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12-1-2006

Court Review: Volume 42, Issue 3-4 - Seizing the Accountability Moment: Enlisting Americans in the Fight to Keep Courts Fair, Impartial, and Independent

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Brandenberg, Bert, "Court Review: Volume 42, Issue 3-4 - Seizing the Accountability Moment: Enlisting Americans in the Fight to Keep Courts Fair, Impartial, and Independent" (2006). *Court Review: The Journal of the American Judges Association.* Paper 20.
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Seizing the Accountability Moment:

Enlisting Americans in the Fight to Keep Courts Fair, Impartial, and Independent

Bert Brandenburg

Did the 2005 uproar over Terri Schiavo's end-of-life case mark a peak in the recent surge of attacks on the independence of America's courts? When the case generated threats to impeach and even murder the presiding judge, and Congress passed a bill seeking to manipulate the case, broad public disapproval helped end the political crisis.[1] The President backpedaled—"I believe in an independent judiciary. I believe in checks and balances"[2]—and dispatched the Vice President and Attorney General to add their reassurances. Just a few months later, Supreme Court nomination hearings offered little hint of the rising tide of fury that courts and judges have been facing during the past decade.

Although American history shows that hostility to the courts sometimes rises and falls in cycles, it's unlikely that the current round will subside anytime soon. A generation of opportunistic politicians and special interest groups have nurtured a litany of grievances against the judiciary, aggressively stereotyping judges as enemies of mainstream values.[3] 2005 marked the national coming of age for an outrage industry that stokes anger over controversial decisions and paints judges as "tyrants in black robes" in order to raise money, turn out voters, intimidate and even impeach judges, and roll back the power of the courts to protect people's rights. The Schiavo fight was just one battle in a war that fits perfectly into the polarized politics and 24-hour media circus that is early 21st-century America. Court-bashing won't be fading away any time soon.

How can supporters reclaim the debate and shore up public support for the independence of the courts in the face of this onslaught? This article reviews the results of a major public opinion research project exploring the attitudes of Americans toward the growing tide of attacks on the courts. It suggests that Americans of all backgrounds are ready to reject the sloganeering and stand up for strong courts—if their defenders embrace both independence *and* accountability, and link the work of the courts to the values Americans care about most. It outlines a simple and powerful communications framework for defending courts from political interference, putting court-bashers on the defensive, and exposing radical attacks for what they are.

Above all, the research suggests that for America's courts, the road to independence goes through accountability. Accountability is not the only principle of an effective communications framework. But court-bashers have been abusing the definition of accountability for years, exploiting the reticence of judges and bar leaders who worry that judicial accountability is too complicated, weak, or unique a concept to defend in a public debate. If courts and those who care about them can learn to make accountability their friend and define judicial accountability properly before the other side corrupts it, they'll go a long way toward turning back the onslaught of attacks on the independence and impartiality of our courts.

The Justice at Stake Campaign[4] commissioned the opinion research firm of Belden, Russonello & Stewart to design and conduct a two-phase research project, including focus groups

This article is based in part on findings available in a Justice at Stake monograph, *Speak to American Values: A Handbook for Winning the Debate for Fair and Impartial Courts,* available at http://www.justiceatstake.org/files/SpeaktoAmericasValues2.pdf.

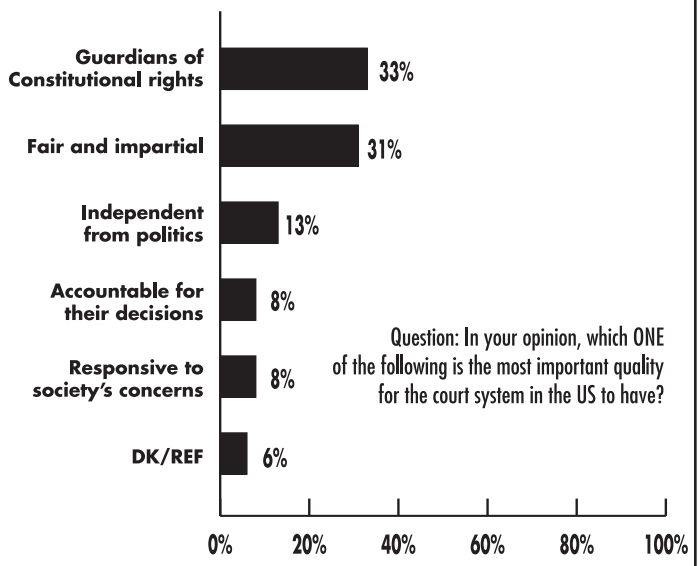
Footnotes

1. By a margin of 70%-27%, Americans called it "not appropriate for Congress to get involved" by passing a law requiring the federal courts to review the Schiavo case. *Federal Intervention in Schiavo Case Prompts Broad Public Disapproval*, Mar. 21, 2005 available at http://abcnews.go.com/images/Politics/978a1Schiavo.pdf.
2. David D. Kirkpatrick, *After DeLay Remarks, Bush Says He Supports "Independent Judiciary,"* N.Y. Times, Apr. 9, 2005 available at http://www.nytimes.com/2005/04/09/politics/09judges.html?ex=1270699200&en=ae896f7768d67eee&ei=5088&partner=rssnyt.
3. At the state level, a Justice at Stake search using Nexis revealed 27 news stories in 1998-2001 about calls for impeachment of state judges. In a comparable period, 2002-05, that number spiked to 45. At the federal level, in 1997 Congressman Tom DeLay said that he had a list of judges who violated their oaths of office and should be impeached. He said that judges "need to be intimidated" into upholding the Constitution. In 2003, he launched the House Working Group on Judicial Accountability, stating, "We in the House are putting America's judges on alert. We are watching you." In 2005, the chief of staff to Oklahoma Senator Tom Coburn, told a conference that, "I don't want to impeach judges. I want to impale them!"
4. Justice at Stake is a nonpartisan national partnership working to keep courts fair, impartial, and independent. The views expressed here do not necessarily reflect the opinions of Justice at Stake partner organizations.

and a national survey.[5] Survey respondents were queried about their confidence in major institutions (including the courts), their knowledge of how courts work, and the values they want their courts to uphold. After an initial test of their willingness to support stronger congressional checks on federal courts, they were asked to consider a variety of mechanisms to implement such checks, including jurisdiction-stripping legislation and impeachment. They were asked to consider whether the power of the courts should be curbed with respect to high-profile issues like gay marriage and the public display of the Ten Commandments in the courtroom. They were asked to react to common arguments made for and against curbing the power of the courts. At the end of the survey, after hearing the arguments on both sides, they were asked once again if they generally supported more congressional checks. (Previous opinion research suggests that the findings are equally valid for controversies involving state courts, and that indeed Americans do not often distinguish between the two).

The survey found that the American public continues to hold favorable but soft opinions about the courts and that the public's knowledge of the courts remains rudimentary. As an institution, the courts enjoy more of the public's confidence than does Congress. The Supreme Court receives the strongest vote of confidence (30% "great deal"; 46% "some" confidence) followed by federal courts (23%; 51%) and state courts (20%; 51%). Even individual judges (20%; 55%) garner more public confidence than Congress (12%; 52%).

MOST IMPORTANT QUALITY FOR THE COURT SYSTEM



Source: Survey by Belden Russonello & Stewart for Justice at Stake, July 2005 (N=1,286; margin of error 2.8%).

THE IMPORTANCE OF KNOWLEDGE AND EDUCATION

The survey revealed how critical it is to educate more Americans on how courts work. Less than half know that federal judges serve life terms, and bare majorities know that federal judges are appointed or can identify the three branches of the government. But the news is not all bleak: most Americans generally understand the Constitutional role of the courts and the opportunity for appealing court rulings, and that judges are bound by precedent in their decisions.

Most significantly, the research confirmed a direct correlation between knowledge about the courts and willingness to support them in the face of attacks. Those Americans with the most knowledge of how courts function tend to be among the most likely to reject attempts to reduce their powers. Having an understanding of the role of precedent, appeals, constitutional review, and other aspects of the courts appears to reinforce an appreciation for the courts and their role as constitutional guardian. Educating Americans about the courts isn't just good civics—it's smart politics as well.

General education levels are also important. A regression analysis of the results shows that the strongest predictor of opposition to or support for congressional checks is education level. As the opinion research firm observed:

> One story line is that the two most reliable predictors of a person's views on most social issues—political party affiliation and political ideology identification—give way to education when it comes to the courts. A highly educated person, whether that person is a Democrat or Republican, liberal or conservative, is more likely to be a core supporter of the courts, while a person with very little education is likely to be a court critic, regardless of other characteristics.

This finding has important implications for targeting. Court defenders should make it a priority to reach well-educated audiences and mobilize them to resist radical attacks on the courts.

Conversely, the greatest challenge will be to inform and engage Americans who have less education. This poll, and others conducted in recent years, suggest an additional complication: when lesser-educated Americans happen to be racial and ethnic minorities, their disaffection with the courts may well be based on factors that have little to do with ideological attacks on the courts. In a 2001-02 poll commissioned by Justice at Stake, 62% of voters, including nearly 90 percent of African-American voters, feel that "there are two systems of justice in the U.S. – one for the rich and powerful and one for everyone else."[6] This is consistent with other polling, which shows that people of color are generally less satisfied and more

5. In phase one, six focus groups were held in Spring 2005—in Raleigh, NC, Chicago, IL, and Columbus, OH—with voters who had at least some college education and who demonstrated some level of community or political involvement. A national telephone survey of 1,286 adults living in the U.S. was conducted from July 20 to July 30, 2005. The data have been weighted by race and age to bring them into proper proportions with the U.S. adult population. The margin of sampling error is 2.8 percentage points for the entire survey.
6. *See Speak to American Values: A Handbook for Winning the Debate for Fair and Impartial Courts,* available at http://www.justiceatstake.org/files/PollingsummaryFINAL.pdf.

cynical about the performance of the judicial system. While minority attitudes toward the courts are beyond the scope of this article, more work needs to be done to make judicial independence issues relevant to communities of color.

A BATTLE OVER VALUES

The research also uncovered evidence of a real battle over values, a contest far more sophisticated than talk-show shouting matches over slogans like "judicial activism." Indeed, one of the most encouraging pieces of news coming out of the research is that the core values that Americans want from their courts—fairness, responsibility, and protection of rights—require that the judiciary be independent from special-interest pressure. More specifically, in focus groups and on the survey, Americans consistently articulated these values in four ways:[7]

- A strong belief in the courts' role in protecting individual rights by upholding the Constitution;
- The priority of guaranteeing access to justice for all Americans;
- Desire for the courts to be fair and impartial, which means free from political influence or pressure once on the bench; and
- The need for accountability to ensure judges follow the law and Constitution and not their own personal beliefs.

Conversely, those who would like to weaken the role of the courts make headway when they are able to assert—unanswered—that judges are violating these values, either by ruling according to their own personal views or because they are not free from political influence. The challenge for court advocates is to show how courts honor the values Americans expect from them, and to show how their opponents would undermine those core beliefs. By focusing on these core values—and not becoming mired in debates over individual rulings, controversial issues of the day or slogans such as "judicial activism"—defenders of strong checks and balances can present a stronger case than those who would undermine them.

Indeed, supporters of independent courts may be heartened to know that the research shows that charges of "judicial activism," as ubiquitous as they may seem, have little effect on the attitudes of most Americans. It's a mistake to be obsessed about such charges or to be drawn into debates over the definition of activism. The charge of "judicial activism" does have a galvanizing effect on people who are already antagonistic to the judiciary but it doesn't tend to win new converts to the cause of weakening the courts. Similarly, defenders of strong courts should avoid being pulled into debates over the merits of controversial decisions or the hot-button issues that underlie them, like abortion, public display of the Ten Commandments, and marriage. When discussions focus on cases and controversies, it's easier to lose sight of the role that Americans want courts to play in a constitutional system.

WHO SUPPORTS THE COURT, WHO DOESN'T, AND WHO'S READY TO LISTEN?

The research found that many respondents fell into one of three categories:[8]

Core supporters: People who were most likely to support maintaining the power of the courts without hearing any information. A majority within each of the groups listed below opposed increased congressional checks when initially asked, and almost three in ten strongly disagree with increased checks:

- People with college education or more
- People earning $75,000 per year or more
- People who rarely or never attend religious services
- People who are knowledgeable about the courts

Most persuadable: People who are more likely to support the courts after being exposed to the arguments on both sides. By the end of the survey, a majority in each of these groups opposes increased congressional checks:

- Men over 40 years old
- Older baby boomers (between 50 and 59 years old)
- Liberals
- Independents
- Northeasterners
- Suburbanites

Court skeptics: Those least likely to support the courts after being exposed to arguments on their behalf:

- Black Americans
- Hispanics
- Less educated
- Lower income
- Less knowledgeable about the courts

It's telling that this last list does not include self-identified conservative frequent church attendees. While most people in this group initially express strong support for weakening the courts, many soften their position after hearing messages for and against congressional checks. After hearing both sides of the argument, the percentage saying they strongly agree with increased congressional checks drops 11 points (39% to 28%). The pro-courts messages that resonate with this segment remind them of the important role the courts serve as guardians of the Constitution and individual rights, and in providing access to justice for all.

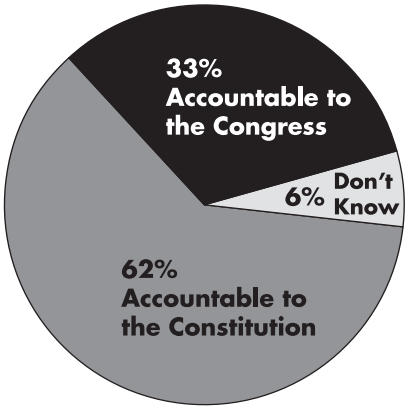
TESTING CHECKS ON THE COURTS

Since congressional attempts to limit the power of the courts have been in the news in recent years, the survey provided a useful opportunity to test Americans' reactions to such efforts. As a general matter, they value accountability very strongly: 81% want more accountability from the courts. "I feel anyone who is held accountable will probably do a better job," said one focus-group participant. So it's not surprising

7. *Id.*

8. *Id.*

SHOULD COURTS BE ACCOUNTABLE TO POLITICIANS OR THE CONSTITUTION?



Question: With whom do you agree more, those who say:
a) It is the job of Congress to hold the courts accountable and reduce abuses by judges, or
b) judges should be accountable to the law and the Constitution and not to Congress?

Source: Survey by Belden Russonello & Stewart for Justice at Stake, July 2005 (N=1,286; margin of error 2.8%).

that when respondents were asked at the outset of the poll, before hearing any arguments on either side, whether more checks on the power of the courts and judges were needed, they agreed by a margin of 54%-40%.[9]

Those who would limit the courts felt more strongly about their position than those who opposed them (31% strongly favored limits, 20% strongly opposed them). Initial support for increased congressional power was strongest among less educated people (37% strongly agreed), frequent churchgoers (36%), conservative frequent churchgoers (39%) and Southerners (38%). Partisan affiliation had little effect: Democrats (30% strongly agreed) and Republicans (32%) both initially leaned in favor of increased checks, as did moderates (28%), and independents (31%). Liberals were split on the issue (28% strongly agree, 26% strongly disagree). As might be expected, regression analysis shows that the strongest predictor of opposition to or support for congressional checks is education level.

In isolation, these findings could spell more trouble for the courts. But when Americans weigh the other values they want from the courts, and the specific remedies being proposed to make courts more accountable, they grow wary of attempts to curb their powers. For example, when asked to consider a variety of competing values, only 16% of respondents thought that the most important quality they wanted from courts was to be either "accountable for their decisions" or "responsive to society's concerns"— compared to 77% who chose "fair and impartial," "independent from politics," or "guardians of Constitutional rights."

These findings were reinforced by an additional question series that tested how Americans react to common messages advanced on both sides of the debate over whether Congress should impose more checks on the courts. When asked whether any of the following were excellent reasons to support such checks, respondents picked:

> "Too many activist judges are reinterpreting the Constitution to fit their personal views." (29% called it an "excellent" reason to support more checks)
>
> "When judges start changing the definition of marriage by allowing gay couples to marry, it is time for Congress to step in and check the courts." (29%)
>
> "Too many judges are making decisions that are out of 'mainstream America' like banning displays of the Ten Commandments, and it is time for Congress to step in and check the courts." (28%)
>
> "Too many judges are legislating from the bench and making laws instead of interpreting the laws." (28%)
>
> "Judges who are unaccountable to voters should not be allowed to make decisions that run counter to Americans' beliefs." (22%)

On the other hand, when asked whether any of the following were excellent reasons to oppose such checks, respondents picked:

> "We need strong courts to protect our rights under the Constitution and the Bill of Rights." (61% called it an "excellent" reason to oppose such checks)
>
> "We need strong courts to ensure access to justice/a day in court for all Americans." (56%)
>
> "We need strong courts to protect us from abusive actions by government/law enforcement." (46%)
>
> "Strong courts are necessary to balance the power of the Congress and President and it would be a mistake to upset this balance." (43%)
>
> "The courts are part of our democracy that has worked well for hundreds of years and we should not weaken it now." (41%)
>
> "Strong courts are a necessary check on extreme politicians." (39%)
>
> "We need strong courts as a check on the will of the majority, because the majority at any given time may want to pass laws that threaten the rights of individuals." (35%)

The comparison is striking—*every single message in opposition to more checks on the courts, even the weakest, bested every single message in support of more checks on the courts, even the strongest.* Indeed, after hearing messages from both sides of the debate, public support drops for the general idea of increased congressional checks on the courts. Overall support for the idea decreases five points from 54% to 49% and opposition to Congress as enforcers of judicial accountability rises five points from 40% to 45%.

Certain groups were more likely than others to curb their enthusiasm for congressional checks after hearing both sides,

9. *Id.*

including women, westerners, Democrats and moderates. Indeed, by the end of the survey, a majority of the following groups opposed increased congressional checks:

- Men over age 40 (57% disagree)
- People between 50 and 59 years old (54%)
- Liberals (55%)
- Independents (51%)
- Suburbanites (56%)
- Northeasterners (53%).

Conservative frequent church attenders softened their position after hearing messages for and against congressional checks. Their overall support for congressional checks dropped two points, but the percent saying they strongly agree with increased congressional checks drops 11 points (39% to 28%). Like other Americans, they are moved by messages that remind them of the important roles the courts serve as guardians of the Constitution and individual rights and in providing access to justice for all.

Americans were also asked to evaluate four ways that Congress could reduce the power of the courts. In every instance, they expressed less support for specific checks than they had for the general concept of increased checks. They clearly opposed stripping jurisdiction from the courts to hear certain kinds of cases (53% to 39%) and threatening judges with impeachment over an unpopular decision (63% to 32%). Indeed, a majority (53%) believes that if Congress "threatens judges with impeachment" based on their rulings "it will result in political intimidation" and "prevent the courts from being fair and impartial." However, they leaned in favor of summoning a judge to hearings before Congress to answer questions (51% to 40%) or even threatening impeachment over a series of decisions that many people disagree with (51% to 42%). In each instance, higher support for checks was expressed by racial minorities, people with less knowledge of how courts work, those with less education, and people earning less money.

THE IMPORTANCE OF ACCOUNTABILITY

One of the most important lessons of this research project involves the concept of judicial accountability, which is popular among all segments of the population. Supporters of strong courts can't afford to ignore it. Indeed, court-bashers have made accountability a staple of their message, seeking to portray judicial independence and its defenders as the enemies of America's mainstream values and populist heritage.

Of course, since courts must protect rights and offer impartial justice, judicial accountability is different than for executives and legislators. That's one of the reasons that judges, bar leaders, and other defenders of the courts ignore the topic, or grow almost apologetic when it is brought up. Courts are different, they say. That's true, but such responses come across as dismissive of accountability and plays into the court-bashers' trap. Americans feel strongly that courts have to be accountable, and they will reject any message to the contrary. This strong public belief in accountability—and the fact that Americans simultaneously demand a sophisticated blend of values from their courts—has powerful implications for the current national debate.

The crux of the question is this: *to whom should courts be accountable?* When this question was posed, Americans were decisive in rejecting accountability that smacked of political interference in their courts of law. More specifically, large majorities of Americans believe the courts should be accountable to the Constitution and law (62%) rather than Congress (33%). A plurality (42%) believes it strongly. Few demographic characteristics divide the population on this matter, and even among those groups giving congressional checks the strongest support, the percentage on the side of the law and Constitution is near 60 percent. Defenders of strong courts would do well to embrace accountability—to the Constitution and the Bill of Rights, not to politicians and special interests. They should remind Americans that court decisions must be published, and that they can be appealed to higher courts.

This finding is consistent with other parts of the research. As one focus group participant, a self-described moderate, put it: "Representatives are only in office for a short period of time, and the Constitution has been around for hundreds of years. So let's go with something that has been there for a while instead of someone who just got into office." In the survey, by a margin of 94% to 5%, respondents agreed that, "We need strong courts that are free from political influence." This finding is reinforced by Americans' revulsion at congressional meddling in the Terri Schiavo case.

CONCLUSION AND RECOMMENDATIONS

Americans are ready to reject political interference with our courts—if defenders of the courts use the right language to make their case. The research findings can be boiled down to five recommendations:

> *Stick to the core message:* In order to protect access to justice for all and our rights under the Constitution, we must defend fair and impartial courts from political interference.
>
> *Speak to American values:* Connect with a bipartisan majority of Americans by talking about the role of the courts in protecting individual rights and ensuring everyone a day in court.
>
> *Describe the threat:* Americans grow concerned when they hear about political interference with the courts, but they need to be educated about those threats.
>
> *Embrace accountability:* People want courts to be accountable—but to the Constitution and the law, not to politicians and special-interest groups.
>
> *Don't be distracted:* Don't get trapped debating controversial decisions or slogans like "judicial activism."

If more bench, bar, and civic leaders are willing to speak to American values, and invoke time-tested principles, they can help check the "outrage industry" that hopes to wage a permanent campaign against the courts.

But the findings also suggest implications that go well beyond communications frameworks and today's debates. It's fair to say that the long-term health of the courts is dependent on Americans' civic education generally and knowledge of the courts in particular. Here, too, there are encouraging signs; in the wake of growing concern about the state of civics educa-

tion in the schools, a growing number of states are reexamining their educational standards and considering strategies for improvement. Last year, the American Bar Association created a Commission on Civic Education and the Separation of Powers, co-chaired by former Supreme Court Justice Sandra Day O'Connor and former U.S. Senator Bill Bradley, to boost education on the separation of powers, with a particular emphasis on the role of an independent judiciary. One of the commission's tasks is to review current curricula on separation of powers in U.S. civics, government, and history classrooms in order to recommend improvements and model programs.

Increased education outside the classroom will also be critical: in the mass media, in small gatherings, and everywhere in between. Many courts and bar associations work hard to educate the public. They would do well to increase these efforts wherever possible, and to view them as part of a permanent campaign, not a short-term fad. The fact is, those who would tear down the courts have been fighting for a generation. They are committed to a long-term plan to make courts less fair, impartial, and independent. Defenders of the courts need to look beyond the Schiavo battle, and commit to long-term investments in education designed to protect our system of checks and balances.

Bert Brandenburg is the Executive Director of Justice at Stake. Brandenburg was the Justice Department's Director of Public Affairs and chief spokesperson under Attorney General Janet Reno. He served in policy and communications positions for the U.S. Secretary of Agriculture, the National Performance Review, the 1992 Clinton-Gore campaign and presidential transition team, Congressman Edward Feighan, and the Progressive Policy Institute. Brandenburg was Vice President of International Programs for the Santéch Institute, and served as an observer during the 1990 Pakistan national elections. Brandenburg serves on the National Ad Hoc Advisory Committee on Judicial Campaign Conduct and the Coalition Alliance of the American Bar Association's Coalition for Justice. He received his J.D. and B.A. degrees from the University of Virginia.

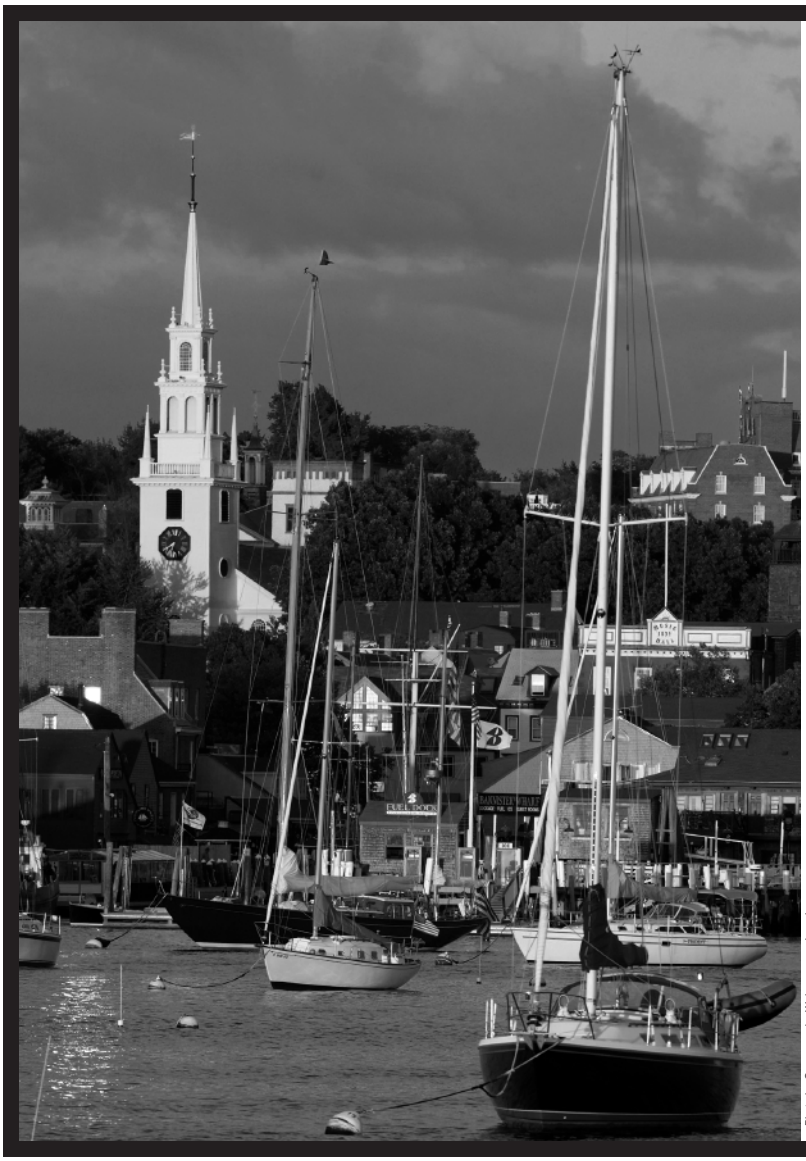


Photo by Onne van der Wal www.vanderwal.com

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- Keynote luncheon speaker: Rhode Island Chief Justice Frank Williams, author of *Judging Lincoln*, on Abraham Lincoln
- 3-hour workshop with Justice-at-Stake campaign leaders

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- Opening Dinner/Reception

Friday, April 20

- Board of Governors Meeting
- Luncheon
- Justice-at-Stake Workshop

Saturday, April 21

- Board of Governors Meeting

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