

Remarks at U.S. Court of Federal Claims Law Day Observance

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Thank you for your introduction and for inviting me. It's a privilege to be substituting for Associate Attorney General Tony West at your Law Day Observance. I feel a little like the aptly named Ryan Minor, who showed up at shortstop one day for Cal Ripken Jr. But since, as Chief Justice John Marshall famously reminded us in *Marbury*, "The government of the United States has been emphatically termed a government of laws, and not of men," I'm hopeful that the identity of the speaker will be less important than the message about the law.

The Court of Federal Claims is devoted to the rule of law in a distinctive way. That way is captured by a quotation from President Abraham Lincoln that is etched onto the wall of your courthouse: "It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." Inspired by that quotation, and keeping in mind that this year marks the sesquicentennial of President Lincoln's reelection in 1864, I thought I would discuss this year's Law Day theme – American Democracy and the Rule of Law: Why Every Vote Matters – by telling you about how the election of 1864 transformed not just America, but voting in America.

At the founding of our Republic, the right to vote was mentioned in the Constitution in only a backhanded way. States could, and did, limit the right to

vote on the basis of sex, race, property ownership, longtime residence, and age (to name only the most common restrictions); the Constitution provided that members of the House of Representatives – the only federal office subject to popular election – should be selected by whoever the state permitted to vote for the most numerous branch of the state legislature. Elections were often conducted *viva voce* – by voice vote in front of the county courthouse – the secret ballot being in many places a mid-nineteenth century innovation.

The conventional view of civil rights and civil liberties is that they expand in times of peace and contract in times of war. There are certainly many examples of that dynamic – think about President Abraham Lincoln’s suspension of habeas corpus during the Civil War or the internment of Japanese Americans during World War II. But when it comes to the right to vote, we have a striking counterexample. On the eve of the Revolution, every colony restricted the right to vote either to freeholders who held a particular amount of land or to taxpayers (and this was in an era long before income taxes brought virtually every adult within this category). Service in the war provided an opening wedge for arguments in favor of a broader franchise: as one editorialist put it, the electorate should consist of “every man who pays his shot and bears his lot.” States as different in every other way as Connecticut and Mississippi enfranchised men who served in the militia even if they owned no land and paid no taxes. And by the eve of the Civil War, most states had eliminated economic restrictions on the franchise.

The Civil War transformed voting, producing, among other things, the first constitutional provisions that actually protected the right to vote.

The story behind the Fourteenth and Fifteenth Amendments is relatively well known. As early as 1862, Ulysses S. Grant observed that black contrabands might ultimately serve in the Union Army and “it would be very easy,” he observed, if a man “fought well, eventually to put the ballot in his hand and make him a citizen.” Although General William Tecumseh Sherman declared that “when the fight is over, the hand that drops the musket cannot be denied the ballot,” black enfranchisement was actually a close call. Despite the rhetorical appeal of Sergeant Henry Maxwell’s demand for “two more boxes besides the cartridge box – the ballot box and the jury box,” very few states actually repealed their restrictions on black suffrage. Only when the Republicans realized that their continued hold on the national government was dependent on the enfranchisement of black voters in the South to counterbalance whites’ overwhelming support for the Democratic Party did Congress propose the Fourteenth and Fifteenth Amendments.

In the long run, the Equal Protection and Due Process Clauses of the Fourteenth Amendment were to become the primary constitutional sources protecting the right to vote. But initially, the major voting rights provision in the Fourteenth Amendment was the Reduction-of-Representation Clause, which provided that a state’s representation in Congress (and hence its electoral college votes as well) would be reduced “when the right to vote in any election . . . is denied to any male inhabitants of such State, being twenty-one years of age, and citizens of

the United States, or in any way abridged, except for participation in rebellion, or other crime.”

The clause equates the people whose voting rights should be protected with the people who serve in the militia: male adult citizens. It distinguished between those who had served, or might one day serve, in defense of the United States and those who participated in rebellion, that is, those who took up arms against the United States. Ironically, its language also implicitly excluded another large group of citizens. After the war, Elizabeth Cady Stanton announced that women intended “to avail ourselves of the strong arm and the blue uniform of the black soldier to walk in [to the election booth] by his side.” But the United States Supreme Court was to rely on the use of the word “male” in the Reduction-of-Representation clause to reinforce its conclusion that nothing in the Fourteenth Amendment was intended to confer the right to vote on women. It took roughly a half century from the end of the Civil War for women to gain the right to vote.

The Civil War marked another, far less famous, transformation of voting rights. For the first time in American history, massive numbers of citizens – over two million men, many of them voters, enlisted in the Union Army – were away from home on Election Day. Republicans were, quite naturally, more likely to enlist than Democrats, and in the elections of 1861 and 1862, the party lost votes. Swayed again by the moral equation of the duty to serve and the right to vote, wanting to keep troops in the field, and concerned with the partisan effect of soldiers’ absence, many states enacted absentee voting laws for the first time. (Tellingly, the three

northern states where Democrats controlled the state legislatures did not provide for absentee voting in 1864.)

The opinion of the Wisconsin Supreme Court upholding that state's "Military Suffrage Act" emphasized the connection between military service, citizenship, and the franchise:

But, whatever else may be said upon the subject, this at least is true, that history has furnished no better example illustrating the capacity of the people for self government, than that furnished under this law, of the citizen soldiers pausing amid the horrors of war to discharge their duties as the primary legislators of the republic, and to guard by an intelligent use of their ballots, to be forwarded to their homes, the welfare of their country, and those principles of civil liberty for which they are ready at any moment to lay down their lives upon the field of battle.

Some of the Civil War-era statutes were short-lived. Indeed, several were struck down under state constitutions while the war was still raging. But in the interim, they may well have provided the votes to give President Lincoln his margin of victory, thereby profoundly shaping the future history of our country.

Absentee voting laws reflected a recognition that conditions in a modern nation might require modifying the actual mechanism by which votes were cast, a recognition that has played out repeatedly in modern times. During World War I, nearly every state enabled servicemen to vote absentee, and during World War II, the federal government enacted legislation to protect soldiers' voting rights. The

Soldier Voting Act was the first federal statute to preempt a state poll tax as a condition of voting . . . and was the first federal statute protecting voting rights enacted after the end of Reconstruction. Today, the Uniformed and Overseas Citizens Absentee Voting Act and the MOVE Act safeguard the voting rights of military personnel. Congress is now considering additional legislation – the SENTRI Act – to further protect the ability of the men and women who serve abroad to participate fully in electing the government they’re defending.

More broadly, just as the relaxation of property qualifications for soldiers during the Revolutionary War was an opening wedge in the more general abandonment of wealth restrictions, the provision of absentee ballots to soldiers in the field during the Civil War heralded a more widespread availability of absentee ballots. At the Massachusetts Constitutional Convention of 1917-18, for example, a delegate from the city of Somerville noted “a very clear-cut analogy” between the votes of soldiers “and such citizens as trainmen and traveling salesmen.” Just as the national government might compel military personnel to leave “their place in the body politic,” so too, the “industrial system,” which is “also in the interest of the public good,” might demand workers’ absence from home. The modern economy should not deprive them of their ability to vote. In the last twenty years, many states have expanded the rationale even further and now provide for “no-excuse-needed” absentee voting or early voting as ways to ensure that every citizen can cast a ballot and have that ballot counted.

Everyone who has ever given a speech on a commemorative occasion is well aware that the greatest such speech in American history – President Lincoln’s Gettysburg Address – is 280 words long. None of us succeeds, no matter how long we talk, in better describing the foundation of American Democracy and the Rule of Law: “government of the people, by the people, and for the people.” That government depends on the consent of the governed. And that is why every vote matters.

Thank you very much.