused to go along with the low quota dealt to it. The company's president was summoned to [MITI], however, and wisdom prevailed.

Elsewhere in the study, they explain how the ministry was able to make that wisdom prevail:⁴²

A major sanction until the mid-1960s was MITI's authority over the allocation of foreign exchange for purchasing essential inputs. For example, Sumitomo Steel during 1965 recession refused to restrict the growth of its capacity in line with guides recommended by MITI, and the ministry retaliated by limiting the firm's access to imported coking coal.

MITI organized a cartel, Sumitomo refused to comply, MITI cut its coal quota, and Sumitomo surrendered.

Chalmers Johnson tells a similar tale. Challenged by Sumitomo Metals, MITI "stuck to [its] guns and won." Although "Sumitomo's export quota was also raised,"⁴³ ultimately "the confrontation" ended when Sumitomo "back[ed] down."⁴⁴ Takashi Wakiyama writes that "MITI threatened to cut the company's import quota of coking coal and finally persuaded the company to follow its request."⁴⁵ Robert M. Uriu reports

⁴⁰ We found only two exceptions in the Western literature. First, Kent Calder correctly notes: "In the Sumitomo Metals case, MITI pressured Sumitomo strongly to refrain from expanding crude-steel production capacity amid the 1965 recession, but Sumitomo ... went ahead with expansion plans nevertheless." See *Strategic Capitalism: Private Business and Public Purpose in Japanese Industrial Finance* 321 n.56 (Princeton: Princeton University Press, 1993). Second, John O. Haley, *supra* note, at 117, rightly observes that "Sumitomo was able to force MITI to retract this action [i.e., the threatened imports restraint] and increase its share of production."

⁴¹ Richard E. Caves & Masu Uekusa, *Industrial Organization in Japan* 55 (Washington, D.C.: Brookings, 1976).

⁴² Caves & Uekusa, *supra* note, at 149-50.

⁴³ Johnson, *supra* note (MITI), at 271.

⁴⁴ Chalmers Johnson, *The Reemployment of Retired Government Bureaucrats in Japanese Big Business*, 14 *Asian Survey* 953, 958 (1974).

⁴⁵ Takashi Wakiyama, *The Nature and Tools of Japan's Industrial Policy*, 27 *Harv. Int'l L.J.* 467, 473 (1986).

that “MITI cracked down” and “eventually prevailed.”⁴⁶ Karel van Wolferen finds in “the way Sumitomo Metals in Osaka was forced to go along with a production cut ordered by MITI in 1965” a “famous example” of MITI’s power.⁴⁷

B. Intellectual Consequences:

Almost single-handedly, the tale has created and sustained the notion that MITI used its controls over foreign exchange and trade to force firms to comply with otherwise unrelated directives. Consider just the most prominent of the accounts.⁴⁸ According to Caves & Uekusa, for example, MITI “holds a general implied administrative responsibility and authority that goes well beyond what is customary in the United States A major sanction until the mid-1960s was the MITI’s authority over the allocation of foreign exchange for the purchase of essential inputs.”⁴⁹ Indeed, “[c]ontrols over international transactions have often served as a club when gentle persuasion failed.”⁵⁰

Kozo Yamamura echoes the argument. MITI, he writes:⁵¹

⁴⁶ *Troubled Industries: Confronting Economic Change in Japan* 109, 27 n.14 (Ithaca: Cornell University Press, 1996).

⁴⁷ van Wolferen, *supra* note, at 345.

⁴⁸ Other accounts include Ezra F. Vogel, Introduction: Toward More Accurate Concepts, in Ezra F. Vogel, ed., *Modern Japanese Organization and Decision-Making* xiii, xv (Berkeley: University of California Press, 1975) (MITI “maintained considerable leverage in getting companies to accept ‘administrative guidance’ because of its capacity to make decisions about foreign exchange”); John Haley, *The Context and Content of Regulatory Change in Japan*, in Kenneth Button & Dennis Swann, eds., *The Age of Regulatory Reform* 124, 129 (Oxford: Oxford University Press, 1989) (the foreign exchange and trade laws “became the principal statutory props for what now, in hindsight, appears as a coherent ‘industrial policy’”); Eugene J. Kaplan, *Japan: The Government-Business Relationship -- A Guide for the American Businessman* 145 (based on a study by Thomas M. Hout and James C. Abegglen) (“Until 1965 MITI directly controlled the importation and allocation among producers of both ore and coal through the mechanism of foreign exchange import quotas.... In this way, MITI could control the rate of production, and hence the rate of expansion, with reasonable effectiveness.”); Geoffrey Carliner, *Industrial Policy for Emerging Industries*, in Paul R. Krugman, ed., *supra* note (Strat TP), at 147, 152 (“MITI also used foreign exchange allocations to persuade individual firms to follow its ‘administrative guidance’ on specific actions such as mergers and new investments.”); Ulrike Schaede, *Understanding Corporate Governance in Japan: Do Classical Concepts Apply?*, 3 *Indus. & Corp. Change* 285, 290 (1994) (if bureaucrats “find a noncompliance with administrative guidance, they have numerous options to obstruct the business of the party concerned”).

⁴⁹ Richard E. Caves & Masu Uekusa, *Industrial Organization*, in Hugh Patrick & Henry Rosovsky, eds., *Asia’s New Giant: How the Japanese Economy Works* 459, 487-88 (Washington, D.C.: The Brookings Institution, 1976).

⁵⁰ *Id.* at 489 (ital. added). They repeat the claim in Caves & Uekusa, *supra* note, at 151. See also Richard E. Caves & Masu Uekusa, *Industrial Organization in Japan* 54 (Washington, D.C.: The Brookings Institution, 1976)(enforcement of guidance “has rested partly on specific enforcement powers held by MITI, first over the allocation of foreign exchange, later over the approval of licenses for imports of technology”).

⁵¹ Yamamura, *supra* note, at 173. Similarly, see George C. Eads & Kozo Yamamura, *The Future of Industrial Policy*, in Kozo Yamamura & Yasukichi Yasuba, eds., *The Political Economy of Japan: Volume 1, The Domestic Transformation* 423, 433 (Stanford: Stanford University Press, 1987) (“uncooperative or recalcitrant firms can expect, immediately or at a later date, indirect retribution from a disappointed or displeased ministry”).

played a vital role in formulation and implementation of Japanese industrial policy. During most of the rapid growth era the ministry had the power to allocate selectively foreign exchange for the purchase of imports; because nearly every Japanese industry relied heavily on imported raw materials, this discretionary power gave MITI a valuable ‘stick’ for prodding business.

Similarly, James Vestal explains that “MITI’s control over foreign exchange gave it enormous influence over corporations, since it could deny a firm access to needed imports of machinery or raw materials.”⁵²

To James Abegglen and Thomas Hout, MITI’s control over foreign exchange in the steel industry let it “control the rate of production, and hence the rate of expansion, with reasonable effectiveness.”⁵³ Dan Henderson characterized the “hallmark” of foreign exchange law as “unchallengeable discretion in practically every provision.”⁵⁴ And for Johnson, the foreign exchange law was simply “the single most important instrument of industrial guidance and control that MITI ever possessed.”⁵⁵

C. Sumitomo Metals as History:

1. Introduction. -- As critical a role in our understanding of Japanese bureaucratic power as the tale of a powerful MITI using its foreign exchange and trade powers to stare down upstart Sumitomo Metals may play, the tale is too tall by half. MITI never used its foreign exchange powers to punish Sumitomo Metals. Sumitomo never backed down. To our knowledge, at no time before had MITI even threatened to use those powers to enforce unrelated policies. When four years later it did use them to enforce unrelated policy, the courts declared the ploy flatly illegal. When municipal governments tried similar schemes, the courts voided them all. And when petroleum firms cut production and set prices under MITI’s supervision in the mid-1970s, the courts convicted them of criminal pricefixing.

As critical a role as the tale of Sumitomo Metals may play, the tale is simply false. Turn to the most significant aspects of the tale: whether MITI had designed the policies at stake in the dispute (Subsection C.2.), whether it punished Sumitomo Metals (C.3.), whether it won the dispute (C.4.), and whether it considered its controls over foreign exchange important (C.5.). In Section V., we ask whether the courts did let bureaucrats use their power in one field to induce firms to cooperate in another.

2. Whose interests did MITI represent? -- Begin with the question of on whose behalf MITI spoke (parenthetical references refer to contemporary newspaper accounts).

⁵² Industrial Policy and Japanese Economic Development, 1945-1990 110 (Oxford: Oxford University Press, 1993).

⁵³ Kaplan, *supra* note, at 145. The passage relates to the steel industry, a case study “prepared under contract” for the book “by Thomas M. Hout of the Boston Consulting Group under the direction of James C. Abegglen.” *Id.* at v.

⁵⁴ Dan F. Henderson, Access to the Japanese Market: Some Aspects of Foreign Exchange Controls and Banking Law, in Saxonhouse & Yamamura, *supra* note, at 131, 146.

⁵⁵ Johnson, *supra* note, at 194-95.

Was this dispute part of any “industrial policy” it sought to implement? In fact, it was not. Instead, the ministry was merely enforcing a private cartel.

For several years, the six major steel producers (Yawata, Fuji, Kokan, Kawasaki Steel, Kobe, and Sumitomo Metals) had met regularly to discuss capacity expansion plans. Facing lower industry demand, in early 1965 they discussed the possibility of coordinating production cuts. Although they (including Sumitomo Metals) agreed on the general principle, they disagreed on specifics. Sumitomo wanted to produce more than the others would allot it, but -- ostensibly as an emergency measure -- acquiesced anyway. Thereupon, on July 12 the presidents of the firms adopted production restraints for the second fiscal quarter (July-September 1965; the fiscal year for most Japanese firms begins in April). They keyed the restraints to 90 percent of the production rates they had maintained during October 1964-March 1965, a period during which they had not maintained production restraints.

The firms needed now to decide how to proceed. They did not want a private agreement. The agreement would not bind any of them, and potentially subjected them to criminal antitrust penalties besides. Neither did they want a statutorily authorized “depression cartel.” Although it let them skirt criminal liability for pricefixing, it still would not bind (Asahi, 11/20/65). Instead, they opted to approach MITI (Asahi, 7/13/65, 12/16/65). If the ministry endorsed their plans, they reasoned, they could both avoid criminal liability and bind each other to the cartel (wrong on both counts, as we explain below).

Of the six firms, Sumitomo Metals remained dissatisfied. At root, it wanted to produce more than the cartel allotted it. It had invested aggressively in new equipment and now sold abroad more than the others. To let it continue this strategy, it demanded quota that excluded exports.⁵⁶ It continued to negotiate with the other firms over these issues haphazardly through the summer. Apparently, it hoped that the others would defer to its misgivings by the end of the third quarter (December). When by November the other firms still had not acquiesced, it announced that it would no longer cooperate. MITI ordered it to cut production to the level demanded by the other five firms, and the battle was joined. “Production cutbacks should be decided strictly by agreement among the firms,” an indignant Sumitomo replied (Mainichi, 11/16/65). Should MITI try to punish us, “we intend immediately to file suit” (Nikkei, 11/28/65).

3. Did MITI punish Sumitomo? -- Did MITI try to punish? For all the attention scholars lavish on MITI’s apparent control, did it punish Sumitomo Metals? In fact, it did not. Although it talked of doing so, it never did. When Sumitomo Metals threatened to sue, it quickly backed down.

To force Sumitomo’s hands, MITI would have needed to take far more draconian measures than the steps observers typically relate. Crucially, Sumitomo held two months’ supply of coal in reserve (Nikkei, 11/20/65). Under its own plans, it hoped to produce 10 percent more than allowed under the industry quota. Suppose MITI allotted it the coal it needed for its cartel allocation. By even the crudest of calculations, it could have ignored the cartel and produced at its planned level for twenty months.

⁵⁶ Asahi, 7/13/65; Mainichi, 11/16/65. On Sumitomo’s other demands, see Miwa & Ramseyer, *supra* note (Sangyo), at ch. 9.

To force Sumitomo Metals to comply with the cartel, MITI would have needed to exhaust its coal reserves. To exhaust them in even six months, it would have needed to cut the amounts it allocated Sumitomo by a full third. Yet even that ploy Sumitomo Metals claimed ready to outlast. Let MITI starve it of coal, it declared. It would simply import pig iron directly (Nikkei, 11/20/65). After all, by the mid-1960s, pig iron imports (like most imports) were subject to no restrictions. MITI controlled coal imports only because of the role rural mining villages played in keeping the LDP in power.

These draconian measures were measures MITI never took. Ultimately, it never tried to exhaust Sumitomo's reserves. Instead, it allocated Sumitomo the full amount it needed for its cartel quota (Nikkei, 11/27/65, 12/8/65, 12/27/65; Asahi, 11/20/65).

4. Did MITI win? -- The most unnerving aspect of the standard accounts is the notion that MITI largely accomplished what it wanted. In fact, it did not. Instead, Sumitomo did.

Most fundamentally, Sumitomo Metals wanted exported steel placed outside the quotas. Although it favored a cartel in principle, it wanted one only in the domestic market. Ultimately, that was exactly the position MITI and the steel industry adopted.

Already by early December, MITI announced that it would consider placing exports outside the cartel (Mainichi, 12/3/65). When it finalized its deal with Sumitomo in mid-January, it did just that. During the third quarter (Oct.-Dec. 1965), Sumitomo had exceeded its cartel allocation by 88,000 tons. Of this amount, it had exported 55,000 tons. For the fourth quarter, the industry ignored the 55,000 tons exported and cut Sumitomo's allocation by only the remaining 33,000 (Nikkei, 1/12/66). Barely 40 days from the time it declared that it would no longer comply with the industry cartel, MITI had acquiesced.

By its own behavior during the ensuing months, Sumitomo Metals displayed the lesson it took away from the dispute: firms that ignore MITI get what they want. Come mid-1966, it adopted exactly the strategy again. The demand for steel had increased, and Sumitomo now wanted the production limits -- the very limits to which it had just agreed -- abolished. Its rivals refused, and insisted it keep its end of the deal. Up yours, Sumitomo seemed to reply. "Even if the industry decides to continue the crude steel adjustments into October," announced its president, "we have no intention of complying" (Nikkei, 8/25/66).

The ploy had worked for Sumitomo Metals in 1965, and it worked in 1966. The second quarter would have lasted through September, but not the production restrictions. Faced with Sumitomo's announcement that it would renege on its earlier deal, MITI terminated the restrictions at the end of August (Nikkei, 8/30/66).

5. How important to MITI was foreign exchange? -- Was the power over foreign exchange important to MITI? As noted earlier, Johnson finds the power "the single most important instrument of industrial guidance and control that MITI ever possessed." Caves & Uekusa claim that "[c]ontrols over international transactions have often served as a club when gentle persuasion failed" (ital. added). So -- was foreign exchange important to MITI? Again, the answer is no.

To the best of our knowledge, as of mid-1965 MITI had never used its powers over foreign exchange and trade to enforce unrelated policies (Nikkei, 11/20/65). Several

years earlier, at Diet committee hearings over what would become the Petroleum Industry Act, a senior MITI bureaucrat had faced inquiries about the powers that the new act would give the ministry over refining capacity. Would it use its powers over capacity to enforce other goals? Certainly, scholars since have assumed that it would. Upham (173-74), for example, put it most starkly:

If, for example, a petroleum company resists MITI's recommendations concerning production quotas during a period of oversupply, MITI need only remind the company of its powers in other areas, whether this involves controlling import of petroleum under the Foreign Exchange Control Law or approving plant expansion under the Petroleum Industry Law.

Replied the MITI representative: "Such actions would be undesirable."⁵⁷

To MITI, such action was not just "undesirable" in theory. It was action it did not take in fact. Contemporaneously with the Sumitomo Metals dispute, in the petroleum refining industry the ministry faced exactly the question posed the Diet committee. Through the industry trade association (the Petroleum Federation) the major refiners had tried to maintain a cartel. The Idemitsu kosan firm refused to follow the cartel's terms, and the Federation asked MITI to force Idemitsu to comply (Nikkei, 1/13/66, 1/19/66). MITI pleaded with Idemitsu and negotiated, but at no time did it threaten to punish the firm. Instead, by September 1966 it simply abandoned the production limits. Thereupon, Idemitsu rejoined the Federation.⁵⁸

To be sure, MITI did try the ploy once. A few years after the Sumitomo Metals dispute, MITI did try using its foreign trade powers to enforce unrelated policy. As we detail below, however, when it did the Tokyo District Court declared the ploy flatly illegal. If by doing so it damaged a firm, it owed the firm compensation.

At root, by the mid-1960s the Japanese government had heavily liberalized imports anyway. In many ways, the shift had begun in 1959 when it decided to integrate Japan more fully into the international economy. Where in 1960 only 44 percent of the volume of imported goods were unrestricted, by 1963 the fraction had risen to 92 percent.⁵⁹ Statements like those by Eugene Kaplan that "[u]ntil 1965, MITI directly controlled the importation and allocation among producers of ... ore ... through the mechanism of foreign exchange import quotas" are simply untrue.⁶⁰ Steel ore had instead been freely importable for several years.⁶¹

Among American scholars (in truth, among Japanese scholars as well) the claim that MITI used its powers in one area to enforce compliance in another has a long

⁵⁷ Statement of MITI Mining Bureau Chief Kawade, at the meeting of the Commerce & Industry Committee of the House of Representatives, Apr. 10, 1962. The connection between foreign exchange for coal imports and steel production, of course, is arguably even more tenuous than between petroleum refining capacity and production.

⁵⁸ Miwa & Ramseyer, *supra* note (Sangyo), at ch. 7.

⁵⁹ As calculated in Ryutaro Komiya, *Kogyohin ni kansuru NTB* [NTBs Relating to Industrial Products], in Kiyoshi Kojima & Ryutaro Komiya, eds., *Nihon no hikansei shoheki* [Japan's Non-Tariff Barriers] 71 tab. 2 (Tokyo: Nihon keizai shimbun sha, 1972).

⁶⁰ Kaplan, *supra* note, at 145.

⁶¹ Miwa & Ramseyer, *supra* note (Sangyo), at ch. 1.

pedigree. Back in 1965, William Lockwood had asserted that in the cotton spinning industry in the 1950s MITI “allocat[ed] foreign exchange for raw cotton imports only to cooperating spinners.”⁶² A decade later, Caves & Uekusa repeated the claim, nearly word-for-word: in cotton spinning, “MITI allocated foreign exchange for raw-cotton imports only to cooperating firms.”⁶³ Taken at face value, the claims seemed to imply that MITI could, as Yamamura put it, use its “power to allocate selectively foreign exchange for the purchase of imports” as a “discretionary ... ‘stick’ for prodding business.”

The implication is misleading at best.⁶⁴ The 1950s legal regime never authorized MITI to allocate foreign exchange among cotton-spinning firms in a “discretionary” fashion. Instead, the statute prohibited firms from spinning cotton thread unless they registered their spindles with the government. MITI then allocated the exchange among the firms on the basis of their number of authorized spindles.

Crucially, despite haphazard efforts MITI never enforced the ban on unregistered spindles. As a result, a thriving resale market in raw cotton emerged and the gray market in unregistered (and hence illegal) thread boomed. Hundreds of tiny firms competed, and by liberalization in 1961, they produced nearly 15 percent of the industry output.

V. The Case Law

A. Informality:

From time to time, western scholars have argued that the very informality of Japanese regulation prevented courts from adjudicating disputes over it. Upham put the claim starkly (171):

The Japanese Supreme Court has limited [review] to administrative acts that immediately and directly create or delimit private rights and duties. Under this definition, most of industrial policy is beyond judicial review. MITI almost invariably acts informally in a legal sense, and only a final and legally formal act directly creates legal rights and duties.

The logic does not follow. MITI may “act informally,” but that emphatically does not put “most of industrial policy ... beyond judicial review.” If a firm wants to contest an informal instruction, it need simply ignore it. By doing so, it will force the government’s hand. To induce it to comply, the government would then need to take more formal steps. When it did, in most cases the policy would be eminently reviewable.

All this is as true in the U.S. as in Japan. If the Japanese government regulates informally, so does the U.S. And if informal government advice is nonjusticiable in Japan, it is nonjusticiable here as well. There or here, a firm that wants to contest a government order must first force the government’s hand. When it does, almost always courts will adjudicate the dispute. They will adjudicate it in the U.S., and they will adjudicate it in Japan.

⁶² William W. Lockwood, Japan’s “New Capitalism,” in William W. Lockwood, ed., *The State and Economic Enterprise in Japan* 447, 501 (Princeton: Princeton University Press, 1965).

⁶³ Caves & Uekusa, *supra* note, at 55.

⁶⁴ The following discussion is drawn from Miwa & Ramseyer, *supra* note (Sangyo), at ch. 4.

B. Unrelated Retaliation:

1. The question. -- Given that MITI seldom had a statutory basis for its informal directives, scholars could not plausibly (and seldom try to) claim it could have enforced directives directly. Instead, they claim it could enforce instructions on issue A (like production quantities) by punishing a firm in an otherwise entirely unrelated field B (like foreign exchange). As Upham put it in the context of the petroleum industry, if “a petroleum company resists MITI’s recommendations concerning production quotas ... MITI need only remind the company of its powers in other areas”

The question is whether a court would let MITI do this. As noted earlier, MITI itself had said (precisely in the context of the petroleum industry) that it did not think it could. Upham, however, asserts (174):

There are no cases directly on point in the industrial policy context, but there are cases in other contexts that indicate that the range of permissible criteria is much greater in Japan than in the United States.

Most instructive is a series of land use planning cases.

Yet just as Upham mischaracterizes the Sumitomo Metals dispute, he misstates the case law. There are indeed cases on point, and the land-use planning cases are cases the governments lost.

2. Land-use litigation. -- Consider first the land-use cases. For the case law in the area, Upham relies on a 1984 article by Michael Young.⁶⁵ As Upham summarized Young’s work, the cases created (175):

a vaguely defined sphere of action -- one judicial opinion would define it by the ‘common sense of society’ -- within which the city can operate to ‘encourage’ developer compliance with land use policy that is without any specific legal basis.

The implication, to Upham, was stark (176): “the effect [of the cases is] to insulate almost entirely from judicial review most forms of bureaucratic activity in Japan.” Applied to MITI (184):

[I]f the land use planning cases are indicative, [the ministry’s] broad mandate may be enough to give MITI authority to use its specific legal powers, even those not directly related to the particular dispute, to encourage compromise among private parties whose dispute is within MITI’s jurisdiction.

In fact, the land-use cases indicate nothing of the sort.⁶⁶ In these disputes, suburban governments had typically told developers to donate money or land for the local schools. Although they had no statutory authorization for the policies, they could straightforwardly show how the developers were fueling population growth, and how that rapid growth was straining the schools. When developers balked at making the

⁶⁵ Michael Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 *Columbia Law Review* 923 (1984).

⁶⁶ The discussion below summarizes J. Mark Ramseyer, *Rethinking Administrative Guidance*, in Masahiko Aoki & Gary R. Saxonhouse, eds., *Finance, Governance, and Competitiveness in Japan 199* (Oxford: Oxford University Press, 2000), and J. Mark Ramseyer & Minoru Nakazato, *Japanese Law: An Economic Approach 206-211* (Chicago: University of Chicago Press, 1999).

“donations,” they stalled permits for the proposed condominium complexes or refused water or sewage facilities.

From time to time, uncooperative developers sued. Already at the time Young’s article appeared in 1984, the handwriting was on the wall. In 1978 prosecutors had filed criminal charges against the mayor of the Tokyo suburb Musashino who refused to provide water to a developer who would not give to the school system. By early 1984 the district court had already convicted him.⁶⁷ Let there be no mistake: the “administrative guidance” was not just illegal and unenforceable; it was a crime.

By 1985, one of the first of the land-use planning cases reached the Supreme Court. Held the court: the cities could not refuse permits to an uncooperative developer. If they did, they owed him damages from any resulting delays.⁶⁸ The High Court affirmed the criminal conviction against the Musashino mayor that same year,⁶⁹ and the Supreme Court affirmed in 1989.⁷⁰

By the late 1980s, developers were suing municipal governments the country over, and creating a legal avalanche. According to these cases, cities could not use their control over facilities like water to force a developer to negotiate. If a developer refused, he could force them to proceed. If they stalled, he could obtain an injunction.⁷¹ If their delays cost him money, he could collect damages.⁷² If he had already given land or money under the “administrative guidance,” he could sue for a refund.⁷³ And if the city had paid a developer damages for the mayor’s “guidance,” local citizens could sue the mayor to force him to reimburse the city.⁷⁴

3. The oil cartel cases. -- On whether firms could legally resist MITI directives, Upham states that “in the industrial policy context” there “are no cases directly on point.” Yet consider a pair of cases Upham himself discusses. Known popularly as “the oil cartel cases,” the dispute involved actions that paralleled those in the Sumitomo Metals incident.

⁶⁷ Kuni v. Goto, 1114 Hanrei jiho 10 (Tokyo D. Ct. Hachioji Branch Off. Feb. 24, 1984).

⁶⁸ Tokyo v. G.G. Nakaya honten, 1168 Hanrei jiho 45 (Sup. Ct. July 16, 1985).

⁶⁹ Kuni v. Goto, 1168 Hanrei jiho 41 (Tokyo High Ct. Aug. 30, 1985).

⁷⁰ Kuni v. Goto, 1328 Hanrei jiho 16 (Sup. Ct. Nov. 7, 1989).

⁷¹ Yamaki kentetsu, K.K. v. Musashino shi, 803 Hanrei jiho 18 (Tokyo D. Ct. Hachioji Branch Off. Dec. 8, 1975); see Sankei kanko, Y.G. v. Kyoto fu, 1116 Hanrei jiho 56 (Kyoto D. Ct. Jan. 19, 1984) (declaration of illegality); Shiroyama kankyo joka, Y.G. v. Tochigi ken, 1385 Hanrei jiho 42 (Utsunomiya D. Ct. Feb. 28, 1991); Arakawa kensetsu kogyo, K.K. v. Yamanashi ken, 1457 Hanrei jiho 85 (Kofu D. Ct. Feb. 24, 1992); Toho jutaku sangyo, K.K. v. Shime machi, 1438 Hanrei jiho 118 (Fukuoka D. Ct. Feb. 13, 1992); K.K. Yoka ichiba kanko kaihatsu v. Chiba ken, 1471 Hanrei jiho 84 (Chiba D. Ct. Oct. 28, 1992).

⁷² Tokyo v. G.G., Nakaya honten, 1168 Hanrei jiho 45 (Sup. Ct. July 16, 1985); Yamaki kentetsu, K.K. v. Musashino shi, 1465 Hanrei jiho 106 (Tokyo D. Ct. Hachioji Branch Off. Dec. 9, 1992); Fujisawa kensetsu, K.K. v. Tokyo to, 1074 Hanrei jiho 80 (Tokyo D. Ct. Nov. 12, 1982).

⁷³ Takahashi v. Musashino shi, 1506 Hanrei jiho 106 (Sup. Ct. Feb. 18, 1993); Senboku seikatsu kyodo kumiai v. Sakai shi, 1239 Hanrei jiho 77 (Osaka D. Ct. Sakai Branch Off. Feb. 25, 1987).

⁷⁴ Y.G. Seron nyusu sha v. Tanashi shi, 504 Hanrei taimuzu 128 (Tokyo D. Ct. May 11, 1983); see Goto v. Yamada, 1354 Hanrei jiho 62 (Sup. Ct. Mar. 23, 1990) (reimbursement of legal fees), aff’g 1186 Hanrei jiho 46 (Tokyo High Ct. Mar. 26, 1986), aff’g 1080 Hanrei jiho 40 (Tokyo D. Ct. May 27, 1983).

When Arab nations slashed the oil they would sell Japan in the early 1970s, petroleum refining firms had responded by cutting production and fixing prices. They negotiated their agreements through their trade association, the Petroleum Federation, but also called on MITI. Not only did they work closely with the ministry to design the cartel, they delegated to it the job of enforcing its terms on each other.

To implement the cartel, MITI used informal directives. In doing so, it could cite more statutory authority than it could have cited in the steel industry. In steel it could cite none at all -- hence its threat to manipulate the foreign exchange allocations. In petroleum it could at least point to the 1962 Petroleum Industry Act.⁷⁵ Through the Act it had the authority to deny applications for new refineries, to review annual production plans, to advise firms to cut output, and to propose resale price guidelines.

The Fair Trade Commission attacked the cartel anyway. The Ministry of Justice launched criminal prosecutions, and in 1980 the trial court straightforwardly convicted the firms.⁷⁶ Never mind that the Petroleum Industry Act authorized MITI to advise firms to cut output or set resale prices, explained the court. Advice does not bind, and the firms could validly have ignored it. Never mind that MITI had ordered the firms to follow the prices. The initiative had come from the firms themselves, and MITI had only enforced the cartel at their request. The firms had violated antitrust law, and the violation was a crime.

On appeal, in 1984 the Supreme Court duly affirmed the convictions (other than two of the firms and one of the executives).⁷⁷ The resulting case law echoes the law of the land-use planning cases. Following MITI's informal instructions was not just illegal. It was a crime.

4. COCOM. -- The oil cartel cases were not the first to signal MITI's inability to force reluctant firms to comply. Already in the 1960s the Tokyo District Court had held that MITI could not necessarily use its power over international trade to enforce unrelated policy goals.⁷⁸

The dispute involved exports to China. With the cold war in progress, the United States had tried to keep militarily sensitive technology away from the communist block. It would not sell the technology, and it did not want its allies selling the technology either. To coordinate the boycott it organized "COCOM," an unofficial agreement among its allies not to sell specified products to the Soviet block.

In the late 1960s, a Japanese group decided to ship industrial equipment to trade fairs in Beijing and Shanghai. Some of the equipment it wanted to ship appeared on the COCOM-prohibited list. When it sent MITI the export application required by the

⁷⁵ Sekiyu gyo ho [Petroleum Industry Act], Law. No. 128 of 1962.

⁷⁶ Japan v. Idemitsu kosan, 985 Hanrei jiho 3 (Tokyo High Ct. Sept. 26, 1980), aff'd in part and rev'd in part, 1108 Hanrei jiho 3 (Sup. Ct. Feb. 24, 1984) (two of the firms and one of the executives were acquitted on appeal); Japan v. Sekiyu renmei, 983 Hanrei jiho 22 (Tokyo High Ct. Sept. 26, 1980) (acquitting the Petroleum Federation).

⁷⁷ Japan v. Idemitsu kosan, 1108 Hanrei jiho 3 (Sup. Ct. Feb. 24, 1984).

⁷⁸ 1969 nen Hokkyo Jokai Nihon kogyo tenran kai v. Japan, 560 Hanrei jiho 6 (Tokyo D. Ct. July 8, 1969).

foreign exchange statute, however, MITI turned it down. Shipping the equipment would violate the COCOM agreement, and that the ministry had no intention of letting it do.

The group sued MITI on the application, and the court held MITI's denial illegal. It noted that if the group exported the equipment the U.S. might retaliate. Indeed, the U.S. did exactly that when twenty years later Toshiba flouted COCOM by selling the Soviets submarine screw technology. It further noted that such retaliation could adversely affect the Japanese economy.

Notwithstanding the resulting risks to the public welfare, the court refused to let MITI deny the export permit. Article 22 of the Japanese Constitution protected a citizen's right "to choose his occupation," and the government could regulate private conduct only by the "principle of administration according to law." If it regulated in such a way that it limited an individual's right to choose his business, the regulation was consistent with that principle only if it was clearly authorized by statute. The foreign exchange statute may have delegated the question of whether an export adversely affected the national economy to MITI's discretion, for example, but that discretion extended only to "direct economic reasons." It did not cover indirect effects like American retaliation. If MITI based its denial on those indirect economic effects, it violated the law and owed the group damages.⁷⁹

IV. Conclusions

Japanese politicians seldom gave bureaucrats the tools they would have needed to promote growth by shaping significantly the business and investment decisions that firms made. The politicians never wanted their bureaucrats to try to promote growth through an interventionist approach, and seldom empowered them to do so. Firms that decided to ignore what bureaucrats told them to do often could safely do so -- and did. Firms that faced bureaucrats trying to make them comply could sue -- and win.

Given that politicians never empowered their bureaucrats to try to grow the economy through intervention, the debate over the effectiveness of Japanese industrial policy misses the point. It misses the point because Japanese bureaucrats never had an industrial policy to enforce. Voters had elected politicians committed to free-market principles, and those politicians had largely implemented that commitment. They implemented the usual pork barrel programs too, of course. Unfortunately, when observers talk of effective industrial policy, they merely confuse the standard cover for pork with actual policy.

Put another way, Japanese voters could have chosen their leaders from among the array of communist and socialist politicians offering to plan the economy. They did not. Instead, they elected their leaders from the LDP, and the LDP placed a liberal, non-interventionist approach at the center of its economic policy. The fact that bureaucrats did not intervene reflected the policies of the LDP; those policies, in turn, reflected voter choice.

The story of Japanese industrial policy is not a story about the virtues of an interventionist bureaucratic policy. Neither is it a story about its vices. It is not a story about interventionist bureaucratic policy at all. This should not surprise. In lacking

⁷⁹ 1969 nen, 560 Hanrei jiho at 21-22.

economically interventionist policies, Japan was not the exception. Among the advanced capitalist economies, it was instead the norm.

There is a moral here, and it goes to the perils of relying on secondary research. For their accounts of 1950s and 1960s Japan, modern scholars rely on the social science literature of the times. Alas for modern scholars, those were the days when Marxists dominated Japanese social science departments. Predictably, they told tales that suited their doctrinal requirements: markets fail, government planning works. Given that the Marxists simply rewrote the government's self-serving pamphleteering in social scientific guise, modern scholars who now borrow from the earlier Marxists simply borrow tales politicians everywhere tell to disguise their pork-barrel politics -- nothing more, nothing less. Had modern scholars done more than recount the conclusions in the secondary literature, they would have noticed that they were merely adding academic gloss to political sloganeering. Unfortunately, they never tried.