Since President Trump took office in early 2017, the State of California has filed over 70 different lawsuits challenging the Trump Administration's policy initiatives on multiple fronts, including the environment, immigration policy and health care. Over 40 of California's lawsuits have targeted the Administration's efforts to roll back longstanding federal environmental protection, natural resource management and public health regulations. And California has prevailed in the vast majority of those cases that have been decided to date.

Beginning in 2019, the Trump Administration apparently came to the conclusion that its best legal defense might just be a good offense: it has begun launching its own legal initiatives–including lawsuits–against the State of California and its allies. Two examples: 1) the Justice Department's curious litigation alleging that California water regulators violated the California Environmental Quality Act when they ordered that more water be left in the San Joaquin River to support fish and wildlife resources (a lawsuit analyzed in my earlier post); and 2) USDOJ's retaliatory launch of a baseless antitrust investigation targeting several automakers that had collectively pledged to meet California's greenhouse gas (GHG)-reducing tailpipe emission standards for cars and light trucks. (The antitrust investigation, launched by the feds with great fanfare late last year, was quietly dropped in February.)

The Trump Administration's most recent legal offensive against California's environmental standards is equally meritless and, indeed, has already crashed and burned. That's a federal court lawsuit, filed last October, challenging the constitutionality of California's linkage of its GHG cap-and-trade program with that of the Canadian province of Quebec. The U.S. District Court disagreed, ruling in California's favor earlier this month. U.S.A. v.

State of California, E.D. Cal. Case No. 2:19-cv-02142-WBS.

In its complaint, the Trump Administration claimed that linkage of the California/Quebec cap-and-trade programs constitutes a "treaty" or "compact" between California and Quebec that is invalid under the U.S. Constitution.

A bit of background is helpful at this point: beginning in 2006, the California Legislature enacted a series of laws committing California to aggressively reducing the state's aggregate GHG emissions, and directing the California Air Resources Board (CARB) to devise a multifaceted strategy to accomplish that goal. One of the components of that strategy was CARB's creation of a cap-and-trade program, which first took effect in 2011. Under that program, CARB establishes yearly caps, or "budgets," for the total GHGs of all regulated sources ("covered entities"). Those emission budgets decline annually, in order to obtain gradual GHG emission reductions from covered entities. CARB issues allowances–authorizations to emit up to one metric ton of carbon dioxide equivalent GHGs per allowance–in quantities equal to the emissions budget for each covered entity for a given year. To provide a market-based system and to promote flexibility of compliance, covered entities are allowed to trade allowances and are required to acquire and sell allowances equivalent to the metric tons of GHGs they each emit.

Critical to the USDOJ lawsuit, CARB created a cost-containment measure to expand the secondary market for allowances by linking California's cap-and-trade program with those of other jurisdictions. Following the California Legislature's statutory authorization of the linkage and CARB's adoption of implementing regulations, CARB in 2013 signed an agreement with its Quebec counterpart linking California's cap-and-trade program with that of Quebec. In doing so, CARB expressly and fully retained its authority over California's cap-and-trade program; preserved its unilateral power to amend that program; and possessed the unilateral ability to withdraw from its agreement with Quebec at any time. In sum, the California-Quebec agreement is designed simply to provide covered entities–California's regulated community–additional flexibility in complying with the regulatory mandates of CARB's cap-and-trade program.

In its lawsuit, the Trump Administration alleged (among other things) that the California-Quebec agreement is constitutionally defective for two related reasons:

- The agreement violates the "Treaty Clause" of the Constitution, which prohibits states from "enter[ing] into any Treaty, Alliance, or Confederation," in deference to exclusive federal authority over such matters; and
- The agreement contravenes the "Compact Clause" of the Constitution, which

> bars states from entering into any Agreement or Compact…with a foreign Power" unless approved by Congress.

The Administration's complaint alleges that the State of California "ha[s) pursued, or [is] attempting to pursue, an independent foreign policy in the area of greenhouse gas regulation." Doing so, the U.S. argues, "unlawfully enhance[s] state power at the expense of the United States and undermine[s] the United States' ability to negotiate" climate change agreements.

The State of California, represented by Attorney General Xavier Becerra, defended the California-Quebec agreement as falling "well outside the narrow categories of…Treaties and Compacts" under the Constitution. Noting that the U.S. Supreme Court has only once in American history struck down an agreement under the Treaty or Compact Clauses–the 1861 agreement by the Southern states creating the Confederacy that precipitated the Civil War–California argued that its agreement with Quebec raises no such constitutional objections. Citing Supreme Court precedent, California contended that the agreement "does not violate the Treaty Clause or the Compact Clause because it does not implicate the weighty matters, such as preserving national unity or protecting federal supremacy against an expansion of state power, at which those Clauses are aimed." In support of its position, California cited the many agreements that are routinely reached among states and between states and foreign subnational governments that have not been declared–or even alleged to be–unconstitutional under the Treaty or Compact Clauses.

U.S. District Court Judge William Shubb heard lengthy oral arguments in this case in Sacramento earlier this month. A mere three days later, Judge Shubb issued his decision rejecting the Trump Administration's arguments and upholding the constitutionality of the California-Quebec agreement. In that decision, Shubb determined that the term "treaty" as used in the Constitution is "a term of art" limited to "treaties of alliance for purposes of peace and war, mutual government [and] cession of sovereignty." But, concluded Judge Shubb, "[b]y any metric, the Agreement between California and Quebec falls short of these consequential agreements."

Judge Shubb found the federal government's Compact Clause arguments equally unpersuasive. He observed, "the Supreme Court has limited the [Compact Clause's] application to agreements that encroach upon federal sovereignty." In contrast, the district court judge concluded, the California-Quebec agreement does no such thing.

The $64,000 question at this point is whether the Trump Administration will pursue an appeal of Judge Shubb's decision to the Ninth Circuit Court of Appeals in the hope of

obtaining a more sympathetic audience or, alternatively, fold its tents and wait to do battle with California on other legal fronts.

Finally, left unaddressed in either the parties' arguments or the district court's decision is an obvious irony: the federal government predicated its constitutional challenge in large measure on the claim that California's agreement with Quebec somehow interferes with the Trump Administration's efforts to advance its own climate change policy initiatives. In point of fact, however, the Trump Administration has pursued *no* such initiatives, aside from attempting to dismantle preexisting federal (and state) GHG emission reduction programs.

Political and legal hypocrisy apparently know no bounds in the Age of Trump.

(Full disclosure notice: the author of this post served as counsel of record for a coalition of Professors of Foreign Relations Law who filed an amici curiae *brief in support of defendant State of California in* U.S.A. v. California.)