

**ACCOUNTABILITY FOR FOREIGN CONTRACTORS:
LIEUTENANT COLONEL DOMINIC "ROCKY"
BARAGONA JUSTICE FOR AMERICAN HEROES
HARMED BY CONTRACTORS ACT**

HEARING

BEFORE THE

AD HOC SUBCOMMITTEE ON CONTRACTING
OVERSIGHT

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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**ACCOUNTABILITY FOR FOREIGN
CONTRACTORS: LIEUTENANT COLONEL
DOMINIC "ROCKY" BARAGONA JUSTICE
FOR AMERICAN HEROES HARMED BY
CONTRACTORS ACT**

WEDNESDAY, NOVEMBER 18, 2009

U.S. SENATE,
AD HOC SUBCOMMITTEE ON CONTRACTING OVERSIGHT,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:34 p.m., in room SD-342, Dirksen Senate Office Building, Hon. Claire McCaskill, Chairman of the Subcommittee, presiding.

Present: Senators McCaskill, Tester, and Bennett.

OPENING STATEMENT OF SENATOR MCCASKILL

Senator MCCASKILL. Good afternoon. The Subcommittee on Contracting Oversight today is going to be looking at testimony and potential legislation surrounding accountability for foreign contractors. I want to thank everyone for being here today. Senator Bennett will be joining us. He is running a little late. I am going to go ahead and get started. With the permission of the witnesses, when he arrives I may interrupt you if you are in your testimony and give him an opportunity to make his opening statement on this important subject matter.

Since the beginning of the wars in Iraq and Afghanistan, more than 5,000 American service members have been killed and more than 35,000 have been wounded. One of these brave Americans was Lieutenant Colonel Dominic "Rocky" Baragona.

Lieutenant Colonel Baragona was killed in Iraq in 2003 when his vehicle was struck by a truck being driven by an employee of Kuwait and Gulf Link Transport Company (KGL). An Army investigation found the accident was caused by the KGL's driver.

For 2 years, the Baragona family went to the Army, the Defense Department, and the White House to obtain information about their son's death and whether these officials intended to seek accountability. And for 2 years, the government did nothing.

So in 2005, the Baragona family acted on its own and brought a lawsuit against KGL. The company refused to appear in the matter until after the court had entered a \$4.9 million judgment against them. Only then did KGL enter the case, arguing that the

(1)

court had no jurisdiction over the Kuwaiti company and that the lawsuit must be dismissed.

In September 2006, 17 months after the Baragona family's suit began, and more than 3 years after the accident, the Army sent KGL the first of three letters asking for information about KGL's tactics in the litigation and other concerns. Each time, the relevant information was supplied to the Army by the Baragona family or their lawyers. KGL responded to each letter, and the Army took KGL's response at face value every time.

This February, Uldric Fiore, the Army's suspension and debarment official, decided based on a review of "the information available" that he would not initiate any suspension or debarment proceedings against KGL. This May, 4 years after the Baragona family brought their lawsuit, the court vacated its \$4.9 million default judgment and dismissed the Baragona family's case for lack of jurisdiction over KGL.

Today, more than 6 years after Rocky's death, the Baragona family is still waiting for justice. KGL has never admitted that their employee caused the accident. They have never paid a dime of compensation even though they were required as a contractor to the American Government to carry liability insurance. They have never even expressed condolences to the Baragona family for the loss of their son.

Meanwhile, KGL has received millions of taxpayer dollars in subcontracts from major defense contractors like KBR, CSA, and IAP. According to information produced to the Subcommittee, KGL has received more than \$200 million in new subcontracts since Lieutenant Colonel Baragona was killed.

That is why I introduced the Lieutenant Colonel Dominic "Rocky" Baragona Justice for American Heroes Harmed by Contractors Act in March of this year. Yesterday, the Ranking Member on the Subcommittee, Senator Bennett, the former acting Ranking Member, Senator Collins, and Senators Brown, Casey, LeMieux, Bill Nelson, and I reintroduced this legislation. This bill provides needed tools to ordinary Americans and the U.S. Government to hold foreign contractors accountable.

First, the bill requires foreign entities who choose to enter—and I want to emphasize that—who "choose" to enter into contracts with the United States, it requires them to consent to personal jurisdiction in cases involving serious bodily injury, sexual assault, rape, and death.

The bill also provides explicit authority under the Federal Acquisition Regulation for agencies to suspend or debar those companies who attempt to frustrate the legal process in these cases by failing to accept service or appear in court.

The legislation that my fellow Senators and I reintroduced yesterday is a good first step, but the need for Congress to act with this legislation has raised serious questions for me about the systemic failures that have allowed companies like KGL to escape accountability for their actions.

In April, the Subcommittee began an investigation of the suspension and debarment process. The Subcommittee's findings are sum-

marized in a fact sheet that I am releasing today, and I ask unanimous consent that it be made part of the record.¹

The Subcommittee has found that Federal agencies have only rarely used the suspension and debarment process to protect the government's interests. In fact, agencies have consistently failed to suspend or debar even those companies who have been convicted through the work of their own Inspectors General.

For example, from 2004 through March 2009, the Defense Department Office of Inspector General reported 2,768 convictions. The Defense Department suspended or debarred only 708 individuals and companies.

The State Department is the second largest Department responsible for contracting in Iraq and Afghanistan behind the Department of Defense (DOD), and in 2008, the State Department did not suspend or debar a single company.

From 2005 to 2008, the Department of Homeland Security (DHS) awarded 325,000 contracts to 67,696 different contractors and debarred just four companies.

In 2006, amidst widespread reports of waste, fraud, and abuse following Hurricane Katrina, DHS did not suspend or debar a single company.

At today's hearing, we will hear from Lieutenant Colonel Baragona's father, Dominic Baragona, about his family's struggle to hold KGL accountable and how legislation like this could have helped him.

We will also hear from two distinguished legal scholars about the gaps in the legal framework that this bill will help address.

We will also hear from the Justice Department about its efforts to pursue accountability for foreign contractors and ask whether they have the tools they need to protect the U.S. Government and the men and women who bravely serve us in uniform.

We will also ask our witnesses from the Defense Department and the Army tough questions about their suspension and debarment practices. And we will ask our witnesses what we need to ensure that Federal agencies aggressively protect the government and its citizens from irresponsible contractors.

I thank our witnesses for being here today and look forward to their testimony, and I recognize the Ranking Member of this Subcommittee, Senator Bennett, for his statement.

OPENING STATEMENT OF SENATOR BENNETT

Senator BENNETT. Thank you very much, Madam Chairman. Thank you for calling this hearing. It is interesting, perhaps poignant, that we are doing this in the month of November. We are about to reflect on Veterans Day when we talk about our veterans and the sacrifice they make for our country, particularly this November with the tragedy at Fort Hood, where a single act of brutality against our troops demonstrates once again that merely wearing the uniform of the United States puts one at risk.

The life and service of Lieutenant Colonel "Rocky" Baragona stands as an example of those who are willing to take this risk and

¹The Fact Sheet submitted by Senator McCaskill appears in the Appendix on page 36.

that the danger that comes from serving can come in places other than the battlefield itself.

Now, following his commissioning at West Point, Colonel Baragona dedicated his life to being an officer in the U.S. Army. And in the early days of the war in Iraq, he commanded a maintenance battalion that ensured our soldiers had essential equipment and supplies necessary to fulfill their mission. And it was while he was fulfilling that duty, a very genuine duty even though it was not in combat, on a remote highway in Iraq that he was the victim of a negligent driver.

Now, Colonel Baragona's father, Dominic Baragona, is here today with us as a witness to testify. I want to take this opportunity to offer my condolences to you, sir, and to your family on the loss of your son. I apologize.

We were able to meet the last time you were here in town and talk about him as a person. I wish I had had the opportunity to meet him, but I got to know a little bit about him through your stories and your description. Again, my deepest sympathies.

When our troops make this ultimate sacrifice, we as a Nation inherit their legacy of selflessness and of service and, most of all, of freedom. And as their beneficiaries, we owe the fallen and their families our best efforts to ensure that their sacrifice was not in vain and that fairness in contracting must be applied in all instances. And in some particularly egregious instances, justice should be served.

Justice is owed to the Baragona family. It has not been found because the company that is liable for Rocky's death has refused to answer in any forum for the actions of its negligent driver. I do not hold them responsible for having a negligent driver because every organization runs that risk. But I do hold them responsible for not owning up to the consequences of what happened as a result of the actions of one of their employees.

There are many facets to this case that go beyond just the Baragona experience, however, and, therefore, it justifies legislation of the kind that you have introduced.

The company, Kuwait Gulf Link, has performed contracts for the Army and seeks to do it again. This is not a closed issue entirely in terms of the past. KGL, in avoiding answering for its negligence, has not only avoided the judgment of the Federal courts, but has managed to avoid the suspension and debarment process that would disqualify it from being a future contractor to the U.S. Government if the facts were fully aired, in my opinion. So to the outside observer, the outcome of the case and lack of consequences from the case are almost as abhorrent as the accident itself and demonstrate remedies that must be made to the system to see that it does not occur again.

So this, which I cosponsor, is not in any sense anti-contractor. I have said here in this Subcommittee and will continue to say that I believe that the decision on the part of the Defense Department to move to contractors in those areas that do not require the skills of a warfighter is a wise decision. But contractors, U.S. owned and operated—as well as foreign owned and operated—regardless of their location or ownership, must be held accountable for their ac-

tions and at the same standard. Foreign-owned contractors must be at the same standard as U.S.-owned contractors.

This point is even more important in the hazardous areas because there the contractors are an extension of U.S. forces. And as such, the contractors in these cases must submit to the command, control, and communications of the U.S. military and, as they are working in concert with the U.S. military, they must be expected to answer for their actions to the United States, whether it be a military or civilian forum. They take on that obligation when they enter into an agreement with the U.S. Government.

So, again, as a general principle, I am against any legislation or regulation that becomes a barrier for well-intended contractors. Many well-intended regulations actually do that, and they result in worse contracting behavior, as they keep some of the good ones out.

But this bill, therefore, is not a barrier to entry; it addresses future contracting behavior for a variety of reasons. It is strictly voluntary and does not impose excessive cost on either party. It is just an agreement up front as to what the rules will be if something goes wrong.

The central remedy of the bill will ensure a consistent forum for civil cases in the most dire of circumstances, and the act of contracting parties voluntarily submitting to a designated forum is one that is well established in common law.

So today's hearing, for which I thank you, Madam Chairman, convenes to examine some esoteric aspects of government contracting, civil law, and justice. And I am unburdened with a legal education, so I am here to be instructed by those who have that background. But we will examine legislation that seeks to remedy a gap that seems to exist in the command, control, and accountability of contractors that work for our military overseas. It is appropriate that the legislation bears the name of Lieutenant Colonel Rocky Baragona because of the sacrifice he made 6 years ago. And I hope that under the banner of his name we can move to see to it that justice will be available to any others who are unfortunate enough to have the same sort of circumstance occur to them.

Thank you.

Senator MCCASKILL. Thank you, Senator Bennett.

I will introduce the witnesses now. I am going to skip Dominic, not because I do not want to tell about you and your wonderful family, but we are fortunate to have Representative Tim Ryan from Ohio, with us today, who has been by your family's side from the beginning of this ordeal, trying to be of assistance. And so I am not going to tell about you, and when it is time for you to testify, we will defer to Representative Ryan to do your introduction.

Ralph Steinhardt is the Arthur Selwyn Miller Research Professor of Law and International Relations at The George Washington University Law School here in Washington. He is co-founder and director of the program in international human rights law at New College, Oxford University. For 25 years, Professor Steinhardt has been active in the domestic litigation of international human rights norms, having represented pro bono various human rights organizations as well as individual human rights victims before all levels of the Federal judiciary, including the U.S. Supreme Court. He has also served as an expert witness in several cases testing the civil

liability of multinational corporations for their complicity in human rights violations. He currently serves on the International Commission of Jurists' Expert Legal Panel on Corporate Complicity in International Crimes. He is also the founding Chairman of the Board of Directors of the Center for Justice and Accountability, an anti-impunity organization that specializes in litigation under the Alien Tort Statute.

Scott Horton is an adjunct professor at Columbia Law School where he teaches law of armed conflict and international commercial law courses. He has served as chair of a number of committees at the Association of the Bar of the City of New York, including the Committee on International Law, and the Committee on International Human Rights. He currently serves on the association's task force on national security law issues. In 2007 and 2008, he managed the Project on Accountability of Private Military Contractors, a Human Rights First Project, leading to the publication of "Private Security Contractors at War," a comprehensive study of legal accountability issues surrounding government contractors. He has also served as a legal affairs commentator for a number of network and cable news broadcasters and is a contributing editor covering legal and national security affairs for *Harper's Magazine*.

It is the custom of the Subcommittee that we swear in all witnesses that appear before us, so if you do not mind, I would like the three of you to stand, and raise your right hand.

Do you swear that the testimony you will give before the Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. BARAGONA. I do.

Mr. HORTON. I do.

Mr. STEINHARDT. I do.

Senator McCASKILL. I want to thank all of the witnesses for being here today. We will use a timing system. We will ask you to try to hold your testimony to about 5 minutes, and your written testimony will be printed in the record in its entirety. And, with that, I will now turn to Representative Tim Ryan for the wonderful opportunity to represent and introduce Dominic Baragona and his family.

TESTIMONY OF HON. TIM RYAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. RYAN. Thank you, Senator McCaskill and Senator Bennett, for the opportunity. On a personal note, I just want to thank you for how much it has meant to the Baragona family. This has really been an American story with a cause by the parents and the sister to come up here and literally work Capitol Hill until they get a hearing in the U.S. Senate and legislation introduced, and it is a real testament to them and the fact that our system does work. And I want to thank you for that.

It is my distinct pleasure to introduce to you Dominic Baragona, who will deliver a personal story regarding his son, Lieutenant Colonel "Rocky" Baragona of the U.S. Army, and the injustice surrounding the negligence of a company that continues to avoid responsibility.

As you know, in 2003, Rocky Baragona was killed while serving our country in Iraq when his Humvee was struck by a supply truck driven by a Kuwaiti contractor. At the time, the company was under contract with the DOD to deliver supplies into Iraq. Near the end of his tour, as he was preparing to return home, Rocky was struck and killed.

As the law now stands, U.S. citizens who have family members killed or harmed by foreign contractors working with the U.S. Government may not be able to bring those foreign contractors into a U.S. court to win justice for a wrongful death. This barrier to justice for American families is particularly worrisome for many reasons, among them the fact that these contractors are funded by us, the U.S. taxpayer.

In light of this injustice and the perilous position in which it places the families of armed service members and other Americans pursuing our national interests, I draw to your attention Senator McCaskill's bill as well as our bill that we have introduced, that I have introduced in the House, H.R. 2349, your bill's companion in the House.

This legislation requires that all foreign and domestic contractors operating pursuant to a Federal contract consent to U.S. Federal court jurisdiction over disputes arising out of such contracts, including suits involving injury to American armed service members, government employees, and American citizen contract employees.

Under the bill, for existing cases brought on or after September 11, 2001, contractors must consent to Federal jurisdiction as a condition of either entering into future contracts or receiving payments under current contracts. The legislation also provides for suspension and debarment of contractors for evading services of process and failure to answer for suits in U.S. Federal courts brought in relation to the performance of a Federal contract.

Unfortunately, the Baragona case is by no means an isolated situation where a contractor headquartered abroad has acted in an egregious, fraudulent, or negligent manner. While few stories are as tragic as the Baragona case, there are many instances of impropriety. Such behavior is beyond egregious and must end. It is imperative that our legal system has unfettered reach in order to adjudicate such cases in our courts rather than allowing these companies to escape liability simply because they are headquartered abroad.

My distinguished colleagues, this is about accountability. Foreign companies seeking American contracts paid by our tax dollars should be subject to the jurisdiction of our courts. If these companies seek our business, they can agree to appear in our courts, and it is that simple.

Finally, the Baragona family will never completely recover from their tragic loss over 6 years ago. The family may, however, find solace in the knowledge that other families enduring similar circumstances will not face the particularly injustices they have been forced to endure since 2003. And, again, this family has taken the burdens of many other families here to Capitol Hill to have their voice heard, and it is just a wonderful, well-respected family back in Ohio, and Florida as well, and I want to thank you again and would like to introduce a hero in and of himself, along with his

wife, Vilma, and their daughter, Pam, speaking on behalf of their son, Rocky, as well, Dominic Baragona.

Mr. BARAGONA. Thank you.

Senator MCCASKILL. Go ahead.

**TESTIMONY OF DOMINIC BARAGONA,¹ FATHER OF
LIEUTENANT COLONEL DOMINIC "ROCKY" BARAGONA**

Mr. BARAGONA. Good afternoon, Senator McCaskill, Ranking Minority Member Senator Bennett, and Subcommittee Members. I ask that my full written statement be entered into the record.

Behind me is my wife, Vilma, and our daughter, Pam.

I want you to know I am scared to death. [Laughter.]

Senator MCCASKILL. You have absolutely nothing to be worried about. You really don't. [Laughter.]

Mr. BARAGONA. I hear this.

Senator McCaskill, you said it all in your statement. I could just turn this in and not even have to go any further.

Senator MCCASKILL. No. We want to hear from you.

Mr. BARAGONA. There you go. Our son, Lieutenant Colonel Rocky Baragona, battalion commander of the 19th Maintenance Battalion, was killed in Iraq on May 19, 2003, when a tractor-trailer truck owned and driven by Kuwait Gulf Link Transport careened across three lanes and crushed his Humvee.

I am here to build a legacy in Rocky's life through the passage of this bill. If it becomes law, foreign contractors who do harm to any of our soldiers will be held responsible in the U.S. courts.

Second, I want a real criminal investigation into my son's death, holding KGL responsible.

I am kind of lucky, if you can say that. Just hours before Rocky got killed, I talked to him on a satellite phone. He said, "Dad, I am on my way home, and I will be in Kuwait in a couple of hours." And I said to him, "Hey, Rock, is there anything I got to worry about?" He said, "Not unless something stupid happens, Dad."

Well, the next morning two soldiers are standing in my back yard. I realized something stupid had happened. We were shocked to learn that Rocky had been killed in a civilian accident.

A civilian accident? It was just beyond us. We had a million questions, but the casualty officer told us, "Don't worry, Dominic." He said, "The Army will answer all your questions. In fact, they will answer questions you have not even heard of."

So the next few weeks are like a blur to us, between memorials in our home town, Fort Sill, and finally, Rocky's burial at Arlington National Cemetery.

By December, the report is delivered, 2 days before Christmas, what would be our first Christmas without the Rock. Our family felt the report, which had been approved by General Sanchez, was terrible. For one thing, it had no information about the driver or the name of the company. It gave a false impression of how Rock had died. The pictures they give us are just grainy xeroxed copies. You couldn't see nothing. Key personnel were missing. Direct statements were omitted. As a result, we demanded a second investiga-

¹The prepared statement of Mr. Baragona with attachments appears in the Appendix on page 40.

tion with a written statement of questions from my family to be answered.

The colonel, Rocky's commanding officer, gave us a little hint on who the company was by saying, "Dominic, I saw the original pictures, and they got 'KGL' written, and the color of the truck is orange." Well, with the wonderful Internet we have today, we hold our own investigation and learned that the name of the company responsible for Rocky's death was Kuwait Gulf Link Transport, a multi-million-dollar DOD contractor.

We couldn't get nothing done. We decided we needed to contact Ohio Senator DeWine to help us with the Army report and contacting KGL.

Senator DeWine said, "Dominic, let me handle this." He said, "You know what? This company wouldn't be in existence today if we had not gone to the Gulf War and saved that company. They will do the right thing. I am going to write a letter to the Kuwaiti Ambassador, and they will straighten this company right out." Well, needless to say, he got rebuffed.

He met with the Kuwaiti Prime Minister who tells him, "The Baragona family has to go to Iraq. That is where the accident happened, and they have got great courts there. They will solve the whole thing. Don't worry about it."

I couldn't help but think—but here we are, we liberated this country, and this company is going to get away with this? Anyhow, by the summer of 2004, Kuwait Gulf Link gained national attention by paying ransom money to terrorists for the release of their employees kidnapped in Iraq. CNN videos of the drivers—shows drivers complaining about KGL forcing them to work for U.S. forces by taking away their passports.

We also learned that KGL was banned in India for the recruitment scams and forced labor—the point being they were known human traffickers with human rights violations.

In January 2005, the second report was finally delivered to Senator DeWine's office by Brigadier General Wright. The first thing the general says to us is, "This company has no contracts with the Army. Not only that," he says, "they have immunity." And I was trying to figure out whose side the general was on. I said we just could not fathom that. In fact, not to embarrass them, our lawyers whispered their name in their ear saying, "Hey, this company has got millions of dollars worth of contracts with DOD."

This report was also flawed, but the new pictures showed the truck has no license plates, and the driver's passport with no commercial driver's license. And yet we couldn't figure out—the Army wouldn't do no criminal investigation with just that evidence alone. And Rock was a battalion commander.

Well, you won't believe this next story. In February 2005, our daughter has a chance meeting with President Bush and asked him for his help. The first thing the President said is, "How are your parents doing?" President Bush literally initiates a debarment inquiry and the DOD issued a show cause letter to KGL citing bad behavior. KGL responded to the President's request by hiring retired Brigadier General Richard Bednar, an ex-DOD debarment chief, who held off-the-record conversations with DOD officials, and the case come to a stop, the show cause letter.

I couldn't believe this so I had Brian Persico, who was in charge of the Army's suspension and debarment office. I had his number. I give him a call. I said, "I want to know how this show cause letter just came to an end like this. My God, we got the President behind us. How high do we have to go?"

Let me tell you what he tells me. Well, I asked him about General Bednar and his conversation. He said, "If he moved the debarment forward, his career would come to an end." I went, "Wow." I said, "Is it possible that a KGL lawyer can trump the President and kill the debarment inquiry?" It was scary.

So we pursued justice through the court since we had no admission by KGL and its negligence and no criminal investigation. KGL responds to the lawsuit by ignoring the court, not even bothering to show up. Well, it kind of made it a little bit easier for us to win if it was just one-sided. So the judge awards us \$5 million. Well, 30 seconds later, the KGL attorneys ask the court to vacate the judgment for lack of jurisdiction.

Well, we always felt there was a weak case there. Judge Duffey ultimately rules in their favor, but he blasted KGL on their bad behavior.

We spent the worst days since the funeral watching KGL executives and lawyers giving high-fives after the judge's ruling. Since then, we have appealed the ruling.

Our personal investigation found KGL continues forced labor practices and, in February 2008, was responsible for killing another soldier. This is a company that is supposed to have insurance with DOD for just such instances, but somehow manages never to pay when found guilty of negligence.

It has really greatly disappointed our family that the Army did not take care of the Rock and investigate anything unless we pushed them to do it. You know what? We love the Army. We have two sons who graduated from West Point. We have a grandson nominated by Senator McCain to the Naval Academy. He goes to Iraq next month. I am a Korean War veteran. Our hearts bleed for the survivors of the Fort Hood families. We know how they felt during the final roll call. We were there.

Today, we are grateful for Senator McCaskill's bill, though it may not necessarily help our case. We just want to make sure that it does not happen again to other families. Just level the playing field between U.S. and foreign contractors. After this bill passes, the Wild West of contracting for foreigners will be over.

Senator McCaskill and Senator Bennett sent a bipartisan letter to Secretary Robert Gates showing concerns that a company under investigation by the Senate Subcommittee could be awarded a multi-million-dollar food contract. And then we also appreciate letters from Representative Ryan and Representative Driehaus, who wrote a letter to the Department of Justice demanding a real investigation into KGL's misconduct.

Vilma, Pam, and I, we cannot thank everybody enough for trying to help us. For 6 years, we have walked these halls with our brownies and our hot peppers, and are exhausted. We have worked with three branches of the government for justice, and here we are today. Only in America.

Thank you.

Senator MCCASKILL. Thank you so much, Mr. Baragona. And please convey to the rest of your children that we send our condolence for the loss of their brother because I know that you and your wife had seven children, including Rocky. So a big family, worked hard, the American dream, and I know that Senator Bennett and I are going to work as hard as we know how to get this law passed in your son's name.

Mr. BARAGONA. Thank you.

Senator MCCASKILL. We will now turn to the testimony of Professor Scott Horton.

TESTIMONY OF SCOTT HORTON,¹ PROFESSOR, LECTURER-IN-LAW, COLUMBIA LAW SCHOOL

Mr. HORTON. Chairman McCaskill and Ranking Member Bennett, I am really moved by the testimony we have just heard from Mr. Baragona about this case. It is a clear miscarriage of justice, and I, therefore, feel honored to be able to offer some remarks in support of this legislation.

I think it is a significant piece of legislation that will close an important jurisdictional gap that exists for Federal courts and allow them to adjudicate claims that arise from serious misconduct involving U.S. Government contractors, which now appears to be beyond their jurisdiction.

I want to say at the outset that talking about accountability and accountability measures for contractors is not intended to be criticism or disparagement of contractors. In fact, it would be impossible for us to perform the contingency missions we have overseas without those contractors. They play key roles in protecting American soldiers overseas, and frequently they put their own lives at risk. But, nevertheless, it is inappropriate for them to operate without accountability. Accountability is necessary for safety, and it is essential to upholding basic norms of the rule of law.

One of the questions that Congress has to look at is whether or not it has created the correct framework for this accountability to occur. Well, I want to suggest that there has been a change in the way the United States has approached this issue over the last couple of decades that justifies these changes.

The United States has relied much more heavily on contractors in connection with these contingency operations, and taking this change into account, the United States has also adopted a much more aggressive posture on the negotiation of Status of Forces Agreements around the world, seeking higher levels of immunity from the law of host governments.

Well, whenever it does so and it takes away the jurisdiction of the U.S. Government, which, in fact, is what happened in the case where you talked about the Kuwaiti Ambassador who told you, "Bring it to the courts of Iraq." Actually, you could not bring this matter in the courts of Iraq because of Order No. 17, which we had issued—it was issued by Paul Bremer in July 2004—that exempted exactly this sort of issue from the jurisdiction of Iraqi courts.

Now, when that happens, it is very important that the United States step in and expand its own jurisdiction so that there is no

¹The prepared statement of Mr. Horton appears in the Appendix on page 60.

vacuum. In fact, I think that is something axiomatic. If the United States says the host country does not have jurisdiction, the United States has to supply its own jurisdiction. And, moreover, this is an area where the United States clearly has both the right and the responsibility to do that.

Well, one obvious question that arises from this litigation is whether or not it is constitutional to do so, because, of course, the district court judge here applying the International Shoe Doctrine concluded that there was a lack of sufficient minimum contacts with the jurisdiction to warrant that. And my answer to that question is clearly yes. The legislation approaches this on the basis of consent. Consent provides a completely adequate basis for the exercise of this jurisdiction, notwithstanding the Fourteenth Amendment's limitations that apply minimum contacts.

But even beyond that, there is an entirely separate area here which Senator Bennett alluded to in his remarks, and that is, the U.S. law of armed conflict jurisdiction. When contractors are brought in in connection with a contingency operation beyond the territory of the United States, the United States has the power to expand the jurisdiction of its courts to address those situations. That is something that has been recognized since the Constitution. It is implicit in the power that is given to Congress to define the law of nations. And, in fact, as that phrase was originally used at the time of the enactment of the Constitution, that comprehended little beyond this law of armed conflict norm.

I would like to just note as well that the contracts, in order to implement this properly, probably need to address a couple of other things not dealt with in specificity in the legislation, but probably would be appropriate for the contracting officer to deal with. That is the venue of the court that would handle the case, and also a provision in the contract that would provide that third-party beneficiaries would be able to use it and, finally, more detailed notice provisions. Thank you.

Senator MCCASKILL. Thank you, Professor Horton, for being here, and we will look forward to some questions.

Professor Steinhardt.

**TESTIMONY OF RALPH G. STEINHARDT,¹ PROFESSOR OF LAW
AND INTERNATIONAL AFFAIRS, THE GEORGE WASHINGTON
UNIVERSITY LAW SCHOOL**

Mr. STEINHARDT. Madam Chairman McCaskill, Ranking Minority Member Bennett, and Members of the Subcommittee, I am extremely grateful for the opportunity to testify today and to pay tribute to the Baragona family. I would like to emphasize just a few points from my written testimony and then respond to any questions.

It is safe to say that this legislation is a welcome bipartisan response to an injustice. It is a response to a particular case, but as Senator Bennett suggested in his statement, the importance of this legislation goes well beyond that one lawsuit.

The problem of government contractors' accountability takes many forms, including not only the kinds of torts that are at the

¹The prepared statement of Mr. Steinhardt appears in the Appendix on page 66.

heart of the Baragona case, but also in some rare but high-profile cases, human rights abuses that undermine the credibility of the United States, that contradict its values, and potentially empower our enemies.

This proposed legislation, it seems to me, is one step towards assuring a measure of accountability whenever foreign businesses enter into contracts with the U.S. Government and, most importantly, levels the playing field between U.S. corporations and foreign corporations.

In my written testimony, I describe the likely trajectory of lawsuits under this legislation with particular emphasis on the constitutional and international law issues that may arise and that supporters of the legislation need to anticipate. I also offer some modest suggestions for improving the reach and the reliability of the legislation. In the interest of making the legislation as strong as possible, let me just anticipate what some of those issues are likely to be.

Specifically, and in a nutshell, the legislation offers a statutory solution to a constitutional problem, and it offers a domestic solution to an international problem. It also addresses issues that arise at the beginning of the litigation—notably, jurisdiction and service—but it does not address the range of obstacles that can derail transnational litigation at a later stage.

One of the occupational hazards of being a law professor, other than faculty meetings and paper cuts, is that sometimes we get lost in the doctrine and the theory, so let me be plain.

A constitutional concern. There is no question that Congress has constitutional authority over government contracts. That is easy. There is no question that you could require a bond of government contractors to assure that there is a compensation fund for future plaintiffs in Mr. Baragona's circumstances. The harder case is that under the Supreme Court's decision in *International Shoe* that Professor Horton mentioned, the courts will have to determine in every case, case by case, whether the particular defendant has certain minimum contacts with the forum or not.

Congress cannot legislate a one-size-fits-all legislative answer to that constitutional question. Requiring a waiver of personal jurisdiction objections as a precondition for doing business with the government is an attractive approach, but it will be challenged as an unconstitutional condition. That is, there are many government privileges like contracting or driver's licenses that cannot be subject to advance waivers of certain due process or fairness rights. I think that there are arguments that we should anticipate for getting around the unconstitutional conditions doctrine, but they have to be acknowledged and not ignored. The same is true with respect to service.

Second, and turning briefly from the constitutional to the international issues, the proposed legislation addresses an international problem, and international law, including the treaties of the United States, will not be irrelevant. The most significant international issue arises under the Hague Service Convention, as the Baragonas discovered, to their dismay. I, too, have come up against the constraints of the treaty in practice. I have criticized the treaty in print and in testimony before the House of Representatives. I am

fully familiar with the logistical obstacles that the Hague Service Convention represents, but, again, this may not be an area in which we can simply legislate our way out of the box. Every one of this Nation's major trading partners is a party to the Hague Service Convention, including Canada, China, Japan, Korea, Mexico, the United Kingdom, and almost every member of the European Union. They are unlikely to go away quietly if this legislation is construed as an effort to render that Hague Service Convention irrelevant.

Let me just also briefly mention that there are certain practical considerations that have to be taken into account here. Defendants from countries that are parties to the Hague Service Convention will almost certainly insist on compliance with the treaty to the letter, and that is significant because when the judgments are taken from an American court to where the assets are likely to be—namely, one of the reasons that the courts in foreign countries resist U.S. judgments is that service has not been done in accordance with the treaty.

There are other issues, of course: Choice of law, forum non conveniens, and enforcement of judgments. In my written testimony, I also describe the Alien Tort Statute. But, again, let me express my gratitude for the opportunity to testify today.

Senator McCASKILL. Thank you, and we welcome Senator Tester to the Subcommittee.

I have to be honest with the professors on the panel. I am burdened with a legal education, and there for a minute I started thinking I should start taking notes— [Laughter.]

That I might have to write on this subject matter. And it is complicated, and we do want your help, and that is why we have asked you to come here today.

Let me ask you, Professor Steinhardt, as it relates to the waiver of personal jurisdiction objections as a precondition of contracting with the Federal Government. Can you address the court's decision in *Insurance Corporation of Ireland v.*—I think it is—I do not know how to say this in French. I am not French. I am going to say it like we would say it in the Midwest—*Compagnie des Bauxites de Guinee*, that personal jurisdiction is an individual constitutional right, like other rights, may be waived.

Is there anything else we need to do in this legislation to assure that we could fall under the aegis of that Supreme Court decision, that is, a waiver in advance to submit to the jurisdiction of the court and, therefore, avoid the constitutional problems that you delineated?

Mr. STEINHARDT. Absolutely right, Senator McCaskill. There is that dictum in the insurance company case. The difficulty is whether the waiver of due process rights is voluntary or statutorily directed, and that is what is going to trigger the unconstitutional conditions doctrine.

I am not saying that those who challenge this legislation will necessarily win on the unconstitutional conditions doctrine, but if the government confers a benefit with conditions, and in particular the condition that parties relinquish a constitutional right, that triggers the unconstitutional conditions doctrine. The next step is to ask: Is there a substantial relationship, what the courts have

called an essential nexus, between the benefit conferred and the condition that is imposed?

I think that if the Senate and the House of Representatives found as a matter of fact that there was a connection between the performance of the contract and the submission to liability litigation in the United States, then that is likely to satisfy this essential nexus test. But we should not oversimplify it or think that it is just going to go away.

So the general principle that you can waive these rights is absolutely correct. But if you are forced to do so in a way that triggers the unconstitutional conditions doctrine, there will be difficulty.

Senator MCCASKILL. Well, I certainly understand the point you are making. I just have to think that if we pass this law, the nexus of a company wanting to do business with our country, especially within the context of the military in a contingency operation, that level playing field that everyone referenced in their testimonies, I would think that there would be some compelling—as I think I remember from law school, the weighing tests. I think that on that weighing test you are going to get a thumb on the scale on the side of accountability as it relates to these foreign contractors. Am I off base on that?

Mr. STEINHARDT. I do not think you are off base. I just do not think we can necessarily predict that the courts will automatically do the right thing in that regard, and that is why the sense of Congress, the finding by the Senate that liability is an essential part of the actual performance of the contract or the leveling of the playing field I think goes a long way towards assuring that the unconstitutional conditions doctrine will not be an obstacle.

Senator MCCASKILL. Let us talk about the Hague Service Convention. What is your suggestion on service of process? The two of you with your knowledge of legal actions on an international platform, if you were writing this legislation, what suggestions would you give us to strengthen the process piece of this? I certainly get when it comes time, it does not—frankly, even if this company had not been such a coward and refused to ever step up and even speak to you about their negligence, Mr. Baragona, enforcing the judgment at a bank, as you referenced, could get really tricky if the lawyers start talking about the validity of process.

What advice can you give us of any tweaking we can do to the language in this legislation that would strengthen the process part as it relates to the Hague Service Convention? Professor Horton.

Mr. HORTON. Well, I know that the notice provisions are particularly important for this purpose, and in the sophisticated commercial contract that is an international contract, it is quite conventional not only to have specification of the law and the forum for the resolution of disputes, but also to have a designation of an agent for service of process. And if you want to anchor that to a jurisdiction in the United States, have an agent for the service of process designated at the jurisdiction that you have also specified for litigation, I think that really makes it much easier, and it shows within the four corners of the contract that this issue has been given thorough consideration and extraordinary steps have been taken by the contract counterparty to do this.

I agree with the general analysis that Professor Steinhardt has laid out. I think generally when we are talking about government procurement contracts, where it is a free and open process and a company participating has made the election to participate, to qualify, and bid, that these choices will be made in the context of the contractors, nothing coerced about it. That would be respected, I think, by a Federal court.

There are other situations, particularly in wartime, certainly we saw circumstances in the 19th Century when military forces would commandeer—they would require or levy services from a local agent in terms of provisioning, yes, that would produce some problem in this regard. But not the sort of procurement that we are talking about here in connection with the war on terror.

Senator MCCASKILL. Right. We are begging them—they are begging us to hire them.

Mr. HORTON. Exactly right.

Senator MCCASKILL. I do not know how in that context we are going to fall under a huge problem of coercion. Nobody is putting a gun to their head. They are working very hard to get our business, and I think as a piece of that, they should be responsible for their actions, and especially as it relates to our men and women in uniform.

Senator Bennett.

Senator BENNETT. I am sufficiently impressed with your legal background that I will pass. [Laughter.]

Senator MCCASKILL. All right. Senator Tester.

Senator TESTER. I can ask some questions, but it has no reflection on your legal background. [Laughter.]

Senator MCCASKILL. That is a good thing.

OPENING STATEMENT OF SENATOR TESTER

Senator TESTER. Mr. Baragona, I want to thank you for testifying here today. I apologize for not getting here earlier for the entire panel, but I do understand that you did a fine job, and I certainly want to express my condolences to you and your family on your tragic loss.

This is a question for any one of the three who can answer it. How pervasive is the problem of foreign contractors killing or injuring American service members or American civilians? Does anybody know the answer to that?

It would be good to have the numbers on that. One is too many, but it would be good to have the numbers.

A question for the legal team. Do the contractors in Afghanistan have the same kind of immunity that they did in Iraq?

Mr. STEINHARDT. That is a completely opaque issue right now because the immunity was created—and there is a diplomatic note, which we have reproduced here, between the U.S. Embassy and the Afghan government that talks about levels of immunity that the United States is proposing. The United States also has proposed a Status of Forces Agreement which would give immunity to contractors. The Afghan government has essentially not agreed to this, so we are at something of a standoff on this immunity issue, and we do not have something like Order No. 17 which, clearly, effectively codifies the immunity.

Senator TESTER. So the question is what you just said, that there is immunity for contractors that injure or kill American servicemen or civilians? Is that what they are advocating for?

Mr. STEINHARDT. Immunity.

Mr. HORTON. I think it is a consequence of positions that the United States has taken, but let me go back and say Order No. 17 said effectively they are immune from process under local law. That means that in Iraq no one can bring a contractor into a court other than Iraqi contractors—they were fair game—but not a Kuwaiti contractor, for instance, on account of wrongful death, rape, even murder, I mean, even an intentional crime they were immune. That is right. Of course, there was a major question as to how far the United States had gone in filling that void with assertion of U.S. jurisdiction. We have the Military Extraterritorial Jurisdiction Act and a couple of other pieces of legislation. The Uniform Code of Military Justice also was revised in December 2006 to create some basis of jurisdiction. We had no actual practice of enforcing that by the Department of Justice during that period. We had one single prosecution of a contractor coming out of Afghanistan up until the end of 2007. So it is only quite recently that our Justice Department has begun to step in and deal with these cases.

Mr. STEINHARDT. Could I just add to that? Even if immunity were overcome by legislation or otherwise, there would still be a significant legal issue with the state secrets privilege. Many of these government contractors would be able successfully to invoke the state secrets privilege in circumstances that I suspect many Members of Congress would disapprove of.

Senator TESTER. So let me get this straight, if I might, and please do correct me if I am wrong, because I hope I am.

We have a situation in Afghanistan right now where, if a contractor is negligent, kills or injures somebody, there is no recourse.

Mr. HORTON. Well, I was talking about immunity from the local courts. Then we have the question of whether there is immunity, whether there is a basis to go after that contractor in the United States, and on that we have a lot of very contentious litigation going on right now with contractors successfully asserting immunity under different doctrines in some cases, but also being held accountable in other cases. So it is a very complex picture.

Generally they will attempt to argue that they are under the authority of the command there, and, therefore, they should have the same immunity that the military has, and they have gotten split verdicts on that question so far.

Mr. STEINHARDT. Usually under the Alien Tort Statute.

Senator TESTER. All right. And the contractors, of course, the ones we are talking about, are paid for by the American taxpayer.

Mr. STEINHARDT. Correct.

Senator TESTER. OK. Thank you very much.

Senator MCCASKILL. Definitely we have work to do.

I want to thank all three of you for your appearance today. Particularly I want to thank the Baragona family.

The staff of this Subcommittee has done great work for this hearing, and when legislation gets passed, there is a moment on the floor where the sponsoring Senators thank the staffs of various committees. But many times the work that staff does day in and

day out is taking the time to sit, to listen, to understand, and I have a man on my staff, Stephen Hedger, who is a West Point graduate, who decided after he met the Baragona family that he was not going to let me rest until I did something about Rocky Baragona's death. As a fellow West Point graduate—and he is now the Legislative Director in my office, so he has some elbows to throw around about what the priorities are. And I want to thank Mr. Hedger for his dedication to your family and to Rocky's memory. Thank you all for being here today.

[Applause.]

Senator MCCASKILL. And he loves your brownies. [Laughter.]

If the second panel of witnesses will come forward, please. Thank you for being here today.

First, Tony West was nominated by President Barack Obama to be the Assistant Attorney General for the Justice Department's Civil Division on January 22, 2009. He was confirmed by the Senate on April 20, 2009. From 1993 to 1994, he has served as a special assistant in the Justice Department. From 1994 to 1999, he served as Assistant U.S. Attorney for the Northern District of California. He later served as Special Assistant Attorney General, an appointee of California Attorney General Bill Lockyer. Prior to his return to the Justice Department, Mr. West was a litigation partner at Morrison and Foerster in San Francisco.

Richard Ginman assumed the position of Deputy Director for Program Acquisition and Contingency Contracting, Defense Procurement and Acquisition Policy, in May 2007. In February 2008, he assumed the position of Principal Deputy to the Director of DPAP. In that capacity he is the principal adviser to the Director for all contracting and procurement policy areas. Mr. Ginman has more than 37 years of experience in government and commercial business in the fields of contracting, acquisition management, logistics, and financial management. Mr. Ginman was commissioned an ensign in the Supply Corps of the U.S. Navy in 1970 and retired as a rear admiral in 2000.

Uldric Fiore was selected as the Army's suspension and debarment official in October 2008. He has also served as the Director of Soldier and Family Legal Services for the Army Office of Judge Advocate General since July 2008. He formerly served as General Counsel for the Department of Defense Office of Inspector General from May 2005 until July 2008. He retired at the rank of colonel following 30 years of service, including 25 years in the Judge Advocate General Corps.

It is the custom of this Subcommittee to swear all witnesses that appear before us, so if you do not mind, I would ask you to stand and raise your right hand.

Do you swear that the testimony that you will give to the Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. WEST. I do.

Mr. GINMAN. I do.

Mr. FIORE. I do.

Senator MCCASKILL. Thank you so much. We would ask you to try to keep your testimony to 5 minutes, and we will be happy to put your entire statements in the record as part of today's hearing.

We will turn first to Tony West from the Department of Justice.

**TESTIMONY OF TONY WEST,¹ ASSISTANT ATTORNEY GENERAL,
CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE**

Mr. WEST. Thank you, Madam Chairman, Ranking Minority Member Bennett, and distinguished Members of the Committee. I appreciate the opportunity to appear before you today.

Let me say at the outset that we, at the Department of Justice, greatly appreciate this Subcommittee's attention to this issue, and we support your efforts to ensure that our servicemen and service-women and their families have recourse to our Federal courts.

Let me also express the Department's condolences to the Baragona family and express our gratitude to them both for the brave and honorable service of their son and for their perseverance to help turn the tragedy of his death into a legislative legacy that will ease the pain of other military families who may find themselves faced with the same road blocks.

Now, as has been noted, S. 526, named for Lieutenant Colonel "Rocky" Baragona, was introduced to address the challenges faced by them in trying to establish personal jurisdiction in a U.S. court for the wrongful death of their son. Lieutenant Colonel Baragona's family pursued justice by suing the foreign contractor whose employee was involved in that accident, but that lawsuit was dismissed when the court held that it had no personal jurisdiction over the contractor.

S. 526 would change that. For certain contracts, it would require contractors to consent to personal jurisdiction, thereby allowing U.S. courts to hear civil suits alleging rape, sexual assault, or serious bodily injury to members of the U.S. armed forces, U.S. civilian employees, or U.S. citizens employed by contractors working under government contracts performed abroad. And, importantly, S. 526 would also require contractors to consent to personal jurisdiction in matters brought by the United States alleging wrongdoing in the performance of a government contract performed abroad.

Madam Chairman, addressing procurement fraud is among our highest priorities at the Department of Justice. We have pursued and we will continue to aggressively pursue all contractors, foreign or domestic, who seek to defraud the government in the procurement process. Since 1986, we have recovered in excess of \$4.4 billion in procurement fraud matters involving the Defense Department in cases that range from ensuring that the American taxpayer is not overcharged for vital services to our men and women in uniform, to enforcing the laws against bribery and other corruption.

In fraud suits against foreign entities, we have been largely successful in asserting personal jurisdiction in U.S. courts. We have just announced the filing of two war-related cases against defendants that include foreign entities.

The Department announced 2 days ago that it had intervened in a *qui tam* action against Public Warehousing Company (PWC) and others alleging that the defendants knowingly overcharged the United States for food supplies for our service members in Kuwait,

¹The prepared statement of Mr. West appears in the Appendix on page 81.

Iraq, and Jordan. A criminal indictment has also been filed against PWC in connection with that alleged fraud.

Now, in these cases we anticipate that our authority under the False Claims Act will enable us to establish personal jurisdiction over the foreign entity defendants, just as we have had that success in the past.

With respect to S. 526, we believe that the requirements it imposes should facilitate the establishment of personal jurisdiction over foreign contractors, particularly where it does not currently exist. We have a number of technical suggestions to the legislation that we have discussed with Subcommittee staff, and we are happy to further discuss with Subcommittee staff, and I discuss those in more detail in my written testimony.

In conclusion, the Department of Justice supports protecting the rights of individuals and their families to recover appropriate damages for injuries caused by the negligent acts of foreign contractors. We are also dedicated to pursuing contractors that commit fraud against the government and drain the Treasury of funds so vital to our military and procurement systems. We appreciate the Subcommittee's efforts to help us fulfill that important mission, and I am happy to answer any questions you have.

Senator MCCASKILL. Thank you, Mr. West, for being here. Mr. Ginman.

TESTIMONY OF RICHARD T. GINMAN,¹ DEPUTY DIRECTOR FOR PROGRAM ACQUISITION AND CONTINGENCY CONTRACTING, DEFENSE PROCUREMENT AND ACQUISITION POLICY (DPAP), OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS, U.S. DEPARTMENT OF DEFENSE

Mr. GINMAN. Madam Chairman, Senator Bennett, and distinguished Members of the Subcommittee, thank you for the opportunity to appear before you today on behalf of the Hon. Robert Gates, Secretary of Defense, to discuss the accountability of foreign contractors.

Before I begin, I would like to convey my condolences to the Baragona family. You have my heartfelt sympathy for the loss of your son in service to his country.

You asked me to address several aspects of S. 526 cited as the Lieutenant Colonel Dominic "Rocky" Baragona Justice for American Heroes Harmed by Contractors Act.

The legislation is designed to ensure foreign contractors with U.S. contracts who perform contracts abroad are held accountable for their actions that result in serious bodily injuries of members of the armed forces, civilian employees of the U.S. Government, and the U.S. citizen employees of government contractor companies. While I support the overall substance of the legislation, I believe there are portions that could be improved.

First, I believe liability should be limited to actions that are linked to the performance required under the government contract and not be broadly applied to any action by a government con-

¹The prepared statement of Mr. Ginsman appears in the Appendix on page 89.

tractor, subcontractor, independent contractor, or their respective employee.

Second, applying this provision to contractors at all tiers is problematic. Changing the definition of "contractor" and limiting the applicability of this legislation to the prime contractor would allow us to more effectively implement and enforce it. It is likely, in order to protect themselves, that prime contractors would require all subcontractors, at all tiers, to certify compliance with this provision. This will undoubtedly impact the issuance of contracts in a combat environment and impact the ability to get our troops what they need in the required time that they need it.

Third, the legislation could affect competition to some degree. Because the statute would apply to "any contract" regardless of dollar value, many smaller local vendors overseas would either refuse to do business with U.S. forces, or they would need to increase prices to cover the additional insurance for handling possible U.S. litigation, particularly for injuries unrelated to their business with the U.S. Government.

Fourth, there should be a threshold used to apply the consent provision to contracts.

Fifth, the prospective applicability under contracts and the retroactive application as a condition of receiving payments under current contracts would fall outside the changes clause and require bilateral modifications. It would eliminate the Department's ability to unilaterally exercise valuable options and require bilateral modifications which allow the contractor to ask for consideration, or force termination of the contracts.

We do not know for certain the extent that this new law will have on our ability to contract overseas and obtain mission-critical supplies and services. If foreign contractors opt not to bid on U.S. contracts as a result of the legislation, there would be negative impacts on the Department's mission. In Iraq and Afghanistan, for example, our men and women rely on the delivery of food, fuel, and supplies from local and foreign contractors. If these contractors refuse to accept contracts from the U.S. Government to perform these services, a disruption of the logistical and supply system would impact operations while trying to find another contractor who will mobilize to perform these critical functions.

And, finally, it would make sense to include a provision to allow the commander in the field to authorize an exception and that the contracting officer properly document that decision in the file.

The Department agrees that we contract only entities that are responsible for fulfilling their contractual obligations. The Federal Acquisition Regulations (FAR) prescribes policies, standards, and procedures for determining whether prospective contractors are responsible. By statute, the U.S. Government may contract only with responsible contractors.

To summarize, I believe the goals of the proposed legislation are sound. The U.S. Government should not do business with companies that are not accountable for their actions. However, as discussed, we believe we can achieve the intended end state and also limit any adverse impact or unintended consequences by addressing the concerns that I have shared with you.

I ask that my full statement be entered into the record. I understand the latest draft of the bill has addressed several of my concerns, and, again, thank you for this opportunity to appear before you today, and I am ready to answer your questions.

Senator McCASKILL. Thank you, Mr. Ginman. Mr. Fiore.

TESTIMONY OF ULDRIC I. FIORE, JR.,¹ SUSPENSION AND DEBARMENT OFFICIAL, AND DIRECTOR, SOLDIER AND FAMILY LEGAL SERVICES, OFFICE OF THE JUDGE ADVOCATE GENERAL, DEPARTMENT OF THE ARMY

Mr. FIORE. Thank you, Chairman McCaskill, Ranking Minority Member Bennett, and distinguished Members of the Subcommittee. Thank you for the opportunity to appear before you today on the important issue of government contractor accountability.

As Chairman McCaskill described, I serve in the dual capacity as Director of Soldier and Family Legal Services for the Army and also, since October 2008, as the Suspension and Debarment Official. I succeeded Robert Kittel who served as the Army Suspension and Debarment Official from September 2003 to September 2008.

The Army follows the suspension and debarment regulatory process set forth in Subpart 9.4 of the Federal Acquisition Regulation. A government contractor can be debarred when there is a criminal conviction or civil judgment for fraud or a similar offense, or when there is a preponderance of the evidence that a contractor willfully failed to perform, has a history of unsatisfactory performance, or has engaged in conduct that affects the contractor's present responsibility.

Suspension and debarment are discretionary actions taken to ensure agencies contract only with responsible contractors, and the FAR specifies that these actions are "not for the purposes of punishment."

For several years, the Army has led DOD in the number of suspensions and debarments with over 300 actions annually, including 390 actions during fiscal year 2009 and almost 300 actions since 2005 against contractors and individuals in cases arising in Iraq and Afghanistan. I am not aware of any legal or regulatory barriers to the Army's exercise of suspension and debarment authority.

I understand that this Subcommittee is very concerned about the Army's decisions not to debar the contractor involved in the accident that resulted in the tragic death of Lieutenant Colonel Dominic Baragona. I would like to express my condolences to the family of Lieutenant Colonel Baragona for their loss, and while I cannot comment on potential future proceedings, I can address the background and rationale for the Army decisions to date.

In August 2006, the Army received information from Senator DeWine that in May 2003 a negligent driver for KGL had caused the death of Lieutenant Colonel Baragona in a collision between a commercial vehicle and his military vehicle in which he was a passenger, and that KGL had failed to appear in a related wrongful death civil lawsuit filed in Federal court in Georgia. The following month, the Army formally advised KGL that it was considering suspending or debaring it.

¹The prepared statement of Mr. Fiore appears in the Appendix on page 96.

In October 2006, KGL replied that while it did not accept the initial service of process because it was served improperly, in July 2006, it had accepted a properly served complaint. Based on this information, the Army suspension and debarment official decided against initiating a suspension or debarment action at that time.

In November 2007, the Baragona family attorney notified the Army of the \$5 million default judgment against KGL. Responding to the Army's Request for Information, KGL advised PFB that in February 2008 it had sought to vacate that judgment. And, in fact, in May 2009, the Federal court did vacate that judgment and dismissed the lawsuit for lack of personal jurisdiction.

In June 2008, Lieutenant Colonel Baragona's father wrote to the Army seeking to have KGL debarred based on an Army accident investigation that concluded that the truck driver's negligence was the cause of the accident. Mr. Baragona also alleged that KGL was involved in illegal "human trafficking." Separately, the Baragona family attorney alleged that KGL lacked adequate automobile insurance at the time of the incident.

In July 2009, KGL responded to a second Army Request for Information with proof of insurance, and further Army inquiry discovered insufficient evidence of human trafficking. After carefully reviewing that information, I determined that the allegations of human trafficking and lack of insurance were not substantiated and did not warrant a debarment proceeding.

The Army's decisions to date do not preclude future Army suspension or debarment action if it is determined that KGL has acted, or intends to act, in a manner demonstrating a lack of present responsibility. Under present authorities, contractors' failures to respond to properly served process of a U.S. court or administrative tribunal would be an indication of a lack of present responsibility and could be the basis for a suspension and debarment proceeding.

I have recently declined to lift a foreign contractor's suspension in a case involving an indictment on just that specific basis. Although I certainly do not approve of the tactics employed by KGL in the lawsuit, KGL acted within its legal rights, and a suspension and debarment action was not warranted on that issue.

Thank you again for this opportunity to appear before you today and for the support Congress and the Members of the Subcommittee have provided to our soldiers, sailors, airmen, and marines, and their families.

I am happy to answer any questions you may have.

Senator MCCASKILL. Thank you, Mr. Fiore.

Let us start with a timeline here. I think you have just testified that the first involvement was in August 2006 of the suspension and debarment folks, and that was some 3 years after this accident occurred. Is that correct?

Mr. FIORE. Based on the records available to me, that is correct.

Senator MCCASKILL. And you have access to all the record, correct?

Mr. FIORE. I have access to the records in the Procurement Fraud Branch, which is the branch that processes these cases, yes.

Senator MCCASKILL. OK. And you have reviewed all those records?

Mr. FIORE. I have.

Senator MCCASKILL. And so in August 2006, as a result of the Baragona family, not as a result of anybody else—I want to make sure the record is clear on that—that this initial inquiry of suspension and debarment looking at the actions of this company occurred as a result of the Baragona family contacting their Member of Congress, and that Member of Congress making an inquiry to the Suspension and Debarment Office. Is that correct?

Mr. FIORE. That is my understanding. I was not in this capacity at the time.

Senator MCCASKILL. I understand that. And it was, in fact, after that point in time that the Baragona family began to try to seek justice on their own because of their frustration that the military had not done anything, that General Bednar got involved. Is that correct?

Mr. FIORE. I have not had any involvement with General Bednar.

Senator MCCASKILL. And there is nothing in the records about General Bednar contacting the office?

Mr. FIORE. I would have to go back and check that and respond to the Subcommittee on that, Senator.

Senator MCCASKILL. I think that would be important. When you were reviewing the records, wouldn't it jump out at you that a former general was representing the Kuwaiti company that killed a member of the military? Wouldn't that be something that would stick in your mind?

Mr. FIORE. General Bednar represents many contractors in his capacity as a private attorney. He has been retired for almost 30 years at this point, but he has been very active in the private bar in Washington.

Senator MCCASKILL. But when he worked in the military, he worked in the Suspension and Debarment Office. Is that correct?

Mr. FIORE. For a brief period of time, he was a suspension and debarment official in his last position as the Assistant Judge Advocate General for Civil Law.

Senator MCCASKILL. OK. I just would find it startling, if you have reviewed all the records, that you would not have noticed that General Bednar would have been involved. But you are saying you did not see his name when you were reviewing the records, or you are just not sure?

Mr. FIORE. I am not sure because, as I said, he is involved in a number of different cases in this field, and seeing his name in a suspension and debarment file would not be unusual.

Senator MCCASKILL. I do not know whether that is good news or bad news, but I would certainly appreciate you looking at the records and letting us know specifically where his name appears, if at all, in the records of this case and in what context, and we would like copies of any of those records.

Mr. FIORE. We will do so.

Senator MCCASKILL. OK. Now, in your testimony you correctly refer to the various ways that suspension and debarment can occur, and one of them that you quote in your testimony is that a company “has engaged in conduct of so serious and compelling a nature that it affects that contractor’s present responsibility as a

government contractor.” And I think we would call that in the legal business a catch-all. Would you characterize it that way?

Mr. FIORE. Yes, Senator.

Senator MCCASKILL. And it provides for discretion on the part of the Suspension and Debarment Office because clearly this is in many ways a subjective decision that the office would have to make. Is that correct?

Mr. FIORE. It is a decision that is made based on the evidence of record. There are times when it has some subjectivity to it, but we try and use objective evidence.

Senator MCCASKILL. Well, serious and compelling, I think that is one of those things that juries figure out, and it is one of those things that finders of fact figure out. It is not a matter of law. That is a factual determination, interpreting the facts to determine whether or not it is serious and compelling.

Mr. FIORE. Yes, that is correct.

Senator MCCASKILL. I am going to read you what the judge said at the point in time that the judge reluctantly had to let any hope of justice on the civil front in the courts of this great country go out the door for the Baragona family.

“KGL derived substantial revenue from its contracts with the United States Army. For KGL to then turn a blind eye to the death caused by a KGL employee of a United States service member, who was on duty protecting the region at the time of the incident, is an affront to the solemn sacrifices service members such as Lieutenant Colonel Baragona honorably provided. KGL took this callousness even further by causing plaintiffs to expend nearly 4 years and significant expense in merely getting the question of jurisdiction before the court. This court abides by its charge to seek just and constitutional results, in spite of KGL’s irresponsible participation in this process.”

Those were the words of the judge.

Now, what about that is not serious or compelling?

Mr. FIORE. Senator, there is an argument that can be made that is serious and compelling. However, the judge also pointed out that KGL was within its legal rights to do so, however abhorrent. Therefore, it is hard for me to conclude that was misconduct, however serious and compelling or important it might have been.

Senator MCCASKILL. Well, the phrase does not say “misconduct,” sir. It says “serious and compelling.” And I guess what I am trying to get at, if a contractor kills one of our soldiers through their negligence and then sits silently and plays a game of “You can’t touch me” and watches this family suffer the way they have for years on end and go to great expense trying to find justice, and if the court itself cries out at the time they must follow the law and turn this family away, what would be serious and compelling? Is it two people being killed? What if they killed three people? What if there were seven soldiers killed that day in the accident? At what point in time does their conduct become serious and compelling?

Is it that your office takes the view that it must be a crime or that the courts must find something wrong first?

Mr. FIORE. No, Senator, that is not the case.

Senator MCCASKILL. Well, I am at a loss at what the Suspension and Debarment Office would consider serious and compelling if this

is not, and somebody in the military needs to explain that to me. I am, frankly, flabbergasted that most, if not all, of the effort in this case came from the Baragona family and not internally in our military after a member of our military is killed, that the only way that we are sitting here today is because of this brave and tenacious family doing this on behalf of their loved one. And I guess I am confused that there is not more remorse about the way this was handled.

Do either of you have any testimony you would like to give about how you think this has been mishandled? None?

Mr. GINMAN. I do not.

Senator MCCASKILL. You do not. OK.

In your testimony, Mr. Ginman, let me ask you about the exception that you testified about that you think that people should be able in the field, commanders in the field should be able to give an exception to personal jurisdiction to a contractor. Could you give me an example of when you think that exception would be appropriate?

Mr. GINMAN. It is difficult to determine when that would be. If I am the battle group commander, I am on the scene, the only contractor that has the product that I need is, in fact, debarred or has been suspended, do I think I might need an exception to be able to get to that person? Yes. Do I think it would be an exception that I would expect to take? No. I think I should always expect to find contractors that are responsible to deliver.

Senator MCCASKILL. Well, if there is a hypothetical that you could come up with that would be specific that a commander in the field would want to do an exception, I would be very interested in understanding what the parameters of that situation would be where an exception for a foreign contractor—by the way, if you hire an American company, they do not get to write an exception in the field for them. Why would we need to write an exception in the field for a foreign contractor?

I am trying to understand why there is this distinct difference between the Army's view or the military's view of contractors from the United States of America and foreign contractors? And believe me, I understand the need for foreign contractors. I have spent a lot of time on military contracting in the time I have been here. I understand that. But I think I need a more specific example why we would want to write into the law the ability to ignore the law. If you could work on that and get back to us, I would really appreciate it.

Why don't I go ahead and let Senator Bennett ask questions, and I will do that on my second round. Thank you. Senator Bennett.

Senator BENNETT. Thank you, Madam Chairman. I appreciate that, and I appreciate, again, your holding the hearing, and these witnesses. I apologize that I am going to have to leave after my round because I have another assignment, but this has been a very useful experience.

Mr. Fiore, you made the point, which I think is an important point to make, that you do not use suspension and debarment as a punishment, and as I say, I think that is an appropriate point to make.

However, as the Chairman has pointed out, you do have discretion, and she has done her best to make a case that feels to me that says that in this circumstance the discretion can be appropriately used, not as punishment.

Is KGL still a viable candidate for Army contracts?

Mr. FIORE. At this point they are. They are not on the excluded parties list. And I would just point out that my discretion is not unfettered. The decisions I make are subject to review in Federal courts under the Administrative Procedures Act, and so that is the standard by which I have to make decisions on the records that I have before me.

Senator BENNETT. So you feel that the record before you, if you were to say KGL should not be considered for future contracts, you feel if you made that decision it would be overturned?

Mr. FIORE. Based on the record I had before me, I did not feel that it would be sustainable in Federal court.

Senator BENNETT. All right. Let us talk about that record. As I understand it, as you went through it, the reactions—and when I say “you,” I understand that many of these decisions were not necessarily made by you personally, but by the office that you now hold. The decisions were made on the basis of the responses from KGL. Did you take their word for it on every point of fact or conduct any kind of independent investigation to see if they were leveling with you?

Mr. FIORE. The record includes the submissions by the Baragona family and their attorney, the courts records that we obtained, the information that KGL provided, and other information that the people in the Procurement Fraud Office gathered on those issues. We did not take the information from either side at face value.

Senator BENNETT. But you did not conduct any kind of investigation of your own? You just said, OK, here we are, and everybody who wants to comment, comment, and then you made the decision on the basis of—

Mr. FIORE. I did not personally conduct an investigation. The Procurement Fraud Branch attorney in charge of the case conducted an investigation, to the extent he had the ability to do so, of various sources that had relevant information. It is not done to the same level as you would conduct a criminal investigation.

Senator BENNETT. OK. Let us talk about that level. I continue to be troubled here. How do you investigate evidence in these cases? Whether it is accusatory or exculpatory, you are getting information—one family is saying to you this is what happened, somebody else says, no, and we are within our rights to stonewall. What kind of follow-up do you do?

Mr. FIORE. Those items that are in agreement, we do no follow-up on. Where there is a dispute, then additional information is gathered if it is available, and ultimately it is brought to me, and I have to make the determinations of fact based on what is in the record. I am not an investigator. I am an adjudicator at that point.

Senator BENNETT. OK. Additional information is gathered and submitted to you. Gathered by whom?

Mr. FIORE. It would be gathered by the attorneys in the Army's Procurement Fraud Branch.

Senator BENNETT. Would it be useful, Madam Chairman, if we got a look at what that information was?

Senator MCCASKILL. I think it would be great.

Senator BENNETT. Could you supply that for us, Mr. Fiore?

Mr. FIORE. We certainly can. I believe most of it has already been provided to staff in prior meetings, but we can certainly make sure that it has been made available.

Senator BENNETT. I think that would be helpful because—well, all right. I will leave that.

Now, you entered into a discussion with the Chairman about General Bednar. Do you know General Bednar?

Mr. FIORE. I know him professionally.

Senator BENNETT. For how long have you known him?

Mr. FIORE. I first met him somewhere around 1980 briefly when he was still on active duty and I was a mere captain.

Senator BENNETT. There is always a relationship between a general and a mere captain that is somewhat different than the normal—

Mr. FIORE. It is somewhat attenuated, Senator.

Senator BENNETT. Yes, I understand that.

Mr. FIORE. Until I assumed this position, I may have seen him three times in 30 years. Since I have assumed this position, I have probably seen him twice. Once was at a meeting of the ABA's Committee on Suspension and Debarment, of which he is a member.

Senator BENNETT. But you do not recall any conversations with him or any contact with him about this case?

Mr. FIORE. No, I do not. Certainly since I have been the suspension and debarment official, I do not believe I have had any contact with him on this case.

Senator BENNETT. And you are going to review the record for the Chairman about any contact he may have had with your predecessor?

Mr. FIORE. Or with the Procurement Fraud Branch office, yes.

Senator BENNETT. All right. Well, again, the fact that I am not a lawyer enters into this, but having been an executive who had hired lawyers, I have paid a lot of legal bills, although I am not a lawyer. I would like to know a little bit more about the whole process because it does strike an outsider that this particular case has been decided on very technical grounds all the way through without any exercise of judgment along the way. And maybe that is the way it should be done, but I think the Chairman is appropriate in calling this hearing to pursue that question because it is a question that a non-lawyer would ask looking at the facts that we have before us.

Thank you, Madam Chairman.

Senator MCCASKILL. Thank you very much, Senator Bennett.

I certainly understand that you have to make a decision. As you indicated, you are an adjudicator in the position you hold. You are not an investigator. You are an adjudicator. I understand that you have to have a record in front of you that will justify your decision. But I am curious since debarment, relative to the number of contractors that are out there in our government, is a fairly rare occurrence. Suspension is a little less rare, but, nonetheless, there is a whole lot of bad activity going on in contracting where there is

never a suspension or a debarment. I mean, you can look at some of the things that happened with KBR, and you have to scratch your head as to why—maybe we are into the too big to fail category in defense contracting like we have been in other areas of government.

But I am curious. Is there a large body of case law where suspensions and debarments have been overturned?

Mr. FIORE. It is not a large body, Senator, but there was one within the past month.

Senator MCCASKILL. Where one was overturned?

Mr. FIORE. Yes, Senator.

Senator MCCASKILL. Well, I think it is incumbent on our Subcommittee, if we want to be responsible, that we take a look at that, and we will, to look at the case law in the area of suspension and debarment—maybe it is the former prosecutor in me, but it feels like there are some layoffs here that are occurring that people are not erring on the side of being aggressive in terms of cleaning up contracting procedures and practices. And I do not think that characterization is unfair, but we will take a look at the cases and see on what basis—and, generally speaking, in the case law how many cases would you say are out there that are informative of the legal standards you face on suspension and debarment where you have been challenged and the military has been overturned on their suspension and debarment activities?

Mr. FIORE. I have not personally been challenged. I know in the Army it happens once every few years. The other services occasionally get challenged as well. Non-DOD agencies are not as aggressive in suspension and debarment as DOD agencies are, so there will be fewer of them.

Senator MCCASKILL. Yes. And, generally, the basis is insufficient record?

Mr. FIORE. The standard for the Administrative Procedures Act is arbitrary, capricious, or contrary to law. So a reasonable basis was a preponderance of the evidence type—

Senator MCCASKILL. So it is preponderance standard and it is arbitrary and capricious?

Mr. FIORE. Yes, Senator.

Senator MCCASKILL. OK. Well, I will admit I did not practice extensively in administrative law, but this does not feel like it would have been arbitrary or capricious, and it certainly feels like there was a preponderance of the evidence that there was some compelling activity here.

Let me ask you about liability insurance. It is my understanding these contractors have to have liability insurance, correct?

Mr. GINMAN. Yes, ma'am.

Senator MCCASKILL. What for?

Mr. GINMAN. They have third-party workers' compensation, particularly in the case of transportation, there is a responsibility to have—I will get it exactly.

Senator MCCASKILL. Well, I think—it has been a long time since I have been to law school, but I think if transportation contractors, which KGL was, are required to have liability insurance, I think it is because they are supposed to use that insurance if they are negligent and kill someone.

Mr. GINMAN. Yes, ma'am.

Senator MCCASKILL. Why are we requiring them to have liability insurance if we cannot ever sue them? That seems kind of dumb to me.

Mr. GINMAN. They are required to have vehicular and general public liability insurance.

Senator MCCASKILL. Yes.

Mr. GINMAN. And at thresholds specified in the contract.

Senator MCCASKILL. Yes, so that is what is really curious about this case, that we would require them to have insurance for just this occurrence, but yet the military would put no pressure on them to utilize the insurance that we require them to obtain for just this kind of occurrence. It is really curious to me. Frankly, I would think that they would not carry that insurance. That is an expense they do not need, because we cannot get them, we cannot reach them. And so it seems to me that we ought to take that out as a contract requirement and then maybe we can get the contracts for less money if we are not going to require them to make that insurance available to the victims of their negligence.

Mr. West, let me talk about procurement litigation, and I did notice the cases that occurred a few days ago, and I think it is terrific. But it brings up the thorny subject of *qui tam*'s and why there are so many that are sitting at the Department of Justice. It seems these are money makers, right?

Mr. WEST. Our record of intervention has been good, Madam Chairman. In terms of the cases that the government intervenes in, they tend to be successful, and they do tend to bring money back to the Federal Treasury.

Senator MCCASKILL. So this is one of those things—this is the speech I always make about more auditors. Auditors save money.

Mr. WEST. Right.

Senator MCCASKILL. We need to hire more of them. This would be where I would want to make the speech: Why are we not putting more resources into these *qui tam*'s. Why are so many of them sitting—I mean, you seal them so we are not really sure how many there are. I do not suppose you would tell us today, would you?

Mr. WEST. Well, actually, I will tell you, because this is something that has come up before, and when I began in this job in late April, it was something I was curious about, too. And what I have learned in my conversations with the attorneys who do these cases is that I would say there are roughly 1,000 cases which are currently under seal, *qui tam*'s. And at first glance, it might look like that is a backlog, that they are sitting there. But, in fact, what those 1,000 cases represent are active investigations which are going on, not only in Main Justice but in every one of the 94 U.S. Attorney's Offices around the country. And so that 1,000 actually represents every single *qui tam* that the United States is currently actively investigating.

There are two other dynamics which also affect that number. One is that if you were to take a snapshot of the 1,000 or so cases that were under seal a year ago and you were to take a snapshot of those same 1,000 cases today, you would notice that the pool is actually different. There are cases which are always moving in and

cases which are always being unsealed, moving out. And so they are actually not the same cases.

And then the last thing I would note is that oftentimes what you will see is when a case is unsealed, it is not simply an announcement of the allegations. What you often see is an announcement not only of the allegations, but also a settlement agreement at the same time, because what is actually happening when these cases are under seal is we are working with defendants, we are working with relators, to actually resolve the case so that we can announce both an allegation, a complaint, as well as a resolution at the same time. We think that serves everyone's interests best.

Senator MCCASKILL. Well, I think it would behoove this Administration to make this a priority. It is of great frustration to many people who have brought I think meritorious action under this law that it appears to go into a big black hole, not to be heard from for a while. And I do not know what your resources are over there, but maybe this is a subject matter that we can take up outside the purview of this hearing. But the lack of transparency—I understand the public policy reason behind the sealing. It is abhorrent to me in government that we have to seal anything. But the lack of transparency provides a really fallow ground for cynicism about how aggressive the government is being in going after these actions, especially in the field of contracting right now and the whistleblowing that we have had as a result of contingency contracting in Iraq and now carrying forward into Afghanistan. I think it is really important that we continue to work those cases very hard.

Let me finish up. I want to make sure I understand who everybody works for. I know you work for Attorney General Holder.

Mr. WEST. That is correct.

Senator MCCASKILL. Mr. Ginman, what is your line of command?

Mr. GINMAN. My immediate supervisor is Shay Assad, who is Director of Defense Procurement.

Senator MCCASKILL. OK. I know Mr. Assad well.

Mr. GINMAN. Who works for Under Secretary Carter for Acquisition, Technology, and Logistics, who in turn works for Secretary Lynn and Secretary Gates.

Senator MCCASKILL. OK. And, Mr. Fiore, what is your command?

Mr. FIORE. My supervisor is the Judge Advocate General, Lieutenant General Dana Chipman, and I operate under a delegation from the Secretary through him to me.

Senator MCCASKILL. And who is the person who is responsible for actually—who fills your position? The JAG? Is that who fills your position?

Mr. FIORE. The Judge Advocate General appoints the suspension and debarment official under authority delegated by the Secretary.

Senator MCCASKILL. OK. I wanted to make sure I was clear on that.

I think requiring these contractors to get liability insurance is great, and I think that we do it for a reason. And I think the notion that the Baragona family had to sit in a courtroom and watch lawyers high-five because they never even had to contact their insurance coverage is a gut punch for justice in this country. And I think we need to remedy that gut punch, and we are going to work really hard on this legislation. And I ask for your help and support to

make this legislation. I know we have changed it already, Mr. Ginman, because of some of the concerns of your office. I would certainly ask for your guidance, Mr. Fiore, if there are more tools you need to use the discretion as a determinator of the facts, as you make a determination of the facts, I would certainly hope you would speak up now, because something is terribly wrong with this story, and I think it is incumbent on all of us to get it fixed before there is another Rocky Baragona laying on a highway somewhere in Afghanistan with a foreign contractor that has an insurance policy but 6 years later high-fives a lawyer in a courtroom somewhere in America and says, "Catch me if you can. You cannot touch me." I think that is a very bad result for our American military.

I want to thank all of you for being here today, and the record will stay open for a week for any additional information you want to add. Thank you.

[Whereupon, at 4:18 p.m., the Subcommittee was adjourned.]

A P P E N D I X

HEARING ON ACCOUNTABILITY FOR FOREIGN CONTRACTORS: THE LIEUTENANT
COLONEL DOMINIC 'ROCKY'
BARAGONA JUSTICE FOR AMERICAN HEROES
HARMED BY CONTRACTORS ACT
November 18, 2009

Senator Claire McCaskill

Opening Statement

This hearing will now come to order.

Since the beginning of the wars in Iraq and Afghanistan, more than 5,000 American service members have been killed and more than 35,000 have been wounded. One of these brave Americans was Lieutenant Colonel Dominic "Rocky" Baragona.

Lieutenant Colonel Baragona was killed in Iraq in 2003 when his vehicle was struck by a truck being driven by an employee of the Kuwait & Gulf Link Transport Company ("KGL"). An Army investigation found that the accident was caused by KGL's driver.

For two years, the Baragona family went to the Army, the Defense Department, and the Bush White House to obtain information about their son's death and whether these officials intended to seek accountability. And for two years, the government did nothing.

So in 2005, the Baragona family acted on its own and brought a lawsuit against KGL. The company refused to appear in the matter until after the court entered a \$4.9 million judgment against them. Only then did KGL enter the case, arguing that the court had no jurisdiction over the Kuwaiti company and that the lawsuit must be dismissed.

In September 2006 - seventeen months after the Baragona family's suit began and more than three years after the accident- the Army sent KGL the first of three letters asking for information about KGL's tactics in the litigation and other concerns. Each time, the relevant information was supplied to the Army by the Baragona family or their lawyers. KGL responded to each letter and the Army took KGL's response at face value every time.

This February, Uldric Fiore, the Army's Suspension and Debarment Official, decided, based on review of [QUOTE] "the information available" that he would not initiate any suspension or debarment proceedings against KGL.

This May - four years after the Baragona family brought their lawsuit - the court vacated its \$4.9 million default judgment and dismissed the Baragona family's case for lack jurisdiction over KGL.

Today, more than six years after Rocky's death, the Baragona family is still waiting for justice. KGL has never admitted that their employee caused the accident. They have never paid a dime of compensation, even though they were required to carry liability insurance. They have never even expressed condolences to the Baragona family for the loss of their son.

Meanwhile, KGL has received millions of taxpayer dollars in subcontracts from major defense contractors like KBR, CSA, and IAP. According to information produced to the Subcommittee, KGL has received more than \$200 million in new subcontracts since Lieutenant Colonel Baragona was killed.

That is why I introduced "The Lieutenant Colonel Dominic 'Rocky' Baragona Justice for American Heroes Harmed By Contractors Act" in March of this year. Yesterday, the Ranking Member on the Subcommittee, Senator Bennett, the former Acting Ranking Member, Senator Collins, and Senators Brown, Casey, Lemieux, Bill Nelson, and I reintroduced this legislation.

This bill provides needed tools to ordinary Americans and the U.S. government to hold foreign contractors accountable.

First, the bill requires foreign entities who choose to enter into contracts with the United States to consent to personal jurisdiction in cases involving serious bodily injury, sexual assault, rape, and death.

The bill also provides explicit authority under the Federal Acquisition Regulation (FAR) for agencies to suspend or debar those companies who attempt to frustrate the legal process in these cases by failing to accept service or appear in court.

The legislation that my fellow Senators and I reintroduced yesterday is a good first step. But the need for Congress to act with this legislation has raised serious questions for me about the systemic failures that have allowed companies like KGL to escape accountability for their actions.

In April, the Subcommittee began an investigation of the suspension and debarment process. The Subcommittee's findings are summarized in a fact sheet I am releasing today, and I ask unanimous consent that it be made part of the record.

The Subcommittee found that federal agencies have only rarely used the suspension and debarment process to protect the government's interest. In fact, agencies have consistently failed to suspend or debar even those companies who have been convicted through the work of their own Inspectors General. For example:

- From 2004 through March 2009, the Defense Department Office of Inspector General reported 2768 convictions. The Defense Department suspended or debarred only 708 individuals and companies.
- The State Department is the second largest Department responsible for contracting in Iraq and Afghanistan behind the Department of Defense. In 2008, the State Department did not suspend or debar a single company.
- From 2005 through 2008, DHS awarded 325,270 contracts to 67,696 different contractors and debarred just 4 companies. In 2006, amidst widespread reports of waste, fraud, and abuse following Hurricane Katrina, DHS did not suspend or debar a single company.

At today's hearing, we will hear from Lieutenant Colonel Baragona's father, Dominic Baragona, about his family's struggle to hold KGL accountable, and how legislation like this could have helped him. We will also hear from two distinguished legal scholars about the gaps in the legal framework that this bill will help to address.

We will also hear from the Justice Department about its efforts to pursue accountability for foreign contractors, and ask whether they have the tools they need to protect the U.S. government.

We will also ask our witnesses from the Defense Department and the Army tough questions about their suspension and debarment practices.

And we will ask our witnesses what we need to do to ensure that federal agencies act aggressively to protect the government and its citizens from irresponsible contractors.

I intend to get answers to these questions today.

I thank our witnesses for being here and look forward to their testimony.



Fact Sheet

AGENCIES FAIL TO SUSPEND OR DEBAR COMPANIES

Senator Claire McCaskill

Chairman, Subcommittee on Contracting Oversight

Under the Federal Acquisition Regulation, agencies are authorized to suspend or debar irresponsible contractors. Individuals and companies can be suspended or debarred for offenses including fraud, delinquent federal taxes, violations of the Drug-Free Workplace Act, lack of business integrity, or any other "serious or compelling" cause.

Over the last five years, GAO, agency inspectors general, and other officials have issued countless reports of waste, fraud, and abuse in contracts across the federal government. Despite these findings, federal agencies have only rarely used the suspension and debarment process to protect the government's interest. In fact, agencies have consistently failed to suspend or debar even those companies who have been convicted through the work of their own Inspectors General.

The federal government suspends or debars far more individuals than companies. More than 61,000 individuals but fewer than 5,500 companies are currently excluded from receiving federal contracts. In other words, 10 times more individuals than companies have been suspended or debarred.

In 2008, the federal government awarded contracts to more than 227,000 companies. Only 452 companies were suspended or debarred in 2008.¹

Defense Department: From 2004 through March 2009, the Defense Department Office of Inspector General reported 2768 convictions. The Defense Department suspended or debarred only 708 individuals and companies.

State Department: The State Department is the second largest Department responsible for contracting in Iraq and Afghanistan behind the Department of Defense. During a four year period, from 2005 through 2008, the State Department awarded contracts to 89,593 companies and debarred only one company. In 2005, 2006 and 2008, the State Department did not debar a single company or individual.

Department of Homeland Security: From 2005 through 2008, DHS awarded 325,270 contracts to 67,696 different contractors and debarred just 4 companies. In 2006, amidst

¹ Data in this fact sheet are from the Semiannual Reports of Inspectors General, USASpending.gov, and the Excluded Parties List System.

widespread reports of waste, fraud, and abuse following Hurricane Katrina, DHS did not suspend or debar a single company.

US Agency for International Development: USAID has debarred only one firm in 2009 to date. In 2007 and 2008, the agency did not debar any companies.

Small Business Administration: From 2004 through March 2009, the SBA Office of Inspector General reported 220 convictions and just 41 debarments. In 2008, despite more than 25 convictions reported by the SBA Inspector General, SBA did not suspend or debar a single company.

Opening Statement by Senator Robert R. Bennett

November 18, 2009

Subcommittee on Contracting Oversight

U.S. Senate Homeland Security & Governmental Affairs Committee

"Accountability for Foreign Contractors: Lieutenant Colonel Dominic 'Rocky' Baragona
Justice for American Heroes harmed by Contractors Act"

Every year in mid-November we reflect as a nation on the sacrifices our sons and daughters have made for our nation. The week of Veteran's Day this year was particularly poignant as it followed the tragedy at Fort Hood, Texas. This singular act of brutality against our troops, preparing to serve once again to protect the United States and others, reminds us of the dangers inherent in simply wearing the uniform of our armed forces, and the bravery of those who choose to face that danger for us.

The life and service of Lieutenant Colonel Dominic "Rocky" Baragona stands as an example of this ethic. Following his commissioning at West Point, LTC Baragona dedicated his life to being an officer in the US Army. In the early days of the war in Iraq, LTC Baragona commanded a maintenance battalion that ensured our soldiers had essential equipment and supplies needed to fulfill their mission. While fulfilling that duty, on a remote highway in Iraq, LTC Baragona was taken from us; the victim of a negligent driver.

LTC Baragona's father, Dominic Baragona, is here today as a witness to testify. I would like to offer my condolences to you Mr. Baragona, and your family, on the loss of your son. We were able to meet the last time you were in town and talk about "Rocky" as a person, as a son, and as a soldier. I regret not getting to meet him but I felt as if I got to know a little bit about him through your stories and your description of Rocky's selfless dedication to his country—our country and the belief that we must all serve in one capacity or another. Again, my deepest sympathies.

When our troops make this ultimate sacrifice, we as a nation inherit their legacy of selflessness, of service, and most of all, of freedom. As their beneficiaries, we owe the fallen and their families our best efforts to ensure that their sacrifice was not in vain and that fairness in contracting must be applied in all instances. In some particularly egregious instances, justice should be served.

Justice is owed to the Baragona family, but has not been found because the company that is liable for Rocky's death has refused to answer in any forum for the actions of its negligent driver.

- There are many facets to this case that demonstrate the problems with our use of contractors overseas.
- The company, Kuwait Gulf Link, is one that performed contracts for the Army, and seeks to do so again.
- Kuwait Gulf Link, in avoiding answering for its negligence, not only avoided the judgment of the Federal courts, it avoided the suspension and debarment

process that would disqualify it from being a future contractor to the US government.

- To the outside observer, the outcome of the case, and lack of consequences for KGL is almost as abhorrent as the accident itself.

This legislation is not anti-contractor, and I have said in earlier statements on this subcommittee that I believe there is an important role to be served by contractors in government operations. Contractors, U.S.-owned and operated--and foreign-owned and operated contractors, regardless of their ownership or location, must be held accountable for their actions and held to the same standard.

- This point is even more important in hazardous areas, where contractor actions are in many instances, an extension of US forces.
- As such – contractors in these cases must submit to the command, control, and communications of the US forces.
- Also – as they are working in concert with US forces, contractors in these areas must be expected to answer for their actions in a US forum.

As a general principle, I am against any legislation or regulation that may be a barrier to entry for well-intended contractors. In fact, I believe many well-intended regulations result in worse contracting behavior, as efficient and scrupulous companies are driven away from selling their goods and services to the government.

- This bill is not a capricious barrier to entry, however, as it addresses future contracting behavior
- As such, it is strictly voluntary, and does not impose excessive cost on either party
- The central remedy of this bill will ensure a consistent forum for civil cases in the most dire of circumstances
- The act of contracting parties voluntarily submitting to a designated forum is well established in common law

Today's hearing convenes to examine some esoteric aspects of government contracting, civil law, and justice. We will examine legislation introduced yesterday that seeks to remedy a gap that exists in the command, control and accountability of contractors that work for our military overseas, and also for other federal agencies. This legislation bears LTC Baragona's name because of the sacrifice he made six years ago. I hope we move forward to bring legislation that honors him and his brothers and sisters in arms; legislation that serves to protect them and their families after their sacrifice, in the same way they serve to protect us each day. It's the least we can do.....and it's the least we should do. If we don't look out for our American brethren who go overseas to carry-out American missions, who will? We need to stand up and ensure that when harm comes to an American servicemen and woman and American employees, that there is a way to protect their interests and ultimately ours—contractors performing responsibly and providing best value of services. This legislation accomplishes this goal.

Thank you Madam Chairwoman.

STATEMENT OF
DOMINIC BARAGONA
BEFORE THE
SENATE HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
AD HOC SUBCOMMITTEE ON CONTRACTING OVERSIGHT
November 18, 2009

Chairman McCaskill, Ranking Member Bennett, and members of the Subcommittee, I am Dominic Baragona, father of West Point graduate, the late Lt. Col. Dominic "Rocky" Baragona, Commander of the 19th Maintenance Battalion, and I appreciate the opportunity to appear before you to discuss the proposed bill named for my late son. I want to first introduce my wife, Vilma, our son, John, and our daughter, Pam, sitting behind me. Chairman McCaskill, we are humbled and honored that you chose to name this important legislation after our beloved Rocky and that you asked me to testify here today. It is our hope that in telling our story we can, for Rocky, achieve justice through a criminal investigation into Rocky's death; give him a legacy with the passage of the bill; and influence your future policymaking so our soldiers will be protected from contractors who use trafficking and other illegal practices that put our soldiers in harm's way.

That May 19th, 2003 was the last time I spoke to my son. He was just a few hours away from the border. I asked him if there was anything I had to worry about, he answered by saying, "Not unless something stupid happens." The next day two officers came to tell us our son was dead, and I realized that something stupid had happened. Near Safwan, a tractor-trailer owned and operated Kuwait & Gulf Lines Transport (KGL) careened across three lanes of the highway and destroyed my son's Humvee, killing him. Never could I have imagined that I would sit here six years later with no justice, no criminal investigation, few answers and my testimony here today.

That day we asked the officer the first questions about the accident. Had the accident occurred in the United States, it would have been investigated as a vehicular homicide, with potential imprisonment for the driver and civil liability for KGL and the driver. But in the crush of a wartime environment, the Army did not commit enough resources to investigating and determining the criminal liability for the accident – the official Defense Department press release merely says, "A tractor-trailer jackknifed on the road and collided with Baragona's Humvee causing his death." The Army didn't take possession of the KGL truck for investigation, and it disappeared the day after the accident. The Army didn't interview the truck driver; he disappeared and has never been seen since that day. The first accident report did not include any information about KGL or a criminal investigation as required. At our insistence, another Army office reviewed that report, and concluded that the initial accident investigation report was riddled with errors and failed to gather critical evidence. I have attached that report to my testimony.

The Army assured us that we would receive all of the answers through an official Army criminal investigation, known as a "15-6." So we waited patiently while Rocky was honored in three funerals, in Florida, Ft. Sill in Oklahoma, and at Arlington National Cemetery. We decided Arlington is appropriate because everyone goes to Washington and we knew he would want to be among his men.

We learned a number of disturbing facts about the accident later:

- The KGL truck did not have a license plate at the time of the accident, which is a violation of Kuwaiti law. The truck could not have crossed into Iraq without a

license plate, which leads us to believe that the license plate was removed after crossing the checkpoint for illicit activities.

- We believe that KGL was not properly insured for the accident, as was required by U.S. procurement law.
- The driver did not have the valid truck driver's license that all DOD contractors are required to have in order to be employed.

Army officers who investigated the accident concluded that the loss of evidence critically hindered the investigation. The investigators were unable to ascertain why a KGL truck was driving on that road without license plates by an unlicensed driver. The report did conclude that the KGL driver's negligence caused the accident that killed Rocky.

KGL has always refused to accept responsibility for Rocky's death – no admission, no apology, no communication, nothing. Angered by KGL's silence and insensitivity, and frustrated by the lack of a proper criminal investigation by the Army, we sued KGL in federal court in May 2005. KGL ignored the suit and did not respond to our complaint. KGL hired US counsel and closely monitored the suit, but then refused to participate in the jurisdictional briefing, even though the Court made KGL aware of briefing well before it occurred. In 2007, the federal judge openly admonished KGL for its bad behavior, and the judge awarded a summary judgment against KGL for almost \$5 million in damages. Attending the hearings and testifying at trial over the years of the lawsuit was emotionally and physically exhausting for me and my wife of 54 years, Vilma, but we were willing to walk through hell to make sure Rocky received his day in court. Testifying in court about Rocky was especially hard on us; it brought back a lot of memories and difficult emotions.

Then, in February 2008, after the Court found KGL liable for my son's death, KGL filed a motion to vacate the judgment on the grounds of lack of jurisdiction by federal courts. In other words, we had made incredible sacrifices and gone through the grueling ordeal of reliving my son's death for nothing, and even though KGL could have argued about jurisdiction before the trial, they stood on the sidelines waiting for the opportune time to sweep into court. In May of this year, the court reluctantly agreed with KGL and vacated the judgment, but noted that KGL's conduct was "indignant and callous" and questioned KGL's "blind eye to the death caused by a KGL employee of a United States service member." Our attorneys have filed an appeal in the case.

Over the past six-plus years, we have learned of other very disturbing facts about KGL:

- In 2004, while Americans and other Westerners were being beheaded in Iraq by Sunni terrorists, KGL paid one group \$500,000 ransom to release 7 kidnapped employees working in Iraq on contracts for the U.S. and United Nations (see attached story). In other words, KGL received our tax dollars through contracts and gave it to Sunni terrorists, who no doubt used it to finance more terrorist attacks against our men and women in Iraq.
- The Government of India banned KGL from operating in India after KGL lied to Indian nationals by saying they were being recruited to work in Kuwait but then forced them to work in the extremely dangerous conditions that prevailed in Iraq. Similar reports of human trafficking by KGL emerged in the Philippines and were investigated by the Philippine Senate.

The Army has not been blind to KGL's improprieties but seems willing to overlook them, because KGL is still a defense contractor and is being considered for a new 10-year, multi-billion contract to

feed our troops in the region. In 2006 and again in 2008, the Army sent letters to KGL demanding more information as part of an investigation into debarring KGL from future contracts. KGL responded to the 2006 letter by hiring retired General Richard Bednar, a former U.S. Army debarment official, who held off-the-record conversations with the debarment office, and that debarment inquiry ended. We do not know how KGL responded to the Army's 2008 letter, but we do know that KGL is still in the running for the 10-year, multi-billion contract. We consider KGL to be a dirty company and unworthy of any contract for the care and feeding of our soldiers. What happens the next time that KGL kills or injures one of our soldiers? The family will have no recourse.

Numerous Members of Congress have tried to help us over the years: former Senators Mike DeWine and Mel Martinez; Senators Bill Nelson and George Voinovich; and Representatives Tim Ryan, Steve Driehaus, Dennis Kucinich and of course Senator Claire McCaskill. We applaud and thank you, Chairman McCaskill and Senator Bennett, for your letters this year and for Chairman McCaskill's questioning of the new Army Secretary during his confirmation hearing. We deeply appreciate the recent letter by Representatives Ryan and Driehaus to the Attorney General requesting a real criminal investigation into the accident and KGL's potential liability for contract fraud. At one point in 2004, Rocky's sister Pam was able to talk with President Bush and his White House military liaison, and we understood that the President personally ordered the debarment review. But nothing happened, perhaps because of Gen. Bednar's connections.

We are not trying to pick on the Army. We had 2 sons graduate from West Point, and Senator McCain nominated our grandson to the Naval Academy -- who will be leaving to serve in Iraq sometime next month. We love the military and know that in the fog of war mistakes can and will be made. We are just asking for justice. We get renewed energy from the bill being named in our son's honor. Even though we know this bill would not help our case, since it is not retroactive, we know the passage would level the playing field between domestic and foreign contractors,

This bill will not bring us justice or peace. But it will ensure that no family of an American soldier will ever have to go through the hell that we have endured for over six years, thanks to KGL's inhuman silence.



DEPARTMENT OF THE ARMY
 HEADQUARTERS, 212 FIELD ARTILLERY BRIGADE
 III CORPS ARTILLERY
 FORT SILL, OKLAHOMA 73503-5000

AFVI-B

6 January 2004

MEMORANDUM THRU: Commanding General, IIId Armored Corps Artillery, Fort Sill,
 Oklahoma 73503

FOR: Commanding General, Human Resources Command, ATTN: AHRC-PD (BG Farrisee),
 2461 Eisenhower Avenue, Alexandria, Virginia 22331-0481

SUBJECT: 23 December 2003 Fatal Ground Accident Investigation Presentation to the Family of
 LTC Dominic Baragona (Date of Accident: 19 May 2003).

1. Purpose.

- a. Provide my assessment of the accident investigation report.
- b. Provide my assessment of the accident investigation presentation.
- c. Request additional information on behalf of LTC Baragona's family.

2. The Accident Investigation (Encl 1). The V Corps Commander approved the results of the Accident Investigation on 5 October 2003. I fully understand that this investigation was conducted under combat conditions. That said, it is my opinion that the investigation only very minimally addresses the pertinent questions of what happened, who was at fault, and what corrective actions should be taken to minimize the potential for future similar incidents. Additionally, the report contains several factual errors, failed to include direct statements from key witnesses, failed to include interviews with other key personnel, and was poorly assembled. I will discuss those problems and their impact on the briefing and the family later in this report.

3. The Accident Investigation Presentation.

a. Background.

(1) Briefing Team. I met and formed a personal relationship with the Baragonas when they came to Fort Sill last May for LTC Baragona's memorial service. We remained in contact via e-mail over the past seven months. CSM Nuijens was LTC Baragona's CSM. He spoke with Mr. Baragona (Father) often while LTC Baragona was serving in Iraq. His wife, Mrs. Christine Nuijens, was especially helpful to the Baragona family when they came to Fort Sill. The Nuijens continue to maintain a friendly relationship with the Baragona family.

(2) The Baragona family. Based on my previous conversations and e-mail traffic with the Baragonas, I knew that they were very interested in a few specific areas:

- (a) Who was at fault?

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(b) Was LTC Baragona wearing his seatbelt at the time of the accident?

(c) Were life-saving measures taken to save LTC Baragona at the accident scene and if not, why not?

(d) Who was driving the tractor-trailer? Was he qualified to drive a tractor-trailer? Was he insured? Who was he working for?

b. Preparation for the briefing.

(1) The investigative report.

(a) The investigating officer did determine, with reasonable certainty, that the accident was caused by the tractor-trailer driver's reaction to the debris on the road. Pictures of the accident scene, the location and position of the vehicles, and the investigating officer's summary of the statements by LTC Baragona's driver and the passenger in the back seat all positively indicate that the driver of the tractor trailer failed to notice the debris until the last minute, then took evasive action that caused the tractor - trailer to jack-knife in front of LTC Baragona's HMMWV. However, it is unfortunate that the investigating officer only summarized the witness statements, rather than having the witnesses give written statements/questions and answers. It is also unfortunate that the investigating officer and the 7th CSG SIR state the time of the accident as 1300HRs when all witnesses state that it occurred at 1500HRs. I checked with CSM Nuijens, LTC Baragona's driver, and the backseat passenger who all re-verified that the accident occurred at or about 1500HRs. I listed 1500HRs as the time of the accident in my briefing and explained that discrepancy up front during my 23 December presentation.

(b) The investigating officer was not able to determine whether or not LTC Baragona was wearing his seatbelt at the moment of the accident. Only an examination of the seatbelt straps and/or fastener might determine whether the seatbelt was in use at the moment of the accident. The investigating officer was unable to examine either because the MedEvac crew cut the seatbelt straps out of the HMMWV to fasten LTC Baragona and the driver of the tractor-trailer to their stretchers. Additionally, the investigating officer was unable to examine the fastener because no one knows who removed the HMMWV from the scene and where it went. The investigating officer made a modest attempt to locate the HMMWV. There is nothing in the report, however, to indicate that the investigating officer ever identified the last MPs at the site by name, and asked them if they knew the disposition of the HMMWV.

(c) The investigating officer determined that CSM Nuijens was the first to arrive on the scene and that CSM Nuijens determined that LTC Baragona was deceased and did not render life saving measures. The report also states that a Navy corpsman arrived shortly after CSM Nuijens. The corpsman also determined that LTC Baragona was deceased, and that there was nothing he could do. The report did not state specifically why they both came to that conclusion. I discussed this with CSM Nuijens and, based on his description, I am convinced that LTC Baragona died on impact. CSM Nuijens is a trained paramedic. I asked him to accompany me to the briefing to look the family in the eyes and explain what he saw and why he came to that conclusion if they so desired.

(d) The investigating officer did not determine the exact identity of the tractor-trailer driver. While the investigating officer did attempt to locate the driver by checking with the UK 202nd Field Hospital's patient logs, he was only able to ascertain the name Hussain Mahmoud. He was not able to verify the name or determine the driver's address, phone number, or employer with the limited information on record at the hospital. The investigating officer did attempt to locate the driver through a contracting officer who was also unable to help. The report does not indicate that the investigating officer took any further action to locate the driver of the tractor-trailer. Upon viewing the pictures of the accident

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scene, however, I did notice that the tractor-trailer had the letters "KGL" on its door. I conducted a yahoo search of KGL and Kuwait on the Internet and discovered that "KGL" indicates that the truck may belong to Kuwait & Gulf Link Transport Company. In mid-December, I asked if DA Casualty or CJTF-7 could have the investigating officer attempt to find out more about the truck and driver through the company. I still have not received an answer.

c. Final coordination of the briefing.

(1) DA Casualty Office. I provided a copy of the briefing (Encl 2) to MAJ Sonia Carter, DA Casualty Assistance Office on 11 December 2003 and solicited her feedback. She was a great source of assistance throughout the entire preparation process. She had no significant comments or concerns with the briefing. I recommend DA Casualty Assistance Office continue to provide action officers to assist Next Of Kin briefers.

(2) Mr. Dominic Baragona (Father). I coordinated the briefing date and location with Mr. Dominic Baragona. He was concerned about whether or not the briefing would answer all his questions. I told him that, based on my review of the report, he would probably be frustrated by our inability to answer all his questions at this time but did not elaborate on which questions. I also told him we would give him the truth as we know it, and that we would take any questions he has back to the Army to see if they can get more complete answers. He also asked if he could have a copy of the report to read before the briefing. I told him that I would deliver three copies of the report to his son, David, the evening prior to the presentation. I delivered three copies of the report in tabbed binders to Mr. David Baragona on the afternoon of 22 December, after we arrived in Phoenix.

(3) David Baragona (Brother) invited CSM Nuijens, Chaplain Meyer, and me to join the entire Baragona family for dinner at his home the evening prior to the briefing. This event was entirely social. We did not discuss the pending briefing or the accident report. In fact, David Baragona told me he would not give the report to anyone to read until after we left the home that evening.

d. The Accident Report Presentation (23 December 2003).

(1) Facts.

(a) Army Personnel in attendance: COL David A. Schneider (Briefer), CSM Richard Nuijens (CSM, 19th Maint Bn), MAJ Robert Meyer (Bde Chaplain), MSG John Wright (DA Casualty).

(b) Family members in attendance: Dominic F. Baragona (Father), Vilma D. Baragona (Mother), David Baragona (Brother) with Ms. Tee Huntington (David's Fiancé), John and Carolyn Baragona (Brother and Sister-in-Law), Anthony and Patricia Baragona (Brother and Sister-In-Law), and Pam Baragona Robinson (Sister).

(c) Date/Time/Place of presentation: 23 December 2003 / 0930 – 1230 HRs / Home of David Baragona, 1225 Gwen Street, Phoenix, Arizona.

(2) Family's Reaction to the Report.

(a) Every family member read the accident report within 12 hours prior to the briefing. They were polite, attentive, patient, and courteous during the briefing. At the conclusion of the briefing, Mr. John Baragona (Brother) asked me what I thought of the accident investigation report. I told them that it minimally addressed many of the issues and failed to address others that we had already discussed and were working resolution of. He also asked MSG Wright what he thought. MSG Wright told him it was

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one of the weakest investigation reports he had seen. John then asked us to give the family a few minutes while they met in the backyard. About 10 minutes later, the family returned to the living room to give their opinion of the report and ask their questions.

(b) Mr. John Baragona then told me that, speaking for the entire family, they read the entire report and think it is garbage. They were also disappointed that we would even deliver it to them. He cited factual errors by the investigating officer; sloppy, confusing, and often irrelevant statements by the investigating officer; the absence of direct statements by any of the witnesses; the absence of any statements or information about other key personnel; and the inability of the investigating officer to determine the identity and employer of the tractor-trailer driver as the family's greatest disappointments. I told John that I understood his frustration and reminded him that we were obligated to provide them with a copy of the report that was approved by LTG Sanchez, and that a week earlier I had warned his father that there were still some unresolved issues that we were working resolution on. He asked if the family should attempt to contact LTG Sanchez directly. I advised him to let us work the issues for them. I reminded the family that we asked to deliver this report precisely because we wanted to ensure the family got every possible answer to their questions. I believe they trust we will do our best, but that they have little confidence that the Army will expend much effort to cooperate.

(c) Mrs. Pam Baragona Robinson (Sister) expressed the same concerns as her brother John. She and her siblings asked us a series of questions, most of the questions pertained to how we could identify the driver of the tractor-trailer, whether or not we would ever be able to locate the HMMWV, why didn't anyone administer life-saving measures at the scene, and why didn't the MPs do a better job of recording pertinent information at the accident scene. We spent about two hours discussing their various questions. They did ask CSM Nuijens why he believed there was nothing he could do for LTC Baragona at the scene. CSM Nuijens gave them a graphic description of his checks and what he observed. I believe that was as thorough an explanation as the Army can give the family, and that the family appreciated his candor. I told the family we would ask the Army to provide more complete answers to any questions we could not fully answer.

4. Baragona Family Information Requirements. I told the Baragona family that I would pass their questions to the Army Casualty Office and would get back to them with any answers CJTF-7 or the Army Casualty Office may be able to provide. Most importantly, the family wants to know if the Army can identify the tractor-trailer driver by checking with KGL and they want to know if we can do more to locate the HMMWV by asking the MPs if they arranged to have it removed from the scene. Locating the HMMWV would better enable an investigating officer to check the seatbelt fastener for any faults. Specifically, the family wants to know:

a. Driver Identity. The identity of the tractor-trailer driver; who he worked for; whether or not he was licensed and insured. I recommend the investigating officer, MPI, or SJA check with KGL to determine whether or not they had a truck involved in an accident on 19 May 2003 and if, if so, can we link it and the driver to this accident. Such a link may enable us to answer the family's questions about the driver.

b. HMMWV Location. I explained that any number of people, civilian or military, might have removed the HMMWV for any number of reasons. I also told the family that we would ask CJTF-7 to ask its units to try to locate it at any cannibalization points. The family also wants to know who the last MPs on the scene were and whether or not they directed disposition of the HMMWV. If not, then why? One likely explanation is that the MPs did not have recovery assets to move the HMMWV before nightfall; so they left it there and it was stolen during the night. We do not know if that is the case or not because the investigating officer never identified the last MPs on site and never asked the question. The family wants to know why the investigating officer did not take those steps. They also want the investigating officer to question those MPs to get a better, or at least more complete, answer.

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c. Safety Report. The family requests a copy of the Safety Report. I told them that it was still under legal review (I had asked for a copy prior to the briefing) and that we would get to them as soon as it is released. I request that report be released as soon as possible.

d. Autopsy Report. An autopsy report was not included in the investigation. Why? Can the family have a copy of it?

e. Address Book. LTC Baragona's parents told me that LTC Baragona always kept a small black address book on or very near his person and that it was not listed in his personal effects or returned to the family. They want to know if anyone knows anything about it. CSM Nuijens removed all personal effects from the HMMWV and did not see it. It may have been left unnoticed in the HMMWV or around the accident scene. I ask that DA Casualty assistance check their records at their processing facilities to see if they have any unclaimed/unidentified address books fitting that description.

f. Other Witnesses. There were three HMMWVs in LTC Baragona's movement party. LTC Baragona's was the last of three in the movement. The two lead HMMWVs (with a driver and TC in each) returned to the scene after the accident. The family wants to know why the investigating officer only interviewed one of the four people in those two HMMWVs (CSM Nuijens). They are concerned about the investigating officer's lack of thoroughness and believe that so many other people who could have been questioned may have been able to confirm or deny the accounts provided by CSM Nuijens, LTC Baragona's driver, and the backseat passenger as well as provide better information about the tractor-trailer and its driver.

g. Unnamed Lieutenant Colonel. A lieutenant colonel from I MEF Headquarters Group initially took charge of the accident scene. The investigating officer knew his name and unit. Why didn't the investigating officer interview him or his corpsman? Did the lieutenant colonel file any reports with anyone? The family wants to know if they knew anything about the tractor-trailer, its driver, or any other pieces of information about the accident scene that may prove relevant. They also want to know if the investigating officer or lieutenant colonel know of any other units that passed by that may have more information about the tractor-trailer.

h. Media Presence. While the family was at Fort Sill in May 2003 for LTC Baragona's memorial service, one of the drivers in one of the other HMMWVs told Pam Baragona Robinson that he thought he saw media at the scene. She wants to know if anyone has any record of media coverage of the accident. I told her that it is unlikely that any records exist but that we would ask CJTF-7 to see if their PAO has any such records.

i. Picture Quality. The pictures in the accident report are low-quality Xerox copies. The family wants to know if they can get a CD with copies of the original pictures.

j. MP Report. The family wants to know why none of the MPs who worked the scene that day ever filled out a written report. They understand that LTC Baragona's driver and other 19th Maintenance Battalion personnel at the scene were "numb" after the accident and can understand why they did not think to fill out a SF 91 (Motor Vehicle Accident Report) but do not understand why the MPs did not fill one out. What's more, they are dissatisfied with the apparent lack of accountability for those MPs and are upset that the investigating officer did not do more to highlight that deficiency in his report.

k. MedEvac Procedures. The family is upset that the Air MedEvac crew cut the seatbelts to use as straps to secure the tractor-trailer driver and LTC Baragona to their stretchers. They want to know if that

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is a common practice and, if so, why don't they have their own straps so that they do not have to remove evidence from an accident scene?

5. **Summary.** Again, I fully appreciate the fact that the investigating officer conducted this investigation under combat conditions in a very austere theatre of operations. That said, the factual errors; the summary, rather than direct statements from key witnesses; the failure to interview other accessible key personnel; the lack of accident documentation by the MPs; the failure to question the last personnel at the scene about the disposition of the HMMWV; and the failure to do more to identify the tractor-trailer driver significantly damage the credibility of the investigative process in the eyes of the Baragona family. While we left the Baragona home under still personally cordial terms, the Baragonas were more than outraged by the quality of the investigative report. At the same time, however, I sense that the Baragonas want to believe the Army will do a better job. The timeliness and quality of our response to that family is critical to our ability to keep the faith with them.

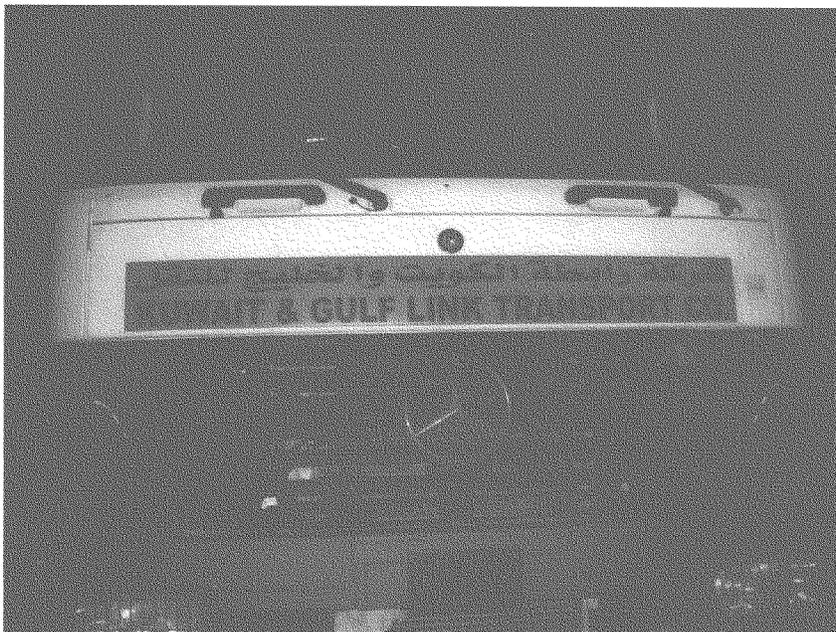
6. **Recommendations.**

a. That the DA Casualty Office work with CJTF-7 to determine whether or not they are able to answer the questions in paragraph 4 and that they provide those answers to the Commander, IIIrd Armored Corps Artillery so that we may follow-up with the Baragona family.

b. That IIIrd Armored Corps Artillery provide an assistant investigating officer here in the CONUS to assist the CJTF-7's investigating officer question any personnel who may have returned to the states since the accident/investigation. I am willing to provide that person from my brigade.

DAVID A. SCHNEIDER
COL, FA
Commanding

Enclosures
as







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United States Senate
 COMMITTEE ON
 HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
 WASHINGTON, DC 20510-6250

September 10, 2009

The Honorable Robert Gates
 Secretary of Defense
 1000 Defense Pentagon
 Washington, D.C. 20301-1000

Dear Secretary Gates:

As part of the Subcommittee's ongoing oversight of contract management, we are writing to raise concerns relating to the Defense Department's potential award of new contracts to Kuwait & Gulf Link Transport Company (KGL), a Kuwait-based company.

As you may know, the Subcommittee has opened an investigation into the death of Lieutenant Colonel Dominic "Rocky" Baragona, an Army logistician from Ohio. This is a continuation of work Senator McCaskill's office has been doing in reviewing the Baragona case over the past two years and that has led Senator McCaskill's introduction of S. 526, the "Lieutenant Colonel Dominic 'Rocky' Baragona Justice for American Heroes Harmed by Contractors Act."

On May 19, 2003, Lt. Col. Baragona was killed in Safwan, Iraq, when his vehicle was struck by a truck being driven by a driver employed by the Kuwait & Gulf Link Transport Company (KGL), a Kuwaiti company.¹ Since 2000, KGL has received nearly \$44 million in prime contracts from the federal government.² KGL has also received approximately \$100 million from federal subcontracts, including multiple subcontracts under KBR's massive LOGCAP contract to support the troops in Iraq.³

On May 12, 2005, Lt. Col. Baragona's family brought a wrongful death claim against KGL in federal court in Georgia.⁴ After KGL refused to appear in the matter, the court entered a default judgment and ordered the contractor to pay \$4.9 million in damages to the Baragona

¹ *Baragona v. Kuwait Gulf Link Transport Co.*, Civ. No. 1:05-CV-1267-WSD, Opinion and Order (N.D.Ga. Nov. 5, 2007).

² Federal Funding Accountability and Transparency Act Information Center, online at (accessed August 25, 2009).

³ S. 526, 111th Congress (March 4, 2009).

⁴ *Baragona v. Kuwait Gulf Link Transport Co.*, Civ. No. 1:05-CV-1267-WSD, Complaint (N.D.Ga. May 12, 2005).

family.⁵ On February 15, 2008, KGL requested that the judgment be vacated on the grounds that the court has no personal jurisdiction over the company.⁶ On May 8, 2009, the court granted KGL's request.⁷ The Baragona family intends to appeal the ruling.

We recently learned that the Defense Department has approved KGL to bid on a new, multi-billion dollar Defense Department contract to supply food in the Middle East. The winner of the "prime vendor" contract will become the Defense Department's sole supplier of perishable and non-perishable food items for military and civilian personnel in Kuwait, Iraq, and Jordan for up to six years.⁸ The contract value is currently estimated at more than \$3.1 billion with a maximum dollar value of \$9.4 billion.⁹

The Federal Acquisition Regulations require that all prospective contractors meet a "responsibility" standard, including "a satisfactory record of integrity and business ethics."¹⁰ The Government Accountability Office has interpreted this standard to find that contractor actions which may not rise to the level of suspension or debarment may still merit a finding that the contractor is not responsible.¹¹

We have significant concerns regarding KGL's responsibility as a potential contractor for the "prime vendor" contract. First, KGL's refusal to submit to the jurisdiction of U.S. courts to answer the claims brought by the Baragona family raises questions about KGL's integrity.¹² Second, it appears that KGL may have failed to carry liability insurance for its active contracts and subcontracts, in violation of federal contract regulations.¹³

⁵ *Baragona v. Kuwait Gulf Link Transport Co.*, Civ. No. 1:05-CV-1267-WSD, Opinion and Order (N.D.Ga. Nov. 5, 2007).

⁶ *Baragona v. Kuwait Gulf Link Transport Co.*, Civ. No. 1:05-CV-1267-WSD, Defendant Kuwait & Gulf Link Transport Company's Memorandum of Law in Support of its Motion to Vacate Default Judgment (N.D.Ga. Feb. 15, 2008).

⁷ *Baragona v. Kuwait Gulf Link Transport Co.*, Civ. No. 1:05-CV-1267-WSD, slip op. (N.D.Ga May 8, 2009).

⁸ Defense Supply Center Philadelphia, Defense Logistics Agency, Solicitation for Prime Vendor Kuwait/Iraq/Jordan (May 2, 2008) (SPM300-08-R-0061).

⁹ Supply Center Philadelphia, Defense Logistics Agency, Amendment of Solicitation/Modification of Contract (May 29, 2008) (SPM300-08-R-0061 Amendment 18).

¹⁰ Federal Acquisition Regulation § 9.1.

¹¹ See, e.g., *Drexel Industries Inc.*, BV-189344 (Nov. 6, 1977) (citing *Kennedy Van and Storage Company Inc. B-180973* (June 19, 1974), finding that a determination regarding integrity need not be based on standards as rigid as suspension and debarment).

¹² Letter from Christine McCommas, Chief, Army Procurement Fraud Branch, to KGL Legal Affairs Director Ahmed Afifi (Dec. 4, 2008).

¹³ *Id.*; Federal Acquisition Regulation §28.3 *et seq.*

We urge you to consider these concerns when evaluating KGL's bid for the new "prime vendor" contract. Previous logistics and supply contracts in Iraq have been plagued by waste, fraud, abuse, and mismanagement. We need to ensure that we take every step possible to ensure that the next generation of contracts does not repeat the mistakes of the past.

We look forward to working with you in the future to ensure that this and other Defense Department contracts are truly in the best interests of the U.S. taxpayer. Please contact us or ask your staff to contact Margaret Daum with Senator McCaskill's Subcommittee staff at (202) 224-3230 or Molly Wilkinson with Senator Bennett's Subcommittee staff at (202) 228-3141 with any questions.

Sincerely,



Senator Claire McCaskill
Chairman
Subcommittee on Contracting Oversight



Senator Robert Bennett
Ranking Member
Subcommittee on Contracting Oversight

Congress of the United States
Washington, DC 20515

November 12, 2009

The Honorable Eric H. Holder
 Attorney General
 U.S. Department of Justice
 950 Pennsylvania Avenue, NW
 Washington, DC 20530

Subject: Request for commencement of formal investigation and report of findings.

This is a request that a criminal and civil investigation be conducted into the misconduct of a foreign United States government contractor for vehicular homicide and for civil contract fraud for operating without mandatory licenses and the U.S. government contractor insurance protection required under the Federal Acquisition Regulation ("FAR").

We request an investigation of egregious contractor misconduct involved in the death of Lieutenant Colonel Dominic Baragona in Iraq on May 19, 2003 on a road in Iraq. His death was caused by a tractor trailer truck owned and operated by Kuwait Gulf Link & Transport Company ("KGL"), the predecessor company to an enormous group of international Kuwaiti companies, which have and continue to perform large U.S. government contracts potentially worth billions of U.S. dollars. KGL's tractor trailer careened across three lanes of a highway in the middle of a clear, sunny day and destroyed the Humvee in which Colonel Baragona was riding.¹ At the time of his death, Colonel Baragona had served honorably during Operation Iraqi Freedom and was on his way home to his family. Indeed, this company's negligence has led to another traffic fatality of a U.S. soldier. Staff Sgt. Javares J. Washington, 27, of Pensacola, Florida, died February 11, 2008 at Camp Buehring in Kuwait City, Kuwait, from injuries sustained in a vehicle accident with a KGL truck.

The official U.S. Army 15-6 2004 accident reconstruction report found that the driver caused Colonel Baragona's death, but a criminal investigation into the circumstances surrounding the traffic accident never occurred. Mahmoud Muhammed Hussein Serour, the KGL driver was airlifted to a military hospital after the accident, from which he later disappeared. KGL later claimed that he quit his job, and moved back to Egypt but did not have his contact information. Other troubling facts have emerged from the US Army investigation of this accident. It is clear from US Army photographs of the accident that the KGL truck did not have a license plate at the time of the accident, which is a violation of Kuwaiti law.² The truck could not have crossed into Iraq through security checkpoints without a license plate, which leads to the presumption that the license plate was removed after crossing the checkpoint for illicit activities. The KGL truck also disappeared immediately after the accident.³

¹ See attached photos of accident site.

² See attached photos of accident site.

³ U.S. Army amended 15-6 report, exhibit 22.

There remains an open question whether KGL was properly insured for the accident as required by the U.S. government contracts, and therefore U.S. procurement law, it was operating under at the time of accident. The question remains critical because KGL never offered an insurance payment to the Baragona family, testified in a U.S. federal court proceeding that it did not retain any records of its insurance contracts for the time period involved and has refused to produce its response to a request for information from the U.S. Army Legal Services Agency, Fraud Procurement Branch regarding this issue.

If KGL did not carry the insurance required under the FAR for the performance of its U.S. government contracts, criminal penalties could result. The FAR contains several mandatory insurance clauses which are incorporated into a wide variety of federal contracts, including transportation contracts, e.g. FAR 52.228-8. The historic purpose of those clauses is to serve two equally important public policy goals. First, they are to protect innocent third parties from financial losses experienced through the negligent acts of contractors while in the performance of government contracts by making liability insurance coverage an available resource for the satisfaction of any damages to innocent victims of contractor negligence. The second purpose is to protect the United States from lawsuits by those third parties under the theory of respondent-superior. A former KGL employee named Robert Stephens stated to Steven R. Perles, representative for the Baragona family, that:

[H]e had been directed by Mohamed Fahmie, a legal advisor for KGL at the time, to improperly certify that KGL carried the proper insurance requirements for US government contracting, even though KGL did not meet the US government insurance requirements. Mr. Stephens believed this to be an act of procurement fraud and refused to bid on the contracts that required him to make those certifications. He was subsequently let go.⁴

Counsel for the Baragona family filed this statement in an affidavit in the United States District Court for the Northern District for the District of Georgia. Mr. Perles subsequently received an email from Mr. Stephens that stated he could not participate in the matter any further because he was being threatened with deportation by Kuwaiti government officials unless he retracted his prior statements regarding KGL.

There remain other open questions regarding the legality of KGL's transportation operation from the day of the accident. According to the U.S. Army 15-6 report the driver of the truck had a license as a "Chauffer" and not a "CDL class A" driver as required by U.S. Army regulations for the driver of a tractor trailer truck.⁵ As stated in the Army Regulation 600-55, paragraph 2,⁶ all DOD contractors are required to have a valid CDL license in order to be employed. It is clear that the driver did not carry the license necessary since his passport would have reflected the proper license or the special clearance that a foreign national would have needed.⁷ A further concern was the driver's age, 58 years, which would have required the Army to issue a 346 special condition order that should have

⁴ Exhibit to Opposition to Motion to Vacate, Docket Entry #48, exhibit 6, Baragona v. KGL, 05-cv-01267-WSD (filed March 21, 2008).

⁵ U.S. Army amended 15-6 report, exhibit 23.

⁶ http://www.army.mil/USAPA/epubs/pdff/r600_55.pdf

⁷ section 6.3 Army Regulation 600-55

been indicated on the driver's passport, which was not on the passport.⁸ More troubling details permeate the record of the accident. The nurse who treated the KGL driver was told that he was a Kuwaiti civilian working in Iraq as a truck driver, which was incorrect.⁹ The nurse treated him for a fractured wrist and pain in his ribs. She then arranged a taxi upon his request for Basra.¹⁰

KGL, in a subsequent statement to a U.S. Army investigator¹¹, claimed that the driver had a back injury, as opposed to a rib injury, quit his job and returned to Egypt ten days after the accident. The driver should be found and interviewed regarding the suspicious circumstances of this accident, which resulted in the death of a U.S. Army colonel. KGL is responsible for employee discipline, proper training and licensing. In a fatality, as a contractor, KGL is required to fully and completely cooperate with investigating officials. At the least, by allowing their driver to return to Egypt, KGL impeded a federal investigation. KGL personnel are subject to prosecution under Federal law as a result of the Military Extra-territorial Jurisdiction Act ("MEJA").¹²

A KGL manager¹³ later stated that a crew was sent the day after the collision to retrieve the badly damaged KGL vehicle. According to the KGL manager, the vehicle disappeared. Other photographs taken at the scene of the accident show clearly that the KGL truck was missing its license plates, which were required by Kuwaiti law.¹⁴ Thus, both the driver and the truck involved in a fatal accident with a U.S. Army colonel disappeared after the accident. Statements in both U.S. Army 15-6 reports by the investigating officers conclude that the loss of evidence in the form of vehicles, driver and witnesses critically hindered the investigation. The investigators were unable to ascertain why a KGL truck was driving on a road without license plates by an unlicensed driver. The missing license plates, combined with the fact that a waybill was not produced at any time after the accident, raises further questions.

The Army admitted that the initial accident investigation report was replete with errors and failures to gather pertinent evidence. In his report to the Commanding General of the Human Resources Command, dated January 6, 2004, on the accident investigation presentation to the family, Col. David Schneider stated, "I fully understand that this investigation was conducted under combat conditions. That said, it is my opinion that the investigation only very minimally addresses the pertinent questions of what happened, who was at fault, and what corrective actions should be taken to minimize the potential for future similar incidents. Additionally, the report contains several factual errors, failed to include direct statements from key witnesses, failed to include interviews with other key personnel, and was poorly assembled." This stunning declaration leaves no doubt that a new investigation is warranted to determine the circumstances of the accident, the potential criminal liability of both the driver for the accident and of KGL for obstruction of justice, and the potential civil liability of KGL for civil contract fraud.

The troubling nature of these facts is further highlighted in the context of the history of misconduct by this company. KGL has been placed on the Indian government's Prior Approval List

⁸ U.S. Army amended 15-6 report, exhibit 23.

⁹ U.S. Army 15-6 report, exhibit DD.

¹⁰ U.S. Army 15-6 report, exhibit DD.

¹¹ U.S. Army amended 15-6 report, exhibit 22.

¹² <http://www.fas.org/irp/agency/dod/1206report.pdf> at pg. 10

¹³ U.S. Army amended 15-6 report, exhibit 22.

¹⁴ See attached photos of accident site.

“(PAC”), which functioned as a blacklist for any emigration by Indian nationals overseas based upon employment with KGL. This blacklisting was predicated upon KGL’s hiring Indian nationals to work in Iraq upon the “pretext of deploying them to Kuwait.” It is widely reported in Indian news sources that employees were recruited to work in Kuwait or other Gulf States but then were forced to work in the extremely dangerous conditions that prevailed in Iraq at the time.¹⁵ The U.S. commander in Iraq responded to abuses such as these by ordering that contractors return all confiscated passports by May 1, 2006.¹⁶ Penalties for disregarding this order included blacklisting from future work.¹⁷ KGL remained on the Indian government’s blacklist as late as August 25, 2008 for these types of violations. Based upon this company’s extensive history of human trafficking violations, the licensing issues with the driver of the truck and his subsequent disappearance, KGL must answer whether the driver was another case of forced labor, this time forced to drive into Iraq without insurance and, considering the missing license plates, potentially carrying illegal cargo.

It is troubling that a criminal investigation of this company was never conducted given the suspicious circumstances surrounding the accident and KGL’s well-documented history of human trafficking. Based upon these findings by the Indian government, Senator Mel Martinez wrote to Secretary Robert Gates on July 9, 2008 to question the fitness of KGL to receive any further contracts from the U.S. government. Other letters have been sent by the Senate this year regarding KGL’s fitness as a federal contractor, based upon the KGL’s conduct in a court case filed against it for its responsibility for the death of Colonel Baragona and for other reasons. Senator Claire McCaskill, Chairwoman of the Senate Subcommittee on Contracting Oversight, sent a letter to KGL on April 3 requesting information about the contract (attached). On September 14, Senator McCaskill and Senator Robert Bennett, the Ranking Minority Member on the Subcommittee, expressed their doubts about KGL’s qualifications to Secretary Gates (attached).

As a result of Colonel Baragona’s death, the U.S. Army proposed KGL for debarment on September 22, 2006 in a “show cause” letter and reopened the investigation with a “request for information” letter in December of 2008. KGL’s disregard for law and decent conduct has also resulted in KGL’s official ban from recruiting in India for human trafficking. Similar reports of human trafficking by KGL have begun to emerge in the Philippines and were the subject of an inquiry by the Philippine Senate.¹⁸ KGL’s numerous instances of ethically challenged behavior will create obstacles in its future performance of any U.S. contracts. A U.S. federal contractor is required to conduct itself with the highest degree of integrity and honesty under Section 3.10 of the FAR. The U.S. Army’s Fraud Procurement Branch sent a request for information to KGL on December 4, 2008 to inquire about the human trafficking issue and to determine whether KGL has carried sufficient insurance as required by the Federal Acquisition Regulation. It seems to these members of Congress that any contractor, foreign or domestic, which is found at fault for causing death or bodily injury to a U.S. service member or a U.S. citizen accompanying the force, and which refuses to pay any compensation under the laws of the United States ought to be deemed non-responsible *per se* and precluded from doing further business with the United States.

¹⁵ <http://www.voanews.com/english/archive/2004-08/a-2004-08-16-21-1.cfm?moddate=2004-08-16;>
<http://www.corpwatch.org/article.php?id=13184;> [http://www.indianexpress.com/news/tn-men-killed-in-iraq-kin-to-sue-firm/312765/.](http://www.indianexpress.com/news/tn-men-killed-in-iraq-kin-to-sue-firm/312765/)

¹⁶ <http://www.chicagotribune.com/news/local/chi-060423pipeline-story,0,1853590.story>

¹⁷ <http://www.chicagotribune.com/news/local/chi-060423pipeline-story,0,1853590.story>

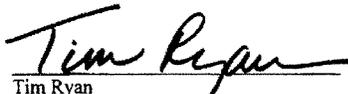
¹⁸ [http://www.senate.gov/ph/lisdata/698462221.pdf.](http://www.senate.gov/ph/lisdata/698462221.pdf)

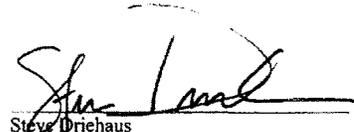
Finally, there is a question regarding the propriety of the off-the-record contacts between counsel for KGL, retired Brigadier General Richard Bednar, the former Army Chief Debaring Official and the U.S. Army Legal Services Agency. What ethical issues are present when the former Army Chief Debaring Official is hired to lobby the debarment office, which is a quasi-judicial body? The former chief debaring officer should not be able to exert any influence on a quasi-judicial proceeding.

We request that you investigate the facts and circumstances raised in this request. This matter is urgent, as a corporate alter ego of the company whose negligence resulted in the wrongful death of Colonel Baragona is bidding on a service contract(s) with an approximate value of 9.4 billion dollars over ten years¹⁹ to feed thousands of U.S. service members in the Iraq and Kuwait theater. This committee is acutely sensitive to the grave risks associated with any such potential award, as U.S. service members could be put in some harm's way by this contractor's gross negligence, and like Colonel Baragona's family will have no practical remedy under the current law and regulations.

The Baragona family and their representatives have done a great deal of research on the issues explained above, among others, and have more information that can be made available upon request. A potential contact for issues arising from the Army's 15-6 report would be the investigating officer, Colonel Schneider. Thank you in advance for your prompt attention to this pressing matter.

Sincerely,


 Tim Ryan
 Member of Congress


 Steve Driehaus
 Member of Congress

¹⁹ Solicitation number SPM300-08-R-0061, contracting officer Linda A. Ford of the Defense Logistics Agency.

UNITED STATES SENATE
COMMITTEE ON HOMELAND SECURITY
SUBCOMMITTEE ON CONTRACTING OVERSIGHT

**“Accountability for Foreign Contractors: The Lieutenant Colonel Dominic
‘Rocky’ Baragona Justice for American Heroes Harmed by Contractors Act”**

Hearing on November 18, 2009

SD-342 – Everett Dirksen Senate Office Building

PREPARED REMARKS OF

SCOTT HORTON

Chairwoman McCaskill, Ranking Member Bennett, distinguished senators, it is an honor for me to appear before you this morning and offer some remarks in support of S. 526, the "Lieutenant Colonel Dominic 'Rocky' Baragona Justice for American Heroes Harmed by Contractors Act." I support this legislation because I believe it will close an important jurisdictional gap for the federal courts and allow them to adjudicate claims arising from serious misconduct by U.S. government contractors. It's clear that over the last fifty years, the United States has turned increasingly to the use of contractors to meet its global challenges, especially in the national security arena. At present, the United States relies much more heavily on contractors in connection with the conduct of contingency operations overseas than it has in prior conflicts. I say this not to characterize this as a positive or negative development, but merely to note that it marks a point of departure from historical precedent. Taking this change into account, the United States has also adopted a more aggressive posture in the negotiation of Status of Forces Agreements around the world, seeking higher levels of immunity from the law of host governments with respect not just to its uniformed service personnel (that is a very long standing position), but also U.S. government employees and contractors. I discuss this process in greater detail in *Private Security Contractors at War*, which can be examined at <http://www.humanrightsfirst.info/pdf/08115-usls-pse-final.pdf>.

The issues surrounding the Baragona Act are tightly connected to these developments. So is the question of expanded jurisdiction. I'll first state an axiomatic consideration: if the United States wants to establish host government immunity for the benefit of contractors, at least to the extent of their conduct within the scope of their contract, then it's essential for the United States to clearly define its jurisdiction over those contractors. If it fails to do so there is an obvious potential problem: a jurisdictional void. That would be contrary to the duty of the United States to enforce the law of armed conflict over its contingency operations, and it would be contrary to the interests of the United States in maintaining good order and discipline in connection with these operations. Moreover, this is a consideration that covers enforcement of the criminal law in the first instance, but also civil law, particularly tort law relating to significant violent acts (whether they are criminally chargeable or not) such as wrongful death, serious bodily injury or rape. The Baragona Act addresses this issue by assuring a U.S. forum for the resolution of these claims, though that forum might not be an exclusive choice. I believe it proceeds in a reasonable manner in doing so.

One obvious question is whether this assertion of jurisdiction is constitutional? In the case that gave rise to the proposed legislation, *Baragona v. Kuwait & Gulf Link Transit Corp.*, the learned District Court Judge, William S. Duffey, applied conventional minimum contacts analysis to conclude that the facts did not show a sufficient connection between the contractor and the United States to warrant an exercise of federal court jurisdiction. This doctrine, which we frequently call the *International Shoe* doctrine (after *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)), holds that the fourteenth amendment to the Constitution requires, as a fundamental notion of due process, that any defendant have some minimal connections to a jurisdiction before a court can pass on a claim against it on an *in personam* basis. I've read the opinion and it strikes me as a well reasoned and unobjectionable application of minimum contacts principles. On the other hand, this proposed legislation appears designed to insure that the result obtained in the *Ba-*

ragona case doesn't happen again. But since the case rests on Constitutional doctrine, can Congress do this?

The answer to that question is very clearly "yes." The legislation approaches this question on the basis of consent. It is well established that a contractor can consent to the jurisdiction of any court that has a reasonable relationship to the contract for purposes of resolving questions that arise under a contract or in connection with the performance of a contract. If the contract is between the United States Government and a foreign contractor, the United States clearly has a fair basis to provide for the resolution of questions under the contract through a dispute resolution mechanism (including federal courts) in the United States. That would cover a dispute between the contractor and the government. But what about a case like the *Baragona* suit? The United States would be free also to provide jurisdiction for third parties under the contract at least for a limited array of cases. Doing so might in fact serve important government interests—if there is a criminal investigation and prosecution arising from the violent conduct, for instance, it would be sensible for a U.S. court to exercise "clean up" jurisdiction to take care of the related civil claims that arise from the same facts. Particularly when the case arises out of a contingency operation, the United States has a strong interest in controlling such cases, and that is something it can do more effectively when the cases are in United States courts.

Even aside from the contractual consent approach, Congress does have the power to create federal court jurisdiction over the claims specified in this proposed legislation quite apart from the minimum contacts analysis that Judge Duffey went through. This can be done through the exercise of its authority to define and provide a path for the enforcement of the law of armed conflict as applied to contractors. In addition to *in personam* jurisdiction and *in rem* jurisdiction, there are also certain types of subject matter jurisdiction that have been recognized since the early days of the republic. One of these has to do with enforcement of the laws of armed conflict in connection with contingency operations conducted by the United States outside its own territory. Under doctrine articulated by Hugo Grotius, Emerich de Vattel and Samuel von Pufendorf—all writers known to and relied upon by the Founding Fathers—a sovereign conducting military operations outside of its territory has the right and responsibility to enforce the law governing belligerency over whatever force it fields. Indeed, at the time Grotius, Vattel and Pufendorf were writing, military forces consisted heavily of contractors rather than uniformed servicemen—by that I mean not just mercenaries which then made up the mainstay of most armies, but also camp followers and suppliers which kept them clothed, armed, fed and entertained. Normal territorial considerations were completely irrelevant to this rule—the power to enforce the law followed the military force and its entourage, wherever it was deployed, and it included both the conventional theater of war and staging areas from which provisioning and support might be managed.

As applied to civilians rather than military personnel, this jurisdiction is somewhat narrower. But there are two areas in which it is clear: the first is violent conduct. In an armed conflict, the right to use violence is properly viewed as a monopoly of command authority. This means that violent acts which are not authorized and are inconsistent with military objectives may be harshly disciplined in the interests of morale and order, as well as compliance with the law governing armed conflict. The sovereign therefore has a right and a responsibility to act against a contractor who acts violently contrary to law and the orders of command authority. The second area relates to intelligence and security. A contractor believed to be engaged in espionage or

whose conduct otherwise compromises the security of the force would also be subject to discipline under this reasoning. This authority under international law—what our Founders called the “Law of Nations”—is plainly recognized in the Constitution. Remember that the Constitution vests in Congress the power to “define... the Law of Nations” in article I, section 8, clause 10 and gives it special authority to make rules for the armed forces, including their provisioning and to govern military installations in subsequent clauses. We can see Congress’s assertion of this jurisdiction in a number of areas: in the December 2006 amendment of article 2 of the Uniform Code of Military Justice, and in the Military Extraterritorial Jurisdiction Act, for instance. This jurisdiction is often viewed as essentially criminal in scope, but that is not necessarily so. It can also reach questions of tort and would allow the resolution of private claims related to violent acts in a closely related but very narrow space—essentially that covered by this legislation.

This means that the grant of jurisdiction envisioned by the Baragona Act can be justified in two ways independently: the first by contractual consent, and the second by Congressional grant exerting the law of armed conflict jurisdictional authority.

I’d like to look at a few further questions surrounding the bill from a more technical perspective. One of the complications here is that the legislation does not actually write future contracts—instead it gives guidance to the authorities who conclude them. It would of course be advisable for contracts implementing the consent to jurisdiction envisioned by this legislation to contain the provisions that a commercial contract conventionally would:

- (1) The consent to jurisdiction would conventionally include the choice of a specific court to resolve claims, that is, including a venue choice. The proposed legislation states a preference, but it would be advantageous for the contract to reflect this choice so as to avoid any potential disputes about the validity of the specific court which will serve as the venue for the claim.
- (2) Under both Anglo-American contract norms and the *lex mercatoria*, only the parties to a contract are normally entitled to rely on its terms and enforce them in courts. For a third party to do so, that intention should be stated expressly in the contract. Therefore to ensure that the Baragona Act is effective, contracts concluded pursuant to it should expressly recite that the third parties specified in the Act can rely upon and enforce the consent provisions.
- (3) A notice provision should be clearly incorporated that stipulates how notice can be provided to the contractor by potential claimants. Additionally, the contractor should designate an agent for the service of process in the specified jurisdiction so that preliminary disputes about service of process can be avoided.

These are all matters for the contracting authority to consider, as they should in the ordinary course of concluding a significant agreement for the provision of goods or services to the government. The legislation, wisely from my perspective, puts a threshold of \$5 million in value on contracts which are subject to the personal jurisdiction agreement; it would clearly be an inappropriate nuisance for small scale procurement contracts. I think the legislation is also wise to keep to a narrow set of cases: sexual assault and serious bodily injury to American service personnel, civilian employees and other contractors. This is not to say that other valid claims may not exist, or that it would be inappropriate for Congress to be concerned with them. But Con-

gress should exercise reasonable limitations over how much of this is swept into the jurisdiction of federal courts, recognizing that such grants burden the contract and may tend to limit the number of potential bidders and thus raise the cost to taxpayers of the contract. Moreover, violent acts leading to wrongful death or serious injury and rape clearly are within the special authority of Congress to fix court jurisdiction in connection with contingency operations.

The claims of local contractors and nationals of the host country or other countries may also have claims, but there is no compelling reason for them to come into U.S. courts. I will offer one qualification to this. The grant of jurisdiction has to be measured carefully to the immunity that the United States seeks and secures from a host country through status of forces agreements and similar arrangements. If the United States secures immunity from local courts, then it is incumbent on the United States and upon Congress to craft some sort of alternative jurisdiction to avoid a vacuum. For instance, Coalition Provisional Authority Order No. 17 from June 27, 2004 provided

“Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.”

This order was binding occupation law, issued by L. Paul Bremer with the concurrence of the Department of Defense. Having stripped Iraq of jurisdiction over U.S. Government contractors working in support of operations in Iraq, the United States should have fully stepped into the vacuum by offering its own jurisdictional embrace. Instead a situation of confusion and possible impunity arose due to gaps that the U.S. Justice Department perceived in its own jurisdictional reach. Congress has been struggling for several years now to address this problem, including through ongoing important efforts in the House and the Senate to pass legislation to clarify the jurisdiction of U.S. courts to try serious crimes committed by contractors that the United States has deployed abroad.

The Baragone Act also contains a clause stipulating the governing law, and providing that in certain cases “the substantive law of the State in which the covered civil action is brought shall be the law applicable to a covered civil action.” I’m a bit troubled by this. It’s perfectly conventional for a contract to provide what law governs the contract—that is, how it is to be interpreted and applied. But the next step, namely what law governs the actions of parties performing a contract, is much trickier. It obviously matters where those actions occur and what the law of that jurisdiction is. We can look at traffic rules, for instance. If we conclude a contract for the delivery of goods providing for the application of Missouri law and much of the delivery occurs in Illinois, can we stipulate that Missouri tort rules will govern what happens in Illinois? Assume that Missouri is a right turn on red state and Illinois is not, and an accident arises from the violation of this rule. We quickly come to a result that doesn’t make a lot of sense: we want the driver to follow the traffic rules in place in Illinois when he drives through Illinois. His negligence may be measured by his departure from those rules. I understand this provision of the Baragone Act as a quest to uphold the tort law expectations of American parties, standards which can conveniently be applied by U.S. courts, and I note that U.S. courts previously indulged presumptions of identity of law to get around problems like this. But I am still very skeptical about this approach. I would leave it to the federal court to find and apply the correct law and do so in a way that matches our traditions of fairness.

This legislation leaves some important still unaddressed questions. One of them is the broader rights of persons entitled to receive compensation on account of tort claims against contractors. In a decision in September in the case of *Saleh v. Titan*, Judge Leon Silberman wrote for the District of Columbia Circuit, reversing a district court ruling and holding that prisoners who claimed to have been tortured at Abu Ghraib prison could not bring a claim against a contractor. He wrote:

“During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.”

I believe that the law is well settled that military activities subject to command authority are preempted. But I found the conclusion that the contractors working at Abu Ghraib were subject to command authority to be quite surprising—especially after several years of interviewing figures in the Baghdad command and hearing their complaints about their inability to exercise precisely the sort of command authority that the Court of Appeals majority concluded they had.

But this case also presents the dilemma of immunity run wild. As I noted, Order No. 17 blocks these claimants from raising claims in the Iraqi courts—the contractors are immune. If they are also immune in U.S. courts, and they were not at the time subject to accountability under the Uniform Code of Military Justice—which, Judge Silberman’s characterizations notwithstanding, was plainly the case at least up to the December 2006 amendment, then complete impunity has been created. It is up to Congress to fashion some system through which these claims can be considered. I doubt that the U.S. tort law system is the most sensible or efficient manner for resolving these claims.

One potential alternative forum for resolving the claims of victims of contractor abuse would be through a multi-stakeholder enforcement mechanism for a global code of conduct for private military and security contractors. The Swiss government has initiated a process through which governments, civil society and industry members would work together to establish an effective enforcement mechanism that could handle claims of contractor abuse and provide remedies to victims, regardless of their nationality. (More about this initiative can be found at: <http://www.wiltonpark.org.uk/themes/governance/pastconference.aspx?confref=WP979>) There may be other additional forum for considering claims. One would be a development of the military’s current authority for *ex gratia* payments in settlement of claims for property damage. Another could be an administrative process that affords a path for claims assertion, prescription and payment. But it is essential that some channel for these claims be provided.

Before the
Subcommittee on Contracting Oversight
of the
Senate Committee on Homeland Security and Governmental Affairs

Testimony of

Professor Ralph G. Steinhardt
Arthur Selwyn Miller Research Professor of Law
The George Washington University Law School

Accountability for Foreign Contractors:
S. 526: Lieutenant Colonel Dominic "Rocky" Baragona Justice
for American Heroes Harmed by Contractors Act

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2:30 PM

Submitted by:
Professor Ralph G. Steinhardt
The George Washington University Law School
2000 H Street, N.W.
Washington, D.C. 20052
Phone: 202.994.5739
Fax: 202.994.9446
E-mail: rstein@law.gwu.edu

TESTIMONY OF RALPH G. STEINHARDT
BEFORE THE
SUBCOMMITTEE ON CONTRACTING OVERSIGHT
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

Hearing on
Accountability for Foreign Contractors:
S 526: Lieutenant Colonel Dominic "Rocky" Baragona Justice for American Heroes
Harmed by Contractors Act
18 November 2009

Chairman McCaskill, Ranking Member Bennett, and members of the Subcommittee. I am grateful for the invitation to testify on S. 526, the "Lieutenant Colonel Dominic "Rocky" Baragona Justice for American Heroes Harmed by Contractors Act." This legislation is a response to a particular case, *Baragona v. Kuwait & Gulf Link Transport Company*, but its importance goes well beyond that one lawsuit. It is an effort to assure a measure of accountability whenever foreign businesses enter into contracts with the United States government and cause certain kinds of serious bodily injury to members of the armed forces, civilian employees of the government, and certain American citizens performing work for the United States.

In its current form, the proposed accountability regime rests on three pillars: (1) it debars or suspends government contractors who evade the service of process or fail to appear in actions "in connection with" government contracts; (2) it amends the Federal Acquisition Regulation ("FAR") to require *inter alia* that government contractors consent to personal jurisdiction in certain civil actions brought in U.S. courts by certain categories of plaintiffs; and (3) it amends the FAR to require *inter alia* that government contractors consent to personal jurisdiction in civil or criminal actions brought by the United States government for "wrongdoing associated with the performance of the covered contract."

In this testimony, I describe the likely trajectory of lawsuits under S. 526, with particular emphasis on the constitutional and international issues that are likely to arise. I base my conclusions on a quarter century of practice and scholarship on transnational litigation in U.S. courts. My expertise does not extend to government contract law, your invitation to testify does not extend to such issues, and I offer no observations on the legislation from that perspective.

In summary, I share every American's concern that government contractors not escape accountability, and I offer some modest suggestions for improving the reach and reliability of the legislation. At the same time, I am concerned that the legislation in its current form raises significant problems under the Constitution of the United States and under international law. Specifically, the legislation is problematic to the extent that it offers a statutory solution to a Constitutional problem and a domestic solution to an international problem. It also addresses issues that arise at the beginning of transnational litigation -- notably jurisdiction and service -- without addressing the range of obstacles that can derail the litigation at a later stage.

THE CONSTITUTIONAL CONTEXT

It is axiomatic that Congress has the constitutional authority to regulate U.S. government contracts and contractors. Although the Constitution is silent on the specific power of federal contracting, the Appropriations Clause assures that Congress determines how taxpayers' money is spent: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., Art. I, Sec. 9, Cl. 7. Of course, the fact that Congress has the constitutional power to adopt S. 526 does not mean that all the constitutional issues that might arise in litigation under the law are easily or necessarily resolved. To the contrary: Congress may be able to specify the terms and conditions under which an appropriation may be used, but it cannot impose an unconstitutional condition on the use of those funds.¹

The Committee should anticipate that the legislation in its current form will trigger constitutional challenges both on its face and as applied in any given case.

Personal Jurisdiction

In the United States, the power of a court over a particular person or a corporation is always a constitutional question, and defendants in every case under the legislation will have a right to have a court determine whether the exercise of personal jurisdiction *in that particular case* is constitutional or not. Stripped to its essentials, the question is whether the exercise of personal jurisdiction comports with Due Process and specifically whether the exercise of jurisdiction is fair and reasonable given the particular facts of the case. It was on precisely these grounds that Judge Duffy ruled in favor of the defendant in the *Baragona* case last May.

Although Congress can exercise its power over government contracts in a way to assure that the Baragona family receives compensation,² Congress cannot legislate a one-size-fits-all answer to the Due Process inquiry. Specifically, requiring a waiver of personal jurisdiction objections as a precondition for contracting with the government of the United States qualifies in my opinion as an unconstitutional condition.

Minimum contacts, purposeful availment, and reasonableness. Beginning with *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), the Supreme Court has ruled in a series of cases that a court may exercise jurisdiction over a defendant *unless* that would

¹ See, e.g., *United States v. Klein*, 80 U.S. (8 Wall.) 128 (1872) (invalidating an appropriations provision that nullified certain aspects of a presidential pardon); *United States v. Lovett*, 328 U.S. 303 (1946) (invalidating as a bill of attainder an appropriations provision denying money to pay salaries of named officials).

² For example, I believe that Congress could constitutionally insist that foreign contractors post a bond that would provide the protected class of injured plaintiffs a compensation fund in the event that litigation in U.S. courts were derailed. Or the United States could pay the claim and seek compensation from the contractor wherever it can be sued, including in a foreign jurisdiction.

be so unfair as to violate the Due Process clause of the U.S. Constitution. The defendant must have “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”³ The courts have had occasion to apply the “minimum contacts” standard in a bewildering variety of cases but have done little to reduce the *ad hoc* fact-dependency of these decisions. At a minimum however, the constitutional inquiry has evolved from *International Shoe* into a three-step inquiry: (1) does the plaintiff’s claim arise out of the defendant’s conduct within the forum state?; (2) do the defendant’s contacts within the forum state constitute “purposeful availment” of the privilege of conducting business there?;⁴ and (3) is the exercise of jurisdiction “reasonable?” In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), the reasonableness inquiry required the court to consider a range of interests in addition to the burden on the defendant, including:

the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief (at least when not protected by the plaintiff’s power to choose the forum), the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.

In summary, “[a]n exercise of personal jurisdiction . . . complies with constitutional imperatives only if the defendant’s contacts with the forum relate sufficiently to his claim, are minimally adequate to constitute purposeful availment, and render resolution of the dispute in the forum state reasonable.” *United States v. Swiss American Bank*, 191 F.3d 30, 36 (1st Cir. 1999).

Each of these inquiries is implicated by S. 526.

1. *Does the plaintiff’s claim arise out of the defendant’s conduct within the forum state?*

It is clear that S. 526 attempts to establish personal jurisdiction over conduct that occurs entirely abroad, as in the *Baragona* case itself. That is difficult enough from a constitutional perspective, but there is also no requirement in the legislation that the plaintiff’s claim actually arise out of the government contract itself. To the contrary, at various points in the legislation, the specified relationship is only that the action must be “in connection with the performance of the contract” or involve “wrongdoing associated with the performance of the covered contract.”

Under the Constitution, if the plaintiffs’ claims are not related to the defendant’s contacts with the forum state, the jurisdiction is properly characterized as “general,” which means in turn that plaintiffs must demonstrate the defendant’s continuous and systematic contacts or presence. The effort in S. 526 to require foreign companies doing business with the U.S. government to waive their objections to personal jurisdiction runs afoul of this constitutional requirement and

³ 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

⁴ In *Hanson v. Denckla*, 357 U.S. 235 (1958), for example, the Supreme Court wrote that “there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws....” *Accord, Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (“Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a ‘substantial connection’ with the forum State.”)

potentially amounts to an unconstitutional condition on the privilege of doing business with the U.S. government.

2. *Do the defendant's contacts within the forum state constitute "purposeful availment" of the privilege of conducting business there?* There is an attractive logic to the assertion that bidding on a contract with the U.S. government qualifies as "purposeful availment." But the courts have generally required that the defendant purposefully avail itself of the privilege of doing business in the forum, and the primary indicators of that purpose include the location of negotiation, execution, and performance. Certainly some government contracts with the United States will qualify as evidence of an intent to do business in the United States. But not all of them can be so construed, especially if the contract is negotiated, signed, and performed abroad. A statute requiring companies to waive this constitutional requirement and also amounts to an unconstitutional condition on the privilege of doing business with the U.S. government.

3. *Is the exercise of jurisdiction "reasonable?"* The Due Process inquiry into fairness is inevitably open-ended and dependent on the facts of every individual case. The factors identified in *Woodson, supra*, cannot be legislatively determined in advance, although the existence of legislation can itself be taken as evidence of a powerful national interest in resolving the litigation locally. But that is only one factor of many, and, as noted above, Congress has no authority by legislation to preclude a constitutional protection to which the defendant may be entitled. I am especially concerned that a court will invalidate the effort in Section 3(a)(3) to extract consent to be sued in the United States District Court for the District of Columbia if the events giving rise to the action occurred abroad and personal jurisdiction cannot be established in another Federal Court.

Service of Process

The Constitution defines the minimal requirements for the service of process. Specifically, under the Due Process Clause as interpreted in *Mullane v. Central Hanover Bank & Trust Co., supra*, defendants must receive "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."⁵ The Supreme Court has ruled that foreign nationals in particular must be "assured of either personal service, which typically will require service abroad and trigger the [Hague Service] Convention, or substituted service" that meets the *Mullane* test.⁶

In *Baragona*, the plaintiffs attempted to serve the defendants using the Hague Service Convention – discussed below -- and encountered some of the recurring difficulties associated with that treaty. S. 526 attempts to avoid those problems by creating an incentive to accept service, specifically debarring or suspending any government contractor "that evades service of process in any civil action or criminal prosecution brought against the contractor by the United States or a citizen ... of the United States in connection with the performance of the contract."

⁵ 339 U.S. 306, 314 (1950).

⁶ *Volkswagenwerk Aktiengesellschaft v. Schlunk* 486 U.S. 694, 705 (1988).

For contracts whose value is not less than \$5 million, the contractor must also designate an agent located in the United States for service of process if it does not maintain an office in this country.

It is understandable that Congress would penalize any bad faith effort to evade service of process. But statutory directives to accept service will be subject to constitutional scrutiny, and the precedents are not favorable for finding jurisdiction on the basis of service on a statutorily-designated agent, if the defendant is not actually doing business in the forum. *See, e.g., Arkwright Mut. Ins. Co. v. Scottsdale Ins. Co.*, 874 F.Supp. 601 (S.D.N.Y., 1995). From this perspective, S. 526 might solve the problem of assuring that defendants have actual notice of the lawsuit, but that standing alone does not solve the personal jurisdiction problem.

The proposed legislation might minimize these constitutional issues if it were amended to allow the service of process on the defendant contractor "wherever the [contractor] resides, is found, has an agent, or transacts business...." Several federal statutes permit world-wide or nationwide service of process by any federal district court to any place that the foreign defendant "may be found" or "transacts business." Notably included are the Racketeer Influenced and Corrupt Organizations Act,⁷ the Federal Interpleader Act,⁸ the federal securities laws,⁹ the Clayton Act,¹⁰ and the Telemarketing and Consumer Fraud and Abuse Prevention Act,¹¹ among others. *On its face*, such a service provision, though broad, is as constitutional as these similar provisions in other federal legislation. Whether the provision is constitutional *as applied* in any given case will depend of course on the facts of that case, especially if service is attempted on a U.S.-based agent, subsidiary, or partner of the foreign company.

THE INTERNATIONAL CONTEXT

S. 526 address an international problem, and international law, including treaties of the United States (like the WTO government procurement code and various friendship, commerce, and navigation treaties) and customary international law, is relevant. As a matter of U.S. law, Congress may legislate in derogation of pre-existing treaties and customary international law. When it does so consciously and explicitly, the later-in-time prevails in U.S. courts to the extent of the conflict.¹² But under the authoritative Vienna Convention on the Law of Treaties, Article

⁷ 18 U.S.C. §1965.

⁸ 28 U.S.C. §2361.

⁹ 15 U.S.C. §§77v and 78aa.

¹⁰ 15 U.S.C. § 22 .

¹¹ 15 U.S.C. §6101.

¹² Under the Supremacy Clause of the Constitution, treaties are "the Supreme Law of the Land" on a par with federal legislation, and, if there is an unavoidable conflict between a statute and a

27, domestic law is not a defense to international breach, and the United States is subject to international remedies if it breaches a pre-existing treaty or customary international law by legislation. For that reason among others, it is never presumed that Congress intends to override the international obligations of the United States, and U.S. courts will attempt to construe the legislation and the treaty consistently with one another whenever possible.

One of the genetic markers of legislation that runs afoul of international law is that it fails the reciprocity test: how would the United States government react if such legislation were enacted and enforced abroad? In this case, how would the United States government regard an effort to hold a U.S. company liable in a foreign court "in connection with" that company's performance of a contract with that country's government? The case is easy if the company's conduct occurs in the country that is asserting jurisdiction. But that is not what S. 526 purports to cover.

Jurisdiction to Prescribe, to Adjudicate, and to Enforce

Customary international law recognizes and protects a variety of powers for nations, including (1) the jurisdiction to prescribe or to legislate, *i.e.*, the authority of a nation to extend its laws substantively to particular persons or property or events; (2) the jurisdiction to adjudicate, *i.e.*, the international equivalent of personal jurisdiction; and (3) the jurisdiction to enforce, *i.e.*, the authority of a nation to compel compliance with its law. With respect to prescriptive jurisdiction, under the theory of so-called "objective territoriality," international law recognizes the right of nations to regulate foreign conduct that has domestic effects, especially if those effects are significant and intentional. In Sections 402 and 403 of the RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW (1987), for example, the American Law Institute recognized every nation's jurisdiction to legislate with respect to "the conduct outside its territory that has or is intended to have substantial effect within its territory," so long as the exercise of jurisdiction in any given case is "reasonable." The courts of the United States have applied that standard for decades, in effect harmonizing the international and the constitutional standard for the application of U.S. law.

Jurisdiction to prescribe. It appears at several points in S. 526 that the applicable law will be the law of the United States or the law of the State in which the action is brought. *See, e.g.*, Section 3(a) (5)(A) and (B). The concern from an international law perspective is that this will amount to the extraterritorial application of U.S. law. Events and persons occurring entirely abroad will be judged under the substantive laws of the United States. Certainly a breach of a government contract can be assessed under the laws of the United States, but S. 526 potentially goes much further, because it applies to actions that do not necessarily arise under the contract itself and include tort actions arising entirely abroad.

This is not necessarily illegal. As shown below, actions under the Alien Tort Statute typically involve transitory or transboundary torts: the defendants' tortious acts create an obligation to make reparation that follows the defendant wherever he or she goes in the world.

treaty, the later-in-time prevails to the extent of the conflict.

But it is the defendant's actual presence in the United States that triggers the transitory tort doctrine in such cases, and S. 526 does not require the actual presence of the defendant in this country.

Jurisdiction to adjudicate. The RESTATEMENT also articulates the international standard for jurisdiction to adjudicate that resembles the domestic constitutional standard, discussed above. Under Section 421(1) of the RESTATEMENT,

A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction *reasonable* [emphasis supplied].

Section 421(2) then offers a laundry list of factors that tend to show that the exercise of jurisdiction to adjudicate is "reasonable:"

- (h) the person, whether natural or juridical, regularly carries on business in the state;
- (i) the person, whether natural or juridical, had carried on activity in the state, but only in respect of such activity;
- (j) the person, whether natural or juridical, had carried on outside the state an activity having a *substantial, direct, and foreseeable* effect within the state, but only in respect of such activity... [emphasis supplied]

The proposed legislation is intended to reach cases brought by a class of plaintiffs with significant contacts to the United States, but the defendant's actual contacts are equally important to the RESTATEMENT's reasonableness analysis.

Jurisdiction to enforce. The jurisdiction to enforce under S. 526 equally complicated. Under international law, no nation may exercise its sovereignty in the territory of another without the consent of the latter. Extraterritorial arrests and extraterritorial seizures of evidence by government officials are plainly illegal in the absence of the territorial state's consent, but considerably less dramatic exercises of power may also violate this basic standard, including the service of judicial documents like subpoenas and complaints. In many nations, service is a public function which, if undertaken by private parties, can violate local law. Serving the defendant in person or by mail can be equally unlawful. In order to avoid conflict, states have adopted various means of cooperation or international judicial assistance in the serving of documents, including the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention"), discussed below, and the Inter-American Convention on Letters Rogatory. In the absence of a treaty framework for service, counsel generally reverts to the ancient mechanism of the letter rogatory, in which the forum court seeks assistance from the foreign court, a request that is transmitted through diplomatic channels, honored (or not) through the foreign judiciary, and returned through diplomatic channels. Neither the treaty regimes nor the letters rogatory are entirely seamless or reliable.

Service and the Hague Service Convention

To the extent that service under S. 526 is accomplished within the territory of the United States, international standards of jurisdiction to enforce will be satisfied. But difficulty will arise if litigants and courts simply treat the law as an override of the United States' pre-existing international obligations, including the Hague Service Convention. Every one of this nation's

major trading partners is a party to the Hague Service Convention (including Canada, China, Japan, Korea, Mexico, the United Kingdom and most members of the EU). According to the government of the United States itself, "United States courts have consistently and properly held that litigants wishing to serve process in countries that are parties to the Service Convention must follow the procedures provided by that Convention unless the nation involved permits more liberal procedures."¹³ It is widely understood that the Convention procedures, when they apply, are exclusive and mandatory. *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694 (1988). I am concerned that S. 526 might be construed as an effort to identify circumstances under which the Convention simply does not apply, though nothing within the four corners of the legislation purports to do so.

If that is the intent of the legislation, I think it is short-sighted and potentially self-defeating. There is no doubt that defendants from countries that are parties to the Convention – and potentially their home governments – will insist on compliance with the treaty to the letter. That is significant not only for the foreign relations of the United States. It can profoundly affect the ability of American plaintiffs who actually win their cases under S. 526 to enforce their judgments in the manufacturer's home country, where its assets are likely to be concentrated. The inadequacy or illegality of service is a powerful defense to the recognition and enforcement of U.S. judgments in foreign courts.

It is true that the Hague Service Convention may be an improvement over the prior haphazard system for the service of process, but it can be complicated, costly, and unreliable, as the *Baragona* litigation demonstrated. The Convention is criticized in part because some States-Parties require U.S. litigants to translate U.S. legal papers into the foreign language of the defendant. But of course, reciprocity is the key: plaintiffs in a foreign action may be required under the Convention to translate their court papers into English if they sue an American defendant. I urge Congress to calibrate the service measures of S. 526 in light of the reality that U.S. companies contracting with foreign governments will be subject to reciprocal measures abroad.

Discovery and the Hague Evidence Convention

There is an additional aspect of international judicial assistance that is implicated by S. 526 but not addressed by it: the gathering of evidence. The parties' discovery powers in U.S. litigation, combined with the power of the court under Federal Rule of Civil Procedure 37 to impose sanctions for non-compliance, offer a fertile breeding ground for international conflict, especially with those legal systems in which pre-trial discovery and the gathering of evidence is an exclusively judicial or public function. In response to what they perceive as unilateral, extraterritorial, invasive, and privatized discovery -- all in violation of their sovereign prerogative -- some foreign countries have adopted blocking statutes or non-disclosure statutes, which specifically prohibit compliance with U.S. discovery orders for the production of evidence located within the foreign state's territory. In high-profile litigation, especially in antitrust and

¹³ Brief for the United States as Amicus Curiae, *Volkswagenwerk, A.G. v. Falzon*, 465 U.S. 1014 (1984).

product liability cases where massive transnational discovery is routine, discovery requests and orders can provoke formal protests.

In an effort to prevent or manage these potential conflicts, many countries, including the United States and most Western European nations, have become parties to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (“Hague Evidence Convention”), which, like the Hague Service Convention, obliges parties to designate a “Central Authority” to provide judicial assistance in the completion of official acts. The Hague Evidence Convention builds on a long-standing practice in which letters rogatory were used to request some particular act of judicial assistance in the territory of another state. When the Hague Evidence Convention is inapplicable, courts with transnational cases may attempt to apply the discovery provisions of the Federal Rules of Civil Procedure as though the case did not cross borders, or they may revert to the somewhat *ad hoc* technique of issuing letters rogatory. None of these expedients has worked particularly well, and Congress should anticipate that the problem of transnational discovery will recur in litigation under the proposed legislation.

CHOICE OF LAW

At some point in every transnational case (and sometimes at multiple points), the court is required to choose which law from which jurisdiction should apply to resolve each issue that arises – everything from standing and the elements of the claim, to the standard of liability, the burden of proof, the measure of damages, and evidentiary privileges. It is possible, even routine, that different jurisdictions’ laws will control different issues in the same case. But, in stark contrast to issues of personal jurisdiction, where the Due Process Clause is fundamental, the constitutional dimension of choice-of-law decisions is surprisingly modest. Even taken together, the Due Process Clause, the Equal Protection Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause do little to limit the constitutional discretion of state and federal courts to devise their own choice-of-law rules.

But the Constitution is not completely irrelevant in this arena, *see, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and I am concerned that the choice-of-law provisions of S. 526 will be challenged on multiple grounds. First, in Section 3(a)(5), the revised FAR will require (A) that any covered civil action will be analyzed “in accordance with” the laws of the United States and (B) that the substantive law of the forum state will be the “applicable” law if the substantive law otherwise applicable would be the place where the events giving rise to the cause of action occurred and that location is designated as a hazardous duty zone. I am unclear how these two clauses can operate in tandem, since one refers to the laws of the United States and the other refers in defined circumstances to the law of the forum State. Second, *Shutts* suggests that some kind of relationship must exist between the defendant and the forum whose law is being applied:

For a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.

472 U.S. at 820. In *Shutt*, the mere fact of being the forum was not sufficient to pass constitutional muster. The concern in S. 526 is that another unconstitutional condition is being placed on the privilege of entering into a contract with the U.S. government.

FORUM NON CONVENIENS

Transnational litigation routinely requires the courts to decide whether they *should* hear cases that are admittedly within their power. The court may well have personal jurisdiction over a foreign defendant and subject matter jurisdiction over the case, for example, but the plaintiff's choice of forum is nonetheless unfair to the defendant or imprudent from the court's institutional perspective. The difficulties of gathering evidence abroad and the prospect of harassing a defendant through distant litigation may lead a court in its discretion to dismiss a case precisely because the chosen forum is seriously inconvenient or inappropriate.

Forum non conveniens is the common law doctrine under which a court may decline to exercise judicial jurisdiction, when some significantly more convenient alternative forum exists. In the United States, the touchstone for all litigation under the *forum non conveniens* doctrine is *Gulf Oil Corp. v. Gilbert*,¹⁴ and its companion case, *Koster v. Lumbermens Mut. Cas. Co.*¹⁵ In those decisions, the Supreme Court endorsed a presumption in favor of the plaintiff's choice of forum, directing that that choice be disturbed only rarely and in compelling circumstances.

Specifically, the court is to engage in a two-step process. First, it must determine if an adequate alternative forum exists, and much contemporary litigation turns on the adequacy of the asserted alternative.¹⁶ Second, assuming that an adequate alternative forum does exist, the court must balance a variety of factors involving the private interests of the parties and any public interests that may be at stake, all for the purpose of determining whether trial in the chosen forum would "establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience," or whether the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems."¹⁷ The defendant

¹⁴ 330 U.S. 501 (1947).

¹⁵ 330 U.S. 518 (1947).

¹⁶ For example, the court may be asked to consider whether the applicable law in the alternative forum is less favorable to the plaintiff in the alternative forum. Perhaps the statute of limitations has run there, or the court may be unsure about the quality of justice meted out in an alternative forum that is available.

¹⁷ *Koster, supra*, at 524. To guide the lower courts' discretion, the Supreme Court has provided a list of "private interest factors" affecting the convenience of the litigants, and a list of "public interest factors" affecting the convenience of the forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1982). The factors pertaining to the private interests of the litigants included the "[1] relative ease of access to sources of proof; [2] availability of compulsory process for attendance

bears the burden of establishing that an adequate alternative forum exists and that the pertinent factors "tilt[] strongly in favor of trial in the foreign forum,"¹⁸ with the understanding that "the plaintiff's choice of forum should rarely be disturbed."¹⁹

Neither *Gilbert* nor *Koster* was an international case. Both involved the *forum non conveniens* doctrine in cases involving different states of the Union, and the litigated question today is whether the public and private factors announced in these cases need to be modified in transnational cases or replaced altogether with a different set of criteria. After all, globalization – whether in the form of e-commerce, international intellectual property, or human rights law – puts paradoxical pressure on the *forum non conveniens* doctrine. On one hand, the rise of transnational litigation will raise the prospect of court proceedings in a distant forum under unfamiliar rules, suggesting that foreign defendants will increasingly argue that the exercise of jurisdiction would be imprudent even if it is constitutional. On the other hand, the very forces that give rise to transnational litigation may reduce the inconvenience of foreign litigation, especially with the digitization of information, nearly instantaneous communication, the internationalization of virtually every economy on earth, and the harmonization of law across borders.

Nothing in S. 526 overrides or modifies the *forum non conveniens* doctrine,²⁰ and foreign companies who can identify a meaningful alternative foreign forum will establish the necessary precondition for applying the doctrine. But that standing alone is not sufficient, and the legislation puts extra weight on the scale at the second step by establishing the public interest of

of unwilling, and the cost of obtaining attendance of willing, witnesses; [3] possibility of view of premises, if view would be appropriate to the action; and [4] all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gilbert*, 330 U.S., at 508. The public factors bearing on the question included [1] the administrative difficulties flowing from court congestion; [2] the "local interest in having localized controversies decided at home;" [3] the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; [4] the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and [5] the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.*, at 509.

¹⁸ *R. Maganlal & Co. v. M.G. Chemical Co. Inc.*, 942 F.2d 164, 167 (2d Cir. 1991).

¹⁹ *Gilbert*, 330 U.S. at 508.

²⁰ In some cases, the courts have found a statutory override of the *forum non conveniens* doctrine grounded either in the federal interests behind the law, as in *Wiwa v. Royal Dutch Shell Co., et al.*, 226 F. 3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001) (the Alien Tort Statute), or in the language of the statute itself, especially if there is an exclusive venue provision requiring venue in the United States. *See e.g.*, the Jones Act, 46 U.S.C. App. § 688(a) or the Federal Employers' Liability Act, 45 U.S.C. § 56. It is conceivable that courts will reach a similar disposition under S. 526.

the United States in assuring certain U.S. plaintiffs a meaningful remedy against foreign contractors who cause injury in another country.

ENFORCEMENT OF JUDGMENTS

Plaintiffs who win judgments against foreign companies under S. 526 should be able to enforce those awards by attaching the U.S.-based assets of the foreign defendants in the United States. But in many cases, the defendant may not have any assets in the United States, and in those common circumstances the value of a U.S. judgment will depend upon its recognition or enforcement abroad. Unfortunately, the relatively accommodating regime in the United States for recognizing foreign judgments²¹ is not characteristic of other nations' approach to U.S. judgments, and the assumption has long been that U.S. litigants do not compete on a level playing field. "U.S. courts are quite liberal in their approach to the recognition and enforcement of judgments rendered in foreign jurisdictions, whereas the reverse is not true."²²

It is impossible here to canvass transnational *res judicata* practices around the world, but it is possible to define and illustrate the *types* of obstacles that U.S. judgments encounter abroad, potentially including judgments under S. 526:

1. *Extraterritorial application of U.S. law.* Foreign courts may resist the recognition or enforcement of a U.S. judgment that is perceived to rest on an illegitimate extraterritorial application of U.S. law.²³
2. *Aggressive interpretations of personal jurisdiction.* Foreign courts will decline to enforce a U.S. judgment that rests on objectionable exercises of personal jurisdiction, such as "tag" or transient jurisdiction based on the defendant's temporary presence in the forum, or minimal or incidental effects within the state of extraterritorial conduct outside of it. This is potentially a significant hurdle under the proposed legislation.

²¹ See, e.g., *Hilton v. Guyot*, 159 U.S. 113 (1895). See also The Uniform Foreign Money Judgments Recognition Act, 13 U.L.A. 149 (1962).

²² Matthew H. Adler, "If We Build It, Will They Come? – The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments," 26 LAW & POL'Y INT'L BUS. 79, 94 (1994).

²³ For example, "[t]he United Kingdom has provided, by legislation, that U.S. antitrust judgments are not enforceable in British courts, and both Australia and Canada have given their Attorneys General authority to declare such judgments unenforceable or to reduce the [antitrust damage awards] that will be enforced." William S. Dodge, "Antitrust and the Draft Hague Judgments Convention," 32 LAW & POL'Y INT'L BUS. 363 (2001). Even in the absence of such blocking legislation in the foreign forum, the policy framework may differ so fundamentally that a U.S. judgment grounded in the offensive law will not be enforced, though "mere differences" in substantive law tend not to trigger the same hostility.

3. *Improper service and other procedural failings.* Foreign courts have occasionally declined to enforce a U.S. judgment if the defendant was not served in a way that the enforcing court considers proper. Class actions, summary judgments, and default judgments, though proper under the Federal Rules of Civil Procedure and equivalent state rules, have also occasionally encountered difficulty when enforcement is sought in foreign courts, typically on ground that the defendant did not receive a full trial on the issue of his or her individual liability.

4. *Excessive damage awards.* The American jury is neither mirrored nor conspicuously respected in foreign court systems around the world. In part, that reflects the tendency of the American system to rely on private litigation and juries to constrain the conduct of defendants through the award of compensatory and punitive damages, in contrast to other legal cultures which rely predominantly on administrative law and institutions to control hazardous behaviors.

In 1992, in an effort to overcome these obstacles and improve the reception of U.S. judgments abroad, the United States proposed that the Hague Conference on Private International Law develop the first global treaty addressing both the bases for personal jurisdiction and the recognition and enforcement of foreign judgments.²⁴ But international law-making of this sort, “[l]ike reform of judicial administration in the United States, ... is ‘no sport for the short-winded.’”²⁵ After many years of negotiations, the proposed Hague Judgments Convention, was put on the back burner, and its eventual promulgation by the Hague Conference – let alone its adoption by the United States and other governments – remains profoundly unlikely for the foreseeable future.⁶²

THE ALIEN TORT STATUTE

The Committee invited my testimony on the Alien Tort Claims Act, also known as the Alien Tort Statute, 28 U.S.C. § 1350 (“ATS”).¹ In its modern form, the Alien Tort Claims Act, 28 U.S.C. 1350, provides that

the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

²⁴ Although no universal treaty exists to resolve conflicts in the rules governing the recognition and enforcement of foreign court judgments, regional treaties in Europe and the Americas have settled interjurisdictional practices there, typically on the basis of reciprocity.

²⁵ Stephen B. Burbank, “Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law,” 49 AM. J. COMP. L. 203 (2001).

²⁶ The Hague Convention on Choice of Court Agreements (2005) promotes party autonomy in the selection of a forum for the resolution of international disputes but is not a wide-ranging solution to the problem of enforcing judgments in the absence of private forum selection clauses.

The text of the statute, included in the First Judiciary Act of 1789, suggests that claims under it must satisfy three requirements: the plaintiff must be an alien, the claim must be a tort (as distinct from a contractual cause of action), and the tort must be in violation of the law of nations (*i.e.*, customary international law) or a treaty of the United States. What little legislative history exists suggests that the First Congress of the United States intended to empower the federal courts to hear tort cases implicating the fundamentally federal interests in foreign nationals and the interpretation of international law. The framers also understood that transitory or transboundary torts would have fallen within each state's general jurisdiction. The framers of Section 1350 understandably endorsed the option to bring such cases in federal courts whenever the case involved international law. The Alien Tort Claims Act remained dormant for nearly two centuries until 1980, when it became a vehicle for human rights cases with the Second Circuit's decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

In *Sosa v. Alvarez-Machain*, 1124 S.Ct. 2739 ("*Sosa*"), the Supreme Court established that the ATS does not itself create a cause of action but that it does recognize a cause of action, derived from federal common law, for certain violations of international law.

[A]lthough the [ATS] is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. *The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.*

124 S.Ct. at 2761 (emphasis supplied). As of 1789, according to the Court, only three torts were recognized under the common law as being violations of the law of nations "with a potential for personal liability:" violation of safe conduct, infringement of the rights of ambassadors, and piracy. *Id.* at 2761. The Court also found that the "international law violations" recognized at federal common law were not frozen as of 1789:

We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute.

Id. at 2761. The recognition of a claim under the "present-day law of nations" as an element of common law is limited to "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 2761-2762. The ATS thus authorizes federal courts to develop common law rules of liability where the underlying abuse violates an international norm that is "specific, universal, and obligatory," as had occurred – *Sosa* noted with approval, *id.* at 2766 – in *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir.1995) *cert. denied*, 518 U.S. 1005 (1996), and *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994).

In recent years, several cases have been filed against multinational corporations under the ATS, alleging their complicity in human rights violations. The most important current controversy in these cases is the standard for determining aiding-and-abetting liability. It is important that this remedy remain open to those injured by the intentional torts of corporations that can be found within the jurisdiction of the United States. It is at least equally important that U.S. servicemen and citizens be able to recover just compensation in U.S. courts from foreign corporations that contract with the U.S. government.

My thanks again for the opportunity to testify on this important legislative initiative.

STATEMENT OF
TONY WEST
ASSISTANT ATTORNEY GENERAL

BEFORE THE
SUBCOMMITTEE ON CONTRACT OVERSIGHT
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

AT A HEARING ENTITLED
“ACCOUNTABILITY FOR FOREIGN CONTRACTORS:
THE LIEUTENANT COLONEL DOMINIC ‘ROCKY’ BARAGONA
JUSTICE FOR AMERICAN HEROES HARMED BY CONTRACTORS ACT”

PRESENTED
NOVEMBER 18, 2009

Chairwoman McCaskill, Senator Bennett and distinguished Members of the Subcommittee, I appreciate the opportunity to appear before you today. S.526, the “Lieutenant Colonel Dominic ‘Rocky’ Baragona Justice for American Heroes Harmed by Contractors Act,” was prompted by the difficulties the Baragona family experienced in establishing personal jurisdiction in a United States court for the wrongful death of their son. Lieutenant Colonel Baragona was serving this country in Iraq when he was killed in an accident. His family sued the foreign contractor whose employee was involved in the accident, but the judgment was vacated and the lawsuit was dismissed when the court found it had no personal jurisdiction over the contractor. Let me say at the outset that we greatly appreciate the Subcommittee’s attention to this difficult and tragic situation and support your effort to ensure that our service men and

women and their families have recourse to our Federal courts in these types of terrible circumstances.

For certain covered contracts, S.526 would require contractors to consent to personal jurisdiction over the contractor by U.S. courts to hear civil suits alleging rape, sexual assault or serious bodily injury to members of the United States armed forces, civilian employees of the United States, or United States citizens employed by contractors working under government contracts performed abroad. S.526 also would facilitate establishment of personal jurisdiction in civil procurement fraud matters brought by the United States by requiring contractors to consent to personal jurisdiction alleging wrongdoing in the performance of a government contract performed abroad.

We greatly appreciate the Subcommittee's effort in this regard to ensure that the United States's interests are protected in providing for personal jurisdiction in procurement fraud matters brought by the government. Addressing procurement fraud is among our highest priorities at the Department and for the Civil Division, which I lead. This includes everything from pursuing fraud in connection with the delivery of vital services to our men and women in uniform, to ensuring that the American taxpayers are not overcharged for what we purchase; ensuring that the equipment we deploy is built to specifications, tested, and properly performs, and enforcing the laws against bribery or other corruption that taints our contracts.

In conjunction with the United States Attorney's Offices, the Civil Division pursues civil enforcement of procurement fraud matters that are initiated either through *qui tam* actions under the False Claims Act, or as a result of referrals from agencies or through parallel or joint

investigations with criminal components of the Department. Since 1986, when the False Claims Act was substantially amended, the statute has been the government's primary weapon against all forms of fraud against the United States, including procurement fraud. The Fraud Enforcement Recovery Act (or "FERA"), enacted on May 20, 2009, further strengthened the False Claims Act. The Department pursues False Claims Act cases against contractors, subcontractors and others that engage in all forms of procurement fraud, including false claims under contracts fraudulently induced by bid rigging and kickback schemes; inflated claims for payments; claims for defective or counterfeit products; defective pricing; and other forms of procurement fraud. Indeed, since 1986, the Department has recovered in excess of \$4.4 billion in procurement fraud matters involving solely the Department of Defense.

Where a non-resident defendant has not consented to personal jurisdiction in a United States court, the Due Process Clause of the Fifth Amendment requires that such defendant have "minimum contacts" with the forum, and that the exercise of personal jurisdiction not offend "traditional notions of fair play and substantial justice." Because Section 3732 of the False Claims Act authorizes worldwide service of process, the United States need only demonstrate that the foreign defendant has sufficient minimum contacts with the United States as a whole rather than with the particular judicial district in which the suit is brought. Also, the minimum contacts test can be met based on defendant's specific contacts with the forum in connection to the events alleged in the complaint, or defendant's overall contacts with the forum, which usually must be "continuous and systematic". It is not necessary that the defendant's actions

actually take place in the forum to establish personal jurisdiction. All that is required is that the defendant's actions were "purposefully directed" toward the forum.

Over many years, the Department has brought cases successfully against foreign contractors and subcontractors, and other nonresident defendants, for violations of the False Claims Act. For example, in *U.S. ex rel. Miller v. Holzman*, a case now on appeal, the U.S. District Court for the District of Columbia entered judgment in the amount of \$90 million in favor of the United States after an earlier jury verdict found foreign defendants liable for conspiring to rig bids on contracts financed by the U.S. Agency for International Development to construct waste water treatment facilities in Cairo, Egypt. The *Holzman* case is one where the Department was able to establish personal jurisdiction over two foreign defendants. In the case of one of those foreign defendants, the court found that the United States had established personal jurisdiction for claims under one contract, but not for claims submitted under two other contracts. That defendant has appealed the court's ruling finding personal jurisdiction.

The Department also is litigating two False Claims Act cases against Toyobo Co. Ltd. of Japan and its American subsidiary, Toyobo America Inc., for their role in manufacturing and selling defective bullet-proof vests to the United States for use by federal, state, local and tribal law enforcement agencies. The United States has alleged that Toyobo, which manufactured the Zylon fibers used to make the vest, and others in the vest manufacturing chain, knew that Zylon was unsuitable for ballistic uses because it degraded when exposed to light, heat and humidity.

To date, we have not yet faced a personal jurisdiction challenge in connection with a procurement fraud matter arising out of contracts related to the wars and reconstruction efforts in

Iraq and Afghanistan. But as more civil investigations involving the wars and reconstruction in Iraq and Afghanistan mature and move forward into litigation, we likely will see additional False Claims Act cases involving foreign contractors, and challenges to personal jurisdiction.

Just this month, the Department filed two war-related cases. On November 5, 2009, the Department initiated an action under the False Claims Act in the United States District Court, for the Western District of Texas, against individuals and entities involved in the bribery of John Cockerham, Jr., and James Momon, Jr., two former Army officers serving in Kuwait who earlier pleaded guilty to criminal charges. The complaint alleges that Cockerham and Momon were bribed for awarding Blanket Purchase Agreements (BPAs) to Kuwaiti companies owned and controlled by defendant Saud Al Tawash, or in which Al Tawash had an interest, including Green Valley Co., Palm Springs General Trading and Contracting Establishment, and Jirch Springs General Trading and Contracting Establishment. We have sued these entities and expect to establish personal jurisdiction over them. The BPAs were awarded during 2004-2005, and covered supplies such as bottled water and tents, and services such as removing waste water from Army camps.

On November 16, 2009, the Department announced that it had intervened in a *qui tam* action in the Northern District of Georgia against Public Warehousing Company ("PWC") - and others. At the same time, the Department also announced indictments against PWC.

The *qui tam* complaint alleges that since 2003, PWC has engaged in a scheme to defraud the Defense Supply Center of Philadelphia, a field activity of the Defense Logistics Agency, by presenting or causing others to present false claims for payment under PWC's multi-billion

dollar contracts to supply food for U.S. service members serving in Kuwait, Iraq, and Jordan. The *qui tam* complaint alleges that the defendants overcharged the United States for local market ready items (*i.e.*, fresh fruits and vegetables) and, that PWC failed to disclose and pass through rebates and discounts it obtained from its U.S.-based suppliers, as required by its contracts.

With respect to the proposed legislation, we believe that requiring contractors to consent to personal jurisdiction in U.S. courts as a condition of their contract with the United States should assist us in establishing personal jurisdiction over foreign contractors in procurement fraud cases. These provisions could be especially helpful in cases involving subcontractors that are not in direct privity of contract with the United States. We note that S.526 defines the term "contractor" to include subcontractors, and expect that in implementing these provisions the FAR Council will require contractors to flowdown the consent provisions to their subcontractors. While requiring subcontractor consent to personal jurisdiction would be helpful in pursuing civil procurement fraud matters, we also note the concerns expressed by the Department of Defense that requiring subcontractor consent to personal jurisdiction might make contracting more difficult, and impede its efforts to obtain on a timely basis the goods and services needed by our troops in combat environments. We would be happy to work with the Subcommittee to explore ways to realize both of these important goals.

As currently written, S.526 arguably does not capture the full range of procurement fraud violations that we can pursue under the False Claims Act, including some of the most prevalent forms of fraud, including bid rigging, kickbacks, bribes and other forms of fraud. These types of fraud typically occur at the time of contract formation, and arguably may not be encompassed by

the current phrase in the bill – “wrongdoing associated with the performance of such a contract.”

The *Holzman* and *Cockerham* matters are examples of False Claims Act matters involving fraud in the formation of a contract. (To be clear, it is the Department’s view that the False Claims Act covers fraud that occurs at the time of contract formation.)

S. 526 would amend the Federal Acquisition Regulation (“FAR”) to require contractors to consent to personal jurisdiction in any civil or criminal lawsuits alleging “wrongdoing associated with the performance of” a contract. However the legal concept of “personal jurisdiction” is only relevant to civil lawsuits, not to criminal proceedings. Federal court jurisdiction over criminal cases exists in jurisdictions where all or some part of a crime occurred. In those cases where the government relies on extra-territorial jurisdiction to reach crimes which occurred outside the United States, jurisdiction is established when the government is a victim. We can prosecute someone acting overseas in committing government contract fraud because typically, the United States is a victim. The concept of civil “personal jurisdiction” does not apply to criminal matters.

The Department supports protecting the rights of individuals and their families to recover appropriate damages for injuries caused by the negligent acts of foreign contractors. We note that it appears that the intent of the bill generally is to extend these new protections on a prospective basis. We note, however, that the provisions would apply to new task orders under currently-existing indefinite delivery, indefinite quantity contracts (IDIQ contracts), or new calls under existing BPAs issued after the Federal Acquisition Regulation is amended in accordance with the statute. The government’s existing contractual obligations may be affected by these

provisions. We would anticipate that the effect of this legislation would be to impose upon most active pre-existing IDIQs and BPAs a requirement that the contractor consent to personal jurisdiction through change orders. Foreign contractors would be entitled, by law, to seek “reasonable compensation” from the United States for performance of this additional contractual term. What would constitute such “reasonable compensation” is not plainly evident, but it would certainly become a source of additional costs to the government and most likely become a cause for litigation from contractors dissatisfied with our proposed compensation. We look forward to working with the Subcommittee to address these concerns in order to ensure that personal claims brought by our service members and their families are appropriately addressed.

The Department is committed to pursuing contractors and subcontractors, including foreign entities, that violate the False Claims Act and drain the treasury of funds so vital to our military and procurement systems. We appreciate the Subcommittee’s efforts to ensure that there is jurisdiction over these foreign entities in the federal courts.

**HOLD
UNTIL RELEASED BY THE
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
COMMITTEE**

TESTIMONY OF

RICHARD GINMAN

**DEPUTY DIRECTOR FOR
DEFENSE PROCUREMENT AND ACQUISITION POLICY,
OFFICE OF THE UNDER SECRETARY OF DEFENSE
(ACQUISITION, TECHNOLOGY AND LOGISTICS)**

BEFORE THE

**HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS COMMITTEE
SUBCOMMITTEE ON CONTRACTING OVERSIGHT**

ACCOUNTABILITY FOR FOREIGN CONTRACTORS

November 18, 2009

**HOLD
UNTIL RELEASED BY THE
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
COMMITTEE**

Chairman McCaskill, distinguished members of the Committee, thank you for the opportunity to appear before you today on behalf of the Honorable Robert Gates, Secretary of Defense, to discuss Accountability for Foreign Contractors.

But first let me introduce myself. I am Dick Ginman, a Career Civil Servant, and I serve as the Deputy Director, Defense Procurement and Acquisition Policy (DPAP), in the Office of the Under Secretary of Defense for Acquisition, Technology and Logistics. I have more than 38 years experience in government and commercial business in the fields of contracting, acquisition and financial management. Before assuming this position in October 2006, I held several private sector positions including Vice President of General Dynamics Maritime Information Systems and Director of Contracts for Digital System Resources. I served in the United States Navy for 30 years retiring as a Rear Admiral, Supply Corps. In addition to three tours afloat, I served in a variety of contracting and acquisition positions that included Commander, Navy Exchange Service Command; Deputy for Acquisition and Business Management in the office of the Assistant Secretary of the Navy, Research Development and Acquisition; and Deputy Commander for Contracts, Naval Sea Systems Command.

Before I begin, I would like to convey my condolences to the Baragona family. They have my heartfelt sympathy on the loss of their son in service to his country.

You asked me to address several aspects of Section 526 cited as the, "Lieutenant Colonel Dominic 'Rocky' Baragona Justice for American Heroes Harmed by Contractors Act."

The Department's View of the Act

The legislation is designed to ensure foreign contractors with United States Government contracts, who perform contracts abroad, are held accountable for their actions that result in serious bodily injuries of members of the Armed Forces, civilian employees of the United States Government, and the United States citizen employees of government contractor companies. While I support the overall substance of the legislation, I believe there are portions that could be improved. These include: limiting to performance on a DoD contract; applicability to all subcontract levels; lack of a dollar threshold; retroactive applicability; and the ability to waive the legislative requirement when unique circumstances arise that, but for a waiver, could jeopardize our warfighter mission.

The Department's capacity to enter into future contracts with foreign contractors

First, I believe liability should be limited to actions directly linked to performance required under a government contract and should not be broadly applied to any action by a government contractor, subcontractor, independent contractor, or any respective employee. Second, applying this provision to contractors at all tiers is problematic. Changing the definition of "contractor" and limiting the applicability of this legislation to the prime contractor would allow us to more effectively implement and enforce it. It is likely, in order to protect themselves, that prime contractors would require all their subcontractors, at all tiers, to certify compliance with the provision. This will undoubtedly impact the issuance of contracts in a combat environment and support

in the field, and impact the ability to get our troops what they need in the required time they need it. Third, the legislation could effect competition to some degree; however, I do not know to what extent. Because the statute would apply to "any contract" regardless of dollar value, many smaller local vendors overseas would either refuse to do business with U.S. forces, or would need to increase prices to cover the additional insurance for handling possible U.S. litigation costs, particularly for injuries unrelated to their business with the U.S. Government. This expansion of jurisdiction could significantly alter our relationship with contractors overseas, to include contractors providing mission critical services. Fourth, there should be a threshold used to apply the consent provision to contracts; otherwise, the Government is faced with the prospect of having contractors consent to jurisdiction of Federal courts of the U.S. on thousands upon thousands of much smaller dollar value acquisitions overseas, leaving the Federal Government with no executable means of serving if the contractor has no agent within the U.S. The result may be there is no real enforcement mechanism via the contract should a civil action commence in the Federal courts of the U.S., or that the cost of serving process may far exceed the value of the contract itself. The provisions requiring a contractor to maintain an office in the U.S. for contracts valued over \$5M to be served notice of a pending court action may be unnecessary. I understand that treaties such as The Hague Convention and diplomatic methods of service are already in place, to which the U.S. has agreed, with regard to service of process of civil suits.

How legislation will affect the Department's existing contracts

Fifth, prospective applicability under current contracts and retroactive application as a condition to receiving payments under current contracts would fall outside the changes clause and require bilateral modifications. It would eliminate the Department's ability to unilaterally exercise valuable option requirements or gain acceptance and performance of future task or delivery orders. Modifying existing contracts to include this legislation would require bilateral modifications which allow the contractor to ask for consideration, likely an increase in contract price, to account for the additional cost the legislation would impose on the contractor. The contractor could refuse to sign the modification and the contract would then have to be terminated and re-competed. In the case of a multiple award, indefinite delivery contract, inserting a clause implementing the legislation could reduce the level of competition if one or two contractors decide not to propose based on this requirement.

How this legislation would impact the Department's mission

We do not know for certain the extent that this new law will have on our ability to contract overseas and obtain mission critical supplies and services. If foreign contractors opt not to bid on U.S. contracts as a result of the legislation, there would be negative impacts on the Department's mission. In Iraq and Afghanistan, for example, our men and women rely upon the delivery of food, fuel and supplies from local or foreign contractors. If these contractors refuse to accept contracts from the U.S. Government to perform these services, a disruption of the logistical and supply system would disrupt operations while trying to find a contractor who could mobilize and perform these critical

functions. Sixth, it would make sense to include a waiver or exception to the legislation, to allow the Commander in the field to authorize an exception to the legislation and for the contracting officer to properly document that decision in the file.

The legislation may adversely impact section 886 of the Fiscal Year 2008 National Defense Authorization Act, "Acquisitions in Support of Operations in Iraq or Afghanistan," as well as section 801 of the Fiscal Year 2010 National Defense Authorization Act, "Temporary Authority to Acquire Products and Services Produced in Countries Along a Major Route of Supply to Afghanistan." Both sections establish authority to limit competition and grant a preference for products or services from Iraq or Afghanistan, or along major supply routes to Afghanistan. Sections 886 and 801 are critical to gaining local support for the presence of United States forces and maximizing employment in these countries to diminish the pool of the unemployed, who are more easily drawn into the insurgency. This authority will also align U.S. procurement and acquisition policy to support critical efforts to bolster stability in Pakistan, expand the Northern Distribution Network, resupply U.S. forces in Afghanistan, and build partnerships and improve stability throughout the region. Finally, the United States will demonstrate in a concrete way that we value the support of these countries, and that we aim to develop with them lasting partnerships tied to the international efforts for stabilization in the Middle East.

Barriers the Department faces in ensuring that it is contracting only with those entities responsible for fulfilling their legal and contractual obligations

The Department agrees that we contract with only entities that are responsible for fulfilling their contractual obligations. The Federal Acquisition Regulation prescribes policies, standards, and procedures for determining whether prospective contractors and subcontractors are responsible. By statute the U.S. Government may contract only with responsible contractors.

The legislation's anticipated effect on the suspension and debarment of foreign contractors

Finally, as far as the legislation's anticipated effect on the suspension and debarment of foreign contractors, I will defer to Mr. Fiore's testimony to address this area, keeping in mind the Federal Acquisition Regulation already prescribes policies and procedures governing the debarment and suspension of contractors by agencies for specific causes.

To summarize, I believe the goals of the proposed legislation are sound. The U.S. Government should not do business with companies that are not accountable for their actions. However, as discussed, we can achieve the intended end state, and also limit any adverse impact or unintended consequences by addressing the concerns I have shared with you today. Again, thank you for the opportunity to appear before you today.

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STATEMENT BY

MR. ULDRIC I. FIORE, JR.
DIRECTOR, SOLDIER AND FAMILY LEGAL SERVICES
OFFICE OF THE JUDGE ADVOCATE GENERAL, U.S. ARMY

BEFORE THE

HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS COMMITTEE
SUBCOMMITTEE ON CONTRACTING OVERSIGHT

ACCOUNTABILITY FOR FOREIGN CONTRACTORS

NOVEMBER 18, 2009

NOT FOR PUBLICATION
UNTIL RELEASED BY THE
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS COMMITTEE

1

STATEMENT BY MR. FIORE

Thank you for the opportunity to provide testimony before you here today on the important issue of accountability for foreign contractors.

I serve as the Director, Soldier & Family Legal Services, Office of The Judge Advocate General, Department of the Army. In that capacity, I am responsible for policy and oversight of legal services provided to Soldiers and their families, including legal assistance and claims services, with particular emphasis on legal support to Soldiers undergoing Medical Evaluation Boards and Physical Evaluation Boards in the Army Physical Disability Evaluation System.

On October 2, 2008, I also was designated as the Department of Army Suspension and Debarment Official (SDO). I succeeded Mr. Robert N. Kittel who served as the Army SDO from September 2003 to September 2008.

Army Suspension and Debarment Practices

The Army follows the suspension and debarment regulatory process set forth in the Federal Acquisition Regulation (FAR) Subpart 9.4. Pursuant to that regulation, an agency may suspend, debar, or otherwise declare ineligible certain contractors in order to protect the interests of the Government on behalf of the public. Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts from the Government. Further, agencies may not solicit offers from, award contracts to, or consent to subcontracts with debarred or suspended contractors. Debarment and

suspension are discretionary actions taken to ensure agencies contract with responsible contractors only and "... not for the purposes of punishment." (FAR 9.402(b)).

Pursuant to FAR Subpart 9.403, suspension and debarment authority is vested in the agency head or a designee authorized by the agency head to act as SDO. As the Army SDO, I am the decision authority for all Army suspension and debarment cases, including those cases arising in the Iraq and Afghanistan theaters of operation. In Europe and the Republic of Korea, the Army has further delegated overseas suspension and debarment authority for contractors located within those geographic areas of responsibility to officers in those locations. As the Army SDO, I am an independent decision-maker and I report directly to The Judge Advocate General. I do not supervise the Army attorneys in the Procurement Fraud Branch (PFB) who monitor procurement fraud investigations and prepare and present procurement fraud cases. I receive their recommendations and provide guidance and decisions on the disposition of those cases.

The Army Procurement Fraud Branch, part of the Contract and Fiscal Law Division, United States Army Legal Services Agency (USALSA), is the single, centralized organization within the Army to coordinate and monitor criminal, civil, contractual and administrative remedies in procurement fraud cases. PFB has a staff of five attorneys who work closely with Army Criminal Investigation Division Major Procurement Fraud Unit (CID MPFU) and the Department of Justice (DoJ). Cases arising under Army contracts or involving Army personnel are investigated by MPFU. PFB coordinates and monitors cases referred to DoJ for criminal and civil action. Over 250 Army Procurement Fraud Advisors (PFAs), located in the legal offices of commands and installations worldwide, assist PFB attorneys.

The Army's resources for investigating procurement fraud include approximately 100 CID criminal investigators. DoD also provides investigative support through the Defense Criminal Investigation Service (DCIS), which is part of the DoD Office of the Inspector General (DoDIG).

Army Suspensions and Debarments over the Past Three Years, Current Investigations, Referrals to DoJ

For the past several years, the Army has led DoD in the number of suspensions and debarments. During Fiscal Year (FY) 09, the Army had 151 suspensions, 115 proposed debarments, and 124 debarments, for a total of 390 actions (including 27 actions on cases decided by overseas suspension and debarment officials in Korea and Europe). In FY 08, the Army had 111 suspensions, 113 proposed debarments and 77 debarments for a total of 301 actions. In FY 07, the Army had 112 suspensions, 94 proposed debarments, and 122 debarments for a total of 328 actions. Since 2005, the Army has taken over 290 suspensions, proposed debarments, and debarment actions against contractors and individuals in cases arising from Iraq and Afghanistan.

PFB has a current caseload of over 1000 cases and monitors and coordinates those cases referred to DoJ. Army Criminal Investigation Division coordinates with DoJ when there is an ongoing criminal investigation.

Barriers the Army Faces in Ensuring it is Contracting only with Responsible Contractors

I am not aware of any legal or regulatory barriers in this area.

The Baragona Case

I understand that this committee is very concerned about the Army's decision not to debar the contractor involved in the accident that resulted in the tragic death of LTC Baragona. While I cannot comment on future proceedings in the case, I can address the background of the case and the rationale for the Army's decisions to date.

On August 8, 2006, the Army received an inquiry from Sen. DeWine that Kuwait and Gulf Link Transport Company (KGL) negligence (KGL truck – HMMWV collision in theater) led to LTC Dominic Baragona's death in May 2003 and that KGL failed to appear in a related wrongful death civil lawsuit filed in the U.S. District Court (N.D. Ga.). PFB formally advised KGL in a September 6, 2006 letter that the Army SDO was considering suspending or debarring KGL from Government contracts.

On October 20, 2006, KGL replied that it did not accept the initial service of process because it was served improperly, but that it subsequently accepted a properly served complaint on July 11, 2006. As a result of this information, then Army SDO, Mr. Robert N. Kittel, decided against a suspension or debarment of KGL.

On November 27, 2007, the Baragona family attorney then notified PFB of a \$4.9 million default judgment against KGL. Responding to an SDO Request for Information (RFI) dated December 19, 2007, KGL advised PFB that on February 15, 2008 it had sought to vacate the judgment. The court ultimately vacated the judgment and dismissed the case for lack of jurisdiction in May 2009. PFB is unaware of any other KGL criminal or civil action.

LTC Baragona's father (Dominic Baragona) wrote to the Army in June 2008 seeking to debar KGL based on an accident investigation conducted by the Army, which concluded that the KGL truck driver's negligence caused the accident. Mr. Baragona also alleged KGL was involved in illegal "human trafficking" in India and the Philippines. In separate correspondence, the Baragona family attorney also alleged that KGL lacked adequate automobile liability insurance coverage at the time of the accident. KGL responded to a second RFI with proof of automobile insurance and documentation that it had not employed Indian workers since 2005. Further inquiry also uncovered no evidence of human trafficking. After carefully reviewing this information, I concluded that the evidence did not warrant suspension or debarment.

An SDO has authority to debar a Government contractor when there is a criminal conviction or civil judgment for fraud or a similar offense. Absent that, an SDO can debar a Government contractor for cause only when he determines by a preponderance of the evidence that a contractor willfully failed to perform one or more terms of a contract, has a history of unsatisfactory performance of a contract, or has engaged in conduct of so serious or compelling a nature that it affects that contractor's present responsibility as a Government contractor.

The materials provided in response to PFB's September 6, 2006 letter, evidenced that proper service of process was not made to KGL until July 11, 2006 via the Kuwaiti Ministry of Justice. The materials provided in response to the Army SDO's December 19, 2007 RFI indicated that KGL was exercising its legal rights in the civil litigation by contesting jurisdiction in the Northern District of Georgia. After evaluating KGL's January 5, 2009 RFI response, I determined that the allegations of improper recruitment

of Indian nationals and lack of third party liability insurance were not substantiated and did not warrant a debarment proceeding.

As SDOs, Mr. Kittel and I are not empowered to make determinations regarding KGL's civil liability in the death of LTC Baragona. Such determinations are the province of an appropriate judicial system; in this case, the plaintiffs chose to bring an action in a Federal District Court. Neither the existence of a wrongful death lawsuit, nor KGL's decision to contest jurisdiction constitute a basis for debarment of a contractor.

Under present authorities, a contractor's failure to respond to properly served process of a U.S. court or administrative tribunal would be an indication of a lack of present responsibility and could be the basis for a suspension or debarment proceeding. Indeed, although it is a matter involving a criminal indictment, I have recently declined to lift a foreign contractor's suspension on that specific basis. KGL, however, did respond within its legal rights once it was properly served with the process of the U.S. District Court, and a suspension or debarment action was not warranted on that issue.

The decisions to date do not preclude future Army suspension or debarment action if it is determined that KGL has acted, or intends to act, in a manner lacking of business integrity or honesty.

Thank you again for this opportunity to appear before you today and for the support Congress and the Members of this Committee have provided for our Soldiers, Sailors, Airmen, and Marines.

I am happy to answer any questions you may have.

**Post-Hearing Questions for the Record
Submitted to Professor Scott Horton
From Senator McCaskill**

**“ACCOUNTABILITY FOR FOREIGN CONTRACTORS: THE LIEUTENANT COLONEL DOMINIC
'ROCKY' BARAGONA JUSTICE FOR AMERICAN HEROES HARMED BY CONTRACTORS ACT”**

**Wednesday, November 18, 2009, 2:30 P.M.
United States Senate, Subcommittee on Contracting Oversight,
Committee on Homeland Security and Governmental Affairs**

During the hearing, you raised several concerns with S. 526, including: 1) there may be issues related to third party beneficiary access; 2) the bill does not address venue issues; 3) the bill could be improved with the addition of notice provisions; and 4) the bill may render irrelevant the Hague Convention on Service to which nearly all U.S. allies are a party. The purpose of the bill is to fill the vacuum that results from the U.S. obtaining immunity for military personnel and contractors in contingency operations by providing access to U.S. courts for certain civil causes of action.

Q. Is there language that should be added to the bill to ensure that third party beneficiaries do not face jurisdictional constraints on their ability to bring civil claims against Federal contractors?

Yes. The bill cannot address this problem directly since it is a matter of contract between the government and private contractor, but the bill should contain a clause stating that all contracts within its scope will contain a clause stating that covered persons under the bill are third-party beneficiaries of the contract, and that they shall be entitled to enforce provisions of the contract designed to create jurisdiction over the contractor for the purpose of pursuing their claims. I will be happy to work directly with your staff to come up with language specifically tailored to the current draft of the act.

Q. What provisions can be revised or added to ensure that the Hague Convention on Service is not affected?

The Hague Convention on Service, and other bi- and multilateral agreements concerning legal process to which the United States and other nations are parties provide one channel of service. But the bill should provide that all contracts within its scope have a separate means of service. In international commercial contracts this is conventionally done by having the contractor accept

the jurisdiction and venue of a particular court (or stipulate its consent to binding arbitration) for the resolution of disputes. When a court is stipulated, the contractor should then be required to designate an agent for the service of process within that jurisdiction. This is a simple service offered by a number of corporate vendors, usually at a nominal cost. If a third-party beneficiary clause is incorporated, then the claimant would be able to serve process by delivering notice of its claim (usually in the form of a summons and copy of pleadings) to the local agent acting for the contractor. This by-passes the need for compliance with the Hague Convention, which is often rather rickety and is always extremely time-consuming. Again, I can work with your staff to propose specific language which would accomplish this within the text of the existing bill, and the government contracting agency should also be consulted on the point since the choice of forum would in the first instance be the government contracting agency's choice.

Post-Hearing Questions for the Record
Submitted to Professor Scott Horton
From Senator Joseph I. Lieberman

“Accountability for Foreign Contractors: The Lieutenant Colonel Dominic ‘Rocky’
Baragona Justice for American Heroes Harmed by Contractors Act”
November 18, 2009

1. In your testimony, you stated that where the U.S. government has established host government immunity for contractors under Status of Force Agreements, it is essential for the United States to clearly define its jurisdiction over those contractors. Do you think that the approach of S. 526 is also appropriate for foreign contractors operating in countries with which the United States does not have such an agreement and has not limited host government immunity?

I believe the approach of S. 526 in this regard is sound. But allow me to break my response down based on the different categories of contractors implicated.

First, I think the approach of seeking to exempt military contractors from the application of the law of the host country is reasonable in concept within certain limits. The United States has pursued this approach for at least 10 years under both Democratic and Republican administrations. If contractors are assuming functions which were previously viewed as “core military” functions, then accountability and oversight need to be exercised by the United States and not through the law of the host country. However, the United States cannot make a compelling case for the host country to grant this sort of immunity unless it can convince the host country that it does in fact have both the legal tools to allow it to exercise such jurisdiction and the investigative and prosecutorial resources. The problem that arose in Iraq in the period from 2003-08 followed from the grant of immunity without either a parallel jurisdictional grant or the allocation of investigative and prosecutorial resources to make it work. As figures in the Baghdad Command have indicated, discipline and morale of the operations in Iraq were adversely affected by this lapse of jurisdiction and enforcement. S. 526 cleans up a small part of this problem, but there are still some troubling gaps (some of which are being explored in the courts now).

Second, I think we have to disaggregate the concept of “contractors.” I see three major categories. American contractors, which could be defined as contractors where the controlling interests are American, regardless of the technical formalities of incorporation, registration, etc., should clearly be subject to American jurisdiction and indeed already would be for cases like Colonel Baragona’s.

Contractors of the host country are the most problematic category. U.S. forces will make heavy use of them for logistical support in country, but it would be absurd to give them immunity from the host country. (Even Order No. 17

excluded Iraqi contractors from the grant of immunity, for instance.) It is difficult to rationalize subjecting an Iraqi contractor to U.S. court jurisdiction and U.S. law for actions that occur in Iraq simply because the contractor is providing services to the United States. Nevertheless, for the category of contractors envisioned by S. 526 this step is reasonable, because the contractor is generally required to secure insurance to cover claims like those made in connection with Colonel Baragona's death, and the U.S. proceedings are essentially a predicate step to secure payout under the insurance policy.

Foreign contractors from nations other than the host country have little basis to object, assuming the contract is of significant scope. These contractors appreciate that the government agency awarding the contract will want a central forum for the resolution of claims of its choosing. That could be a court or an arbitration forum or a combination of the two. Accepting such dispute resolution terms is essentially a cost of the contract. Incidentally, Middle Eastern contractors are now used heavily by U.S. forces in Iraq and Afghanistan and in other locations. They fully understand that the U.S. will apply its law to them in connection with their discharge of these contracts. There have been a significant number of criminal probes launched, and prosecutions brought, by the Justice Department with respect to corruption or malfeasance associated with these contracts, and these facts have been broadly reported in media in the Middle East. So contractors now readily accept the risk of being dragged into a U.S. court for serious wrongdoing.

But I believe the extension of jurisdiction is appropriate whether the United States has secured a grant of immunity or not. If not, it will buttress the arguments of U.S. diplomats and military representatives seeking the immunity. In a wrongful death action, authorities of the host country may well defer to the United States in a prosecution or civil action if they understand that the natural interests of the United States are stronger than their own. And in any case, having concurrent jurisdiction in multiple fora does not present a difficult problem, as courts have rules which allow them to sort through the competing fora and choose the one which is most appropriate (the doctrine of *forum non conveniens*).

2. Are there circumstances in which it would be feasible and appropriate to require foreign contractors to agree to contract clauses agreeing to arbitration for civil claims related to the performance of the contract? If so, is it feasible and appropriate for such clauses to allow third parties to avail themselves of arbitration for civil claims related to the performance of the contract?

Because of my own background as an international corporate practitioner, I am predisposed to favor arbitration as a more efficient means of resolving claims than national courts. Arbitration is also indicated by the policy of delocalization, that is, that the dispute in a significant international matter should be resolved by finders of fact who are not attached with either party. I will note two exceptions to this general rule. One relates to large-scale public contracts. The nation

awarding the contract may well have strong reason to require the resolution of such claims in its national courts, especially if it has a strong tradition of an independent judiciary. The other has to do with certain categories of claims concerning acts of serious violence resulting in rape, bodily harm, dismemberment or death. It is reasonable for the legislature to require such claims, because of the gravity of the offense against the public peace they suppose, to be resolved in courts.

I also believe that Congress should solicit the views of the government contracting agencies involved on this question. These agencies should have settled policies on how claims are resolved that tend to channel them into a particular forum. That process facilitates the drafting of contracts and helps contract administrators predict how disputes would likely be resolved.

As I noted in my testimony, an agreement to resolve claims through a particular process would normally be viewed as binding only on the parties to the contract. Third parties would not be able to avail themselves of these clauses unless they are clearly designated as third-party beneficiaries. If they are so designated, they should be able to make use of the claims settlement process which is agreed upon in the contract. This should not conflict with, but rather reinforce, the interests of the United States, which should favor the channeling of all claims into a single forum for review and resolution.



RALPH G. STEINHARDT

ARTHUR SELWYN MILLER RESEARCH PROFESSOR OF LAW
CO-DIRECTOR, OXFORD PROGRAMME IN INTERNATIONAL HUMAN RIGHTS LAW

10 January 2010

The Honorable Joseph Lieberman
The Honorable Claire McCaskill
Committee on Homeland Security and Governmental Affairs
Sub-Committee on Contracting Oversight
United States Senate
613B Hart Senate Office Building
Washington, D.C. 20510-6250

RE: Post-Hearing Questions for the Record: "S. 526: Accountability for Foreign Contractors: The Lieutenant Colonel Dominic 'Rocky' Baragona Justice for American Heroes Harmed by Contractors Act"

Dear Senator Lieberman and Senator McCaskill:

After my testimony on the proposed legislation, you asked a variety of questions for the record, and in this letter I try to answer them as fully as possible. When your questions overlap with one another, I have taken the liberty of combining them and answering them together.

Q. (Senator McCaskill) What are your recommendations to ensure that the bill is constitutional in light of the constitutional conditions doctrine? (Senator Lieberman) In your testimony, you state that a statutory requirement for contractors to consent to personal jurisdiction in the United States might be viewed by courts as an unconstitutional condition on the privilege of doing business with the U.S. government. Are there changes that would you recommend to the bill to minimize successful constitutional challenges while maintaining the intent of the bill? If a consent clause resulted not from a statutory mandate, but from negotiations between a U.S. agency and the foreign contractor, would you still have the same concern that the clause would be viewed as an unconstitutional condition on the privilege of doing business with the U.S. government?

There is no certain answer to these questions, because the courts have never been models of clarity in articulating and applying the constitutional conditions doctrine. As you know, at its heart, the doctrine prohibits the federal government from withholding or conditioning a benefit on the recipient's waiver of his or her constitutional rights. It ensures that the government may

202-994-5739 * FAX 202-994-9446 * E-MAIL rstein@law.gwu.edu

INTERNATIONAL GRADUATE PROGRAMS OFFICE * 2000 H STREET, NW * WASHINGTON, DC 20052

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not indirectly accomplish a restriction on constitutional rights which it is powerless to decree directly. Perhaps its clearest hypothetical application would be a case in which the government attempted to condition the granting of a driver's license on the condition that the recipient waive his or her constitutional right to be free of unreasonable searches and seizures. When the doctrine applies, *even if the benefit could have been denied altogether*, the government cannot condition the benefit on the recipient's surrender of a constitutional right.

In the context of the proposed legislation, the doctrine offers an obvious counter-weight to the common sense argument that the recipient of a benefit – namely a government contract – has to “take the bitter with the sweet” and can be forced as a condition of the contract to waive all due process objections to the exercise of personal jurisdiction by a federal court. The fact that the District Court ruled in favor of Kuwait & Gulf Link Transport Company in the *Baragona* litigation suggests that U.S. government contractors' due process objections to personal jurisdiction are extremely powerful if the contract is administered abroad and the contractor remains offshore.

The constitutional conditions doctrine requires a court to employ strict scrutiny in analyzing the challenged condition, and it is the structure of strict scrutiny that guides my specific recommendations below. Professor Gerald Gunther's famous observation – “strict in theory, fatal in fact” – may be more popular than accurate, but the conditions in the proposed legislation must satisfy three demanding criteria.

First, the condition must be justified by a “compelling governmental interest.” The courts look for some crucial or necessary governmental interest, not a mere policy preference, and that interest must be articulated and reasonable. In this case, the Congress might well determine that the security and economic interests of United States are profoundly undermined by the misconduct of a government contractor anywhere in the world and that impunity breeds contempt. The American judicial system is one reliable venue for assuring accountability, even if others (like debarment or suspension) are also available. The Congress might also determine that the legislation levels the playing field as between foreign and domestic companies that contract with the U.S. government, establishing the governmental interest in non-discrimination.

Second, the condition must be narrowly tailored to achieve that governmental interest. In the best case scenario, a court will determine that requiring foreign corporations to waive their due process objections to personal jurisdiction cases arising out of their contracts with the U.S. government is narrowly tailored to achieve the ends of corporate accountability and non-discrimination, and you may decide to take that risk. But with respect I suggest that you anticipate the argument that the legislation is both overbroad (because it attempts to reach conduct in connection with a U.S. contract rather than directly out of the contract itself) and under-inclusive (because nothing in the American tort system necessarily assures redress for the protected class).

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Third, and relatedly, the condition must be the least restrictive means for achieving that interest. In other words, there cannot be a less restrictive way to achieve the compelling government interest. Analytically, this "least restrictive means" requirement overlaps the second criterion, but the courts generally treat the two separately. Courts will question whether conditioning a government contract on a waiver of constitutional rights is the least restrictive way of achieving the goals of accountability and non-discrimination.

Recommendations re Constitutional Conditions Doctrine

1. Congress should make formal findings in the legislation about the compelling government interest in assuring the accountability of all government contractors, and linking accountability to the availability of litigation in the United States, in ways that debarment or suspension alone cannot achieve. The Findings section of the legislation should deal less with the facts of the *Baragona* case (as in earlier versions of the bill) and more with the interests of the United States. Congress should explicitly invoke its legislative power to raise and support an army, because its legislative authority is then at its "apogee." *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).
2. Congress should tighten the language of the proposal to limit U.S. litigation to cases arising out of the performance of the contract itself, rather than to cases of serious bodily injury caused by the conduct of any contractor (or its employees) anywhere in the world, whether pursuant to the contract or not. I am aware that this may be an unattractive restriction for other reasons, but you have asked me for recommendations designed to avoid the unconstitutional conditions doctrine. To the extent that this revision would not help the Baragonas themselves, Congress should consider compensating the family and then seeking reimbursement from the defendants either in Kuwaiti or Iraqi courts or through an administrative process in the United States.
3. In an effort to pre-empt the argument that the proposed legislation is both overbroad and under-inclusive, *supra*, Congress should consider a different approach for assuring compensation to people in the Baragona's position. For example, Congress could constitutionally insist that foreign contractors post a bond that would provide the protected class of injured plaintiffs a compensation fund in the event that litigation in U.S. courts were derailed for any reason. Alternatively, Congress might consider a federal "workers compensation" regime for assuring a remedy using an administrative model rather than a litigation model. Compulsory arbitration might accomplish the same goal.
4. If the contractual consent clause resulted from negotiations between a U.S. agency and the foreign contractor, it might establish voluntariness in a way that a statutory mandate would not. In my opinion, that would reduce the risk that the unconstitutional conditions doctrine would apply, but it would not eliminate the risk altogether, because the executive branch is as limited by the doctrine as the legislative branch. And there is the risk that not all successful contractors will agree to the waiver, in which case the prospect of another *Baragona* case will recur.

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Q. (Senator McCaskill) Given the intent of the bill, what other revisions would you suggest to improve its scope and ensure that its purpose is fulfilled?

1. *Service.* In my written testimony, I addressed the constitutional dimensions of the problem of service of process. I continue to think that the best way to approach this issue is by amending the legislation to allow the service of process on the defendant contractor "wherever the [contractor] resides, is found, has an agent, or transacts business...." Several federal statutes permit worldwide or nationwide service of process by any federal district court to any place that the foreign defendant "may be found" or "transacts business," and this proposal would bring the legislation into line with these other statutes. The revision should avoid a facial challenge to the statute, even if an "as-applied" challenge is predictable on a case-by-case basis.

2. *Choice-of-law and extraterritoriality.* S. 526 requires that cases brought under the statute shall be analyzed at least initially "in accordance with the substantive laws of the United States." There is no general federal common law of tort, and S. 526 does not purport to create or recognize one. The closest existing federal legislation is arguably the Federal Tort Claims Act, which governs tort claims against the United States government, and the choice of law provision of the FTCA looks to the "whole law of the State *where the act or omission occurred*[" including its choice of law rules." *Richards v. United States*, 369 U.S. 1, 11 (1962). Unless Congress is prepared to adopt legislation defining the substantive tort obligations of foreign contractors, the default provision of S. 526 is likely to be the dominant rule, meaning the law of the place where the damage occurred unless that location is designated a hazardous duty zone, in which case the law of the forum will apply. There are clear constitutional limitations on applying the law of the forum just because it is the forum, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, and international law limitations on jurisdiction to prescribe would also be violated by such a rule. I would therefore recommend (a) that the applicable federal law be defined, (b) that the preference for the law of the place of the injury be retained, (c) subject only to the proviso that, if the law of that place does not provide an adequate remedy (say by not recognizing vicarious liability in any circumstances or immunizing companies from tort liability altogether), then the law of the place with the most significant relationship to the parties and the transaction will apply. This test is consistent with the Second Restatement of Conflicts and is broadly accepted in both state and federal courts.

3. *State secrets privilege.* Accountability lawsuits against government contractors can founder on dubious claims under the state secrets privilege. *Cf. Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (9th Cir. 2009). I recommend that Congress define the contours of the state secrets privilege to assure that it does not become a ruse for impunity in *Baragona*-like cases and similar actions under the Alien Tort Statute.

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4. *Enforceability of judgments.* I have previously recommended that Congress impose a bond obligation on foreign contractors to assure that they appear in tort cases in the United States. Such a bond would also be useful to assure that successful plaintiffs are not subject to the uncertainty of trying to enforce a U.S. judgment abroad. Some defendants will have no U.S.-based assets, and the judgment creditor will be obliged to seek enforcement where the assets are. That can be a logistical nightmare, because the relatively liberal approach to recognizing and enforcing foreign judgments in U.S. courts is not generally reciprocated: litigants in the United States do not compete on a level playing field when it comes to the recognition and enforcement of U.S. judgments abroad. Until there is an international treaty resolving these issues – an increasingly unlikely prospect – it will be necessary to build protection of judgment creditors' interest into the contracting process.

Q. (Senator Lieberman) In your written testimony, you state that courts have generally required that the defendant purposefully avail itself of the privilege of doing business in the forum, and the primary indicators of that purpose include the location of negotiation, execution, and performance. Aside from, or in addition to, the approach taken in S.526, are there actions the U.S. government can take to facilitate the creation of jurisdiction in the United States for foreign contractors that would minimize potential constitutional challenges? For example, would contract administration and oversight conducted from the United States help to establish the "minimum contacts" that are necessary under the traditional constitutional analysis of jurisdiction?

As a matter of both constitutional law and international law, this is a potentially fruitful approach. If foreign contractors actually negotiated and executed government contracts in the United States and those contracts were then administered in or from the United States, the jurisdictional contacts – especially the requirement of "purposeful availment" – would be significantly enhanced. Jurisdiction would then lie in the federal district court in the state where those events actually occurred, not – as specified in S. 526 – in the state of the plaintiff's residence or the District of Columbia. My primary concern would be the unintended consequences of such a regime: in addressing the constitutional problem, the revised legislation could trigger considerable logistical problems in the administration of government contracts.

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Q. (Senator Lieberman) Are there circumstances in which it would be feasible and appropriate to require foreign contractors to agree to contract clauses agreeing to arbitration for civil claims related to the performance of the contract? If so, is it feasible and appropriate for such clauses to allow third parties to avail themselves of arbitration for civil claims related to the performance of the contract?

Statutory requirements of compulsory arbitration do not violate the Due Process Clause so long as certain procedural protections are included in the arbitral regime. In *Hardware Dealers Fire Ins. Co. v. Glidden*, 284 U.S. 151 (1931), the Supreme Court rejected a constitutional challenge to a Minnesota statutory scheme that required all state fire insurance policies to provide for compulsory binding arbitration of the amount of certain losses:

The [Due Process Clause of the] Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. . . . In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard.

Id. at 158. The courts have subsequently defined the procedural requirements of compulsory arbitration regimes. For example, in *Country-Wide Ins. Co. v. Harnett*, 426 F.Supp. 1030 (C.D.N.Y. 1977), the court sustained New York's No-Fault Insurance Law permitting compulsory binding arbitration of certain disputes at the demand of any claimant, so long as there was "provision for adequate notice, hearing before an impartial decision maker, presentation of evidence and witnesses who testify under oath, and the assistance of counsel." *Id.*, at 1033. In addition, arbitration awards were subject to judicial review, especially on the issue of whether the award was supported by evidence in the record. By parity of reasoning and with similar procedural protections, third-party claimants could constitutionally be empowered to initiate to the arbitration proceeding. Although the arbitration of *Baragona*-like claims would presumably include both liability and damages, I do not believe that that necessarily distinguishes the proposal from the regimes sustained in *Glidden* and *Harnett*.

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In conclusion, I feel compelled to observe – perhaps unnecessarily – that hard legal questions like the ones you have posed often have only better and worse answers, rather than absolutely right or wrong answers, and that reasonable people might disagree with some of the conclusions expressed here. But in every case I have tried to respond in a way that will both adhere to the best reading of current law and support the effort to address the injustices at the heart of the *Baragona* litigation. I hope that these thoughts are useful to you as you continue the important work of assuring the U.S. government contractors do not escape accountability. Needless to say, if I can assist your Committee in its further deliberations, I would be pleased to do so.

Sincerely,



Ralph G. Steinhardt
Professor of Law and Arthur Selwyn Miller Research Professor of Law

Hearing before the
Subcommittee on Contracting Oversight
Committee on Homeland Security and Governmental Affairs
United States Senate

Entitled
“Accountability for Foreign Contractors: The Lieutenant Colonel Dominic ‘Rocky’
Baragona Justice for American Heroes Harmed by Contractors Act”

November 18, 2009

Questions for the Record
Submitted to
Tony West
Assistant Attorney General
Department of Justice

1. In your written testimony, you note that “we believe that requiring contractors to consent to personal jurisdiction in U.S. courts as a condition of their contract with the United States should assist us in establishing personal jurisdiction over foreign contractors in procurement fraud cases.”

Q. Please elaborate on the benefits that the Department believes could result from this legislation.

Answer:

Procurement fraud is second only to health care fraud in terms of the numbers of civil fraud cases handled and the monies recovered by the Department of Justice. Since 1986, when the False Claims Act was substantially amended, settlements and judgments in cases involving the Department of Defense alone total more than \$4.4 billion. The vast majority of those matters are procurement fraud cases.

The United States has relied heavily on foreign contractors for goods and services needed for the wars in Iraq and Afghanistan, and for the reconstruction of those countries. Many of these contracts were performed overseas by foreign companies, both at the prime and subcontractor levels. The Government also enters into agreements with foreign contractors for a host of other goods and services. Thus, our ability to sue foreign contractors under the False Claims Act is important to our overall effort to prevent and redress fraud in Government contracts.

When the United States sues a foreign contractor under the False Claims Act and the contractor challenges personal jurisdiction, the courts engage in a constitutionally required

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minimum contacts analysis to assess whether personal jurisdiction exists. In such circumstances, the Department usually has been successful in meeting the minimum contacts test. Nevertheless, requiring contractor consent in these situations would provide an alternative ground for asserting personal jurisdiction in United States courts over foreign contractors. Accordingly, Section 4 of the new legislation (concerning personal jurisdiction for suits brought by the United States alleging wrongdoing under U.S. Government contracts performed abroad) would provide the Government with a valuable, additional tool for combating procurement fraud.

2. You also noted that you currently have approximately 1,000 *qui tam* actions currently under seal.

Q. What resources, if any, are necessary to reduce the number of *qui tam* actions under seal in a more timely manner?

Answer:

The *qui tam* cases currently under seal are actively being investigated by the Department. When a new *qui tam* case is filed, it does not wait in a queue for earlier cases to be completed. Rather, the investigation of a *qui tam* case begins immediately upon filing. The timing of the Government's election decision in any particular case is influenced by a variety of factors, including the size and complexity of the case, the specificity of the *qui tam* complaint, the existence of related criminal proceedings and, in cases that show promise, the ability of the parties to resolve the matter before intervention. Defendants have an incentive to settle cases before the United States makes an election and the cases are unsealed, so they can announce a settlement at the same time the allegations are made public. This process benefits both the United States and relators, even though it may prolong the Government's election decision. Keeping these factors in mind, the Department's record of investigating *qui tam* cases is a good one. According to current data, since fiscal year 2006, the average length of time from the Civil Division's receipt of a *qui tam* case until the Department notifies the court of its election decision is 13.7 months.

That said, we anticipate an increase in False Claims Act cases relating to financial fraud. The Department has recently obtained recoveries in a number of cases involving participants in the mortgage industry. Additionally, Congress has made available \$50 million to the Special Inspector General for TARP to audit and investigate disbursements under the TARP program. And as of January 31, 2010, the Recovery Board and the Federal Inspectors General have received more than 1,500 complaints of wrong-doing associated with Recovery funds and there are more than 150 active investigations. It has been the Department's experience that when inspector general resources are augmented and investigations increase, it translates into additional referrals to the Department. An increase in financial fraud cases will place additional resource demands on the Civil Division's attorneys and support personnel. We therefore encourage Congress to support the President's proposed budget.

Hearing before the
Subcommittee on Contracting Oversight
Committee on Homeland Security and Governmental Affairs
United States Senate

Entitled
“Accountability for Foreign Contractors: The Lieutenant Colonel Dominic ‘Rocky’
Baragona Justice for American Heroes Harmed by Contractors Act”

November 18, 2009

Questions for the Record
Submitted to
Tony West
Assistant Attorney General
Department of Justice

Questions from Senator Lieberman:

1. You stated in your written testimony that S.526 would facilitate establishment of personal jurisdiction in civil procurement fraud matters brought by the United States for contracts performed abroad.
 - a. What are the obstacles that the Department of Justice (DOJ) most frequently encounters in establishing jurisdiction over foreign contractors in actions related to procurement fraud?

Answer:

The Civil Division generally has been successful in establishing personal jurisdiction over the foreign defendants it has elected to sue under the False Claims Act, 31 U.S.C. §§3729-3733 (“FCA”). Whether personal jurisdiction exists is a fact-intensive and case-specific inquiry, but certainly there is increased litigation risk to the United States for establishing personal jurisdiction where key events in a contract involving foreign contractors or subcontractors — such as contract award and performance — occur outside the United States.

- b. Has DOJ previously considered whether contract clauses could help establish jurisdiction in fraud or other civil actions?

Answer:

The Justice Department’s Civil Division does not negotiate the terms and conditions of the contracts that are the subject of the FCA actions that it brings on behalf of Federal agencies.

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The Civil Division has not had occasion to litigate a question of personal jurisdiction where the contractor consented to personal jurisdiction through a clause in the contract.

- c. What advantages does S.526 provide with respect to procurement fraud that the False Claims Act does not?

Answer:

The Department's ability to establish personal jurisdiction is assisted by the fact that the FCA provides for worldwide service of process. See 31 U.S.C. § 3732(a) ("A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States."). For purposes of establishing whether a non-resident defendant has the minimum contacts required by principles of due process (such that subjecting the defendant to suit in the United States does not offend "traditional notions of fair play and substantial justice," *International Shoe v. State of Washington*, 326 U.S. 310, 316 (1945)), the practical implication of the FCA is that the United States as a whole is the relevant forum, and not just the forum district. *U.S. ex rel. Thistlewaite v. Dowty Woodville Palmer, LMT*, 976 F.Supp. 207, 210 (S.D.N.Y. 1997).

Section 4 of S. 526 would be helpful in procurement fraud cases because it contains a consent provision that the FCA does not. Specifically, section 4 would require a contractor to consent to personal jurisdiction as a condition of contracting with the United States. Because the requirement of personal jurisdiction is an individual right under the Due Process Clause that may be waived, *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982), the consent provision could provide an alternative basis for personal jurisdiction in difficult cases. For example, it might be helpful where a contractor's contacts with the United States were more attenuated and the minimum contacts test more difficult to meet. In this way, it could help to ensure that litigation concerning contract fraud could be conducted in a court of the United States. Moreover, the consent provision might avoid the burdensome litigation of an otherwise colorable defense of personal jurisdiction at the outset of the case.

Subsection 6(1) of S. 526 would define the term "contractor" to include "subcontractors." We note that the effect of a subcontractor's consent to suit in the United States would be less certain because there would be no privity of contract between the United States and a subcontractor. For consent to be effective, it would have to come directly from a subcontractor, not from a prime contractor on behalf of the subcontractor.

We believe that section 4's consent requirement may facilitate the Department's efforts to establish personal jurisdiction over foreign defendants in some procurement fraud cases. However, litigation involving foreign defendants or contracts formed or performed abroad poses challenges to the Department's use of the False Claims Act to combat procurement fraud. These challenges include (a) the difficulty, in many foreign jurisdictions, of enforcing a fraud judgment if the judgment is based upon the FCA, and not upon a common law tort of fraud; and (b) limits

on the extraterritorial application of United States law. With respect to the second issue, a recent Supreme Court decision, *Morrison v. National Australia Bank Ltd.*, 2010 WL 2518523 (June 24, 2010), is notable notwithstanding that the claims at issue in that case are different in many ways from the types of procurement fraud cases the Department typically pursues under the FCA. In *Morrison*, the Court held that section 10(b) of the Securities and Exchange Act of 1934 did not apply extraterritorially to permit foreign plaintiffs to proceed with a private securities fraud action against foreign and United States defendants concerning securities issued by an Australian bank traded only on foreign exchanges. Even if a United States law were held to apply extraterritorially, the question remains whether a domestic judgment based upon that law could be enforced outside of the United States.

2. Do you agree with the concern expressed by Professor Steinhardt in his testimony that the constitutionality of S. 526 may be challenged? If so, what changes would you recommend to the bill that would minimize successful constitutional challenges while still achieving the intent of the bill?

Answer:

Like other legislation that has consequences for private parties in litigation, S. 526 well might be challenged on constitutional grounds. This would be so regardless of whether the objections expressed in Professor Steinhardt's testimony are well-founded. However, the United States Government has a strong interest in ensuring that its citizens receive redress for injuries suffered at the hands of foreign contractors, and the Supreme Court has stated that "the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704 (1982). Accordingly, there should be little question as to the facial validity of conditioning the availability of Federal contracts on the waiver of an objection to a United States court's exercise of personal jurisdiction. However, the bill could be construed to apply to lawsuits that are unrelated to the performance of a contract with the Federal government. See bill § 3(a)(1). Additionally, the bill seeks to condition future payments for existing contracts upon the contractor's agreement to accede to the jurisdiction of United States courts in lawsuits commenced on or after September 11, 2001, see bill § 4(c)(2)(B)(3). These aspects of the bill might prompt litigation about their functioning under the Constitution.

3. In his written testimony, Professor Steinhardt suggested Congress could require that foreign contractors post a bond that would create a fund that would compensate plaintiffs who are unable to find relief in the courts. Do you think that this idea is workable?

Answer:

While the notion of a fund to compensate individuals not able to obtain relief from the courts is superficially attractive, we believe that it would encounter numerous legal and practical difficulties and likely would increase the cost of contracting.

Our most pressing concern is that requiring a bond would impose an added cost to foreign contractors that would not be imposed upon domestic contractors. This would be contrary to some of our free trade agreements. Among other potentially relevant agreements, the World Trade Organization Government Procurement Agreement requires that the Government treat foreign contractors the same as domestic contractors. A bond requirement applying only to foreign contractors would run counter to this imperative and potentially violate such agreements.

Another significant challenge would be establishment of the payment fund and the devising of rules to govern its operation. Presumably, injured parties would need to apply for compensation, then a mechanism — perhaps arbitration — would be used to determine eligibility for compensation and the amount of compensation. A host of policy questions, including whether to cap damages for individual cases or individual contracts, would be presented. The absence of a cap on damages, combined with rules favoring the award of compensation would lead to increased insurance costs for the contractors, and any uncertainty regarding the exposure of contractors would increase the costs of the bonds. Further questions, regarding who would administer the fund and whether a contractor or an injured party should have any recourse in the event of an unfavorable decision also would need to be resolved.

Finally, the costs of such bonds would be reflected in the contract bids and would be effectively passed on to the Government through higher contracting costs.

4. Are there circumstances in which it would be feasible and appropriate to require foreign contractors to agree to contract clauses agreeing to arbitration for civil claims related to the performance of the contract? If so, is it feasible and appropriate for such clauses to allow third parties to avail themselves of arbitration for civil claims related to the performance of the contract?

Answer:

Like the idea of a payment fund for individuals not afforded relief in United States courts, we believe that this kind of mandatory arbitration clause is legally and practically problematic. As set forth in our response to question 3, *supra*, imposing a requirement upon foreign contractors that is not imposed upon domestic contractors is contrary to free trade agreements that we have entered with many foreign governments. In this case, the obligation to submit to civil arbitration would be different than the obligations to which domestic contractors would be subject.

Nevertheless, in the event that an arbitration clause were found permissible, practical problems would arise concerning enforcement of the arbitration agreement. These would stem from the fact that only one of the potential parties to the contract would be a party to the arbitration. Under the proper conditions, an intended third-party beneficiary may sue to enforce a contract provision. However, the same concerns regarding personal jurisdiction that would prevent an injured party from obtaining redress in the United States courts for the negligence of a contractor potentially could apply to the same party's attempt to enforce the arbitration clause. Thus, in the event of a dispute between the injured third party and the contractor over the clause, intervention by the United States on behalf of the third party might be the only means for resolution. Such intervention well might be appropriate, but it would bring with it the risk of litigation.

**Post-Hearing Questions for the Record
Submitted to Mr. Richard Ginman
From Senator McCaskill**

**“ACCOUNTABILITY FOR FOREIGN CONTRACTORS: THE LIEUTENANT COLONEL DOMINIC
‘ROCKY’ BARAGONA JUSTICE FOR AMERICAN HEROES HARMED BY CONTRACTORS ACT”**

**Wednesday, November 18, 2009, 2:30 P.M.
United States Senate, Subcommittee on Contracting Oversight,
Committee on Homeland Security and Governmental Affairs**

During the hearing, you expressed concern there is no waiver provision in the Baragona legislation allowing foreign contractors to opt-out of the jurisdictional consent requirements. You noted that circumstances on the ground may warrant the necessity of a waiver of the consent requirements, but were unable, at the hearing to provide a specific example of such potential circumstances. Notably, all U.S. contractors in Afghanistan are subject to personal jurisdiction in U.S. courts.

Q. Under what scenario can you envision the necessity of a waiver of consent to personal jurisdiction with a foreign contractor? Please provide examples of situations in which the Department of Defense would want the authority to opt-out of consent requirements and contract with an entity who has signaled its intent neither to consent to jurisdiction in U.S. courts nor to comply with service provisions.

Answer. Field Commanders need flexibility when performing military operations to ensure proper battle rhythm. A Commander would need a waiver or exception to the proposed legislation while planning for an operation in a specific area where there is a limited number of responsible contractors to assist in the logistical aspects of an operation, such as for transportation services support. Assisting in an operation could mean transporting hundreds of Iraqi police to a location where secrecy of operations is paramount to ensure surprise. To ensure this surprise, it would be prudent to contract with a bus company at the last moment to avoid any security breaches. If only one bus company is readily available but it refuses to accept a contract because of the jurisdiction clause, the operation would have to be put on hold until the contracting officer could find another company, throwing off the timing of the operation as well as possibly breaching the secrecy of the operation. This is a real world example where an operation would have been disrupted or would not have occurred at all if the Commander did not have the flexibility to contract expeditiously with a local company. This type of waiver or exception is consistent with circumstances permitting other than full and open competition under unusual and compelling urgency.

Post-Hearing Questions for the Record
 Submitted to Mr. Richard Ginman, Deputy Director for
 Defense Procurement and Acquisition Policy, U.S. Department of Defense,
 From Senator Joseph I. Lieberman

“Accountability for Foreign Contractors: The Lieutenant Colonel Dominic ‘Rocky’
 Baragona Justice for American Heroes Harmed by Contractors Act”
 November 18, 2009

1. In your testimony, you expressed the view that a contractor’s liability under S. 526 should be limited to actions that are directly linked with the contractor’s performance under the contract.
 - a. Would your suggestion result in the contractor being liable for tortious or illegal actions that the contractor committed while performing under the contract? For example, would the contractor be liable in the circumstances of the Baragona case?

Answer: Yes. We agree with S. 526’s Finding (16) that redress should be available when a covered injury occurs to a covered individual “because of the negligent performance by the contractor of its work for the United States government.” We are concerned, however, that there is nothing in the operative language of the consent-to-jurisdiction provisions (*see* Section 3(a)(1)) that would require this nexus between the injury and contract performance. As I expressed in my written testimony, the potential litigation exposure in U.S. courts of foreign contractors, particularly smaller vendors, for injuries unrelated to their business with the U.S. Government could adversely affect our base of competition. If Lieutenant Colonel Baragona’s fatal crash occurred in connection with the foreign contractor’s performance of a U.S. government contract, the Baragona family would be able to obtain redress from the responsible foreign contractor under our suggestion.

- b. Would the contractor be liable for rape committed during the span of time the contractor is performing the contract? How would you recommend gaining jurisdiction for other actions, such as rape?

Answer: It is our view that victims of tortious or intentional misconduct should be able to seek civil redress from a foreign contractor under circumstances in which redress is available from employers generally under the doctrine of respondeat superior. S. 526 appears to incorporate this principle. *See* Section 3(a)(1) (“...including a suit for negligence against one or more employees of the contractor for which the contractor may be liable under theories of vicarious liability.”). Some courts have found that in certain circumstances an employer may be civilly liable to victims of an employee’s sexual assault. *See* Note, “Scope of Employment” Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by their Employees, 76 Minn. L. Rev. 1513, 1522

and nn. 2, 35 (1992) (collecting cases). In these cases, the courts typically have found that the employee's sexual misconduct arose from or was in some way related to the employee's essential duties. *E.g.*, *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1349-52 (Cal. 1991) (police officer raped motorist after stopping her on suspicion of drunk driving); *Lyon v. Carey*, 533 F.2d 649, 651, 655 (D.C. Cir. 1976) (furniture deliveryman raped furniture recipient after gaining access to customer's apartment). Under other circumstances, courts have concluded that the employer should not be responsible for a sexual assault committed by an employee. *See* 76 Minn. L. Rev. at 1513, 1521-22 and nn. 2, 33, 34 (collecting cases). We see no reason why a foreign contractor should be subject to a different degree of exposure to liability for a sexual assault committed by one of its employees than employers generally. Based on the current case law in this area, foreign contractor liability would require a showing that the sexual assault arose from or was in some way related to contract performance.

We believe that S. 526 could be an appropriate means to secure *in personam* jurisdiction over a foreign contractor whose exposure to liability for a sexual assault committed by an employee is warranted by existing case law applicable to employers generally. Injury caused by rape or other sexual assault will, in some cases, already fall within the definition of "serious bodily injury" in Section 3(b). Certainly, this definition also could be amended specifically to include "other injuries resulting from rape or other sexual assault."

2. Can a contractor's tortious actions, such as in the circumstances of the Baragona case, be included in a contracting officer's responsibility determination when awarding a contract?

Answer: Subpart 9.1 of the Federal Acquisition Regulation (FAR) prescribes policies, standards, and procedures for contracting officers to determine whether prospective contracts and subcontractors are responsible.

Pursuant to FAR subpart 9.102, the applicability to determine responsibility of a prospective contractor is dependent on location: (1) In the United States, or its outlying areas; or (2) Elsewhere, unless application of the subpart would be inconsistent with the laws or customs where the contractor is located. It does not apply to proposed contracts with foreign, state or local governments or other U.S. Government agencies or their instrumentalities.

Contracting officers shall only award contracts to responsible prospective contractors. If there is no information indicating the prospective contractor is responsible, a determination of nonresponsibility is written for the contract file.

To be determined responsible, a contractor must (1) have adequate financial resources, (2) be able to comply with required delivery or performance schedule, and (3) have a satisfactory performance record, integrity and business ethics. Failure to meet the

quality requirements is a significant factor when determining satisfactory performance. The contracting officer shall consider the affiliate's past performance and integrity when they may adversely affect the prospective contractor's responsibility. Generally, the prospective prime contractor is responsible for determining the responsibility of their prospective subcontractors.

The contracting officer shall obtain information regarding the responsibility of prospective contractors to include requesting preaward surveys when necessary. The contracting officer should also consider relevant past performance information, check the Excluded Parties List System (EPLS), check records and experience data from other contracting offices, other sources such as publications, suppliers, subcontractors and customers of the prospective contractor. There is also a requirement for contracting offices and cognizant administration officers that become aware of circumstances casting doubt on a contractor's ability to perform to promptly exchange relevant information. The contractor officer shall refer the matter of a small business concern's determination of nonresponsibility to the Small Business Administration, which will decide whether or not to issue a Certificate of Competency.

Contracting Officers are required to include FAR provision 52.209-5, Certification Regarding Responsibility Matters in solicitations where the contract value is expected to exceed the simplified acquisition threshold (currently at \$100,000.00). Offers/Bidders are required to submit the certificate regarding whether the company or any of its Principals are debarred or suspended and within the past three years been convicted or had a civil judgment renders against them, or presently indicted for, or otherwise criminally or civilly charged by a government entity, or been notified of Federal tax delinquency and remains unsatisfied. This certification is reviewed by the contracting officer to determine contractor responsibility.

3. In his written testimony, Professor Steinhardt suggested Congress could require that foreign contractors to post a bond that would create a fund that would compensate plaintiffs who are unable to find relief in the courts. What do you think of this idea?

Answer: I do not believe that requiring foreign contractors to post bonds covering potential tort liability would either solve the problem exemplified by the Baragona case or be in the U.S. government's best interest.

The Baragona case was a wrongful death case brought in the U.S. against a foreign contractor. Recovery in a wrongful death matter requires a decision regarding the damages to be paid by the defendant, which are set by a court on a case-by-case basis. Even if the foreign contractor posted a bond for potential tort liability, a mechanism would be required to determine the amount of damages, which would bring the matter back into court, and which would raise jurisdictional issues again. Plaintiffs could

attempt to have damages set against a foreign contractor in the country of the contractor's incorporation, but success would be dependent on the unique laws of that country.

Furthermore, administration of such a bond system would be complex and costly. Since the presumptive beneficiaries of such a bond system would be U.S. citizens, administration would presumably fall upon the U.S. government. DoD does not have the technical expertise or the manpower to support a bonding system. Given the complicated administration of a bond system and the limited utility provided by it, it does not appear to be in the best interest of the U.S. government, and would advise against such a system.

**Post-Hearing Questions for the Record
Submitted to Mr. Uldric Fiore
From Senator McCaskill**

**“ACCOUNTABILITY FOR FOREIGN CONTRACTORS: THE LIEUTENANT COLONEL DOMINIC
‘ROCKY’ BARAGONA JUSTICE FOR AMERICAN HEROES HARMED BY CONTRACTORS ACT”**

**Wednesday, November 18, 2009, 2:30 P.M.
United States Senate, Subcommittee on Contracting Oversight,
Committee on Homeland Security and Governmental Affairs**

During the hearing, you testified that a decision was made not to debar KGL from future government contracting because no conviction was entered against KGL or any of its employees, and the facts of the case did not constitute serious or compelling conduct by KGL to justify debarment. You reached this conclusion despite the determination by the judge in the Baragonas’ civil suit against KGL that the conduct of KGL was “an affront to the solemn sacrifices service members such as Lt. Col. Baragona honorably provided.” The judge also noted that “KGL took this callousness even further by causing Plaintiffs to expend nearly four years and significant expense in merely getting the question of jurisdiction before the Court.” You stated concern that a decision to debar KGL would be overturned by a court as arbitrary and capricious.

Question 1) How many Army suspensions and debarments that were not based on criminal convictions have been overturned by federal courts? Please provide the legal citations for those cases.

Answer. I am not aware of any Army suspensions or debarments that have been overturned by federal courts. No court challenges have been filed during my tenure as Army Suspension and Debarment Official (October 2, 2008 to present).

Ms. Christine McCommas, Chief, Army Procurement Fraud Branch, who has been in that office for over 20 years, confirms that there have been a handful of federal court challenges during that period; however, no Army suspensions or debarments that have been overturned by federal courts in that period.

Question 2) To what extent and in what context was General Bednar in contact with the Army Suspension and Debarment Official regarding the Baragona case? Please provide copies of any documents related to General Bednar’s involvement in this matter.

Answer. During my tenure as Army Suspension and Debarment Official (October 2, 2008 to present), I have had no contacts with Brigadier General (Retired) Bednar regarding the Baragona case. I have no knowledge as to whether my predecessor, Mr. Robert Kittle, had any such contacts.

In response to a Committee request at the November 2009 hearing, Mr. Brian Persico, Litigation Attorney, Army Procurement Fraud Branch, provided information concerning contacts he and Army Procurement Fraud Branch may have had with Brigadier General (Retired) Bednar.

Post-Hearing Questions for the Record
 Submitted to Uldrich I. Fiore, Jr.,
 Director, Soldier and Family Legal Services,
 Office of the Judge Advocate General, U.S. Army,
 From Senator Joseph I. Lieberman

“Accountability for Foreign Contractors: The Lieutenant Colonel Dominic ‘Rocky’
 Baragona Justice for American Heroes Harmed by Contractors Act”
 November 18, 2009

1. Given that the Army’s investigation of the death of LTC Baragona concluded that the negligence of KGL’s employee caused the accident, could you debar KGL for the actions of its employee or for its refusal to accept responsibility for the negligent actions of its employee on the basis that KGL “engaged in conduct of so serious and compelling nature” that it affects that contractor’s responsibility as a Government contractor?

Answer: In general, an employer normally has legal responsibility, or tort liability, for the negligent acts of employees that are within the scope of the employment. A driver’s simple negligence, or the absence of reasonable care, would be within the scope of employment; however, simple negligence would not be a basis for a finding of “conduct of so serious and compelling nature” as to warrant suspension or debarment proceedings against an employer. More serious forms of negligence, often termed “willful,” “wanton” or “reckless,” and criminal acts involve intentional conduct and may be considered independent acts and outside the scope of employment, in which cases employers are not legally responsible.

Government contractors are required to maintain liability insurance to cover their responsibilities for negligent acts of their employees, especially drivers. Such insurance policies are designed to pay claims once liability is determined, either by the investigation of the insurance policy issuer or in an appropriate judicial forum in the event of disagreement as to liability.

In the accident in which LTC Baragona died occurred in Iraq and there has been no final, undisputed determination regarding liability. The finding of the Army investigation has not been accepted by KGL or its insurer, and they are not required to accept it. Nor has there been a final judicial determination. The judicial action in U.S. District Court for the Northern District of Georgia has been dismissed for lack of jurisdiction and that dismissal has been affirmed on appeal. Accordingly, as a legal matter, there is only the “allegation” of negligent actions of a KGL employee.

In the absence of a binding negligence determination, there is no refusal to accept legal responsibility by KGL. As the court noted, KGL was within its legal rights to resist the jurisdiction of U.S. Court, however inappropriate it may appear to the court and others from other perspectives. A contractor’s lawful exercise of legal rights is not “conduct of so serious and compelling nature” as to warrant suspension or debarment.



DEPARTMENT OF THE ARMY
 UNITED STATES ARMY LEGAL SERVICES AGENCY
 901 NORTH STUART STREET
 ARLINGTON VA 22203-1837

REPLY TO
 ATTENTION OF

Contract and Fiscal Law Division
 Procurement Fraud Branch

24 November 2009

MEMORANDUM FOR RECORD

SUBJECT: Testimony of Mr. Dominic Baragona Before the Subcommittee on Contracting Oversight of the U.S. Senate Committee on Homeland Security and Governmental Affairs, 18 November 2009

1. On 18 November 2009 Mr. Dominic Baragona (Mr. Baragona), father of deceased Lieutenant Colonel Dominic Baragona, USA (LTC Baragona), appeared before the Subcommittee on Contracting Oversight of the U.S. Senate Committee on Homeland Security and Governmental Affairs to discuss S. 526, the "Lieutenant Colonel Dominic 'Rocky' Baragona Justice for American Heroes Harmed by Contractors Act." As part of his oral testimony, Mr. Baragona alleged that on an unspecified date between August 2006 and February 2009 he personally contacted me via telephone to ask about the status of the Army Procurement Fraud Branch's (PFB) inquiry into the present responsibility of Kuwait and Gulf Link Transport Company (KGL). Mr. Baragona stated that in response to this inquiry, I responded that "If I moved this debarment forward, my career would come to an end." Mr. Baragona also stated that it was his belief that my statement was based on being coerced or improperly influenced by KGL's choice of legal counsel, BG Richard Bednar, USA (Retired), formerly of Crowell and Moring LLP, to "kill the debarment inquiry" initiated at the request of President George W. Bush.

2. In August 2006, I was assigned to the KGL case and have acted as the primary point of contact for representatives of the Baragona family as well as KGL's attorneys. One of the duties of my position at PFB is to act as the Army's primary point of contact for counsel representing contractors under investigation and other interested parties. In the 39 months since I began work on the KGL case, I have never received a phone call, voice mail, electronic mail message or other correspondence from Mr. Baragona on any topic, including KGL. I have never stated that recommending the debarment of KGL would result in any detriment to my position as an employee of the Army Judge Advocate General's Corps nor do I believe that such a recommendation would have any adverse impact on my employment or future employment opportunities. I have been in communication with BG Bednar on this case and other matters, however, these discussions have been of a professional nature and did not improperly influence my actions with regard to my recommendations to Mr. Robert Kittel or Mr. Uldric Fiore, the two Army Suspension and Debarment Officials who have reviewed this matter. During my assignment to the KGL case, I have been in frequent contact with Mr. Steven Perles, the attorney for the Baragona family and his associate, Mr. Edward McAllister, but have never spoken directly to a member of the Baragona family. At no time did I state to either Mr. Perles or Mr.

JALS-KFLD-PF

SUBJECT: Testimony of Mr. Dominic Baragona Before the Subcommittee on Contracting Oversight of the U.S. Senate Committee on Homeland Security and Governmental Affairs, 18 November 2009

McAllister that my employment or future employment would be adversely impacted by recommending KGL for debarment.

3. In my present position, I have personally drafted 447 finalized suspensions, proposed debarments and debarments of contractors who have been involved in fraudulent activity involving Government contracts, many of whom have been involved in violent crimes or have been the subject of media attention. All were accomplished according to requirements of the Federal Acquisition Regulation and applicable professional responsibility requirements. At no time have I ever felt personally or professionally under threat due to my recommendations.

4. I ask that this memorandum be added to the official record of the Subcommittee on Contracting Oversight's hearing on S. 526, the "Lieutenant Colonel Dominic 'Rocky' Baragona Justice for American Heroes Harmed by Contractors Act" to rebut Mr. Baragona's testimony that I acted improperly to hinder an ongoing inquiry by the Army, initiated at the behest of the President of the United States, into the present responsibility of a Government contractor. The addition of this memorandum to the record would serve to rebut Mr. Baragona's statements and correct the record of my actions to date.



BRIAN A. PERSICO
Attorney, Procurement Fraud Branch

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