

## Ghost Rules

Amy J. Wildermuth  
Lincoln L. Davies

CSAS Working Paper 16-09

*Environmental Law in the Administrative State*

September 16, 2016

## *Ghost Rules*

Amy J. Wildermuth  
Lincoln L. Davies

### I. INTRODUCTION

Administrative law often operates in the interstices. Perhaps the greatest debate in the field, over discretion in statutory and regulatory interpretation, is about who gets to fill in the gaps of law. The bulk of what makes up administrative law, the prescription of what procedures agencies must follow when they act, aims precisely at ensuring that agencies do not leave too big of holes in how they protect the rights of those they regulate. Indeed, the very need for administrative law arises because of legal gap-filling, that is, from the use of agencies to execute, enforce, and implement broader legal mandates and prohibitions adopted by Congress or preferred by the President.

Likewise, the substance of what agencies do often takes place in the shadows. A large body of case law and scholarship has arisen around the thorny distinction of when an agency is actually making legally enforceable rules and when it is merely offering guidance or advice. An equally important strain zeroes in on what agencies must do when they want to change their precedent, while acknowledging that agencies can do so, frequently, even when they are acting in an adjudicative capacity. Some agencies, indeed, are so powerful that their merely initiating an investigation or publicly releasing information can act as a form of shadow lawmaking. If the Fed breathes, markets move.

Administrative law scholarship has given much attention to these problems, but it typically has done so by focusing discretely (and disjointedly) on the specific legal doctrines that govern the different ways agencies may act. This Article seeks to apply a wider lens to the dilemma of agencies creating law that is simultaneously influential but evasive of legal challenge—what we call “ghost rules.” Agencies engage in spectral lawmaking in myriad ways, but the ghost rule problem arises when an agency adopts a rule that in fact is wholly or partially unlawful.

In order to understand the concerns surrounding ghost rules, consider the Clean Power Plan proposed on June 18, 2014<sup>1</sup> and promulgated as a final rule on October 23, 2015.<sup>2</sup> Relying on Section 111(d) of the Clean Air Act,<sup>3</sup> the rule directs states to reduce emissions from existing fossil-fuel plants and to shift electricity generation from coal-fired plants to natural gas and renewables on an ambitious timeline.<sup>4</sup> Under the proposed rule, states were to submit plans by September 6, 2016 and reductions were to be implemented beginning in 2020.<sup>5</sup> After “significant comment” regarding

---

<sup>1</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (proposed Jun. 18, 2014).

<sup>2</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (to be codified 40 C.F.R. Part 60).

<sup>3</sup> 42 U.S.C. § 7411(d) (2016).

<sup>4</sup> *Id.* at 64,664.

<sup>5</sup> *Id.* at 64,673.

timing was received,<sup>6</sup> the final rule allows states, if they make the appropriate showing, to seek approval from the EPA for an extension until September 6, 2018,<sup>7</sup> and plans must make clear how reduction goals will be met beginning in 2022.<sup>8</sup>

On the day the final rule was promulgated, over twenty states and state agencies filed a petition for review of the rule and requested a stay of the rule pending that review in the D.C. Circuit.<sup>9</sup> After briefing on the stay, the D.C. Circuit denied the request to enjoin the rule from going into effect, but did order expedited briefing in a short order issued on January 21, 2016.<sup>10</sup> On January 26, 2016, states and state agencies sought a stay from the Supreme Court.<sup>11</sup> To the surprise of many observers, by a 5-4 vote the Court granted a stay on February 9, 2016, delaying the rule from going into effect.<sup>12</sup>

Although the Court's order was brief, one might be able to learn much about the stakes in this case and others involving potential ghost rules. Like other administrative agencies defending against stay requests, in addition to defending the merits of its actions,<sup>13</sup> the EPA emphasized the need to take action swiftly to address a pressing public health crisis, here the crisis of climate change.<sup>14</sup> With respect to the burdens the rule imposed in the short term, the agency noted the changed timing, highlighting that the rule required planning but no particular actions until 2022.<sup>15</sup> It argued forcefully not to allow the stay, which would ultimately, it argued, extend every deadline set in the rule.<sup>16</sup> In other words, the game being played by the regulated parties is well-known and well-worn: They always try to delay regulation with litigation. Don't let them do it.<sup>17</sup>

---

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 64,669.

<sup>8</sup> *Id.* at 64,676; *see id.* at 64,824 tbl. 12 (detailing emissions goals for each state).

<sup>9</sup> *See* Office of the West Virginia Attorney General, *State of West Virginia, et al. v. EPA*, <http://www.ago.wv.gov/publicresources/epa/Pages/D-C--Circuit,-No--15-1363.aspx> (detailing and providing links for filings). Several states filed an extraordinary writ in the D.C. Circuit seeking a stay of the rule in August after the Clean Power Plan was publicly announced but before the rule was finalized. *See In re West Virginia*, No. 15-1277, [http://www.ago.wv.gov/publicresources/epa/Documents/Emergency%20Petition%20for%20writ%20-%20file%20stamped%20\(M0101798xCECC6\).pdf](http://www.ago.wv.gov/publicresources/epa/Documents/Emergency%20Petition%20for%20writ%20-%20file%20stamped%20(M0101798xCECC6).pdf). The D.C. Circuit denied that request. *In re West Virginia*, No. 15-1277 (Sept. 9, 2015), [http://www.ago.wv.gov/publicresources/epa/Documents/Order%20denying%20extraordinary%20petition%20\(9-9-2015\).pdf](http://www.ago.wv.gov/publicresources/epa/Documents/Order%20denying%20extraordinary%20petition%20(9-9-2015).pdf).

<sup>10</sup> *See West Virginia v. EPA*, No. 15-1363 (Jan. 21, 2016), [http://www.ago.wv.gov/publicresources/epa/Documents/Order%20granting%20expedition%20and%20declining%20stay%20\(M0116449xCECC6\).pdf](http://www.ago.wv.gov/publicresources/epa/Documents/Order%20granting%20expedition%20and%20declining%20stay%20(M0116449xCECC6).pdf).

<sup>11</sup> *See West Virginia v. EPA*, No. 15A773, [http://www.ago.wv.gov/publicresources/epa/Documents/Final%20States%20SCOTUS%20Stay%20App%20-%20ACTUAL%20\(M0116774xCECC6\).pdf](http://www.ago.wv.gov/publicresources/epa/Documents/Final%20States%20SCOTUS%20Stay%20App%20-%20ACTUAL%20(M0116774xCECC6).pdf).

<sup>12</sup> *See* 577 U.S. (Orders List) in No. 15A773, [http://www.ago.wv.gov/publicresources/epa/Documents/15A773%20West%20Virginia%20v.%20EPA%20-%20USSC%20stay%20order%20\(M0118593xCECC6\).pdf](http://www.ago.wv.gov/publicresources/epa/Documents/15A773%20West%20Virginia%20v.%20EPA%20-%20USSC%20stay%20order%20(M0118593xCECC6).pdf); *see* Lyle Denniston, *Carbon pollution controls put on hold*, SCOTUSblog (Feb. 9, 2016, 6:45 PM), <http://www.scotusblog.com/2016/02/carbon-pollution-controls-put-on-hold/>.

<sup>13</sup> *West Virginia v. EPA*, No. 15A773, Memorandum for the Federal Respondents in Opposition to the Stay of Agency Action (Feb. 4, 2016), at 4, <http://www.ago.wv.gov/publicresources/epa/Documents/M0117886-1.PDF>.

<sup>14</sup> *Id.* at 5-6.

<sup>15</sup> *Id.* at 54.

<sup>16</sup> *Id.* at 2-3.

<sup>17</sup> Funk cite.

Unlike other cases, however, the states and state entities were able to draw attention to and question the EPA's conduct. On page one of their request, the petitioners told the Court of a new game that was being played by the agency. At the end of June 2015, the Court decided *Michigan v. EPA*,<sup>18</sup> which remanded an EPA rule regulating mercury and other air toxics from power plants to the D.C. Circuit after concluding that the agency should have considered costs.<sup>19</sup> The EPA's response to the decision was to express disappointment in the ruling but to emphasize that, because the rule had been in effect during the years of litigation over the rule, most plants had complied or would be in compliance shortly. EPA spokeswoman Melissa Harrison said "this rule was issued more than three years ago, investments have been made and most plants are already well on their way to compliance. Likewise, a blog post after the decision made the point twice: Early in the post, the author pointed out that "the majority of power plants are already in compliance or well on their way to compliance," and then in conclusion noted again that the rule "is still in place and many plants have already installed controls and technologies to reduce their mercury emissions."<sup>20</sup> The upshot was that if plants had already spent the money to comply, it was unlikely they would remove the equipment that had been paid for and installed (or would be soon), which meant, for those worried about the dangers posed by these kinds of emissions, there was little to fear.

Whether this was simply an ill-devised public relations strategy or something more, it is clear that the EPA's choice to emphasize its ability to get nearly full, no-turning-back compliance with a rule that was eventually remanded after legal challenge has given rise to concerns over agency manipulation of the rule process.<sup>21</sup> In the petitioners' request for a stay of the Clean Power Plan rule, they asserted that the EPA "extracted nearly '\$10 billion a year' from power plants before [the] Court could even review the rule."<sup>22</sup> Despite the many legal questions surrounding the validity of the Clean Power Plan rule—including the EPA's own admissions regarding the unprecedented and ambitious nature of the rule—that might have led to the Court concluding that there was uncertainty regarding the legal merits,<sup>23</sup> the perception of EPA's "victory dance" after *Michigan*—the idea that we still win even when we don't win—is the center of this paper.

The problem of ghost rules is critical. All agency rulemakings can have wide-ranging impact on society, and ghost rules are no exception. Unlike an appellate court decision—which may be constrained geographically depending on the court's jurisdiction or limited substantively if later litigants can distinguish one set of facts from another—agency rulemakings apply in blanket fashion nationwide. The field of administrative law, of course, seeks to reign in agency rulemaking power in many ways, but it does little to address the hidden effects that ghost rules can impose: As soon as a possible rule is proposed, it can influence the behavior of those it targets. And in the

---

<sup>18</sup> 135 S. Ct. 2699 (2015).

<sup>19</sup> *Id.* at 2711-12.

<sup>20</sup> Janet McCabe, *In Perspective: the Supreme Court's Mercury and Air Toxics Rule Decision* (June 30, 2015), <https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/>.

<sup>21</sup> Jonathan H. Adler, *Supreme Court puts the brakes on the EPA's Clean Power Plan*, WASH. POST (Feb. 9, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/?utm\\_term=.f7ea0492779d](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/?utm_term=.f7ea0492779d), linking to Michael S. Greve's post, *Clean Power, Dirty Hands* (Feb. 1, 2016) at <http://www.libertylawsite.org/2016/02/01/clean-power-dirty-hands/>.

<sup>22</sup> *West Virginia v. EPA*, No. 15A773, Application for Stay (Jan. 26, 2016), [http://www.ago.wv.gov/publicresources/epa/Documents/Final%20States%20SCOTUS%20Stay%20App%20-%20ACTUAL%20\(M0116774xCECC6\).pdf](http://www.ago.wv.gov/publicresources/epa/Documents/Final%20States%20SCOTUS%20Stay%20App%20-%20ACTUAL%20(M0116774xCECC6).pdf).

<sup>23</sup> See Adler, *supra* note 71, UPDATE.

interim period between when an agency finalizes a rule and a court determines its legality, an entire industry—or segment of society—may be forced to invest in expensive changes simply because agency rules come with deadlines and any given rule might be upheld. Precisely because of ghost rules, acquiescence often is less expensive than protest in the administrative context.

The ghost rule problem is also increasingly relevant. Although ghost rules are hardly a new arrival on the regulatory scene, they take on greater importance whenever an administration seeks to use agency action to achieve its ends. This can occur in a variety of contexts, reflecting how the constitutional balance of powers plays out. One such circumstance is when the Executive Branch determines it cannot achieve its ends through Congress. In other words, ghost rules become even more important in times of legislative logjam. Ghost rules are the unexplored dark side of congressional gridlock.

This Article seeks to tackle the ghost rule problem head-on. After developing a taxonomy of ghost rules and their effects, we address why the ghost rule problem is both relatively unique to agencies and exceptional in the administrative context in terms of its ill effects. Using that new framework, we then present a unique dataset we have developed of [[insert number]] appellate and trial decisions on requests for stays of agency rulemakings nationwide. [[This data offers numerous insights into how ghost rules function, including [describe results, noting among other things the courts rarely stay agency actions so ghost rules in fact have big impacts and that courts are not uniform in how they apply the stay test]]. Given these insights, we argue that courts should fundamentally change how they analyze requests for stays in administrative cases. Instead of applying the traditional sliding-scale test for preliminary injunctions, we contend that courts ought to employ a presumption that affords a modest delay for judicial review of rules before irrevocable investments must be made.

The balance of this Article proceeds as follows. Part II provides a taxonomy of the various ways that agencies may engage in ghost policymaking. It identifies five core types of ghost policymaking, as well as a sixth, related category—zombie rules. It then contrasts ghost rules with standard agency rules, the other types of ghost policymaking, and spectral lawmaking by the other branches of government to help define what makes something a ghost rule. Part III provides the basics on preliminary injunctions, or stays, and briefly discusses the broader literature on this thorny issue. In Part IV, we turn to our analysis of [[insert number]] judicial decisions of requests for stays of agency rules. We focus first on the D.C. Circuit and the D.C. District Court, and then turn to cases from every circuit in the U.S. Court of Appeals as well as the U.S. Supreme Court. We have found clear patterns in that work, including a surprising insight on analyses of the likelihood of success. Part V details our suggestion for how courts should reform how they determine whether to grant judicial stays of agency rules. Finally, Part VI concludes.

## II. IDENTIFYING GHOST RULES

Understanding why ghost rules are so important requires first placing them in a broader context. By definition, everything an agency does is coercive.<sup>24</sup> Irrespective of how an agency puts into motion the vast machinery of policymaking tools at its disposal, the fact is that agencies

---

<sup>24</sup> Cf. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 70 (2009).

touch every aspect of modern life.<sup>25</sup> This is true whether agencies are formally invoking the express, sometimes rigid powers granted to them by Congress or simply going about their daily business. No matter what agencies do, or do not do, they influence private and public, economic and non-economic, behavior. It may be that the modern administrative state would be unrecognizable to FDR,<sup>26</sup> but that is precisely the point. In a world where it is not even clear precisely how many federal agencies there are,<sup>27</sup> the full sway of administrative action cannot be understated. Administrative influence does not just permeate twenty-first century America; it is an integral part of our societal fabric.

A crucial corollary of administrative agencies' vast influence is that not all of what they do is perfectly visible. Much, if not most, of what any given agency does occurs out of the public eye, and often, outside the careful watch of the other branches of government.<sup>28</sup> Indeed, there is so much regulatory work taking place outside the light of day that one observer has suggested that such “regulatory dark matter”—“agency and presidential memoranda, guidance documents (‘nonlegislative’ or interpretive rules), notices, bulletins, directives, news releases, letters, and even blog posts”—constitutes one of the most important ways that agencies adopt policy today.<sup>29</sup> The presence of this “regulatory dark matter” is particularly noteworthy because the agency actions taken to create it often occurs outside normal APA, and without giving affected individuals recourse in the courts.<sup>30</sup>

Analogizing agency creation of penumbral law to “dark matter”—the bulk of the universe that, unlike galaxies, planets, and stars, the human eye cannot see—is both apt and limited. The analogy is apt because it is certainly true that agencies often seek to shape behavior through informal means that, like dark matter, can be both hard to detect as well as to measure. The analogy quickly runs up against limits, however, because agency actions, unlike dark matter, do not just exert some kind of mysterious gravitational pull on the objects that happen to be around them. Rather, far more often, agency action is more tangible; it is specific and clear and targeted at certain entities or actors. This is why agency action outside the explicit contours of the APA is so important. It aims to change how identifiable decisions in society are made, how markets function, and how industries are structured. Moreover, labeling penumbral agency policymaking as “dark” gives some suggestion that it is always negative or undesirable—or at least, that all of

---

<sup>25</sup> Cf. Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 150 (2014); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015).

<sup>26</sup> See generally, e.g., Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121 (2016); Catherine M. Sharkey, *The Administrative State and the Common Law: Regulatory Substitutes or Complements?*, 65 EMORY L.J. 1705 (2016); Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 N.Y.U. J. L. & LIBERTY 491 (2008); Michael Ray Harris, *Breaking the Grip of the Administrative Triad: Agency Policy Making Under a Necessity-Based Doctrine*, 86 TUL. L. REV. 273 (2011).

<sup>27</sup> Clyde Wayne Crews, *Nobody Knows How Many Federal Agencies Exist* (Aug. 26, 2015), <https://cei.org/blog/nobody-knows-how-many-federal-agencies-exist>.

<sup>28</sup> See, e.g., Clyde Wayne Crews Jr., *Here's How Financial And Other Regulators Are Issuing Rules Without Writing Them*, FORBES.COM (July 11, 2016), <http://www.forbes.com/sites/waynecrews/2016/07/11/heres-how-financial-and-other-regulators-are-issuing-rules-without-writing-them/#2c30b648753c>.

<sup>29</sup> Clyde Wayne Crews Jr., *Competitive Enterprise Inst., Mapping Washington's Lawlessness 2016: A Preliminary Inventory of "Regulatory Dark Matter"* (December 2015), <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Mapping%20Washington%27s%20Lawlessness.pdf>.

<sup>30</sup> *Id.*

it exerts a true gravitational or regulatory force. But both of these suggestions are under-inclusive. In fact, some kinds of penumbral agency policymaking may be quite beneficial, and some may actually remove rather than add regulation. In administrative law as in life, some specters are friendly ghosts.<sup>31</sup>

Thus, agency policymaking that occurs outside the more mechanical procedures laid down by the APA might better be likened to specific types of spirits, apparitions, or ghosts than to dark matter. Like these disembodied, ethereal beings, spectral regulation by agencies comes in certain, discernible forms and aims at shifting the behavior or practices of known, identifiable actors in society. If an agency's ghost policy haunts you, you know it.

Regardless the metaphor, the key point is that agencies consistently—and ubiquitously—make policy through a wide array of devices and actions that fall outside the procedures contemplated by Congress for regulating agency behavior. A core contribution of this Article is to highlight the overlooked problem of how agencies do this through rules that are illegal (or potentially illegal) but nonetheless promulgated by the Executive Branch: ghost rules. Before delving into that more specific manifestation of the problem, however, we must place ghost rules in the broader universe of spectral lawmaking by agencies: ghost policymaking. That universe, as it turns out, is wide indeed. In the continually expanding U.S. administrative state, the landscape is filled with many spirits, phantoms, and shades.

#### A. *Ghost Policy: A Taxonomy*

Anyone familiar with film, literature, or scripture knows that the types of ghosts present in the universe are virtually innumerable.<sup>32</sup> From archangels to King Hamlet, from creepers to Slimer, the possibilities for classifying ghosts is almost as extensive as the myriad types of poltergeists.<sup>33</sup> So too for the breadth of ghost policymaking in the administrative context: Agency actions in this vein crop up in many ways, and there are almost as many by which they can be categorized. Nonetheless, building a coherent taxonomy of the kinds of ghost policymaking that agencies engage in is essential because it allows for their juxtaposition and, in turn, evaluation of the problems and benefits that each type of ghost policy may present.

Three traits run through agencies' various types of ghost policymaking. Each manifests on a spectrum. First, a ghost policy may be more or less concrete. That is, the imminence, clarity, and likelihood of an agency's ghost policy may vary. For instance, if an agency issues a press release stating that it will be cracking down on the manipulation of prices in electricity markets, that sends a signal to the industry, but how and when the agency will proceed may remain tenuous enough that some of the targeted behavior continues.<sup>34</sup> By contrast, if the agency initiates enforcement actions against specific companies for manipulating electricity prices—an effort that aims, at least in part, to establish that the agency even has the legal authority to do

---

<sup>31</sup> See, e.g., <https://www.youtube.com/watch?v=OGz0AvAwrnw>.

<sup>32</sup> [Amy, Suzanne is working on this footnote for us.]

<sup>33</sup> [Amy, Suzanne is working on this footnote for us.]

<sup>34</sup> See generally Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380 (1973).

so—its action quickly becomes much more concrete even for those entities not subject to the enforcement action.<sup>35</sup>

Second, agency ghost policymaking may be more or less compulsory. In other words, in establishing a ghost policy, the agency might sometimes issue it as an imperative, sometimes more in the form of guidance or suggestion, and other times somewhere in between. A written, published agency interpretation of the requirement that all animal enclosures be “safe,” for instance, actually means that they must be at least twelve feet high effectively imposes a new imperative on those subject to the safety requirement.<sup>36</sup> If, in contrast, one of the agency’s field agents merely suggests that it “would be a good idea” to raise the animal enclosures to twelve feet, this might also exert regulatory force on the owners of such closures but not be seen as actually compulsory in nature.<sup>37</sup>

Third, an agency’s ghost policymaking might be broader or narrower. This idea tracks the basic distinction between adjudication and rulemaking in the administrative law context.<sup>38</sup> An agency declaration with particular, individualized impacts tends to be the former; a new policy that applies more broadly in society or to a larger class or group tends to be the latter.<sup>39</sup> The same distinction applies in the spectral world of administrative law as well. For instance, a general policy statement that charities that receive less than \$500,000 in donations per year typically will not be audited has a rather broad impact. Yet an opinion letter to the same effect issued to a single charity and not made widely available is by definition much narrower in application.

These three traits combine in a variety of ways to form the different kinds of ghost policies that agencies create. Undoubtedly, the specific manifestations of these regulatory ghosts are extensive, but they can be grouped into five general categories. These categories begin with the least concrete and compulsory and move the most specific and mandatory. In order, they are: (1) ambient spirits; (2) personal phantoms; (3) administrative specters; (4) regulatory phantasms; and (5) ghost rules. In addition, a notable, non-ghost category—zombie rules—demands mention.

### 1. *Ambient Spirits*

Some forms of agency ghost policymaking are so extensive and mundane they may not even go noticed by the general public. To the targets of agency action, though, they are paid attention to with great interest. In the universe of agency ghost policies, these are the “ambient spirits.” They earn this moniker because they appear largely in the background, and thus are ambient, and because they are spirits in the direct sense of the word, that is, they are incorporeal as far as actual regulatory law goes. Even though this kind of policymaking is so omnipresent it acts almost like a backdrop for what an agency does, it cannot be disregarded. In fact, it is relied

---

<sup>35</sup> <https://ferc.gov/media/news-releases/2005/2005-4/11-15-05.asp>

<sup>36</sup> WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES (4th ed. 2010).

<sup>37</sup> *Id.*

<sup>38</sup> *Compare* *Londoner v. City & County of Denver*, 210 U.S. 373 (1908), *with*, *Bi-Metallic Inv. Co. v. State Bd. Of Equalization*, 239 U.S. 441 (1915).

<sup>39</sup> *Id.*



on, often heavily, by parties potentially subject to more extensive regulation by the relevant agency.

Good examples of ambient spirits often summoned by agencies include public speeches, press releases, blog posts, and other statements made by agency officials.<sup>40</sup> Without question, these are not the usual activities that come to mind when regulation is thought of, but their influence cannot be understated—and agencies know this. It is an open secret inside the beltway that law firms and trade groups representing regulated industries devote large resources to following the everyday goings on of the agencies relevant to their clients and members. This is why extensive, expensive trade presses tracking agency developments, proposals, and rumors prosper, and it is why practice groups in firms will assign attorneys to watch agency decisional announcements live.<sup>41</sup> Understanding not just what an agency’s written rationale was but what the policy currents and forces behind it are has value. There is gold in the breadcrumbs, precisely because agencies can influence behavior simply by speaking. Particularly in the absence of other clear guidance from the agency about how it may address a given issue, these ambient spirits can have great sway.

## 2. *Personal Phantoms*

Just as some ghosts choose specific people to haunt,<sup>42</sup> so too do some agency ghost policies have more particularized effect, targeting individuals or certain companies or organizations. These, then, are “personal phantoms”—personal because they tend to be more individualized and phantoms because they appear quite clearly but lack material substance, that is, they are unlikely to be compulsory.

Anyone who has ever dealt directly with an agency has encountered this kind of policymaking ghost. It arises in the form of individualized advice, guidance, or direction given by the agency. This can be as informal as a conversation with an agency representative, and it can be as formal as a properly issued opinion letter.<sup>43</sup> In either situation, the effect is the same. The agency influences the behavior of the person or entity it has communicated with, and it has done so without going through any kind of extensive procedure. Personal phantoms, then, may be narrower in their reach than ambient spirits often are, but they are more likely to be concrete, precisely because they are so individualized.

## 3. *Administrative Specters*

“Administrative specters” fall in the middle of the spectrum of the different species of agency ghost policymaking, and for this reason they may be the most nebulous as well. Specters

---

<sup>40</sup> Clyde Wayne Crews Jr., Competitive Enterprise Inst., Mapping Washington’s Lawlessness 2016: A Preliminary Inventory of “Regulatory Dark Matter” (December 2015), <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Mapping%20Washington%27s%20Lawlessness.pdf>.

<sup>41</sup> See, e.g., <http://www.fortnightly.com/>.

<sup>42</sup> See generally, e.g., CHARLES DICKENS, A CHRISTMAS CAROL (1843).

<sup>43</sup> Clyde Wayne Crews Jr., Competitive Enterprise Inst., Mapping Washington’s Lawlessness 2016: A Preliminary Inventory of “Regulatory Dark Matter” (December 2015), <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Mapping%20Washington%27s%20Lawlessness.pdf>.

are “visible disembodied spirit[s],”<sup>44</sup> and in the agency context, this is what administrative specters are as well. This category encompasses ways in which agencies extend their regulatory grasp outside the corporal body of their positive law. These efforts thus can be felt and seen, but they float outside—and influence parties outside—the agency actions where they are created.

Prominent examples of administrative specters include agencies’ establishment of precedent through consent decrees or other kinds of approvals. For instance, when the Department of Justice or Federal Trade Commission approves a proposed merger, the consent decree may well include conditions that neither agency actually has express power to enforce.<sup>45</sup> Merging corporations, of course, often agree to whatever these conditions may be for fear that failure to do so will tank their deal. The net effect is two kinds of ghost policymaking. First, the agency has effectively expanded its regulatory authority beyond what Congress actually gave it. Second, these decrees put other entities on notice of the types of conditions that the agency may demand in future deals. That is, even though the agencies do not necessarily have authority to require these concessions in the first place, they can use this kind of ghost policy to effectively establish precedent.

#### 4. *Regulatory Phantasms*

In their common form, “regulatory phantasms” may be the most recognizable of all the various kinds of agency ghost policymaking. This is because the foremost examples of this particular spiritual species are “nonlegislative” rules: interpretive rules and general policy statements that fall outside the scope of regular notice-and-comment “legislative” rules.<sup>46</sup> In common parlance, a phantasm is an “illusory likeness of something.”<sup>47</sup> This is precisely what general policy statements and interpretive rules are—illusory likenesses of legislative rules. Thus, they are regulatory phantasms.

Of course, the degree to which any given policy statement or interpretative rule is phantasmal rather than an actually animate rule will vary from case to case. This is why a core doctrine in administrative law aims at determining when something is actually a policy statement or interpretative rule, or instead, a binding rule that is merely masquerading as a nonlegislative rule.<sup>48</sup> The difference matters, in all kinds of ways, including for what kind of procedure is required to make the statement, whether the agency will be bound by its words, and the degree to which the agency might receive deference in what it says. While this rule / non-rule distinction is legally important, what is often overlooked about the need to make it in the first place is that the categories of what agencies do when they say what the law means often blur together. Like actual rules, general policy statements and interpretative rules also exert regulatory force in very

---

<sup>44</sup> MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1129 (10th ed. 1993).

<sup>45</sup> D. Bruce Hoffman, *Rhetoric vs. Reality: An Assessment of Trends in Civil Non-Merger Antitrust Enforcement Comparing the Bush and Obama Administrations*, 22 No. 2 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 105 (2013); Thomas J. Horton, *Fixing Merger Litigation “Fixes”: Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act*, 55 S.D. L. REV. 165 (2010).

<sup>46</sup> See, e.g., *Am. Hospital Ass’n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987); *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993).

<sup>47</sup> DICTIONARY.COM, <http://www.dictionary.com/browse/phantasm>.

<sup>48</sup> See, e.g., *Am. Hospital Ass’n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987); *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993).

clear and perceptible ways. Because they are concrete and broadly applicable, they share all but one trait with a regular legislative rule (compulsoriness). That is, they are likenesses of this close regulatory cousin. They are another way agencies engage in ghost lawmaking.

### 5. *Ghost Rules*

Of all the different kinds of spirits in the agency policymaking world, “ghost rules” are both the most concrete and compulsory, as well as broad in their applicability. A ghost rule comes in a very specific form. It is an actually promulgated rule that is or may well be illegal. It is thus concrete; it has been issued. It is also mandatory; it is a rule. And it is broadly applicable; it does not arise in the adjudicative context. For this reason, ghost rules have the potential to be the most troublesome of all the different administrative spirits. They exert a real, quite palpable force on society until they are invalidated or enjoined, and it is this latent effect that keeps them in the spirit world, rather than the material universe, of administrative law.

Because they are so easily identifiable, it is not every day that agencies create ghost rules. When they do, however, the implications are often great. Potentially, an agency can use a ghost rule to fundamentally alter core pillars of society. An agency rule can be classified as a ghost rule anytime it is unlawfully adopted, including if the agency failed to follow proper procedures, has exceeded constitutional authority, or failed to back the rule up with sufficient evidence or reasoning. Most problematic, however, an agency might erect a ghost rule that is unlawful because the agency lacks authority to regulate at all.<sup>49</sup>

Notably, the list of instances in which agencies have adopted rules that exceed their jurisdictional powers is not short. In addition to arguably the highest profile, now pending case where the argument is that the agency has unleashed a ghost rule—the challenge to the Clean Power Plan—numerous cases have chronicled instances where agencies overstepped their legislative bounds.<sup>50</sup> The Food and Drug Administration sought to regulate an industry worth billions—tobacco—only to be shut down in this effort by the courts.<sup>51</sup> And the Federal Communications Commission attempted to require all electronic manufacturers selling products in the United States to install specific technology to restrict the way that digital video signals could be transmitted, copied, or stored by these device, an action it took at the behest of the movie and television industry.<sup>52</sup>

Undoubtedly, the impact of such regulations might not be deleterious, but rather, net positive. Certainly government has long lagged in sufficiently responding to both climate change and the health impacts of tobacco. This, moreover, is only the beginning of the list of ways in which the government has failed to adequately protect the public. But that is beside the point. Regardless of whether any given regulation will benefit society, an agency’s unleashing of a ghost rule raises numerous other problems, including doing violence to the carefully and constitutionally constructed balance of power among the federal government’s three branches.<sup>53</sup>

---

<sup>49</sup> See 5 U.S.C. § 706.

<sup>50</sup> *West Virginia v. EPA*, No. 15A773 (Feb. 9, 2016), \_\_ S. Ct. \_\_.

<sup>51</sup> *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

<sup>52</sup> *American Library Ass’n. v. FCC*, 406 F.3d 689 (D.C. Cir. 2005).

<sup>53</sup> See *infra* Part III.A.

How and when the courts intercede to stop agencies from flexing regulatory strength in this way is thus critically important—the topic we return to in Part III.

## 6. *Zombie Rules*

A final, separate category of agency decisions deserves identification. This category does not involve administrative spirits but rather a different kind of ghoul—the undead. When an agency decides to use policymaking to stop enforcing statutory or other mandates that otherwise would be in effect, it has created a “zombie rule.” The legal mandate exists, can be pointed to, and even cited, but the agency’s action has effectively killed it. As a result, it is technically alive but not truly animate. It is the walking dead.

Zombie rules thus stand in contrast to other kinds of supernatural administrative lawmaking because they typically involve an agency’s removal of regulatory force in society, whereas ghost policymaking usually, if not always, seeks to expand the agency’s regulatory influence. Nonetheless, zombie rules can raise the same kinds of problems as ghost policymaking. An agency’s unilateral decision not to enforce a law necessarily raises separation of power concerns. If the agency does so without using APA or APA-like procedures, that also presents procedural justice, transparency, legitimacy, and accountability concerns. And, to the extent the legal mandate offers a net benefit to society, the agency’s choice to render the law a zombie will be substantively deleterious.

Agencies may engage in zombie rulemaking in myriad ways, and in many circumstances, the incentive will be to do so as quietly and as opaquely as possible. One of the most notable examples of zombie rulemaking, however, is also high profile. The Obama administration’s official announcement that it will not prosecute marijuana sales that occur under the auspices of state regulatory regimes is a prototypical example of a zombie rule.<sup>54</sup> Irrespective of whether the Department of Justice’s decision was politically sound or substantively wise, it was made while expressly acknowledging that marijuana sales remain illegal under federal law.<sup>55</sup> Thus, through unilateral executive action, the agency took an in-effect, on-the-books law and made it a zombie rule: technically alive, but in practice, dead.

### B. *Ghost Rules: Isolating the Species*

In law as in biology, it is essential to accurately identify species. It is critical in biology because species are the most basic form of life. In turn, what is and is not a species has significant practical consequences, from being able to properly understand the function of ecosystems, to accurately chronicling history, to determining what should and should not be protected—or regulated—by law.<sup>56</sup>

For similar reasons, it is essential to be able to correctly identify the species of “ghost rules” among other kinds of agency policymaking. Knowing what is and is not a ghost rule is

---

<sup>54</sup> [https://www.washingtonpost.com/national/health-science/obama-administration-will-not-preempt-state-marijuana-laws--for-now/2013/08/29/b725bfd8-10bd-11e3-8cdd-bcdc09410972\\_story.html](https://www.washingtonpost.com/national/health-science/obama-administration-will-not-preempt-state-marijuana-laws--for-now/2013/08/29/b725bfd8-10bd-11e3-8cdd-bcdc09410972_story.html)

<sup>55</sup> *Id.*

<sup>56</sup> Cite Stanford website you found

necessary to identify when this type of penumbral lawmaking occurs and, correspondingly, where it does and does not raise the myriad problems that often accompany ghost rulemaking. Moreover, because key legal doctrines and tools have been created to address the specific dilemma of ghost rules,<sup>57</sup> isolating what falls into this category is important for understanding the scope and limitations of those doctrines.

Having described the core attributes of a ghost rule, here we engage in the further taxonomical endeavor of describing how they can be isolated as a unique species of administrative action. Biologists employ differing theories and constructs for classifying species. The so-called Biological Species Concept is perhaps most well-known. It identifies species based on which organisms can interbreed and produce offspring capable of reproduction.<sup>58</sup> Other accepted species classification theories include the Phylogenetic Species Concept, which “defines a species as a group of organisms bound by a common ancestry,”<sup>59</sup> and the Ecological Species Concept, which says something is a species if it occupies a distinct ecological niche.<sup>60</sup>

Our approach borrows from the Phylogenetic Species Concept as well as the Ecological Species Concept. Both lenses can help isolate and identify ghost rules: It is relevant how agencies create ghost rules; that is, they share a common ancestry. It also matters what ghost rules do; because they share common attributes for how and when they seek to regulate, ghost rules occupy a unique niche in the ecosystem of the modern administrative state.

Defining species necessarily requires contrasting organisms with each other. Here we do so in three sequential ways, each of which helps identify and isolate ghost rules as an independent species of agency action. We juxtapose ghost rules, first, against traditional legislative, notice-and-comment rules; second, against other kinds of ghost policymaking by agencies; and third, against comparable types of penumbral law adopted by the other two branches of the federal government.

### 1. *Ghost Rules v. Rules*

Distinguishing ghost rules from “regular” administrative rules is perhaps the simplest distinction to make but also the most important. The APA defines rules as the “agency statement[s] of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy.”<sup>61</sup> When an agency creates such a rule, the APA further mandates that agencies go through the familiar notice-and-comment process of proposing a draft rule, seeking public input on it, and then responding to that input before the rule is finalized and promulgated into regulation.<sup>62</sup> Ghost rules comprise a specific subset of this kind of notice-and-comment rulemaking. What, then, sets them apart from other legislative rules?

---

<sup>57</sup> See *infra* Part IV.

<sup>58</sup> <http://plato.stanford.edu/entries/species/>

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> 5 U.S.C. § 551(4).

<sup>62</sup> 5 U.S.C. § 553.

Only two lines need be drawn to distinguish ghost rules from “regular” administrative rules. First, ghost rules, unlike standard administrative rules, are not lawful. Second, as a result of their illegality, ghost rules impose only latent, rather than direct, regulatory effects.

A straightforward example illustrates these differences. Suppose that the U.S. Environmental Protection Agency issues a rule defining its jurisdiction under the Clean Water Act to extend to the construction of homes and any other activity that involves the filling in of wetlands—and, moreover, that the agency decides the term “wetlands” includes any parcel of land where there is sufficient water present for migratory birds to use the land as fleeting habitat.<sup>63</sup> To issue this rule, the EPA jumps through all the usual hoops, including issuing a proposed version of its regulation, an extensive discussion of why it is proposing what it is, and a comment period before it finalizes the rule. Nonetheless, property owners who are upset with the rule challenge it in court and, eventually, win. The Supreme Court strikes down the rule as an invalid interpretation of the agency’s powers under the Clean Water Act.<sup>64</sup>

At first blush, this rule may look like any other. It went through notice-and-comment rulemaking. The agency carefully considered public comment before finalizing it. It has broad, prospective effect, in fact applying throughout the country. Because the judiciary ultimately strikes it down, however, this rule falls into a different category than other legislative rules. It is a ghost rule: The fact that it is unlawful means that it never should have been enacted. And, the fact that it is in place for some time despite being unlawful means that its impact on society, while real, is merely fleeting and latent rather than long-lasting. EPA’s rule is, in short, not a regular, “animate” rule, but rather, a “ghost” rule—haunting only for a time.

While defining ghost rules in this way is clean, it is not devoid of problems. Most critically, distinguishing ghost rules based on their legality begs the question whether anything can be identified as a ghost rule independently, or instead if it can only be done in relation to the judiciary speaking. The problem seems thorny, and in some cases it will be. The truth is, however, that the vast majority of rules adopted by agencies are legal. And, of those that are not, most of any real importance are likely challenged in court. As a practical matter, this means that the possible universe of ghost rules is quite narrow. Moreover, while agencies tend to be adept at defending their rules before the judiciary, they (and the entities they regulate) almost always know when a rule is illegal, or at least if it is pushing the limits of being so. This narrows the universe further still. Consequently, while it may be true that the full scope of what rules count as ghost rules cannot be known with certainty until after the judiciary has ruled, what generally falls into that category can be ascertained with at least some predictability and precision *ex ante*, not only *post facto*.

## 2. *Ghost Rules v. Ghost Policymaking*

Ghost rules also can be identified by contrasting them with other kinds of ghost policymaking. While the difference between ghost rules and straight-up agency rules speaks to ghost rules’ lineage, placing them within the broader universe of ghost policymaking highlights their role in the administrative law ecosystem. The most straightforward way to do so is by

---

<sup>63</sup> *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

<sup>64</sup> *Id.*

identifying how each type of ghost policymaking places in terms of its concreteness, compulsoriness, and breadth.

From this perspective, the central feature that distinguishes ghost rules from other kinds of spectral policymaking by agencies is their compulsoriness. This feature stems directly from the fact that ghost rules are actually promulgated rules that turn out to be invalid. Importantly, other categories of ghost policymaking do not share this trait. The kind of diffuse policymaking pressure exerted by “ambient spirits,” such as public speeches by agency officials, draws the sharpest contrast with ghost rules. This kind of general regulatory pressure is not formal in any sense of the word, but rather, admonitory and signaling. Industries listen carefully when agencies speak, but until there is force behind such statements, some entities will inevitably choose not to respond. Nonetheless, this same difference can be drawn between ghost rules and the other types of agency ghost policymaking, if somewhat less starkly. The key distinction, for instance, between ghost rules and the kind of general policy statements and interpretative rules that fall into the category of regulatory phantasms is that the former are binding while the latter are not. A unique trait of ghost rules, in short, is their compulsoriness.

Similarly, ghost rules are typified by their concreteness and specificity, again, because they are actually promulgated rules. While ghost rules do not stand alone in this regard, their concreteness does set them apart from some other categories of ghost policymaking. Indeed, ambient spirits typically are not concrete at all: That is why they are ambient—they are environmental rather than specific, operating in the background as context rather than text. Moreover, even those ghost policymaking species that are more concrete tend not to carry the same regulatory heft as do ghost rules. Both personal phantoms and administrative specters, for instance, can be quite concrete, giving the recipient of the agency’s message specific information on how the agency would like them to act. Still, neither of these species matches ghost rules in terms of regulatory force. Ghost rules are concrete because they are explicit, but they also are mandatory, which means they have real bite. By contrast, the kind of informal agency advice that falls into the species of personal phantoms is by definition not binding on the party. And, while agency efforts to influence behavior through administrative specters, such as extra-legal conditions in consent decrees, in fact bind the parties in that adjudication, their broader precedential effect on similarly situated entities is only hortatory and not immediately binding at all.

In contrast to their compulsoriness and concreteness, ghost rules are less distinct from other kinds of ghost policymaking in terms of their breadth. Ambient spirits, administrative specters, and regulatory phantasms all can apply quite broadly, just as ghost rules do. All four of these species of agency ghost policymaking will vary in their breadth but in general are far broader than, say, how the APA defines an agency adjudication.<sup>65</sup> In fact, the only species of ghost policymaking that tends to be narrow in its application is the category of personal phantoms, which, by their nature, are individualized and specific.

The way, then, that ghost rules are truly distinct from the other categories of ghost policymaking is that they are the only species of spirit that checks off all three boxes: They are compulsory *and* concrete *and* broad in scope. That is, of all the species of ghost policymaking,

---

<sup>65</sup> See U.S.C. § 551.

ghost rules pack the most regulatory punch. This is crucial definitionally, and it is important because it means that the problems that ghost policymaking can create are likely to be most concentrated and acute in ghost rules.<sup>66</sup> Of course, at the same time, because many ghost rules may eventually be vacated by the courts, their effects may also be the most fleeting of the various ghost policymaking species. Most often, they are ghosts precisely because they have been, or will be, slayed by the courts.

Table 1. Characteristic Traits of Ghost Policymaking Species

<b><u>Ghost Species</u></b>	<b><u>Concreteness</u></b>	<b><u>Compulsoriness</u></b>	<b><u>Breadth</u></b>
<i>Ambient Spirits</i>	Varies	Advisory	Varies
<i>Personal Phantoms</i>	Concrete	Advisory	Narrow
<i>Administrative Specters</i>	Varies	Varies	Varies
<i>Regulatory Phantasms</i>	Concrete	Advisory	Broad
<i>Ghost Rules</i>	Concrete	Compulsory	Broad

### 3. *Ghost Rules v. Corollary Ghost Lawmaking*

The contours of ghost rules can be further traced by comparing them against the types of spectral lawmaking that other branches of the government create. Administrative agencies are not alone in making law that imposes secondary effects. In fact, every branch of government does this.

For courts, ghost lawmaking occurs in at least three ways. First, and most prominently, courts engage in spectral lawmaking by issuing *obiter dicta*. While this problem is longstanding, deeply entrenched, and heavily analyzed,<sup>67</sup> what gets much less play is that when courts include dicta in their opinions, it is a kind of ghost law. This is because it forces parties coming later to distinguish (and invites debates about) which elements of the decision are binding and which are not.<sup>68</sup> Second, courts make ghost law by issuing unpublished decisions. While state trial courts have long engaged in this practice and federal district courts have always been selective in publishing their rulings, in recent years appellate courts have increased the practice of issuing decisions as “unpublished,” even though they are widely available in digital and other databases. The rise of this practice has spurred a spirited debate about its merits, problems, and effects.<sup>69</sup> It should be obvious why. The issuance of decisions by a court that look like the way a court normally makes law—but that the court says are in fact not law—holds both the risk of confusion and the power to sway behavior. It is ghost law. Finally, although far less common,

<sup>66</sup> See *infra* Part III.

<sup>67</sup> [RA working on cites].

<sup>68</sup> See, e.g., Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219 (2010). Cf. Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931 (2008).

<sup>69</sup> See, e.g., Barbara Busharis, *Unpublished Opinions: The Saga Continues*, 25 NO. 4 TRIAL ADVOC. Q. 5 (2006); J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 ARIZ. L. REV. 419 (2005); Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 546 (1997); Stephen R. Barnett, *From Anastasoff to Hart to West’s Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 12 (2002); Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473 (2003); Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514, 514-15 (1984).



some state courts issue advisory opinions that act very much as a kind of spectral lawmaking. As one study showed, from 1990 through 2004, courts in Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota issued advisory opinions in response to questions presented by their governors or legislatures.<sup>70</sup> In some jurisdictions, the state constitution gives courts this authority, but in others, statutes do so.<sup>71</sup> This, then, is a third form of judicial ghost lawmaking. Non-binding, advisory, and anticipatory, it is designed clearly to influence behavior and outcomes, without actually having compulsory effect.

Legislatures, too, engage in various forms of latent lawmaking. The most obvious is the legislative resolution, which expresses the intent of one or both houses of a legislative body but that explicitly fails to rise to the level of law.<sup>72</sup> In one sense, such resolutions might be considered similar to unpublished decisions by a court. They pronounce publicly what all or part of the legislative body thinks on a matter, so they may be taken by the public as a signal of how to act.<sup>73</sup> Yet, they explicitly do not purport to act as law itself. Like other kinds of ghost law, then, they exert influence without being binding. A second way that legislatures can create ghost law is much more analogous to ghost rules in the administrative realm. When Congress passes laws that are eventually overturned by the courts, these statutes look very much like agency-made ghost rules. They are concrete, compulsory, and broadly applicable, but their effect is latent, applying only in the interim period before the statute is invalidated.

The existence of these different kinds of spectral lawmaking begs the question of why administrative ghost rules deserve special attention. Part of that answer is bound up in the inherent nature of agencies, including the concentration of many powers within them, their comparative lack of accountability, and their extensive incentives for adopting ghost rules. As is the case for other kinds of administrative ghost policymaking, only one of these species of spectral law ticks off all three boxes of being concrete, compulsory, and broad in applicability. The rest fall short of that threshold, but it is met both by ghost rules and by ghost laws adopted by Congress but later invalidated in the courts. Nonetheless, a key difference distinguishes these ghost laws and administrative ghost rules. The former must first clear the difficult hurdle of passage in Congress and ratification by the President, whereas agency actions are uniquely—and potentially, dangerously—unilateral.

### III. GHOSTBUSTERS: ENJOINING RULES

The unique problem posed by ghost rules means that we ought to think carefully about what mechanisms might be best for preventing ghost rules. The classic method of ghostbusting has been

---

<sup>70</sup> Jonathan D. Persky, Note, “*Ghosts That Slay*”: *A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155 (2005); *see also, e.g.*, Christopher S. Elmendorf, *Advisory Counterparts to Constitutional Courts*, 56 DUKE L.J. 953 (2007); Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114 (2009); Note, *Advisory Opinions and the Influence of the Supreme Court Over American Policymaking*, 124 HARV. L. REV. 2064 (2011); Girardeau A. Spann, *Advisory Adjudication*, 86 TUL. L. REV. 1289 (2012).

<sup>71</sup> Jonathan D. Persky, Note, “*Ghosts That Slay*”: *A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155 (2005).

<sup>72</sup> *See generally, e.g.*, Robert E. Moore, *Legislative Resolutions: Their Function and Effect*, 31 TEX. L. REV. 417 (1953).

<sup>73</sup> *Id.*

to request a stay or a preliminary injunction. We turn now to a review of the current law on preliminary injunctions, particularly when requesting to enjoin an administrative rule from taking effect.

### A. Seeking a Stay: The Basics

When a party seeks to challenge agency action of any sort, it must meet the usual standards for reviewability. For example, the party bringing the claim must have standing, the action must not be excluded from judicial review, and the agency action must be final.<sup>74</sup> In addition, in order to seek judicial review of an agency action, a party must identify a federal statute that gives the court jurisdiction to hear the case.<sup>75</sup>

The default jurisdictional review provision for administrative cases is the general grant of jurisdiction to federal district courts to hear issues that raise questions of federal law.<sup>76</sup> But many organic statutes for administrative agencies provide for review of agency action in either the D.C. Circuit or other U.S. Courts of Appeals.<sup>77</sup> This means that requests for a preliminary injunction or stay of the agency's action could, depending on the organic statute's jurisdictional provisions, be sought in the first instance in either a district court or a court of appeals.

There is, as we discuss further in Part V, variation in how the district courts and courts of appeals have approached granting a request for a preliminary injunction or stay of agency action. But regardless of whether a district court or a court of appeals is considering the request in the first instance or on review, the longstanding test that governs the granting of a preliminary injunction consists of four factors:

- (1) the significance of the threat of irreparable harm to the plaintiff if the injunction is not granted;
- (2) the state of the balance between this harm and the injury that granting the injunction would inflict on defendant;
- (3) the probability that plaintiff will succeed on the merits; and
- (4) the public interest.<sup>78</sup>

We discuss each factor and how they are considered briefly below.

#### 1. Four Factors

The first factor, irreparable harm, is often viewed as “the single most important prerequisite for the issuance of a preliminary injunction.”<sup>79</sup> This factor considers the toll that the proposed action

---

<sup>74</sup> WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, *ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES* 407-10 (5th ed. 2014).

<sup>75</sup> *See id.* at 407.

<sup>76</sup> *See* 28 U.S.C. § 1331 (2016).

<sup>77</sup> *See, e.g.*, 42 U.S.C. 7607(b) (2016) (providing that judicial review for some actions under the Clean Air Act will be in the D.C. Circuit; others involving plans that are “locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.”).

<sup>78</sup> CHARLES ALAN WRIGHT ET AL., 11A FED. PRAC. & PROC. CIV. § 2948 (3d ed. 2015).

<sup>79</sup> CHARLES ALAN WRIGHT ET AL., 11A FED. PRAC. & PROC. CIV. § 2948.1 (3d ed. 2015).

will have on plaintiffs' interests. In considering whether to grant relief, the plaintiff must show that without a stay, the court will be unable to grant an effective remedy. This generally means that if there is an alternative remedy such as money damages, a preliminary injunction is not appropriate.<sup>80</sup> In addition, a plaintiff must show that it is likely, not speculative, that the harm will occur.<sup>81</sup>

Next, the court must consider the hardship to the defendant of granting the requested relief and how that compares to the harm to the plaintiff if the relief is not provided.<sup>82</sup> Although this balancing is necessary dependent on the facts of each case, preliminary injunctive relief has often been denied when it is shown that a defendant is likely to become insolvent if a preliminary injunction is issued.<sup>83</sup>

Third, courts are to consider the likelihood of the plaintiff's claims being successful.<sup>84</sup> Courts justify this factor as necessary by claiming that they must evaluate the legal claim in some way because "the need for the court to act is, at least in part, a function of the validity of the applicant's claim."<sup>85</sup> When teaching preliminary injunctions, however, it is our shared experience that this is the most difficult factor to digest. After teaching students the process of litigation and the need for the thorough vetting of evidence and witnesses, we then teach them a test in which we are asking a court to take a "peek" at the case and guess as to what it thinks it might do. It is therefore not surprising that courts frame the likelihood of success on the merits in several different ways. But one thing they agree: A plaintiff does not need to show that it will win the case.<sup>86</sup>

Finally, courts must evaluate the public interest in the relief. This factor does not seem to be a determinative factor in actual outcomes other than in two kinds of cases: those involving national security<sup>87</sup> and those involving human health.<sup>88</sup> In those kinds of cases, protecting the country and protecting people's health are given priority above all else.

After an evaluation of each factor, the next step is for the court to make a final determination considering the result of each of the four analyses in culmination. Here too there is a wide variety of approaches, but most courts embrace some kind of sliding scale that allows, for example, an injunction to be issued on a stronger showing on irreparable harm that "balances out" a lesser showing on likelihood of success.<sup>89</sup>

---

<sup>80</sup> See, e.g., *Schrier v. University of Co.*, 427 F.3d 1253 (10th Cir. 2005) (denial of preliminary injunction upheld because money damages could be sought by terminated chair of medical department for loss of prestige).

<sup>81</sup> CHARLES ALAN WRIGHT ET AL., 11A FED. PRAC. & PROC. CIV. § 2948.1 (3d ed. 2015).

<sup>82</sup> *Id.*

<sup>83</sup> See, e.g., *Grease Monkey Intern., Inc. v. Ralco Lubrication Services, Inc.*, 24 F. Supp. 2d 120 (D. Mass. 1998).

<sup>84</sup> *Id.*

<sup>85</sup> CHARLES ALAN WRIGHT ET AL., 11A FED. PRAC. & PROC. CIV. § 2948.3 (3d ed. 2015).

<sup>86</sup> See *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 173 (3d Cir. 2001)).

<sup>87</sup> See, e.g., *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008).

<sup>88</sup> See, e.g., *Burlington Northern R. Co. v. City of Connell*, 811 F. Supp. 1459 (E.D. Wash. 1993).

<sup>89</sup> See *Duct-O-Wire Co. v. U.S. Crane, Inc.*, 31 F.3d 506, 509 (7th Cir. 1994). ("This balancing involves what we have termed a "sliding scale" analysis: the greater the moving party's chance of success on the merits, the less strong a showing must it make that the balance of harms is in its favor; conversely, the less likely it is that the moving party will succeed on the merits, the more the balance need weigh towards its side."); Bethany M. Bates, Note, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM L. REV. 1522, 1530 (2011).

The difficulty posed by applying these tests was most recently on display in the Supreme Court's decision in *Winter v. Natural Resources Defense Council, Inc.*<sup>90</sup> Although the Court might have provided more clarity, it did not. We now turn to that case.

## 2. *Winter v. Natural Resources Defense Council, Inc.*

For many years the Navy trained its units to detect, track, and neutralize enemy submarines using active sonar in waters populated by a wide variety of animal species, including at least 37 species of marine mammals, off the coast of Southern California.<sup>91</sup> In 2007, the Navy evaluated its upcoming training exercises as required by the National Environmental Policy Act of 1969 (NEPA),<sup>92</sup> and concluded that the activities would have no significant impact on the environment.<sup>93</sup>

The plaintiffs, groups and individuals “devoted to the protection of marine mammals and ocean habitats,”<sup>94</sup> sought review of the Navy's actions under NEPA, the Endangered Species Act of 1973 (ESA), and the Coastal Zone Management Act of 1972 (CZMA).<sup>95</sup> The plaintiffs also requested a preliminary injunction that would prevent the Navy from carrying out the exercises until the case had been decided.<sup>96</sup> The District Court granted the injunction, which was narrowed after an appeal to the Court of Appeals for the Ninth Circuit.<sup>97</sup> After an additional series of actions by the Navy, the Navy sought to vacate two of the six restrictions in the injunction but the District Court and Court of Appeals refused the Navy's request. The Navy then filed a petition for certiorari in the Supreme Court, arguing that the Court should take the case because the injunction posed a “substantial harm to national security.”<sup>98</sup> Interestingly, despite decades of discussion about the uncertainty regarding the proper test for preliminary injunctions,<sup>99</sup> the Court did not note any disagreement or explore the various tests in the circuits.

In an opinion written by Chief Justice Roberts, the Court reversed and vacated the portion of the preliminary injunction challenged by the Navy.<sup>100</sup> In so holding the Court repeated the long-standing test formulation of the preliminary injunction test: “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor,

---

<sup>90</sup> 555 U.S. 7 (2008).

<sup>91</sup> 555 U.S. at 13-14.

<sup>92</sup> 42 U.S.C. § 4332(2)(C) (2016).

<sup>93</sup> 555 U.S. at 16.

<sup>94</sup> *Id.* at 14.

<sup>95</sup> *Id.* at 16-17.

<sup>96</sup> *Nat. Res. Def. Council, Inc. v. Winter*, 645 F. Supp. 2d 841, 846-847 (2007).

<sup>97</sup> 555 U.S. at 17.

<sup>98</sup> *Winter*, Petition for Cert. at 13.

<sup>99</sup> *See, e.g.*, Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381 (2005); Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495 (2003); Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH & LEE L. REV. 109 (2001); Linz Audain, *Of Posner, and Newton, and Twenty-First Century Law: An Economic and Statistical Analysis of the Posner Rule for Granting Preliminary Injunctions*, 23 LOY. L.A. REV. 1215 (1990); Lea B. Vaughn, *A Need for Clarity: Toward a New Standard for the Preliminary Injunction*, 68 OR. L. REV. 839 (1989); Arthur D. Wolf, *Preliminary Injunctions: The Varying Standards*, 7 W. NEW. ENG. L. REV. 173 (1984); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

<sup>100</sup> 555 U.S. at 20.

and that an injunction is in the public interest.”<sup>101</sup> It also noted that “[a] preliminary injunction is an extraordinary remedy never awarded as of right.”<sup>102</sup>

Beyond these two principles, we are left with little else to guide us from the case. The majority opinion clearly rejected the Ninth Circuit’s “possibility” of irreparable harm as sufficient to satisfy the requirement for a preliminary injunction.<sup>103</sup> In so doing, it appeared to embrace a test that requires a “likely” standard for both success on the merits and irreparable harm. Justice Ginsburg’s dissent, however, suggests that the sliding scale test is still alive and well:

Consistent with equity’s character, courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief. Instead, courts have evaluated claims for equitable relief on a “sliding scale,” sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high.<sup>104</sup>

In the end, because the District Court had found that the plaintiffs had shown “a ‘near certainty’ of irreparable harm,”<sup>105</sup> which would satisfy the “likely” standard proposed by the majority,<sup>106</sup> there was no resolution on this point. As a result, although there was a strong hint that the sliding scale may have seen better days, the Court based its decision on its disagreement with the Ninth Circuit on the public interest prong of the analysis.<sup>107</sup>

In the wake of *Winter*, several commentators have noted that very little has changed. For example, after reviewing the state of preliminary injunction tests both before and after *Winter*, Bethany Bates argued that:

The Supreme Court did not intend to displace the decades of precedent in multiple circuits that allowed for the serious questions standard within a sliding scale analysis—if it had, it would have discussed the issue and not simply reiterated the traditional four-part standard. In sum, Supreme Court precedent affirms the proposed standard, which permits sliding scale analysis and allows for serious questions going to the merits to suffice for the likelihood of success prong.<sup>108</sup>

Likewise, Professor Sarah Morath studied preliminary injunctions in environmental cases in the three years before and after the decision in *Winter*.<sup>109</sup> She concluded that very little had changed in terms of both in the courts’ articulation of the preliminary injunction test and the sheer number of

---

<sup>101</sup> *Id.* (citing *Munaf v. Geren*, 553 U.S. 674, 689-690 (2008); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542, (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–312 (1982)).

<sup>102</sup> 555 U.S. at 24.

<sup>103</sup> *Id.* at 22.

<sup>104</sup> 555 U.S. at 51 (Ginsburg, J., dissenting).

<sup>105</sup> 555 U.S. at 22.

<sup>106</sup> *See id.* at 23.

<sup>107</sup> *See id.*

<sup>108</sup> Bates, *supra* note X, at 1553-54.

<sup>109</sup> Sarah J. Morath, *A Mild Winter: The Status of Environmental Preliminary Injunctions*, 37 SEATTLE U. L. REV. 155 (2013).

injunctions issued.<sup>110</sup> A few Notes have suggested that a circuit split has emerged in the wake of *Winter*<sup>111</sup> but one is hard-pressed to explain how the reaffirmation or even slight adjustment of tests in the courts of appeals prior to *Winter* make for more of a circuit split after *Winter* than before it was decided. In the end, *Winter* appears to have done little to advance the understanding of how a court should evaluate a request for a stay in an administrative case or any other. In fact, some have suggested that the case simply reaffirmed the importance of national defense when considering what is in the public interest and that it may overwhelm all other considerations.

We are therefore left, as we have been for many decades, with several variations of the preliminary injunction test. The circuit and district courts uniformly offer a rote repetition of the four factors to consider; on that, they all agree. From there, the analysis follows whatever unique formulation the circuit has settled on for their consideration. Given this variation, commentators through the years have suggested that guidance can be found by looking at the history, purposes, and economics of preliminary injunctions. We turn to that discussion now.

### 3. Why Preliminary Injunctions?

It is hornbook law that “the purpose of the preliminary injunction is the preservation of the status quo.”<sup>112</sup> This is explained by “the desire to prevent defendant from changing the existing situation to plaintiff’s irreparable detriment.”<sup>113</sup> This long-standing justification, however, has been roundly criticized.

In 1978, Professor Leubsdorf argued in his influential article that the “status quo is a habit without a reason.”<sup>114</sup> He further explained: “To freeze the existing situation may inflict irreparable injury on a plaintiff deprived of his rights or a defendant denied the right to innovate.”<sup>115</sup> In addition, status quo involves a timing factor that is difficult to assess:

Classically, that time was the last peaceable status between the parties. But when courts have attempted to inquire into that peaceable situation, they have tripped over another component of status quo oriented purpose: the parties’ last subjective description of that time. One person’s last uncontested status was often another’s declaration of war.<sup>116</sup>

*Winter* serves as a good illustration of the classic issues encountered when relying on status quo in the determination, particularly in environmental cases.

---

<sup>110</sup> See *id.* at 160.

<sup>111</sup> See Rachel A. Weisshaar, Note, *Hazy Shades of Winter: Resolving the Circuit Split Over Preliminary Injunctions*, 65 VAND. L. REV. 1011 (2012); Jacob S. Crawford, Note, *Unlikely to Succeed: How the Second Circuit’s Adherence to the Serious Questions Standards for the Granting of Preliminary Injunctions Contradicts Supreme Court Precedent and Turns an Extraordinary Remedy into an Ordinary One*, 64 OKLA. L. REV. 437 (2012).

<sup>112</sup> CHARLES ALAN WRIGHT ET AL., 11A FED. PRAC. & PROC. CIV. § 2948 (3d ed. 2015).

<sup>113</sup> *Id.*

<sup>114</sup> Leubsdorf, *supra* note X, at 546.

<sup>115</sup> *Id.* (footnotes omitted).

<sup>116</sup> Vaughn, *supra* note X, at 850; see *Cobra North America, LLC v. Cold Cut Systems Svenska AB*, 639 F. Supp. 2d 1217, 1229 (D. Colo. 2008).

First, assuming the Navy was engaging in exactly the same training exercises that it had for forty years, the question is what constitutes the “existing situation” when the argument for relief is that the plaintiffs seek to stop further environmental injury or degradation. If the status quo or existing situation is the current marine environment, each training exercise does further damage to that environment so the preservation of status quo would require a stoppage of the exercises. If, on the other hand, the status quo is that exercises have occurred for many years, there should be no injunction because stopping the exercises would not preserve the status quo. The majority, in fact, notes the importance that the exercises have taken place for forty years: “[T]his is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment.”<sup>117</sup>

There is yet another complicating factor to the status quo discussion: Although the majority finds it important that the exercises have gone on for forty years, Justice Ginsburg counters that it appears the Navy was asking to do a more intensive sort of training than before.<sup>118</sup> This prompts the next question: Is the existing situation one in which exercises of the same variety are done (when training has most certainly changed with advances in technology over forty years) or is the existing situation exactly what had been done immediately before the suit was brought? Or is it at least at the last peaceable uncontested status, which will be equally difficult to determine?

As a result of these problems and others, many have suggested abandoning status quo as a factor to consider in the preliminary injunction analysis.<sup>119</sup> In its place, Professor Leubsdorf suggested that the focus should be on “minimiz[ing] the probable irreparable loss of rights caused by errors incident to hasty decision.”<sup>120</sup> This standard, also embraced famously by Judge Posner,<sup>121</sup> emphasizes the importance of success on the merits over all other factors.<sup>122</sup> Judge Posner proposed the following formula to capture the injunction analysis:  $P \times H_p \geq (1-P) \times H_d$ , where P is the probability that P will succeed on the merits and H is harm, to Plaintiff as a result of not enjoining and to Defendant if enjoined.<sup>123</sup> Magistrate Judge Denlow went farther, arguing that a preliminary injunction should not be granted unless there is a greater than 50% chance of success on the merits.<sup>124</sup> This formulation too, however, prompted criticism in that it over-relies on the merits, which are very difficult to assess at a preliminary stage.<sup>125</sup>

Yet another purpose that has been suggested it that courts should “consider directly how best to create a state of affairs in which effective relief can be awarded to either party at the conclusion of the trial.”<sup>126</sup> Although Professor Vaughn’s formulation does not discard the analysis of the merits, it de-emphasizes it.<sup>127</sup> She provides two reasons for this. First, she notes that many parties

---

<sup>117</sup> 555 U.S. at 23.

<sup>118</sup> 555 U.S. at 53 n.4 (Ginsburg, J., dissenting).

<sup>119</sup> See Lee, *supra* note X; James Powers, *A Status Quo Bias: Behavioral Economics and the Federal Preliminary Injunction Standard*, 92 TEX. L. REV. 1027 (2014).

<sup>120</sup> Leubsdorf, *supra* note X, at 541.

<sup>121</sup> See *American Hospital Supply v. Hospital Products*, 780 F.2d 589 (1986).

<sup>122</sup> Vaughn, *supra* note X, at 850.

<sup>123</sup> 780 F.2d at 593.

<sup>124</sup> Denlow, *supra* note X, at 538.

<sup>125</sup> Vaughn, *supra* note X, at 850.

<sup>126</sup> *Id.* at 850-51 (citing *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1058 (1965)).

<sup>127</sup> *Id.* at 852.

insist on a preliminary injunction as a way to move more quickly to the front of very crowded dockets.<sup>128</sup> Although understandable, she argues this is “a procedural shortcut” to get a merits determination that may be erroneous. It thus undermines the notions of a full trial on the merits.<sup>129</sup> Second, she notes that although traditionally commentators have argued that defendants must be protected from frivolous claims by the preliminary injunction test, there are other mechanisms, such as the crafting of the injunction and Rule 11, that protect defendants from meritless claims.<sup>130</sup>

Like Professor Vaughn, others have argued for a de-emphasis on success on the merits. For example, Professor Kevin Lynch has argued that the “lock-in effect”—the idea that “decision makers get trapped or locked into a particular course of action, due to their motivation to justify resources committed toward that course of action”<sup>131</sup>—argues for a lowered showing on success.<sup>132</sup> Although Professor Lynch contemplates the arguments against any consideration of success on the merits, which he concedes would “completely eliminate the risk of lock-in based on inaccurate assessments of the merits,”<sup>133</sup> he suggests that it should not be entirely ignored because, like Professor Vaughn, he fears that injunctions might otherwise be granted on claims with little or no merit.<sup>134</sup> He therefore advocates for the sliding-scale approach, which permits an injunction to be issued “[s]o long as a case raises ‘serious questions’ on the merits” and otherwise satisfies the other requirement of irreparable harm and the balance of the equities.<sup>135</sup>

Finally, there are those who have argued that the best course is to set aside a consideration of the merits altogether. One such argument was offered by Professor Arthur D. Wolf over thirty years ago.<sup>136</sup> He contended that the lack of an adequate record for determining merits meant that courts often inappropriately examine the merits of the claims too deeply at too early a stage, which gives the wrong signals about the final merits of a suit.<sup>137</sup> It also draws appellate courts into an inappropriate in-depth review when they hear the appeal of the granting or denying of a preliminary injunction under §1292(b).<sup>138</sup> In response to concerns about frivolous or clearly meritless claims, Professor Wolf thought little of the “serious question” test as a way to curb such claims because “A good lawyer can make even the most meritless claim appear, at least at first blush, to raise serious questions of law or fact.”<sup>139</sup> He suggested instead that procedural devices such as motions to dismiss and Rule 11 better handle these kinds of problems.

A more recent article using the lessons of law and economics has suggested that the test should not eliminate consideration of the merits, it should also not consider irreparable harm.<sup>140</sup> Professors Brooks and Schwartz argue that preliminary injunctions should “promote efficiency.”<sup>141</sup>

---

<sup>128</sup> *Id.* at 852-53.

<sup>129</sup> *Id.* at 853.

<sup>130</sup> *Id.* at 853-856.

<sup>131</sup> Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 780 (2014).

<sup>132</sup> *Id.* at 810.

<sup>133</sup> *Id.* at 803.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Wolf, *supra* note X.

<sup>137</sup> *Id.* at 230-32.

<sup>138</sup> *Id.* at 232.

<sup>139</sup> *Id.* at 233.

<sup>140</sup> Brooks & Schwartz, *supra* note X.

<sup>141</sup> *Id.* at 387.



Accordingly, the question they believe the preliminary injunction analysis should center on “minimizing the loss.”<sup>142</sup>

In addition to the Brooks and Schwartz article, many others have argued for either the elimination or substantial modification of the irreparable harm prong of the preliminary injunction test.<sup>143</sup> Much of this literature, however, is focused on the reconciliation of remedies at law and at equity.<sup>144</sup> In most preliminary injunction cases, the focus of the irreparable harm inquiry is the injury or harm to the plaintiff that cannot be redressed by a monetary award.<sup>145</sup> In most administrative cases, and particularly in environmental cases, this inquiry is simplified because no monetary award is available.<sup>146</sup>

\*\*\*

Given the state of both the many tests and commentary on preliminary injunctions, we set out to answer the following questions: What is the current state of the tests that are applied for a preliminary injunction in administrative cases? Do we have more uniformity or less than with respect to the usual tests for preliminary injunctions? Is there any reason to think that preliminary injunctions in the context of administrative rules are or should be treated differently? Are courts sensitive to the expectation that regulated entities might seek delay to avoid regulation and agencies might seek compliance with a rule that would ultimately be found invalid? It is to these issues we next turn.

#### IV. STAYS IN ADMINISTRATIVE CASES

[[Please note: Our analysis is still in process. We have hired a new RA to perform additional data gathering because we are hoping to include all federal courts in our analysis. Our preliminary work was on data from the D.C. district court and circuit court of appeals. That data gave us some pause because it was more limited than expected. We would like a bigger data set to work with. As a result, the short observations below should be considered tentative and subject to change based on what we eventually learn.]]

Because statutes like the Clean Air Act often specify the D.C. Circuit as the circuit these cases should be brought, it is not surprising that the D.C. Circuit hears a larger percentage of the requests for a stay than other circuits. In addition, because the general venue statute for the federal district courts allows cases to be brought “in a judicial district in which any defendant resides”<sup>147</sup> and all agencies reside in D.C., many requests for stays are sought in the District Court for the District of Columbia.<sup>148</sup> We therefore primarily focused our attention first on these two courts.

---

<sup>142</sup> *Id.* at 393.

<sup>143</sup> See, e.g., OWEN FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990); Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 FLA. L. REV. 346 (1981); Douglas Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEX. L. REV. 1065 (1979).

<sup>144</sup> Vaughn, *supra* note X, at 858.

<sup>145</sup> See *id.* at 862.

<sup>146</sup> Cite to statutes with declaratory and injunctive relief as remedies.

<sup>147</sup> 28 U.S.C. § 1391(b)(1) (2016).

<sup>148</sup> Funk cite.

As we discuss above, stays are granted or denied based on the basis of many different tests that it is hard to predict what might happen to any particular request. Certain themes, however, emerge.

First, as a raw number, requests to stay rules are more often denied than granted. Interestingly, the ratio is much closer than one might expect. Our research so far shows that the denial to grant ratio is roughly 60 to 40.

In addition, requests for stays appear to be on the rise. Prior to 2000, we find very few opinions considering the merits of staying the effective date of a rule. After 2000, we see a relatively steady increase. Although the numbers remain relatively small, by 2015, for example, there regularly at least five such opinions per year in the D.C. District Court alone.

One might pause here for some explanation of both the increase in requests for stays as well as the fairly evenly divided win-loss rate when those requests are made. One might suggest that regulated entities are more likely to challenge administrative action than in the past, perhaps because there is a sense that courts are becoming more open to such challenges. There is also the possibility that we are in a moment of great change in administrative law as a result of the relative inaction of Congress.

Take, for example, the environmental laws. There has been no major revision of any environmental statute for over twenty-five years.<sup>149</sup> This can be contrasted with the very regular promulgation and amendment of environmental statutes from 1970 to 1990.<sup>150</sup> As a result, the EPA must attempt to solve today's environmental issues with statutes that are long out of date. The result, as one sees in the Clean Power Plan, "raises new legal questions that courts have not had cause to answer before."<sup>151</sup> That is, instead of Congress drafting new climate change legislation or amending the Clean Air Act to address it, the EPA must breathe new life into old statutory provisions and then do its best to insulate its new rules from legal challenge.<sup>152</sup> What this means in the context of administrative law is that we have entered into a new era. Courts will be asked to explore new twists in all areas of administrative law, perhaps best reflected in the heated debates over deference doctrines. It also may mean, given the uncertainty of the legality of agency assertions of power, that there will be more requests for stays.

Second, parties who are awarded stays have been required to demonstrate irreparable harm for which there is no adequate remedy without the stay. As we noted above, though, the irreparable harm showing is largely focused on the injury to the plaintiff from the proposed action. In particular, in the administrative context, courts assess the costs or economic burdens that are imposed by a particular administrative action on the plaintiffs.

---

<sup>149</sup> Clean Air Act Amendments of 1990.

<sup>150</sup> List enviro statutes and amendments.

<sup>151</sup> Johnathan H. Adler, *Placing the Clean Power Plan in context*, WASH. POST (Feb. 10, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/10/placing-the-clean-power-plan-in-context/?tid=a\\_inl&utm\\_term=.feaf61554eeb](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/10/placing-the-clean-power-plan-in-context/?tid=a_inl&utm_term=.feaf61554eeb).

<sup>152</sup> Jody Freeman, *How Obama plans to beat his climate critics*, POLITICO (Aug. 3, 2015), <http://www.politico.com/agenda/story/2015/08/how-obama-plans-to-beat-his-climate-critics-000186>.

Third, when balancing the equities, there is often some difficulty in sorting out the harm to the defendant, which is the government in the form of an agency, from the public interest factor. Moreover, it is here that status quo arguments are trotted out, often unhelpfully. That is, the balance of the equities is often not analyzed from the perspective of what the relative harms are but rather whether the proposed action will change current conditions.

Finally, despite the many pages of opinions on the likelihood of success on the merits, that factor appears to be less relevant and perhaps is sometimes a distraction to whether the relief is awarded. This should not be terribly surprising as consistent criticism of the preliminary injunction test is that it asks a court to “peek” at the merits without full evidence or argument on what those ultimately might be.

## V. A MODEST PRESUMPTION FOR GHOSTBUSTING

We began this paper with the idea that the phenomena of ghost rules undermines the integrity of the administrative state. This, we suggest, ought to be considered carefully when insisting that a rule be in effect while undergoing a legal challenge. But there are two sides to the strategic behavior that might be encountered. There is the possibility that agencies promulgate rules with questionable legal footing that will force entities to change behavior. But likewise regulated entities may seek stays on weak legal grounds in order to delay regulation. Both seem equally plausible with the key being the legal merit of any rule.

One therefore might expect us to engage in a full-throated defense of the success on the merits analysis. That is, if the issue is whether an agency is issuing a rule that will change behavior irrevocably on an invalid legal basis, one easy solution might be to ensure from the outset that the rule is more likely than not to be found legally sound. Our review of the cases and our concern over the strategic behavior of both agencies and regulated entities, however, suggests a different approach.

When thinking about how courts handle the likelihood of success on the merits analysis, we are less convinced this prong offers much help. Let’s begin with the concern that regulated entities might bring weak legal claims against rules in order to delay regulatory action. In cases in which the legal claims are frivolous, the court can act quickly to dismiss the case altogether, and it need not entertain a preliminary injunction motion. District courts, for example, do this work in evaluating claims under Rule 12(b)(6)<sup>153</sup>, which requires a plausibility analysis: “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim that is plausible on its face.’ . . . it asks for more than a sheer possibility that a defendant has acted unlawfully.”<sup>154</sup> On the other end of this spectrum, if an agency has done something that is so clearly illegal, a court can use either a 12(c) motion or an expedited summary judgment motion to vacate any such rules.<sup>155</sup>

The possibility of dismissal on 12(b)(6) grounds, however, only makes clear that very weak claims cannot serve as the basis of any lawsuit or stay. The burden under the preliminary injunction test of showing likely success on the merits is, of course, a more difficult than demonstrating that a

---

<sup>153</sup> F.R.C.P. 12(b)(6).

<sup>154</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

<sup>155</sup> FRCP 12(c); *Humane Society case*.

claim is frivolous. That said, the very idea that we ask one party or another to show success so early in litigation runs counter to the idea that we afford each side adequate time and opportunity to make their best case.<sup>156</sup> As a result, the criticisms discussed above leads us to conclude that this prong is best understood as establishing that there are legitimate, “serious” legal issues and questions raised by a particular challenge. It does not work to police either an agency’s or a regulated entity’s strategic behaviors.

The balancing of harms offers more promise in the sense that many courts have been more successful in applying it, albeit with the complication that the benefits of a particular rule include many benefits to the public, which makes it difficult to separate from the “public interest” prong of the traditional analysis. This balancing might be made somewhat easier by the fact that the agency typically produces, as it did for the Clean Power Plan, a Regulatory Impact Analysis, which “discusses potential benefits, costs, and economic impacts” of the rule.<sup>157</sup> Although the costs and benefits of any rule tends to be a subject of hot debate, the parties typically have a well-worn path for making these arguments.

The difficulty is that the benefits and harms of a rule over its life-span are very different than the relatively short time frame that is to be considered in the preliminary injunction analysis. The preliminary injunction analysis focuses on what is the immediate harm to the regulated entities if this rule is in effect during the litigation compared to the relative harm if it is not. As illustrated by the *Michigan v. EPA* case, the problem in many instances is that the investments that are required initially by a rule are not recoverable. For example, if an emissions control rule is found to be legally flawed in some way, once a company has invested millions of dollars in pollution control equipment, there is no easy way to take the pollution control equipment back and have the money returned. In other words, many of the administrative rules cases turn on exactly when an irreversible investment must be made. And so we return to the two principal strategic behaviors of the agencies and regulated entities: How can an agency get regulated entities to comply on a timely basis with rules without sacrificing the regulated entities ability to challenge the legality of those rules?

One might suggest that the logical solution is to delay the effective date of any rule such that it would afford sufficient time for legal challenge, which would be something like three to four years.<sup>158</sup> This approach, which has some appeal in that it eliminates any need to engage in a difficult preliminary injunction analysis, lays to the strategic behavior of regulated entities to draw out legal challenges in order to gain more delay. It would also severely limit the ability of administrative agencies to respond in a timely fashion to urgent issues, particularly health and safety concerns. This was the door left open in *Abbott Laboratories* many years ago:

If the agency believes that a suit of this type will significantly impede enforcement or will harm the public interest, it need not postpone enforcement of the regulation and may oppose any motion for a judicial stay on the part of those challenging the regulation. . . . It is scarcely to be doubted that a court would refuse to postpone the

---

<sup>156</sup> FPP cite.

<sup>157</sup> U.S. EPA, *Regulatory Impact Analysis for the Clean Power Plan Final Rule*, Oct. 23, 2015, at ES1, <https://www.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf>.

<sup>158</sup> Cf. Congressional proposals to stay effective dates of agency rules; also FRCP 6-month delay.

effective date of an agency action if the Government could show, as it made no effort to do here, that delay would be detrimental to the public health or safety.<sup>159</sup>

While a blanket delay of the effective date until the end of legal challenges does not seem to solve the problem, we think considering a presumption of a delayed effective date in some cases warrants consideration.

In those cases in which regulated entities can demonstrate that very expensive, irrevocable investments must be made within two years of the effective date of a rule, we suggest that courts, when analyzing the relative harms and public interest, they begin with a presumption that the rule should be stayed unless a very clear case is made that public health and safety is endangered. In other words, in this modified preliminary injunction test, if there are serious questions raised by a legal challenge, the court should presume that a stay should be granted if very significant investments must be made within two years of the effective date of the final rule. This presumption can be overcome by an agency if it can convince the court that the immediate harm to health and safety is such that the rule should go into effect immediately.

[We will then apply the test to the CPP, which will turn on what investments would have to be made in the two year window after October 23, 2015. We will do the same with other environmental rules to test whether the test makes sense for policing the strategic behaviors we have identified.]

## VI. CONCLUSION

---

<sup>159</sup> *Abbott Laboratories v. Gardner*, 387 U.S. 136, 156 (1967).