

CONSTITUTIONAL COPE IN THE TIME OF TEXAS HOLD'EM

There's a coping mechanism I often see that involves stating we will get justice against the perpetrators of fascism once we "win." It goes something like, "when we win we'll hold all of these ICE goons accountable."

I get the urge: you're feeling outraged and helpless *right now* and one way to feel better – one way to affirm justice – is to imagine a more just time in the future. I get the import of accountability.

I say it's a coping mechanism for several reasons. *Making the statement* is an act of obscuring how difficult or, in this case, almost impossible delivering justice to these particular people are. Those ICE goons? Most of what they're doing is currently legal or at least covered by qualified immunity. To the extent we ever held torturers accountable, they were low-level schlubs and not the architects who successfully hid behind legal advice. So if you want to hold the ICE goons accountable, you're going to have to figure out how to do something far bigger than just winning an election.

And making the statement often serves as a substitute for doing the work – any work – to actually win.

If the ICE goons make you feel helpless – which after all is the intent – why not search out one of the efforts to resist, like the ones Michelle Goldberg described here?

[I]f Los Angeles is a testing ground for mass deportation, it's also a place to see how the resistance is evolving. Though there have been some big anti-Trump marches this year, many of those most horrified by this administration

are looking for more immediate, tangible ways to thwart it. The movement against ICE in Los Angeles – one that is starting to take root, in different forms, in cities like New York – is part of a growing shift from symbolic protest to direct action.

It may be no match for the Trumpian leviathan. But it can protect a few people who might otherwise get swept into the black hole of the administration's deportation machine. And in the most optimistic scenario, it could be a foundation for a new, nationwide opposition movement.

[snip]

With ICE increasingly seen as the front line of a growing police state, people all over the country are looking for ways to stand up to it. In New York, ICE arrests seem to be concentrated in immigration courts, where agents have been snatching people after their asylum hearings, even when judges ask them to come back for further proceedings. Activists, in turn, are showing up at the courts to try to provide whatever support to immigrants they can. They hand out fliers – languages include Spanish, French, Urdu, Punjabi and Mandarin – informing immigrants of the few rights they have. They collect emergency contacts and immigration ID numbers so that when people are arrested, someone can inform their loved ones and track them through the detention system.

When the hearings are over, the volunteers try, often in vain, to escort the immigrants past intimidating groups of masked, armed ICE agents to the elevators and onto the street. That's what New York City's comptroller, Brad Lander, was doing when he was arrested

in June.

As Goldberg notes, that way to stop feeling helpless about your neighbor being kidnapped can also build the kind of network that we need *in order to win*, a network that not coincidentally is not conceived in terms of political party.

There's another version of this that involves writing entire columns akin to the comment about the ICE goons: What will Democrats do, *will they do it*, if we win?

With little consideration of how we win or what a win is.

Two examples from yesterday demonstrate the type – but also point to where the discussion could be, and why.

After reviewing two of the horrible events of the last day – the frivolous attack on James Boasberg and the confirmation of Emil Bove – JV Last inexplicably pitches an entire post that assumes Dems are feckless but also imagines what we should do if those feckless Dems manage to win in spite of their fecklessness.

I have some questions for Democrats, and for you, that I hope you'll discuss in the comments. I want a real conversation about wisdom because it's possible that I'm a few degrees too hot on this stuff.

- *Should the next Democratic president fire FBI Director Kash Patel, even if there is no immediate pretext? Why or why not?*
- *Should a Democratic Congress attempt to remove Bove from the bench since he*

apparently perjured himself during his confirmation hearing?

- *Should a Democratic president pressure universities to adopt policies friendly to liberalism and punish universities that caved to the Trump administration, in order to establish that collaboration comes with a cost?*
- *Should a future Democratic administration pursue all available modes of accountability for federal agents who broke the law under the Trump administration by—just as a for-instance—filing false charges against innocent civilians?*

Or should Democrats who gain power in the future decide that it's better to focus on kitchen-table issues. To work with Republicans to pass bipartisan legislation that impacts Real People's Lives.

Offering advice for a potential 2026 candidate, and so imagining how not to be feckless as a candidate, Dan Froomkin adopts a more optimistic stance, offering a 10-point plan of what to do if Dems do win.

Someone I know who is thinking about working for a primary campaign in the fall asked me the other day what I would want to see in a 2026 congressional candidate.

And from my perspective covering the resistance, my answer was clear: I want to see some fight.

My view is that if Democrats want to harness the energy of the resistance in the 2026 elections, they need to start talking now about how to stymie Trump as much as possible in the short term and how to undo the damage he has wrought in the long term.

I'm honestly not so clear myself on the short term. As long as Trump is president, given his veto power, it seems to me it will be impossible to pursue a positive legislative agenda even if Democrats win both chambers. And if Trump is willing to hold the country hostage, which he is, Democrats might even have to make some concessions simply to keep the government functioning at all. Does anyone have any thoughts about the best course? Please share them with me.

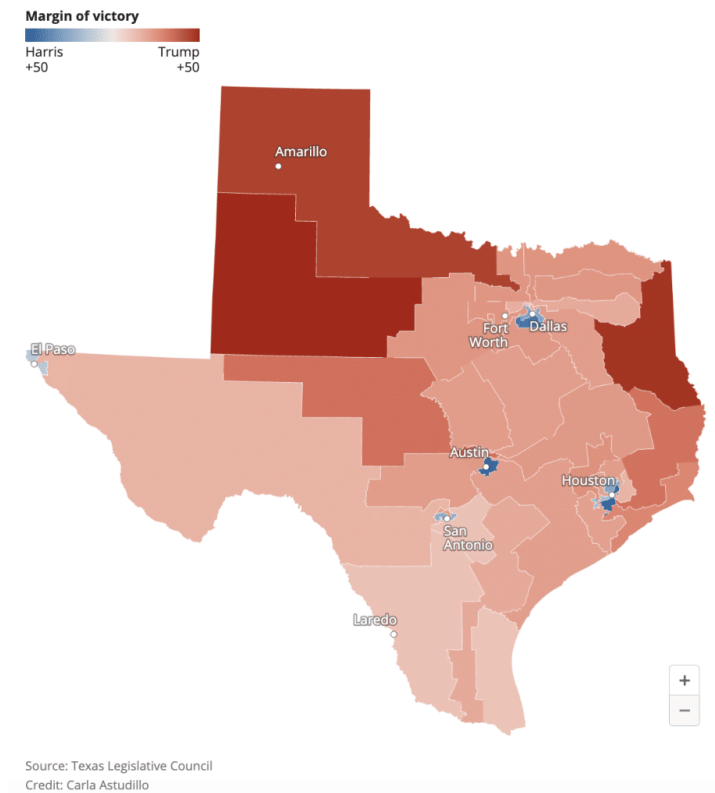
I do know that a Democratic House majority starting in 2027 could aggressively use subpoena power to fully investigate the many abuses committed by this administration, setting the stage for reforms to come. Every candidate ought to make that a solemn vow.

As for the long term, candidates should enthusiastically address the need to restore sanity and good government to the country after Trump is gone.

I'd like to see people campaign on something along the lines of a 10-point plan. And my first draft is something like this:

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1. *Restore the rule of law. This includes rebuilding a devastated and defiled Justice Department, prosecuting the rampant law-breaking of the Trump era, and expanding the Supreme Court.*
 2. *Stop mass deportations. That includes defunding ICE, closing concentration camps, restoring temporary protected status, respecting asylum claims, ending to the harassment of people on visas, and welcoming more international students.*
 3. *Revive the civil service. That means hiring back tens of thousands of workers who were driven out, undoing organizational changes, reestablishing the tradition of a nonpartisan bureaucracy.*

I read these, and then I read the Texas gerrymander plans that aim to turn Democrats into a permanent minority, and wonder, what the fuck are we doing here, people?



You need to find a way to ensure there will be some kind of real representation left, you need to find some way to ensure martial law like Trump tested in Los Angeles doesn't disrupt elections, you need to figure out what the fuck DOJ is doing by demanding election rolls from every state before you can even think about what we do if Democrats win in 2026.

Even the question of retaliating against the Texas gerrymander – which would involve rolling back efforts that have made states more democratic – for short term survival is not an easy one (as Semafor lays out).

Beyond the difficult political problems, gerrymandering is at the core of partisan and racial polarization that is Trump's magic sauce. This is a fight not just about whether Republicans can insulate themselves from accountability for the wildly unpopular policies they've rubber stamped in service of their liege Donald Trump. It's a fight over whether Americans can find common ground with their neighbors.

Without that – without finding some way to break through the polarization that Republicans use to

demonize Democrats and people of color and in so doing blinding their followers to the pain they're imposing on them, the followers – you will not defeat fascism.

Which is why I think Last and Froomkin aren't thinking big enough, and in the process aren't really addressing the problem.

Fire Kash? No brainer. But the problem isn't Kash, per se. It's that in the zero sum game of polarization, right wingers are wielding "justice" as a political tool, all the while duping their rubes into believing Democrats did that, *because* they tried to hold a privileged white billionaire accountable for his actions. Jim Comey did stupid things because he was afraid right wing FBI agents would leak and make him – make FBI – look bad. Chris Wray refused to defend what happened before he arrived, making it easy to spin conspiracy theories about how Donald Trump was the one unfairly treated during an 2016 election in which FBI may have decisively hurt Hillary. At least Kash's rabid partisanship has the potential of backfiring – certainly it has so far on Epstein – because he'll never be able to deliver on the promise of children's books.

Ending mass deportations, restoring civil service? Of course. But why conceive of that as a simple reversal, a restoration of the protections that right wingers easily hijacked? What would it take to provide real job security for the weather forecasters and cancer researchers if we ever get to bring them back? And should we purge FBI and ICE of all those leakers and goons first, or is there a review of Trump's abuses provides a way to fix past problems? What does "restoring rule of law" mean when right wingers have embraced a mafia state? How do you restore faith in rule of law from both right and left, especially when the norms that provide the necessary foundation are gone?

There are a list of things that need to happen to address this: Dramatically curtail the Presidential pardon. Establish a way – a

replacement for the failed experiment with Special Counsels – to hold the political accountable that is insulated from partisan chain of command. Eliminate the abuse of informants. We have barely begun to conceive of how much Trump has thrown out all rules prohibiting domestic spying, which provides an opportunity to rethink how to protect privacy in the age of dragnets (and how to safely disaggregate the data Trump is accumulating on one place). Why not take Trump's debasement of FBI and supercharge of ICE as an impetus to rethink Federal law enforcement entirely and take all of it out of DHS, where it has far fewer rules? And yes, you'd have to do something about SCOTUS, but why stop at expanding SCOTUS instead of reconceiving of it, finding away to make it something other than the zero sum fight it has been for three decades?

Trump has destroyed the justice system – Trump has stolen rule of law from ordinary people, whether they're Jeffrey Epstein's victims, victims of his fraudster buddies he let off scot free, or American taxpayers whose shared national interest he has converted for political gain. He has replaced it with a spoils system that rewards loyalty. That makes the task of restoring it far harder, but it also provides an opportunity to show the cost of Trump's corruption, and to pitch this as a fight against corruption, not Trump per se.

I'm not saying you'd be able to do this immediately with a House majority in 2026 or the White House in 2028. You wouldn't, unless Trump precipitated a collapse so major that America is rebuilding as it struggles to feed its people, not at all an impossibility. But the reason Joe Biden, a man who enacted historic legislation with the thinnest of margins, failed is because the rising flood of fascism wiped all that away within weeks, even though Biden anticipated some of the means (like the attack on civil servants) Trump used to do that.

There are really better ways to fight fascism

than focusing on what magical ponies we'll ride if we "win." But if you're going to do that, consider what would need to happen to actually reverse the tide.

Update: As if on cue, The American Prospect has a thoughtful piece on what kind of reforms we could impose in the wake of Trump that might fix things. It focuses closely on the post-Watergate reforms.

A post-Trump legislative agenda could begin by reinforcing the post-Watergate laws and reaffirming the public purposes that motivated them. Congress could strengthen the enforcement provisions of the Impoundment Control Act. In light of the Supreme Court's ruling about the president's power to remove executive branch officials, Congress could put inspectors general out of the president's reach and under its own protection as part of the Government Accountability Office, a congressional agency (although Trump has tried to control congressional agencies too).

Congress could also enact a new National Emergencies Act that would limit the ability of presidents to declare forever emergencies. In 1983, the Supreme Court struck down the provisions in the 1976 act that enabled a single chamber of Congress to withhold consent for an emergency's continuance. Under the Court's decision, Congress now must have a two-thirds majority in each house to overcome a presidential veto and end an emergency. As Josh Chafetz of Georgetown Law School suggested recently in an unpublished paper, a new Emergencies Act could—like the original 1976 act—terminate all existing emergencies and end lurking emergency powers in statutes that Congress no longer thinks necessary. Most important, it could establish new sunset provisions.

Emergencies would end within a short period (perhaps 60 days) and be nonrenewable unless approved under expedited procedures by a joint resolution of Congress. Those provisions, as Chafetz argues, would afford presidents short-term powers in genuine emergencies but ensure that Congress retains the power to make lasting policy.