

## COMMENTARY

### Presidents as Consensus Builders: *A Reflection on Political Skills*



By David Fairman

see much more complex people—and much more skillful consensus builders—than the sound bites of the primary season can convey.

Though sometimes criticized as “polarizing,” Hillary Clinton has been successful as a bipartisan legislative bridge-builder on health care and veterans’ issues. While casting himself as an outsider bringing change to the Illinois State Senate, Barack Obama worked closely with a tough crowd of Democratic Party insiders to pass a groundbreaking campaign finance disclosure law. John McCain has earned his reputation for independence by advocating bipartisan legislation (on climate change and immigration) and passing it (on tax reform, campaign finance reform, rules on torture), while arguing that his core values remain Republican and conservative.

Do the candidates have what it takes to translate their successes as legislators into Presidential consensus building? In our evolving thinking, Presidents and other senior public executives need a distinctive set of political skills to drive public decision making forward from goal-setting through strategy development to implementation and impact. The

Every four years, the U.S. Presidential campaign provides pundits and the public a fresh opportunity to decide what qualifies a candidate to be the nation’s political leader. This year, the leading candidates are offering “experience,” “change,” and “straight talk.” But reading between the lines of their carefully pruned biographies and message-tested stump speeches, we

five skills we’ve identified are “political” in the sense that they focus not on the substantive analysis of issues or the mechanics of electoral, legislative or regulatory process, but on identifying, engaging and influencing a wide array of public stakeholders, in highly contested terrain, to manage conflicting interests, change incentives, build agreements and maintain coalitions.<sup>1</sup>

**1. Translating Vision into the Right Priorities:** the ability to turn a broad vision into a set of ambitious but achievable goals, and to adjust and reframe those goals in a constantly changing landscape of public concerns, political risks and opportunities.

Though we ask Presidents to act on principle and resist compromising their core values, we also want them to get things done. For Presidents and other leaders, priority-setting is both a question of vision and a matter of judging “ripeness”—the combination of public demand for solving a problem, the availability of policies that seem likely to help, and a political balance favorable to action.<sup>2</sup>

1 The five skills reflect our ongoing work with the United Nations to develop a set of political competencies for top UN development representatives.

2 John Kingdon argues that the alignment of these “three streams” is necessary for effective action on major public issues. See his *Agendas, Alternatives and Public Policies* (Harper Collins, 1984).

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As for vision, the historian Henry Adams wrote that the President “resembles the commander of a ship at sea. He must have a helm to grasp, a course to steer, a port to seek.” Arthur Schlesinger, among the greatest presidential scholars, agreed with Adams, noting “The Constitution offers every president a helm, but the course and the port constitute the first requirement for presidential greatness. Great presidents possess, or are possessed by, a vision of an ideal America. Their passion is to make sure the ship of state sails on the right course.”<sup>3</sup>

Leaders must also translate vision into clear and concrete priorities for action. Skilled leaders set priorities through a finely honed process of dialogue with key constituencies, examining the political or organizational landscape for issues on which action seems possible and desirable, and testing new ideas and themes.

After his election, Bill Clinton judged right on prioritizing deficit reduction as an area of common ground in a closely divided country, despite strong Republican opposition to higher taxes. In retrospect, he and Hillary Clinton erred in making health care reform their next top priority. Though their vision was clear, they misjudged the political forces for and against reform, and were too confident in advocating a complex policy solution whose impacts on cost, coverage and competition were hard to understand. Even the greatest Presidents can overreach: FDR’s initiative to sway the Supreme Court by adding Justices became the infamous “court packing” controversy, and Roosevelt discovered that public support for New Deal reform did not give him a mandate to remake the judiciary.

**2. Assessing Stakeholders:** the ability to identify the key political actors (in government, civil society, business and communities) involved in a complex issue, assess their interests, capabilities and constraints, and find out what arguments and incentives are most likely to influence their views and their behavior.

<sup>3</sup> Arthur Schlesinger, “Rating the Presidents: Washington to Clinton,” at *The Choice* 2004, PBS Frontline.

Once priorities are set, Presidents and other leaders need to deepen their understanding of the players whose support is going to be necessary to enable progress, those whose opposition could stymie it, and those who could be mobilized as allies or opponents depending on the way the issue is framed and proposals are presented.

Hillary Clinton and Barack Obama recently stirred controversy over the contributions of Martin Luther King, Jr. and President Lyndon Johnson to passing the Civil Rights Act of 1964. To historians of that epic struggle, one thing is clear: the two leaders were one of the finest political assessment teams in modern American politics. During the winter and spring of 1964, the two men and their deputies talked many times, trying to determine where key Senators stood on the draft bill, and what it would take to gain a 60-vote majority on the Senate floor. In considering what would move those Senators, they assessed a huge range of stakeholders, from the die-hard Southern segregationists in the Senate to Southern white clergy, Northern liberals and TV anchors. They also considered and debated dozens of possible amendments to the draft legislation, in light of their assessment of how key Senators and their constituencies would respond. Without that focused and ongoing process of joint assessment to drive strategy and action, the two could not have achieved victory.<sup>4</sup>

**3. Crafting a Strategy for Influence:** the ability to plan and structure a process for influencing the decisions or behavior of other actors. Strategy includes the selection of tools/approaches (coercion, persuasion, advocacy, negotiation, coalition and consensus building), sequencing (what actions to take in what order), and substantive choices (what facts, proposals, options and questions to explore with individuals and groups during the process).

On any major issue, advancing Presidential priorities requires a clear strategy for building support among key stake-

<sup>4</sup> The story is well told in Nick Kotz’ *Judgment Days: Lyndon Baines Johnson, Martin Luther King, Jr., and the Laws That Changed America* (Houghton Mifflin 2005).

### CBI Reports

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The Consensus Building Institute (CBI) is a not-for-profit organization created by leading practitioners and theory builders in the fields of negotiation and dispute resolution. CBI works with leaders, advocates, experts, and communities to promote effective negotiations, build consensus, and resolve conflicts.

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holders—whether the Congress, the American people, or foreign governments. The choice of strategy can vary enormously depending on the issue, the target of influence, and the decision making arena. LBJ was famous for his ability to move the Congress through carefully calculated sequencing (figuring out which legislators would be most influential with their peers, and then developing strategy to influence them). Facing a Democratic Congress, Ronald Reagan relied heavily on regulatory coalitions on issues where he could not drive legislation.

Presidents can also change the incentives for Congressional leaders by appealing directly to their constituencies, as Harry Truman did in his campaign against the Republican “do nothing Congress” in 1948. After the Republicans retook Congress in 1994, Bill Clinton developed a strategy of “triangulation” between increasingly polarized Democratic and Republican party leaders, using his persuasive powers with the voting public to limit losses on the issues most important to him.

In foreign policy, the President has more decision-making latitude and more coercive power. Richard Nixon and his Secretary of State Henry Kissinger ended the Vietnam era and changed the global balance of power by opening diplomatic relations with China, then offered détente to the Soviet Union from a position of strength. Jimmy Carter staked his Presidential capital on bringing Egypt and Israel to a peace agreement, and succeeded at Camp David through a careful sequence of relationship building, understanding the interests of both Menachem Begin and Anwar Sadat in depth, creating new options to deal with the most contentious issues, and using very substantial pressures and incentives to close the deal. After Saddam Hussein’s invasion of Kuwait, George H.W. Bush and his Secretary of State, James Baker, used a coalition building strategy to isolate Iraq at the UN and gain commitments by more than 30 nations to a multinational force, before giving Saddam an ultimatum.

Whether acting as a negotiator or as a mediator, the President has to chart an agreement-seeking strategy using the basic elements of issues, interests, options and alternatives, and designing a sequence of actions to make some choices less viable and others more attractive for the other players.

**4. Choosing the Right Roles:** the ability to choose and enact a role that key political actors will see as legitimate and appropriate. The role may have to shift subtly or swiftly in response to changes in the situation and/or in the set of actors involved.

Successful presidents earn and maintain the trust of the public and other leaders using not only acute analysis and strong will, but also authenticity and empathy.

Presidents play a number of formal roles: as Commander in Chief, senior executive of the Federal government, foreign policy maker, and legislative negotiator, among others. Cross-cutting these functional roles is a set of process roles: advocate, convenor, facilitator, and mediator. Effective advocacy (using what Presidential scholar Richard Neustadt famously called “the power to persuade”) is certainly a critical skill for Presidential and other forms of public leadership, but not the only one.

Frequently, the President must act as a convenor, and sometimes as a facilitator or mediator. When John F. Kennedy struggled to respond to the intelligence that the USSR had placed missiles in Cuba, he began by playing the role of convenor. He pulled together a small group of trusted advisors—the ExComm—to assess the situation and the motivations of Soviet and Cuban leaders. He facilitated their discussions, raising questions without taking positions, and encouraging the group to generate options. Only after managing and guiding an intensive deliberation within the ExComm did he take on the role of advocate, speaking publicly—and with great impact—on the nature of the crisis and the U.S. response.

**5. Using Personal Influence:** the ability to communicate, negotiate, advocate, facilitate and/or mediate effectively with other actors to advance a set of goal(s), taking account of others’ personalities and life histories, professional and institutional roles, cultural norms, and relationships with other actors.

Whatever role the President chooses to play, building consensus requires not only good analysis, but very strong interpersonal and group management skills. The presidency, like many other senior positions in the public eye, requires a strong, tough ego. But successful presidents do not lose touch with the reality that they must earn and maintain the trust of the public and of thousands of other leaders, and that doing so requires not only acute analysis and strong will, but also authenticity and empathy.

The modern Presidency has featured several insightful leaders who used their “emotional intelligence” to great effect: FDR had an uncanny ability to sense the public mood and build on it through his fireside chats and public speeches; Ronald Reagan used gentle humor to deflect the criticism of his most vociferous opponents; and Bill Clinton’s voracious appetite for meeting, understanding and winning over people of all political persuasions helped him advance his agenda and defend his Presidency. There have, of course,

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been Presidents with problematic interpersonal skills: Woodrow Wilson and George W. Bush arguably suffered from acute limitations on their ability to work with those who disagreed with them; and Richard Nixon's deep personal insecurity led him to extraordinarily petty, vindictive, and ultimately illegal acts.

The man who may have been America's greatest President, Abraham Lincoln, was certainly one of our finest practitioners of interpersonal politics. Doris Kearns Goodwin's *Team of Rivals* portrays him harnessing the egos, ambitions and wounded pride of his two rivals for the Presidency, William Seward and Salmon Chase, to preserve the Union. Lincoln succeeded by showing them unfailing respect, taking them deeply into his confidence and offering them more power than they had expected.

Over the course of the war, Secretary of State Seward went from seeing Lincoln as a lowbrow, cunning country lawyer to recognizing in him the greatest statesman the country had known. When Treasury Secretary Salmon Chase could no longer contain his own ambitions, and began to undermine Lincoln in large and small ways, Lincoln offered him an exceptionally graceful exit (from the Cabinet and from his political career) to the post of Chief Justice of the Supreme Court. And when Lincoln finally decided that General George McClellan's case of "the slows" and outright defiance of his orders were causing the Union to lose the war, he relieved him of command in a way that demonstrated unambiguously Lincoln's authority as Commander in Chief, while honoring McClellan's service and thereby preserving the unity and spirit of the army.

To be effective in a context where they have surprisingly little power to direct, but enormous power to influence, Presidents must translate vision into a set of political priorities, assess stakeholders and ways to influence them, craft strategies for advocacy, negotiation, coalition and consensus building, and use interpersonal skills to manage potentially explosive tensions with allies and opponents. When they perform these tasks with skill, they increase the chances that the ship of state will hold to their chosen course. When they falter, the ship may too.

As this year's campaign for the Presidency continues, we should as attentive to the candidates' management of complexity, conflict and ambiguity as to their policy statements and self-presentations. Governing is very different from



*L-R: Montgomery Blair, Caleb B. Smith, Salmon P. Chase, Abraham Lincoln, William H. Seward, Simon Cameron, Edward Bates, Gideon Welles. (Harper's Weekly, July 1861)*

campaigning, and the political skills laid out here are probably a better guide to performance in office than the set of "principled positions" that the candidates are endlessly repeating to win the battle of sound bites.

Equally important, we should ask whether candidates who seem less able to build broad consensus will be capable of overcoming some of their limitations—or turning to others in the White House and in the Cabinet—to become more effective in office than they appear in the campaign. Public leaders unquestionably can develop their coalition and consensus building skills over time, but the next President will face a raft of pressing challenges at home and abroad on Inauguration Day, and is likely to have short honeymoon in a country eager for change.

In the remaining months of the campaign, we should be seeking more clarity from the candidates on how they will move from platform to priority. Whoever wins, we hope that the new President will quickly translate a broad platform into a clear focus on a few "ripe" issues; spend the time to understand deeply the full range of stakeholders, interests and options on each issue; seek bipartisan support as a core element of strategy; and use personal engagement to build confidence in Presidential leadership and in the political process. ★

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# Beyond Negotiation Training: CBI Offers More in 2008

Over the last fifteen years CBI has offered on-site negotiation training for hundreds of agencies, corporations, and non-profit organizations and groups. We've worked with organizations and leaders in more than 50 countries. Our tailored courses are grounded in careful application of the Mutual Gains Approach, with up-front assessment of the kinds of negotiation challenges each audience is likely to face. We use an ever-growing library of simulations and cases—and our expertise in writing them—to directly tackle the negotiation problems at hand.

Over the years we've found ourselves applying our expertise within recurring contexts—such as supplier-buyer relationships, technology negotiations, regulatory and compliance negotiations, and dealing with angry publics. We've also found over the years that training alone is typically not enough to create and maintain real organizational improvement in negotiations.

CBI is now pleased to formally offer the following eight new courses for organizations and groups, to complement our basic and advanced courses in negotiation. For each course, we'll provide assessment at the front end to ensure a well-tailored approach; and coaching and support on the back end, so that organizations and groups can implement negotiation processes and incentives that enable more effective negotiations and results. ★

## Building A World Class Negotiating Organization

Negotiation today is an organizational capability. Organizations that want to achieve sustainable improvements in their negotiations must understand how to align existing organizational processes, structures, and incentives with an approach that can create value while protecting relationships. Building individual insight and skill is a start, but without larger changes, individual negotiations often return to their organizations find themselves swimming against strong currents, or getting lost among competing priorities and initiatives. This course introduces a rigorous and proven approach to negotiating more effectively, and highlights an organizational development model for implementing effective negotiation practices.

## Collaborating in Competitive Environments

Businesses operate in competitive environments. Success requires creating and claiming value for shareholders and employees, while protecting relationships with customers, partners, and suppliers. Using simulations, video, and cases, this course focuses on the skills and insight required to sustain collaboration in environments where revenues and margins often overwhelm other corporate values, and where internal negotiations are often as difficult as external ones.

## Negotiating Effective Regulatory Agreements

Do you face skeptical regulators across the negotiating table? Are you confronted with regulators (or, as regulators, with companies and other stakeholders) who just won't take "no" for an answer? What if you had a better understanding of how to negotiate regulatory agreements that better met all parties' interests, thereby enhancing value and increasing the stability of the agreement? This course is designed to teach negotiation to those at the regulatory negotiation table. Through case studies, exercises, and extensive interaction, you'll be better prepared to negotiate in this unique, constrained environment.

## Dealing with An Angry Public: Turning Controversy into Joint Gain

Leaders and managers today are often faced with skeptical and angry public groups, as well as aggressive media. When faced with projects that involve potential risks, decisions that have harmed others, or actions where values collide, you may face any angry public. What should you do? When you've done something that has made people angry, how can you protect your brand and credibility? How do you preserve or enhance your reputation, engage your stakeholders, and exercise leadership in times of crises? This course is designed to teach leaders practical and proven ways to leverage these critical moments of anger into opportunities for joint gain.

## The Art and Artifice of Public Apology

"I'm sorry." These may be simple words, yet public apology is anything but straightforward. Depending on your perspective, an apology could signify "admissible evidence to prove wrongdoing," "brand management," "necessary to move forward," or "an essential part of regaining trust."

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Using real-world case examples, exercises, videos, and reflections this course focuses on helping government and corporate leaders to understand when to apologize, when not to, and how to do so in ways that build credibility and protect relationships.

### Negotiating Partnerships for Sustainable Development

Designing projects and policies for sustainability is becoming a baseline expectation across the business, government and non-profit sectors. In practice, decision makers and stakeholders face challenges: how to integrate economic, environmental and social goals, what to do when trade-offs are necessary, and how to manage their relationships to produce and sustain joint gains. This course uses the Mutual Gains Approach and CBI's consensus building expertise to teach strategies and tools for engaging stakeholders, producing agreements on project design and policy development, and translating fragile relationships into partnerships for sustainable development.

### Negotiating with Internal and External Auditors: Sarbanes-Oxley and Beyond

The typical auditor must establish a set of controls to mitigate risks, and then seek to independently verify adher-

ence to those controls. Too often, auditors develop controls in isolation and then seek to assert power over the organization by demanding compliance, often at an enormous hidden cost to the organization. Is this process really an effective approach to managing risk and enabling the organization to function effectively? This course shifts the paradigm toward collaborative, internal negotiation of controls and audits to ensure effective risk management and compliance.

### The Mutual Gains Approach to Developing Requirements and Specifications

Successfully developing project requirements and specifications depends on effective negotiation. In the rush to build, requirements are "gathered" with limited involvement from affected stakeholders. This course tackles the challenge of designing effective internal negotiations and outlines best practices for the manager or leader who must communicate and negotiate in this context.

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*For more information about CBI's new courses, please contact Joshua Gordon at [jgordon@cbuilding.org](mailto:jgordon@cbuilding.org) or call (617) 844-1128.*

## THEORY, IN PRACTICE

# Assessing the State of Conflict Assessment

Many mediators and consensus builders have incorporated conflict assessment in their toolkits for identifying parties and issues, and designing collaborative processes. While methodologies differ, most practitioners follow a process similar to that outlined in *figure 1*. CBI recently reviewed over 40 conflict assessment reports from around the world on behalf of an organization hoping to advance public sector dispute resolution in Japan. Our study revealed a wide variety of approaches. (See *figure 2*.)



By Todd Schenk

The assessment reports we reviewed range from eight to eighty-six pages, are based on ten to one hundred and ninety-eight interviews, cost from two thousand to one hundred and fifty thousand dollars, and were typically contracted independently of full-

blown mediation processes. The assessments fell into a several topic areas: education, energy, environment, industry, land use/municipal affairs, resource management, and transportation.

### Initiating the Assessment

The sponsors initiating and often funding assessments ranged from government agencies to Indian tribes. In most cases a sponsor, which was one of the primary stakeholders, hired an assessor, defined the conflict assessment process with the assessor, and suggested the first round of people to be interviewed.

However, in some cases a core group of stakeholders formed beforehand to hire the assessor and weigh-in on the process from the early stages. An example is the Federal Outdoor Advertising Control Program<sup>1</sup> case, in which a core group of representative stakeholders, called the Assessment

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<sup>1</sup> Prepared by the Osprey Group for the U.S. Institute for Environmental Conflict Resolution.

Resource Group, was formed at the beginning to represent diverse interests and help guide the process.

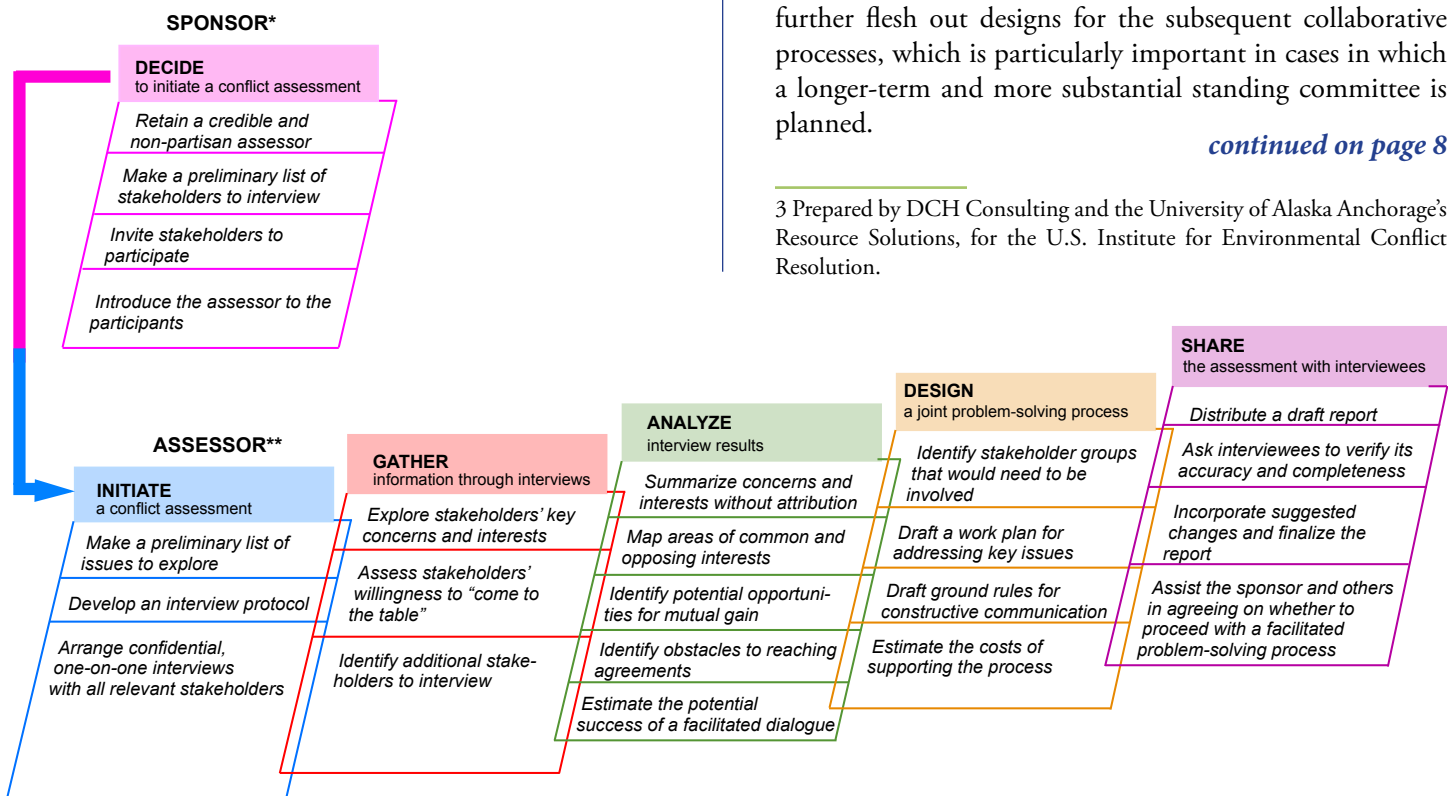
In other cases an independent organization initiated the process. For instance, in the case of Barriers to and Opportunities for Mutual Gains Negotiation and Conflict Resolution in Land Use Decision-making on Martha's Vineyard Island Regional Case Report,<sup>2</sup> the Lincoln Institute of Land Policy and CBI initiated the assessment "to better understand the specific barriers to local officials in using mediation and, prior to the dispute, the principles of collaboration and mutual gains negotiation, to prevent disputes or at least resolve or manage them early."

## Interviews

In most of the cases we examined, the assessor asked an initial set of stakeholders to recommend others that should be contacted; this process was repeated until all relevant parties were identified. Interviews were typically conducted one-on-one to support confidentiality, allowing parties to be freer in their comments, and to avoid the arguing and reactive commenting that might happen in a group interview session. Interviews were also usually conducted in-person, which served to make the interviewees more comfortable, facilitate interactivity, and give the process a greater air of importance.

2 Jointly initiated by the Lincoln Institute of Land Policy and CBI.

**Figure 1** *How To Conduct a Conflict Assessment*



\*A sponsor is any individual or organization interested in assessing the feasibility of a facilitated dialogue.

\*\*An assessor must be neutral, impartial, and experienced in dispute resolution.

The number of people interviewed in assessments varied widely, but the number of interviewees did not always correlate to the comprehensiveness of the assessment. Some assessments involved shorter interviews—often in the 20-minute range—with more stakeholders, while others involved more intensive interviews with a smaller group. Only 20 people were interviewed within the very complex Situation Assessment and Recommendations for Government-to-Government Consultations between Interior Alaska Tribes and the U.S. Department of Defense on Military Impacts in Interior Alaska<sup>3</sup> process, for example, but interviews ranged from two to eight hours in length. The reasons for choosing one approach over the other seem to include stylistic and sponsor preferences, the cohesion of stakeholder groups, and the nature of the situation.

## Additional Tools

In some cases, other tools were used to collect information. The Federal Outdoor Advertising Control Program assessment included focus group discussions with 50 invited stakeholders; 'public listening sessions' with over 200 individuals in attendance; and a Federal Register docket through which approximately 1,800 comments were submitted. Telephone surveys, web-based questionnaires, and literature reviews (including case studies) were used in other assessments. In some cases, the interviewing phase was followed up with a clinic or workshop.

These additional interventions confirmed and expanded upon the issues identified, and provided opportunities to further flesh out designs for the subsequent collaborative processes, which is particularly important in cases in which a longer-term and more substantial standing committee is planned.

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3 Prepared by DCH Consulting and the University of Alaska Anchorage's Resource Solutions, for the U.S. Institute for Environmental Conflict Resolution.



**Figure 2** *Assessment Approaches*

Types of clients	International organizations, government departments and agencies (Federal and State), commissions and management bodies, municipalities, Indian tribes, stakeholder interest groups, non-profit organizations, and private foundations.
Topic areas	Education, energy, environment, industry, land use, resource management, and transportation.
Range of number of interviews	10–198 (individually and in groups)
Timeline range	2 weeks—over a year
Length range	8–86 pages
Cost range	2,000–150,000 USD

### Standards

While there are no concrete standards as to how conflict assessments are conducted, the scopes were bounded in some cases by external rules and regulations. Most assessments conducted for federal agencies are, for example, subject to the government's Negotiated Rulemaking Act of 1990. This statute is not overly prescriptive, but does include some procedural recommendations, including timelines, proper representation, and the requirement that the agency publish its intentions and collect comments via the Federal Register.

### Issues Versus Process

Most assessments both examined the perspectives held by the various stakeholders and considered the viability and potential structure of a mediation process. Some, however, focused more on one or the other.

The State of the Carbon Cycle Report<sup>4</sup> focused exclusively on collecting input from stakeholders for the preparation of a larger report. By contrast, the BLM Resource Management Plan Amendment for Otero Mesa<sup>5</sup> assessment did touch upon stakeholder issues, but primarily assessed the feasibility of a mediated process and outlined potential alternative systems for the management of oil and gas resources in the area.

The processes that assessments recommended varied widely. Some assessments focused on particular one-time

or limited scope issues and thus prescribed ad hoc committees to engage in mediation then dissolve. Other assessments were conducted around broader concerns or sets of issues that cannot be resolved but rather need to be managed indefinitely; these assessments tended to prescribe standing committees with indefinite or much longer-term mandates.

In most cases, the assessor initially compiled a draft assessment report, which anonymously summarized the interview findings, and distributed it back to those who were interviewed for their review and feedback. Then, once the report had been updated in light of any clarifications, it was usually given to the sponsor and often, though not always, publicly disseminated without further editing. Through this process, the assessor aimed to accurately reflect the range of feedback collected.

It is important to note that while most assessments recommended some form of mediation—often with caveats and warnings of potential roadblocks—many did not. The BLM Resource Management Plan Amendment for Otero Mesa is an example of a case in which the assessors recommended against a mediation process at the time.

### Conclusion

Conflict assessment, as a distinct practice from the broader consensus building process, provides an effective way to ensure that the issues and players are identified, assess the feasibility of proceeding with mediation or other consensus-building interventions, and consider whether or not the assessors are suitable as mediators, should a process proceed. Particularly in more extensive multiparty disputes, a conflict assessment provides an invaluable way to avoid problems such as overlooked stakeholders or issues and the ineffective use of resources in subsequent interventions, and is therefore a good investment. ★

*Todd Schenk is an associate at CBI while pursuing a Master's degree in Urban Studies and Planning at MIT. This article was written under the direction of Patrick Field, Managing Director at CBI and Associate Director of the MIT-Harvard Public Disputes Program.*

## New CBI Office in Washington, D.C.

The DC CBI office will be relocating to 1201 New York Avenue, Suite 625, Washington, D.C., 20005. Merrick Hoben and Juliana Birkhoff are leasing space from Bickerman Dispute Resolution a full service alternative dispute resolution firm devoted to providing individuals, corporations, public interest organizations and governments an alternative to litigation and trial.

Dr. Birkhoff and Mr. Hoben will be working on developing more Mid-Atlantic and National projects for CBI and looking forward to possible collaborations with John Bickerman.

<sup>4</sup> Prepared by CBI for the federal government's Climate Change Science Program.

<sup>5</sup> Prepared by RESOLVE for the U.S. Institute for Environmental Conflict Resolution at the request of the Bureau of Land Management's Resource Advisory Council.



# Mediator as Juror: A Day in Middlesex County Superior Court



By Pat Field

In 1215, King John encoded juries into English common law by approving Article 39 of the Magna Carta, which ensures that “no freemen shall be taken or imprisoned...except by the lawful judgment of his peers.” Later, trial by jury was forever enshrined in the U.S Constitution. Thus, in January of 2008, I found myself on a jury panel for Middlesex County Superior Court—feeling a little less stately than King John, but doing my duty nonetheless.

And just as an introductory video greeting by Chief Justice Marshall promised, the experience proved to be rich and thought provoking.

The case seemed simple. A commercial landlord sued his former tenant of twenty years for breaching the lease terms. What struck me was the remedy the landlord sought: approximately \$10,000 for repairs to restore the office space to “normal wear and tear” condition, and, yes, over \$40,000 in legal fees.

After an initial angry phone call about late rent, the parties “lawyered up” and communicated almost solely through written correspondence. Only much later did they try meeting face-to-face to work things out, though unsuccessfully.

As a mediator and citizen, I asked myself: how could two professionals—not to mention the judicial system—let a case of so little cash value wind its way all the way to a jury trial at such great legal expense? Frankly I felt like the parties were wasting the Court’s time, the jurors’ time, and my tax dollars.

Yet the case reminded me why mediators have such an important, but difficult, job in supporting justice, civil society and social capital. Many parties simply cannot find a way out of escalating conflict and assume that justice can only be served in the courts. This case was a perfect example of several time-tested conflict lessons.

**Serving on a jury reaffirmed to me that justice doesn’t simply emanate Solomon-style from on high.**

## Emotions get the better of us.

Here were two well-educated, well-off individuals who let their anger, hurt, offense, and desire for revenge get the best of them.

## Communicating is the hardest thing to do.

A second phone call, an attempt to be conciliatory, or a short email asking to set a different tone didn’t happen. Somehow, the simplest thing to do—talk—became the hardest.

## Sunk costs sink us further.

Clearly, the plaintiff was trying to recover his sunk costs, but had passed the point of no return. From an economic standpoint, he had failed to get out when it made dollars and sense (pun intended) and was embarrassingly digging himself deeper and deeper.

## Taking responsibility is harder than fighting over it.

The facts, as we came to understand them, suggested that this dispute could and should have been resolved months earlier—to everyone’s benefit. Yet the parties chose to point fingers and relinquish their responsibility for resolving the dispute efficiently, fairly, and expeditiously.

## Justice is sought but not necessarily served.

The parties, both angry, both determined that they were right, decided to take their case all the way to jury. Each was going to get a verdict in his favor one way or another! But the reality was that several partial settlements were offered, winnowing the total amount down, and the judge retained the right to rule on legal fees. We, the jury, were left with a seemingly trivial case, wishing we could punish them both for being so foolhardy.

Serving on a jury reaffirmed to me that justice doesn’t simply emanate Solomon-style from on high. Here’s what I learned.

- **Justice is not divined; it is negotiated.** As our jury deliberated, I realized that this was in fact a negotiation, constrained as it might be by our charge and the evidence. Was the contract valid? Did the defendant actually breach the contract? If so, how

much were the damages really worth? When parties hand over their dispute to a jury, they are not avoiding a serious negotiation, they are simply leaving it in the hands of strangers.

- **Justice is blind.** As jurors, we couldn't ask questions. We couldn't get at the parties' deeper motivations, feelings, and emotions (like a mediator might). We did issue a verdict, but we did so blindly, due to our exceedingly limited information and understanding.
- **Juries deliver verdicts, not necessarily justice.** I feel our verdict was fair and reasonable, given what we knew. My fellow jurors (all twelve) took the case seriously, considered the evidence, and did their best to arrive at logical conclusions.

However, we probably didn't deliver much on the larger front of justice. We couldn't help the parties find a resolution that left them better off in terms of lower costs, less bitterness, and greater self-respect. We couldn't censure the lawyers for not doing a better job of restraining their clients' emotions. We couldn't issue an admonition against abusing the courts with cases that should be settled by reasonable people elsewhere. We couldn't aid society by helping its citizens take responsibility for their actions, emotions, and disputes.

So, mediators, next time you sit with parties who are rearing to go to court, I encourage you to keep in mind that court is really settlement, formal as it may be, by other means. And to the future parties of such a suit, it would be well to remember that there is no certainty—and in fact much reason to doubt—that a judge and jury will issue a better verdict or clearer justice than you might arrive at by your own making. ★

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*Pat Field's article first appeared as a blog entry on our website. Read more news and views in real time—and subscribe via RSS—at [cbuilding.org](http://cbuilding.org).*

## May 2008

### Upcoming Executive Education Courses

*Presented by CBI Staff through the Program on Negotiation at Harvard Law School*

#### Program on Technology Negotiation

How do you optimize the outcome of complex technology negotiations? It is difficult to do using standard negotiating strategies that may not account for different levels in skill and education, the fog of technological uncertainty, or parties who expect to be rewarded in ways that seem out of step with their organizations' interests.

Join CBI and the Program on Negotiation for a popular seminar, The Program on Technology Negotiation, on May 8-9, 2008. You'll explore how to manage analytical complexity, identify the psychological biases that thrive in conditions of uncertainty and ambiguity, and address organizational capacity and alignment issues effectively. Most importantly, you'll take away a practical process model for your next technology negotiation.

#### Dealing with an Angry Public

How can you avoid disaster when your organization has triggered a crisis that threatens your reputation and your image? What specific steps can you take to turn consumer anger into opportunities for gain?

Find out at a special two-day seminar for Senior Management offered through the Program on Negotiation at Harvard Law School. CBI's Patrick Field, Lawrence Susskind, and Michael Wheeler (Board member) will share techniques for managing or avoiding public disputes – and for dealing with the media – that you can apply whether you are attempting to defend controversial decisions or trying to protect your organization from the consequences of an accident or a mistake.

Visit [www.pon.harvard.edu](http://www.pon.harvard.edu) or call (617) 495-1684 more information.

## CBI Gets a New Look Online

CBI recently revamped its website ([www.cbibuilding.org](http://www.cbibuilding.org)) in order to take advantage of new technologies. The site, which is now easier to navigate, includes searchable, full-text articles and case studies, plus news, announcements, blog entries, and—shortly—podcasts. We hope you enjoy the new site and find it useful. Please share your feedback and suggestions by sending an email to [cbi@cbibuilding.org](mailto:cbi@cbibuilding.org).



# CBI Project Updates



## Durham, New Hampshire Mill Plaza Study

CBI's Patrick Field and associate Adam Knowlton-Young are finishing up a final report with the Durham, New Hampshire Mill Plaza Study Committee and the AIANH 150 team of professional architects, planners, and landscape architects. This report reflects dozens of public meetings, workshops, and focus groups with the Durham community help over the past 16 months. The community has built a terrific vision for the development of a village center in the home of the University of New Hampshire. Town Council will receive the final recommendations in May 2008.



## Cape Hatteras National Seashore

CBI staff Patrick Field and Ona Ferguson, with consultant Robert Fisher of Fisher Collaborative Services are facilitating the ongoing Cape Hatteras National

Seashore Negotiated Rulemaking. The process is designed to develop Off-Road Vehicle regulations for Cape Hatteras National Seashore, located on the Outer Banks in North Carolina. The negotiated rulemaking committee began meeting in 2008 and as of early April is deep into its work reviewing how different parts of the beach are used currently and identifying management strategies that could be implemented going forward.

## Science and Technology Advice for Congress in the 21st Century

CBI, in conjunction with the Keystone Center, have just completed their report on Science and Technology Advice for Congress in the 21st Century. Interviewing over twenty five current Congressmen and women, staff, and former elected officials, CBI/Keystone have identified possible options for Congress improving its own access to technology assessment through innovative institutional arrangements. The report was sponsored by the Lounsbery Foundation.

## Bureau of Indian Education

CBI's Stacie Smith has completed the final convening report regarding Department of the Interior's (DOI) Bureau of Indian Affairs (BIA)-funded school facilities construction as identified in the No Child Left Behind Act of 2001 (NCLB Act). This report was

written based on views and opinions expressed by two-hundred (200) people with an interest in BIA-funded school facilities construction during confidential interviews with our interview team. The report compiles the findings from these interviews and recommends that the Bureau initiate the regulatory negotiation on these issues. CBI's recommendations include detailed suggestions on committee process and membership, including strategies for increasing the opportunities for input for the 184 bureau-funded schools.

## Resolving Land Use Disputes Courses

Resolving Land Use Disputes, the series of courses CBI offers annually in conjunction with the Lincoln Institute of Land Policy, continues to be offered around the country to full houses. CBI staff members Merrick Hoben, Patrick Field and Ona Ferguson plus Senior Advisor and CBI Founder Larry Susskind taught the courses this past year, offering a two-day regional course in Salmon, ID in October and an advanced three-day course in Cambridge, MA in November. CBI is always looking for organizations interested in serving as local hosts for these trainings. Please contact Ona Ferguson if you have questions or would like to learn more about these courses ([oferguson@cbuilding.org](mailto:oferguson@cbuilding.org)).



## Preserve America Summit

At the Preserve America Summit in New Orleans, Louisiana in 2006, Summit participants discussed ways to improve the structure of Federal government historic preservation programs. This spring, through a discussion facilitated by Juliana Birkhoff, a small panel of experts will review previous advice and information, discuss options and build consensus on improvements to the structure of the federal historic preservation programs. If they reach consensus they will send their suggestions to the Advisory Council on Historic Preservation.

## Air Toxics

CBI is continuing its work with EPA's Indoor Air Division on it Community Leadership Training Initiative. On-going projects include assisting a native American community in Fort Peck, Montana to reduce asthma and improve indoor air, and facilitating an on-going stakeholder dialogue for Federal, state, and industry group representatives concerned with radon, who are developing joint initiatives to reduce the risks of radon-induced lung cancer.

# CBI Welcomes New Staff Members

*CBI is pleased to introduce our two newest staff members. Joshua Gordon, who focuses primarily on corporate assessment, coaching, and training, joined CBI last July after an extensive search. Juliana Birkhoff, an experienced mediator, transitioned from RESOLVE to CBI last October following a joint announcement by CBI and Gail Bingham, President of RESOLVE.*

## Joshua A. Gordon



Joshua A. Gordon, Senior Associate at CBI, helps organizations to address negotiation challenges that arise in diverse practice areas and sectors, including financial services, information technology, compliance, outsourcing, quality assurance, demutualization, sales, media, and advertising. He also helps organizations to prevent

and resolve litigation and to resolve conflict, both with partners and within the organization.

A dispute resolution professional for more than fifteen years, Mr. Gordon is a negotiation trainer, facilitator, mediator, and process consultant, with experience in corporate, legal, governmental, and community environments. Past and current clients include John Hancock Financial, Manulife Financial, WPP, Massachusetts Department of Social Services, and the Massachusetts Office of the Attorney General.

Mr. Gordon has a Bachelor of Arts in Psychology and Sociology from the University of Massachusetts Amherst, and is recipient of both a Master of Arts degree and a Graduate Certificate from the University of Massachusetts Boston Program on Dispute Resolution. He is completing his law degree at the Suffolk University Law School. ★

## Juliana Birkhoff

Juliana Birkhoff, a Senior Mediator at CBI, is an experienced mediator, facilitator, dispute resolution trainer, and scholar. She combines her theoretical understanding, research experience, and group learning and collaboration skills to flexibly respond to complex group planning, problem solving and decision making challenges. In her 22 years of experience as a mediator and facilitator, she has worked with federal, state, and local level government as well as consumer, community, grassroots, and public interest groups. She has designed and conducted a variety of collaborative and consensus-based multi-stakeholder dialogues, workshops, and scientific review processes designed to improve communications, develop group learning, integrate complex information and provide input into state or federal plans or policies, develop recommendations, or create consensus plans and policies. She has particular experience in facilitating and mediating complex scientific and technical issues in politically charged contexts.

Dr. Birkhoff is an experienced trainer and teacher. She has designed and conducted a wide variety of negotiation, collaboration, and conflict resolution trainings for non-profit, governmental agencies and advocacy groups. Her training focuses on helping technical and scientific experts to work productively in collaborative processes and to expand the



capacities of stakeholders, agency conflict resolution specialists, and collaborative leaders to handle team leadership, collaboration, and conflict resolution.

She has extensive background in multi-disciplinary research on conflict and conflict analysis, in particular focused on the use of collaborative decision-making processes in politically charged and technically complex issues. Her previous research projects include best practices for integrating complex scientific and technical information into collaborative processes and how stakeholders and collaborative leaders integrate different ways of knowing in collaborative processes.

From 1993 until 1996, Dr. Birkhoff held a teaching appointment at the Institute for Conflict Analysis and Resolution, George Mason University. As well as teaching graduate courses in conflict resolution theory, research, and practice, she supervised students clinical and research experiences in communities and organizations. ★