



**Judicial
Watch®**
*Because no one
is above the law!*

October 19, 2007

BY FEDEX & FAX (202-647-2283)

The Honorable Condoleezza Rice
Secretary of State
U.S. Department of State
2201 C Street, NW
Washington, DC 20520

Re: Misleading Testimony from State Department officials regarding the
United Nations Convention on the Law of the Sea (UNCLOS)

Dear Madam Secretary:

We write to call your attention to troubling statements made by State Department Legal Adviser John B. Bellinger III and Deputy Secretary of State John D. Negroponte during testimony before the Senate Foreign Relations Committee on September 27, 2007. The testimony concerned the United Nations Convention on the Law of the Sea (UNCLOS).

We are concerned, that in advocating for UNCLOS, Messrs. Bellinger and Negroponte may have misstated important facts to the Senate Foreign Relations Committee with respect to:

1. Section Five, "International Rules and National Legislation to Prevent, Reduce and Control Pollution of the Marine Environment," Article 207, UNCLOS; and,
2. Section Six, "Enforcement with respect to pollution from land-based sources." Article 213, UNCLOS.

Deputy Secretary of State John Negroponte told the Senate committee that the United Nations body established by the treaty has "no jurisdiction over marine pollution disputes involving land-based sources." He said, "that's just not covered by the treaty." State Department Legal Adviser John B. Bellinger III testified: "It clearly does not allow regulation over land-based pollution sources. That would stop at the water's edge." Senator David Vitter of the Senate Foreign Relations Committee then asked, "Why is there a section entitled pollution from land-based sources?"¹ Not only is there a section by that name, Sen. Vitter pointed out, but there is a section on enforcement.

¹ UNCLOS Article 207 is entitled "Pollution from Land-based Sources."

Following herein are relevant excerpts of the colloquy on this matter between Senator David Vitter, State Department Legal Adviser John Bellinger, and Deputy Secretary of State John Negroponte:

Sen. Vitter:

Another concern is regulation of domestic activity. It seems to me the treaty clearly states jurisdiction over land-based pollution sources. Why do we want to open that Pandora's box?

Mr. Bellinger:

Senator, I think it clearly does not allow regulation over land-based pollution sources. That would stop at the water's edge. At least dispute resolution involving them, there can be limitations on the pollution that could emanate, but as far as the ability of any other country to complain and bring us to dispute resolution over pollution that would come from land, that's not permitted under the treaty.

Sen. Vitter:

Article 213 says states shall enforce their laws and shall – mandatory – adopt laws and regulations and take other measure to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution. Sounds to me like the Kyoto Protocol is an international standard and we shall pass laws to enforce that.

Mr. Bellinger:

Well this is not a back-door way to subject us to the Kyoto Protocol. There is no way that those standards could be standards that someone could subject us to in dispute resolutions.

Sen. Vitter:

Why? It says we shall do this. We shall pass laws to enforce international environmental standards. So why couldn't a state take us to dispute resolution, saying 'you're not doing that. You need to heighten environmental laws A, B, C, D and E?'

Amb. Negroponte:

There are some environmental issues that are the subject of international agreements, such as ocean dumping, for example. But when you talk about land-based pollution, our view is that that's just not covered by the treaty, Senator. That's the point. We believe there is no jurisdiction over marine pollution dispute involving land-based sources.

Sen. Vitter:

If it is completely not covered by the treaty, why is there a section entitled “Pollution from Land-based sources?”

Mr. Bellinger:

It’s just the dispute resolution. The treaty has not – a number of general hortatory provisions. But the dispute resolution mechanisms are extremely limited for this very reason. We wanted dispute resolution to have things we could use in our favor – if our vessels were seized.

Sen. Vitter:

Let me follow up on your answer. You say it’s not dispute resolution. Section Six – enforcement. First article: enforcement with respect to pollution from land-based sources. Why is that article there if there is no enforcement with regard to pollution from land-based sources?

Mr. Bellinger:

I think on this gets sufficiently technical. We’ve worked our way through the treaty. We are confident that pollution from land-based sources would not be subject to the jurisdiction of the tribunals or arbitral panels. But we’re happy to write it down for you on paper and get it to you Senator.

Sen. Vitter:

I would point you to Section Six, Article 213. Section six, which is about enforcement with respect to pollution from land-based sources. It seems to me the very title of that article at least sets up a prima facie case that your statement isn’t correct.

State Department Legal Adviser John Bellinger had told the Senators that “This is not a back-door way to subject us to the Kyoto [global warming] Protocol.” But Senator Vitter, by citing actual provisions of the treaty, had proven that the truth was something quite different. In fact, Madam Secretary, the evidence is that UNCLOS can be used by international lawyers to try to force the United States to implement the provisions of the unratified global warming treaty by forcing a reduction of the discharge of industrial carbon dioxide and other greenhouse gases.

Indeed, the use of UNCLOS for this purpose was articulated by Dr. William C. G. Burns in the 2006 article entitled, “Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention.” Litigation against the United States is “unavoidable,” he argues, and UNCLOS “may prove to be a primary battleground for climate change issues in the future.”

Speaking at the March 29, 2007, annual conference of the American Society of International Law (ASIL), Dr. Burns indicated that:

The heating in the oceans associated with climate change would likely be construed by a dispute resolution body as the introduction of energy under this definition, since the Law of the Sea Convention has already construed the introduction of heated waste water in a similar manner.

As Dr. Burns explained in an interview, “the key to it is that there is a definition of pollution under it (UNCLOS) and you are not supposed to pollute the oceans.”² In further explanation, he said:

(The key) is whether . . . carbon dioxide is a form of pollution. The argument I make is . . . CO2 is going to lower the pH of the ocean and mess up the ability of coral reef organisms to form reefs and affect other species that form shells The Law of the Sea Tribunal has before defined heated waste water as pollution. I would think that heating of the ocean and having heat-related impacts would fall under the rubric of pollution. Once you get that, under the Law of the Sea Convention, then there’s all of these proscriptions in terms of preventing pollution that the parties are required to do. . . . Those obligations then kick in and then create obligations to ameliorate those impacts.

The use of the Law of the Sea Treaty to combat land-based pollution could dramatically affect the industrial, economic and military activities of the United States.

Dr. Burns went on to say that he had informed the U.S. Department of Justice about lawsuit threats associated with UNCLOS, but it brushed the issue off.

In warning about an onslaught of litigation should the Senate ratify the treaty, Senator Vitter referenced Dr. Burns’ analysis. This is the type of information and analysis that should have been provided to Senator Vitter and the entire U.S. Senate by the State Department, but was not.

During a private meeting which included Mr. Kincaid, Mr. Bellinger was also warned about the concerns that the treaty would be used as a vehicle for anti-American lawsuits. In fact, Mr. Bellinger was given a relevant report published by America’s Survival, Inc. (ASI).³ This meeting occurred before Mr. Bellinger’s Senate testimony.

² Interview with Cliff Kincaid, March 29, 2007.

³ <http://www.usasurvival.org/docs/los.pdf>

The Honorable Condoleezza Rice
Re: UNCLOS
October 19, 2007
Page 5 of 5

Further, during his Senate testimony, when asked about the specific provisions under which action could be taken against the U.S. for failing to apply international regulations to land-based sources of pollution, Mr. Bellinger tried to insist—in the face of the text and the evidence—that there was no need for the Senate to worry because the provisions did not apply.

We hope the State Department becomes more forthright about UNCLOS and its ramifications as the Administration continues to push for its ratification.

As it stands now, the State Department does not seem a “reliable witness” for any U.S. Senator seeking to understand the truth about this controversial treaty. It would seem appropriate to review the testimony of Messrs. Bellinger and Negroponte in this regard. As their testimony seems lacking, the State Department should request another opportunity to testify to the Senate about UNCLOS so that the record can be clarified.

Thank you for your prompt attention to these important matters.

Sincerely,



Thomas Fitton
President
Judicial Watch, Inc.



Cliff Kincaid
President
America's Survival, Inc.

cc: Hon. Howard J. Krongard
Inspector General
U.S. Department of State
By Fax (202-663-0390)

Senator David Vitter
United States Senate
By Fax (202-228-5061)

Senator Joseph Biden
Chairman, Senate Foreign Relations Committee
By Fax (202-224-0139)

Senator Richard G. Lugar
Ranking Member, Senate Foreign Relations Committee
By Fax (202-228-0360)