Prompting rage by President Trump, California and several carmakers entered a voluntary agreement on carbon emissions from new cars that blew past the Administration's efforts to repeal existing federal requirements. Last week, the Trump Administration slapped back at California. Although there's been a lot of editorializing about that response, I've seen very little about the legal dimensions of the Administration's actions. I'd like to shed a little bit of light on those.

The Administration took two separate actions. First, the Department of Transportation and EPA sent a letter arguing that California's action appeared to violate the federal statutes governing CAFE (fuel efficiency) and emissions standards for new vehicles. Second, the Justice Department opened an antitrust probe of the car companies themselves. How strong are the government's legal positions?

Let's start with the DOT/EPA letter. The Clean Air Act and the CAFE statute both contain provisions that preempt state law. Under the provision in the Clean Air Act, states may not "adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." California currently has an EPA waiver of this provision, which EPA is now attempting to withdraw. Under the CAFE provision, a state may not "adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles." The forbidden state actions here are "standards," "laws," and "regulations." The trouble with the government's position is that it's hard to apply any of these terms to a voluntary agreement. A state's laws, standards, and regulations are all legally mandatory, and a voluntary agreement is not.

At this point, there doesn't even seem to be an actual contract between the carmakers and the state; just an agreement in principle. It's not clear to me if a binding agreement is even contemplated. If a legally binding arrangement resulted, the preemption argument would be stronger. But even then, it's far from clear that Congress meant to prohibit carmakers from voluntarily binding themselves to larger emissions reductions than required by federal law. Overall, the DOT/EPA position seems underwhelming.

Turning to the antitrust issue, we're handicapped by a lack of specifics about the Justice Department's claims. Although I don't claim to be an antitrust expert, I can at least explain the basics. The first question is whether the carmakers have entered into an agreement with each other regarding fuel efficiency or have somehow colluded to do so. There does seem to have been some cooperative

element to their actions, so I’ll leave it to the experts to decide whether this amounts to a “combination or conspiracy” under the antitrust laws. Assuming we get past that threshold, the next question is whether the carmakers’ conduct is a per se violation of the antitrust laws, like agreeing to fix prices. In recent years, the Supreme Court has narrowed that category and tried to exclude agreements that have some redeeming social value. The environmental benefits of the agreement would probably count in its favor in this analysis.

One important factor is whether the agreement will inevitably raise prices to the detriment of consumers. It’s not completely clear in this case what impact the agreement will have on prices. On the one hand, more fuel efficient cars may well be more expensive for consumers. On the other hand, the alternative the carmakers face is operating under legal uncertainty, not knowing whether they will be subject to California’s standards until lengthy litigation is concluded. That in itself is very costly, as is the prospect that they might have to produce different versions of cars to comply with different state and federal standards if California wins in court. So the companies may well view the agreement as ultimately cheaper than the uncertainty the Trump Administration is creating. That would make consumers better off.

Assuming that the agreement isn’t subject to the per se test, a court would then apply what is called the “rule of reason,” meaning a complete consideration of the costs and benefits for consumers and the competitive market. Under this test, the agreement seems highly likely to survive. As noted above, the impact on prices is ambiguous, and the agreement seems to serve useful purposes for each company that are unrelated to the effect on competition. The agreement also has obvious societal benefits. Moreover, the companies involved are large but by no means have a dominant position in the market, so it’s not clear that they could undermine competition or collectively raise prices even if they wanted to.

Even if those arguments were to fail, the companies could offer a fallback defense. The antitrust laws do not prohibit companies from banding together to influence government. If they did, trade associations wouldn’t be able to hire lobbyists or litigate against the government. So to find an antitrust violation, the government might have to show that the companies did something more than just press California to create the framework agreement.

Putting all this together, I’m not sure that I would say the government’s actions are legally frivolous. But their legal foundation seems pretty shaky.