Political Accountability and Judicial Review in the Context of Climate Change Regulation

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INTRODUCTION

In the absence of comprehensive climate change legislation, federal agencies are left to use the regulatory tools granted to them by existing environmental laws to address the challenges posed by greenhouse gas ("GHG") emissions and climate change. These laws, including the Clean Air Act ("CAA"), the National Environmental Policy Act ("NEPA"), and

the Endangered Species Act ("ESA"), were all drafted nearly half a century ago when environmental protection had bipartisan support.[1]

These laws were each drafted to address a singular social problem. For the CAA it is air pollution,[2] for NEPA it is federal consideration of the environment in decision making,[3] and for the ESA it is species decline.[4] The regulatory tools they provide agencies are designed to remedy those specific issues. Climate change was not yet a looming social or political issue when these laws were passed; it was not on Congress's mind. Therefore, the regulatory tools these acts provide agencies are not designed to address the temporally and spatially dispersed collective action problems posed by climate change.[5] Although these analytical tools and policy techniques are not best suited to address the current climate crisis, that does not mean that they cannot be used to successfully curb GHG emissions.[6] In the absence of robust climate legislation, agencies and courts must look more closely and think more critically about the role existing policy tools, such as cost-benefit analysis, play in driving or curtailing climate action.[7]

Since the Clinton administration, agencies have made attempts to use the regulatory tools provided by the legacy environmental laws to address climate change.[8] Many scholars have mused over whether the use of these tools is adequate to address and remedy the climate change crisis.[9] The answer is often some complicated variation of "no."

In light of the political polarization surrounding individuals' perceptions of the causes and consequences of climate change, it is unlikely Congress will pass the comprehensive legislation needed to implement large-scale adaptation and mitigation. While it is of increasing

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1 Kate Richard, *Environmentalism's Less-Partisan Past*, YALE PROGRAM ON CLIMATE CHANGE COMMUNICATION (Oct. 23, 2017), https://climatecommunication.yale.edu/news-events/environmentalisms-less-partisan-past/.

2 Clean Air Act, 42 U.S.C. §§ 7401–7671q (1970).

3 National Environmental Policy Act, 42 U.S.C. §§ 4321–4370m-12 (1969).

4 Endangered Species Act, 16 U.S.C. §§ 1531–1544 (1973).

5 *See generally* NATIONAL RESEARCH COUNCIL, AMERICA'S CLIMATE CHOICES (The National Academic Press 2011), https://doi.org/10.17226/12781.

6 *Id.* at 37.

7 *Id.*

8 *Timeline of Major Accomplishments in Transportation, Air Pollution, and Climate Change*, EPA https://www.epa.gov/transportation-air-pollution-and-climate-change/timeline-major-accomplishments-transportation-air (last updated Jan. 10, 2017).

9 *See generally* Henry McGee, *Litigating Global Warming: Substantive Law in Search of a Forum*, 16 FORDHAM ENVTL. L. REV. 371 (2005); Hari M. Osofsky, *The Future of Environmental Law and Complexities of Scale: Federalism Experiments with Climate Change under the Clean Air Act*, 32 WASH. U. J. L. & POL'Y 79 (2010).

concern to some, climate change has not yet become a "kitchen table issue" in most American households; while seventy-eight percent of Democrats say that climate change should be a top policy priority, only twenty-one percent of Republicans agree.[10] Given this partisan split, it is unlikely that climate change legislation will make its way through bicameralism and presentment for some time.[11]

Due to the political and social realities of the moment, presidents and federal agencies who want to address climate change will have to continue to go through the regulatory channels created for them by the legacy environmental laws. These actions take place on the margins of these laws. Not one of the legacy laws provides "addressing climate change" as a stated purpose. None have tools tailored to curbing GHG emissions or implementing mitigation measures. By acting on the margins of these laws, agencies open themselves up to judicial scrutiny. The lack of clear statutory direction also allows agencies to change their interpretation of these laws. This results in changes to the regulatory approach depending on an administration's priorities.

This Note will focus on the Environmental Protection Agency's ("EPA") use of the CAA to regulate GHG emissions. It will suggest a new standard of review that courts should utilize when evaluating flip-flopping statutory interpretations of the CAA's provisions relating to the regulation of GHG emissions, including the EPA's jurisdiction over such pollutants; namely, that courts should examine political considerations driving the EPA's decisions through the implementation of a Hard Look standard at *Chevron* step two.

The analysis begins with an overview of the existing standards of review used by courts when evaluating the EPA's interpretations of the CAA. It then proceeds through a discussion of the political challenges involved in comprehensively legislating to address climate change and

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10 Brian Kennedy, *U.S. Concern About Climate Change is Rising, but Mainly Among Democrats*, PEW RESEARCH CENTER (Apr. 16, 2020), https://www.pewresearch.org/fact-tank/2020/04/16/u-s-concern-about-climate-change-is-rising-but-mainly-among-democrats/.

11 Even as the polls show that more Americans are paying attention to, and are concerned about climate change, they also show that the partisan divide on this issue continues to run deep. This contention is less likely to hold true if both chambers of Congress (with a super majority in the Senate or a pause on the filibuster) and the White House, are controlled by Democrats. *See* Nadja Popovich, *Climate Change Rises as a Public Priority. But It's More Partisan Than Ever.*, N.Y. TIMES (Feb. 20, 2020), https://www.nytimes.com/interactive/2020/02/20/climate/climate-change-polls.html?te=1&nl=morning-briefing&emc=edit_NN_p_20200220&section=whatElse&campaign_id=9&instance_id=16115&segment_id=21432&user_id=cc1e10db3e9b257f2e68428342ee86f3&regi_id=91123188ion=whatElse.

how and why the EPA is able to regulate GHGs under the CAA. The Note then switches to a review of the theory of political accountability, which centers the President as an appropriate overseer of agency action while shielding her from scrutiny by not requiring disclosure of political considerations in the agency record. Past presidential involvement in agency decision making around climate change is then highlighted. This background is followed by an explanation of the tools agencies use to calculate the costs and benefits of curbing GHG emissions and their susceptibility to manipulation. The Note concludes with a recommendation for how courts should look at the cost consideration tools the EPA uses and then addresses counterarguments.

I. OVERVIEW OF STATUS QUO JUDICIAL REVIEW

Section 706 of the Administrative Procedure Act ("APA") gives courts the authority to review agency actions.[12] Under Section 706, courts have the power to "hold unlawful and set aside agency action, findings and conclusions found to be … arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law."[13] Further, Section 706 makes clear that determinations made by the court must be based on a review of the whole record.[14] While this whole record review has been challenged in recent cases, the statutory language remains clear: the agency's action must be reviewed in light of the *whole record*.[15]

When engaging in judicial review, the court first determines whether the agency action boils down to a question of law or a question of fact. This determination tells the court what standard of review it is required to apply. The standard of review remains the same whether the agency action the court is reviewing involves a new rule or a rescission or revision of an old rule.[16] This Note proposes that when reviewing EPA actions regulating GHG emissions under the CAA, courts should apply a blend of the two most common standards of review available under the APA. Below is an overview of the dominant standards of review for questions of fact and questions of law.

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12 Administrative Procedure Act, 5 U.S.C. §706 (2018).

13 5 U.S.C. §706(2)(A).

14 5 U.S.C. §706.

15 *See* FCC v. Fox TV Stations, Inc., 556 U.S. 502, 537 (2009); 5 U.S.C. §706.

16 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (reviewing the NHTSA's rescission of a rule and applying the arbitrary and capricious standard).

A. Questions of Fact

For questions of fact, the court applies a Hard Look review to determine whether an agency's action was arbitrary and capricious. Under a Hard Look review, a court has an obligation to look closely at the agency action. The reviewing court must establish that the decision has merit based on the substance of the record. In doing so, a court cannot substitute its own judgment for that of the agency.[17] After engaging in a Hard Look review of the whole record, a court will find that an agency's action is arbitrary and capricious if:

> (1) the agency has relied on factors which Congress had not intended it to consider; (2) the agency entirely failed to consider an important aspect of the problem; or (3) the agency offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[18]

The modern Hard Look doctrine evolved from *Motor Vehicle Manufacturers Association v. State Farm*, a case that looked at the rescission of a rule and therefore may be particularly salient to the problem this Note addresses. In *State Farm*, the Court ruled that an agency must base a rescission or revision of a rule on something more than just a political consideration or policy change.[19] The decision-making agency must connect the dots between the facts found and the choices made based on the whole record, including the record developed during prior iterations of policy formulation.[20] Politics should not be the deciding factor either way.[21]

B. Questions of Law

For questions of law, a court must consider whether an agency's legal interpretation of a statute is permissible. In doing this, the court applies a highly deferential standard of review called *Chevron* deference. Relevant to the arguments advanced in this Note, the *Chevron* standard traces its origins to a case where the Supreme Court was asked to review the EPA's interpretation of a provision of the CAA, *Chevron v. The Natural*

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17 Ethyl Corp. v. EPA, 541 F.2d 1, 66–67 (1976) (Bazelon, J., concurring).

18 *State Farm*, 463 U.S. at 43.

19 *See id.* at 59–60 (Rehnquist, J., dissenting) (arguing that a change in political administration is a reasonable basis on which to change policy direction).

20 *Id.* at 56–57 (majority opinion); FCC v. Fox TV Stations, Inc., 556 U.S. at 537.

21 *See State Farm*, 463 U.S. at 57; *Id.* at 59 (Rehnquist, J., dissenting).

Resources Defense Council.[22] *Chevron* review includes two steps.[23] The first step examines if the statute is unclear or otherwise ambiguous.[24] Here, the court is tasked with determining whether Congress spoke to the precise question at issue in its writing of the statute.[25] If the statutory language is clear, then the court must enforce the statute.[26] If the statute is unclear, the court moves to step two of the *Chevron* analysis.[27]

At step two of *Chevron*, the court looks at whether the agency's interpretation of the statute was "reasonable," or, in other terms, whether it was a "permissible" construction of the statute.[28] Review of agency interpretations at *Chevron* step two is highly deferential.[29] The court does not interpret the statute for the agency.[30] Instead, it acts as the overseer of agency decision making and ensures that the interpretation the agency based its decision off of was permissible.[31] Review at *Chevron* step two is not as vigorous as the Hard Look review of *State Farm*; there is no need for connecting the dots.[32] The deferential standard in *Chevron* moves the court's role from decision maker to overseer.[33]

Some argue that this strikes the appropriate balance between executive and judicial branch actions, a view the Supreme Court has seemingly endorsed.[34] This argument proposes that the agency is the expert, and Congress, through their ambiguity, left the decision making to the expert.[35] Therefore, it would be undesirable to have the judiciary step in and decide.[36] Facially, that analysis makes sense. However, when a court only reviews whether an agency's use of interpretive tools was reasonable, it may miss an important part of the problem. One solution for politically charged areas of statutory interpretation, like interpreting the CAA to curb GHGs, is a form of *State Farm* Hard Look review at *Chevron*

22 *See* Chevron v. NRDC, 467 U.S. 837, 839 (1984).

23 *Id.* at 842–43.

24 *Id.* at 842.

25 *Id.*

26 *Id.* at 842–43.

27 *Id.* at 843.

28 *Id.*

29 *Id.* at 843–44.

30 *Id.* at 844.

31 *Id.*

32 Kenneth A. Baumberger & Peter L. Strauss, *Chevron's Two Step*, 95 VA. L. REV. 611, 624 (2009).

33 *Id.* at 625.

34 *See e.g., Chevron*, 467 U.S. at 864–66; Emily Hammond, *Deference for Interesting Times*, 28 GEO. ENVTL. L. REV. 441, 442 (2016).

35 *Chevron*, 467 U.S. at 843–44; Baumberger & Strauss, *supra* note 32, at 625.

36 *See* Baumberger & Strauss, *supra* note 32, at 625.

step two. This blended standard would require a court to look closely at the reasoning and support for the changed interpretation, ensuring they do not miss an important part of the problem.

II. THE COMPLICATED AND DISTINCT ISSUES OF REGULATING TO MITIGATE CLIMATE CHANGE

Acting to solve climate change—even once it is understood that the EPA has the authority to do so—is no simple task.[37] This Part will review the growing consensus and lasting disagreements around climate science and will highlight how political uncertainty results in a greater role for executive branch actors. Then, it will discuss how the increased role of the executive branch introduces the specter of politics into decision making. Finally, it will explain why politics in decision making is not by itself an undesirable prospect and propose a way for courts to take this influence into consideration.

A. The Difficulty of Passing Comprehensive Climate Change Legislation

Climate change has become a divisive partisan issue.[38] The fight in the Senate over cap-and-trade legislation during President Barack Obama's first term is a case study of why large-scale climate legislation is not currently politically feasible, and therefore, why agencies are required to use their regulatory tools to take action on climate change.[39] One reason for that legislation's failure was the intensive lobbying by fossil fuel industries against the bill.[40] Industry groups and advocates of small government banded together to successfully defeat the legislation.[41] Their efforts against the cap-and-trade bill added to decades of disinformation campaigns concerning climate science.[42] These campaigns have been highly successful at muddying the water around climate science, including

37 *See infra* Section IV.

38 Popovich, *supra* note 11.

39 Matthew C. Nishet, *Environmental Advocacy in the Obama Years: Assessing New Strategies for Political Change, in* ENVIRONMENTAL POLICY: NEW DIRECTIONS FOR THE TWENTY FIRST CENTURY 58, 59 (9th ed. 2016).

40 *Id.*

41 *Id.*

42 Richard C. J. Somerville & Susan Joy Hassol, *Communicating the Science of Climate Change*, 64 PHYSICS TODAY 48, 49 (2011).

both the causes and consequences of increased GHGs in the Earth's atmosphere.[43]

There is currently a lack of consensus among the American public regarding climate science, despite that science being largely undisputed among academics.[44] According to a 2019 study from the Yale Program on Climate Change Communication, sixty-seven percent of American adults think climate change is happening, while only fifty-three percent believe that it is mostly caused by human activities.[45] While these numbers show some promise of a shift toward a general consensus in the realities of climate change and its causes, they belie the strength of political affiliation in determining these beliefs. One political analyst has called climate change "the deepest partisan rift between republicans and democrats."[46]

Another study from the Yale Program on Climate Change Communication supports the contention that climate change represents the deepest partisan rift between the two major political parties.[47] In 2018, ninety-one percent of registered Democrats believed climate change was real, contrasted against only fifty-two percent of Republicans.[48] When asked whether humans are causing climate change, seventy-nine percent of Democrats said yes, compared to thirty-five percent of Republicans.[49] The disparity between democratic and republican views may have been widened by President Donald Trump himself.[50] President Trump has a history of discounting the impacts of climate change, calling it a "hoax invented by the Chinese."[51]

The data shows that, despite collective agreement amongst scientists, climate change has become a partisan issue, with individuals on different

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43 *Id.* at 48.

44 *See* Jennifer Marlon et al., *Yale Climate Opinion Maps 2019*, YALE PROGRAM ON CLIMATE CHANGE COMMUNICATION (Sept. 2, 2020), https://climatecommunication.yale.edu/visualizations-data/ycom-us/; Somerville, *supra* note 42, at 48.

45 Marlon et al., *supra* note 44.

46 Cathy Burke, *Analyst: Biggest Partisan Divide is over Climate Change*, NEWSMAX (Mar. 5, 2019), https://www.newsmax.com/newsfront/division-divisiveness-democrats-resistance/2019/03/05/id/905609/.

47 *See* Matto Mildenberger et al., *Democratic and Republican Climate Opinion Maps 2018*, YALE PROGRAM ON CLIMATE CHANGE COMMUNICATION (July 1, 2020), https://climatecommunication.yale.edu/visualizations-data/partisan-maps-2018/?est=happening&group=dem&type=value&geo=cd.

48 *Id.*

49 *Id.*

50 Burke, *supra* note 46.

51 A statement that is wrong on multiple fronts. Justin Worland, *Donald Trump Called Climate Change a Hoax. Now He's Awkwardly Boasting About Fighting It*, TIME (July 9, 2019), https://time.com/5622374/donald-trump-climate-change-hoax-event/.

ends of the political spectrum either fully believing that climate change is a crisis or doubting whether it even exists. This reality underscores the potential for politics to usurp legitimate reasons for regulating (or not) and emphasizes the importance of good judicial review.[52] Strong judicial review is one measure that can be taken to ensure that the best science and expertise are responsible for our climate policy rather than politicians appealing to their political base. Climate change regulation under the CAA is an area that deserves heightened scrutiny by the courts due to the American public's complicated views on the subject and the political drivers often shaping those views.

With these political realities in play, the chance of passing comprehensive climate change legislation in the near term is slim. The legislature is largely out of the picture. If the federal government is to be involved in addressing climate change, other branches of government need to become the primary actors. The judiciary is not the branch best suited to creating comprehensive climate change policy for the country and has acknowledged so itself.[53] With the legislative and judicial branches largely out of the picture, the executive branch and its agencies are left with the job of addressing one of the most pressing challenges of the twenty-first century. Therefore, the relationship between the different actors in the executive branch, primarily the political Executive Office of the President ("EOP") and the expert agencies it oversees, is critical for the public to understand and for the courts to acknowledge when reviewing GHG regulations promulgated by the EPA.

B. Politics in Agency Decision Making

Politics are inherent in agency decision making and not necessarily bad. Policy concerns and political considerations are essentially built into the process, but in some instances, this leads to undesirable results. The scope of this Note is limited to agency decisions around whether or not the EPA has the authority to engage in regulation of GHGs under the CAA, decisions that often flip based on who is in the White House. This Note suggests that reviewing courts should closely consider what the EPA is taking into consideration when making these jurisdictional interpretations.

It is clear and settled that under different administrations, agencies are free to use their own expert discretion in implementing or revising

52 Mildenberger et al., *supra* note 47.

53 Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020).

regulations that address GHG emissions.[54] They are allowed to change course. However, a strong argument exists for requiring courts that are tasked with reviewing these flip-flopping agency decisions to take a Hard Look at the justifications presented by the agencies, including the underlying political and policy calculations. This is a reasonable argument to make in a system where the "headless fourth branch" of government, as independent regulatory commissions are often called, and agencies, are justified as an appropriate delegation of legislative and executive branch authority under the theory of political accountability.[55]

The back and forth on large-scale regulatory undertakings, such as the Clean Power Plan and the Affordable Clean Energy Rule, which require significant input from states, local governments, and corporations, comes at a significant cost.[56] Consistent changes in the administrative approach to GHG regulation have led to extensive litigation.[57] This has made judicial review an important component of whether the United States will make meaningful progress toward mitigating climate change. Therefore, it is paramount that courts consider the politics behind the decision making. This is desirable because it will lead to political accountability for agency decision making. Searching judicial review will compel the EPA to support its decisions on scientific and economic facts. Additionally, it will diminish the EPA's ability to hide political

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54 *See, cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (holding that an agency can change course and rescind or revise existing regulations but that it must be done based on appropriate considerations).

55 *See* Edward H. Stiglitz, *Unitary Innovations and Political Accountability,* 99 CORNELL L. REV. 1133, 1148–54 (2014); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

56 *See* Dalia Patiño-Echeverri, Paul Fischbeck, & Elmar Kriegler, *Economic and Environmental Costs of Regulatory Uncertainty for Coal-Fired Power Plants*, 43 ENVTL. SCI. TECHNOL. 578 (2009). Additionally, in this Clean Power Plan regulatory back and forth, the big question was whether the EPA could have tools of the Best System of Emission Reduction ("BSER") outside of the "fence line" of an emitting power plant. The Obama administration interpreted the CAA to give them the authority to set BSER at the grid level and to allow states, when creating plans, to require increases of renewable sources across the energy system, increases to energy efficiency, and other mitigating measures. The Trump administration repealed and replaced the Clean Power Plan with the Affordable Clean Energy Rule, abolishing the "outside-the-fence" measures and replacing them with purely "inside-the-fence" technology options based on their interpretation of what was allowed under BSER, rather than on other technical or scientific grounds. For a more comprehensive explanation of this regulatory history *see* Rachel Jacobson & Sarah Judkins, *Trump Administration Issues Affordable Clean Energy Rule,* WILMER CUTLER PICKERING HALE AND DORR (June 25, 2019), https://www.lexology.com/library /detail.aspx?g=4907b152-e506-4722-99d3-a492b531dc18.

57 *See* Util. Air Regulatory Grp. v. EPA, 573 U.S. 302 (2014); Massachusetts v. EPA, 549 U.S. 497 (2007); West Virginia v. EPA, D.C. Cir., No. 15-1363, (Sept. 2019).

considerations behind a court's surface-level examination of the tools used by the agency.

If an agency unduly relied on the consideration of politics in forming its statutory interpretation and subsequent regulatory decisions, courts should give less credence to those decisions.[58] Less deference is due because the agency's statutory interpretation and regulatory analysis is skewed by political judgments, especially when presidential influence causes the agency to ignore technical and factual observations.[59] In a system of decision making where deference is given to agencies acting as "experts," less deference should be given when it is clear that the agency decision is not based on expertise but rather on political considerations.[60] Courts must look at the scientific, economic, and political basis of an agency's decision in order to determine the appropriate level of deference to be applied. This searching form of *Chevron* deference may quell some of the critiques that the judiciary abandons one of their core responsibilities when they defer to an agency's statutory interpretation.[61]

Another undesirable consequence of the back and forth of regulation that occurs when politics takes center stage in decision making is the persistent uncertainty for regulated entities. In the GHG emissions context, some regulated entities are deciding to continue to adhere to (or even advocate for) the stricter regulations imposed by the Obama EPA.[62] Entities voluntarily complying with stricter standards are often the bigger players in the industry who can better absorb the costs of regulations compared to their smaller counterparts.[63] Big players know that by continuing to follow the stricter regulations they are acting in their best interest based on consumer preferences.[64] Large actors in industries with

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58 *See* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1141 (2010).

59 *See id.*

60 *Id.* at 1140–41 *citing to* FCC v. Fox, 129 S. Ct. 1800, 1832 (2009) (Breyer, J., dissenting) ("Where does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim?").

61 Paul Daly, *The Future of Chevron Deference III: The Weakness of the Anti-Chevron Arguments*, ADMIN. L. MATTERS (Mar. 7, 2019), https://www.administrativelaw matters.com/blog/2019/03/07/the-future-of-chevron-deference-iii-the-weakness-of-the-anti-chevron-arguments/.

62 Ford Motor Co. et al., *Terms for Light-Duty Greenhouse Gas Emission Standards*, https://ww2.arb.ca.gov/sites/default/files/2019-07/Auto%20Terms%20Signed.pdf; Clifford Krauss, *Trump's Methane Rule Rollback Divides Oil and Gas Industry*, N.Y. TIMES (Aug. 29, 2019), https://www.nytimes.com/2019/08/29/business/energy-environment/methane-regulation-reaction.html?searchResultPosition=1.

63 Krauss, *supra* note 62.

64 *Id.*

regulated GHG emissions, such as auto manufacturers and oil and gas producers, do not want to be viewed as acting against the interest of the greater good by a consumer base that is increasingly conscious about its impacts on the environment.[65] For smaller entities that are less able to afford the costs of regulation, the compliance complications that come from changing approaches every four or eight years is a significant added cost.[66]

One solution to this "problem of politics" is for courts to adopt the *State Farm* Hard Look review approach at *Chevron* step two. Specifically, courts should use this approach when examining the EPA's interpretation of the CAA and its bearing on their statutory authority to regulate GHGs. This level of review would ensure that the EPA is fully analyzing the regulatory question in light of the scientific and economic facts of climate change, and that it is reaching a regulatory decision based on its expertise rather than on political calculations. This form of judicial review would allow reasonable policy concerns to be considered in the course of decision making but would expose purely political decisions. It would ensure that the CAA's statutory language of protecting public health and welfare was not undermined by purely political considerations.[67]

During a *Chevron* step-two analysis, courts should look at the political calculations behind the EPA's expert decision making. This kind of Hard Look would help validate an agency that has been given considerable authority in the American system of government. One of the primary justifications for agencies' extensive power is that they are accountable through the president, who is ultimately held politically accountable for agency actions.[68] However, there can only be true political accountability when there is some form of public acknowledgment of the president's role in agency decision making, an acknowledgment that is very often lacking.[69] One way to remedy this is to ask agencies to disclose, and courts to examine, the role of the president when considering the merit of the agency action.

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65 *Global Consumers Seek Companies that Care About Environmental Issues*, NIELSEN (Sept. 11, 2018), https://www.nielsen.com/eu/en/insights/article/2018/global-consumers-seek-companies-that-care-about-environmental-issues/.

66 *See* Krauss, *supra* note 62; *see generally* Stacey English & Susannah Hammond, *COST OF COMPLIANCE 2018: Regulatory change and continuing uncertainty*, REUTERS (July 24, 2018), https://www.reuters.com/article/bc-finreg-cost-of-compliance-change-unce/cost-of-compliance-2018-regulatory-change-and-continuing-uncertainty-idUSKBN1KE1ZM.

67 *Summary of the Clean Air Act*, EPA, https://www.epa.gov/laws-regulations/summary-clean-air-act (last updated Aug. 6, 2020).

68 Mendelson, *supra* note 58, at 1134–35.

69 *See id.* at 1155.

III. THE ROLE OF EXECUTIVE ORDERS IN JUDICIAL REVIEW AND THEIR INSIGHT INTO POLITICAL MANIPULATION OF AGENCY ACTIONS

There are many avenues by which presidential administrations may exert their influence over agencies.[70] Defining the full scope of what can be considered political is a tremendous exercise and one that is too large for this Note. Instead, this Note will focus on executive orders and their mandates for regulatory review by entities in the Executive Office of the President ("EOP"), such as the Office of Management and Budget ("OMB") and the Office of Information and Regulatory Affairs ("OIRA"), as clear presidential involvement in the agency decision-making process.[71]

A. An Overview of Early Trump Administration Executive Orders

To assess just how vulnerable to political motivations EPA actions addressing climate change are, one need not look further than the executive orders President Trump signed almost immediately upon arriving in the Oval Office.[72] While these executive orders do not always explicitly call for the rescission of rules adopted to address climate change, their language calls on the EPA to perform a review of the *costs* these regulations impose on private individuals and the government.[73] These cost calculations are rooted in inherent value judgments. The justification for Executive Order 13771, *Reducing Regulation and Controlling Regulatory Costs*, which created the policy that for every new regulation two should be rescinded, is rooted in reducing costs.[74]

In addition to this "Two for One" rule, in Executive Order 13783 the Trump administration specifically called on the EPA to reduce regulatory burdens around the development of energy resources.[75] This Executive Order directed executive departments and agencies, including the EPA, to:

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70 William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. OF POLITICS 1095, 1095–96 (2002), https://cpb-us-w2.wpmucdn.com/voices.uchicago.edu/dist/5/539/files/2017/05/Agencies-wzu9qd.pdf.

71 *The Executive Branch*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/the-executive-branch/ (last visited July 4, 2020).

72 *See, e.g.*, Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017); Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017); Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

73 Exec. Order No. 13,771, 82 Fed. Reg. 9339.

74 *Id.*

75 Exec. Order No 13,783, 82 Fed. Reg. 16,093.

"…review existing regulations that potentially burden the development or use of domestically produced resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law."[76]

Executive Order 13783 announced that it is: "…the policy of the United States that necessary and appropriate environmental regulations comply with the law, *are of greater benefit than cost* when permissible, achieve environmental improvements for the American people, and are developed through transparent processes that employ the best available peer-reviewed science and economics."[77]

The emphasis on cost considerations and the use of economic tools in these orders highlights the central role that costs and economics play in regulatory decision making.

Executive Order 13783 went farther when it came to inserting politics into the regulation of GHGs. It called for the rescission of specific Obama administration presidential and regulatory actions.[78] The Order rescinded seven climate-related documents and ordered agency heads to identify actions taken pursuant to those documents.[79] Once an action was identified, the agency was required to suspend, rescind, or revise the action.[80] Further, the Order disbanded the Interagency Working Group on the Social Cost of Greenhouse Gases, a group created by the Obama administration, and rescinded documents discussing the social costs of various GHGs.[81] Finally, the Order specifically called on the EPA to review regulations related to oil and gas development in the United States.[82] One of these regulations was the *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, or Modified Sources*, colloquially known as the Methane Rule.[83]

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76 *Id.*

77 *Id.* (emphasis added).

78 *Id.* at 16,094.

79 *Id.*

80 *Id.*

81 *Id.* at 16,095–96; TECHNICAL SUPPORT DOCUMENT: TECHNICAL UPDATE OF THE SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866, INTERAGENCY WORKING GROUP ON SOCIAL COST OF GREENHOUSE GASES, UNITED STATES GOVERNMENT, https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf.

82 Exec. Order No. 13,783, 82 Fed. Reg. at 16,096.

83 *Id.*

B. Courts Should Engage in a Review of Agency Actions that Appreciates the Influence of the President and Presidential Politics by Examining Actions Taken Pursuant to Executive Orders

The specificity with which Executive Order 13783 directed the hand of the EPA to act and defined the context in which the EPA could act, through rescission of climate change documents and working groups, emphasizes the need for courts to engage in a meaningful review of agency actions. The specific instructions of these Executive Orders make it clear that the agency will be acting as an agent of the president. This is okay! In fact, it is something that may be desirable because of the acceptance of the doctrine of political accountability and the belief that, by holding the president accountable for the actions of agencies, a check is placed on them.[84]

If courts are not engaging in a review that allows the public to hold the president accountable for the actions of an agency, then they are not acting in a way that is faithful to the theory of political accountability. A faithful review would require the courts to look in-depth at: (1) the economic tools the agencies are using; (2) the value judgments behind the use of those tools; and (3) the origin of those value judgments. In conducting this review, courts would be able to identify presidential influence that is out of bounds.[85] As Nina Mendelson discusses in her article on political considerations in agency decision making, there are at least three instances where presidential influence is out of bounds: "[when it] is inconsistent with the agency's legal constraints; … prompts the agency to ignore its factual or technical conclusions; and … is aimed at achieving some goal other than service to the public interest."[86]

Executive orders directing agency actions are one of the plainest indicators of the political calculations and politicized value judgments underlying agency actions. The policy goals advanced by executive orders can often be closely, if not directly, tied to statements made and policies advanced on the campaign trail.[87] Executive orders are often used by presidential administrations as a way to advance the campaign promises of the candidate through directing agency action.[88] When courts review

84 Mendelson, *supra* note 58, at 1134–35.

85 *Id.* at 1141.

86 *Id.*

87 Avalon Zoppo, Amanda Proença Santos, & Jackson Hudgins, *Here's the Full List of Donald Trump's Executive Orders*, NBC NEWS (last updated Oct. 17, 2017 11:58 AM), https://www.nbcnews.com/politics/white-house/here-s-full-list-donald-trump-s-executive-orders-n720796.

88 Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9339 (Jan. 30, 2017).

the revision or rescission of an EPA rule regulating GHG emissions, they should trace the agency action to the underlying executive orders to better understand the influence of presidential politics.

After examining the role of politics in agency decision making and the courts' role in assessing political involvement, this Note examines the EPA's authority to regulate GHGs under the CAA and reviews what the Supreme Court has held regarding EPA using its judgment, political or otherwise, to come to a regulatory decision.

IV. THE EPA'S AUTHORITY TO REGULATE GHG EMISSIONS

This Part will briefly review the Supreme Court precedent that directs the EPA's regulation of GHG emissions under the CAA. It will discuss the promise and problems with this regulatory framework. Then, it will assess how different presidential administrations have used the framework. Finally, it will discuss how the proposed adoption of an adapted form of *Chevron* review can better assess the political considerations and value judgments made by the EPA and presidential administrations in coming to regulatory decisions.

A. GHG Emissions as Air Pollutants and Massachusetts v. EPA

At base, the EPA has the authority to regulate GHG emissions and, under some parts of the CAA, is required to consider whether regulation is appropriate.[89] In *Massachusetts v. EPA*, the Supreme Court analyzed whether GHGs are an "air pollutant" under Section 202(a)(1) of the CAA and determined the scope of the EPA's authority to regulate them.[90] The Court held that the EPA must at least consider whether they need to regulate GHGs because they squarely fall within the statute's definition of "air pollutant."[91] In coming to its conclusion, the Court grounded its reasoning in the "unambiguous" text of the statute.[92] This part of the *Massachusetts* decision was a big win for the environmental plaintiffs and states that brought the case.

However, at the end of the decision, the Court hedged and reaffirmed the agency's ability to use its judgment in determining whether to

89 Massachusetts v. EPA, 549 U.S. 497, 533 (2007).

90 *Id.* at 505.

91 *Id.* at 534.

92 *Id.* at 528–29.

regulate.[93] In doing so, the Court narrowed the agency's ability to exercise its "judgment" by constraining it to reasoning based in the statutory language.[94] In the context of *Massachusetts*, the judgment needed to be related to whether a pollutant "causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare."[95]

Ultimately, the Court found that the previously proffered reasoning for refusing to regulate GHGs, even if they were pollutants, was beyond the scope of the statute because it had nothing to do with whether emissions were reasonably anticipated to endanger public health or welfare.[96] The agency had previously relied on, as the court described it, a "laundry list of reasons not to regulate" all outside of the scope of the statutory command.[97] The opinion's judgment language, while it limits the agency's discretion, still leaves the EPA with considerable freedom. This is especially true considering the broad statutory language in the parts of the CAA that guide agency discretion.[98] When regulating under different parts of the CAA, the EPA is mandated to consider hard-to-define concepts like the public interest, costs, and benefits.[99] Ultimately, the Court left open an important question: namely, whether politics and policy concerns could influence the judgment of the agency. The Court did not directly address whether policy judgments could influence public interest determinations or cost considerations or, rather, whether these determinations must be based on agency expertise.[100]

The policy concerns at the end of *Massachusetts* looks like a small crevasse in the middle of a large glacier that is an otherwise great opinion for those who want to use existing legal mechanisms to combat climate change. However, read in the larger context of principles of administrative law and judicial review of agency actions, it is more like a large ice calving, with some of the strength of the glacier sliding into the ocean of messy political accountability in agency decision making.

If *Massachusetts* was the last word on the issue, it would stand to reason that GHG regulation was not on the margins of the CAA but rather squarely within its statutory mandates. The EPA could use its judgment

93 *Id.* at 534–35.

94 *Id.* at 532–33.

95 *Id.*

96 *Id.*

97 *Id.* at 533.

98 *Summary of the Clean Air Act*, *supra* note 67.

99 42 U.S.C. § 7411 (2018).

100 Massachusetts v. EPA, 549 U.S. at 534–35.

and discretion regarding whether to regulate.[101] This judgment must be based on the statutory text but could likely include some degree of policy concern or political consideration. However, this was not the Court's last word on the EPA's regulation of GHGs through the CAA.

B. After Massachusetts v. EPA*, EPA's Authority to Regulate GHG Emissions Became Limited in Scope*

The Supreme Court revisited the subject of GHG emission regulation when it decided *Utility Air Regulatory Group v. EPA* ("*UARG*").[102] In large part, *UARG* reaffirmed the EPA's ability to regulate GHGs under the CAA.[103] However, it limited this ability by drawing the authority back to Congress's intent and the clear statutory language of the CAA.[104] The Court applied a *Chevron* analysis to the EPA's "Tailoring Rule," a rule that changed the statutory limits triggering regulation of GHGs because the agency had found the existing statutory limits unworkable.[105] Writing for the majority, Justice Scalia pointed to EPA's need to rewrite the statute as a clear sign that the agency had embarked on a regulatory action that was inappropriate and outside the scope of Congress's intent.[106] This decision once again placed GHG regulation on the margins of the CAA by allowing regulation only when it falls within Congress's clear intent.[107]

C. How the EPA Has Used Its Regulatory Authority in the Realm of GHG Emissions and the Need for Searching Judicial Review

For the first six years of the Obama administration, *Massachusetts* was the legal backdrop for the EPA as it pursued climate action through the regulatory mechanisms of the CAA. Some notable efforts to curb GHG emissions included the Clean Power Plan, the Corporate Average Fuel Economy standards negotiated with auto-manufacturers after the bailout

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101 The case remanded the decision back to the EPA and directed it to make an endangerment finding pursuant to Section 202(a)(1) of the Clean Air Act and, through that finding, determine whether GHGs were the kind of pollutant that should be regulated under that section. *EPA's Endangerment Finding: The Legal and Scientific Foundation for Climate Action*, NAT. RES. DEF. COUNCIL, INC. (May 2017), https://www.nrdc.org/sites/default/files/epa-endangerment-finding-fs.pdf.

102 *See* Util. Air Regulatory Group v. EPA, 573 U.S. 302 (2014).

103 *See id.* at 308–10.

104 *See id.*

105 *Id.*

106 *Id.* at 328.

107 *See id.* at 333–34.

of 2008, and rules to limit methane emissions.[108] As described above, the legal backdrop changed in 2014 after *UARG*. However, this decision had a limited practical effect on the Obama EPA's ability to regulate GHGs. For the last two years of the administration, the EPA continued to use the CAA to reduce GHG emissions, including finalizing the methane New Source Performance Standards for the oil and natural gas source category.[109]

In 2016, the legal backdrop remained the same as the Obama EPA handed off to the Trump EPA. What has happened since highlights the role political considerations can play in forming value judgments around mandates of public health, welfare, and costs and benefits. This leads to questions of the appropriateness of these judgments and considerations in interpreting the statutory mandates of the CAA, the door that was left open at the end of *Massachusetts*.

The stark contrast in administrative approaches to using the CAA to address GHG emissions in the absence of comprehensive climate change legislation exposes a weakness in the current judicial review doctrine. This weakness is the general reluctance of courts to evaluate when an agency action is based on a judgment in light of the statutory language (i.e., public health, welfare, and costs) versus when it is based on a value judgment or political concern (i.e., climate change is not real or is not a real concern).[110] This weakness may be particularly problematic in politically charged but scientifically technical fields, such as mitigating climate change through GHG emission regulation, where courts defer to the agencies as experts and political considerations and value judgments parade under the guise of judgments in light of the statutory text. As cases reviewing Trump administration changes to Obama-era GHG programs

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108 *See* Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, or Modified Sources, 81 Fed. Reg. 107, 35,824 (June 3, 2016) (to be codified at 40 C.F.R. pt. 60); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 205, 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60); 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 199, 62,624 (Oct. 15, 2012) (to be codified at 49 C.F.R. pt. 523, 531, 533. et al.).

109 Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, or Modified Sources, 81 Fed. Reg. at 35,824.

110 This kind of review has been done in other cases but less so in CAA GHG emission regulation challenges. A recent example of this kind of review is *Department of Commerce v. New York*. There, the Supreme Court held that the reason given for including a citizenship question on the census was pretext. Amy Howe, *Opinion Analysis: Court Orders Do-Over on Citizenship Question in Census Case (Updated)*, SCOTUSBLOG (June 27, 2019), https://www.scotusblog.com/2019/06/opinion-analysis-court-orders-do-over-on-citizenship-question-in-census-case/.

wind their way through the courts, remedying this weakness grows increasingly important.[111]

Currently, courts use a *Chevron* analysis to guide their opinions when the EPA is interpreting whether the CAA gives the agency authority to regulate GHG emissions, leaving considerable discretion to the agency in making its judgments. By adopting the Hard Look standard at *Chevron* step two, the courts could evaluate whether regulatory judgments are based on appropriate reasons, such as science and public health data, in light of the statutory language. This would provide more certainty for the courts and give more direction to agencies regarding what is required to support a regulatory decision. To date, the unwillingness of courts to look at the political reasoning underlying regulatory judgments and cost analyses has led to flip-flopping regulation in politically contentious areas such as climate change. Inconsistent regulation in areas such as GHG emissions is undesirable because it leads to inaction on a dire problem, extensive litigation, and regulatory uncertainty.

V. THE THEORY OF POLITICAL ACCOUNTABILITY AND A PLACE FOR POLITICS IN ARBITRARY AND CAPRICIOUS REVIEW

Legal academics have increasingly relied on a theory of political accountability to justify the power given to executive branch agencies by the legislature and judiciary.[112] This Part will overview the role of the president in overseeing agency action and ensuring political accountability. It will further discuss what constitutes a political consideration or policy judgment in the context of agency decision making.

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111 So far, many of the Trump administration rollbacks have been stayed for procedural deficiencies and, therefore, courts have not reached this stage of the analysis. *See When We Win*, EARTHJUSTICE, https://earthjustice.org/features/environmental-lawsuits-trump-administration (last updated Aug. 31, 2020). For discussions of upcoming court challenges that may reach the merits *see Attorneys General Take Trump Administration to Court on Rollback of Passenger Vehicle Emissions Standards*, EHS DAILY ADVISOR (June 8, 2020), https://ehsdailyadvisor.blr.com/2020/06/attorneys-general-take-trump-administration-to-court-on-rollback-of-passenger-vehicle-emissions-standards/; *Allies File Lawsuit Challenging Trump's "Inadequate" and "Dangerous" Clean Power Plan Rollback*, ENV'TL DEF. FUND (Aug. 14, 2019), https://www.edf.org/media/edf-allies-file-lawsuit-challenging-trumps-inadequate-and-dangerous-clean-power-plan-rollback.

112 Mendelson, *supra* note 58, at 1128.

A. The Role of the President

The theory of political accountability argues two primary contentions. First, that what might otherwise be a gap in oversight is filled by presidential supervision.[113] And second, that the president is politically accountable for the actions of the agencies of the executive branch.[114] In order to be persuaded by this view of political accountability, one first needs to be persuaded that the president has a role in agency decision making. There are generally two views of the role and authority of the president in overseeing agency decisions.[115] The first is that statutes generally permit presidential oversight of executive agency decision making.[116] The second is that statutes that delegate decision-making power to the heads of agencies should not be read to permit the president to move from the role of overseer to decider.[117] For those who subscribe to the second theory of the role of the president, executive orders that consolidate control of agency decisions in the EOP, through review by the OMB and OIRA, are overreaches of presidential authority.[118] However, the predominant and controlling view is the former, that statutes generally permit presidential oversight of agency actions.[119]

1. Political Accountability for Agency Interpretations of Questions of Law Under Chevron

Justice Elena Kagan wrote the ground-breaking law review article, *Presidential Administration*, that launched the primary theory of political accountability and placed the president as an important and appropriate player in agency decision making.[120] This acceptance of the role of the president leads to the opportunity for political accountability in judicial review by encouraging courts to look at the political nature of value determinations made by agencies at the request of the Chief Executive—determinations not typically constrained by statute.[121] An opportunity exists for legitimizing the power of agencies by rooting its accountability

113 *Id.*

114 *Id.*

115 *Id.* at 1131; *See also* Elena Kagan*, Presidential Administration* 114 HARV. L. REV. 2245 (2001); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. Rev. 696 (2006).

116 *See* Kagan*, supra* note 115.

117 *See generally* Strauss, *supra* note 115.

118 *Id.; See, e.g.,* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

119 *See* Kagan*, supra* note 115.

120 *See id.*

121 Mendelson, *supra* note 58, at 1128.

in the electorate through the president.[122] This is an opportunity that, as of yet, courts have been reluctant to take, yet one that they should when reviewing agency decisions rooted in legal interpretations.[123]

In *Presidential Administration*, Justice Kagan acknowledges the judiciary's unwillingness to adopt any kind of searching review of presidential involvement in decision making in either their *Chevron* or *State Farm* analyses.[124] She argues that both forms of review, review of agency legal conclusions under *Chevron* and review of agency decision-making processes under *State Farm*, would be greatly enhanced if the court took an "unapologetic account of the extent of presidential involvement in administrative decisions in determining the level of deference to which they are entitled."[125]

Her formulation of *Chevron*, which she postulates was anticipated in the initial *Chevron* decision, is one that considers and applies deference to instances of substantial presidential involvement in agency decision making.[126] She argues this interpretation would relieve some of the suspicion that courts have when looking at changes in an agency's interpretation of a particular statute by bringing to light the presidential involvement in an agency's conception of its authority.[127] This presidential involvement and the rationales advanced by the EOP would then be examined under the *Chevron* reasonableness test, allowing courts to better understand the reasoning behind an agency's change in a legal interpretation of a statute.

2. Political Accountability for Agency Interpretations of Questions of Fact Under Hard Look

For there to be consistent political accountability in agency decision making, courts should also take a Hard Look at presidential involvement in an agency decision during an analysis of an issue of fact.[128] Justice Kagan argues that a Hard Look review should give more deference to agency actions with clear signs of involvement from the president. This thought stems from the idea that that office will absorb the political costs

122 *See id.*

123 *See id.*

124 Kagan, *supra* note 115, at 2372.

125 *Id.*

126 *Id.* at 2375–78.

127 *Id.* at 2378.

128 *Id.* at 2380.

of a bad decision through political accountability. However, that argument was implicitly rejected in *State Farm*.[129]

In *State Farm*, Justice Rehnquist dissented, arguing that the agency should be allowed to consider a change in presidential administration and a subsequent change in presidential policies when reaching a decision.[130] Such an expression in a dissent implies it was rejected by the majority when they formulated their opinion. This does not mean that there is no place for looking at the record of presidential involvement in agency decisions on questions of fact. It simply means that the Supreme Court has rejected the argument that any indicia of presidential involvement warrant a decision *more worthy* of deference from the courts.

3. Increasing Transparency Around the Role of the President to Ensure Political Accountability in Judicial Review of EPA Decision Making

The current conception of Hard Look provides for little political accountability because there is no requirement that presidents, the OMB, or any other office acting under direction from the executive, disclose their involvement in agency decision making. This is an undesirable result given the increased role that the EOP has taken in the regulatory process since the Reagan administration.[131] Courts should take the reality of EOP involvement in agency decision making into consideration when assessing decisions and further require information of this involvement to become a part of the record. This would necessitate political considerations advanced by the president or other EOP offices to become part of the record that courts require agencies to base their final decision on. The availability of this information in the record, and therefore of the opportunity for courts to review this information, would advance the goals of political accountability by shedding light on presidential involvement in agency decision making.

It is desirable for courts to adopt the formulation of judicial review advanced throughout this Note in the context of climate change regulation because politics fuel value judgments and value judgments lay behind many of the tools used to assess the costs and benefits of GHG regulation. If courts were required, through a Hard Look review at *Chevron* step two, to examine the political calculations and value judgments behind agency

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129 Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29, 58–59 (Rehnquist, J., concurring in part and dissenting in part); Kagan, *supra* note 115, at 2380.

130 *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part).

131 *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

actions, it would lead to a more sound and stable regulatory process where the science and economics of the expert agencies plays the central role.

B. Regulatory Review in the Executive Office of the President Inserts Political Considerations into the Agency Decision Making Process

To advocate for this kind of review by courts, what is considered political involvement must be established so that it can be disclosed as a part of the record.[132] Presidential, and therefore political decision making, often happens during the regulatory review process once the decision has left the agency and traveled to OIRA within the OMB and the EOP.[133] This kind of regulatory review has been a staple of administrative law since the Reagan administration and has become a way for the president to impose their values on decision making.[134] Many of the protocols and goals of OIRA review are established through executive orders as discussed previously.[135] Decisions made during the regulatory review process are passed back to the agency where it becomes responsible for implementing the principles of the review into its decision making.[136] This circumvents the mechanisms of expertise within the agency by imposing politically motivated executive branch policies and priorities.[137] There is no requirement for disclosure of these regulatory reviews as part of the final record, which creates a barrier of information for courts and the public.[138]

It is important to note once more that presidential involvement is not necessarily good or bad.[139] A system of centralized presidential oversight, in the form of a regulatory review process in OIRA and the EOP, can help to eliminate inefficiencies that inevitably occur in a complex and ever-expanding administrative state.[140] Likewise, political considerations in agency decision making are not necessarily good or bad.[141] Certain

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132 Mendelson, *supra* note 58, at 1128.

133 *See id.* at 1129; Kagan*, supra* note 115, at 2247.

134 Kagan*, supra* note 115, at 2247–49.

135 *Supra* Section 2.B.

136 *Regulations and the Rulemaking Process*, U.S. OFF. OF INFO. & REG. AFF., https://www.reginfo.gov/public/jsp/Utilities/faq.jsp (last visited July 5, 2020).

137 *Id.*

138 *See id.*

139 Mendelson, *supra* note 58, at 1130.

140 Kagan*, supra* note 115, at 2340.

141 Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 9 (2009).

political motivations for acting can be seen as legitimizing the process, while others are seen as corrupting it.[142] Distinguishing between a political motivation that is corrupting versus legitimizing can be difficult.[143] Generally, political influences that seek to advance policy considerations or public values are seen as legitimate.[144] Whereas, political influences that seek to advance partisan politics, divorced from the general intent of the statutory scheme, are seen as illegitimate.[145]

When political considerations exist but are not considered in a judicial review system focused on the technocratic role of agencies, it leads to the undesirable result of agencies hedging or distorting science to align their expert decision with political goals.[146] If courts adopted a Hard Look review at *Chevron* step two and considered an agency's decision in light of both the technocratic and political realities at play, it would remove the pressure on agencies to distort scientific or economic tools while allowing courts to determine whether political considerations were legitimate or illegitimate based on developed standards of reasonableness.[147] In the context of EPA's regulation of GHG emissions under the CAA, this modified form of review would advance the goals of political accountability by highlighting the influences of the president, the use of cost calculating tools to change the outcome of cost-benefit analyses, and the influence of the regulatory review process.

VI. ECONOMIC TOOLS USED IN REGULATORY ANALYSES AND THE POTENTIAL TO INCREASE POLITICAL ACCOUNTABILITY

Cost considerations have become a central way in which agencies, including the EPA, decide whether or not to act. These considerations often help to guide statutory interpretation decisions. However, there is no uniform evaluation of costs and benefits. There are tools such as the Social Cost of Carbon, the use of which is not widely agreed upon.[148] Then there

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.* at 12.

147 For a discussion of reasonableness and *Chevron* step-two *see* Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 253 (1997).

148 *See* Jason Bordoff, *Trump v. Obama on the Social Cost of Carbon – and Why it Matters*, WALL STREET J. (Nov. 15, 2017), https://blogs.wsj.com/experts/2017/11/15/trump-vs-obama-on-the-social-cost-of-carbon-and-why-it-matters/.

are economic tools that are widely accepted across administrations, including discount rates and cost-benefit analysis.[149] However, even these widely accepted tools pose their own challenges as different values and standards can be used to achieve drastically different results. The ability to manipulate otherwise standard economic tools is where political considerations can influence agency decision making without judicial scrutiny.[150]

Nearly all cost calculation tools require inherent value judgments to determine the metrics that an agency or reviewing entity will use. These value judgments require political considerations: considerations about the costs and benefits of climate change, considerations about the value of future life, and considerations about whether to care about the cumulative costs of environmental harms—these political considerations and value judgments can drastically change the way a regulation looks on its face and influence whether it is considered an economically feasible way to address a social problem.[151] Cost calculation tools are used across government decision making but they are especially susceptible to manipulation for desired political outcomes in the context of climate action.

As of yet, judicial review of agency actions has not embraced a standard of review that requires courts to take a deep dive into the economic tools used by agencies to come to their decisions.[152] Instead, courts often stop at whether the agency action was reasonable.[153] In determining reasonableness, they often never look past whether the agency has used a widely accepted cost consideration tool.[154] If they do look more closely, it is often in the context of cost-benefit analysis where the court determines whether the agency considered all reasonable costs and

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149 58 Fed. Reg. 51735 (1993); MARK SQUILLACE, ENVIRONMENTAL DECISION MAKING FOR THE 21ST CENTURY 193 (2016).

150 Jack Thorlin, *No Credit Unless You Show Your Work: How Judges Can Stop the Gaming of Climate Change Discount Rates in Federal Rulemaking*, 31 COLO. NAT. RESOURCES, ENERGY & ENVT'L. L. REV. 85, 145 (2020).

151 Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1571 (2002); Niina H. Farah, *3 Grievances Greens Have with White House NEPA Guidance*, GREENWIRE (June 25, 2019), https://www.eenews.net/stories/1060655009; *see generally* EPA, FINAL REPORT ON REVIEW OF AGENCY ACTIONS THAT POTENTIALLY BURDEN THE SAFE, EFFICIENT DEVELOPMENT OF DOMESTIC ENERGY RESOURCES UNDER EXECUTIVE ORDER 13783 (2017); Thomas J. Kneiser & W. Kip Viscusi, *The Value of a Statistical Life*, VAND. L. RES. PAPER SER. NO. 19-15 (Apr. 10, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3379967.

152 Thorlin, *supra* note 150, at 137–42.

153 Chevron v. NRDC, 467 U.S. 837 (1984).

154 Thorlin, *supra* note 150, at 120.

benefits.[155] This standard of review is superficial, allowing agencies and regulatory review bodies like OIRA to manipulate cost calculation tools, often for political reasons, to reach vastly different results.

If courts engaged in a Hard Look analysis of either the EPA's or OIRA's use of economic tools in valuing the costs and benefits of regulating at *Chevron* step two, the court would be advancing the goals of political accountability by formally evaluating the policy considerations taken when making calculations using those tools. Below proceeds a brief analysis of the tools that the EPA and OIRA regularly use when assessing the costs and benefits of regulations addressing GHGs and how the courts have historically treated their use.

A. Cost-Benefit Analysis

Cost-benefit analysis has long been used by agencies to justify their decision making.[156] In 1993, President Bill Clinton issued Executive Order 12866, which required agencies to "adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[157] Under this Order, OIRA is tasked with conducting a review of all agency cost-benefit analysis for "significant" regulations.[158] The use of cost-benefit analysis sanctioned in Executive Order 12866 has remained a feature of the regulatory review process ever since.[159]

Cost-benefit analysis has had bipartisan support as an economic tool to assess the strength or weakness of a regulatory proposal.[160] Yet, it is not without controversy. Cost-benefit analysis can be problematic when applied in the environmental context due to the difficulty of quantifying environmental outcomes.[161] However, in order for cost-benefit analysis to be a useful and accurate tool for agencies, the relevant consequences of policies need to be measured and put into dollar terms.[162] In the environmental context, the complexity of valuing noneconomic

155 SQUILLACE, *supra* note 149, at 193.

156 *Id.*

157 Exec. Order No. 12866, 58 Fed. Reg. 51,735 (1993).

158 *Id.*

159 *See* Susan Rose-Ackerman, *Putting Cost-Benefit Analysis in Its Place: Rethinking Regulatory Review,* 65 U. MIAMI L. REV. 2 (Winter 2010), https://www.researchgate.net/publication/228218264_Putting_Cost-Benefit_Analysis_in_Its_Place_Rethinking_Regulatory_Review.

160 Exec. Order No. 12866, 58 Fed. Reg. 51,735; Exec. Order No. 12291, 46 Fed. Reg. 13,193 (1981).

161 Amy Sinden et al., *Cost Benefit Analysis: New Foundations on Shifting Sand*, 3 REG. & GOVERNANCE 48, 56 (2009).

162 *Id.* at 51.

environmental values opens the door to abuses of discretion by political actors.

While people tend to agree that the environment holds tremendous economic value, values which are not tradeable on the open market are harder to quantify and fall outside of the traditional economic model of "value."[163] Traditional notions of economic value are not rooted in philosophical, ecological, or moral benefits whereas many nonmarket environmental benefits, such as ecosystem services and environmental amenities, are based on these hard to value abstract notions.[164] Even when environmental attributes are valued, it is difficult to come to a consensus on what the value should be.[165]

A cost-benefit analysis that truly takes into account the costs and benefits of a policy's impacts would have to balance market costs and benefits with nonmarket costs and benefits.[166] There are many schools of thought related to evaluating nonmarket environmental benefits and many economic tools that can be used to come to a valuation.[167] Reasons for the EPA's and OIRA's considerable discretion in valuing nonmarket environmental attributes include a lack of consensus around how to value these costs and benefits, and a lack of transparency around how those costs and benefits are determined.[168]

Cost-benefit analysis is a particularly difficult tool to use in the context of GHG regulation because of the challenges of valuing costs and benefits around climate change.[169] Some critiques of cost-benefit analysis that are particularly salient in the climate policy context are problems with valuing harms outside the United States and to future generations.[170] For example, the Trump administration has issued policy guidance that requires agencies to only consider the costs and benefits of climate action to the United States as part of the agency decision-making process.[171] This is an especially troublesome policy when considered in light of the realities of climate equity and which countries emit the greatest number of GHGs,

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163 JONATHAN M. HARRIS & BRIAN ROACH, ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS: A CONTEMPORARY APPROACH 107 (3d ed. 2013).

164 *Id.* at 107–08.

165 *Id.* at 108.

166 *Id.*

167 *Id.* at 107–09.

168 *See* Ackerman & Heinzerling, *supra* note 151, at 1576–78.

169 *See, e.g., id.* at 1571; Sinden et al., *supra* note 161, at 56.

170 Sinden et al., *supra* note 161, at 56.

171 INST. FOR POLICY INTEGRITY, N.Y. UNIV. SCHOOL OF LAW, HOW THE TRUMP ADMINISTRATION IS OBSCURING THE COSTS OF CHANGE 2 (2018), https://policyintegrity.org/files/publications/Obscuring_Costs_of_Climage_Change_Issue_Brief.pdf.

versus which countries suffer the greatest consequences from climate change.[172] To disregard the costs to those outside the United States when climate change is a global issue seems to ignore an important part of the cost-benefit analysis. Additionally, the use of discounting future costs and benefits results in a muddy perception of our obligation to future generations.[173] The economic and scientific uncertainty around cost-benefit analysis provides a strong argument for requiring courts to look closely at the choices agencies make when conducting presidentially mandated cost-benefit analyses.[174] It is not enough that the agencies have engaged in this analysis. Courts can and should use a Hard Look approach to determine whether the cost-benefit analysis is using majority or consensus economic and scientific information around climate change. Specifically, courts should look closely at how agencies use tools such as discount rates and social cost measures in developing their cost-benefit analysis. This would ensure agencies are making regulatory decisions based on cost-benefit analyses that comply with the mandates of the statute.

B. Discount Rates

Discount rates are used to adjust downward, or devalue, the future impacts of current policy decisions.[175] The primary justification for the use of discount rates is that future impacts are deemed less relevant than current impacts.[176] Discount rates are calculated by looking at average investment rates.[177] Economists have estimated that realistic consumption discount rates range between two and seven percent, with seven percent being the investment rate of return for private corporations and two percent being the average rate of return on government bonds after taxes.[178] During the George W. Bush administration, the OMB endorsed the use of a discount rate between three and seven percent in Circular A-4.[179] The

172 J. Samson et al., *Geographic Disparities and Moral Hazards in the Predicted Impacts of Climate Change on Human Populations*, 20 GLOB. ECOLOGY & BIOGEOGRAPHY 532, 539 (2011).

173 Sinden et al., *supra* note 161, at 56.

174 Exec. Order No. 12866, 58 Fed. Reg. 51,735 (1993).

175 HARRIS & ROACH, *supra* note 163, at 122.

176 *Id.*

177 *Id.* at 123.

178 Richard G. Newell & William A. Pizer, *Uncertain Discount Rates in Climate Policy Analysis*, 32 ENERGY POL'Y 519, 522 (2004).

179 OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4: REGULATORY ANALYSIS (2003).

Obama administration used discount rates between 2.5 and five percent[180] and the Trump administration has been using discount rates between three and seven percent.[181]

In the context of climate change, where the benefits of action are diffuse, both geographically and temporally, while upfront costs can be significant, discount rates are an important tool for agencies to use to justify their actions.[182] The discount rate that an administration chooses to use can have significant impacts on the outcome of a cost-benefit analysis.[183] A discount rate may dramatically change the value of future costs and benefits.[184]

Jack Thorlin, in his article on discount rate gaming, discusses the dangers of adjusting discount rates for different outcomes and proposes solutions for how courts or the legislature can stop this manipulation.[185] Thorlin advocates that courts should examine an agency's choice of discount rate if setting the rate remains in the agency's discretion.[186] He believes that requiring agencies to be upfront about their use of discount rates can "moderate policy shifts" from administration to administration.[187] If agencies were required to explain their choice of discount rate as a part of the record, it would also increase transparency around the value judgments being made.[188] For a long time, agencies have gotten away with a simple citation to OMB Circular A-4 as justification for their chosen discount rate.[189] Something more should be required. Courts should apply the Hard Look review at *Chevron* step two to an agency's choice of discount rate to ensure that changes to GHG emission

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180 INTERAGENCY WORKING GROUP ON SOC. COST OF CARBON, TECHNICAL SUPPORT DOCUMENT: SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866 1, 17 (2010), https://www.epa.gov/sites/production/files/2016-12/documents/scc_tsd_2010.pdf.

181 U.S. ENVTL. PROT. AGENCY, EPA-452/R-18-006, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING ELECTRIC UTILITY GENERATING UNITS; REVISIONS TO EMISSION GUIDELINE IMPLEMENTING REGULATIONS; REVISIONS TO NEW SOURCE REVIEW PROGRAM at ES-4–5 (2018), https://www.epa.gov/sites/production/files/2018-08/documents/utilities_ria_proposed_ace_2018-08.pdf.

182 Lawrence H. Goulder & Roberton C. Williams, *The Choice of Discount Rate for Climate Change Policy Evaluation* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 18301, 2012).

183 *See* Newell & Pizer, *supra* note 178.

184 *Id.*

185 *See* Thorlin, *supra* note 150, at 146.

186 *Id.* at 145.

187 *Id.* at 137.

188 *Id.*

189 *Id.* at 138.

regulations are based on reasoned judgments backed by science and economics and not by the arbitrary manipulation of an economic tool.

C. Courts Should Apply a Hard Look Review at Chevron *Step Two when they Evaluate an Agencies Use of Cost Calculating Tools*

When the EPA dramatically switches its approach to regulating GHG emissions, it cannot just walk away from its prior justifications for acting.[190] It must contend with the record that was developed as the preceding administration decided how to act.[191] When statutory language guiding agency action remains the same, as it has with the CAA, but the agency decision making changes course, it is important for courts to ask why. With questions of fact the courts do, but with questions of law the courts are largely deferential to agencies under the *Chevron* standard.

When the EPA is using a cost-benefit analysis as part of the justification for why its action is based on a reasonable interpretation of a statute, a reviewing court should take a Hard Look at the cost-benefit analysis and discount rate to determine whether the agency was acting arbitrarily or capriciously. If courts take a Hard Look at the economic tools the EPA is using to come to their regulatory decision, it will be more difficult for agencies to change course based purely on political grounds. This will allow for greater regulatory certainty and better decision making based on the best available science. Knowing that the possibility for gaming of these economic tools is high, courts should ask the EPA to be transparent about the policy concerns and political considerations that went into calculating the cost-benefit analysis. By engaging in this form of review, courts will also increase the possibility of political accountability.

VII. COUNTERARGUMENTS TO ADVANCING POLITICAL ACCOUNTABILITY THROUGH JUDICIAL REVIEW OF AGENCY ACTIONS

There are important counterarguments to adopting this form of searching review but ultimately this conception of judicial review is likely what the *Chevron* Court initially had in mind.[192] One potential

190 *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009); Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

191 *See Fox Television Stations*, 536 U.S. at 537.

192 Kagan, *supra* note 115, at 2375–78.

counterargument is that a Hard Look review at *Chevron* step two requires courts to look at information beyond their expertise. Namely, that this form of review undoes years of precedent where courts and judges worked hard to strike a balance between their expertise of the law and an agency's expertise of the subject matter.[193] However, while this form of review suggests that courts take a harder look at an agency's justifications and cost considerations, it does not suggest that the court replace its thinking for the agency's. Instead, it asks that the agency and the EOP release more information to the public and the court regarding the political concerns and cost considerations that the EPA or OIRA looked at when coming to their regulatory decision. This will increase the availability for true political accountability.

Another counterargument is the risk that this form of review will lead to an overpoliticization of the judiciary. A politicized judiciary is a real concern and something that should be avoided in order to retain trust in this independent branch of government.[194] While ensuring judicial independence should always be a priority, this form of review does not present an opportunity for the judiciary to become politicized any more than existing standards of review.

Applying a Hard Look review at *Chevron* step two asks courts to look at more information more carefully; it does not invent a fully new form of review. It asks courts to apply the existing *State Farm* Hard Look to a new category of information: the EPA's interpretation of the CAA. This is an appropriate place for Hard Look review because much of the information that the agency looks at to come to a legal interpretation, such as cost-benefit analyses, are similar to the tools that agencies use to come to decisions that are typically treated to a Hard Look review. Costs are one of the factors that are often considered under *State Farm* and this proposal asks that the same standard be applied as part of the *Chevron* reasonableness review in order to ensure agency decision making is based on the best science and economic data available rather than on merely political considerations.[195]

Ultimately, these counterarguments are important to keep in mind as courts work at adopting this Hard Look review at *Chevron* step two. The

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193 *See* Ronald J. Krotoszynski, Jr., "*History Belongs to the Winners": The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995 (2006).

194 *See* Sandra Day O'Connor, *The Importance of Judicial Independence*, STAN. LAWYER (May 15, 2008), https://law.stanford.edu/stanford-lawyer/articles/the-importance-of-judicial-independence/.

195 For an example of cost being considered in both a *State Farm* and *Chevron* analysis *see Clean Air Act — Cost-Benefit Analysis — Michigan v. EPA*, 129 HARV. L. REV 311, 313 (2015).

separation of powers between the branches is of vital importance. Agencies should remain experts and should act as such. But, because the realities of climate change pose unique political and scientific challenges, it is an area that requires heightened judicial review to ensure that agencies continue to act as experts and that the president is held politically accountable for an agency's action or failure to act when that decision is linked to presidential politics.

CONCLUSION

Polling data indicates that there is a growing consensus among the American public that climate change is real, a looming threat, and that something must be done about it. However, the data also shows that the reality of our current political moment and the stark difference in climate change ideology among political parties stands in the way of comprehensive climate change legislation. While optimism remains, the EPA must fall back on the statutory tools left available to it. The CAA provides the EPA avenues with which to pursue regulation of GHGs. The Supreme Court has sanctioned the use of the CAA for this purpose, at least in some instances. The EPA is largely left to determine when, and in which ways, the CAA gives it the legal authority to regulate GHGs. It is in this context that we have seen stark contrasts in approaches across presidential administrations on how and whether regulation of GHGs should take place. In creating its regulatory boundaries, the EPA engages in statutory interpretation of the CAA. Entities such as OIRA, within the EOP, and under authority of various executive orders, are also involved in determining EPA's regulatory approach to GHGs. Between administrations, there have been stark contrasts in interpretations of the same language. These interpretations inevitably get challenged and it becomes up to the courts, using their standards of judicial review, to determine whether EPA's interpretation is reasonable, or rather, if it is arbitrary and capricious.

Courts should apply a Hard Look review at *Chevron* step two to determine the considerations shaping the EPA's change in position on issues of statutory interpretation. This conception of judicial review would allow for increased political accountability by spotlighting the president's political justifications for encouraging the EPA to act (or not act) to regulate GHG emissions. Regulatory reviews mandated by executive orders and manipulations of economic tools that require value judgments often skewed by political considerations are important starting places for courts to look to better understand the role of politics in decision making that should otherwise be public health and economics based.

This is not to say whether or not political calculations are appropriate in the agency process, but rather that courts should be encouraged to engage in a review of the political considerations that might be influencing expert agencies since the role of agencies is built around a theory of political accountability. A court's Hard Look review at political considerations when engaging in a *Chevron* analysis will help courts make more informed judicial decisions around the EPA's interpretations of the CAA. Ultimately, the specter of this searching review will likely encourage better agency decision making in the context of climate change regulation.