

# The Clough Center Report

## THE CLOUGH CENTER FOR THE STUDY OF CONSTITUTIONAL DEMOCRACY

### From the Director:

This summer, I traveled for the first time to Israel as a participant in a week-long study tour for a small group of social scientists sponsored by Combined Jewish Philanthropies (CJP) of Boston. The trip, which took us to Tel Aviv, Jerusalem, the Lebanese, Syrian, and Gaza borders, Galilee, and the West Bank, was fascinating and enjoyable on so many fronts. In this brief letter, I would like to share a few thoughts on three of our sessions with a particular resonance for those interested in the promise and problems of constitutional democracy.

The first is our group's meeting with Palestinian Prime Minister Salaam Fayyad at the Palestinian Authority's headquarters in Ramallah. The conference room in which we were welcomed, and the various offices around the Authority's headquarters, prominently displayed portraits of Yasser Arafat, which was striking to me, at least, as a Long Island Jew. The Arafat portraits were reminders of the role of the sometimes violent and morally questionable revolutionary leaders who are often critical actors in founding struggles. As a later inheritor of this struggle for Palestinian nationhood, Fayyad is a very different person, who is positioned to, and chose to, assume a

quite different role. A World Bank economist with a Ph.D. from the University of Texas at Austin who worked under the Bank's head Stanley Fisher (a former M.I.T. professor, and the current head of the Bank of Israel), Fayyad sees his mission chiefly as a builder of institutions, both economic and political. Fayyad, moreover, is a firm believer that it is important to work on establishing functional Palestinian institutions of state and civil society even before the founding of the Palestinian State itself, thus enlarging the prospects for success and stability from its inception.

Interestingly, Fayyad's commitment to institutionalism derives in significant part from his recognition of the wellsprings of Israel's success, where The Jewish Agency worked in advance of the nation's 1948 founding to build institutions which subsequently served as the foundations of the Jewish State. Our group met with the current chairman of The Jewish Agency, Natan Sharansky, in the Agency's circa 1930s art deco headquarters just blocks from the Old City in Jerusalem, and heard his thoughts



on nation-building as people-building. As an institutional center of the Zionist Movement, the Agency's major focus throughout its history has been the relationship between the Jewish diaspora

and the Jewish state. Sharansky, a brilliant and heroic physicist -- and legendary Soviet dissident (he spent almost a decade in Gulag prisons, much of the time in solitary confinement, where he held onto sanity by playing elaborate chess matches with himself in his head) -- Sharansky introduced us to recent immigrants to Israel from Russia, who shared their own understanding of themselves as Jews, and their thoughts and feelings about leaving their homes and families to build new lives in the Jewish state.

The difficulties of sustaining a successful constitutional democracy, even in a mature, prosperous, and technologically advanced democracy were apparent in our meeting with the former Chief Justice of the Israeli Supreme Court, Aharon Barak. Through his audacious and activist leadership of Israel's highest court, which aggressively forged itself into a

*Continued on page 2*

## “From the Director”

Continued from page 1

constitution-making, policy-making, and rights-protecting body, Barak became one of the world's most celebrated jurists. That a court should assume such wide-ranging powers, acting often on its own initiative, is problematic in a democracy, where, as a matter of democratic theory, such powers (rights-protection largely excepted) should properly lie in the people's elected representatives. But even the staunchest critics of Barak's judicial activism are forced to concede that he had chosen to step in to govern in large part because of the dysfunctionality of Israel's system of government, where a fractious scheme of proportional representation in a parliamentary system renders any government coalition fragile, and increasingly captive to the polity's most radical and intransigent members. Particularly in light of the challenges Israel is facing, not only at home, but also on the world stage, sensible constitutional reform seems to be an imperative – yet, somewhat depressingly – nowhere in sight.

What Israel does have in abundance – world perceptions notwithstanding – is an abundance of astute home-grown analysis and a teeming diversity of opinions. There, arguments on all sides of the most pressing questions are aggressively hashed out. Currently, however, the nation's institutions make it difficult for the country to avail itself of the fruits of this vibrant democratic culture and thought.



Ken I. Kersch

## French Anti-Terror Official Calls For International Cooperation

The Clough Center's relationship with the Foundation Alliance Française continued this spring with a lecture by French antiterrorism Judge Jean-Louis Bruguière, who addressed a large audience of Boston-area students and local news media in BC's Heights Room. The European Union's liaison to the Terrorist Finance Tracking Program at the U.S. Treasury Department, Bruguière detailed the development of radical Islam in the West. He noted that in France, its adherents have risen in recent years by thirty percent.

In fighting terrorism, Bruguière explained on behalf of his nation that: “France has always considered placing the fight against terrorism within the framework of the law as a basic premise. Whatever the circumstances, we [France] have never yielded to temptation to resort to special legal means.” He argued that a “law and order” approach that sets up special procedures or uses extra legal means plays into the hands of terrorists, is politically questionable and is, in the long run, inefficient. That said, Bruguière did note in response to audience questions that judges have a much freer hand under French law in investigating and prosecuting terrorists than they do in the United States, which has a much more extensive commitment to the rights of criminal defendants and to the separation of powers.

Democracy's strength against radical Islamic terrorists, Bruguière insisted, stems from its commitment to the protection of civil liberties and its respect for the law: “to renounce these values would be to play into

the terrorist's hands.” Although careful not to criticize the Bush administration (which he noted was operating under challenging circumstances, and with whom he worked closely and productively) Bruguière praised the two executive orders setting out special procedures for dealing with terrorism that were issued by President Obama shortly after taking office.

The judge explained that the world remains a very dangerous place – more dangerous than most people realize. Major institutional challenges remain in the anti-terrorist fight. For example, EU security arrangements are not currently integrated, with authority remaining with each member country. There is no real common police force in Europe, despite many European initiatives to change that. This lack of integration, Bruguière insisted, hampers the kinds of communication and coordinated action that is essential to deal effectively with the problem.

## Integrating Americans, Past and Future

Also at the Clough Center this spring was Kristi Andersen of the Maxwell School of Citizenship and Public Affairs of Syracuse University. Her talk, “Incorporating Immigrants into American Civic and Political Life” explored the integration of immigrants in six U.S. cities and the switch from political parties to non-party integrating forces.



JUDGE JEAN-LOUIS BRUGUIÈRE

## Clough Center Supports Research, Civic Service

Each summer, the Clough Center provides Civic Internship Grants for Boston College students working in typically uncompensated work on behalf of government, non-profit, or other civic organizations. This summer, the Clough Center awarded seven such grants. Among the recipients were Chris Terris (interning for U.S. Representative Paul Ryan of Wisconsin), sophomore Chris Fitzpatrick (the Irish Department of Justice, Dublin), and Gregory McGee (the African Community Education Program in Worcester). Graduate students were once again awarded Graduate Research Grants and Summer Stipends

providing assistance for graduate and professional school students with expenses associated with work on projects related to the study of constitutional democracy. Fifteen graduate research grants were awarded, supporting a range of work, including work by Rachel Ball (Ph.D Candidate, History) who is rethinking the conventional wisdom on the rise of Hindu nationalism and examining the ways in which the 1950s and 1960s were critical in the emergence of Hindu nationalist politics, and Laura Kathryn Baines-Walsh, also of the history department, received support for her research on the process of Americanization, or more specifically

Southernization, of Lutherans in the North Carolina piedmont. In the political science department Ph.D. Candidate Hillary Thompson is examining the incidence of obscenity enforcement on the local and state level in a legal system increasingly focused on national regulation.

Professors Alan Wolfe and Robert Faulkner of the political science department were awarded Faculty Research Grants to hire students to work with them on projects exploring Political Evil (the topic of Wolfe's next book) and Making and Keeping a Liberal Democracy: Planners and Statesmen of the American Republic. (Faulkner's current book project). The Center welcomes applications for each of these type of grants each spring.

## Eminent Harvard Historian Draws Crowd

“Is accurate history possible?” asked Bernard Bailyn, Professor Emeritus of history at Harvard University, two-time Pulitzer Prize winner, and one of the nation's foremost historians, at the outset of a rare public lecture hosted by the Clough Center and delivered to a full house of attendees ranging from BC undergraduate students to faculty from other universities, and members of the general public. Bailyn's address, titled “When Historians Get it Wrong: The American Constitution, For Example,” was co-sponsored by the Boston College Legal History Roundtable, and made possible by the Roundtable's chair, Mary Bilder.

Bailyn began by criticizing historians for the air of inevitability they bring to history: many modern historians see the Constitution, for example, not only as sacred but also as an inevitable



BERNARD BAIYLYN

product of its times. In fact, the Constitution very nearly didn't happen, and only came together because as a matter of chance, arising out of happenstances, and a series of auspicious accidents. Bailyn argued that the Constitution arose in four distinct stages: drafting, ratification, amendments, and President George Washington's first term. There was no grand, overarching design throughout the drafting process, he insisted; instead, its “main purpose was to deal with specific abuses of power.”

As an example, Bailyn offered the second clause of section six in Article One, the restriction against holding multiple governmental offices. Inclusion of this clause was

first defeated, although the clause was secretly dropped in at a later time. This essential restriction against abuses of power was underestimated by the delegates, and very nearly was not included.

Bailyn also related a tale of happenstance and political intrigue essential to the Constitution's ratification. During ratification, John Hancock claimed a case of gout in an attempt to avoid taking a position on ratification. Only a last-minute political deal got him onboard—leading to a ratification vote by a wavering Massachusetts, which was critical in pushing New York's ratifying committee toward passage. This assured critical northern support. “The Constitution almost wasn't ratified, but quickly became sacred,” he concluded, leaving his audience to draw their own conclusions about whether, under these distinctive circumstances, such status is truly warranted.

# Center Brings Scholars, Students Together in Conference on Obama and National Security

This past spring, the Clough Center hosted its first major academic conference on “President Obama, National Security, and Executive Power.” Organized by BC’s Marc Landy (political science), and George Brown (currently the acting dean of BC Law School), the conference’s attendance exceeded all expectations. Local media, Boston area scholars, and members of the BC community created an often standing-room-only crowd in the Heights Room of Corcoran Commons.

Clough Center Senior Fellow and renowned political scientist James Q. Wilson kicked off the conference with a keynote address in which he sharply criticized efforts by the Obama administration to engage in diplomatic negotiations with nations like Iran. He argued against what he saw as the weakened position of the Obama administration on the world stage, as contrasted with the more assertive Bush administration.

The conference’s first panel featured National Public Radio’s Mara Liasson chairing a discussion amongst George Mason University’s Hugh Hecla, Yale Law School’s Akhil Reed Amar, and Landy. The panel’s general consensus was that Obama’s first term closely resembled a hypothetical third term by Bush. Liasson noted

that while the rhetoric shifted between administrations, there has been little change in substantive policy.

Hecla looked at the constitutional law courses that President Obama taught at the University of Chicago to shed light on his current approach to executive power. Despite siding with the Supreme Court in executive power rulings, Obama has already made frequent use of signing statements and invoked the state secrets privilege to prevent the release of information concerning extraordinary rendition, Hecla noted. He added that, while Obama had enormous success in campaign management, he has failed to realize its essential difference from executive management.

Landy agreed with Wilson’s keynote, although he was more sanguine about Obama’s promise than was Wilson. Landy argued that Obama’s attempts to shift rhetoric—abandoning the “war on terror” metaphor, refraining from use of the labels “rogue state,” or “Islamic radicalism”—is an important tool in the battle against terrorism, even if it is not being properly used. “Who’s afraid of Obama? Not Ahmadinejad, not Attorney General Holder,” Landy said with a chuckle, here coming closer to Wilson, alluding to the Iranian president and a perceived fallout

in the prosecution of Guantanamo detainees. Drawing heavily on comments by the 15th century Italian political philosopher Niccolo Machiavelli, Landy recommended that Obama appear as a lion, that he be feared rather than loved.

“It’s foreign policy, stupid,” Yale’s Akhil Reed Amar provocatively argued in his remarks. The Presidency was designed as a foreign policy office, he explained, as many early presidents were either generals or former Secretaries of State. Amar continued with the theme of a divide between rhetoric and action, claiming that in the modern democratic world, there must be a unity of the two in order to win over voters.

The panel’s commenter was BC Law School Assistant Professor Richard Albert, who described Obama’s campaign rhetoric as one of redemption after eight years of downturn. Obama the candidate had accused the Bush administration of violating separation of powers and abusing human rights, Albert said. Though the speeches indicated disagreement, Obama has more or less followed the same course, such that it remains to be seen whether the “rhetoric of redemption was uttered in conviction or disingenuousness,” he said. A spirited question and answer period followed, with BC professor Peter Skerry calling Bush’s war mask “a paper tiger.”

Benjamin Wittes, Senior Fellow at the Brookings Institution, began his

*Continued on next page*



BENJAMIN WITTES

## “Obama Conference”

*Continued from previous page*

lunchtime address by expressing discomfort with the conference’s developing theme of continuity vs. change in the exercise of executive power between the Bush and Obama administrations. Wittes claimed that there are elements of both continuity and change to be found, with neither amenable to soundbite summation. Wittes argued that, in fact, the biggest change with respect to executive power took place during the middle years of the Bush administration; Obama is in line with the practices of the second half of the Bush administration.

Wittes advocated looking at the question through four different lenses of “continuity and change.” The first considers what substantive powers the President claims. The second looks at the theoretical basis for their exercise. Wittes argued that, third, attention should be paid to the rhetorical manner of the President in talking about his powers. Fourth, and finally, we must look to the ways in which the President tactically deploys those claimed powers. Wittes argued that continuity in the claimed substantive powers between the Bush and Obama administrations has been very strong—both Bush and Obama claimed the same powers. The deepest area of change has been rhetorical, “There was a chest thumping quality to the previous administration’s rhetoric” has disappeared from Obama’s rhetoric, Wittes stated. Wittes argued that continuity vs. change in the fourth category has been mixed—for example Obama has repatriated some of the Guantanamo detainees that Wittes suspects, Bush would not

have. In closing, Wittes argued that we should consider these questions outside of the framework of any particular administration. The war powers model we are currently using arose out of necessity – during the Clinton administration. That model reached its apex under Bush, and it has declined under Obama. The wave of aggressiveness and non-aggressiveness does not correspond to presidential succession.

BC’s R. Shep Melnick introduced the first afternoon panel “Controversies Facing the Bush Administration.” The panel began with Philip Heymann of Harvard Law School outlining the four unresolved issues the Obama Administration still must address. Although Heymann argued that the Obama Administration has likely ended the question of torture as an American interrogation technique, issues of torture by foreign governments are likely to remain problematic. Second, the Administration must face questions of detention, including questions of who may be detained, and where (whether the United States must follow the rules of war). Third, questions concerning “targeted killing” operations and procedures taking place on foreign soil (including nations with which the United States is not at war) remain an issue. Finally, questions concerning the efficacy and legitimacy of civilian or military trials for terrorism suspects remain on the table.

Next, BC Law School’s Daniel

Kanstroom looked at the question of controversies facing Obama from a human rights perspective. There is, he argued, an obvious dissonance between the administration’s rhetoric and its stated desires and the positions it has been taking in both terror-related litigation and its day-to-day, pragmatic, behind-the-scenes maneuvering. Kanstroom discussed at length the options available to the administration in prosecuting accused terrorists—all of which, he insisted, are flawed. Civilian trials, he pointed out, as an example, may distort the criminal justice system in disturbing ways: the administration guarantees a conviction while at the same time claiming to provide a fair trial and a presumption of innocence.



CONFERENCE PANEL

Orin Kerr of George Washington Law School began his talk by condemning the positions on executive power first set out by Bush Administration

lawyer John Yoo when he was a law professor at UC-Berkeley. Kerr asserted that Yoo’s earlier condemnation of the Clinton administration for aggressively wielding executive power underlined the reality that presidents in power are always partisans of a strong executive. Although there has been substantial agreement that Bush had pushed Presidential power too far, a uniform view of the alternative is elusive. Scholars and politicians resort to muddling through and calling for more balance. Kerr’s

*Continued on page 6*

*“Obama Conference” Continued from page 5*

suggested that the key to progress in this regard would involve more openness in the executive branch about internal legal positions.

Finally, Mary-Rose Papandrea of BC Law School sharply criticized Obama’s tendency to change his mind, using rhetoric of openness in government, but when faced with actual requests for sensitive material, balking. She discussed the case of prisoner photos other than those at Abu Ghraib. After initially fighting their release (following the Bush administration’s lead), an agreement was reached with the ACLU for limited release. Obama changed his mind on this agreement, Papandrea claimed, asking Congress to pass a law specifically allowing the Department of Defense to exempt abuse photos from the requirement of release. During the question and answer period Kanstroom picked up on this theme as well, arguing that those with an interest in hiding the photos should have more limited power in making decisions about their release. Both Papandrea and Kanstroom argued for a judicial role in the release process, such as pre-release in camera (confidential, secret) review.

The final panel, “Lessons Learned,” chaired by Center Director Ken Kersch, looked at the differences between the Bush and Obama administrations in combating terrorism. George Brown stressed the need to get to the bottom of how the Bush administration conducted itself in fighting the war on terror. He argued that there needed to be accountability for torture at Guantanamo Bay and other locations. Brown outlined a six stage accountability process –

information, justification, evaluation, compensation, sanctioning, and, finally, guidance or deterrence for the future. Congressional committees, he explained, are too quick to attribute sole guilt to the Bush administration for policies that are ongoing under Obama.

Timothy Crawford, associate professor of political science at BC, previewed an upcoming paper, “Obama’s War on Terror at the U.N.” He argued that the United Nations is a “place where the [Obama] administration has a particular claim.” Susan Rice, the current U.N. ambassador, is more inclusive and open to new ideas than her predecessors, he said. Her approach seeks to address the root causes of terror and take a holistic approach. Crawford highlighted what he called “four pillars of counterterrorism” – addressing the root causes of terror, prevention and combat, use of state sovereignty, and a concern for human rights.

Gabriella Blum of Harvard Law School discussed the importance of combating terror within the confines of international law. She pointed to the 2005 National Defense Strategy report as symptomatic of the Bush administration’s maneuvering outside the sphere of international law. Blum insisted, however, that following global law is in the best interest of the United States. Instead of accepting the status quo, Blum challenged the administration to

work to improve the international legal order and to work within it in Iraq and Afghanistan – by a process she calls “lawfare.”

The Conference concluded with an address by BC alumnus (and parent) Ambassador R. Nicholas Burns, currently at Harvard’s Kennedy School of Government, and a long-time State Department official. “The most fateful issue to hit us after 9/11 is how can we be a great democracy and be effective at fighting evil,” he began. Burns described the conflict between the nation’s values and its security, and he summarized the difficulties President Obama faces. He listed three accomplishments of the President in counterterrorism policy: bolstering credibility in the world by ending torture and reaffirming a commitment to nuclear nonproliferation, rejecting the tension between values and security by embracing both, and shifting the nation’s foreign policy focus from Europe to Asia.

Burns also proposed five areas for improvement, including the development of a nuanced counterterrorism strategy that makes use of the military, solid intelligence, economic resources, diplomacy, and cooperation with Europe. Additionally, he suggested trusting civilian diplomats side-by-side with military officials, using diplomacy as a first resort, acknowledging multipolarity, and striking a balance between national narratives of isolationism and engagement.

The conference concluded with a well-attended reception at which students, faculty, and guests mingled and discussed the day’s proceedings.



R. NICHOLAS BURNS

## Clough Fellows Present Papers at Georgetown Conference

Last March, members of the Clough Center's Junior Fellows Program joined for the first time with students from Georgetown's Toqueville Forum on the Roots of American Democracy and Princeton's James Madison Program in American Ideals and Institutions for an undergraduate conference on the American Polity hosted by the Tocqueville Forum at Georgetown. Boston College seniors Michael Reer and Zachary Markarian and sophomore Brendan Benedict presented research papers at the conference, with four other Clough Center Junior Fellows (accompanied by Center Director Ken Kersch) in attendance: –senior Michael Stork, juniors Kevin Cahalane and Kristian Weir, and sophomore Christopher Terris.

Reer (who is starting at BC Law School this fall) presented his paper "Thomas Jefferson: The Founding Father of Strict Constructionism and Against Constitutional Supremacy" on the conference's first morning panel – research rooted in his senior thesis research directed by Professor Kersch. Reer explained that Jefferson, despite a famously acute intellect, was nevertheless deeply conflicted over tensions within his thought. Though he had long been a strong advocate of states' rights and limited federal power, as President, for example, he authorized the Louisiana Purchase, the most sweeping use of presidential authority yet. Reer argued that Jefferson ultimately adhered to an understanding of the Constitution that insisted upon strict constructionism, but, at the same time, welcomed frequent change, a vision that does not map neatly onto contemporary constitutional theories. Reer's respondent was Dr. Chris West, a post-doctoral fellow at the Tocqueville Forum, who praised Reer's argument and documentation, and pointed out areas of further research.

Drawing from Robert Dahl's book, *How Democratic is the American Constitution?*, Zach Markarian (now a first year law student at UC-Berkeley) presented a paper entitled "Enduring Disparities in Constituency Size in the U.S. Senate," exploring the nature of the U.S. Senate's undemocratic features. Since it represents states with two Senators, regardless of population, people living in smaller states get more power at the ballot box than those in larger states. Combined with the power of the filibuster, the result is that small states can derail

legislation that a majority of the nation supports, he explained. Respondents praised Markarian's attention to historical detail, all the while cautioning him about what they perceived to be his rather radical proposals to correct these perceived constitutional deficiencies.

On the conference's final panel, Brendan Benedict presented his paper "Exporting Tolerance, Not Democracy," exploring the political philosophy of John Rawls in his last major work, *The Law of Peoples*. Drawing on Rawls, Benedict explained that the understanding that democracy is the best form of government rests on comprehensive philosophical doctrines, which are difficult to get other nations to accept without resistance. Accordingly, Benedict argued, American foreign policy should be tolerant – as long as other nations respect fundamental human rights, such as freedom from genocide, and have some form of participatory policymaking process. If this is the case, Benedict insisted, military and economic coercion should be left off the table. James Poulos, a Georgetown graduate student in political theory, responded to Benedict's paper. He commended its depth despite its brevity, but criticized the lack of specificity in terms used by Rawls and warned against naïveté inherent in Benedict's model of tolerance.

After the conference, the junior fellows from all three universities feasted on a barbecue dinner in a private room at Old Glory in Georgetown, and heard a conference keynote address by Hadley Arkes, Edward N. Ney Professor of Jurisprudence and American Institutions at Amherst College.

The Center's Junior Fellows will be regular participants in this annual conference, which will re-convene in the spring of 2011 at Princeton.

### Clough Center Staff

Ken I. Kersch  
Center Director

James Q. Wilson  
Senior Fellow

Susan Dunn  
Administrative Assistant

Hillary A. Thompson  
Graduate Assistant

Brendan Benedict  
Staff Writer

SEPTEMBER 17, 2010  
4:30 PM

Gabriel Schoenfeld, Senior Fellow, Hudson Institute, and Resident Scholar at the Witherspoon Institute, will discuss his new book *Necessary Secrets: National Security, the Media, and the Rule of Law* (W.W. Norton, 2010) [Constitution Day Lecture]

OCTOBER 27, 2010  
4:30 PM

Book Panel on Alison LaCroix's *The Ideological Origins of American Federalism* (Harvard University Press), featuring Alison LaCroix, Assistant Professor of Law, University of Chicago, R. Shep Melnick, O'Neill Professor of Political Science at Boston College, Steven Calabresi, George C. Dix Professor of Constitutional Law at Northwestern University, and Edward Purcell, New York Law School

THE CLOUGH CENTER  
FOR THE STUDY OF  
CONSTITUTIONAL DEMOCRACY

Contact Information:  
The Clough Center  
Boston College  
McGuinn Hall  
140 Commonwealth  
Chestnut Hill, MA 02467  
Tel: (617) 552-4167

Web:  
[www.bc.edu/centers/  
cloughcenter](http://www.bc.edu/centers/cloughcenter)

Questions?  
Email us at:  
[Clough.Center@bc.edu](mailto:Clough.Center@bc.edu)

For more Clough Center Fall 2010 events, please see the Center's website.

The Clough Center  
Boston College  
140 Commonwealth Ave  
Chestnut Hill, MA 02467