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An Interview with John B. Bellinger III

Introduction

In this interview, John B. Bellinger III (Partner, Arnold & Porter LLP and former Legal Adviser to the Department of State from 2005–2009) discusses his experience practicing law in both the public and private sectors, the pressing issues facing the Legal Adviser's Office, the appointment of the first female American Judge to the International Court of Justice, and the recent Kosovo decision by that court. Many thanks to John Bellinger for taking the time to sit down with the Harvard International Law Journal and share his views on these issues.

Q: You were a former Harvard International Law Journal editor—what was your experience like in the Journal and how did the experience influence your interest in international law?

I've always been interested in international matters. I have an undergraduate degree and a master's degree in international affairs so I naturally gravitated to the Harvard International Law Journal. Remarkably I never took the basic international law course at Harvard (something I now wish that I had done), so I learned more of my international law by reading and editing pieces in the International Law Journal rather than by taking a class in school.

I think we got a little behind our year—I think we were trying to get out our last issue out by the following summer. But it was a good experience for me. I liked working on the Recent Developments because they tended to be on more discrete, practical issues.

Q: In your practice, have academic articles on international law influenced your thinking?

I encourage international law journals to try to stay away from the theoretical, which is generally not helpful to practicing government lawyers. But my government colleagues and I did look to articles that were exhaustive surveys of a particular issue—gathering information that we might not have otherwise gathered, looking through a treaty negotiation record, particularly of an older treaty, and particularly collecting information from other countries that might not otherwise be available—or simply a careful look at a practical problem that the government is facing and a serious analysis of it. I have relied on articles and student notes in both of those areas.

I found 90% of law review articles not terribly helpful, but I would occasionally find an exhaustive survey of the history of the Geneva Convention, or the International Covenant on Civil and Political Rights, and this is the sort of stuff that—if someone has put in the time—can be enormously helpful to lawyers in the government. And even on difficult terrorism issues, occasionally we would find people who really thought hard about an issue and who would give us something that we hadn't thought of before. So I think the work that is done by international law journals can be very helpful as long as it doesn't get too academic.

Q: As you moved from law school to private practice and the government, what most surprised you about the practice of international law?

I was most surprised in government how little understanding of the importance of international law there is even at the highest levels of our own government in all three branches—the executive, particularly in congress, and even amongst the judiciary.

As I said earlier today,¹ in other countries international law is something that is absolutely accepted. But in the United States amongst the population, and even in our government, at best there is not an understanding of the importance of international agreements or international tribunals, and at worst there is an active hostility—a belief that international law and international institutions are somehow undermining the sovereignty of the United States. So that was certainly a challenge for me when I was Legal Adviser.

¹ Earlier, John Bellinger had given a talk on “Careers in Public International and National Security Law” co-hosted by the Harvard International Law Journal along with the following Harvard organizations: Office of Public Interest Advising, HLS Federalist Society, Harvard International Affairs Council, National Security and Law Association, National Security Law Journal.

Q: Do you think that position has changed over time, or do you think that position is unique to the United States?

Well I haven't done an exhaustive survey of countries around the world, but I think that is somewhat unique to the United States in our culture of being a really nationalist country that has not shared the experiences of others. And particularly Europeans after World War II, fostered by the United States, have had a much greater respect for international law and international institutions.

Q: You have spent time in both the public and private sectors, and last year left the Legal Adviser's Office to become a partner at Arnold & Porter. What have you found most difficult about the transition between public and private sectors?

The transition from government back to private practice has been much better than I anticipated. I was not unlike a graduating law student: I had the same apprehension after 15 years of being in government about returning to a law firm, whether I would enjoy the practice, and whether the billable hours and chasing clients was going to be terribly unpleasant. However, I've been very favorably surprised. I've been able at least in the first year to recreate much of my previous role of being Legal Adviser.

We have more lawyers in our firm from the Legal Adviser's Office than any other law firm, and we have a number of former senior officials from other government departments. We've recreated the U.S. Government's national security law structure with the former CIA General Counsel and NSA General Counsel, and myself, so we both have complex and fascinating international and national security law issues to work on that are quite similar to the ones I was working on in the government, as well as colleagues who have been in the government before who are enjoyable to work with. So the stress level is down—I no longer have to make the decisions about drone strikes—and the work has been quite interesting.

Q: Is it difficult to be on a different side of an issue, or have different interests when you are looking at the same issue?

My practice consists of both public international law matters (which is mostly representing governments in domestic litigation, international litigation, or issues before international organizations) and national security law issues (which is focused on those U.S. laws that regulate our national security, like export controls and sanctions).

The legal issues are very similar to the issues I dealt with in the U.S. government. We're representing private governments or foreign governments but often it's a

matter of explaining to them how the U.S. government is going to react to something or applying the same bodies of law.

Q: You've written about the continuity between the Bush administration's approach to international legal issues and the current administration's approach.² Which parts of the work of the Office of the Legal Adviser tend to remain constant between administrations, and which parts tend to change?

I would say that really there is tremendous continuity on most issues in the Office of the Legal Adviser. Interestingly, and this may be unique in the government, there are only two political appointees in a 300-person bureau—it's only the Legal Adviser and a Special Assistant. Most government bureaus or general counsel's offices have several deputies—and maybe even more than that—who are political appointees.

Now the Legal Adviser himself can certainly influence things. But bearing in mind that this is really only one person, the influence is somewhat limited. I would say in certain areas like immunities, diplomatic law, certain aspects of international organization law, you will see pretty rough continuity. Where we've seen more of the swings between past Administrations—although I would say we really have not seen an enormous shift between the Bush Administration and the Obama Administration—it's been on certain treaty issues and certain issues of human rights law. Historically there have been certain treaties that Democrats have tended to support and Republicans to oppose, like the Comprehensive Nuclear-Test-Ban Treaty (CTBT) or the Convention on Elimination of Discrimination Against Women, but so far we have not seen the Obama Administration really pushing for Senate approval of those controversial treaties. In fact, I noted in a recent op-ed in the Washington Post that the Obama Administration has gotten fewer treaties through the senate in this last two years than in any two-year period in the last 50 to 60 years.³ You can sometimes see swings if you have a very conservative or liberal Legal Adviser but I don't think you've seen Harold Koh, the new Legal Adviser, really taking the Legal Adviser's Office into enormously new areas so far.

Q: Are there issues in international law where your perspective changed as a result of your experience in government, and particularly your service in the Legal Adviser's Office?

I don't know that I had dramatic changes. I certainly learned a lot about more issues.

² See, e.g., John B. Bellinger III, *More Continuity Than Change*, N.Y. TIMES, Feb. 14, 2010, available at <http://www.nytimes.com/2010/02/15/opinion/15iht-edbellinger.html>.

³ John B. Bellinger III, *Without White House Muscle, Treaties Left in Limbo*, WASH. POST., June 11, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/10/AR2010061004356.html>.

Being the Legal Adviser is like being a kid in the international law candy shop; at least 90% of the issues are just really fascinating. There are some 10% that you really don't want to have to deal with.

From leading treaty negotiations to arguing the *Medellin* case before the International Court of Justice; from going to a ministerial meeting high up in Greenland with the five arctic coastal states to agree on the legal framework for the Arctic, to a meeting with Gaddafi in Libya after his agreement to compensate the victims in the Pan Am Flight 103 bombing—they were all certainly interesting issues. So I learned more about each of these issues, but I would not say that I had an epiphany in which my views dramatically changed.

Q: If you had the opportunity to be the Legal Adviser again, what, if anything, would you do differently?

This is an issue that I look back on. Every Legal Adviser essentially has to play the hand that is dealt to him. You don't really get to pick and choose that much because you are the lawyer to the Secretary of State and for the rest of the administration.

I ended up spending a disproportionate amount of my time on post-9/11 terrorism issues—detention in Guantanamo and various other things—which were important to discuss with our allies. But it was not always terribly enjoyable work to have to go and explain controversial policies to audiences that were very hostile toward those policies, and I sometimes wonder whether, had I spent less time on those issues, I could have spent more time picking other interesting treaty issues and traveling to other places to work out international disputes.

And it was certainly at some personal cost to myself, because I had to be the face of some of these unpopular issues. So I do look back and wonder whether I should have spent so much time on all of those issues. But I felt that it was important to explain issues that other countries didn't understand even if I didn't necessarily agree with our own policies.

Q: Were there issues during your government service where your personal opinion was in conflict with your client's (the government's) position, and how did you deal with that?

This is something that any lawyer, or any government official—and particularly career officials who are working for senior officials of both parties, where there is definitely going to be a shift in position—must face. I have been in this position as a career official in the Justice Department and that can be difficult.

And it can be difficult for political appointees because they don't always agree with

every policy of the Administration that appointed them. So that comes with the territory. In my case it was particularly difficult because I did not agree with a number of our policies, particularly in the area of Guantanamo and detention and prosecution of terrorist suspects. Inside the administration I would argue very forcefully for what I and the Legal Adviser's Office thought should be the position of the U.S. government. But we did not always prevail.

We would have to go and defend vigorously the position of the U.S. government and explain it as best one could. You can't in good conscience just go out and do a half-hearted job.

I tried to express understanding of the criticisms while explaining why the U.S. government had taken a particular position. Critics tend to identify the message with the messenger, and that can often be quite difficult when one is having a good deal of hostility directed towards you.

But no government official is ever going to agree with all of the policies of their administration, and often one is left strongly disagreeing with certain policies. It may be that one will agree with most policies but will strongly disagree with certain policies. And then one simply has to decide—is it better to stay in and try to change the policy, or is someone else going to do a better job of trying to make that argument? So will the government be better off or worse off if one stays?

But these are quite difficult decisions, and I'm sure that it also must be very difficult for my successor, Harold Koh, who has had to now become the public face for some very controversial policies that our allies expected were going to change and have not changed.

Q: Do you think there is any way to structure the Legal Adviser of the State Department so that there is more independence and so that your successors would not have to face those tensions? Would you recommend any particular reforms?

You know, what are you going to be independent from? I mean, you are part of the executive branch, and furthermore, your job as the lawyer is really not to be there just blowing a whistle and throwing flags on the plays. You are not independent from the rest of the executive branch. That's not the role of the government lawyer. You are not an umpire in the game.

You are an advocate and an adviser. That doesn't mean you have to advocate everything your client wants to do, but it does mean that your job is not to just sit there and say, "no you can't do that, you can't do that, you can't do that." You have clients, and you are there to do what your clients want to do. You are not there to set the policy. You are there to help advise your clients on what they want to do.

Now, if you think what they want to do is not legal, you need to tell them that. If you think that what they want to do is not wise policy, and you have a good relationship with them, you can tell them that too. But you really can't take the lawyer out of the departments.

Q: You've called for the current administration to take more steps to engage with the International Criminal Court, to seek ratification of treaties such as the Convention on the Law of the Sea, to pursue legislation to facilitate compliance with judgments of the International Court of Justice, and to close Guantanamo.⁴ If the Administration could do only one of these things, which would you prioritize as the most important?

I think the Obama Administration did miss some opportunities in its first year in office. Particularly because of the ambivalence in the American public about international law and international institutions, it makes it difficult for the government to advance the ball on international law, on treaties, and on compliance with international judgments in election years. That's what we are seeing right now. The Obama Administration is really doing very little that is forward leaning on international law issues in any way in an election year.

It's disappointing to me that they did not try to do some or all of those things in their first year. I'm very surprised. It would have seemed to be low hanging fruit to have at least tried to get legislation to comply with the International Court of Justice's *Avena* judgment. I don't say that it would be easy. But strong Democratic majorities in both Houses, coming off an election where the President had strongly emphasized the commitment to international law and rule of law, it was something that the Vice President Biden—having been a chairman, both of the Senate Judiciary Committee and the Senate Foreign Relations Committee—could have taken hold of. Virtually impossible to get done in an election year, but they might have had a chance to do it in 2009, so I think they did not have their eye on the ball.

With Guantanamo, similarly, they came out strong. I think that they had not gone through and tested the reception for Guantanamo closure with Congress, and that perhaps they had been listening too much to some of our allies where the announcement was widely applauded. But I think they did not recognize, maybe, that the American people were not quite so excited about having Guantanamo closed. So I think they might have been able to get it done had they immediately gone to the Hill and told the leadership in both Houses, "This is a signature initiative of the President. It may be controversial but you need to stand up and back us on this." I mean it's a remarkable thing that after an overwhelming election, where many of these members of Congress owed their jobs to the President, within months they bucked a signature

⁴ See, e.g., John B. Bellinger III, *Lawlessness North of the Border*, N.Y. TIMES, July 17, 2009, available at <http://www.nytimes.com/2009/07/18/opinion/18bellinger.html>.

initiative of the President of the United States.

Similarly on treaties, I think the President could have gotten the Law of the Sea treaty approved in his first year in office. They had 60 votes for cloture. Yes, it's a somewhat controversial treaty, but there are many Republicans that actually do support it. There were certainly enough votes, and that would have been something and, again, in the first year.

And you know, we shouldn't become party to the treaty to make other countries happy, we should do it because it is overwhelmingly in our interest. But to the extent that the Obama Administration was in fact trying to show that it was doing something different, it did not show. The Bush Administration tried much harder with respect to getting the Law of the Sea Convention through in 2008, in complying with the ICJ's *Avena* decision, and in getting treaties through the Congress than the Obama Administration has done in its first two years in office. I think the only thing I can put it down to is essentially that they had other priorities in their first year in 2009, and then by the time they began to focus on some of these issues, it's become an election year and these international law issues are not popular in an election year. The White House is not standing up and saying we can get more votes by trying to get the Law of the Sea Convention done, providing more Geneva Convention rights for terrorists, or complying with an ICJ judgment.

Q: Martha Minow has recently written an article about the increased political attention and controversy that has surrounded international and foreign law in recent years.⁵ Did you experience this tension while at the Legal Adviser's Office? What do you think are the sources of this increased attention and controversy?

I've not made a long study of the last 50-60 years, but people need to understand that this hostility or suspicion (or, at most, benign lack of understanding of international law) has not sprung up in the last ten years. This is something that goes back 70, 80, or more years. In the 1950s, we had the proposed Bricker amendments to the Constitution that would have restricted compliance with certain treaties, and there has just been amongst a segment of the population and their representatives in the Congress, a belief that international law is not our law, is not in our interests, and threatens our sovereignty.

It does seem to be getting a little bit worse, in my view. There do seem to be fewer members of Congress who have an understanding of why we enter into international agreements, why these are actually in the interest of Americans and not gifts to other countries. And in some ways you would think it would be the other way; you would

⁵ Martha Minow, *The Controversial Status of International and Comparative Law in the United States*, 52 HARV. INT'L L.J. ONLINE 1 (2010).

think that as we have an increasingly globalized economy, there would be more elected representatives who would understand the value of certain international agreements. And again, the suggestion is not that every international agreement is good or that every decision of every international tribunal is done purely on the merits. These international institutions tend to be equally politicized. But there is a value to these international agreements and institutions that does not seem to be well understood by Congress or amongst the American people.

Q: Speaking of international institutions, Joan Donoghue was sworn on September 13, 2010 as a Judge of the International Court of Justice. After there has been all this attention last summer for the selection of a new Supreme Court Justice, what was it like being on the nominating committee for an international judge?

Well this was very exciting, I kept telling members of the press that they needed to write one fewer article about my Harvard Law School classmate, Elena Kagan, of whom I am very fond and very proud, and write at least one article about the fact that we were putting the first American woman on the International Court of Justice.

This is exciting! Judge Tom Buergenthal who had served for nearly ten years resigned this summer. The appointments to the International Court of Justice are made not by governments but based on nominations made by the U.S. “National Group,” which comprises the four members of each country in the Permanent Court of Arbitration. So in our case the national group consists of Harold Koh (the Legal Adviser), me, David Andrews (former Legal Adviser to Clinton), and Steve Schwebel (who used to be the president of the International Court of Justice).

So we had to have all four of us to agree to—or at least to have a majority to support—a candidate. We had a number of well qualified candidates to consider, and all of those were people very knowledgeable about international law. We wanted to put the best candidate that we possibly could on the Court. The person we agreed on was Joan Donoghue, who had been a long standing member of the Legal Adviser’s Office. She left to go to the private sector and I had brought her back in to be my principal deputy—so I was very fond of Joan. There was a long interregnum while Harold’s confirmation was being debated when Joan was the acting Legal Adviser so she got to know the Secretary of State quite well. Harold had spent nearly a year with her and became very impressed with her. And we did not actually have, in the end, disagreement about who the candidate ought to be, but this was someone who we could agree on—an indisputably well qualified international lawyer who had served in the administrations of both parties, and whom the National Group consisting of people who had served in both governments agreed on. And this was an exciting appointment, which I wish had gotten greater public attention.

Q: What is your opinion on the ICJ's Kosovo decision?⁶ How do you resolve the tension between self-determination and international law or do you feel there is no tension?

The Kosovo case was also very exciting. I was heavily involved in the Kosovo independence issue. Harold Koh ultimately argued the advisory opinion case before the International Court of Justice, but the Bush Administration had worked very closely with the Kosovars—first trying to hold back from unilaterally declaring independence prematurely to avoid bloodshed, but essentially to have a balanced approach to the issue.

I was surprised at how favorable the International Court of Justice decision was towards Kosovo. I fully expected that the International Court of Justice would rule that the independence was legal; I could not have imagined that they would somehow try to “put the toothpaste back in the tube.” But I was also equally confident that there would be some kind of loose language about self-determination, declarations of independence, or UN Security Council Resolution 1244 that would be unhelpful in some way. And instead it was an excellent opinion that really tracked the arguments that had been made by the United States and others. So I was surprised at how well the opinion turned out.

⁶ Accordance with International Law on the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. No. 141 (July 22), *available at* <http://www.icj-cij.org/docket/files/141/15987.pdf>.