



Transcript of CleanLaw Episode 40: Alex Griswold interviews Jody Freeman on environmental rollbacks and optimism for the future, April 29, 2020

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- Robin Just: Welcome to CleanLaw from the Environmental and Energy Law Program at Harvard Law School. In this episode Alex Griswold of the Harvard University Center for the Environment, interviews Professor Jody Freeman, our founding director. They talk about the Trump era environmental rollbacks that are most troubling to Jody, and why she is still optimistic that we can do better. We hope you enjoy this podcast!
- Alex Griswold: When we last spoke, it was at the beginning of the Trump administration and you were talking about all of the rollbacks in environmental regulations that could happen. Where are we with that?
- Jody Freeman: So, when President Trump took office, there was some speculation about the extent to which he would roll back climate energy and environmental protections and at the time we sort of identified the big policies that we thought he might target to roll back. And at that time we were talking about things like whether he would withdraw the country from The Paris Agreement, The International Climate Agreement, whether he would roll back the historic fuel efficiency standards that President Obama put in place, and whether he would try to rescind or revise the standards for coal fired power plants, for greenhouse gas emissions. And it turns out over the last three years that president Trump has either done or tried to do all of those things and gone much further. So all the things we were speculating about at the start, things that were possible for rollback vulnerability, they all became targets and he has probably done more.
- Jody: The Trump administration has probably done more to undermine environmental protection than any administration in the modern regulatory era. And that's saying a lot because it includes the George W. Bush administration and even the Reagan administration and the Reagan administration did try hard to undermine environmental protection. So this is striking, what president Trump has done and it's more than that because it's not just particular climate or energy related rules that he has either rescinded or rolled back. But also there has been a very sustained purposeful systematic effort to undermine the capacity of these regulatory agencies to do their jobs. That in some sense may be even more serious because there seems to be an agenda that the administration has embraced that is about dismantling regulatory agencies. And it has to do with changing the way that science is incorporated into decisions. It has to do with moving personnel around so that they are less effective.



Jody:

There are a lot of fairly invisible moves that are being made in the agencies that when you take them together, weaken those agencies and their ability to regulate. So it's the combined effect of what the Trump administration is doing, both on particular rules to weaken them and then more systematically, structurally, to weaken agencies like the Environmental Protection Agency that are really concerning. Some of these steps the administration has taken, some of the rollbacks can be reversed if a new president were to think differently, whether it's a new Democratic president or later down the line, if Trump were to win reelection, then the following president to come, they could undo most of what he's done, but not all. And so I'll give you an example. The decision to withdraw the United States from The International Climate Agreement known as The Paris Agreement can be reversed by an incoming president.

Jody:

In fact, that withdrawal doesn't even take legal effect until this November when the election happens is when it takes effect the day after. So, if a new president wins, the international community can just wait because they might be reassured to know that we'll reenter that agreement. So that can just be done by fiat. The new president can announce we're rejoining. Likewise the effort to roll back these fuel efficiency standards that is the historic agreement that the Obama folks put in place. And the reason it's really important climate rule is that if you make cars more efficient and reduce their greenhouse gas pollution, you're making a real dent in about 30% of our economy's greenhouse gas emissions. The transport sector is a huge problem for climate change. And so tackling fuel efficiency is the way to get at it.

Jody:

And the Trump administration has taken a plan to continue to improve the fuel efficiency of cars and decide they want to stop it in its tracks and they want to freeze these standards at the levels they're at in 2020. And that's a very significant loss of improved fuel efficiency compared to what the Obama standards would have done. So something like, instead of getting to 50 miles per gallon average fuel efficiency, we'd only get somewhere like 36 37. That's a lot of greenhouse gas emissions that are left on the table. And the administration is trying to argue that by freezing the standards it's going to be a benefit to consumers and the fact is they can't make the numbers work.

Jody:

So they're trying to roll back a policy that is in the interest of consumers. It's good for public health protection because it reduces pollution and it's good for climate change and they're having a hard time justifying it. Another example of a very significant rule rollback is the administration has jettisoned entirely the Obama administration's Clean Power Plan, which was the first ever set of standards to control carbon pollution from the existing coal fired power plants and natural gas fired power plants that are producing another big chunk of our economy's emissions, about 30-40% of our emissions.



Jody: So setting these standards means the old dirty coal fire power plants have to cut their pollution and the Obama folks put in place a really interesting approach that would require more wind and solar power overtime as coal fired power declined. And the Trump folks came in and abandoned this rule and basically put in place a rule that requires almost minimal improvements of coal fired power plants, maybe 1% improvement in greenhouse gas emissions. So again, they left on the table a huge swath of greenhouse gas emissions that the Obama folks would have taken out of the economy.

Jody: Both of those policies, the transportation standards and the power plant standards were the pillars of our commitment to the Paris climate accord and the Obama administration could go to Paris and say, we're going to do these things in our economy. That's our contribution. And the Trump folks have decided to either freeze or unravel both of those policies. So it's really consequential. And those are just two of the things that the administration is doing. Across the board it's weakening environmental protection. It's trying to shrink the authority of the EPA and the Department of Interior over clean water. It's really trying to minimize regulation wherever it can across the board and the climate, energy and environmental space.

Jody: Not only is the Trump administration trying to freeze or weaken or rescind regulations put in place by their predecessors, they're actually trying to stop states that wish to do more. And this turns environmental law on its head. The tradition of environmental law from its inception, the federal government, that big statutes like Clean Air Act, Clean Water Act, these were passed starting in 1970. And in that period of Congress passing these laws, they put one feature into all of these laws, which was that the federal government will set pollution standards as a minimum floor, as a baseline. But states are allowed to go beyond. And that federalism feature of these statutes was meant to unleash the states to compete to do better, and to kind of race for the top. And for the Trump administration now to come in and not only weaken federal standards, but to actually find ways to say to states like California, you can't do better, you're preempted, is to actually flip what Congress tried to do in environmental law completely on its head.

Jody: So if you add all this up and you see the federal government's rescinding or rolling back clean air, clean water, energy and climate rules, then they're trying to preempt the states from doing anything. And on top of it all, they're trying to disable and disarm the federal bureaucracy. This is a pretty aggressive policy to dismantle the architecture of environmental protection in the United States.

Alex: What's the animus that's driving this?

Jody: Well, it's hard for me to explain the animus driving, for example, the president in particular, I mean I'm not a psychoanalyst. I don't really know. It's clear that there's a deep commitment to undo whatever Obama did. I think there's something about



this, not just in this space, it's across the board, health care, immigration. I mean it's sort of a concerted effort to undo the Obama administration. I do think there is a lot of interest in deregulation generally. That's not probably just the president's interest. I think there's a traditional conservative Republican interest in weakening regulation on the theory that it's bad for the economy. It hampers innovation. I don't happen to think that's true and I think we've shown over the last 50 years of environmental regulation that innovation, economic growth can go hand in hand and should go hand in hand and does better with some environmental protection in place.

Jody: So I don't agree with that philosophy, but I think it's a widespread philosophy. In some cases it's very striking that the administration has gone beyond even what industry wants. I mean the oil and gas industry did not ask for the weakening of rules that cover offshore drilling that the administration put in place. They went too far as far as industry was concerned. Likewise, much of the oil and gas industry does not support the rescinding of rules for methane, which is a very powerful greenhouse gas. Methane leaks from oil and gas processes. The industry thought it's not right. This goes too far. Likewise, much of the auto industries, certain members, leading members of the auto industry think the administration went way too far trying to roll back these fuel efficiency rules. So it's very puzzling to me when administration sets out to go beyond what the business community itself thinks is rational and reasonable.

Jody: In this sense I think the Trump administration has had done itself. It's sort of in an unprecedented way, said, we don't care if you want it. We're going to adopt a massive deregulation agenda even when it doesn't make rational sense for the industries that are most affected. So this is hard for me to explain except as a kind of political gambit. Maybe it's attractive for the base. Maybe it's something that they think will be good politically to campaign on, that's possible. But otherwise it's just, for me it's hard to explain.

Alex: In the past you've spoken about other jurisdictions, state and local governments or the private sector that have stepped up to carry momentum forward in terms of clean energy. Has that momentum continued? .

Jody: So, I do think in the last few years in response to the fact that the federal government has decided to roll back environmental rules and to withdraw from Paris. I do think the states and local governments to some extent cities and the private sector have stepped up. We see an intensification of a number of states committing to reduce their dependence on fossil fuels, to make their electricity sectors more dependent on renewable energy, to commit themselves to buildings that will be more energy-efficient, to commit themselves to energy efficiency across the board in their electricity supply. There are states that are interested in this. California, New York, many of the other coastal states have really committed to wind



and solar power, energy efficiency and the like. So I think there's a lot of innovation and impetus in the states.

Jody: Now having said that, a subset of states cannot achieve what a committed federal government can accomplish in addition. And I think here we need federal leadership. So while I'm still optimistic because I think the states have momentum, they're experimenting with policies that can then be adopted by Congress somewhere down the line. I think right now we're in a period of retrenchment and even though the states are trying, it's not a majority of the states and it's certainly being undermined by everything the federal government is doing. Federal government if anything, has been trying to prop up coal fired power plants, trying to extend their life with various policies so they're working in the opposite direction. So without getting any help, any incentives from the federal bureaucracy, it's really hard for the states to do everything alone.

Jody: But I'm encouraged by the fact that there are leadership states like California, New York, really trying to push the envelope on transitioning from a fossil fuel economy. And they're committed to doing that even though it costs them money because they think the long-term benefits to their own states and to the larger economy and to society are worth it. The private sector is actually doing a lot too. And here I see pressure from investors.

Jody: The leading companies in the United States are under pressure from the investment community, from the consumers to whom they sell their products. They're even under pressure from their own employees and other stakeholders to account for what they are going to do about climate change, to how they're dealing with climate related risks in their businesses. Investors want to know, do you have a plan for dealing with the transition to a cleaner energy economy? What are you doing about the risks that your industry is exposed to? And these companies are having to account for themselves and explain how they're going to manage the vulnerability of their infrastructure to floods, for example, or for the oil and gas industry they're being asked by the investment community, what is your strategic planning around this transition that's beginning to a less fossil intensive global economy?

Jody: And so the pressure on the private sector is really not coming right now from government regulation because it's been weakened so dramatically. It's really coming from their stakeholders and from investors. So that's a whole other dimension that has really picked up steam and it's not going anywhere. The BlackRocks of the world, the sophisticated members of the investment community are only getting more concerned about climate risk. The banks are getting more concerned about climate risks and the industries that are going to be affected have to worry about where their capital is coming from and they have to account to their investors. So I think that dynamic's going to pick up steam over time.



Alex: What kind of message are you trying to communicate to your students who are about to enter the Environmental Law field at this particular juncture in time?

Jody: Even though I think the performance of the administration has been worse than any of us anticipated, in a sense, they really try to do everything possible to undermine environmental protection, climate and energy policy, even though that's all true, I remain optimistic. And I remain optimistic and I tell my students that they need to stay optimistic because there is still so much potential for making progress toward cleaner energy, toward more renewables versus energy. There's so much technological innovation, whether it's electric vehicles and they're increasing penetration rates, whether it's the dramatically low cost of solar and wind power over time, whether it's consumer tastes and consumer interest in more efficient products, in cleaner, greener products. All of this, the trend lines are in the right direction and I think the government is going to be behind. I think the federal government in particular is going to be behind and I do think there's going to be an opening where even the business community is going to start pushing for coordinated policy from the Congress.

Jody: So these things are happening to some extent anyway. I think they would happen at a faster rate and we would see deeper emissions reductions over time if we had federal policy behind it. That is if we had rules and standards that was encouraging this trend and cementing this trend and building on this trend. So I think regulation and market dynamic can go hand in hand. But I'm comforted by the fact that it doesn't look like coal is going to make a revival anytime soon. And I think the market is going to keep us on a trajectory in the right direction. The question is whether we're going fast enough and deep enough. And if we want to achieve the goals of the Paris Agreement, to try to cut global emissions so that we will not have global average temperatures rise more than two degrees Celsius and our real goal is 1.5 degrees Celsius, we are not going to achieve that on the current trajectory globally. We're well off the pace we need to meet the Paris commitment.

Jody: So that's why I think we need the federal government to partner with the private sector to make this happen in an efficient, affordable, economically-viable way, which I think is entirely possible.

Alex: What's your prediction? Where will we be in five years?

Jody: So one feature that's been consistent both in the Obama years and now in the Trump era and which I expect to continue going forward, is that major policy changes that happen from administration to administration, when the agencies like EPA changed their mind about the stringency of a rule wind up in the courts and they wind up there because Congress is not doing its job. In other words, these agencies are interpreting old laws, Clean Air Act, Clean Water Act that date to the 1970s and they're trying to adapt those laws to deal with problems like climate change. And so



every interpretation that the agencies offer is going to be challenged in court as not consistent with these old statutes. And that's going to be true until Congress gets in the game.

Jody:

And so what I would expect is that we'll see every policy shift wind up in the courts. It will take years to resolve unless and until Congress comes out and adopt some agenda for dealing with climate and energy policy. And so that's why I say I think what we need to see is Congress finally pass, let's say a carbon tax or a cap on carbon or some other set of policies that sets the agenda going forward so we don't wind up with the executive branch, the agencies under the control of the president and the courts setting the United States climate policy. The institution that should be in the lead is the Congress. And yet the Congress is really out of the game at the moment. It's the least productive Congress in the modern regulatory era. They're not updating statutes, not just environmental statutes or climate related policies. They're not updating statutes in virtually every area. We have old immigration laws, we have old telecom laws, we don't have a privacy law. We're not dealing with all of the innovations from cryptocurrency to interfering with social media platforms to rig elections.

Jody:

There's so much law and policy to be made that the Congress is behind on. So what I'm hoping for is not just in my domain, but in all these other domains, what we get is a Congress that takes the problems of the country seriously and starts to update old statutes.

Alex:

You're trying to work the legal profession or environmental lawyers out of a job.

Jody:

What do you mean? No, we'll always have a job. The lawyers are always going to have a job because we have to explain what these statutes mean and we have to make sure they're implemented. That's why I say to my law students, this isn't just interesting work. It's necessary work, right? To make sure the right policies get adopted into statutes, that then those statutes get implemented by agencies, the regulatory agencies, and then on the ground lawyers can advise clients about how to comply with these rules and standards because what you really want is a government adopting smart policy that works with business in a coherent and predictable way and you want it all marching in the right direction, which is to an energy transition, globally, that will allow us to stave off the worst risks of climate change. And I continue to believe that's still possible. And I tell that to my law students and I hope they're invigorated.

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