

TRANSCRIPT

Environmental Insights

Guest: Jody Freeman

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- Jody Freeman: The president signed two sweeping executive orders on climate change within the first month. And they encompass everything you could possibly do with the agencies of the federal government.
- 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 the [Environmental Economics Program](#) and our [Project on Climate Agreements](#). On January 20th of this year, Joe Biden was sworn in as the 46th president of the United States. Now, changes from one presidential administration to another are always significant, but sometimes the changes are not so dramatic as when the same political party retains the White House. Although, the last time that happened was the transition in 1988 from Ronald Reagan to George H. W. Bush.
- Rob Stavins: But I for one do not recall a transfer of power that has represented such dramatic changes, both in terms of style and substance, as the change from the former Trump Administration to the Biden Administration. One of the areas among many others where this is the case is the realm of environmental, energy, and natural resource policy. Today we are very fortunate to have with us someone who is exceptionally well-qualified to talk about this change, my Harvard colleague, [Jody Freeman](#), the Archibald Cox Professor of Law at Harvard Law School, where she founded both the [Environmental and Energy Law Program](#) and the school's [Environmental Law Clinic](#). Jody, welcome to Environmental Insights.
- Jody Freeman: Thank you so much for having me, Rob. It's great to be here.
- Rob Stavins: I'm very interested to hear your impressions about environmental policy, as all of our listeners are, but something our listeners are always interested in hearing is learning about you and how you got to be where you are. Let's go back to more or less the beginning, where did you grow up, Jody?
- Jody Freeman: I grew up in Vancouver in Canada. I'm originally Canadian.
- Rob Stavins: A beautiful place. Now, does that mean you went to primary and high school there?

Jody Freeman: Yes, I went all the way through high school. And yes, my family still can't understand what I'm doing in the United States. They still say, "are you serious? It's so beautiful here in Vancouver." So, you know.

Rob Stavins: It is, it's a beautiful city. And then where was college?

Jody Freeman: I went to Stanford for university.

Rob Stavins: And studied what?

Jody Freeman: I studied human biology when I was in Stanford.

Rob Stavins: Oh, interesting.

Jody Freeman: Yeah, it was great, great.

Rob Stavins: And did you go directly to law school after graduating from Stanford, or?

Jody Freeman: I did year of, it sounds crazy to say in a pandemic, but I took a year of traveling around the world by myself after graduation, which was wonderful. I backpacked through China and stuff like that in the 1980s when it was still unusual to do that kind of stuff. And then I went back to Canada for a law degree. My family said, "You should come and do one degree back in your country before deciding where to make your life." I did that. And then I ended up going back down to Harvard for graduate school and I stayed down in the U.S. ever since.

Rob Stavins: Now, tell me something. So, you did LLB at Toronto...

Jody Freeman: Yep.

Rob Stavins: And then an LM and an S.J.D. at Harvard Law School.

Jody Freeman: Yes.

Rob Stavins: Do I have that right?

Jody Freeman: Yeah. So it's sort of the equivalent of doing a doctorate in law.

Rob Stavins: So when one does an S.J.D., I've heard of the degree to before, but I really don't know much about it. Is it coursework? Is it writing a thesis? What's involved in that?

Jody Freeman: It's both. It's really like a PhD program. It's just, most people do their PhDs in other fields like government, or economics, but this is sort of the advanced degree in law. And you often do it when you've come from another country originally. And so I did it partly because I was an import from Canada, and then I

got the chance to be a professor starting out at UCLA. Went on the job market after that degree was finished, and I had a first 10 years of my career that I spent out at UCLA. It was a great place to start.

Rob Stavins: But between, do I have this right that between Toronto and Harvard you did spend time as a clerk in the Court of Appeal in Canada?

Jody Freeman: Oh yes. So I clerked, like the same kind of process that we use here. I clerked at the court that would be most akin to the D.C. circuit...

Rob Stavins: I see.

Jody Freeman: ... in the U.S. context.

Rob Stavins: And then, so then you wind up, after graduating from law school, then you went directly into academia at UCLA, or am I missing something?

Jody Freeman: Yes, so after my degrees at Harvard, I went directly into being a professor and I started out at UCLA.

Rob Stavins: That's unusual, isn't it?

Jody Freeman: No, I mean, there's a sort of an academic route. I mean, increasingly you see people who have a PhD along with their law degree nowadays going into law professoring. Sometimes they practiced for a few years, but you don't see too many people who spent a long career as a practicing lawyer, converting them...

Rob Stavins: I see.

Jody Freeman: ... and becoming a prof.

Rob Stavins: And then about halfway through the time you spent at UCLA, if I have this right, you also took on a faculty position at the Bren School of Environmental Studies at UC Santa Barbara?

Jody Freeman: Yes, I did that as a sort of part-time thing. That is a wonderful school that combines environmental engineering with environmental policy, but they don't have a law school up there. So they kind of brought me in to provide some law for them and I was happy to do it.

Rob Stavins: It is a wonderful school, and of course a wonderful location in Santa Barbara on top of that.

Jody Freeman: Yes, not bad. I did some surfing with the students back then.

Rob Stavins: Did you really?

Jody Freeman: I was mostly embarrassing, but it was kind of fun.

Rob Stavins: I suspect not. And then you came to Harvard in about 2005 or so? Is that correct?

Jody Freeman: Yes, 2005, '06, yes.

Rob Stavins: And you've been on the faculty ever since?

Jody Freeman: I have.

Rob Stavins: So we're not going to lose you back to Canada? Is that fair to say?

Jody Freeman: No, I think I've been here most of my adult life. So I think that risk is very low.

Rob Stavins: Oh good. That's good to hear. So, let's turn to the situation in which we find ourselves, Jody, which is this very important change from the Trump Administration to the Biden Administration. If I have it correct, and my recollection serves me, you were quite critical at various times of Trump Administration moves in the environmental realm. If I do have that correct, is there anything that stands out to you as sort of being the worst in the sense that its effects can be long lasting even with an effective Biden Administration now in place?

Jody Freeman: Well, what I would say about the Trump Administration's impact on environmental and climate policy is that it's just the sheer breadth of it that's so monumentally important. I mean, the Trump Administration unraveled, weakened, or rescinded every climate regulation that the Obama Administration had put in place. And they went beyond that to weaken many other environmental rules too. And so, it's an across-the-board effort to pull environmental protection back as much as possible and weaken the agencies that are responsible for putting rules in place to protect public health and to address climate change. So it's the scale of what the administration tried to do and the kind of destructive nature of it.

Rob Stavins: So perhaps then, in terms of dramatic changes from one administration to another, at least in the environmental realm, then the change over from the Obama Administration to the Trump Administration is surely one of the most dramatic that we've ever experienced? Is that right?

Jody Freeman: Absolutely. I mean, I think everybody across all of the fields that you can think of, immigration, healthcare, would say the same thing in their field probably. That the shift from Obama to Trump was really a drastic shift. But in environment, climate, energy, it's really hard to think of a major policy that was left untouched. And to put that in context, just one more point about that, the Obama Administration was the first ever to adopt federal rules to limit greenhouse gas emissions. It was a sea change, fuel efficiency standards for cars

and trucks and standards for power plants and standards for methane from oil and gas operations, and I could go on. And so that was a very important set of policies to put the U.S. in position to make a pledge to the [Paris Agreement](#), which we could talk more about. And the Trump Administration took that kind of watershed set of policies and said, “We want to weaken them and roll them back to the extent we can.”

Rob Stavins: Now you were actually very involved in the antecedents for that action in the Obama Administration, in terms of some very important litigation, were you not?

Jody Freeman: Well, I was involved, I was counselor for energy and climate change in the Obama White House in the first term. And I was sort of a participant in some of the major policies that got put in place early. And the one that people would be most familiar with is the decision in the Obama era to double fuel efficiency standards for cars and trucks, and put that agreement in place with the backing of the auto industry. So I was part of that effort and some other things too.

Rob Stavins: But what I was thinking about was even before that, the litigation of Massachusetts that actually then eventually led to the [endangerment finding](#).

Jody Freeman: Oh, yes. Sorry. Yeah. So the most important Supreme Court case on climate ever, most important environmental case, Massachusetts versus EPA. Yes, I wrote a brief on behalf of Madeleine Albright in that case, and so I got to participate that way. It was a really wonderful opportunity to play even a small role in, in what became such an important decision by the Supreme Court.

Rob Stavins: Now that litigation, that was during the period of the George W. Bush Administration, is that correct?

Jody Freeman: Yes. So it started in, I mean, the case was decided in 2007.

Rob Stavins: Take us through, what were the basics of that case? This is so important, I think people would be interested to hear about it. The basics of the case, and then how that eventually led in the Obama Administration to the so-called endangerment finding, which of course was so important.

Jody Freeman: Right, so this case wound its way to the Supreme Court over a period of years during the George W. Bush Administration. And the heart and soul of it was an effort to require the EPA to set rules to control carbon emissions that were coming from the transportation sector. So the environmental litigants, the advocacy groups, and it ended up being a combination of states together with them, including Massachusetts, which is why it's called Massachusetts versus EPA. We're arguing that the EPA under the [Clean Air Act](#) had an obligation to regulate these emissions coming from cars and trucks. And originally the George W. Bush Administration's point of view was, “No, we don't.” The greenhouse aren't pollutants under the Clean Air Act, so we can't regulate them. And their

view was, "Even if you tell us, even if you the Supreme Court say that actually they are pollutants, we have many policy reasons why we think using the Clean Air Act to control greenhouse gases is a very bad idea."

Jody Freeman: So, the EPA at the time didn't want to use the Clean Air Act to attack greenhouse gas emissions. And that was the issue that went up to the Supreme Court and the Supreme Court decided, first of all, the most crucial issue, the issue of standing, does anybody really have legal standing to sue over the harms caused by climate change? Because it's such disparate, distributed harm, nobody's especially affected. And the court by a vote of 5-to-4, a very close vote, a very different Supreme Court, by the way, voted that yes, Massachusetts as a state has standing, losing its coastline over time is a sufficient harm. And they also ruled that greenhouse gases are a pollutant as it's defined under the Clean Air Act. So the EPA has authority to regulate greenhouse gases and the reasons the agency gave for not doing so were not consistent with the law.

Jody Freeman: So, they sent it back to the George W. Bush Administration to say, "You either have to set these standards or give us a better reason why the science won't let you." And the scientific record was so strong in favor of the harms caused by greenhouse gases that they really didn't have an argument left, but they didn't do anything before leaving office. So, in the waning days of the George W. Bush Administration, they chose still not to regulate these emissions from cars and trucks. And that is what sort of was the foundation for the Obama Administration. When Barack Obama won the presidency, he came in, promising to take the first step in setting these standards, which requires making a finding that greenhouse gases pose a danger to human health and welfare. That's sort of the scientific determination that an agency, that EPA has to make before it sets standards. And that's what you're talking about when you say endangerment finding.

Rob Stavins: And the interesting thing is that the Trump Administration never attempted to overturn that endangerment finding, they never went back to that. They just looked at some of the regulations that were carried out under it, of course, but they didn't go to that.

Jody Freeman: I mean, it's hard for an agency to change his mind about something where the science is so solid and so voluminous, and then go into court and defend that. They would surely lose a legal challenge. But it's easier to say, "Well, the science may be what it is, but we have all these other reasons why we can weaken the regulation," and they hope that a court will let them do that.

Rob Stavins: Well. And as you said, much was done during the years of the Trump Administration to turn things back, but now we have the Biden Administration. So, I'm interested first, before we talk about regulatory actions, I'm interested to hear what's your thinking in terms of new climate legislation, given the challenge obviously that a 60 vote margin is typically required in the Senate, unless it's under very special conditions, and the Democrats have at best 51 votes, with the tie-breaking vote. So what do you see in terms of legislation?

Jody Freeman: Well, I hope I'm wrong about this prediction, but I don't think there's enough support in a close Congress like this is for a major bill that puts a price on carbon. I don't see a carbon tax coming out of this Congress. I don't see some revised version of a cap-and-trade bill, like the one that the House passed in the Obama Administration, the [American Clean Energy and Security Act](#), otherwise known as Waxman-Markey. I don't see a big bill to put a price on carbon getting through. And I say that, because even when the Democrats controlled the Congress back in 2008 to 2010 and had both the House and Senate, they couldn't get that done.

Rob Stavins: Right.

Jody Freeman: And what it shows you is that energy and climate politics don't line up precisely along party lines, right? It depends, your vote depends on the states that people come from and whether they're sort of fossil energy states, traditional fossil states that depend on coal and oil and gas.

Jody Freeman: And so Democrats like Joe Manchin have an awful lot of power. And he in particular at the moment, as everyone knows, does have a lot of power. And he's the chair of the Senate Energy Natural Resources committee to boot. So these key moderates in these key blocking positions I think will make it very difficult to get a bill through. Now, that's not to say that nothing will happen in Congress on climate energy environment, because I think as part of recovery legislation and economic stimulus legislation, we may well see many investments in clean technologies, clean energy sector, investments like grid enhancement investments, infrastructure, things that are boosts and supports for clean energy deployment.

Jody Freeman: But it will come in the form of spending or tax incentives. And it will come through I think budget reconciliation most likely, which is this complicated process that you can use to accelerate passing legislation without the normal filibuster risk. And so I think that we'll see investments, but in terms of regulatory legislation to cap carbon or price carbon, I think we're not quite there yet. At least not for the next couple of years, the midterms may change the politics a bit.

Rob Stavins: Either way.

Jody Freeman: Either way, exactly. It might get worse. It might get harder to do this.

Rob Stavins: So unlikely to see explicit broad-based climate legislation, but possibly carbon friendly aspects of economic stimulus and/or bipartisan infrastructure legislation. And then you also mentioned tax incentives. Is that sort of the best...

Jody Freeman: I think that's what most people think of is on the menu that can garner some bipartisan support. Spending is going to happen, right? The economic situation

requires a big bunch of recovery spending, and I think it would be fair to expect we see some green stimulus in there.

Rob Stavins: Now, given the political challenges that you were just describing in terms of focused climate legislation, there will clearly be interest, indeed, there already has been interest, in taking unilateral approaches without the Congress, that is regulatory approaches, including both executive orders and what is more difficult rule makings. You've had a lot of experience with those. There is some concern that rulemaking can be much more difficult now in the current political environment, and more importantly, the current judicial environment than it was during the Obama Administration, because there are these 228 federal judges appointed by former President Trump. And of course, more importantly, as you already mentioned, the Supreme Court 6-3 conservative majority, what do you think all of that portends for environmental regulatory moves from the White House?

Jody Freeman: Well, that's the multi-billion dollar question. So, presidents come in and use the powers they have to get done whatever they can get done when they face an intransigent Congress that where they don't control both chambers. And even when they do control both chambers, presidents like to use executive branch power. So, you can count on the Biden Administration to be trying to deploy all of the levers, all of the tools that it can use. And they include adopting new rules let's say for power plant emissions of CO₂, adopting new rules for cars and truck emissions, adopting sector by sector rules that EPA has the authority to do. And then there are other agencies too, like the Department of Energy sets appliance efficiency standards. The Department of the Interior regulates extraction of oil and gas on public lands. You've already seen them freeze new leases on public lands, and they're going to favor wind and solar siting on public lands.

Jody Freeman: So I think all of this policy, these changes are things that a president can do under existing law. The trouble you run into is, none of these mechanisms, either individually or collectively, lends itself to an efficient economy-wide way to price carbon, right? So, you, the environmental economist would say, "This is wildly inefficient. We're doing this through regulation." And there are other things that Biden Administration wants to do. The president signed two sweeping executive orders on climate change within the first month. And they encompass everything you could possibly do with the agencies of the federal government, from how the Treasury Department finances overseas projects, to how the Agriculture Department sends money to farmers. The administration is on the hunt for all of the policies that any agency can use to support its clean energy agenda. And so that's what I'm looking for. I think they're going to try to make good on all these announcements that have been made in the executive orders, but they're largely not self-executing. So, just because the president signs the executive order doesn't mean it happens, the agencies have to go and do the work.

Rob Stavins: So I want to take you back to the concerns about the Supreme Court, and this is something you certainly know a lot about it, and infinitely more than I do about.

But that with this conservative majority, I would think as an outsider to legal scholarship or law, that it's going to favor literal reading of statutes, much less flexibility for agencies to interpret statutes in innovative ways such as the Clean Air Act article focusing on localized air pollution being applied to CO2 and climate change. In fact, I've even heard some commentators say that, and I don't know if it's wishful thinking on their part, or they're frightened of it, but that the [Chevron Doctrine](#), the deference to agencies' interpretations could even be overturned by this court. Can you tell us, first of all, tell us what the Chevron Doctrine is. And also what's the outlook for these sorts of moves?

Jody Freeman: Probably the greatest legacy of the Trump Administration is three new Supreme Court justices who are very conservatively inclined, and not just conservative in a sort of a traditional sense, but in terms of how they read statutes. And that is they read laws in a quite textualist literalist way that leaves less room for agencies to interpret their authority creatively or ambitiously. And what these justices tend to want is a very explicit, specific authority to do the thing that the agency is purporting to do. And this point of view is a point of view that would rather have Congress speak afresh, speak again, and be crystal clear that, "Yes, you can set these standards in this way that you're purporting to set them." That's a very limiting approach for agencies that traditionally have been entitled to some flexibility to adapt their statutes to new problems over time.

Jody Freeman: So to the extent we have three new justices who are very narrow in the way they read texts, as you alluded to, that could be a real limiting factor on how ambitious regulatory agencies can be. And I think the Chevron Doctrine is just a principle that has developed over time that stands for the idea that when language is ambiguous or when Congress has been silent on an issue in a law, that the agency's interpretation gets deference from the court. So the theory of this Chevron Doctrine is, when it's not entirely clear, the tie goes to the runner. The agency gets the benefit of the doubt, and it's sort of deferring to the agency's expertise.

Jody Freeman: And the idea is to defer to the fact that Congress must have wanted to hand that ambiguity to the agency, and the current court majority, including the three new justices, at least from what we can tell from their publications prior to them joining the court, from their writings, and their lower court opinions before they were elevated Supreme Court, they seem to be less favorable to that kind of approach, less interested in deferring to the agencies and more interested in deciding themselves. They think that it's the court's job to read these statutes.

Rob Stavins: And will they show their hand in some specific decisions that are coming up, or is that sort of litigation where we'll actually see this more than a year away?

Jody Freeman: Well, I think it depends on what cases they wind up taking and whether those cases involve these issues of statutory interpretation...

Rob Stavins: I see.

Jody Freeman: ... that's already in the last year or two, the court has sent very strong signals about its sort of inclinations, which is to back away from strong deference to the agency. So, what is the bottom line? When agencies like EPA or the other environmental regulators craft rules, they have to be mindful of a court that's going to look skeptically at broad assertions of their legal authority...

Rob Stavins: I see.

Jody Freeman: ... that are not grounded in clear explicit text. And so they have to be more careful than they might otherwise be. That's partly why I mentioned the way that the Biden Administration is using all of the levers, because they're not just using rulemakings, they're trying to use the ways they fund programs. They're trying to use all the discretion that the federal government has, not just rule makings that wind their way to the Supreme Court.

Rob Stavins: Right, now a lot of what comes from the federal government in terms of climate change is intended to affect obviously the compliance entities in private industry. And so before we adjourn this session, I want to turn with you to think about private industry just for a few minutes. You know, some analysts and observers, both in NGOs and even in academia seemed to paint the fossil fuel industry with a broad brush, condemning all firms, whether coal, oil, gas, or any, as essentially uniformly the enemy when it comes to climate change. That may be a straw man I'm painting, but I've heard such characterizations. I'm really interested to know what your view is of this.

Jody Freeman: Well, as you know, I sit on the board of [ConocoPhillips](#), which is an oil and gas company. It's the largest independent producer of oil and gas in the U.S. And so, from that perch, I've learned a lot about the industry. I really understand the perspective you're describing that says the fossil fuel energy is the enemy. I understand where people are coming from. When they want to decarbonize the economy they want to phase out fossil fuels, and they want to do it quickly. And I'm extremely sympathetic. I want to also phase out fossil fuels, and I've spent my whole public career working on those policies. But I will say that there are some nuances, and I think the industry is in a moment of transition. I do see, for example, the European oil and gas companies are already making pledges and investments in alternative business models.

Jody Freeman: And it's the beginning of that. By no means are we down the road far enough or fast enough, but you can see that they're starting to think about becoming different kinds of companies over time. And I think the U.S. companies are following suit. They're beginning to disclose climate-related risks that they see. They already use climate scenarios in their strategic planning. They price carbon when they think about their business and their investments. So behind the scenes there is a shift that's beginning, and it may be long overdue, but I see that change coming from the industry.

Rob Stavins: That's interesting. Now, finally, I want to ask you one other thing just briefly, that is something that we've observed before the pandemic, of course, closed

down so many activities, but in the year 2019 was the rise of youth movements in Europe and in the United States regarding climate change. I'm interested to know what's your reaction to those youth movements, which I'm sure once the pandemic passes, we will see coming back once again on the streets?

Jody Freeman: I mean, I think they've become a very powerful force and powerful voice. I mean, look at the impact that youth groups, the Sunrise Movement in particular had on domestic politics in the last presidential cycle, really forcing climate change into the debate among the Democratic candidates, making it a priority as they debated each other. And eventually when Joe Biden got the nomination and won the presidency, he did so with a very ambitious climate and clean energy agenda. And I think that had a lot to do with the power of these movements you're talking about. So initially I have to confess, I didn't know that the Green New Deal and the movement behind it would have the powerful impact that it had, but it became a tremendous organizational tool, political tool, mobilizing message. And it came to affect the platform and the campaign promises of President Biden. So you have to give them a lot of credit.

Rob Stavins: And together we can watch over the next two years to four years to see what materializes. With that I'm going to bring it to a close. Thank you very much, Jody, for taking time to join us today.

Jody Freeman: My pleasure, I enjoyed it. Thank you.

Rob Stavins: Thanks again to our guest today, [Jody Freeman](#), the Archibald Cox professor of Law at Harvard Law School, where she founded the [Environmental and Energy Law Program](#) and the school's [Environmental Law Clinic](#).

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