

is a formal party to the litigation. The Bush Administration has broadly invoked the privilege, using it repeatedly to block judicial review of questionable constitutional practices, including the secret NSA surveillance program; the secret rendition of alleged terrorists; and challenges to the legality of the dismissal of government whistleblowers.

Fourth, Congress should enact the pending Free Flow of Information Act, which would recognize a qualified journalist-source privilege. This would enable journalists to protect the confidentiality of their sources unless the government can prove that disclosure is necessary to prevent significant harm to the national security that would “outweigh the public interest in newsgathering and maintaining the free flow of information to citizens.” Forty-nine states currently recognize the journalist-source privilege. It is time for the federal government to protect this privilege as well.

Enactment of these four laws would go a long way toward redefining the balance between secrecy and accountability. Some measure of secrecy is, of course, essential to the effective functioning of government, especially in wartime. But the Bush Administration’s obsessive secrecy has effectively and intentionally constrained meaningful oversight by Congress, the press, and the public, directly undermining the vitality of democratic governance. Looking back over the past seven years, one cannot escape the inference that the cloak of secrecy imposed by the administration has less to do with the war on terrorism than with the administration’s desire to insulate executive action from public scrutiny. Such an approach to self-governance weakens our democratic institutions and renders the country less secure in the long run. A basic assumption of self-governance is not only that open decisions enable public participation, but also that decisions are more likely to be wise, thoughtful, and responsible if they are made in the light of day and are open to question. This is an area in which serious reconsideration of our laws is necessary to reinforce the most fundamental elements of our liberty. ▀

Democracy

Michael Waldman

Few presidents talk about democracy around the world as much as George W. Bush has. So it is striking that Bush’s presidency has so degraded America’s instruments of democracy at home: the political process, the legislative process, and the sheer competence and legitimacy of government itself. In myriad ways, the Administration has bristled with contempt for accountability

and simple democratic norms. But the democracy legacy of the Bush years will not only be that of hanging chads, Jack Abramoff, or the “K Street Project.” For the Bush years have also seen a growing public backlash, the resurgence of participation marked by new voters, new sources of campaign cash, and the rise of online activism.

For most of our history, democracy has evoked more poetry than prose. This intense strain of American thought holds that the “distributed intelligence” of the public is better than the blinkered resolve of the “decider.” When progressives tap that notion of citizens as the agents of their own progress, we touch hearts—as the response to the Obama campaign, and especially his victory, shows.

A central premise of any long-term progressive strategy must be to renew the very system of democracy that empowers ordinary citizens, amplifies their voices, and makes all other changes possible. If we do this, we will permanently enlarge the constituency and coalition for progressive politics and make it far easier to realize vital legislation such as universal health insurance, a fair tax system, modernized financial rules, and a shared responsibility for national security. At the very least, renewing the systems of democracy will mark a fundamental shift away from the entrenched and well-funded interests which still dominate governance. If the Bush Doctrine led to a botched push for democracy abroad, the Obama Doctrine should be a commitment to the renewal of democracy at home.

The problems of American democracy are hardly new. Mark Twain, not Jon Stewart, quipped that “there is no distinctly native American criminal class, except Congress.” Voter participation rates have sagged for decades. The turnout rate in the 1996 presidential election was 49 percent of voting age population, the lowest since the 1920s. Campaign finance had grown gaudily corrupt, too, long before Bush took office.

Yet in basic ways, the long-standing decay of America’s democratic institutions worsened markedly in the past decade. Consider voting, the heart of democracy. From the republic’s earliest days, we have waged long and often fierce struggles over who could vote and how. The right to vote expanded, first to white men without property, then to former slaves (a right that was effectively wrenched away), then to women, then, finally, to African Americans through the Voting

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Rights Act. As America prepared for Election Day in 2000, it seemed votes would be cast and counted in a neutral, precise way.

Instead, of course, that election was a strobe-lit tableau of everything sordid and inept about voting in America. We learned that elections were run by fiercely partisan officials who wrongly purged tens of thousands of voters from the rolls. We learned, too, that Florida was one of five states to permanently disenfranchise one million voters with a past felony conviction. Nationwide that year, voting machines and problems with lists cost at least four million votes. Former presidents Gerald Ford and Jimmy Carter concluded, “The registration laws in force throughout the United States are among the world’s most demanding... [and are] one reason why voter turnout in the United States is near the bottom of the developed world.” Disenfranchisement, it turned out, was still widespread—enforced not by billy clubs but by onerous rules, incompetent administration, and partisan chicanery.

Congress did try to help, in its way. The Help America Vote Act of 2002 included new funding and modest reforms, and most significantly, it pushed states to move to electronic voting. (A decidedly mixed result: States are now jettisoning the new equipment, or at least making sure there is a paper record to prevent error or fraud.) Still, in 2004 Ohio proved a petri dish for all that ailed America’s elections, with inner-city residents standing 10 hours in line in the rain to vote. Those problems could well have tilted a state where a switch of 60,000 votes would have made John Kerry president. Republican partisans mounted an increasingly fierce drive to disenfranchise voters, especially minorities, by forcing purges of lists and challenging voters’ legitimacy. This continued in 2008, when Senator John McCain made demonizing the voter registration drive by ACORN a central theme of his campaign. The conservative crusade persisted even though statistically a voter is more likely to be killed by lightning than to commit voter fraud.

And yet Bush’s presidency also triggered an awakening, a surge in civic engagement and participation. Some 130 million Americans voted in 2008, up from 105 million in 2000. Prodded by voting rights groups, states began to shed felony disenfranchisement laws. Even Florida’s new Republican governor, Charlie Crist, followed suit. Twelve new secretaries of state, the officials charged with overseeing voting, won office in 2006 on voter protection platforms.

In 2008, the election system was strained, but it did not break. Most efforts to disenfranchise hundreds of thousands were beaten back. Fewer votes were lost. Long lines on Election Day did not infuriate; they inspired. These very waves of voters, inspired by Bush and Obama, create the conditions for the next great wave of voting reform.

Consider, too, campaign finance and Washington's culture of influence—a major obstacle to any needed policy change. Here, again, gross dysfunction—followed by a halfway reform—has created the possibility for a real leap forward.

The American campaign finance system is notoriously distorting, often shady, and more than a little absurd. Many candidates now spend most of their time raising funds. Incumbent legislators can be found a few blocks from the Capitol, sitting in carrels, dialing for dollars in party campaign offices in a scene more resembling *Glengarry Glen Ross* than *Mr. Smith Goes to Washington*. Under the leadership of Representative Tom DeLay, the nexus between cash and policy reached a level of vulgar explicitness not seen since the Gilded Age. The number of registered lobbyists tripled during that time, almost all of them representing business. Fully half the senators who left Congress in 2004 promptly became registered lobbyists themselves.

Money and democracy always compete. For a time, campaign finance rules had succeeded in boosting equality and curbing the worst abuses. After Watergate, a reform law imposed spending limits and created a system of voluntary public financing for presidential campaigns. But the Supreme Court vivisected the law. In the misshapen *Buckley v. Valeo* decision, it barred mandatory spending limits, thus sentencing candidates to compete raising endless sums in relatively small amounts. In the decades since *Buckley*, spending has increased fivefold, even accounting for inflation.

The one part of the system that has really worked was presidential public financing. In the first five elections, challengers defeated incumbent presidents three times. But beginning in 1988 and reaching a flood tide by 1996, “soft money” overwhelmed the “hard money” limits imposed by federal law. Parties and candidates found they could raise huge sums if funds were funneled through state parties, or used for purportedly independent expenditures, or used for “issue ads” that were little more than thinly disguised campaign commercials. Public officials once again sought hefty corporate contributions, a practice banned since 1907. The McCain-Feingold campaign finance law was the product of eight years of organizing by citizen groups. Passed in 2002, it banned soft money, with a goal of pushing campaigns and parties toward smaller, disclosed funds.

But the broader system began to break down in the last decade. Presidential public financing proved rickety, with the dollar amount having been set too low back in the 1970s. (Adjusted for inflation, it is two thirds of the amount spent by the McGovern campaign, the least successful in history.) In its first three decades, only one major candidate refused public funding. In 2008, in the Democratic primary, only one took it. (John Connally, meet John Edwards.)

When Barack Obama, a progressive supporter of public financing, shrugged it off for the general election, it became much harder to be sanguine about traditional campaign finance reform. The project of crafting ever more precise rules to govern varying kinds of campaign contributions began to look increasingly fruitless, as Mark Schmitt has argued in these pages [“Mismatching Funds,” Issue #4].

Under Bush, a new Supreme Court majority began to systematically disassemble existing rules. Four years ago, the Court upheld McCain-Feingold. Now, led by John Roberts, it poked a huge loophole, rolling back the law governing limits on corporate funding for sham “issue ads” (in the *Wisconsin Right to Life* case). More ominously, last Spring the Court made clear in *FEC v. Davis* that it would look askance at anything that seemed to advantage one candidate over another. The Court’s eyebrow-raising language has set off a frenzy, as conservatives coordinated by the Right to Life Committee’s lawyer and the U.S. Chamber of Commerce file cases across the country. Very possibly, a conservative Court majority will impose a libertarian, deregulatory model on political money, even as the country itself clamors for a more populist response to political domination by the wealthy.

And yet, as with voting, Bush’s presidency has kindled a response, driven by citizens—in this case, the remarkable explosion in small donations given over the Internet. Over three million citizens gave to Obama, in contributions averaging less than \$100, for a total greater than all the candidates had combined to raise four years earlier. In part, this was the product of Barack Obama’s man-meets-moment charisma. But “Yes We Can” can’t explain everything; Hillary Clinton, after all, raised an astonishing \$220 million. Social scientists warn of the law of unintended consequences; this was a consequence fully intended. By banning soft money, McCain-Feingold inevitably forced parties and candidates to find ways to go to smaller donors. The Internet abetted this new approach. To be sure, this hardly marks an “alternate public financing system,” as Obama claimed when he announced he was rejecting public funds. Such a mass fundraising approach may only work for a candidate who is dazzling and appealing, as Obama is, or possibly an ideologue. The small donor revolution is just a rumor in Congress. Lawmakers are raising money the way they have for years, from K Street. But it does point to a new approach that could gather force, if the next president gives it a push.

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In voting and campaign finance, an apathetic citizenry—prodded to attention—began to push back. But such public pressure has been less successful when it comes to the internal workings of government itself. Here, the self-correcting mechanisms of American life proved far less potent.

Bush was hardly the first president to seek increased power in time of crisis. But his constitutional justification is novel and deeply disturbing. Not until he left office did Richard Nixon dare express the view that “if the president does it, it is not illegal.” A decade later, the dissent to Congress’s Iran-Contra report lauded the office’s “monarchical notions of prerogative”—a dissent authored by Representative Dick Cheney. To reporters on Air Force Two years later, Cheney pointed to that dissent as best summing up the Administration’s views. September 11 didn’t “change everything.” Untrammelled presidential power was a bad idea whose time had come. The damage to the Constitution, the rule of law, and the nation’s moral standing has been widely documented.

The problem comes not only from the executive. Congress has degraded alarmingly as a coequal and strong institution. During the first six years of Bush’s term, for example, oversight simply vanished. Not one single subpoena was issued to the White House during the period that Republicans controlled both the legislative and executive branches. (By contrast, a single congressional committee pelted the Clinton White House with 1,400 separate subpoenas.) Congress’ internal deliberative processes atrophied, too. Open conference committees among lawmakers were replaced by conclaves of staff and lobbyists. Norman Ornstein and Thomas Mann, hardly firebrands, labeled it *The Broken Branch*.

When the Democrats took control in 2006, there was ground to hope that the institution would reassert itself as a full equal and a needed check on the executive. Oversight hearings have increased. But at crucial moments, Congress shrank from confrontation to enforce its full role. A taunting example: the refusal of the Bush White House to allow top aides even to appear before Congress to claim executive privilege. That absurd position required Congress to go to court to sue to enforce a contempt citation. Courts have been far gutsier in standing up to the executive—the Supreme Court, for example, ruled against Bush four times on detention issues—but the fact is that the power grab launched in earnest in late 2001 has not been stopped. The president leaves office having greatly expanded its reach and writ. Unless the next president engages in an historic act of renunciation, that power imbalance will mar the government for the foreseeable future.

George W. Bush bequeaths a dysfunctional democracy, marked by failing institutions and ossified policymaking. For President Barack Obama, all this poses a massive challenge—and a remarkable opportunity.

The challenge, simply, is that we now expect government to do big things, and do them well. And the system of encrusted corruption and dysfunctional elections bequeathed by Bush will make it very hard to get those big things done. It is hard to imagine Congress passing climate change legislation, or health care, or a fair tax code, in the currently dysfunctional culture of Washington. Law-makers would respond very differently if they knew that millions more would vote, or that special interests were no longer able to threaten to bankroll primary opponents. It will not be enough to swamp the system with a new president's popularity. That can dissipate easily. The forces of the status quo will gather confidence and momentum the longer matters drag on.

What is Obama's opportunity? Simply, if he catalyzes democracy reforms as a central part of his governing strategy, he will build power for his program and create a virtuous cycle of change that begets more change. His entire campaign was premised on the notion that new voters and new attitudes could reshape the way politics works. It was not enough, he warned repeatedly, to try the "old ways" and expect them to work. It would be a grave error simply to grasp for discrete policy achievements—a tax cut here, a spending program there. Fortunately, there is ample evidence that Obama gets it.

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The key is to press for bold reforms that tap the participatory spirit of the age. Far too often, democracy reforms bog down in technical arcana, tangled in acronyms and technical fixes. Nobody ever marched for sound election administration; they have marched for democracy, and can do so again. Reforms cannot be expected to purify politics, to "clean up Congress" or impose rational order on a necessarily messy political system. Rather, all the reforms should point in the same direction: more participation, especially designed to boost the voices of those who are too often drowned out.

President Obama should vault past the trench warfare of election issues by advancing universal voter registration. State governments could keep the list of who is eligible to vote; citizens would register automatically at 18, and stay registered even as they move from place to place. New computerized statewide voter lists, ordered by HAVA, make this possible. For any voter who turns up at the polls and still is not on the list, there should be Election Day Registration (EDR). Already used in eight states, this boosts turnout between 5 and 7 percent. A system of universal registration would be massively inclusive, minimize the

chanced of fraud, and obviate the need for endless rounds of voter registration. By adding up to 50 million Americans to the rolls, it would transform politics. Many voting rights groups are now coming to see that there is a rare chance for transformative voter reform. To borrow a phrase from Bill Clinton, let's end voter registration as we know it.

Similar innovative thinking is required in the area of campaign finance. Shopworn reforms cannot be the answer. On the one hand, voters will be seeing and feeling the consequences of government dominated by big money in the continued aftermath of the real estate and credit collapse of 2008. On the other, citizens now have a taste of the empowering nature of campaign contributions. Rather than endlessly trying to regulate campaign gifts and spending, reforms should look for simple ways to boost speech—to give candidates a chance to speak to voters without endless begging for funds from legislatively interested sources. Existing public funding proposals must be recast to show full awareness of the Internet fundraising revolution. One model comes from New York City, where small contributions to candidates for local office are matched six to one. As a result, candidates have an incentive to turn to grassroots organizing, raising funds in coffee klatches and living rooms. This reform does not seek to stamp out private money; rather, it channels it so it boosts participation. The federal government could implement this on a national scale.

Obama must view political reform as a key part of his governing strategy, not just an issue on a laundry list of topics. Truly transformative presidents have long seen the importance of building power through democracy reform. Andrew Jackson, for example, won the presidency in a backlash against perceived backroom deals, corruption, and government by aristocrat. The Jacksonian Democrats promptly institutionalized their own power by sharply expanding who could vote. Other transforming presidents knew they needed to upset the chessboard to achieve other goals. Theodore Roosevelt, Woodrow Wilson, and the Progressives saw massive improvements in democracy—such as direct election of senators, designed to overcome the role of big money in choosing senators through state legislatures, or the 19th Amendment giving women the vote—as necessary to build a modern and effective regulatory government. Franklin Roosevelt used government to create the conditions for union organizing. Ronald Reagan, in turn, saw that firing the air traffic controllers in 1981 shifted the power balance against labor. All these presidents understood that such issues are not about process—they are about power.

Barack Obama enters office burdened with rare high expectations, at a time when the economy is reeling, and there is little money for immediate spending on other priorities. He could push for reforms that would institutionalize the

surge of voters and small contributors that brought him to the White House. If he does, he will change the country, and usher in a new era of democratic aspiration and energy. Once again, as so often in the country's past, democracy itself will be at the center of our politics, where it belongs. ▀

Opportunity

Elizabeth Warren and Amelia Warren Tyagi

Opportunity is the cornerstone of American values. Liberal or conservative, we embrace the religion of opportunity, the dream that we all will have the chance to make ourselves and our families safer, happier, and wealthier. It is the belief in opportunity that spares us significant moral pains when we contemplate the rampant inequalities in our society. If we all have chances to do better, we tell ourselves that those who are on top deserve to be there because they capitalized on their opportunities. By the same reasoning, those at the bottom deserved their fates as well. Even as we laugh at the refrain that George H.W. Bush was born on third base and thought he hit a triple, we cling tenaciously to the idea that America is a meritocracy: If we work hard, we will succeed.

And yet something unsettling has happened to opportunity in America over the last eight years. The poorest Americans have gained little since 2000, while their counterparts at the other end of the income scale have had an amazing run. The levels of opportunity at the extremes have been extreme. Those with less and less of a chance to climb out of poverty are silhouetted against gargantuan CEO salaries and bonus packages pulled down by those on top.

Most Americans, of course, live somewhere between those ends. For the middle class, opportunity is about timing, resources, and a finite number of chances. But it is also about larger forces that have recently, and subtly, shifted the opportunity landscape, making it harder for them to seize the opportunities that come by. In a detailed summary comparing middle class economics over the eight years of the Bush Administration with what happened to the middle class during the 1990s, independent analysts at Third Way concluded that the typical middle-class family—the family that is employed, has health insurance, is investing money in a retirement account, owns a home, and has a child in college—is

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