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Administrative Guidance in the United States

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Abstract: Agency guidance is a crucial and hotly contested tool of US administrative law. Such nonbinding, soft law documents are exempt from the onerous ‘notice-and-comment’ requirements of the Administrative Procedure Act, which apply to the issuance of binding regulations. Guidance facilitates political accountability, administrative flexibility, and consistent enforcement. But it may at the same time coerce compliance, or under-enforce the law, without adequate procedural protection or substantive justification. These documents also impact private parties’ moral reasoning, insofar as they can clarify otherwise binding moral obligations. Finally, guidance can play a fraught role in mediating intense political disputes, as it stakes out uncertain and contestable official stances, which may deepen existing social fissures and legitimation deficits.

1. Introduction

In December 2021, the Omicron variant of COVID-19 began to spread through the United States. To the surprise of many, the Centers for Disease Control and Prevention (CDC) responded by substantially altering its guidance for isolation and quarantine, shifting the recommended isolation period from ten days to five. Dr. Anthony Fauci, Chief Medical Advisor to President Biden, explained the controversial change: ‘The CDC made a decision to balance what is good for the public health at the same time as keeping society running’ (Beals 2022). Given the sheer number of people who would likely become infected by the new variant, a ten-day isolation window might seriously impair the economy. A shift in guidance was necessary to ‘get society to function properly’.

This was a particularly stark example of how administrative guidance can have significant normative and social impacts, despite the fact that it lacks direct, legally binding effect. Not only in the Pandemic, but across other important policy domains, such as immigration and racial and gender civil rights, government documents that lack the force of law can alter the moral self-understandings of individuals and communities and enter into high-profile political disputes.

This chapter will examine administrative guidance in the US as a particular example of the broader phenomena of 'soft law'. While the term is used in different senses, soft law roughly refers to nonbinding or hortatory law in the international as well as transnational and domestic contexts (Weil 1983; Klabbers 1996; Gerson & Posner 2008; Galbraith & Zaring 2014; Korkea-aho et al. 2021). Guidance is the term US legal scholars use to refer to such nonbinding documents in the context of federal administrative law (Anthony 1992; Mendelson 2006; Levin 2018; Parrillo 2019).

These documents have been the subject of intense scholarly debate and political controversy in recent years (Emerson 2019). Prized for their ease of issuance and flexibility in application, guidance is arguably the lifeblood of administrative process. It enables administrators to implement binding legal requirements and purposes efficiently, without prolonged procedures and without imposing strict rules on regulated parties. It creates a means for the leadership of government agencies to control the discretion of enforcement staff and other officials, so that the implementation of law is consistent, predictable, and democratically responsive. At the same time, these documents can have significant coercive and normative effects. Precisely because guidance can be issued and changed swiftly, and because it is often not subject to judicial review, there is a risk that the terms of guidance may fall outside of the issuing agencies' statutory authority or else be poorly justified. Guidance may also coerce parties to comply without affording them procedural protections that would apply if the agency took adjudicatory action against them, or issued a rule with the force of law.

The benefits and risks described above are framed by the well-worn contours of the contest between governmental power and private liberty. Guidance helps the government carry out law but by the same token risks arbitrary infringements on the private sphere. This chapter goes beyond that familiar tension to discuss how nonbinding law enters into political and social conflict and informs moral and ethical judgment. By staking out an official position on uncertain and sometimes controversial matters of policy, guidance mediates political conflict. It affirms some practices, identities, statuses, and forms of life even as it marginalizes others. By telling people how they can comply with otherwise valid obligations, guidance clarifies the content of those obligations. Unlike binding law, guidance by its terms anticipates revision, departure, and amendment. It is suited to times of political friction and uncertainty. However, the use of guidance in such moments may heighten ongoing crises of administrative legitimacy (Freeman 1975; Habermas 1975).

Part 2 of this chapter lays out the legal framework in which federal administrative guidance operates. Part 3 then describes normative tensions concerning liberty and democracy that are at issue in guidance, and explains some recent efforts at reform. Part 4 explains how guidance interacts with moral judgment and political conflict.

2. The Legal Framework

Guidance is the generic term legal scholars use for federal administrative documents that lack 'the force of law' such as policy statements, enforcement memoranda, staff manuals, and frequently asked questions (Anthony 1992). The general legal framework that governs these documents is the Administrative Procedure Act of 1946 (APA). This part describes how the APA's rulemaking process works, and how guidance documents are exempted from that process.

2.1 Rulemaking in the Administrative Procedure Act

Enacted in the wake of the New Deal, the APA is a quasi-constitutional statute. It sets out the basic procedural requirements for administrative action, such as the issuance of general regulations and the adjudication of individual controversies, as well as provisions governing judicial review of such actions. The APA has constitutional heft not only because it fundamentally structures how the executive branch and modern government function. In addition, the Act represents a political settlement between the ideological proponents and opponents of the welfare and regulatory state that had consolidated by the mid-twentieth-century (Shepherd 1996; Grisinger 2012). The APA governs any federal 'agency', a term which includes any 'authority of the Government of the United States' other than Congress, the President, ordinary courts, territorial governments, and certain military tribunals and authorities (5 U.S.C. §551(1); *Franklin v. Massachusetts*, 505 U.S. 788 (1992). It thus covers not merely the so-called 'independent' agencies, such as the Securities and Exchange Commission, but also executive branch departments, such as Treasury or State, and the components of such departments.

One of the most noteworthy and indeed famed provisions of the APA are its procedures for public participation in administrative rulemaking. Agencies' 'legislative' or 'substantive' rules have equal legal validity and binding effect to a law enacted by Congress. When agencies make such rules, they must generally publish a notice of their proposal and invite comments from interested parties. Final rules must then be accompanied by a 'concise general statement of their basis and purpose.' (5 U.S.C. §553(c)). The courts, Congress, and the President have embellished these formal requirements into a detailed process of administrative deliberation, consultation, and review (Mashaw 2018). An agency's statement of basis and purpose today is rarely 'concise'. Rather, agencies respond in detail to the significant comments they receive. They assess the costs and benefits of the regulation against other alternatives, perform environmental impact statements, and much more.

As a consequence of all these analytic requirements, regulatory preambles go on for scores or even hundreds of pages, sometimes accompanied by a docket with all comments received and other supporting materials. That formal record is only a snapshot of a broader process of consultation before the rule is issued, which often involves outreach to regulated parties, and, in some cases, proactive engagement with regulatory beneficiaries (Elliot 1992; Sant'Ambrogio & Staszewski 2021). When the agency finalizes its rule, aggrieved parties may challenge the rule in court. A reviewing court will invalidate rules that it finds to be 'arbitrary' or 'capricious', or which fall outside the bounds or statutory authority, or which are procedurally defective (5 U.S.C. §706(2)). Review for arbitrariness focuses on whether the agency has offered a reasoned explanation for its action. Courts undertake that inquiry, as well as review of the agency's legal interpretations, with some degree of deference to Congress' delegation of authority to the agency as well as the agency's expertise and political accountability. As a practical matter, the courts have great leeway in whether they give administrative actions a 'hard look' that examines the agency's explanation in granular detail or rather a passing glance to ensure no glaring errors have been made (Sunstein 1983; Gersen & Vermeule 2016).

The notice and comment rulemaking process distinguishes US administrative law from that of other countries, such as the United Kingdom, France, and Germany which do not have the same general, formal, judicially enforceable requirements for public participation in agency policymaking (Rose-Ackerman 2021). Supporters of the US-American process see it as an important if highly imperfect institutionalization of participatory democracy (Mashaw 2018; Emerson 2019). Critics worry that it impedes efficient administrative action, rigidifies agency polices, and may even facilitates capture by regulated parties (Bagley 2019; Wagner 2010).

Administrative regulations are 'hard law' and the rulemaking process is accordingly quite hard to pursue. It creates multiple opportunity for input, contestation, and reversal before legally binding action is taken. Agencies must pay a steep price in time, resources, and consideration to issue a rule that changes private parties' legal rights and obligations, and which may establish a sufficient basis for imposing penalties such as fines or even imprisonment.

2.2 The Guidance Exemption from Notice-and-Comment

The APA nonetheless gives agencies several paths avoid these requirements (Levin 2018). Most importantly for our purposes, it exempts from notice-and-comment requirements 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice' (5 U.S.C. 553(b)(A)). These documents, which are different forms of guidance, are 'softer'. General statements of policy, in particular, do not purport to impose mandatory norms, but rather merely 'advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power' (U.S. Department of Justice 1947, p. 30 n. 3). Such policy statements are distinct in that they do not impose 'legally binding requirements' (*Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014)). For instance, an Environmental Protection Agency document which merely 'recommends' that states impose certain permitting requirements on coal mining operations, but which disclaims any 'legal impact' qualifies as a policy statement. (Ibid., 253). While these policy statements may create strong incentives to comply, they are insufficient on their own to sustain an adverse legal action against a member of the public.

The other documents exempted from rulemaking requirements—interpretive and procedural rules—are soft in some respects, hard in others. An interpretative rule 'advises the public of the agency's construction of statutes and rules which it administers' (U.S. Department of Justice, 1947, p. 30 n. 3). Such interpretive rules are not supposed to impose a 'new' obligation that is independent of those already imposed by other sources of binding law. But many courts will consider these interpretations, unlike policy statements, to have the force of law. For example, an interpretive rule may specify a preexisting legal duty to provide wheelchair-bound sporting spectators with a 'line of sight' to the event; it can clarify that such spectators must be able see over *standing* as well as over seated spectators (*Paralyzed Vets. of Am. V. D.C. Arena L.P.*, 117 F.3d 579, 587 (D.C. Cir. 1997)). That administrative interpretation would then be sufficient to uphold an enforcement action taken against a non-compliant sporting arena. By contrast, an agency cannot use a merely interpretive rule to impose a specific height requirement that the agency deems 'appropriate' for the structural containment of 'big cats' (*Hoctor v. U.S. Dep't of Agriculture*, 82 F.3d 165 (7th Cir. 1996)). A key question in drawing the line between impermissible and permissible use of interpretive rules is 'how tightly the agency's interpretation is drawn linguistically from the actual language of a statute or rule' (*Paralyzed Vets*. at 587).

While some scholars use term 'guidance' to refer only to interpretive rules and policy statements (Levin 2018), a procedural rule is also soft in the narrow sense that it must be restricted to internal agency practices and cannot alter the legal rights and obligations of private parties (cf. Stack and Metzger 2017). For example, a decision not to entertain face-to-face applications for label approval would qualify as a procedural rule (*James V. Hurston Assoc., Inc. v. Glickman*, 229 F. 3d. 277, 280 (D.C. Cir. 2008)). However, such rules have the force of law, in the sense that agency officials must obey them and courts will enforce them. Indeed, such rules played a crucial role in the investigation and resignation of President Richard Nixon following the Watergate scandal (*U.S. v. Nixon*, 48 U.S. 683 (1974)).

The lines between these categories of guidance, as well as between guidance and regulations, are famously murky, even metaphysical. Given the indeterminacy of the distinctions, and the often high economic and social stakes, the appropriate scope of the guidance exemption has become one of the 'most litigated' administrative-law issue in the federal courts (Levin 2018, p. 265). Agencies have strong incentives to resort to guidance because it is cheap to issue and rescind as compared to the onerous process of rulemaking, and because it enables the agency's leadership to exercise control over its staff, which may number in the thousands, tens of thousands, or even hundreds of thousands. Private parties, too, have reasons to seek out notice of the agencies' position on how to enforce vague statutory and regulatory requirements. But they may also chafe at an agency's supposedly non-binding statement which seems in fact to require rote compliance. The next part examines the normative issues that underlie these incentives and tendencies.

3. The Guidance Controversy in a Complex Normative Terrain

Legal and political controversy over guidance raises normative problems concerning the administrative state. The debate centers on the conflict between private liberty and governmental discretion. Critics of the proliferation of guidance argue that agencies use such documents to avoid the procedural requirements and judicial review provisions the APA imposes for rulemaking

(Anthony 1992). This poses a problem not only for regulated parties, but, perhaps even more so, for regulatory beneficiaries. Whereas regulated parties will have the opportunities to contest and seek pre-enforcement judicial review of industry-friendly regulations issued through the notice-and-comment process, they will not have the same opportunities with regards to informal guidance (Mendelson 2007). Proponents of the liberal use of guidance, however, highlight the crucial role that guidance plays in providing notice to the public of the agencies' future enforcement posture, as well as ensuring the consistent and equal treatment of regulated parties (Strauss 2001; Levin 2018). Guidance also serves as an 'internal administrative law' that implements hierarchical accountability, filling in the interstices left by binding statutory and regulatory law with the policy judgments of politically responsible agency leadership (Stack & Metzger 2017).

Depending on the jurist's sense of the relative weight of these risks and benefits, they are apt to choose more or less stringent restrictions on the use of guidance. For instance, on the more stringent end, guidance is impermissibly binding if 'affected parties are reasonably led to believe that failure to conform will bring adverse consequences' (Anthony 1992, p. 1328-9). On the more permissive end, guidance is impermissibly binding just in case affected parties have no reasonable opportunity to contest the terms of the guidance prior to its enforcement (Elliot 1992; Emerson 2019; Levin 2018).

While such debates are framed by the contrasting values of governmental discretion versus private liberty, the relation between the two is more complex than a simple tradeoff. Below I first describe the fraught relationship between liberty and guidance, and then the fraught relationship between democracy and guidance.

3.1 Liberty and Guidance

At first blush, it would seem that any expansion in agencies' authority to issue and change guidance, to strictly adhere to guidance, or to rely on guidance as a grounds for an enforcement action, would seem to come purely at the expense of affected parties' liberty. To modify an example from a previous section, a guidance document that recommends big cat fencing of eight feet—if rigidly enforced by the agency—would practically deprive the owner or dealer of lions or tigers of the option of building a fence that is only seven feet tall. If she does build a shorter fence than 'recommended', she risks a costly enforcement action.

Nevertheless there are several ways that guidance in fact promotes the liberty of private parties. First, if the issuing agency has significant discretionary power—such as the authority to investigate, adjudicate cases, or issue fines—then the regulated party benefits from the information the guidance conveys about how the agency intends to use that power. Where the underlying, binding rules are vague, such notice may in fact increase regulated parties' practical ability to act without fear of government sanction. The big cat dealer who intends to build an enclosure will know, in advance, that if she builds the fence eight feet high, she is in the clear. In the absence of the guidance, she will be left to guess how much fence is enough to avoid a penalty. It is useful, in other words, to get some concrete details about what the government takes binding but broad terms like 'appropriate' to mean, or how it will exercise the significant coercive powers at hand.

Nicholas Parrillo accordingly notes in his landmark study of guidance that regulated parties often crave guidance like 'water in the desert' (Parrillo 2018, p. 185). They do so when the agency has vast coercive power. The clearest example of this is the Food and Drug Administration's (FDA) binding authority to approve drugs and devices before they reach the marketplace. With sometimes hundreds of millions of dollars on the line, regulated parties want to know how to avoid hiccups with the approval process. FDA guidance tells them.

A related benefit of guidance is preservation of formal equal treatment among regulated parties, which is necessary to ensure the freedom of each consistent with every other according to general rules (Kant 1797 [1999], p. 30). If one field office of the US Department of Agriculture (USDA) thinks the right fence height for big cats is seven feet, whereas another field office believes it is nine, then a puma owner with an 8 foot high fence will be found compliant in one jurisdiction but non-compliant in another. Guidance can thus ensure that like parties are treated alike according to general norms rather than subject to arbitrary enforcement that enlarges the discretion of some parties relative to others.

A distinct consideration is the mediating role guidance plays in coercive relations among private parties. Suppose that the USDA issues no guidance whatsoever as to the appropriate fence heights for big cats, with the result that an ignorant, bumbling, or miserly cat owner builds a fence penning their jaguar only four feet high. When the jaguar jumps over the fence and mauls a passerby, that party's liberty will be grievously and perhaps permanently impaired. Thus, the mere fact that guidance coerces some private parties, sometimes severely, does not mean that it is merely coercive. It may also, and at the same time, empower and enable parties who are otherwise at the mercy of others. For instance, guidance from the Equal Employment Opportunity Commission (EEOC) on the use of arrest and convictions in employments decisions coerces employers to some degree not to ask questions about prior arrests unless they are genuinely related to the job in question (EEOC 2012). Such guidance by the same token increases employment opportunities for persons convicted of offenses, enabling them to function as competent and independent members of society.

This is not to say that the gains guidance provides to one party's liberty always compensate for the losses to another's. When agencies use guidance to give regulated parties, such as polluting industries, a safe harbor against otherwise binding obligations, such guidance may harm the scope of liberty overall. If improperly calibrated, guidance may give regulated parties such great reassurance of non-enforcement that others' freedom from unsafe air and water would have been better promoted by leaving the regulated parties in the dark as to the likelihood of enforcement. As Nina Mendelson (2007) observes, regulatory beneficiaries may lack the opportunity to challenge the guidance because of the rules governing internal agency adjudication as well as judicial review of agency action.

One prominent means of protecting private interests while retaining guidance's consistency benefits is to provide an internal appeal mechanism accompanied by reason-giving requirements. The Food and Drug Administration and the White House's Office of Management and Budget (OMB) have thus provided that executive agency officials may only depart from guidance 'with appropriate justification and supervisory concurrence' 65 Fed. Reg. 56,468 (2000); 72 Fed. Reg. 3432 (2018). Building on such approaches and Parrillo's research, the Administrative Conference of the United States (ACUS) recommends that agencies 'afford members of the public a fair opportunity to argue for lawful approaches other than those put forward by a policy statement or for modification or rescission of the policy statement' (ACUS 2017). ACUS further recommends that, when agencies do permit deviations from guidance, they consider disseminating their decisions and the reasons for them to other interested parties and to the public. Parrillo calls this approach 'principled flexibility' (Parrillo 2019, p. 181). It encourages agencies to develop an internal common law surrounding guidance, where the general policies might be adjusted over time in light of reasoned departures, usually made by higher ranking rather than front line officials. ACUS recommends a similar approach with regards to interpretive rules as well as policy statements, thus rejecting the sharp binary between the two that the courts often insist upon (ACUS

2019; Levin 2018; Emerson and Levin 2019).These approaches give both regulated parties and beneficiaries some assurance that the guidance does not operate as a legally binding requirement in the absence of the required process.

3.2 *Democracy and Guidance*

Guidance may be thought to pose a risk to democratic accountability. Guidance lacks the procedural-democratic controls of either ordinary legislation or of notice-and-comment rulemaking. As described in Part 1, one of the supposed benefits of the US rulemaking process is that it enables participatory democracy to take place within administrative agencies. As imperfect as that process may be, it certainly does give affected members of the public an opportunity to weigh in on the rules by which they will be bound and, in some cases, to challenge such rules in court for failure to take their input into account. The same level of participation is not generally required with regards to guidance documents, because there is no general requirement that agencies solicit and respond to public comment before they issue guidance. This raises the concern that the use of guidance rather than regulation undermines public influence over agencies.

The most direct reply to this legitimate worry is that, while guidance does not facilitate participatory democracy, it nonetheless enforces politically accountable officials' hierarchical control over the bureaucracy. As Gillian Metzger (2015) argues, guidance enables agency leadership to supervise and direct agency staff at low cost relative to the onerous and lengthy requirements of rulemaking or formal adjudication. Since these officials are appointed by the democratically elected president, they have an indirect popular warrant to govern affairs within their agencies. As a means of presidential control, guidance ensures that the significant discretion vested in executive branch officials and agencies is exercised consistent with the values and interest of an elected office.

A salient example of this political use of guidance was the Obama Administration's Deferred Action for Childhood Arrivals policy. Using an 'enforcement memorandum', the Department of Homeland Security announced that it would not commence deportation proceedings against certain classes of undocumented immigrants who came to the United States as children (US Department of Homeland Security 2012). The memorandum was a means of controlling and centralizing the discretion exercised by immigration enforcement officers, so as to align with the political values of incumbent administration (Motomura 2014). While the Trump Administration attempted to rescind this policy, they were unsuccessful. The Supreme Court concluded that the rescission was arbitrary, particularly because it failed to take into account 'serious reliance interests' engendered by the previous guidance (*Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S.Ct. 1891 (2020)).

Another procedural response to guidance's supposed democratic deficit is to replicate some form of public participation in the formulation of guidance documents as well as binding rules. Proponents of this approach recognize, of course, that participation is costly and time consuming; they then aim for a more limited form of participation in the drafting of agency guidance (Mantel 2009). OMB's Good Guidance Bulletin accordingly requires provision of public comment on 'significant' guidance documents, such as those with effects of $100 Million or more or those that raise novel policy issues (72 Fed. Reg. 3432, 3437 (2007)). But the Bulletin but did not require pre-promulgation comment. Agencies commonly provide some opportunity for comment, even if not bound by OMB directives (Emerson & Levin 2019). Public participation can take the form of something as rudimentary as provision of an email address for post-promulgation feedback or a process that is just as formal as the notice-and-comment process required for legislative rules.

In 2019, President Trump went further than these practices and issued an executive order generally requiring agencies to solicit *and respond* to public comments on significant guidance documents (Executive Order 13,891, 84 Fed. Reg. 13,891 (2019)). Given the antiregulatory posture of the Trump Administration, it is doubtful that the intent of the order was to promote genuine public engagement rather than to thwart aggressive actions outside the rulemaking process. The Order also exempted guidance related to homeland security, which would seem to encompass immigration—an area where the Trump Administration was eager to take such aggressive regulatory action without procedural constraint. If fully implemented, the Order would likely have encouraged decreased use guidance, increased used of rulemaking and adjudication, and increased use of other exemptions to notice and comment requirements, such as the APA's provision that an agency may avoid notice and comment when it finds that such process would be 'impractical, unnecessary, or contrary to the public interest' (5 U.S.C. sec. 551(b)(B)).

This sea change did not come. President Biden swiftly rescinded this document at the start of his term. However, by the time Biden withdrew the Trump order, several agencies had already issued procedural rules committing themselves to follow the Trump order (Chambers 2021). While many agencies have rescinded their guidance regulations, the Trump Administration's requirements may remain somewhat sticky so long as other agencies' procedural rules remain in place.

4. Theorizing Guidance Beyond Process: Soft Law's Moral and Political Contribution

American administrative law, and perhaps American public law broadly, is process focused. Where there is fierce dispute over issues of political and moral substance, jurists can turn to questions of procedural fairness to find a neutral terrain and to lower the temperature of social conflict. So it has been with guidance. The political heat around the Obama Administration's immigration guidance, as well as guidance on issues surrounding campus sexual assault and transgender rights, generated a raft of reform proposals and actions to place heightened procedural requirements on such actions. Some of those proposals are well taken. In particular, it makes sense to give affected and interested parties opportunity to challenge the terms of guidance documents and to seek departures from them on terms of principled flexibility. Furthermore, where the guidance concerns particularly weighty matters, and there is no serious harm in delay, the public ought to have opportunity to comment on the guidance at an early stage in its formulation. However, such concerns with procedure can sometimes stifle substantive concern with what guidance does and whether the policies and interpretations adopted in guidance are well justified (Seidenfeld 2011). Of course, it is beyond the scope of this chapter to discuss whether, for instance, it is appropriate as a matter of policy to defer deportation proceedings against undocumented immigrants who came to the US as children; or whether and when to wear masks as a precaution against COVID-19 transmission. Nonetheless, we ought to think about how such guidance on sensitive, contested topics impacts moral judgment and political life.

The underlying phenomena that make guidance distinctive are its tentativeness, openness, and flexibility. As Jeremy Kessler and Charles Sabel have argued, those characteristic features of guidance are a response to profound problems of complexity, fallibility, and uncertainty that attend contemporary governance: 'Guidance is the kind of law that uncertainty admits' (Kessler and Sabel 2021, p. 191). U.S. administrative law has migrated over time from focus on case-by-case adjudication—with its concern for fair hearing and impartial process—to legislative rulemaking—

with its emphasis on public participation—to guidance—with its specialty in iterative learning and adaptive management. Ever increasingly layers of social complexity arguably demand such nimble responses. Kessler and Sabel's analysis seems mostly focused on issues of technical uncertainty that require guidance as an interim regulatory approach, developed in close coordination with regulated parties.

This chapter shifts attention here to the specifically moral and political uncertainty that guidance interacts with. As a moral matter, guidance provides private parties with an official understanding of what their otherwise genuine obligations consist in, in cases where there is significant uncertainty about how to comply with such obligations. Guidance can thus shift moral reasoning, even where it lacks the power to bind, and even if its coercive force is minimal. As a political matter, guidance at once responds to and invites ideological and social conflict. It makes no claim to be authoritative and thus opens itself to continual challenge and rejection. It is therefore a natural response to politically fragmented landscapes where shared sources of authority are in short supply. But because guidance falls short of a claim to valid binding effect, it risks further undermining the already weak foundations of administrative legitimacy.

4.1 Guidance's Moral Impact

Guidance often deals with the many mundane issues that are the stuff of administrative law, such as how obtain a construction permit, conduct a scientific test, or comply with a design or performance standard. Even these dry instances of bureaucratic paper-making often have moral dimensions. (By 'moral dimensions', I mean features that are relevant to the content, implications, and performance of our genuine obligations, as distinct from solely legal, customary, or social obligations.) For example, the USDA administers an organic-certified food program. Guidance documents explain how parties should make appropriate organic food labels (USDA 2014). Consumers may value organic food for moral reasons having to do with preserving their own health or the health of others or avoiding harm to animals or to the environment. Likewise, food producers have a genuine obligations not to mislead or deceive consumers as to products they will ingest. If the USDA offers useful guidance about labeling, it will help both consumers and producers comply with their otherwise binding moral obligations. Consumers will be able to purchase the organic goods that arguably advance various moral ends and producers will know how to convey the contents of their products accurately.

To take a more contentious example, consider the Obama Administration's Dear Colleague Letter on transgender rights, which interpreted existing rules against sex discrimination by federal education grant recipients to require these recipients to let transgender students use school facilities that accorded with the students' respective gender identities (US Department of Education and US Department of Justice 2016). Allow me to explain the guidance's moral significance with a simple hypothetical that does not do full justice to the complexity of gender identity and its non-binary characteristics (Stryker et al. 2008). The guidance would instruct that a transgender person who identifies as a woman be permitted to use a women's restroom (since previous regulations interpret sex equality to permit sex-segregated restrooms). Let us take it for granted that schools have a moral obligation not to discriminate on the basis of sex. Because sex encompasses gender identity, the government reasoned, it would be inconsistent with the obligation not to sex-discriminate for a school to deny a transgender woman access to a women's restroom while permitting access to a cisgender woman. When a school administrator reads this Dear Colleague Letter, it gives them information relevant to determining what their underlying moral obligations not to sex-discriminate requires. It tells them that—in the view of the officials with an obligation to implement the law—sex equality requires institutionalized respect for the gender identity of trans persons amongst all others.

The moral relevance of this information does not turn on an assumption that the law is morally binding simply because it is law. Rather, the guidance's moral claims are based on several interlocking claims. First, some enacted laws do in fact reflect and specify existing moral commitments. They pick out from a number of different ways of implementing or interpreting moral obligations one particular way that we should all comply with (Greenberg 2017). Such laws thus help us to fulfill genuine obligations better than if there were no law available. Second, the considered views of officials who have the obligation to implement such moral-legal obligations deserve special weight in the moral reasoning of private parties. That is not just because these officials may have specialized knowledge. To the extent we respect the officials' roles as authorized agents of our collectively binding commitments, we ought accordingly to privilege their views of the law's requirements. This privileged status does not amount to deference, in which private parties must simply accept the moral position implied by official guidance. Rather, it requires people to give the guidance careful attention and, if the overall weight of reasons proves indecisive, to accept the position the guidance contemplates. Thus, a school administrator who remains uncertain about how to show respect for transgender students consistent with respect for others should know more about what to do after she receives the Dear Colleague Letter—for instance, let transgender women use the women's restroom. Guidance can therefore have a moral impact, in the sense that it provides us with clarity about what our moral obligations and interests require.

Guidance can have a moral impact on its beneficiaries as well as those whose conduct it addresses. Guidance may convey 'official recognition' that a person's identity or status is worthy or respect or that the harms they have suffered deserve redress (Emerson 2019, p. 2207). Inclusive transgender guidance thus conveys to transgender persons that the government sees them as they may understand themselves. Likewise, Guidance that requires educational institutions to create offices to protect against sexual discrimination, harassment, and assault acknowledges that these are genuine problems within educational institutions which require systematic response (US Department of Education 2011). Because the guidance issues from officials entrusted with the authority to interpret and administer law, it carries with it the badges or trust, respect, and good faith that attach to the official role.

4.2 Guidance's Political Impact

The foregoing indicates that guidance informs moral reasoning by clarifying existing obligations and recognizing the moral status of persons. This is not to say that guidance invariably plays this constructive role. Guidance may trigger adverse reactions, objections, and even categorical rejection. This may happen because the guidance simply misreads what moral obligations require. For instance, guidance that advises big cat owners to build fences only four feet high when eight feet is in fact necessary would actually impair cat owners' performance of obligations of secure containment. Or, private parties may not take the guidance genuinely to inform their conduct because they do not trust or have doubts about the legitimacy of the office that issues it. They may therefore ignore the guidance or even take it as an example of what not to do. In situations where private parties' practical orientation towards the guidance, the issuing office, and the underlying norms they enforce diverge from one another in such ways, the moral impact of guidance may heighten political controversy.

Because guidance deals with such morally fraught issues in an advisory rather than authoritative fashion, it invites contestation and critique. That is guidance's benefit as well as its risk. While some may believe that the Dear Colleague Letter regarding transgender rights appropriately clarifies our existing obligation not to discriminate on the basis of sex, others may take the position that it gets the matter badly wrong. This latter group is apt to react by rejecting the guidance—not only in its terms, but also perhaps by rejecting the very effort to be told by way of guidance how they should act. Guidance may thus promote moral clarity for some even as it produces a sense of moral indignation and political alienation for others. There is good reason to believe, for instance, that the Obama Administration's guidance on transgender rights has rendered the issue of bathroom use a flashpoint in the so called 'culture-wars' between left and right as to traditional versus progressive conceptions of gender identity and gender relations. As a *Washington Post* headline succinctly put it, 'Some embrace Obama's transgender directive, others vow to fight' (Emma Brown et al. 2016).

To be sure, the same sort of moral factionalism might have arisen from a binding rule as well as from a nonbinding guidance document. But precisely because guidance does not make any claim to control conduct, but only to suggest, advise, and delimit, it by its terms invites political rather than legal resistance and contestation to a greater degree than rules with the force of law do. The public may interpret reliance on guidance rather than rules to mean that the issuing office is unsure of what they are doing, or unable to set down and justify general binding norms. That condition of ethical and empirical uncertainty may justify and is likely to catalyze probing questions, resistance, and adverse stances from members of the public who are not positively disposed towards the tentative positions the guidance states or the underlying moral claims it articulates. The beneficiaries of guidance are therefore likely to land on the threshold between exclusion and inclusion, protection and vulnerability, that corresponds to guidance's ambivalent legal status. The recipient of deferred deportation action, for instance, does not obtain the status of citizenship or other entitlement, but rather only a 'liminal' legal status—a temporary reprieve from deportation, liable to shift with changing political priorities (Chacón 2015).

The relationship between nonbinding guidance and political conflict has been on particularly vivid display during the COVID-19 pandemic. The CDC and various state and local agencies have repeatedly issued guidance on issues regarding the use of masks, vaccines, social distancing, and isolation after exposure or infection (Wiley et al. 2021) . The country been awash in a sea of guidance throughout this pandemic, as have EU member states (Eliantonio et al. 2021). For those who trust the issuing offices, or who trust their scientific expertise, such guidance helps to clarify a very important moral obligation: to protect others from harm and death. But for those who do not trust the issuing offices, the guidance becomes a rallying point for moral opposition and partisan resistance. For instance when the CDC recommended that unvaccinated people wear masks in doors, some state and local governments implemented this guidance with binding mandates, while others not only ignored it but registered strenuous political objections to the guidance (Vestal 2021). These objections may sometimes have to do with factual disagreement about how best to incentivize vaccination. They may also involve the spread of misinformation and conspiracy theories which now play an outsized role in American politics. But they also bear the marks of a highly partisan dispute about governmental regulation of individual conduct, and about the degree to which one person ought to take into account the interests and welfare of others in their own behavior.

The situation has been exacerbated in the US by frequently shifting guidance and, at times, inconsistency between guidance issued by the White House and guidance issued by the CDC on issues such as social gatherings (Wiley et al. 2021). In part these inconsistencies are attributable to the difficulties of responding to a new and changing disease, as well as evolving scientific understanding of the disease. Political controversy then layers over and feeds upon the underlying medical and scientific difficulty. Economic pressures to open up businesses, social pressure to return to in-person schooling, pressure from teachers' unions to keep schools closed, religious pressure to allow in-person worship, diverse risk levels for various populations, widely divergent knowledge and views about masks and vaccines—all of these factors impinge on the issuance of guidance by multiple actors at each layer of government. In that situation of crisscrossing and varying beliefs and interests, the moral impact of guidance is likely to become less certain, because private parties will be unsure what to do or who to trust. More broadly, as inconsistencies across time and institution proliferate, citizens' faith in government institutions and in one another's moral judgments may further erode. People may build personal identities around wearing a mask or not, or getting vaccinated or not, in ways that are untethered from scientific judgment or genuine moral obligations, and instead align with stark partisan divisions.

As a form of law that is in its nature uncertain and flexible, guidance is at once indispensable in these sorts of situations and liable to deepen the crises of legitimacy that call for such informal governance strategies. Because it is easy to issue and amend, and because it does not legally require people to take specific actions, guidance is indispensable during periods of emergency, in which events unfold quickly and the government must have means of speedily advising the public about how to respond. At the same time, guidance's posture of doubt and openness leaves space open for existing disagreements and conflicts to coalesce and fester. By disclaiming the authority to control, proliferation of guidance may underscore the impression that the state is uncertain over whether its 'monopoly of the use of physical force' is indeed 'legitimate' (Weber 1918 [1946], p. 78). That is a particularly troubling risk in the US, where there are increasingly mainstream arguments that administrative law as a whole is unconstitutional (Hamburger 2014).

In a society with high levels of moral and political consensus, the uncertainty of guidance might not pose a serious problem. People would consider the advice given and accept it or not depending on a set of moral and political judgments they otherwise share. But in politically fractured societies such as the US, the necessary resort to informal and flexible action may simply buttress the existing and increasingly pervasive sense that the administrative state's legitimacy is open to question. 'If you, the government, knew what to do, why did you not actually tell us what we must do? Why do the requirements keep changing? Is it really science that is driving these decision, or just politics?' Such questions are invited by a form of government action that does not make the claim to bind, but explicitly permits departure. Guidance's formal uncertainty and openness compounds deeper uncertainties about whether common and neutral ground exists on which to take collective action. This is not to suggest that guidance should not be used. In risky and fast-paced situations there may be no alternative. Rather, the necessary resort to guidance may be symptomatic of a society beset by such empirical and normative complexity that it has lost the capacity to reach binding judgment, and instead spirals into ever deeper levels of self-doubt and recrimination.

5. Conclusion

This chapter has examined the legal framework, normative tensions, and political controversies surrounding guidance in US administrative law. Guidance is a nonbinding form of law that need not be issued through the formal process required for legislative-type regulations. Such documents are beneficial for liberal democracy insofar as they help to provide fair notice of the government's enforcement position and help to ensure hierarchical supervision by politically accountable agency heads. But they may also threaten liberal democracy by coercing private parties in an informal, opaque manner, and by avoiding public participation requirements. Guidance may, further, help to clarify preexisting moral obligations. But because guidance is at once tentative and coercive, it invites political resistance, contestation, and fragmentation. This may prove perilous where, as in the United States, the administrative state's legitimacy is already open to question.

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