

INTRODUCTION

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In 2009, we celebrated the bicentennial of Abraham Lincoln's birthday and the inauguration of Barack Obama. The coincidence of one's birthday and the other's inauguration only enhanced the parallels between the two. They are the only successful candidates from Illinois, although both were born and raised elsewhere. They were both born poor, and in their own ways, self-made men. Lincoln grew up without his mother and with a father who was emotionally absent. Obama grew up without his father, and with a mother who was often gone. Both were lawyers and, in their own ways, quite successful. 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, and while he may not write his own speeches (as Lincoln did), nevertheless, his eloquence and skill are part of his trademark. Both were accused of radicalism, when in fact, on most issues they are truly quite conservative and traditional. When they ran for President, opponents circulated scurrilous rumors about their religions—that Lincoln was a godless atheist and Obama was a Muslim. Neither was true, but both were designed to emotionally charge the opposition.

Both ran for office in an age when immigration—and rising hostility towards immigration—emerged as a huge political issue. Four years before Lincoln was elected, the American Party, more commonly known as the “Know-Nothing Party,” ran a credible campaign for President on a platform that attacked the idea of open immigration and appealed especially to anti-Catholic sentiments. Anti-immigrant sentiment had also grown rapidly in the years immediately preceding Obama's presidential campaign. His opponent, John McCain, was forced to abandon his own sensible positions on immigration in order to gain full support of his party. Once Obama was elected, anti-immigrant sentiment became worse as some national political commentators claimed that Obama was not legally a citizen of the United States—that he was somehow a foreigner in disguise. Even photocopies of his birth certificate from

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the state of Hawaii could not satisfy some of these anti-immigrant critics.

Both Lincoln and Obama entered the White House in a time of crisis. Lincoln faced the nation's greatest crisis—the secession of seven states and the likelihood of civil war. Obama entered office in the midst of two wars and the most severe economic downturn since the Great Depression three-quarters of a century before. Indeed, historians may look back on the moment of Obama's inauguration as the fourth most difficult time for a new President in our history—surpassed only by the crises Lincoln and Franklin Roosevelt faced during their presidencies and the challenges George Washington encountered in creating a new government under a new Constitution.

Finally, it is obvious that race and race relations are central to the presidencies of both men. As Lincoln noted in his second inaugural, at the time he became President “all knew” that secession and Civil War had been caused by slavery. Lincoln was the first President to confront slavery and to be committed to at least containing its spread. At the time he entered office, he understood that under the Constitution he had no power to end slavery, but by the end of his administration he had in fact found the power to do just that. Similarly, at the beginning of the War, he rejected the idea of allowing blacks to fight in the Army, bowing to social pressures and the political realities of the nation and the nature of the Civil War. By the end of the War, more than 200,000 black men had served in the Army and Navy. While blacks had served in earlier wars, under Lincoln the nation witnessed the first African American commissioned officers. During his time in office, Lincoln became the first President to seek the advice of blacks and to publicly socialize with African Americans. At a reception following his second inaugural, Lincoln walked arm-in-arm with Frederick Douglass, introducing the black abolitionist as “my friend.” Never before had something like this happened. Shortly before his death, Lincoln openly endorsed black suffrage, and become the first President to ever suggest what was at the time considered to be a deeply radical concept.

Obama, is of course, the first black President in our history. That alone makes his election a major event in the history of American race relations. His Cabinet appointments as well as his first two nominees for the Supreme Court of the United States confirmed that this was a new era, as blacks, Hispanics, and women took leading roles in the government and in his administration. Like Lincoln, Obama has changed the nature of who is to govern and participate in the nation's political culture.

What lessons can this new President learn from Lincoln's experience? What can we all learn from President Lincoln? Does the legacy of the 16th President of the United States have any relevance

for politicians, attorneys, and law students of today? This was the subject of the *Albany Government Law Review's* 2009 symposium titled, *Lincoln's Legacy: Enduring Lessons of Executive Power* which culminated in the articles that follow this introduction. These articles exemplify the very best of law review scholarship that examines President Lincoln's legacy for our modern era, and this tribute could not have come at a more fitting time.

The commemoration of Lincoln's 200th birthday led to increasing reflections about Lincoln's role and legacy in American history. The articles in this issue add to this ongoing conversation. To commemorate his 200th birthday in February 2009, Congress established the Abraham Lincoln Bicentennial Commission (ALBC), and the *Albany Government Law Review's* symposium was honored with an official endorsement from the ALBC. While the symposium reflected upon President Lincoln's use of executive power in a historical context, the law review focused on applying a prospective analysis of modern trends in the use and abuse of executive power, and the legal implications of an expanded executive role in a number of substantive areas that are relevant to the world we live in today.

Abraham Lincoln successfully led the nation through its greatest crisis: the American Civil War. In the face of countless challenges, he preserved the Union and put an end to slavery in this country, issuing that most sacred of texts—the Emancipation Proclamation. We find ourselves today in similar times faced with similar challenges. And so, we can learn a lot from President Lincoln. In this issue, not only will you read various perspectives on Lincoln's legacy but also on the limits of executive power that he believed in.

Lewis E. Lehrman, author of *Abraham Lincoln and the Declaration of Independence: From Peoria to the Presidency*, presented the annual Edward C. Sobota '79 Memorial Lecture, which opened the symposium. Mr. Lehrman articulated a vision of Lincoln's prolific political career, focusing mainly on Lincoln's "extraordinary speech" at Peoria, Illinois. It was at Peoria that Lincoln debated Senator Stephen Douglas about the constitutionality and morality of slavery, and it was here that Lincoln formed the foundation of his politics and principles in the 1850s and during his presidency. Mr. Lehrman, a former candidate for Governor of New York, also conducted a book signing and interacted extensively with students, judges, professors, and his fellow Lincoln scholars.

Frank J. Williams, retired Chief Justice of the Rhode Island Supreme Court and Co-Chair of the ALBC, opened his speech with: "The U.S. suffered an unexpected attack." He then drew parallels between the challenges faced by Abraham Lincoln and George W. Bush. His paper, *Abraham Lincoln and Civil Liberties—Then and Now: Old Wine in New Bottles*, presents the view that Lincoln believed wartime Presidents should be allotted certain flexibilities,

and Lincoln acted in accordance with this belief. Still, Lincoln had the deepest regard for civil liberties and sought to protect them even at the darkest hour of our nation's history.

Louis Fisher, a specialist in constitutional law at the Library of Congress, complimented Williams' opinion. In his paper, *Abraham Lincoln: Preserving the Union and the Constitution*, he stresses that Abraham Lincoln has not been America's only President to face adversity during war-time. Numerous Presidents have been faced with that daunting task and a comparison between Abraham Lincoln and James Polk highlights differing methods of dealing with this dilemma. While Polk labored to expand American territory, Lincoln had to preserve it. In so doing, Lincoln did not do what other Presidents have done since; he did not claim inherent powers implied from the Constitution.

Professor Timothy Huebner of Rhodes College presented his paper, *Lincoln Versus Taney: Liberty, Power, and the Clash of the Constitutional Titans*. He began by noting that the swearing-in of President Obama was the first in which a Chief Justice was tasked with administering the oath of office to a President who had voted against his appointment to the Supreme Court. Similarly, Chief Justice Taney and President Lincoln were at odds with each other. Taney exemplified a Jacksonian constitutional understanding—typified in *Dred Scott v. Sandford*—that considered individual liberty and centralized power to be inherently opposed to one another, and which viewed the right to own property and slaves as the cornerstone of individual freedom for white people. Conversely, Lincoln had built his political career in opposition to *Dred Scott*, and viewed the Constitution as providing government the authority and duty to maintain internal equality and freedoms, and to eliminate property rights in slaves.

University of Louisville Professor Thomas C. Mackey presented a paper titled "*An Inestimable Jewel: The Civil War Era Constitutional Amendments and Their Continued Relevance*." Mackey referred to the Civil War Amendments (the Thirteenth, Fourteenth, and Fifteenth) as a second Constitution unto themselves. The end result of Lincoln's constitutional revolution, Professor Mackey concluded, was a "new birth of freedom"; one which truly marked a new era in American history but which did so while maintaining the forms of government which had ultimately led to the outbreak of the Civil War.

Give Lincoln Credit: How Paying for the Civil War Transformed the United States Financial System was presented by Professor Jenny Wahl of Carleton College. Wahl pointed out that Lincoln could not have won the Civil War and freed the slaves without the crucial step of determining how to finance the War. When Lincoln began his term as President, he inherited a banking system that was in shambles

and burdened by high debt. For Lincoln, it was the Civil War that exposed the country's inability to deal with large-scale expenditures and the need for change. With the creation of a national banking system and the taxing of state bank notes, state banks were forced into the federal banking system, ensuring an efficient national implementation that revolutionized our financial system.

Albany Law alumnus Jeffrey M. Samuels, the David L. Brennan Professor of Law at the University of Akron School of Law, delivered a paper co-written with his wife, Linda B. Samuels, a Professor of Business Legal Studies in George Mason University's School of Management, titled *Lincoln and the Patent System: Inventor, Lawyer, Orator, President*. Samuels noted that one of Lincoln's lesser-known, yet very significant legacies, was his involvement with the patent system. Not only was he involved in the patent system as an inventor, lecturer, lawyer, and as the only President to ever be issued a patent, he also recognized the importance of the patent system to the national economy. Lincoln's understanding of this importance was manifested in his *Lectures on Discoveries and Inventions* which he gave between 1858 and 1860. During the lectures he noted that "all creation is a mine, and every man, a miner," pointing out that the universe is an open field for all men to invent and discover for the improvement of the human condition.

While many commentators have discussed the significance of the Emancipation Proclamation, it begs the questions—is emancipation complete? In that context, the symposium highlighted the plight of millions of undocumented workers that continue to toil in America with no hope of inclusion. Angela Alexander, Instructor of History and Humanities at York Technical College, showcased President Lincoln's battle with anti-immigrant nativists in the mid-nineteenth century, whose motto was "America for the Americans." In her paper, "*All Men are Created Equal*": *Abraham Lincoln, Immigration, and Ethnicity*, Alexander concluded that Lincoln believed the Declaration of Independence would eventually apply to all men, and freedom would be delivered to all.

Saikrishna Prakash, David Lurton Masee, Jr., Professor of Law and Sullivan & Cromwell Professor of Law at the University of Virginia School of Law discussed President Lincoln's suspension of habeas corpus in his paper, *The Great Suspender's Unconstitutional Suspension of the Great Writ*. He noted that Lincoln argued that the President is authorized to suspend habeas corpus. This is attributable to the commander in chief powers of the President and the fact that Congress is not always in session, and thus the executive branch has the authority to act in order to protect the country in times of emergency. Professor Prakash, however, disagreed with Lincoln's reasoning and argued that the power of suspension lies solely with Congress. He concluded that our general

reverence for Lincoln blinds us to his constitutional faults and one of Lincoln's legacies should not be this distorted sense of what a President can do in the case of rebellion and crisis—believing that the President was constitutionally authorized to unilaterally suspend habeas corpus.

Finally, Emily Berman, Counsel and Katz Fellow at the Brennan Center for Justice at New York University School of Law discussed the modern use of executive privilege by American Presidents to withhold information from the public. In her paper, *Executive Privilege Disputes between Congress and the President: A Legislative Proposal*, Berman focused on the use of executive privilege as it pertained to congressional requests. She explained that the problems with executive privilege arise from four systemic flaws: (1) a lack of clear guidelines; (2) bias in the favor of the President; (3) the legislature and the executive branches each have their own interpretation of the power; and (4) a lack of guidelines allows the President to expand the privilege at will. In order to resolve these systemic issues, her paper presents comprehensive statutory changes.

The *Albany Government Law Review* is proud to have been a part of the celebration of the bicentennial of President Lincoln's birthday. This symposium gave the law review an opportunity to debate and dissect founding principles of government, individual liberty, and representative democracy—what a fitting tribute to one of the greatest leaders of all time.