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FOREWORD **NAVIGATING THE POLITICAL DIVIDE: LESSONS FROM LINCOLN**

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On a brilliantly sunny but frigid February day in 2007, Senator Barack Obama stood on the steps of the Old State Capitol Building in Springfield, Illinois to announce his candidacy for the Democratic nomination for President of the United States. The location of Senator Obama's announcement was a nod to the eight years the candidate had served in the Illinois State Senate representing neighborhoods on Chicago's South Side. However, the choice of the Old State Capitol Building as the location for the kick-off of the Obama for President campaign was undoubtedly also designed to invoke the memory of the man who was, until Senator Obama twenty-one months later, the only Illinoisan ever to win the presidency¹—our sixteenth President, Abraham Lincoln. It was Lincoln who, nearly 150 years earlier, having just received the nomination of his fellow Illinois Republicans

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¹ Paul Finkleman & Ali A. Chaudhry, *Introduction to Lincoln's Legacy: Enduring Lessons of Executive Power*, 3 ALB. GOV'T L. REV. ix, ix (2010).

for the United States Senate, gave the most famous speech ever uttered in the building: his “House-Divided” Speech. The symbolism and rhetoric of Senator Obama’s announcement in February 2007 recalled both that speech and the man who gave it and framed Senator Obama as the heir to the legacy of President Lincoln.

Even without the purposeful, even forced imagery of the setting for Senator Obama’s announcement, there were indisputable parallels between the candidate and the Abraham Lincoln who delivered the “House-Divided” Speech in June 1858. Both men were born in states other than Illinois (Lincoln in Kentucky and Obama in Hawaii), grew up in very modest single-parent homes (Lincoln was raised by his father and Obama by his mother), and were attorneys by training (in Lincoln’s case, self-training) who practiced in Illinois.² Senator Obama had emphasized these similarities before, openly comparing President Lincoln’s “humble beginnings” with his own in a 2005 essay for TIME Magazine:

[W]hen I, a black man with a funny name, born in Hawaii of a father from Kenya and a mother from Kansas, announced my candidacy for the U.S. Senate, it was hard to imagine a less likely scenario than that I would win—except, perhaps, for the one that allowed a child born in the backwoods of Kentucky with less than a year of formal education to end up as Illinois’ greatest citizen and our nation’s greatest President.³

² *Id.*; see also Edward H. Pappas, *Lawyers, Leadership, and Hope*, 88-FEB MICH. B.J. 8 (2009); Phil Hirschhorn, *The Obama-Lincoln Parallel: A Closer Look*, CBS NEWS (Feb. 11, 2009), available at http://www.cbsnews.com/2100-250_162-4731552.html.

³ Barack Obama, *What I See in Lincoln’s Eyes*, TIME (July 4, 2005), available at <http://content.time.com/time/magazine/article/0,9171,1077287,00.html>. Eyebrows were raised at the comparison. In particular, Peggy Noonan, former speechwriter for President Reagan and a columnist for the *Wall Street Journal*, wrote that Sen. Obama was “flapping his wings in Time Magazine and explaining that he’s a lot like Abraham Lincoln, only sort of better.” BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* 123 (2006); see also Susan Schulten, *Barack Obama, Abraham Lincoln, and John Dewey*, 86 DENV. U. L. REV. 807, 808 (2008-2009).

Another item that made the Old State Capitol Building an appropriate choice for Senator Obama's announcement was the ready comparison, at least superficially, between the speeches that sprung the two relatively inexperienced politicians from obscure Illinois U.S. Senate candidates to nationally relevant voices in their parties.⁴ For Abraham Lincoln, that speech was the 1858 "House-Divided" Speech, so named for the Scriptural reference⁵ he used in the first few passages of the speech to drive home the point that the Union could not "endure, permanently half slave and half free. . . . It will become *all* one thing or *all* the other."⁶

Due to this language, Lincoln's "House-Divided" Speech has, on occasion, been interpreted as a call for national unity in turbulent times. Indeed, in the very sentence in which he announced his candidacy for the presidency, Senator Obama's explicit reference to Lincoln could certainly be construed as such: "And that is why, in the shadow of the Old State Capitol, where Lincoln once called on a divided house to stand together, where common hopes and common dreams still, I stand before you today to announce my candidacy for President of the United States."⁷

Senator Obama must have known that invoking Lincoln in this manner would remind those present of his own "coming-out

⁴ One other similarity between the two men, as candidates and as presidents, is the importance of language and oratory skills to their effectiveness as politicians. "Lincoln was by far our most eloquent President, a craftsman of language who we still quote and read with awe. Obama is an orator of unusual ability . . . his eloquence and skill are part of his trademark." Finkelman and Chaudhry, *supra* note 3, at ix.

⁵ *Mark* 3:24-26 (King James) ("And if a kingdom be divided against itself, that kingdom cannot stand. And if a house be divided against itself, that house cannot stand. And if Satan rise up against himself, and be divided, he cannot stand, but hath an end."); *see also Matthew* 12:25-26; *Luke* 11:17-18.

⁶ Abraham Lincoln, "A House Divided," Speech at Springfield, Illinois (June 16, 1858), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461, 461 (Roy P. Basler ed., 1953).

⁷ Associated Press, *Illinois Senator Barack Obama's Announcement Speech*, WASHINGTONPOST.COM (Feb. 10, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/10/AR2007021000879.html>.

party”: the July 27, 2004 keynote address at the Democratic National Convention in Boston. That speech, given when Obama was a candidate for the U.S. Senate, presented a vision of a post-partisan America that had moved beyond the “red state” and “blue state” distinctions that had only hardened since the bitterly disputed 2000 presidential election. In the speech’s most famous passage, Obama thundered against

those who are preparing to divide us, the spin doctors and negative ad peddlers who embrace the politics of anything goes. Well, I say to them tonight, there’s not a liberal America and a conservative America; there’s the United States of America. There’s not a black America and white America and Latino America and Asian America; there’s the United States of America.⁸

True, Obama also played the standard keynote role of criticizing the incumbent president, George W. Bush, and providing a full-throated endorsement of his party’s presidential candidate, John Kerry. However, his speech struck such a chord because it was so anomalous—and refreshing—in an election cycle notable for the candidates’ emphasis on their differences and efforts to bring their own partisans out in large numbers to the polls.⁹

The memory of the 2004 convention speech notwithstanding, if the Obama for President campaign was using the “House-Divided” speech to propagate the image of their candidate as a grand unifier, then that analogy was misplaced. Indeed, those famous words that Lincoln uttered in June 1858 were intended to draw a sharp line between him and the Republicans to whom he was speaking, on one side, and the Democrats and their Senate candidate, the incumbent Stephen Douglas, on the other. The house-divided metaphor was the

⁸ FDCH E-Media, *Transcript: Illinois Senate Candidate Barack Obama*, WASHINGTONPOST.COM (July 27, 2004), available at <http://www.washingtonpost.com/wp-dyn/articles/A19751-2004Jul27.html>.

⁹ See, e.g., *2004: The Base Strategy*, <http://www.pbs.org/wgbh/pages/frontline/shows/architect/rove/2004.html> (last visited Nov. 14, 2013) (quoting key Republican strategists regarding the “base strategy” employed by the “architect” of President Bush’s re-election campaign, Karl Rove).

antithesis of a call for togetherness. “Many of Lincoln’s friends considered it more eloquent than wise” and disapproved of its use in the speech.¹⁰ At the time Illinois, like the rest of the nation, was divided into a Republican north and a Democratic south, and it was feared that Lincoln’s words would alienate the bloc of influential voters in a belt of “swing counties” in the middle of the state¹¹ (not unlike the ten or so “purple” swing states that have so influenced the last several U.S. presidential elections). Lincoln, however, was determined to take an aggressive stand against both President James Buchanan and Senator Douglas.

Senator Douglas had authored the 1854 Kansas-Nebraska Act and its concept of popular sovereignty allowing residents of each new state to decide for themselves whether their territory would be free or slaveholding. The Kansas-Nebraska Act had not only helped create the Republican party and torn Kansas apart, it also had, in Lincoln’s view, “betrayed the Founders’ intent that slavery die naturally in a Union that—since the 1790s—had tolerated its existence but inhibited its growth.”¹² Douglas’s responsibility for that Act, combined with the U.S. Supreme Court’s decision in *Dred Scott v. Sandford*¹³ and Douglas’s indifference to it,¹⁴ allowed Lincoln to paint Douglas as an enemy of equality and the principles to which the fledgling Republican Party held firm.

The house-divided metaphor was so crucial to Lincoln’s acceptance speech that William H. Herndon, Lincoln’s law partner and biographer, recalled Lincoln declaring: “I would rather be

¹⁰ Don E. Fehrenbacher, *The Origins and Purpose of Lincoln’s ‘House-Divided’ Speech*, 46 MISSISSIPPI VALLEY HISTORICAL REVIEW 615, 618 (1960).

¹¹ *Id.* at 619.

¹² Schulten, *supra* note 3, at 810.

¹³ 60 U.S. (19 How.) 393 (1856).

¹⁴ “The reputed author of the Nebraska bill finds an early occasion to make a speech at this capital indorsing the Dred Scott decision, and vehemently denouncing all opposition to it. . . . The several points of the Dred Scott decision, in connection with Senator Douglas’s ‘care-not’ policy, constitute the piece of machinery [advancing slavery into the territories].” Lincoln, “A House Divided,” *supra* note 6.

defeated with this expression in the speech, and uphold and discuss it before the people, than be victorious without it.”¹⁵ Whether in spite of the “House-Divided” Speech or, in part, because of it,¹⁶ Lincoln was defeated by Douglas in the 1858 Senate campaign, only to be elected to the presidency two years later.

Are we, therefore, simply left with the possibility that a modern candidate stretched a historical reference well beyond its original meaning for political ends? This, in and of itself, would be nothing remarkable. However, the comparison between Lincoln and Obama becomes more complex when considering the path that President Obama took from that cold morning in February 2007 to the spring of 2012, when he faced his second general election campaign. Senator Obama, in *The Audacity of Hope*, had this to say about President Lincoln’s governing style:

We remember [Lincoln] for the firmness and depth of his convictions – his unyielding opposition to slavery and his determination that a house divided could not stand. But his presidency was guided by a practicality that led him to test various bargains with the South in order to maintain the Union without war; to appoint and discard general after general, strategy after strategy, once war broke out; to stretch the Constitution to the breaking point in order to see the war through to a successful conclusion. I like to believe that for Lincoln, it was never a matter of abandoning conviction for the sake of expediency. Rather, it was a matter of maintaining within himself the balance between two contradictory ideas—that we must talk and reach for common understandings . . .

¹⁵ Fehrenbacher, *supra* note 10, at 619. Fehrenbacher doubted the authenticity of this recollection, arguing that “[t]his pretentious talk does not sound at all like the flesh-and-blood Lincoln of 1858, but rather like the legendary figure subsequently evoked from the ashes of martyrdom by Herndon and others. The real Lincoln was a man of flexibility and discretion as well as conviction.” *Id.* at 620.

¹⁶ During the campaign, Douglas had denounced the house-divided doctrine “as a ‘revolutionary’ effort to incite ‘warfare between the North and the South.” *Id.* at 619.

and yet at times we must act nonetheless, as if we are certain¹⁷

Viewed from the perspective of the man writing it—a freshman United States Senator, undoubtedly considering a future run for President—this passage is mildly critical, yet understanding. One must wonder how President Obama views that same passage now, taking into account his subsequent election and the myriad challenges of his first term. President Obama was elected in no small part due to his promises to end the hyper-partisan discord that marked the Bill Clinton and George W. Bush presidencies. However, by the spring of 2012, the partisan divide in Washington had only widened, and President Obama found himself criticized from both sides of that divide.

Republicans and members of the nascent Tea Party argued that, far too often, on issues such as the 2009 economic stimulus plan, the Affordable Care and Patient Protection Act, and the Dodd-Frank Wall Street Reform and Consumer Protection Act, President Obama and members of his party acted unilaterally, “as if they were certain,” without input from the opposition party and against the will of the American people. Conversely, constituencies in President Obama’s own party who had worked so hard to elect him were frustrated by the lack of measurable progress on issues such as climate change and immigration and viewed his legislative achievements as watered-down products of unnecessary compromise—in their view, the president had essentially “abandoned conviction for the sake of expediency.” The truth likely lay somewhere in between these two views.

It was in this environment that the Lincoln Memorial University Law Review held its inaugural Symposium, entitled “Navigating the Political Divide: Lessons from Lincoln,” on April 20,

¹⁷ THE AUDACITY OF HOPE, *supra* note 3, at 97-98; *see also* Schulten, *supra* note 3, at 809 (observing that, in this passage, “Obama recognizes [a] fundamental ambiguity of history”; that it “is complicated, and rarely gives us the moral clarity we would like”).

2012. The subject matter was chosen as an obvious tribute to the man in whose honor the University was established in 1897, and whose professional ideals the School of Law had sought to instill in its students since its founding in 2009. The goal was to bring together a diverse group of scholars, political analysts, and advocates to discuss the state of our body politic entering the 2012 general election and consider whether there were any lessons from Lincoln that could inform the debate and help provide a roadmap for the man and parties who would be chosen by the people to govern in November 2012. This inaugural issue of the Law Review, a combination of articles and transcripts of the speakers from that day, has been assembled in the spirit of, and in order to memorialize, the event.

M. Akram Faizer and Dr. Charles Hubbard, both professors at Lincoln Memorial University, have contributed articles to the issue. Professor Faizer's article concerns an issue that has divided America, and in fact the world, throughout the Bush and Obama presidencies—the War on Terror. America's success in the War on Terror has been hindered, Faizer posits, by the declining world public opinion of America's actions in that conflict. According to Faizer, the global disdain for American military action derives largely from America's excessive focus on unilateral action and ignorance of foreign civilian casualties and legal norms. He reminds us of the world-wide support America enjoyed in the wake of the attacks of September 11, 2001, and how, since then, issues such as Guantanamo Bay, torture, the Iraq war, civilian casualties, and predator drones have all contributed to the decline of America in the eyes of the world. In his article, Faizer offers insightful lessons from Lincoln that can be applied today to America's prosecution of the War on Terror, thus allowing the U.S. to better focus on its domestic concerns.

Dr. Hubbard, a long-devoted Lincoln historian, set the tone for the Symposium by providing an enlightening examination into the State of our Union in 1858, when Lincoln gave his "House-Divided" Speech. Dr. Hubbard demonstrates the role that the *Dred Scott* decision and the famous Lincoln-Douglas debates of 1858 played in the run-up to the Civil War. He also highlights the threat that the

Civil War posed to our democracy, as well as Lincoln's pragmatism—namely, his judicious and sometimes controversial handling of the rebellion by virtue of the Commander-in-Chief powers. Although not facing a Civil War, the Union today remains divided over many political and economic issues, and as Dr. Hubbard writes: "Americans are looking for political leaders to implement the changes required to meet the challenges of the twenty-first century."

The issue also includes annotated transcriptions of several of the remarks given at the Symposium. Political analyst and *Game Change* co-author Mark Halperin remarked that America's divisions have taken on different characteristics from the days of President Lincoln. Although obviously not as intense as Civil War, Americans are constantly bombarded with political extremists, through the 24-hour media cycle and social media, who serve to further divide our nation. According to Halperin, this "freak show" prevents us from solving, or even addressing, the divisive political issues of the day. Halperin traces this polarization back to the Clinton administration and observes that it has only worsened with each successive president. He criticizes President Obama for his failure to bring the country together and urges the public not to take politics personally but to listen and promote unbiased sources of political news and analysis whose reports are derived from facts. Only then will the "freak show" end and the political discourse be raised in America.¹⁸

Helen Lee, "Making Prisoners Visible: How Literature Can Illuminate the Crisis of Mass Incarceration," focused on the faces of

¹⁸ Two other speakers at the Symposium, conservative radio personality Steve Gill and political analyst Goldie Taylor, also addressed the current state of American politics. Gill observed several issues that serve to divide the American public and decried the lack of any meaningful debate to address them. He believed the 2012 presidential election would be one of the most divisive in history. Taylor noted the historic election of President Obama, the first African-American president, but expressed dismay at the "Uncivil War" that has emerged between competing, agenda-driven news organizations supported by the public. Although the viewing and listening public are, to some extent, enablers, she expressed hope that things might change after the 2012 election. Neither Gill nor Taylor approved of the inclusion of their remarks in this volume.

America's isolated prison population: an issue that divides America but receives little attention as many Americans decide to simply "look away." Lee recited a series of alarming statistics showing the increase in the American prison population, highlighting the discriminatory impact the justice system has upon African-Americans. Inspired by her father's career as a criminal defense attorney, Lee then endeavored to move beyond the numbers and humanize the prison population. Her experience teaching storytelling and creative writing to male prisoners through the PEN New England Prison Creative Writing Program, which she established, have equipped her to "speak for those who live behind the walls of American prisons." Through the lives of characters in her novel, *Life Without*, Lee personalized the harsh realities of prison life, including its fears, helplessness, and isolation. Lee opined that the growing prison population is a product of the tendency of the American public and politicians to look away from the glaring problem. She closed by reading a portion of her novel warning the audience: "So, don't you look away."

Michael Steele, the former Lieutenant Governor of Maryland and Chair of the Republican National Committee, emphasized the important role that lawyers play in our public discourse, referring to the legal profession as a calling "to defend our civil liberties under the law, to ensure our freedoms granted by the Constitution, to protect the rights of every citizen, and to enforce the rule of law." Steele discusses the separation of powers in the federal government, specifically the executive branch's encroachment upon the legislative branch and the judicial branch's duty to prevent such expansion. Steele presents numerous examples of the expansion of the executive branch under President Obama, including recent military actions, presidential recess appointments, the No Child Left Behind Act, the Affordable Care Act, and the Dodd-Frank Act. Steele also analogizes Lincoln's use of the Commander-in-Chief powers to suspend the writ of habeas corpus with infringement on civil liberties under the PATRIOT Act. He also touches on the controversial decision by Obama Administration to decline to enforce the Defense of Marriage Act. Steele believes that we need a strong judicial response—a

“Madison 2.0”—to “put the genie back in the bottle” and recalibrate the balance of powers between the three branches of government.

Professor Siegfried Wiessner of the St. Thomas University School of Law built on the concepts discussed by Steele, examining the tension between the strong use of executive power, and the other two branches of government. The value of the doctrine of separation of powers is often only appreciated after a President wields his executive power in such a way as to overstep his boundaries. Two contrasting perspectives on the breadth of executive power were exemplified by Presidents Theodore Roosevelt and William Howard Taft, with the former believing it best to use his executive power to the fullest extent available in order to serve the people, and the latter cautioning that any exercise of executive power must be explicitly authorized by the Constitution. Wiessner uses extensive case law to analyze the scope of the executive’s duties, including removal powers, executive privilege, and emergency powers. Wiessner reminds us to consider how that power we give one president “can be used by the president of the other political color.” This “architecture for freedom,” federalism, and the separation of powers is what makes our American democracy so unique.

As we now know, President Obama maintained “the balance between two contradictory ideas” of conviction and expedience effectively enough to win re-election in 2012. In the first year of the President’s second term, we can only wait and see whether his re-election will lead to four more years of retrenchment in Washington or, alternatively, “break the fever”¹⁹ and allow President Obama the opportunity to work with a bi-partisan Congress to achieve

¹⁹ Byron Tau, *Republican ‘Fever’ Will Break After the Election*, POLITICO (June 1, 2012) (quoting President Obama as telling supporters: “I believe that . . . when we’re successful in this election, . . . the fever may break, because there’s a tradition in the Republican Party of more common sense than that. My hope, my expectation, is that after the election, now that it turns out that the goal of beating Obama doesn’t make much sense because I’m not running again, . . . we can start getting some cooperation again.”).

thoughtful solutions on pressing national issues that are worthy of “the better angels of our nature.”²⁰

²⁰ Abraham Lincoln Online, The Gettysburg Address (Nov. 19, 1863), available at <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>; see THE AUDACITY OF HOPE, *supra* note 3, at 98 (positing that Lincoln’s “self-awareness” and “humility” led him “to advance his principles through the framework of our democracy, through speeches and debate, through the reasoned arguments that might appeal to the better angels of our nature”).