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Transcript

CHINA IN THE WORLD PODCAST

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Guest: **John Bellinger**

Episode 71: Law of the Sea and the U.S. Elections
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Haenle: I'm delighted this week to be here with my former National Security Council (NSC) colleague, John Bellinger, as part of the Carnegie–Tsinghua Center's Distinguished Speakers Program Series. John is a partner at the international law practice, Arnold and Porter. He has a long and distinguished career in government service, going back to his first assignment in government as an executive assistant to the director of the CIA. He has time working on Capitol Hill and the Senate Select Committee on Intelligence as an advisor and worked in the justice department. John and I first came into contact when he was working on the National Security Council as the legal advisor for then National Security Advisor, Dr. Condoleezza Rice. And when she was then selected to become the 66th secretary of state she took John with her and he became her counselor and legal advisor at the state department. John, it's wonderful to have you here with us again in Beijing. Thanks for joining us on this podcast today.

Bellinger: Paul it's nice to be here. Congratulations to what you have built here. Carnegie, of course, didn't have a program before in Beijing; what you've built for Carnegie and Tsinghua University has just been terrific, so it's nice to see it growing and thriving.

Haenle: Thank you very much. Of course, we remember—almost 7 years ago now—when my wife Liz and I arrived here in Beijing when we hadn't set up the center yet, you arrived I think less than a week after I had arrived and we did some things together. So technically we can say you're the first guest to the Carnegie–Tsinghua Center back in January 2010 and of course, a year later when we started the distinguished speaker program you were our first ever distinguished speaker. I'm just delighted to have you back.

John, when you and I first met—which was May of 2004 when I went to the NSC—you had already been there since early 2001. As I said, you have experience in the CIA, experience on Capitol Hill, within the justice department, I would just be interested to know—because I've never asked you about it and I think our listeners would be interested—how did you end up working for Dr. Condoleezza Rice when she became national security advisor?

Bellinger: Well Paul, as you know, the NSC staff is the staff of the president that helps him—or perhaps maybe her now—make national security decisions, whether it is as simple as making a call or a meeting with a foreign leader or a very complicated decision where he has to listen to his different agencies. His NSC staff is his staff to do that; they report to the national security advisor—the staff is a couple hundred people. I headed the legal directorate; most of the staff is detail seconded from different departments and agencies. They are supposed to be the best people—as were you when you were seconded from the department of defense.

Haenle: One of the things I noticed when I arrived at the NSC in May 2004 was that you covered a broad range of issues. It seemed to me—and I think it was an accurate assessment—that you were involved in most of the major issues that Dr. Rice was dealing at the time as national security advisor and that the president was dealing with in terms of his foreign policy agenda. Can you just talk a little bit about as what you saw as your most important issues at that time, both at the NSC and then when you went to the state department and worked for her when she was secretary of state?

Bellinger: So the legal advice for NSC was essentially a staff job inwardly focused rather than outwardly focused that sits in on National Security Council meetings and also advises the staff of the NSA and the president on the legal issues of national security decisions. So I provided advice to the president, to the National Security Council members at the cabinet level, and to the staff on any national security legal issues; so we were involved in everything from terrorism issues—of which there were a lot after 9/11—to treaties, to issues involving the interpretation of treaties, to domestic statutes—so a wide array of both domestic and international law issues involving a whole variety of different countries. Now of course it's difficult for me to know every body of law, so there were some areas of law where I knew a good deal about but others where I'd have to tap into the different departments and agencies because they would know more about it at the state department or justice department. So I was often the lawyer in the room who could raise my hand to say we have a legal issues here, to provide advice, and either provide the advice or get more advice on a particular issue.

Haenle: And you represented the White House in your dealings with the 9/11 commission. In fact, I believe you were there at the White House on 9/11—I understand you were in the situation room during that time. Can you just talk a little bit about that experience?

Bellinger: So I was. We had just started our staff meeting in the morning with Dr. Rice when the first plane had already hit the towers—no one knew what that was. And as we were having our meeting when the second plane hit the other tower, and we realized we were under attack. Within hours, most of the White House staff was evacuated because we thought there was going to be continued attack on the White House. I stayed in the situation room and part of my job was in fact to provide legal advice to the president—who at that point was out of Washington on a trip—as to whether he actually had the legal authority to order the shoot down of additional civilian aircraft that might be heading towards Washington. So that of course—our own aircraft—it was apparent that planes were being used as weapons and if we saw more just commercial aircraft coming to Washington towards the Capitol or the White House—could the president order those to be shot down? Of course, it's a remarkable thing to order a fighter plane to shoot down a civilian aircraft with people on it, but if they were essentially being used as weapons, we were prepared to do so. Fortunately, that didn't have to happen but that was my small piece of it, but ultimately he did have the authority to do that.

Haenle: Fortunately—as you say—we didn't have to do that. Could you give us listeners a sense of the kind of things when you represented the White House with the 9/11 commission, what that entailed?

Bellinger: So we had an enormous investigation created by Congress of what had brought about the 9/11 attacks: Were we prepared, who did it, and what changes ought to be made. That ultimately resulted in the creation of the director of national intelligence and some changes in the structure of our government. But because it was in part an investigative commission they wanted to have all of the papers and the intelligence and the information that the president and senior White House staff had access to before 9/11 so that they could determine if the Bush administration had done everything it could to prevent the 9/11 attacks. They wanted to interview senior staff, they asked Dr. Rice to testify before the 9/11 Commission, they interviewed President Bush and Vice President Cheney, and because this raised issues about access to sensitive White

House information, it came to me to negotiate with the 9/11 commission the terms of access. For example, they wanted to see every one of the president's daily intelligence briefings to see if he had been warned about the possible attacks—this is the product that the CIA produces every morning for the president.

Haenle: Fascinating. I remember you also were involved—as you said—in the legislation that created the director of national intelligence, which is one of the things that of course came out of the 9/11 Commission. You're here this week—you're meeting with Chinese scholars and experts. Tomorrow morning, you and I are going to the Chinese National Defense University. One of the topics in terms of the issues that you covered when you were in government is of course this issue of treaties, and one that's pertinent to U.S.-China relations is the UN Convention on the Law of the Sea as it relates to the maritime disputes in the South China Sea.

And I wondered if I could, while we have you here, talk a little bit about—in July, as you know, the National Tribunal of the Law of the Sea under the Permanent Court of Arbitration, in the Hague ruling on a case brought forward by the Philippines—which largely rejected China's claims on the nine-dash line and related historical claims, as well as claims that reefs qualify as exclusive economic zones for China. I want to get a sense from you whether you think that ruling has been sufficient or has been helpful in reinforcing international law over power or politics or if not. And you're sort of discussion yesterday and what your sense is in terms of what you're hearing from Chinese interlocutors what, if not, what are the implications for both the region but for our relationship with China?

Bellinger: The tribunal decision—the Philippines decision is important. Of course, China has rejected it wholly and did not participate in argument before the tribunal—rejected its jurisdiction and has now rejected the decision. So that is a bad thing for international law because China seems to be not inclined to accept the ruling of this tribunal. The tribunal itself though was setup under the Law of the Sea Convention, which provides for dispute resolution. China is of course a party to the Law of the Sea Party Convention and signed up to the dispute resolution provisions. The Law of the Sea Convention says if there is a question about the jurisdiction of the dispute resolution tribunal to review a case that it can decide its own jurisdiction—and China had agreed in joining the Law of the Sea Convention to those provisions.

So on the one hand, this was an established mechanism to resolve unclear questions about—not the disputed sovereignty over the different islands—but about the maritime entitlements, whether entitled to territorial seas or exclusive economic zones and whether the Chinese land reclamation, and artificial island construction was consistent with the Law of the Sea Convention. The five judges who were on this tribunal were enormously experienced judges—decades of experience. Several of them were currently sitting judges on the Law of the Sea tribunal in Germany, so these are judges who have a lot of experience. So this is the way dispute resolution under the Law of the Sea Convention is supposed to work and since there were really unclear questions in international law about were these artificial islands permissible under the law of the convention. Does a reef or rock—is it entitled to a territorial sea or to an exclusive economic zones? Was China's claim to the nine-dash line area—was that consistent with the Law of the Sea Convention? This tribunal just made decisions on those issues and that's the way dispute resolution is supposed to work under international law; under international law that part is good for international law that there was a

mechanism to decide this. Unfortunately, China did not participate and has rejected the jurisdiction of the tribunal so we'll have to see now what happens going forward.

Haenle: Some people make the point that China is a signatory to the UN Convention on Law of the Sea but doesn't abide by it. The U.S. is not a signatory to the UN Convention of the Law of the Sea but abides by the provisions within it. We are asked a lot here in China, why is the U.S. not a signatory to the UN Convention on Law of the Sea and will that change ever going forward—and do you think it would be the right thing to do?

Bellinger: So it really is unfortunate that the U.S. has not become party to the Law of the Sea Convention. We were amongst its principal proponents and negotiators going way back to the Nixon administration. Of course we had some concerns about the way it was negotiated during the Carter administration—Ronald Reagan had originally rejected the treaty as negotiated—but then it was changed to reflect those concerns. Actually, the U.S. concerns were addressed. Unfortunately our Senate has continued to have problems with the treaty—I personally believe because they misunderstand some of the provisions. It's very long and very complex and virtually no senators have read the treaty, but they recall that Ronald Reagan didn't like it, so it's unfortunately sort of accepted orthodoxy among some Republicans that they don't like this big multilateral convention. A series of presidents, including Republican presidents including George Bush—who you and I served—strongly supported the U.S. becoming party to the treaty. So the position of the executive branch is in the Bush administration and the Obama administration has been that U.S. should become party but the senate has so far refused to give its advice and consent. As you point out Paul, the U.S. abides by all of its terms—most of it actually accepted as customary international law—meaning that we actually accept it as binding on us even though we are not party. For example, the provisions on territorial seas, or exclusive economic zones, or freedom of navigation, we would say is just customary international law—so many countries now follow that as binding obligation that we abide by it as well. More technical provisions, like dispute resolution, we would say that's not necessarily customary international law. But, anyway, I do hope that in the next administration that whoever is president will try to push the Treaty through the senate again. Hillary Clinton knows a lot about the Law of the Sea Treaty; she has testified when she was Secretary of State in favor of the convention—she really knows a good deal about it. She would certainly—I think—support it. The question is really two-fold: One is a matter of priority, since the president has a lot of priorities before the senate, would she make that a priority early in her administration? And of course most important, what would the makeup of the senate be? Would it become a Democratic senate in the two weeks from today? Or even if it's not a Democratic senate, would there be more supporters of the Law of the Sea Convention? I would certainly like to see the U.S. become part of the Law of the Sea Treaty.

Haenle: Well let's talk about the next president. You've been engaged in this presidential campaign. You lead the effort this summer and drafted the letter that fifty senior GOP foreign policy officials signed saying that Donald Trump is unfit to be president of the United States. You also—backing up—I remember in the transition from the first administration to second administration in the Bush White House you ran Dr. Rice's transition to secretary of state and that is basically teeing up the priority national security and foreign policy issues for her, to make sure she's confirmed so when she's secretary of state she has a priority of what she's going to do once she was confirmed. I'd be interested in your sense of when we have a new president on January

20th, what you see as the priority issues—national security, foreign policy issues, for that next president, whether that's Donald Trump or Hillary Clinton—what would you see as the top issues they are going to have to face?

Bellinger: So the transitions in the United States from one president to another, whether it is the same party or particularly of a different party, are a time of some messiness. We try to make it as seamless as we can but a lot of the political officials generally leave, even from one Democratic administration to another or one Republican administration to another, and are replaced by a whole new crop of people. So the top several thousand people are replaced. Leaders, those who have been identified, will look at the challenges facing the United States and decide where do we want to change course, where do we want to have new initiatives. So certainly, some of the same issues facing the new president are going to be: the fight with ISIS, trying to basically finish off the Islamic State in Iraq and Syria—that battle is going on as we speak right now in Mosul—what to do about Russia's increasing assertiveness both in Europe and support in Syria, what to do about North Korea—and that's something the U.S. would need to work with China on—and then with China, what will the relationship with China be? China is a country that the administration you and I served—the Bush Administration—got along with very well at the senior level even though there were some issues disagreed on trade or human rights or even some security issues. The incoming administration—let's assume for a minute that Hillary Clinton were to come in—she knows China very well. She's had lots of meetings with the Chinese. I think she will push the Chinese government particularly on trade issues—because there's a good deal of discontent in the United States about the trade relationship—but also on human rights issues and we will have to resolve these issues as best we can, or at least we can manage them in the South China Sea.

Secretary Clinton because she has been secretary of state and has had so many meetings with senior Chinese leaders, is going to come in perhaps the best briefed and prepared of any president on issues involving China and that can be a good thing for China because you start way down the road and you can sort of pick up a discussion.

If Donald Trump were to be president it's much harder for any of us really to know. He's said some really negative things about China. We don't really know who his China advisors would be—really not any of them. We don't know who his secretary of state would be or his national security advisor or his China team. It's probably a good deal clearer what to expect out of a Clinton presidency than a Trump presidency.

Haenle: Well we are just a couple weeks out now and we want to give you an opportunity here to give our listeners your own prediction of what we might see on November 8.

Bellinger: Well when I left Washington we had just finished the third debate. Hillary Clinton was widely viewed—I think at least by political commentators—of doing better in all three debates. She had prepared extensively and she knows a lot about both foreign policy and domestic policy issues. So she seems to be ahead in the major polls, particularly in the key states. But it's two weeks out there still could be surprises about what would happen. Of course one of the things that was troubling in the last debate was that Mr. Trump said that he would not necessarily accept the results of the election and it really wasn't clear what that meant. Did it simply mean that if the election were extremely close that he might want to contest it in the courts, which is of course

what George Bush did with Al Gore sixteen years ago, or was he suggesting more than that? Of course in the more than two hundred years of our democracy in the United States one of the most remarkable things is that we've always had this very peaceful transition of power and right now our population is so divided and so partisan and so bitter on certain issues that there's some concern that Mr. Trump's statement that he wouldn't accept the results of the election could possibly result in violence, and we certainly hope that that will not happen

Haenle: Political commentators now seem to indicate that she's got a pretty sizeable lead in the polls—Secretary Clinton does. Of course with Brexit we saw earlier this year it was 52 percent to 48 percent remain in most of the major polls and we know what happened there: they voted to leave the European Union. What do you think the chances of a Brexit-like surprise are in the coming U.S. presidential campaign?

Bellinger: Well. I have to say that the Brexit vote was such a shock. I went to bed that night in the U.S. thinking that the Britain would not leave the EU and woke up finding that they'd voted to leave the EU. We just don't know what the American voters are going to vote when they go into their polling booths. What people say in polls is not necessarily what they do when they go into the voting booths. It really does look like Hillary is ahead, particularly in the key states—battleground states. A big question will be well what will be the impact on what we call the down-ballot candidates—the people who are not presidential candidates but members of the senate or congress. Could Hillary win a sweeping electoral win sweeping in lots of Democrats at such that the Democrats were to take the Senate or even the House? There's been some talk about that because Donald Trump is so unpopular in different places and many of the members of congress or the senate who are running have been trying to distance themselves from him. Or will the house and senate remain the same in Republican control—and what we would have what we call a divided government—with a Hillary win to be a Democratic president but then a Republican controlled congress. If she were to win and the Republicans were to maintain one or both houses of congress, it will be extremely important for her to try to overcome this partisanship and bitterness and to work with congress—perhaps better than President Obama did. President Obama—despite having been a senator—perhaps he'd only been a senator for a short period of time—didn't seem to be terribly inclined to work well with congress. Hillary Clinton had been a senator for longer and seems to understand that the country is so divided that she is going to just have to work—even if Democrats were in control but certainly if Republicans are in control—that she's going to have to work with the other side, hold out the olive branch, not just try to ram things through and to try to really go back to where the country used to be in terms of compromise. Now, it takes two to tango as we say, so even if she were to try to be conciliatory, Republicans, whether they are in the majority or not, are going to have to work with Democrats and right now the country is so divided we'll have to see if that's going to happen. It's going to be an interesting period.

Haenle: It'll be an interesting election on November 8 and we want you to know of course that you have an open invitation by the Carnegie-Tsinghua Center and my team to come back and explain the results of the election after—here in China. Thank you very much, John, for being with us this week with the Carnegie-Tsinghua Center and thank you for joining the China in the World podcast.

Bellinger: It's great to be here and I accept the invitation to come back

Haenle: That's it for this edition for Carnegie–Tsinghua Center's China in the World podcast. I encourage you to explore our site and see the work of all our scholars at the Carnegie–Tsinghua Center. Thanks for listening and be sure to tune in next time.