Since he was confirmed to lead the U.S. Environmental Protection Agency six months ago, Administrator Scott Pruitt has relied on three points when discussing the issue of climate change. He has cast doubt on the science by claiming it's difficult to know the human role "with precision." He has questioned the ability of the agency to act for lack of "the tools in the toolbox." And he has claimed that there has been no legislative response to the landmark 2007 case *Massachusetts v. EPA*. In short, he denies the urgent need to act. He denies EPA's ability to act. And by repeatedly emphasizing that Congress has not acted, he appears to be inviting an amendment to the Clean Air Act.

Each of these three points are misleading or false. Scientists and other experts have demonstrated that they are more than capable of an adequate response to Administrator Pruitt's statements about climate science. The other two points are addressed below.

Administrator Pruitt has often questioned whether EPA has the right tools to respond to climate change. For instance, he said during a Fox television interview,

> Congress has never spoken on this issue. You have the Supreme Court decision in 2007. You have an endangerment finding in 2009. There has not been a legislative response in making sure the EPA is actually equipped to respond to this statutorily.

Using a phrase he has returned to again and again, Administrator Pruitt testified before the Senate that *Massachusetts v. EPA* "did not address whether the tools were in the toolbox." But Pruitt's concern over not having the right tools in the toolbox is overstated and misleading – particularly with regard to the authority to address carbon pollution from cars and trucks.

The Clean Air Act may not provide the optimal tools for curbing carbon pollution, but it does provide tools that can be effectively used to make progress. In fact, EPA's tailpipe standards are a particularly bright spot. As Professor Jody Freeman of Harvard recently explained, the auto industry is thriving under EPA's rules even while it has easily exceeded the fuel efficiency standards every year since 2012 and is on track to cut half a billion metric tons of carbon pollution from 2022-2025 alone. Whether the EPA Administrator thinks the Clean Air Act is the right tool or not, the Supreme Court is the final word on the matter.

More importantly, Pruitt's claim that Congress never responded legislatively to *Massachusetts v. EPA* is flat wrong. *Massachusetts v. EPA* was decided in April 2007 and

throughout that year, Congress, where I worked at the time, labored to develop and pass the Energy Independence and Security Act (EISA). In December 2007, it crossed the finish line when President George W. Bush signed EISA into law.

As work got underway in earnest during the summer of 2007 on that bill, Congress was very focused on the Supreme Court decision and worked assiduously to ensure that the ruling and the EPA authority it clarified were preserved. The Democratic majority in the Congress and President George W. Bush were in agreement that the energy bill should mandate greater fuel efficiency under the corporate average fuel economy (CAFE) laws. Since this area of the law had an overlapping relationship with tailpipe standards under the Clean Air Act, the possibility of disturbing the Supreme Court's ruling and affecting EPA's authority over greenhouse gases – perhaps even inadvertently – was a well-understood risk.

In fact, an early draft of the legislation in June 2007 would have overturned *Massachusetts* and precluded greenhouse gas standards under the Clean Air Act for new motor vehicles. It also would have removed California's authority to regulate greenhouse gas emissions from vehicles. This draft resulted in a small furor and then-Speaker of the House Nancy Pelosi issued a press release stating that any proposal to "eliminate the EPA's authority to regulate greenhouse gas emissions will not have my support." Though understated, the message was clear and that draft provision did not advance in the legislative process.

Ultimately the 2007 law included a prominent provision in section 3 that was drafted to ensure that nothing in the legislation relating to automobiles or fuel economy would inadvertently impact EPA's authority to address greenhouse gases. Congress provided that the new law did not supersede or limit the authority of any other provision of law unless expressly stated.

Professor Lisa Heinzerling of Georgetown Law Center testified before Congress in 2008 that this language was effective at preserving the regulatory authority described by *Massachusetts*. She said:

> EISA does not in any way change EPA's obligations on remand from *Massachusetts v. EPA*. EISA affects neither EPA's legal obligations with respect to determining whether greenhouse gases may reasonably be anticipated to endanger public health or welfare or the regulatory obligations that flow from such a determination.

Preserving EPA's authority as interpreted by the Supreme Court was not Congress' only auto-sector policy response in EISA. Congress was not unsympathetic to the fact that the automobile industry would need to improve the vehicles it brought to market due to the CAFE and Clean Air Act requirements. Pollution would be curbed and consumers would save money at the pump, but capital investments would be required.

Accordingly, EISA contained provisions to offer federal financial assistance to the automakers. The legislation included grants to modernize existing domestic manufacturing facilities to make less polluting, more efficient vehicles; loan guarantees for advanced battery and fuel efficient parts manufacturing; and a new incentive program for advanced technology vehicles manufacturing. These provisions made billions of dollars in assistance available for the automakers. As an important side note, these provisions helped Ford avoid bankruptcy during the economic downturn of 2008 and were important in the early years of Tesla.

Once control of Congress changed hands after the 2010 elections, the new Republican majority repeatedly attempted to prevent the EPA from abiding by the *Massachusetts v. EPA* ruling and further regulating greenhouse gas emissions. In 2011, the House of Representatives passed a bill to excise authority to address greenhouse gases from the Clean Air Act passed. A similar bill was rejected by the U.S. Senate. Legislative skirmishes continued over EPA's authority through 2016. However, none of these proposals became law. To their credit, the automakers never embraced these proposals.

Since the *Massachusetts* ruling, Congress has affirmatively enacted legislation to protect the ruling, provided incentives for industry to retool for lower emitting vehicles, and rejected numerous proposals to limit or overturn it. Administrator Pruitt is simply wrong. Congress has clearly responded to the *Massachusetts* ruling.

It is important to understand this history. Because if Congress had never responded, Administrator Pruitt's comments could be understood as a government bureaucrat's desire for clarity. But since Congress has responded by making it perfectly clear that EPA is to comply with *Massachusetts v. EPA* and has offered taxpayer support to facilitate compliance, Pruitt is in effect calling on Congress to change its response or perhaps even reverse it. Combined with a public effort to sow doubt and confusion over climate science, urging Congressional action is particularly risky to an effective climate response.

How might the Congress amend the Clean Air Act? In 2015, the automakers and its allies in Congress unveiled a new policy approach that would keep *Massachusetts* in place but channel EPA regulations in a more industry-friendly direction through legislatively-required

flexibility mechanisms. The result would be an easing of the stringency of required emissions reductions. The auto industry sought this legislative relaxation under the banner of vehicle safety. Specifically, the industry sought emissions credits, so-called off-cycle credits, as an incentive for the introduction of new vehicle safety or congestion mitigation technology. They argued that safer cars should receive emissions credits because reducing accidents would enhance the efficiency of the transportation system as a whole. This argument was flawed at best and when I testified about these flaws I found the issue to be polarizing between the political parties. The proposal was not enacted.

The issue has been rebooted in 2017. The automakers are now pushing a new bipartisan off-cycle emissions credit bill. The Union of Concerned Scientists has calculated that this legislation "will allow manufacturers to make vehicles that are on average 3 mpg less efficient in 2021 than they are able to today and put them on a pathway to missing the current targets by 8-10 mpg in 2025." This will result in a projected increase of 155 million metric tons of greenhouse gas emissions.

Administrator Pruitt's circuitous call for legislation could well facilitate an industry push for Congressional action to erode the integrity of EPA's greenhouse gas standards for cars and trucks. And, should Congress get serious about legislating, consideration of this industry-backed, bipartisan bill could open the door to even more serious attacks on EPA or the states' authority to address climate change.

As congressional consideration of healthcare makes clear, it would be naïve to rely upon Congress to advance such a proposal through regular order with adequate opportunity for public scrutiny. Instead, supporters of an adequate response to climate change should remain vigilant in the months to come particularly as Congress takes up "must-pass" legislation, like appropriations bills.

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