

## TRANSCRIPT

### Environmental Insights

**Guest:** Jeffrey Holmstead

**Record Date:** July 27, 2022

**Posting Date:** August 8, 2022

LINK to podcast: <https://tinyurl.com/2p8c9hbn>

Jeffrey Holmstead: I think that there are technological breakthroughs that are at least on the horizon that could help us solve the problem. But ultimately for me, climate change is a technology issue and not a regulatory issue.

Robert Stavins: Welcome to [Environmental Insights](#), a podcast from the [Harvard Environmental Economics Program](#). I'm your host, Rob Stavins, a professor here at the [Harvard Kennedy School](#) and director of our Environmental Economics Program. Although in the past I featured economists in this podcast series, we've also been privileged to host some top lawyers and legal scholars, including Sue Biniaz, who's now back at the US State Department, Ricky Revesz who's at NYU Law School, Dan Esty from Yale Law School, who's now off at the WTO in Geneva and from here at Harvard, Jody Freeman of Harvard Law School. Now that's a diverse group in terms of gender, but it's not a diverse group politically. So today we're going to begin to make up for that with an environmental lawyer who has worked closely and held important positions in Republican administrations in the United States.

But I didn't invite him here because of his political background and viewpoint, but rather because of his excellence, because he is one of the country's leading and most prominent environmental lawyers. As you'll soon find out, he's both smart and articulate. I'm talking about [Jeffrey Holmstead](#) who leads the [Environmental Strategies Group](#) at [Bracewell](#) in Washington, DC. Welcome, Jeff.

Jeffrey Holmstead: Thank you. I'm very happy to be here.

Robert Stavins: So, before we talk about your extensive experience in government at the White House and at EPA, or about your current thinking about energy, environment and climate change law and policy, I'd like to go back to where you came from and where you've been. And when I say go back, I do mean go way back. So where did you grow up?

Jeffrey Holmstead: I grew up in Boulder, Colorado, which was a wonderful place to grow up.

Robert Stavins: I know Boulder well. And you went to primary school and high school there?

Jeffrey Holmstead: Yeah. Primary school and middle or what was then junior high school and high school. Yep.

Robert Stavins: And then what was next? You graduated from high school and then what?

Jeffrey Holmstead: I graduated from Fairview High School and then went off to Brigham Young University in Utah.

Robert Stavins: And there you studied?

Jeffrey Holmstead: I studied economics, economics and English.

Robert Stavins: Now you received your degree in 1984 and looking at your CV, it looks like you immediately went on to law school. Is that right?

Jeffrey Holmstead: That's correct. Yep. I went to law school right after I graduated.

Robert Stavins: Now I could ask you why you went to Yale Law School of the many law schools. I mean, I guess one answer is that it's traditionally ranked as the number one law school in the United States. Although people at Harvard Law School, I guess, would give us a hard time about that. Were there other specific reasons for your choosing to go to Yale?

Jeffrey Holmstead: Certainly, just the overall ranking was important, but I had just heard really wonderful things about what it was like to study at Yale and all those things turned out to be true. I really enjoyed my three years there. I think there's a lot of law school graduates who can't say that, but for me law school was really a wonderful intellectual adventure.

Robert Stavins: Was there a particular professor that you would cite?

Jeffrey Holmstead: You may know Guido Calabresi, who was then the Dean of the law school, but also taught some introductory classes. And I feel like I learned a great deal from him about a lot of things. And then another professor named Owen Fiss, who you may or may not know.

Robert Stavins: I don't know.

Jeffrey Holmstead: Who was very much on the other side of the political spectrum from where I was. But I appreciated the fact that with the Socratic method, he gave me and a few other conservatives plenty of opportunity to share our views in a respectful way. And actually, when I was looking for a clerkship he wrote me, I think, a very nice letter of recommendation that ended up getting me a clerkship that I enjoyed very much.

Robert Stavins: And that's with Judge Douglas Ginsburg, is that right?

Jeffrey Holmstead: That's right. That's right.

Robert Stavins: And that's at the US Court of Appeals for the DC circuit, which is, I believe second in importance only to the US Supreme Court because its admittedly small geographic jurisdiction, namely Washington, DC, means that it hears

appeals involving administrative law and constitutional law. Or do I have that wrong? It's all secondhand for me.

Jeffrey Holmstead: Well, those of us who clerked there certainly like to say that it's the second most important court. And it's true that I think the majority of justices on the Supreme Court today actually clerked on the DC Circuit before they went on to the Supreme Court. And in fact, when I was clerking for Judge Ginsburg, he was nominated for the Supreme Court.

Robert Stavins: Right.

Jeffrey Holmstead: And ended up withdrawing after it came out that he had smoked marijuana as a law professor at Harvard.

Robert Stavins: Right. Of all things.

Jeffrey Holmstead: Of all things.

Robert Stavins: Indeed.

Jeffrey Holmstead: Back then that was considered, I think, very controversial. Maybe not so much anymore.

Robert Stavins: I presume not now. But I'm not sure. Now, so then after your clerkship, did you go directly to the White House or did something else intervene?

Jeffrey Holmstead: No, I had always expected to be sort of a corporate deal lawyer. That sounded very interesting and appealing. And I finished my clerkship and went on to a Wall Street firm, but it was a Wall Street firm that had an office in DC. And I went there thinking that I would move to New York in a year or two after my wife finished graduate school. But other opportunities came along and kept me in Washington for the rest of my career.

Robert Stavins: And what was the firm you were with in Washington?

Jeffrey Holmstead: Davis, Polk, and Wardwell.

Robert Stavins: Of course. And so, you enjoyed that, but then this other opportunity came along, namely, to become an Associate Council at the White House for President George H.W. Bush.

Jeffrey Holmstead: That's correct. Yes. Judge Ginsburg had, as you may know, had been the head of OIRA in the Reagan Administration and then went on to become the head of the Antitrust Division at DOJ. And so, he was very, I think, well connected with people in the George H.W. Bush Administration and I think with a recommendation from him and some other people that I had gone to law school with, I ended up getting a phone call one day from a former classmate of mine

asking if I would be interested in interviewing for a job in the White House Counsel's Office. And I of course, jumped at the chance.

Robert Stavins: And you interviewed with Boyden Gray, I assume? Is that right?

Jeffrey Holmstead: I did. No, that was Boyden Gray. I interviewed with him. I remember I interviewed with Rob Portman, who also was in the White House Counsel's Office back in those days. And that really has changed the course of my professional career.

Robert Stavins: So that makes it sound from what you've said so far, including that, that perhaps your interest and activity in environment energy law and policy started while you were at the White House in the Counsel's Office.

Jeffrey Holmstead: That's absolutely right. I've come to understand that there was an environmental law class at Yale when I was there, but I never took it. And if you would've asked me then if this is something I would pursue, I would've said absolutely not. But after I went to the White House and came to realize how interesting and important it was, that's really what I've done for the rest of my career.

Robert Stavins: And indeed some listeners might not realize they would hear Counsel's Office and environment and not recognize that during the George H.W. Bush Administration with Boyden Gray running the show, Boyden was absolutely central to the development and eventually the passage in the two houses of Congress of the [Clean Air Act Amendments of 1990](#), including the pathbreaking SO2 Allowance Trading System.

Jeffrey Holmstead: That's right. And I think you may know this, but President George H.W. Bush had been vice president for eight years and had been the head of something called the Council On Regulatory Reform. And so, he had been involved in a lot of regulatory issues, including a lot of Clean Air Act issues. And many of the people who went to his White House had served with him as vice president, who had also been involved in these regulatory issues.

So there were six or seven very senior White House officials who were deeply involved in developing the 1990 amendments. And I actually think that's the reason why they ultimately passed because there was enough attention and enough direction and guidance and assistance from the White House that I think eventually led to the passage of that bill. And Boyden was certainly one of the key people who was involved in that effort.

Robert Stavins: During that time, I spent a lot of time with him. I was commuting to Washington on a weekly basis. I was running something called [Project 88](#) for Senator Wirth and late Senator Heinz, in which we had proposed just such a system, an SO2 Allowance Trading System. And it was wonderful to work with Boyden and others on that at the White House. So let me ask you then, while you were

there, something that some listeners might not recognize is the fact that that was a Republican administration, but it was a very different kind of Republican administration than what at least the younger listeners might assume.

Now, this has come up before in these podcasts when [Dick Schmalensee](#) was on, who of course was at CEA at that time and several others for that matter. But the George H.W. Bush Administration had actually developed the proposal for the Clean Air Act and amendments in 1990, and then sent it off to what was assumed to be and to some degree was an initially hostile Democratic Congress.

Jeffrey Holmstead: That's right. I didn't know it at the time. I was relatively new to Washington, but it was I think a unique moment and a time when there was, I think, less partisanship when it came to environmental issues. There was of course, still wrangling back and forth between Democrats and Republicans, but a real desire to come up with a compromise that everyone could support. It was, I think, an unusual time.

Robert Stavins: Absolutely. Or maybe I will hope that this is an unusual time with the degree of political polarization that we have now, and that we will get back at some point to something like those days. But let's fast forward while we're talking about your government service. Let's fast forward through the Clinton years to the administration of George W. Bush, the earlier president's son, when you held a Senate confirmed position at EPA, namely, Assistant Administrator for Air and Radiation. So again, how did that come about?

Jeffrey Holmstead: Let me go back just quickly to the first Bush Administration. One of the great things about being in the White House is that everybody is willing to talk to you and come in and talk about issues. And I had access to experts at EPA, certainly industry players who cared about these issues. I spent a fair amount of time with OIRA, a fellow named Art Frost who you know, and I spent many hours with Dick Schmalensee. And I came to realize that this set of issues was very interesting. Simply, it was a combination of science and economics and law and politics that make it an extraordinary area in which to practice law.

And I go back to that, just to sort of explain how I ended up going to EPA eventually because during the Clinton years I went to a law firm. I was an environmental lawyer. But I had what I liked to believe was sort of a public policy practice, where certainly we were involved in the nitty gritty day to day issues of Clean Air Act compliance and enforcement, but always had a very keen interest in the different regulatory programs, those that worked, those that didn't work so well. And when George W. Bush was elected, I had not originally intended to go back into government but some of the people who I had worked with eight years before were involved in that administration, including in the Office of Presidential Personnel and reached out to me to see if I was interested in throwing my head in the ring.

And initially, they approached me about going back to the White House Counsel's Office. But I remember saying, I actually think that I could be of

greater service to the administration and to the country by going to EPA. So again, that had not been my intention, but after conversations with my wife, we realized that this might again be a once in a lifetime opportunity. And so, I threw my hat in the ring.

Robert Stavins: And so, you were there in that position from 2001 to 2005. What were one or two top highlights for you of those years as you look back on it?

Jeffrey Holmstead: Something that you may not even be aware of is, the first few months I was there, I had not yet been confirmed. And so, I was not really involved publicly, even in terms of meetings with outside parties. And I spent much of that time working with senior career officials to develop a legislative proposal that became the [Clear Skies Act](#). And the idea was to develop a cap-and-trade program for the power sector for SO<sub>2</sub> and for NO<sub>x</sub> and mercury.

Robert Stavins: Right.

Jeffrey Holmstead: And do something that was that certainly at the time was considered to be very progressive but use that to replace a lot of the other regulatory programs that apply to the power sector. As you know, power plants are subject to many different Clean Air Act programs and there was sort of no rhyme or reason to the way they were regulated. And so, again, working with some very good analysts at EPA, we came up with a regulatory reform proposal where we believed that we could get significantly greater emission reductions at a lower cost than we could have with implementing the Clean Air Act. So that was a real pleasure to put that together. Unfortunately, we came up one vote short in the Senate Environment and Public Works Committee. The president put a fair amount of effort into that but ultimately we came up just short.

Robert Stavins: My recollection, which may be flawed, is that one of the sources of opposition to the legislation was from Democrats because they were disappointed that it was a three pollutant bill rather than a four pollutant bill, where number four would've been carbon dioxide. Is that right or no?

Jeffrey Holmstead: No, no, that's absolutely right. That probably was the biggest issue. Had we just been negotiating about three pollutants, I think it would've been enacted. But again, you may remember that George W. Bush on the campaign trail had called for a four pollutant bill, and only after being elected and I think receiving a lot of pressure from industry, it was decided that CO<sub>2</sub> was not a pollutant like SO<sub>2</sub> and NO<sub>x</sub> and mercury, and dropped that. So, we ended up developing a three pollutant bill, and I think the environmental community didn't want to have any Clean Air Act amendment for the power sector that didn't also include CO<sub>2</sub>.

Robert Stavins: I see. And it's sad because of the fact that my recollection anyway, is that beyond the Clean Air Act Amendments of 1990, what those were accomplishing with SO<sub>2</sub>, that legislation was going to actually result in an additional 75% reduction in SO<sub>2</sub> emissions in the power sector.

Jeffrey Holmstead: Yeah. I think that's right. And what I will say is that was our sort of initial proposal, and there was a great deal of debate whether we should go in with our bottom line or whether we should leave a little negotiating room. And I think based on the analysis we had done and support that we had from John Graham at OIRA, we probably would've gone beyond the 75% reduction.

Robert Stavins: So, let's turn to today. Can you just say a word or two about the nature of your work at Bracewell?

Jeffrey Holmstead: When I left government, actually, I took a year off and had a kind of an amazing adventure with our family. And then when it was time to go back to the professional world, I ended up going to Bracewell because it has a very significant public policy practice. My law firm has a big government relations group that's been very involved in energy and environmental issues, as well as a traditional environmental group, as well as what we call strategic communications. And for many of the issues that I cared about and had worked on, it was important to be able to address them really in all three areas, in terms of sort of the public policy debate, the kind of lobbying and efforts that you have on the Hill, as well as sort of traditional regulatory issues.

And so, I've been working, again, almost entirely on Clean Air Act issues, although a big part of that in the last decade has been the regulation of CO<sub>2</sub>. And I represent quite a range of clients, but included in that is a big coalition of power companies. So I've continued to be very involved in that set of issues, both in sort of the public policy arena, as well as sort of traditional environmental enforcement actions and such things.

Robert Stavins: So that's a natural lead in for us to talk about climate policy, particularly from a legal perspective. But I assume that the most important, and certainly the most prominent legal event affecting climate policy was the June Supreme Court decision in *West Virginia v. EPA*. Can you just, first of all, just very briefly summarize that decision.

Jeffrey Holmstead: So, let me say, yes, I think that decision is probably the most important administrative law decision in the last 20 or 30 years, given the way that the court approached it. And what they really did was develop the contours of a legal doctrine that's been sort of floating around in the half a dozen Supreme Court cases over the last 20 years, that's known as the Major Question Doctrine. And that case is the first time that the court majority had used that doctrine explicitly. And what they basically said is they looked at the Obama Administration's [Clean Power Plan](#), and again, the procedural posture of the case was unusual. The Clean Power Plan was stayed, what, back in 2015, and finally made its way to the Supreme Court. And you may remember that the centerpiece of the Clean Power Plan was what the agency called generation shifting, the idea that to get the necessary CO<sub>2</sub> reductions, they would explicitly shift generation from Coal-fired power plants to natural gas plants and renewables.

And what the court did was look at the specific provision in the Clean Air Act that the Obama Administration had used and noted that it had been interpreted in a very different way for 40 years.

And what they said in the case was there are certain extraordinary cases that involve a major question, something of great political and economic significance. And they said before an agency can regulate in that area or in that way, they need to be able to point to a clear statement from Congress that that's what Congress intended them to do. And since there was no such clear statement in the Clean Air Act, they ruled that that was beyond EPA's regulatory authority. So they explicitly said EPA can regulate CO<sub>2</sub> under the Clean Air Act, but they can't explicitly use generation shifting. And they talk about, in essence what EPA did was decide at that time, roughly 40 percent of the electricity generation came from coal-fired power plants, and the EPA wanted to limit that to about 20 percent. And they said that was beyond EPA's regulatory authority.

Robert Stavins: So I'm not a lawyer. So is this a fair, simplistic summation of this, is that under the Major Questions Doctrine, they found that Chevron deference does not apply?

Jeffrey Holmstead: Yes. I think that's fair.

Robert Stavins: Okay.

Jeffrey Holmstead: People have talked about this as sort of a preliminary step before you get to Chevron, and I think that's probably a good way to characterize it.

Robert Stavins: Okay. Now, in response to that Supreme Court decision, some parties, mainly ones on the left, such as the [Center For Biological Diversity](#) and [350.org](#) have argued, I think fairly recently, for EPA to set a national standard for CO<sub>2</sub> concentrations under a very different part of the Clean Air Act, namely the National Ambient Air Quality Standards, the NAQS, which you're very familiar with now. Again to a non-lawyer, on its face, that strikes me as even more problematic than using section 111(d) for the Obama Clean Power Plan. But what do you think?

Jeffrey Holmstead: What I will say is when the Obama administration was looking at how to regulate CO<sub>2</sub>, they looked at a number of different options and one of those was whether they could develop a National Ambient Air Quality Standard, a NAQ standard. And they also noted that it was plausible that CO<sub>2</sub> could be classified as a hazardous air pollutant and could be regulated under section 112.

Robert Stavins: Right.

Jeffrey Holmstead: And they decided that the most defensible approach would be to regulate it under section 111(d), which is what they did in the Clean Power Plan. I give that by way of background, because I think they understood that regulating it as a

NAQS, as a criteria pollutant was a stretch. And I think there's very little chance that any effort like that would pass muster in the courts, and certainly not with the Supreme Court. And I don't think this administration, even if it has a second term, would ever pursue that approach because they wouldn't want to spend the time and the effort knowing in advance that they were almost certain to be struck down.

Robert Stavins: So stepping back from then, overall, what is your assessment of the Biden Administration's climate, or if you prefer even broader environmental policy, the approaches they've taken, the achievements, successes, failures, all of that?

Jeffrey Holmstead: They have made very clear that climate change is one of their highest priorities, and they've actually done a couple of very important things that I know you're aware of. I think their first priority was in the transportation sector, and they finalized much more aggressive CO<sub>2</sub> emission standards for vehicles. And then they have proposed, but not yet finalized, pretty aggressive approach to regulate methane emissions from oil and gas operations.

Robert Stavins: Right.

Jeffrey Holmstead: And it's a bit surprising that hasn't been finalized yet, but those are difficult issues to deal with. But you would have to say that those are significant efforts. I mean, I do think the West Virginia case could potentially cause issues for EPA's approach to vehicle emissions and we can talk about that, but those are sort of their two big initiatives in the regulatory area.

I think you're right though, that they were focused much more on the possibility of legislative efforts that could achieve their goals when it came to climate change. And I know of course that the collapse of [Build That Better](#) has been a disappointment because I think they believed correctly that carrots were likely to be a much more palatable approach than sticks when it came to regulation. And so, the efforts to give very generous tax subsidies to clean energy, I think, was the part of what they wanted to do. And that now seems, at least for now, to be off the table.

Robert Stavins: Now, it seems that the approach you were mentioning on methane, at least in the oil and gas sector, so leaking from pipelines and wellheads would be a technology specific approach at the source, unless I misunderstood a quotation that was attributed to you that I just read, you think that will pass muster with the Supreme Court?

Jeffrey Holmstead: Yes. Yeah. I doubt it'll ever get to the Supreme Court.

Robert Stavins: Okay. And one other one before we leave, what's happening out with the Biden Administration, what about the social cost of carbon? Naturally to economists like me, that's something that's near and dear to our heart. That has also been in the courts. What's your view on that from a legal perspective?

Jeffrey Holmstead: It depends entirely on how it is used. There have been efforts essentially to directly strike down the social cost of carbon, and you've probably been following those cases. And I think the courts have correctly said that in and of itself, that alone is not the type of action that is reviewable in court, and it won't be reviewable until it's used in a regulation. I think it will depend on the specific contours of the regulation that they're doing. As you know, all these regulatory programs have different standards that the agencies have to meet. And if it's the kind of standard that allows them to consider benefits and costs, I think it depends on the specific context. And I think there will be some interesting litigation about that.

And especially, we could see that in the context of natural gas pipelines, if FERC decides to use the social cost of carbon as a rationale for rejecting a natural gas pipeline, that would present the issue in a very different context. And I think they might run into trouble there. I know that's something that's under consideration, but they have not done that yet.

Robert Stavins: But of these various policies that are moving forward, we may see in proposed regulations some that would survive and as you said, not even go to the Supreme Court, but certainly survive this recent test that's now imposed, the one that I would think would be most of a stretch and most difficult would be [the proposed rules from the Securities and Exchange Commission about disclosure](#). Or do you think differently?

Jeffrey Holmstead: No, no. I think that's absolutely right. In fact, in some ways I think the West Virginia decision will have a much bigger impact on agencies other than EPA.

Robert Stavins: Yeah.

Jeffrey Holmstead: And I think one of the things that the court looks at is whether historically an agency was understood to have that kind of role. And the idea that the Securities and Exchange Commission would essentially be regulating greenhouse gases and they would do it in the form of a disclosure, but at least as proposed, it would be a pretty intrusive form of disclosure. And so, I think that there's a fairly good chance that if the SEC finalizes what it proposed, that it's likely to run into trouble in the courts.

Robert Stavins: Now, I know that you're someone who's close with your wonderful family, and I suspect you're someone who is close and likes to work with youth in general, although I don't know that for a fact, I'm just guessing that, and that makes me wonder about what's your reaction to these youth movements of climate activism? Most prominently, obviously Greta Thunberg, but also students and young people much more broadly than that in Europe and in the United States became very prominent in 2019, somewhat in a hiatus in 2020 because of the pandemic, but then they were back in force in 2021 at Glasgow at the climate negotiations. What's your reaction to those youth movements of climate activism?

Jeffrey Holmstead: I have to say that I've been a bit skeptical and not because in any way I question the sincerity or the passion that they bring to the issue, but as you know, it's much more complicated than a demand that we phase out fossil fuels. And decision makers certainly will be influenced by public opinion. And already we've seen that for years. Part of the problem with climate change is it's never really risen to the top of the agenda for most voters. But ultimately, these decisions are really hard. And we're seeing that now with the dramatic increase in energy prices. Politicians are focused on the cost that that imposes on families, and so, I think any effort to deal constructively with climate is going to have to balance all of those issues. And maybe this cohort will be able to strike that balance in a different way. But I think that remains to be seen. And it's hard to know at this point whether it's sort of, I think, what do you call it, a cohort effect or a youth effect?

Robert Stavins: Or an age effect.

Jeffrey Holmstead: Or an age effect. And my sense is, it's probably some of both.

Robert Stavins: Right.

Jeffrey Holmstead: But in terms of what it will ultimately mean to efforts to reduce climate change, I think the jury is out.

Robert Stavins: And so, where does that leave you, finally, in terms of the scale of optimism to pessimism about future progress on climate change?

Jeffrey Holmstead: I've thought a lot about that. And I have two answers. When it comes to climate change in the United States, I still think that there is a good chance of having comprehensive climate change legislation. And I know that people are skeptical when I say that because they look at the polarized Congress. But I do think you need something like the situation that occurred in 1990, where you have a Republican president, I was a big Mitt Romney supporter, I think he would've been such a president, and maybe the other House of Congress in Democratic hands and the kind of back and forth and the negotiation that goes into something like that, I think there are many people in the business community that would like to have the certainty of legislation. And so, I'm still optimistic that we could see something like that in the relatively near future.

But I always remind myself that we're intentionally focused on the United States and appropriately so, but ultimately it seems to me that it's a technology question. And until there is a way to provide people with electricity and to power mobility, that is at least close to being cost competitive with coal and oil, I think it's going to be an uphill battle. And so, my hope, and you've heard me say this before, is that we'll not only look at sort of regulatory approaches, but we'll consider whether those approaches really are the best way to incentivize sort of next generation technologies or whether there's other government actions that could be done. And so, I tend to be a technological optimist. I think

that there are technological breakthroughs that are at least on the horizon that could help us solve the problem. But ultimately for me, climate change is a technology issue and not a regulatory issue.

Robert Stavins: I'll take that as a positive note of technological optimism and bring things to a close right there. Listen, thank you very much, Jeff, for taking time to join us today.

Jeffrey Holmstead: Well, thank you for having me. I've enjoyed talking with you.

Robert Stavins: Our guest today has been [Jeffery Holmstead](#) who leads the [Environmental Strategies Group](#) at [Bracewell](#) in Washington, DC. Please join us again for the next episode of [Environmental Insights: Conversations on Policy and Practice](#) from the [Harvard Environmental Economics Program](#). I'm your host, [Rob Stavins](#). Thanks for listening.

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