Family and Friends of Judge Daniel Friedman, Members of the Federal Circuit

Bench and Bar, and Honored Guests, I’m truly humbled to have the chance to present this year’s Friedman Lecture. The purpose of the lecture, I’ve been told, is “to advance the field of appellate advocacy.” That’s a broad and daunting mission, and all the more so because, of course, I’m standing here before a discerning audience, many of whom are well-known as excellent advocates, and I am speaking in honor of a man who was among the greatest appellate lawyers our country has ever produced. By all accounts, Judge Friedman was an artist at the bar, performing at the highest level of an advocate’s ambition. For fun, and to hear his voice again, I went back and listened to one of his oral arguments before the Supreme Court. It was Buckley v. Valeo, and though he came up short in that one, it was great to hear him. He was terrific. In his 19 years in the Solicitor General’s office he had nearly eighty appearances at the high court, and they made him a legend. He taught many, many people about the do’s and don’t’s of appellate advocacy, and he practiced what he preached. As it says on the website of the Friedman Memorial...
Committee, Judge Friedman was “an extraordinary teacher of and mentor to his judicial
law clerks and all who crossed his professional path.” Let me give you just one example
of his mentorship. Professor Peter Strauss of Columbia University, a member of the
Solicitor General’s staff during Judge Friedman’s tenure there, spoke of the Judge’s
influence and said, “No ... mentor meant more to my development as a legal writer than
Danny Friedman. He was gentle, understated, wry and absolutely to the point about the
obligations of candor and precision, about what would be persuasive, what excess, what
mere rhetorical flourish. ... I came to the Solicitor General’s office trailing experiences
that I was confident had made me a superb legal writer ... . How quickly it became
apparent how much I had to learn!” (Quoted at https://www.law.columbia.edu/pt-br/node/84626 , visited
10/18/18).

There are many more examples of this kind of praise I could read, but of course,
this is not supposed to be a eulogy. Suffice it to say that Judge Friedman was a genuine
hero to a lot of people and a model of what an appellate advocate should be. And that got
me thinking about other great persuaders in history. I love history. I covet a t-shirt one
of my sisters got for a brother. It says, “History Buff” in large letters and then,
underneath in smaller print, “I’d like you better if you were dead.” Because I’m a history
buff, I like to go for a run on the Mall when I come to Washington and visit my friend
Abraham Lincoln. So, I thought perhaps we could spend time today considering lessons
about advocacy from Lincoln, and along the way show how timeless those lessons are by
pointing out what others, primarily Judge Friedman, have taught along the same lines.

I will confess at the outset that all of what I’m about to say about effective
advocacy you have likely heard before. It’s hard to make any pretense of originality
when you’re quoting others. Moreover, a discussion of this sort tends to the platitudinous
simply because advice regarding good rhetoric hasn’t changed all that much since
Aristotle’s day. But, hearing it given in the words of people whom history has taught us
to hold in high regard can be inspiring; at least I’ve found it to be so, and I hope you will
too.

Lincoln has a lot to teach us about excellence in advocacy, including appellate
advocacy. He was, of course, famous as a trial lawyer. He handled an estimated 5,000
cases at the trial level in his 24-year legal career. But a historian with extensive
knowledge of his legal career, Professor Cullom Davis, has said that “[m]ost impressive
of all was Lincoln’s appellate practice before the Illinois Supreme Court[,]” where the future President had over 400 appeals. (C. Davis, “Abraham Lincoln and the Golden Age of American Law,” Historical Bulletin No. 48 of The Lincoln Fellowship of Wisconsin (April 12, 1992) (“Golden Age”), at 13.) In 1845 alone, Lincoln handled 39 state Supreme Court appeals, on top of his prodigious trial load. (Id.)

He was seen to be, and in fact was, a truly great appellate advocate. So, with the hope that we can appreciate and learn from his example, I’d like to discuss five lessons from Lincoln about appellate advocacy: first, put integrity first; second, be diligent in preparation; third, get to the point; fourth, focus on facts; and fifth and finally, please be clear, and alive to the beauty of language. That sounds like a lot, and it is. So let’s get started.

Lesson #1: Put integrity first, above all else.

The stereotype of the slippery lawyer is, it seems, as old as the legal profession. Lincoln himself observed that “[t]here is a vague popular belief that lawyers are necessarily dishonest.” (Lincoln Speeches and Writings 1832-1858 (“LSW vol. 1”) at 246.) In a document fragment bearing the title “Notes for a Law Lecture,” he called that impression “common, almost universal.” (Id.) And it is truly as old as it is common, including in our
country. Way back in colonial days, when Grafton County New Hampshire had to provide a census report to King George III, some wag wrote, “Your Royal Majesty, Grafton County . . . contains 6,489 souls, most of whom are engaged in agriculture . . . . There is not one lawyer, for which fact we take no personal credit, but thank an Almighty and Merciful God.” (Quoted by Deborah L. Rhode in *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 Geo. J. Legal Ethics 989, Summer, 1998.)

The idea that lawyers are troublemakers and not to be taken at their word continues to be fodder for endless mocking. I had a good friend tell me once that he was delighted to see that his six-year-old niece, Cassidy, was headed for a career in the law. When I asked what made him say that, he told of a time that Cassidy and her older brother Lennon had been in their back yard playing with some neighbor kids when a loud argument erupted. Their mom ran into the backyard to break up the fight and try to sort things out. She turned first to Lennon and asked what happened. He said Cassidy was being loud and bossy. Then the mother turned to Cassidy and asked, “Okay, what’s your version.” Cassidy said, “Well, Lennon started hitting Billy, and then he shoved me when I tried to stop him and he started talking really mean to all of us.” About that time, Lennon burst in, “She’s just lying!” The mom looked at the little neighbor boy, Billy,
who said, “I don’t know what she’s talking about.” Then the mother sternly looked at Cassidy again and said, “Have you been telling me the truth?” Cassidy paused and responded, “I thought you said you wanted my version.”

Too many attorneys look for a semantic loophole like that, to the detriment of their reputation and the reputation of our profession. And, frankly, it is just bad advocacy. Nothing is more disappointing to me professionally than to see a lawyer live down to the negative stereotypes. Judge Friedman warned against it and wisely emphasized, and I quote, “the facts must be stated with absolute accuracy. They cannot be overstated. If the record shows that three people attended a meeting, do not say ‘a large number’ or ‘many.’ Do not state as a fact something that is only an inference to be drawn from the facts.” (D. Friedman, “Winning on Appeal,” 9 No. 3, Litigation 15 (ABA Spring 1983).) He was no less emphatic about the need for perfect candor in describing applicable law.

There’s a simple utilitarian aspect to this advice. If you asked any of the judges here today, I’m confident they would agree that a lack of candor, once discovered, is devastating to an advocate’s ability to persuade. When Judge Taranto stood at this lectern three years ago to give the Friedman lecture, he said “there is ... a requirement [in advocacy] so basic that we take it for granted: [---] intellectual integrity. Make your
representations both affirmatively accurate and not misleading by omission. And this
cannot be a sometime thing: if a judge thinks you’ve been shady about one matter, the
adverse effect on your credibility about other matters is hard to contain.” (R. Taranto, 2015

Lawyers who forget this cannot prosper for long, even if they retain their license
to practice. It is trite but true that a lawyer’s credibility is his stock in trade. As Lincoln
put it to a young lawyer who had gone badly off track, “The court will not pronounce
your disbarment; you have done that yourself.” (A. Woldman, Lawyer Lincoln, at 197-98.) In
other words, in terms of crass self-interest, attorneys are in the persuasion business, and
if, based on your reputation, people are not inclined to believe you, you’ve got nothing to
sell.

Can I suggest, though, that to think of integrity in those terms is to miss a more
important point? It reminds me of the story of a lawyer who was asked the secret of his
success, and he said, “Sincerity. Sincerity is the great key. Once you can fake that
you’ve got it made.” To be real, integrity, which is the substance behind sincerity, must
be more than a means to an end. It is a way of being, a quality of character. And here
Lincoln is an obvious examplar. He described his approach to bearing another’s trust this
way: “I made it a point of honor and conscience in all things, to stick to my word, especially if others had been induced to act on it.” (W. Miller, *Lincoln’s Virtues* at 7; *LSW* vol. 1 at 38.) He was not called “Honest Abe” for nothing. He was determinedly and thoroughly honest in all he did – undivided and uncorrupted. That is integrity. Let that be our first and most important lesson about appellate advocacy, and indeed about life itself, from President Lincoln.

**Lesson #2: Be Diligent in Preparation.**

Lincoln worked under conditions that really did not allow for much in the way of preparation. Especially in his early practice, he was, as one of his biographers put it, “predominantly preoccupied with the simplest problems of country life.” (John P. Frank, *Lincoln as a Lawyer* at 6.) The same author noted that

> [t]he circuit legal life was simple in the extreme. The judge and the lawyers moved from town to town. When they arrived, [...] prepared, interviews might be undertaken with witnesses, and the case would rapidly go to trial. There are many episodes of Lincoln being brought into cases at the last minute.
One story has Lincoln being approached while sitting under a tree whittling a plug to replace a broken button on his suspenders and saying, in effect, I’ll be right with you, as soon as I can keep my pants up. (Id. at 23.)

So time and circumstances being what they were, opportunities for preparation were often limited. But in an important sense, even under those circumstances, Lincoln was well prepared, because he was extraordinarily driven to acquire knowledge and understanding. Carl Sandburg quotes him as saying in his youth, “The things I want to know are in books; my best friend is the man who’ll git me a book I ain’t read.” (Sandburg at 37.) He was a voracious reader, and he would go to great lengths, literally, to get his hands on a book. It was said that he once walked twenty miles to borrow one. (Id.)

With the possible exception of Ben Franklin, Lincoln is probably the most famous autodidact in our country’s history. He taught himself the law and encouraged others to take the responsibility to likewise learn for themselves. In 1855, he wrote to a young man, “If you are resolutely determined to make a lawyer of yourself, the thing is more than half done already. ... Get the books, and read and study them till you understand them in their principal features; and that is the main thing.” (LSW vol. 1 at 364.) He understood that there is no substitute for the sometimes tedious work of preparing. “The
leading rule for the lawyer, as for the man of every calling, is diligence,” he said. (Kelly L. Andersen “Remembering Lincoln the Lawyer,” Clark Memorandum, Spring/Summer 1998, at 7.) He also said, “there is not a more fatal error ... than relying too much on speech-making. If anyone, upon his rare powers of speaking, shall claim an exemption from the drudgery of the law, his case is a failure in advance.” (LSW vol. 1 at 245.)

Lincoln did not read law books for fun. He learned to be technically proficient so that he could accept the trust that others placed in him. Here is the intersection of integrity and a work ethic. In debunking the myth that Lincoln would not take advantage of a mere legal technicality to win, one of his biographers, after examining available court records, found that Lincoln “resorted to every legal device and technical advantage to win his cases.” (M. Steiner, An Honest Calling: The Law Practice of Abraham Lincoln, at 22.) Another said Lincoln could “split hairs as well as rules.” (Robert Bruce, quoted in C. Davis, “Abraham Lincoln and the Golden Age of American Law,” Historical Bulletin No. 48 of The Lincoln Fellowship of Wisconsin (April 12, 1992) (“Golden Age”), at 12.) He knew the rules so that he could use them. The judge I clerked for would have celebrated him for that alone. On more than one occasion, I’m ashamed to say, the judge had to respond to me as I questioned him about some issue in a case, “Did you read the rule, Kent? Did you read the [blankety-blank] rule?!” (The
judge was a gifted curser.) Lincoln was wise and diligent enough to arm himself in advance with the rules.

He also mastered what he needed to learn for each case. One of his law partners, Stephen T. Logan, observed that Lincoln, “would work hard and learn all there was in a case he had in hand.” (Quoted in Steiner at 40.) Appellate work, in which he excelled, if the amazing number of appeals he handled is any indication, allowed Lincoln more time to prepare. Another of his partners, William Herndon, said that “it was in the Supreme Court of the State of Illinois that [Lincoln] was a truly great lawyer ... .” (Steiner at 9.) An appeal allowed him to “read the record and gather up the facts of the case” and to “hunt up the law.” (Quoted in “Golden Age” at 13.)

Here again, on the topic of diligence and preparation, we have a loud “amen” from Judge Friedman, who said the following: “Thorough preparation is the key to a good oral argument…. Nothing is more effective than, after the other side has stated that the record contains no evidence on a particular point, his opponent can give a couple of record references to the evidence the other side has overlooked…. And only a well-prepared lawyer can quickly shift course and argue [a] point as effectively as he would have ... if
permitted to follow his original order of presentation.” (Daniel M. Friedman, *Winning on Appeal*, 9 No. 3 Litig. 15, 18-19 (1983.).)

So be like Lincoln in this too. He was prepared in general and, when circumstances allowed, very well prepared in the specifics of each case. He never stopped working at learning what he needed to know. He lived the advice of the great UCLA basketball coach John Wooden, who said, “It’s what you learn after you know it all that counts.” (Quoted by John K. Carmack in “Unmeasured Factors of Success,” in *Life in the Law: Answering God’s Interrogatories*, at 24.)

**Lesson #3: Get to the Point.**

About now, you might be thinking, “Does this guy have no sense of irony, listing ‘get to the point’ as item number 3?” What can I say, except that the earlier points seem to come first. But now that we’re at “get to the point,” let’s do.

I mean this bit of advice in two ways: first, and closely related to the last lesson, make sure you understand your case well enough to know what the central point is; and, second, when making your case to the court, get to the point as quickly as possible. Judge Friedman certainly understood and taught this. He said, “Do not try to cover every point in the case in oral argument. Select the two or three strongest points, and focus on
them. If the court is concerned with other issues, it will ask about them.” (Friedman, *Winning on Appeal, supra*, at 19.)

Lincoln was the very embodiment of this advice. He was not a grand theorist on legal matters. He was, on the contrary, a “realist – shrewd, practical, and matter of fact.” (Steiner at 22 (quoting Woldman).) Getting to the point was a feature of his preparation and his presentation of a case. It was, perhaps, the predominant feature of his mind. He wanted to get at the nub of things. Herndon described it as a search for cause and effect and he gave this example. Herndon came back from a trip to Niagra Falls and, though he knew Lincoln had seen the Falls, he still tried to paint a vivid word picture of its grandeur.

After well nigh exhausting himself in the effort, Herndon said, “I turned to Lincoln for his opinion. ‘What,’ I inquired, ‘made the deepest impression on you when you stood in the presence of th[at] great natural Wonder?’

“I shall never forget his answer, because it in a very characteristic way illustrates how he looked at everything. ‘The thing that struck me most forcibly when I saw the Falls,’ he responded, ‘was where in the world did all that water come from?’” (Quoted in Andersen at 9.)
Herndon noted that Lincoln “had no eye for the magnificence and grandeur of the scene, for the rapids, the mist the angry water, and the roar of the whirlpool, but his mind, working in its accustomed channel, heedless of beauty or awe, followed irresistibly back to the first cause. It was in this light he viewed every question. However great the verbal foliage that concealed the nakedness of a good idea, Lincoln stripped it all down till he could see the way between cause and effect. If there was any secret in his power this surely was it.” *(Id.)*

Another biographer, though not a contemporary, believed that “[t]he key to Lincoln’s [legal practice] is the key to his mind – directness of thought. His mind worked in terms of basic ideas presented as fundamentals.” *(Frank at 144.)* He was simply tenacious about understanding whatever problem he confronted. Lincoln alluded to this aspect of his mind when he said, “I am never easy when I am handling a thought, till I have bounded it North, and bounded it South, and bounded it East, and bounded it West.” *(Quoted in J. McPherson, *Tried By War: Abraham Lincoln as Commander in Chief*, at 2-3.)* Others might think outside the box. Lincoln wanted to understand the box itself and everything in it. To change the metaphor, Herndon said that his partner “not only went to the root of the
question, but dug up the root, and separated and analyzed every fibre of it.” (Quoted in id. at 3.)

Even Lincoln’s famous penchant for storytelling served his effort to get to the point. In a moment of self-reflection, Lincoln said, “I believe I have the popular reputation of being a story-teller, but I do not deserve the name in its general sense, for it is not the story itself, but its purpose, or effect, that interests me. I often avoid a long and useless discussion by others or a laborious explanation on my own part by a short story that illustrates my point of view.” (Quoted in D. Phillips, Lincoln on Leadership at 159.)

Taking a cue from Lincoln, I want to tell you a quick story to illustrate economy of expression and getting to the point. I used to read to pre-schoolers at a daycare center near my office. One day, I was reading a book of nursery rhymes to a little boy and we came across the illustration of Jack and Jill. The child, maybe four years old, recognized the picture immediately and he said, “Oh, I know this one. I’ll tell it to you.” Of course, I said, “okay; please do.” And this was his rendition: “Jack and Jill, fell down the hill. .... Damn.” That was it. No, preliminaries about going up the hill to fetch a pail of water. No wasted words about tumbling down after. Just right to the point, with a one-word assessment of the tragedy.
Lincoln’s ability to do that kind of thing allowed him to cut through the nonsense and win on the crucial questions in a case. What a marvelous quality for a lawyer to have! Juries loved him, certainly, but no wonder judges loved him too. And no wonder adversaries learned to fear him. At first they might mistake him for some rube giving a case away, but, as one of them put it, “by giving away six points and carrying the seventh, he carried his case. .. the whole case hanging on the seventh.” That focus and force of logic led the same contemporary to say that anyone “who took Lincoln for a simple-minded man would very soon wake up with his back in a ditch.” (Quoted in McPherson at 3.) That’s the power of knowing the point and getting to it.

**Lesson #4: Whenever Possible, Focus on Facts.**

Lincoln’s habit of focusing on what matters most naturally led him to make facts the centerpiece of his efforts to persuade. Now, every lawyer knows the old saying that, when the law is against you, talk about the facts, and when the facts are against you, talk about the law, and when the law and the facts are both against you, pound the table. Lincoln knew better than to ever do the latter. But with his great understanding of human nature, he also knew that, of the other two options, it’s best if you can tell a good story with the facts. People generally think concretely and like to come to their own
conclusions, so, while Lincoln could certainly speak powerfully about principles, he
became a master at persuasion through narrative. That ability was, I believe, one of the
primary ingredients of his greatness as a lawyer and as a politician.

Among the many excellent books on Lincoln is one entitled “Lincoln’s Virtues.”
In it, the author, William Lee Miller, discusses Lincoln’s famous 1860 appearance at the
Cooper Union in New York City. Lincoln had been a state legislator and, in the mid-
1840s, a one-term Congressman, but he had held no public office after that single term.
He had developed some fame during the 1858 race against Stephen Douglas for a U.S.
Senate seat from Illinois, which, as you know, Lincoln lost. However, as the debates
during that race proved, Lincoln had become an outstanding speaker. Now, early in
1860, filled with ambition but not yet a declared candidate for the Presidency, he was
getting a shot at prominence on the national stage. And, with the perspective of a hip-hop
Alexander Hamilton, he was not going to throw his shot away.

His New York audience fancied itself – as New York audiences still tend to – as
the height of sophistication. Here was this gangly character in an ill-fitting suit, with the
marked accent of a frontier hick, but he wowed them. Miller says, “The way [Lincoln]
won over his audience, as he worked his way through his manuscript, was not by
oratorical elegance but by sheer preparation and relentless clarity. … Lincoln’s speeches were marked by … logic, intelligence, and aptness. They were not dependent on the spontaneous excitement of the moment, as the orator’s flights often are, but were carefully written out beforehand. This particular speech … [began] with a factual argument so complete as to overwhelm … . … [I]t surely must have been an important part of the persuasive impact of the address … .” (Lincoln’s Virtues at 376-77.) Herndon’s practically contemporaneous view was that the speech was “devoid of all rhetorical imagery.” It was, instead, “constructed with a view to accuracy of statement, simplicity of language, and unity of thought. In some respects like a lawyer's brief, it was logical, temperate in tone, powerful - irresistibly driving conviction home to men's reasons and their souls.” (Quoted in “Abraham Lincoln Online”

http://showcase.netins.net/web/creative/lincoln/speeches/cooper.htm ) And may I say parenthetically, oh, that all lawyers’ briefs were of that description.

If you’ll bear with me, I’d like to share an excerpt from Lincoln’s introductory remarks in that speech, which is proof of Herndon’s assessment. The question Lincoln was taking up was federal control over the extension of slavery into new territories.

These are now Lincoln’s words:
In his speech last autumn, at Columbus, Ohio, as reported in "The New-York Times," Senator Douglas said: “Our fathers, when they framed the Government under which we live, understood this question just as well, and even better, than we do now.” I fully indorse this, and I adopt it as a text for this discourse. I so adopt it because it furnishes a precise and an agreed starting point for a discussion between Republicans and that wing of the Demo[crats] headed by Senator Douglas. It simply leaves the inquiry: “What was the understanding those fathers had of the question mentioned?”

What is the frame of government under which we live? The answer must be: “The Constitution of the United States.” …

Who were our fathers that framed the Constitution? I suppose the “thirty-nine” who signed the original instrument may be fairly called our fathers who framed that part of the present Government. It is almost exactly true to say they framed it, and it is altogether true to say they fairly represented the opinion and sentiment of the whole nation at that time. Their names, being familiar to nearly all, and accessible to quite all, need not now be repeated. I take these “thirty-nine,” for the present, as being “our fathers who framed the Government under which we live.”
What is the question which, according to the text, those fathers understood “just as well, and even better than we do now?” It is this: Does the proper division of local from federal authority, or anything in the Constitution, forbid our Federal Government to control as to slavery in our Federal Territories? [Close quote.]


There it is. Nothing fancy; just a workman-like framing of the issue to be addressed and a logical launch for the evidence he intended to present. And then he presented it, in careful detail, demonstrating that a clear majority of the Founders, those “thirty-nine,” understood the answer to the question in just the way he understood it and wanted his audience to understand it. It was masterful advocacy.

According to the New York Tribune, Lincoln was interrupted by frequent applause during his Cooper Union address. When the speech was later reprinted, the committee of New Yorkers who had invited him, the leaders of that proudly tough audience, said this by way of introduction:

From the first line to the last, from his premises to his conclusion, he travels with a swift, unerring directness which no logician ever excelled, an argument complete
and full, without the affectation of learning, and without the stiffness which usually accompanies dates and details. A single, easy simple sentence of plain Anglo-Saxon words, contains a chapter of history that, in some instances, has taken days of labor to verify, and which must have cost the author months of investigation to acquire. (Quoted in *Lincoln’s Virtues* at 384.)

Do you see? It was the clear statement of the issue and then the power of the facts themselves, skillfully marshaled and simply presented, that won over that audience and ultimately enough voters to put Lincoln in the White House. His careful preparation of a fact-based argument on an issue worth arguing about is an example well worth emulating. Let’s give Judge Friedman the last word on this topic. He said, “The facts are often the most important part of a brief. If the court can be persuaded to take a particular view of the facts, the legal conclusions may follow almost automatically.” (Friedman, Winning on Appeal, supra, at 16.)

**Finally, Lesson #5: Be clear, and alive to the beauty of language.**

We have the luxury of working with words, you and I. At times, I am guilty of forgetting how very fortunate that makes us, and when I fail to edit my own work carefully or to proof read something well enough, I find myself embarrassed. Perhaps not
as badly as one of my former partners, who sent a memo around our law firm years ago, at the dawn of word-processing and electronic document storage. Intending perhaps to brag a bit, but having failed to proofread and forgetting the curse of auto-correct, he told everyone in an email that the firm had decided to create a “central suppository of information” to better coordinate functions in the firm. This immediately prompted a response from another partner who asked, “with friends like these, who needs enemas?”

Now, I’ve never seen a typo or malapropism quite that entertaining in a brief, but I have, all too often, seen sloppy work that reflects poorly on the lawyers. Within certain bounds, that is forgivable, and it is forgiven, just as I hope some mistakes I’ve made in opinions will be kindly overlooked. Less forgivable, though, is a failure to think through an argument at all. You cannot make a clear argument that you haven’t thought through. And if you can’t be clear, well, then you can only win by accident.

Many experienced advocates and judges have noted that clarity is the cardinal virtue of a good brief. Going back to our diligence-in-preparation point, that virtue is only attained by hard work. Judge Friedman said, “A brief must be carefully and thoroughly organized before it is written. There is nothing worse than a rambling document that sounds as if it had been dictated off the cuff and filed virtually without
change. That kind of brief is difficult to follow, frequently repetitious, often internally inconsistent, and always unpersuasive.” (Friedman, Winning on Appeal, supra, at 16.)

Lincoln was not guilty of that kind of prose. In fact, because of the remarkable work ethic of his that we’ve discussed, he took a natural felicity for pithy expression and turned it into an awe-inspiring capacity to persuade. He understood the beauty and power of the English language. I mentioned at the outset that whenever I come here to Washington, if circumstances will allow, I go for a run along the Mall, that long expanse of grass, monuments, and museums that stretches from the Capitol to the Lincoln Memorial. I was able to do that recently, when I was in town for some meetings. By tradition, when I reach the end with the Lincoln Memorial, I run up the steps, and dance around Rocky-style for a minute. Then I settle down and go in to read the Gettysburg Address and the Second Inaugural. As I did that last month, I experienced once more the sense of reverence I always feel when visiting there. And I was again deeply moved by the magnificence of Lincoln’s prose. The clarity and care and craftsmanship evident in his writing is truly unsurpassed.

Many examples could be given, but let me note just one, in fact, just part of one. I know that the Gettysburg Address is what we all memorized in grade school, and it is a
marvel, but to me the most beautiful, the most staggeringly beautiful, and profound thing that Lincoln ever wrote is his Second Inaugural. In about 700 words (the second shortest inaugural speech – George Washington wins the prize for shortest with his own second inaugural) (Ronald C. White, Jr., “Lincoln’s Memo to Obama” in The Wilson Quarterly, Winter 2009, at 21), Lincoln manages to teach of justice, perseverance, and forgiveness in words that I cannot read without tears. The speech is overwhelming, scriptural not only in its cadences but in its spiritual content.

It is something like asking you to step back from the wonder of Niagra to consider the water volume, but in the very brief quote I’m about to share, I’d like you to attend to how spare the prose is. It is direct and unadorned, plain words suited to profound thoughts. It is a work of genius, but, nonetheless, we can try to learn something about writing from it.

Lincoln gave the speech in 1865. The Civil War was nearly over. He had led the country to the verge of victory against the rebellious South, and one might have expected some sense of self-congratulation or some mild crowing at the imminent end of the Confederacy. But there was none of that. Instead, he reflected briefly on the terrible carnage of the War, and, without placing blame, he spoke these immortal words of
forgiveness: “With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation’s wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.” (http://avalon.law.yale.edu/19th_century/lincoln2.asp)

We ought not let familiarity with those phrases blind us to their beauty. And what is beneath the beauty is simplicity and clarity. There is not a single wasted word. There is only elegance and inspiration. None of us is likely to be called upon to rally a divided nation in a great speech. But that does not mean that we cannot aspire to write beautifully. Ours is the not-insignificant job of helping people solve difficult problems that they cannot solve for themselves. Within that limited sphere, we can and should invest the effort to express ourselves with the kind of clarity that Lincoln mustered, and with an appreciation for the wonder of the English language we are lucky enough to have at our disposal. Please note: I am emphatically not encouraging flowery oratory. Quite the contrary. As the Cooper Union committee noted, it is far more impressive to have “[a] single, easy simple sentence of plain Anglo-Saxon words” than to have “an
affectation of learning,” and when that kind of simplicity and clarity is achieved, the result is often elegance and persuasion.

Well, one of the most often repeated bits of advice to advocates is “know when to sit down.” I’m sure there are many here who think I’ve already missed my cue on that, so I’ll wrap this up by saying thanks again for the honor of being with you. I’ve enjoyed thinking about the legacy of Judge Friedman and Abe Lincoln, a not-so odd couple when it comes to great advice for appellate advocates. Thank you.