

1 ACCOUNTABILITY FOR FOREIGN CONTRACTORS:

2 THE LIEUTENANT COLONEL DOMINICI "ROCKY"

3 BARAGONA JUSTICE FOR AMERICAN HEROES

4 HARMED BY CONTRACTORS ACT

5 - - -

6 WEDNESDAY, NOVEMBER 18, 2009

7 United States Senate,

8 Ad Hoc Subcommittee on Contracting Oversight,

9 Committee on Homeland Security and Governmental Affairs,

10 Washington, D.C.

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

14 Present: Senators McCaskill, Tester, and Bennett.

15 OPENING STATEMENT OF SENATOR McCASKILL

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

UNOFFICIAL TRANSCRIPT

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

6 Lieutenant Colonel Baragona was killed in Iraq in 2003
7 when his vehicle was struck by a truck being driven by an
8 employee of Kuwait & Gulf Link Transport Company, KGL. An
9 Army investigation found the accident was caused by KGL's
10 driver.

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

16 So in 2005, the Baragona family acted on its own and
17 brought a lawsuit against KGL. The company refused to
18 appear in the matter until after the court had entered a
19 \$4.9 million judgment against them. Only then did KGL enter
20 the case, arguing that the court had no jurisdiction over
21 the Kuwaiti company and that the lawsuit must be dismissed.

22 In September 2006, 17 months after the Baragona
23 family's suit began, and more than 3 years after the
24 accident, the Army sent KGL the first of three letters
25 asking for information about KGL's tactics in the litigation

UNOFFICIAL TRANSCRIPT

1 and other concerns. Each time, the relevant information was
2 supplied to the Army by the Baragona family or their
3 lawyers. KGL responded to each letter, and the Army took
4 KGL's response at face value every time.

5 This February, Uldric Fiore, the Army's suspension and
6 debarment official, decided based on a review of "the
7 information available" that he would not initiate any
8 suspension or debarment proceedings against KGL. This May,
9 4 years after the Baragona family brought their lawsuit, the
10 court vacated its \$4.9 million default judgment and
11 dismissed the Baragona family's case for lack of
12 jurisdiction over KGL.

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

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

UNOFFICIAL TRANSCRIPT

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

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

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

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

UNOFFICIAL TRANSCRIPT

5

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

6 [The fact sheet follows:]

7 / SUBCOMMITTEE INSERT

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

7 For example, from 2004 through March of 2009, the
8 Defense Department Office of Inspector General reported
9 2,768 convictions. The Defense Department suspended or
10 debarred only 708 individuals and companies.

11 The State Department is the second largest Department
12 responsible for contracting in Iraq and Afghanistan behind
13 DOD, and in 2008, the State Department did not suspend or
14 debar a single company.

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

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

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

25 We will also hear from two distinguished legal scholars

UNOFFICIAL TRANSCRIPT

7

1 about the gaps in the legal framework that this bill will
2 help address.

3 We will also hear from the Justice Department about its
4 efforts to pursue accountability for foreign contractors and
5 ask whether they have the tools they need to protect the
6 United States Government and the men and women who bravely
7 serve us in uniform.

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

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

18 OPENING STATEMENT OF SENATOR BENNETT

19 Senator Bennett. Thank you very much, Madam Chairman.
20 Thank you for calling this hearing. It is interesting,
21 perhaps poignant, that we are doing this in the month of
22 November. We are about to reflect on Veterans Day when we
23 talk about our veterans and the sacrifice they make for our
24 country, particularly this November with the tragedy at Fort
25 Hood, where a single act of brutality against our troops

UNOFFICIAL TRANSCRIPT

8

1 demonstrates once again that merely wearing the uniform of
2 the United States puts one at risk.

3 The life and service of Lieutenant Colonel "Rocky"
4 Baragona stands as an example of those who willing to take
5 this risk and that the danger that comes from serving can
6 come in places other than the battlefield itself.

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

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

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

25 When our troops make this ultimate sacrifice, we as a

UNOFFICIAL TRANSCRIPT

1 Nation inherit their legacy of selflessness and of service
2 and, most of all, of freedom. And as their beneficiaries,
3 we owe the fallen and their families our best efforts to
4 ensure that their sacrifice was not in vain and that
5 fairness in contracting must be applied in all instances.
6 And in some particularly egregious instances, justice should
7 be served.

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

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

19 The company, Kuwait Gulf Link, has performed contracts
20 for the Army and seeks to do it again. This is not a closed
21 issue entirely in terms of the past. KGL, in avoiding
22 answering for its negligence, has not only avoided the
23 judgment of the Federal courts, but has managed to avoid the
24 suspension and debarment process that would disqualify it
25 from being a future contractor to the U.S. Government if the

UNOFFICIAL TRANSCRIPT

10

1 facts were fully aired, in my opinion. So to the outside
2 observer, the outcome of the case and lack of consequences
3 from the case are almost as abhorrent as the accident itself
4 and demonstrate remedies that must be made to the system to
5 see that it does not occur again.

6 So this, which I cosponsor, is not in any sense anti-
7 contractor. I have said here in this Committee and will
8 continue to say that I believe that the decision on the part
9 of the Defense Department to move to contractors in those
10 areas that do not require the skills of a warfighter is a
11 wise decision. But contractors, U.S. owned and operated--as
12 well as foreign owned and operated--regardless of their
13 location or ownership, must be held accountable for their
14 actions and at the same standard. Foreign-owned contractors
15 must be at the same standard as U.S.-owned contractors.

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

25 So, again, as a general principle, I am against any

UNOFFICIAL TRANSCRIPT

11

1 legislation or regulation that becomes a barrier for well-
2 intended contractors. Many well-intended regulations
3 actually do that, and they result in worse contracting
4 behavior, as they keep some of the good ones out.

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

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

16 So today's hearing, for which I thank you, Madam
17 Chairman, convenes to examine some esoteric aspects of
18 Government contracting, civil law, and justice. And I am
19 unburdened with a legal education, so I am here to be
20 instructed by those who have that background. But we will
21 examine legislation that seeks to remedy a gap that seems to
22 exist in the command, control, and accountability of
23 contractors that work for our military overseas. It is
24 appropriate that the legislation bears the name of
25 Lieutenant Colonel Baragona because of the sacrifice he made

UNOFFICIAL TRANSCRIPT

1 6 years ago. And I hope that under the banner of his name
2 we can move to see to it that justice will be available to
3 any others who are unfortunate enough to have the same sort
4 of circumstance occur to them.

5 Thank you.

6 Senator McCaskill. Thank you, Senator Bennett.

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

16 Ralph Steinhardt is the Arthur Selwyn Miller Research
17 Professor of Law and International Relations at George
18 Washington University Law School here in Washington. He is
19 co-founder and director of the program in international
20 human rights law at New College, Oxford University. For 25
21 years, Professor Steinhardt has been active in the domestic
22 litigation of international human rights norms, having
23 represented pro bono various human rights organizations as
24 well as individual human rights victims before all levels of
25 the Federal judiciary, including the United States Supreme

1 Court. He has also served as an expert witness in several
2 cases testing the civil liability of multinational
3 corporations for their complicity in human rights
4 violations. He currently serves on the International
5 Commission of Jurists' Expert Legal Panel on Corporate
6 Complicity in International Crimes. He is also the founding
7 Chairman of the Board of Directors of the Center for Justice
8 and Accountability, an anti-impunity organization that
9 specializes in litigation under the alien tort statute.

10 Scott Horton is an adjunct professor at Columbia Law
11 School where he teaches law of armed conflict and
12 international commercial law courses. He has served as
13 Chair of a number of committees at the Association of the
14 Bar of the City of New York, including the Committee on
15 International Law, the Committee on International Human
16 Rights. He currently serves on the association's task force
17 on national security law issues. In 2007 and 2008, he
18 managed the Project on Accountability of Private Military
19 Contractors, a human rights first, leading to the
20 publication of "Private Security Contractors at War," a
21 comprehensive study of legal accountability issues
22 surrounding Government contractors. He has also served as a
23 legal affairs commentator for a number of network and cable
24 news broadcasters and is a contributing editor covering
25 legal and national security affairs for Harper's Magazine.

UNOFFICIAL TRANSCRIPT

14

1 It is the custom of the Subcommittee that we swear in
2 all witnesses that appear before us, so if you do not mind,
3 I would like the three of you to stand, raise your hand, and
4 do you swear that the testimony you will give before the
5 Subcommittee will be the truth, the whole truth, and nothing
6 but the truth, so help you God?

7 Mr. Baragona. I do.

8 Mr. Horton. I do.

9 Mr. Steinhardt. I do.

10 Senator McCaskill. I want to thank all of the
11 witnesses for being here today. We will us a timing system.
12 We will ask you to try to hold your testimony to about 5
13 minutes, and your written testimony will be printed in the
14 record in its entirety. And, with that, I will turn over to
15 Representative Tim Ryan the wonderful opportunity to
16 represent and introduce Mr. Dominic Baragona and his family.

UNOFFICIAL TRANSCRIPT

15

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

3 Mr. Ryan. Thank you, Senator McCaskill and Senator
4 Bennett, for the opportunity. I just on a personal note
5 want to thank you for how much it has meant to the Baragona
6 family. This has really been an American story with a cause
7 by the parents and the sister to come up here and literally
8 work Capitol Hill until they get a hearing in the United
9 States Senate and legislation introduced, and it is a real
10 testament to them and the fact that our system does work.
11 And I want to thank you for that.

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

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

23 As the law now stands, U.S. citizens who have family
24 members killed or harmed by foreign contractors working with
25 the U.S. Government may not be able to bring those foreign

UNOFFICIAL TRANSCRIPT

16

1 contractors into a U.S. court to win justice for a wrongful
2 death. This barrier to justice for American families is
3 particularly worrisome for many reasons, among them the fact
4 that these contractors are funded by us, the U.S. taxpayer.

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

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

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

25 Unfortunately, the Baragona case is by no means an

UNOFFICIAL TRANSCRIPT

17

1 isolated situation where a contractor headquartered abroad
2 has acted in an egregious, fraudulent, or negligent manner.
3 While few stories are as tragic as the Baragona case, there
4 are many instances of impropriety. Such behavior is beyond
5 egregious and must end. It is imperative that our legal
6 system has unfettered reach in order to adjudicate such
7 cases in our courts rather than allowing these companies to
8 escape liability simply because they are headquartered
9 abroad.

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

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

UNOFFICIAL TRANSCRIPT

18

1 himself, along with his wife, Vilma, and their daughter,
2 Pam, speaking on behalf of their son, Rocky, as well, Mr.
3 Dominic Baragona.

4 Mr. Baragona. Thank you.

5 Senator McCaskill. Go ahead.

UNOFFICIAL TRANSCRIPT

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

3 Mr. Baragona. Good afternoon, Senator McCaskill and
4 Ranking Minority Member Senator Bennett, and Subcommittee
5 members. I ask that my full written statement be entered
6 into the record.

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

8 I want you to know I am scared to death.

9 [Laughter.]

10 Senator McCaskill. You have absolutely nothing to be
11 worried about.

12 Mr. Baragona. Yeah, yeah, yeah.

13 Senator McCaskill. You really don't.

14 [Laughter.]

15 Mr. Baragona. I hear this.

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

19 Senator McCaskill. No. We want to hear from you.

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

UNOFFICIAL TRANSCRIPT

20

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

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

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

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

17 A civilian accident? You know, it was just beyond us.
18 You know, we had a million questions, but the casualty
19 officer told us, "Don't worry, Dominic." He said, "The Army
20 will answer all your questions. In fact, they will answer
21 questions you have not even heard of."

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

25 By December, the report is delivered, 2 days before

UNOFFICIAL TRANSCRIPT

21

1 Christmas, what would be our first Christmas without the
2 Rock. Our family felt the report, which had been approved
3 by General Sanchez, was terrible. For one thing, it had no
4 information about the driver or the name of the company. It
5 gave a false impression of how Rock had died. The pictures
6 they give us are just grainy xeroxed copies. You couldn't
7 see nothing. Key personnel were missing. Direct statements
8 were omitted. As a result, we demanded a second
9 investigation with a written statement of questions from my
10 family to be answered.

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

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

22 Senator DeWine, he says, "Dominic, let me handle this."
23 He says, "You know what? This company wouldn't be in
24 existence today if we had not gone to the Gulf War and saved
25 that company. They will do the right thing. I am going to

UNOFFICIAL TRANSCRIPT

22

1 write a letter to the Kuwaiti Ambassador, and they will
2 straighten this company right out." Well, needless to say,
3 he got rebuffed.

4 He meets with the Kuwaiti Prime Minister who tells him,
5 "The Baragona family has to go to Iraq. You know, that is
6 where the accident happened, and they have got great courts
7 there. They will solve the whole thing. Don't worry about
8 it."

9 You know, I couldn't help but think, But here we are,
10 we liberated this company--or this country, and this company
11 is going to get away with this? It just--anyhow, by the
12 summer of 2004, Kuwait Gulf Link gained national attention
13 by paying ransom money to terrorists for the release of
14 their employees kidnapped in Iraq. CNN videos of the
15 drivers--shows drivers complaining about KGL forcing them to
16 work for U.S. forces by taking away their passports.

17 We also learned that KGL was banned in India for the
18 recruitment scams and forced labor--the point being they
19 were known human traffickers with municipality human rights
20 violations.

21 In January 2005, the second report was finally
22 delivered to Senator DeWine's office by Brigadier General
23 Wright. The first thing the general says to us is, "This
24 company has no contracts with the Army. Not only that," he
25 says, "they have immunity." And I was trying to figure out

UNOFFICIAL TRANSCRIPT

23

1 whose side the general was on. I said we just couldn't, you
2 know, fathom that. In fact, not to embarrass them, our
3 lawyers whispered their name in their ear saying, "Hey, this
4 company has got millions of dollars worth of contracts with
5 DOD."

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

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

23 I couldn't believe this, you know, so I had Brian
24 Persico, who was in charge of the Army's suspension and
25 debarment office, I had his number. I give him a call. I

UNOFFICIAL TRANSCRIPT

1 says, "I want to know how this show cause letter just came
2 to an end like this. My God, we got the President behind
3 us. How high do we have to go?"

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

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

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

21 You know, we spent the worst days since the funeral
22 watching KGL executives and lawyers giving high-fives after
23 the judge's ruling. Since then, we have appealed the
24 ruling.

25 Our personal investigation found KGL continues forced

UNOFFICIAL TRANSCRIPT

25

1 labor practices and, in February of 2008, was responsible
2 for killing another soldier. This is a company that is
3 supposed to have insurance with DOD for just such instances,
4 but somehow manages never to pay when found guilty of
5 negligence.

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

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

21 Senator McCaskill and Senator Bennett sent a bipartisan
22 letter to Secretary Gates showing concerns that a company
23 under investigation by the Senate Subcommittee could be
24 awarded a multi-million-dollar food contract. And then we
25 also appreciate letters from Representative Ryan and

UNOFFICIAL TRANSCRIPT

1 Representative Driehaus, who write a letter to the
2 Department of Justice demanding a real investigation into
3 KGL's misconduct.

4 You know what? Vilma, Pam, and I, we cannot thank
5 everybody enough for trying to help us. For 6 years, we
6 have walked these halls with our brownies and our hot
7 peppers, and are exhausted. We have worked with three
8 branches of the Government for justice, and here we are
9 today. Only in America.

10 Thank you.

11 [The prepared statement of Mr. Baragona follows:]

UNOFFICIAL TRANSCRIPT

27

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

8 Mr. Baragona. Thank you.

9 Senator McCaskill. We will now turn to the testimony
10 of Professor Scott Horton.

UNOFFICIAL TRANSCRIPT

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

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

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

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

25 One of the questions that Congress has to look at is

UNOFFICIAL TRANSCRIPT

29

1 whether or not it has created the correct framework for this
2 accountability to occur. Well, I want to suggest that there
3 has been a change in the way the United States has
4 approached this issue over the last couple of decades that
5 justifies these changes.

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

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

20 Now, when that happens, it is very important that the
21 United States step in and expand its own jurisdiction so
22 that there is no vacuum. In fact, I think that is something
23 axiomatic. If the United States says the host country does
24 not have jurisdiction, the United States has to supply its
25 own jurisdiction. And, moreover, this is an area where the

UNOFFICIAL TRANSCRIPT

30

1 U.S. clearly has both the right and the responsibility to do
2 that.

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

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

UNOFFICIAL TRANSCRIPT

1 law of armed conflict norm.

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

11 Thank you.

12 [The prepared statement of Mr. Horton follows:]

UNOFFICIAL TRANSCRIPT

32

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

3 Professor Steinhardt?

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

4 Mr. Steinhardt. Madam Chairwoman McCaskill, Ranking
5 Member Bennett, and members of the Subcommittee, I am
6 extremely grateful for the opportunity to testify today and
7 to pay tribute to the Baragona family. I would like to
8 emphasize just a few points from my written testimony and
9 then respond to any questions.

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

15 The problem of Government contractors' accountability
16 takes many forms, including not only the kinds of torts that
17 are at the heart of the Baragona case, but also in some rare
18 but high-profile cases, human rights abuses that undermine
19 the credibility of the United States, that contradict its
20 values, and potentially empower our enemies.

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

1 corporations.

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

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

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

22 A constitutional concern. There is no question that
23 Congress has constitutional authority over Government
24 contracts. That is easy. There is no question that you
25 could require a bond of Government contractors to assure

1 that there is a compensation fund for future plaintiffs in
2 Mr. Baragona's circumstances. The harder case is that under
3 the Supreme Court's decision in International Shoe that
4 Professor Horton mentioned, the courts will have to
5 determine in every case, case by case, whether the
6 particular defendant has certain minimum contacts with the
7 forum or not.

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

21 Second, and turning briefly from the constitutional to
22 the international issues, the proposed legislation addresses
23 an international problem, and international law, including
24 the treaties of the United States, will not be irrelevant.
25 The most significant international issue arises under the

1 Hague Service Convention, as the Baragonas discovered, to
2 their dismay. I, too, have come up against the constraints
3 of the treaty in practice. I have criticized the treaty in
4 print and in testimony before the House of Representatives.
5 I am fully familiar with the logistical obstacles that the
6 Convention represents, but, again, this may not be an area
7 in which we can simply legislate our way out of the box.
8 Every one of this Nation's major trading partners is as
9 party to the Hague Service Convention, including Canada,
10 China, Japan, Korea, Mexico, the United Kingdom, and almost
11 every member of the European Union. They are unlikely to go
12 away quietly if this legislation is construed as an effort
13 to render that Service Convention irrelevant.

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

24 There are other issues, of course: choice of law,
25 forum non conveniens, enforcement of judgments. In my

UNOFFICIAL TRANSCRIPT

37

1 written testimony, I also describe the alien tort statute.

2 But, again, let me express my gratitude for the opportunity

3 to testify today.

4 [The prepared statement of Mr. Steinhardt follows:]

1 Senator McCaskill. Thank you, and we welcome Senator
2 Tester to the Subcommittee.

3 I have got to be honest with the professors on the
4 panel. I am burdened with a legal education, and there for
5 a minute I started thinking I should start taking notes.

6 [Laughter.]

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

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

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

25 Mr. Steinhardt. Absolutely right, Senator McCaskill.

1 There is that dictum in the insurance company case. The
2 difficulty is whether the waiver of due process rights is
3 voluntary or statutorily directed, and that is what is going
4 to trigger the unconstitutional conditions doctrine.

5 I am not saying that those who dealing with challenge
6 this legislation will necessarily win on the
7 unconstitutional conditions doctrine, but if the condition--
8 if the Government confers a benefit with conditions, and in
9 particular the condition that they relinquish a
10 constitutional right, that triggers the unconstitutional
11 conditions doctrine. The next step is to ask: Is there a
12 substantial relationship, what the courts have called an
13 essential nexus, between the benefit conferred and the
14 condition that is imposed?

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

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

UNOFFICIAL TRANSCRIPT

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

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

22 Senator McCaskill. Let us talk about Hague. What is
23 your suggestion on service of process? You know, the two of
24 you with your knowledge of legal actions on an international
25 platform, if you were writing this legislation, what

1 suggestions would you give us to strengthen the process
2 piece of this? I certainly get when it comes time, it does
3 not--frankly, even if this company had not been such a
4 coward and refused to ever step up and even speak to you
5 about their negligence, Mr. Baragona, enforcing the judgment
6 at a bank, as you referenced, could get really tricky if the
7 lawyers start talking about the validity of process.

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

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

25 I agree with the general analysis that Professor

UNOFFICIAL TRANSCRIPT

1 Steinhardt has laid out. I think generally when we are
2 talking about Government procurement contracts, where it is
3 a free and open process and a company participating has made
4 the election to participate, to qualify, and bid, that, you
5 know, these choices will be made in the context of the
6 contractors, nothing coerced about it. That would be
7 respected, I think, by a Federal court.

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

15 Senator McCaskill. Right. We are begging them--they
16 are begging us to hire them.

17 Mr. Horton. Exactly right.

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

24 Senator Bennett?

25 Senator Bennett. I am sufficiently impressed with your

1 legal background that I will pass.

2 [Laughter.]

3 Senator McCaskill. All right. Senator Tester?

4 Senator Tester. I can ask some questions, but it has
5 no reflection on your legal background.

6 [Laughter.]

7 Senator McCaskill. That is a good thing.

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

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

17 It is okay if you do not, I guess. It would be good to
18 have the numbers on that. One is too many, but it would be
19 good to have the numbers.

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

23 Mr. Steinhardt. You first.

24 Mr. Steinhardt. That is a completely opaque issue
25 right now because the immunity was created--and there is a

UNOFFICIAL TRANSCRIPT

1 diplomatic note, which we have reproduced here, between the
2 U.S. Embassy and the Afghan Government that talks about
3 levels of immunity that the U.S. is proposing. The U.S.
4 also has proposed a Status of Forces Agreement which would
5 give immunity to contractors. The Afghan Government has
6 essentially not agreed to this, so we are at something of a
7 standoff on this immunity issue, and we do not have
8 something like Order No. 17 which, clearly, effectively
9 codifies the immunity.

10 Senator Tester. So can I--and I will let you go, Mr.
11 Steinhardt.

12 Mr. Steinhardt. I think that is exactly right.

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

17 Mr. Steinhardt. Immunity.

18 Mr. Horton. I think it is a consequence of positions
19 that the U.S. has taken, but let me go back and say Order
20 No. 17 said effectively they are immune from process under
21 local law. That means that in Iraq no one can bring a
22 contractor into a court other than Iraqi contractors--they
23 were fair game--but not a Kuwaiti credit card, for instance,
24 on account of wrongful death, rape, even murder, I mean,
25 even an intentional crime they were immune. That is right.

UNOFFICIAL TRANSCRIPT

45

1 And there was--and, of course, there was a major question as
2 to how far the United States had gone in filling that void
3 with assertion of U.S. jurisdiction. We have the Military
4 Extraterritorial Jurisdiction Act and a couple of other
5 pieces of legislation. The Uniform Code of Military Justice
6 also was revised in December of 2006 to create some basis of
7 jurisdiction. We had no actual practice of enforcing that
8 by the Department of Justice during that period. We had one
9 single prosecution of a contractor coming out of Afghanistan
10 up until the end of 2007. So it is only quite recently that
11 our Justice Department has begun to step in and deal with
12 these cases.

13 Mr. Steinhardt. And could I--sorry. Could I just add
14 to that? Even if immunity were overcome by legislation or
15 otherwise, it would still be a significant legal issue with
16 the state secrets privilege, that many of these Government
17 contractors would be able successfully to invoke the state
18 secrets privilege in circumstances that I suspect many
19 Members of Congress would disapprove of.

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

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

UNOFFICIAL TRANSCRIPT

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

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

13 Mr. Steinhardt. Usually under the alien tort statute.

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

17 Mr. Steinhardt. Correct.

18 Senator Tester. Okay. Thank you very much.

19 Senator McCaskill. Work to do. Definitely we have
20 work to do.

21 I want to thank all three of you for your appearance
22 today. Particularly I want to thank the Baragona family,
23 and let me just take a minute.

24 The staff of this Committee has done great work for
25 this hearing, and when legislation gets passed, there is a

UNOFFICIAL TRANSCRIPT

1 moment on the floor where the sponsoring Senators thank the
2 staffs of various committees. But many times the work that
3 staff does day in and day out is taking the time to sit, to
4 listen, to understand, and I have a man on my staff, Stephen
5 Hedger, who is a West Point graduate, who decided after he
6 met the Baragona family that he was not going to let me rest
7 until I did something about Rocky Baragona's death. As a
8 fellow West Point graduate--and he is now the Legislative
9 Director in my office, so he has got some elbows to throw
10 around about what the priorities are. And I want to thank
11 Stephen Hedger for his dedication to your family and to
12 Rocky's memory. Thank you all for being here today.

13 [Applause.]

14 Senator McCaskill. And he loves your brownies.

15 [Laughter.]

16 Senator McCaskill. If the second panel of witnesses
17 will come forward, please.

18 Thank you for being here today. Let me introduce the
19 second panel.

20 First, Tony West was nominated by President Barack
21 Obama to be the Assistant Attorney General for the Justice
22 Department's Civil Division on January 22, 2009. He was
23 confirmed by the Senate on April 20, 2009. From 1993 to
24 1994, he has served as a special assistant in the Justice
25 Department. From 1994 to 1999, he served as Assistant U.S.

UNOFFICIAL TRANSCRIPT

1 Attorney for the Northern District of California. He later
2 served as Special Assistant Attorney General, an appointee
3 of California Attorney General Bill Lockyer. Prior to his
4 return to the Justice Department, Mr. West was a litigation
5 partner at Morrison & Foerster in San Francisco.

6 Richard Ginman assumed the position of Deputy Director
7 for Program Acquisition and Contingency Contracting, Defense
8 Procurement and Acquisition Policy, in May of 2007. In
9 February of 2008, he assumed the position of Principal
10 Deputy to the Director of DPAP. In that capacity he is the
11 principal adviser to the Director for all contracting and
12 procurement policy areas. Mr. Ginman has more than 37 years
13 of experience in Government and commercial business in the
14 fields of contracting, acquisition management, logistics,
15 and financial management. Mr. Ginman was commissioned an
16 ensign in the Supply Corps of the United States Navy in 1970
17 and retired as a rear admiral in 2000.

18 Uldric Fiore was selected as the Army's suspension and
19 debarment official in October of 2008. He has also served
20 as the Director of Soldier and Family Legal Services for the
21 Army Office of Judge Advocate General since July of 2008.
22 He formerly served as General Counsel for the Department of
23 Defense Office of Inspector General from May 2005 until July
24 2008. He retired at the rank of colonel following 30 years
25 of service, including 25 years in the Judge Advocate General

UNOFFICIAL TRANSCRIPT

1 Corps.

2 It is the custom of this Committee to swear all
3 witnesses that appear before us, so if you do not mind, I
4 would ask you to stand. Do you swear that the testimony
5 that you will give to the Subcommittee will be the truth,
6 the whole truth, and nothing but the truth, so help you God?

7 Mr. West. I do.

8 Mr. Ginman. I do.

9 Mr. Fiore. I do.

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

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

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

4 Mr. West. Thank you, Madam Chairwoman, Ranking Member
5 Bennett, distinguished Members of the Committee. I
6 appreciate the opportunity to appear before you today.

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

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

19 Now, as has been noted, S.526, named for Lieutenant
20 Colonel "Rocky" Baragona, was introduced to address the
21 challenges faced by them in trying to establish personal
22 jurisdiction in a U.S. court for the wrongful death of their
23 son. Lieutenant Colonel Baragona's family pursued justice
24 by suing the foreign contractor whose employee was involved
25 in that accident, but that lawsuit was dismissed when the

1 court held that it had no personal jurisdiction over the
2 contractor.

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

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

24 In fraud suits against foreign entities, we have been
25 largely successful in asserting personal jurisdiction in

1 U.S. courts. We have just announced the filing of two war-
2 related cases against defendants that include foreign
3 entities.

4 The Department announced 2 days ago that it had
5 intervened in a qui tam action against Public Warehousing
6 Company and others alleging that the defendants knowingly
7 overcharged the United States for food supplies for our
8 service members in Kuwait, Iraq, and Jordan. A criminal
9 indictment has also been filed against PWC in connection
10 with that alleged fraud.

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

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

23 In conclusion, the Department of Justice supports
24 protecting the rights of individuals and their families to
25 recover appropriate damages for injuries caused by the

UNOFFICIAL TRANSCRIPT

53

1 negligent acts of foreign contractors. We are also
2 dedicated to pursuing contractors that commit fraud against
3 the Government and drain the Treasury of funds so vital to
4 our military and procurement systems. We appreciate the
5 Subcommittee's efforts to help us fulfill that important
6 mission, and I am happy to answer any questions you have.

7 [The prepared statement of Mr. West follows:]

UNOFFICIAL TRANSCRIPT

54

1 Senator McCaskill. Thank you, Mr. West, for being
2 here.

3 Mr. Ginman.

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

7 Mr. Ginman. Madam Chairman, Senator Bennett,
8 distinguished members of the Committee, thank you for the
9 opportunity to appear before you today on behalf of the
10 Honorable Robert Gates, Secretary of Defense, to discuss the
11 accountability of foreign contractors.

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

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

18 The legislation is designed to ensure foreign
19 contractors with United States contracts who perform
20 contracts abroad are held accountable for their actions that
21 result in serious bodily injuries of members of the armed
22 forces, civilian employees of the United States Government,
23 and the United States citizen employees of Government
24 contractor companies. While I support the overall substance
25 of the legislation, I believe there are portions that could

1 be improved.

2 First, I believe liability should be limited to actions
3 that are linked to the performance required under the
4 Government contract and not be broadly applied to any action
5 by a Government contractor, subcontractor, independent
6 contractor, or their respective employee.

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

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

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

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

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

24 And, finally, it would make sense to include a
25 provision to allow the commander in the field to authorize

1 an exception and that the contracting officer properly
2 document that decision in the file.

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

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

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

22 [The prepared statement of Mr. Ginman follows:]

UNOFFICIAL TRANSCRIPT

59

- 1 Senator McCaskill. Thank you, Mr. Ginman.
- 2 Mr. Fiore.

UNOFFICIAL TRANSCRIPT

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

5 Mr. Fiore. Thank you, Chairwoman McCaskill, Ranking
6 Member Bennett, and distinguished members of the
7 Subcommittee. Thank you for the opportunity to appear
8 before you today on the important issue of Government
9 contractor accountability.

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

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

25 Suspension and debarment are discretionary actions

UNOFFICIAL TRANSCRIPT

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

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

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

19 In August 2006, the Army received information from
20 Senator DeWine that in May 2003 a negligent driver for KGL
21 had caused the death of Lieutenant Colonel Baragona in a
22 collision between a commercial vehicle and his military
23 vehicle in which he was a passenger, and that KGL had failed
24 to appear in a related wrongful death civil lawsuit filed in
25 Federal court in Georgia. The following month, the Army

UNOFFICIAL TRANSCRIPT

1 formally advised KGL that it was considering suspending or
2 debarring it.

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

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

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

24 In July 2009, KGL responded to a second Army Request
25 for Information with proof of insurance, and further Army

UNOFFICIAL TRANSCRIPT

63

1 inquiry discovered insufficient evidence of human
2 trafficking. After carefully reviewing that information, I
3 determined that the allegations of human trafficking and
4 lack of insurance were not substantiated and did not warrant
5 a debarment proceeding.

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

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

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

25 I am happy to answer any questions you may have.

UNOFFICIAL TRANSCRIPT

1 [The prepared statement of Mr. Fiore follows:]

UNOFFICIAL TRANSCRIPT

1 Senator McCaskill. Thank you, Mr. Fiore.

2 Let us start with a timeline here. I think you have
3 just testified that the first involvement was in August of
4 2006 of the suspension and debarment folks, and that was
5 some 3 years after this accident occurred. Is that correct?

6 Mr. Fiore. Based on the records available to me, that
7 is correct.

8 Senator McCaskill. And you have access to all the
9 record, correct?

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

13 Senator McCaskill. Okay. And you have reviewed all
14 those records?

15 Mr. Fiore. I have.

16 Senator McCaskill. And so in August of 2006, as a
17 result of the Baragona family, not as a result of anybody--I
18 want to make sure the record is clear on that, that this
19 initial inquiry of suspension and debarment looking at the
20 actions of this company occurred as a result of the Baragona
21 family contacting their Member of Congress and that Member
22 of Congress making an inquiry to the Suspension and
23 Debarment Office. Is that correct?

24 Mr. Fiore. That is my understanding. I was not in
25 this capacity at the time.

UNOFFICIAL TRANSCRIPT

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

6 Mr. Fiore. I have not had any involvement with General
7 Bednar, so I--

8 Senator McCaskill. And there is nothing in the records
9 about General Bednar contacting the office?

10 Mr. Fiore. I would have to go back and check that and
11 respond to the Committee on that, Senator.

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

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

21 Senator McCaskill. But when he worked in the military,
22 he worked in the Suspension and Debarment Office. Is that
23 correct?

24 Mr. Fiore. For a brief period of time, he was a
25 suspension and debarment official, yes, in his last position

UNOFFICIAL TRANSCRIPT

1 as the Assistant Judge Advocate General for Civil Law.

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

7 Mr. Fiore. I am not sure because, as I say, he is
8 involved in a number of different cases in this field, and
9 seeing his name in a suspension and debarment file would not
10 be unusual.

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

17 Mr. Fiore. We will do so.

18 [The information follows:]

19 / SUBCOMMITTEE INSERT

UNOFFICIAL TRANSCRIPT

1 Senator McCaskill. Okay. Now, in your testimony you
2 correctly refer to the various ways that suspension and
3 debarment can occur, and one of them that you quote in your
4 testimony is that a company "has engaged in conduct of so
5 serious and compelling a nature that it affects that
6 contractor's present responsibility as a Government
7 contractor." And I think we would call that in the legal
8 business a catch-all. Would you characterize it that way?

9 Mr. Fiore. Yes, Senator.

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

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

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

23 Mr. Fiore. Yes, that is correct.

24 Senator McCaskill. I am going to read you what the
25 judge said at the point in time that the judge reluctantly

UNOFFICIAL TRANSCRIPT

1 had to let any hope of justice on the civil front in the
2 courts of this great country go out the door for the
3 Baragona family.

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

16 Those were the words of the judge.

17 Now, what about that is not serious or compelling?

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

24 Senator McCaskill. Well, the phrase does not say
25 "misconduct," sir. It says "serious and compelling." And I

UNOFFICIAL TRANSCRIPT

70

1 guess what I am trying to get at, if a contractor kills one
2 of our soldiers through their negligence and then sits
3 silently and plays a game of "You can't touch me" and
4 watches this family suffer the way they have for years on
5 end and go to great expense trying to find justice, and if
6 the court itself cries out at the time they must follow the
7 law and turn this family away, what would be serious and
8 compelling? Is it two people being killed? What if they
9 killed three people? What if there were seven soldiers
10 killed that day in the accident? At what point in time does
11 their conduct become serious and compelling?

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

14 Mr. Fiore. No, Senator, that is not the case.

15 Senator McCaskill. Well, I am at a loss at what the
16 Suspension and Debarment Office would consider serious and
17 compelling if this is not, and somebody in the military
18 needs to explain that to me. I am, frankly, flabbergasted
19 that most, if not all, of the effort in this case came from
20 the Baragona family and not internally in our military after
21 a member of our military is killed, that the only way that
22 we are sitting here today is because of this brave and
23 tenacious family doing this on behalf of their loved one.
24 And I guess I am confused that there is not more remorse
25 about the way this was handled.

UNOFFICIAL TRANSCRIPT

71

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

3 Mr. Ginman. I do not.

4 Senator McCaskill. You do not. Okay.

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

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

19 Senator McCaskill. Well, if there is a hypothetical
20 that you could come up with that would be specific that a
21 commander in the field would want to do an exception, I
22 would be very interested in understanding what the
23 parameters of that situation would be where an exception for
24 a foreign contractor--by the way, you know, if you hire an
25 American company, they do not get to write an exception in

UNOFFICIAL TRANSCRIPT

1 the field for them. Why would we need to write an exception
2 in the field for a foreign contractor?

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

13 And, Mr. Tony West, finally--why don't I go ahead and
14 let Mr. Bennett ask questions, and I will do that on my
15 second round. Thank you. Senator Bennett?

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

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

25 However, as the Chairman has pointed out, you do have

UNOFFICIAL TRANSCRIPT

1 discretion, and she has done her best to make a case that
2 feels to me that says that in this circumstance the
3 discretion can be appropriately used, not as punishment.

4 So the question for me: Is KGL still a viable
5 candidate for Army contracts?

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

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

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

18 Senator Bennett. All right. Let us talk about that
19 record. As I understand it, as you went through it, the
20 reactions--and when I say "you," I understand that many of
21 these decisions were not necessarily made by you personally,
22 but by the office that you now hold. The decisions were
23 made on the basis of the responses from KGL. Did you take
24 their word for it on every point of fact or conduct any kind
25 of independent investigation to see if they were leveling

1 with you?

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

8 Senator Bennett. But you did not conduct any kind of
9 investigation of your own? You just said, okay, here we
10 are, and everybody who wants to comment, comment, and then
11 you made the decision on the basis of--

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

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

25 Mr. Fiore. Those items that are in agreement, we do no

UNOFFICIAL TRANSCRIPT

1 follow-up on. Where there is a dispute, then additional
2 information is gathered if it is available, and ultimately
3 it is brought to me, and I have to make the determinations
4 of fact based on what is in the record. I am not an
5 investigation. I am an adjudicator at that point.

6 Senator Bennett. Okay. Additional information is
7 gathered and submitted to you. Gathered by whom?

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

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

12 Senator McCaskill. I think it would be great.

13 Senator Bennett. Could you supply that for us, Mr.
14 Fiore?

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

18 Senator Bennett. I think that would be helpful
19 because--well, all right. I will leave that.

20 [The information follows:]

21 / SUBCOMMITTEE INSERT

UNOFFICIAL TRANSCRIPT

1 Senator Bennett. Now, you entered into a discussion
2 with the Chairman about General Bednar. Do you know General
3 Bednar?

4 Mr. Fiore. I know his professionally.

5 Senator Bennett. For how long have you known him?

6 Mr. Fiore. I first met him in somewhere around 1980
7 briefly when he was still on active duty and I was a mere
8 captain. I have met him--

9 Senator Bennett. There is always a relationship
10 between a general and a mere captain that is somewhat
11 different than the normal--

12 Mr. Fiore. It is somewhat attenuated, Senator.

13 Senator Bennett. Yes, I understand that.

14 Mr. Fiore. I have seen him--until I assumed this
15 position, I may have seen him three times in 30 years.
16 Since I have assumed this position, I have probably seen him
17 twice. Once was at a meeting of the ABA's Committee on
18 Suspension and Debarment, of which he is a member.

19 Senator Bennett. But you do not recall any
20 conversations with him or any contact with him about this
21 case?

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

25 Senator Bennett. And you are going to review the

UNOFFICIAL TRANSCRIPT

77

1 record for the Chairman about any contact he may have had
2 with your predecessor?

3 Mr. Fiore. Or with the Procurement Fraud Branch
4 office, yes.

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

17 Thank you, Madam Chairman.

18 Senator McCaskill. Thank you very much, Senator
19 Bennett.

20 I certainly understand that you have to make a
21 decision. As you indicated, you are an adjudicator in the
22 position you hold. You are not an investigator. You are an
23 adjudicator. I understand that you have got to have a
24 record in front of you that will justify your decision. But
25 I am curious since debarment, relative to the number of

UNOFFICIAL TRANSCRIPT

78

1 contractors that are out there in our Government, is a
2 fairly rare occurrence. Suspension is a little less rare,
3 but, nonetheless, there is a whole lot of bad activity going
4 on in contracting where there is never a suspension or a
5 debarment. I mean, you can look at some of the things that
6 happened with KBR, and you have got to scratch your head as
7 to why--maybe we are into the too big to fail category in
8 defense contracting like we have been in other areas of
9 Government.

10 But I am curious. You know, is there a large body of
11 case law where suspensions and debarments have been
12 overturned?

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

15 Senator McCaskill. Where one was overturned?

16 Mr. Fiore. Yes, Senator.

17 Senator McCaskill. Well, I think it is incumbent on
18 our Committee, if we want to be responsible, that we take a
19 look at that, and we will, to look at the case law in the
20 area of suspension and debarment, because it feels--you
21 know, maybe it is the former prosecutor in me, but it feels
22 like there are some laydowns here that are occurring that
23 people are not erring on the side of being aggressive in
24 terms of cleaning up contracting procedures and practices.
25 And I do not think that that characterization is unfair, but

UNOFFICIAL TRANSCRIPT

79

1 we will take a look at the cases and see on what basis--and,
2 generally speaking, in the case law how many cases would you
3 say are out there that are informative of the legal
4 standards you face on suspension and debarment where you
5 have been challenged and the military has been overturned on
6 their suspension and debarment activities?

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

12 Senator McCaskill. Yes. And, generally, the basis is
13 insufficient record?

14 Mr. Fiore. The standard for the Administrative
15 Procedures Act is arbitrary, capricious, or contrary to law.
16 So a reasonable basis was a preponderance of the evidence
17 type--

18 Senator McCaskill. So it is preponderance standard and
19 it is arbitrary and capricious?

20 Mr. Fiore. Yes, Senator.

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

UNOFFICIAL TRANSCRIPT

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

4 Mr. Ginman. Yes, ma'am.

5 Senator McCaskill. What for?

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

9 Senator McCaskill. Well, you know, I think--it has
10 been a long time since I have been to law school, but I
11 think if transportation contractors, which KGL was, are
12 required to have liability insurance, I think it is because
13 they are supposed to use that insurance if they are
14 negligent and kill someone.

15 Mr. Ginman. Yes, ma'am.

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

19 Mr. Ginman. They are required to have vehicular and
20 general public liability insurance.

21 Senator McCaskill. Yes.

22 Mr. Ginman. And at thresholds specified in the
23 contract.

24 Senator McCaskill. Yes, so that is what is really
25 curious about this case, that we would require them to have

UNOFFICIAL TRANSCRIPT

1 insurance for just this occurrence, but yet the military
2 would put no pressure on them to utilize the insurance that
3 we require them to obtain for just this kind of occurrence.
4 It is really curious to me. Frankly, I would think that
5 they would not carry that insurance. That is an expense
6 they do not need, because we cannot get them, we cannot
7 reach them. And so it seems to me that we ought to take
8 that out as a contract requirement and then maybe we can get
9 the contracts for less money if we are not going to require
10 them to make that insurance available to the victims of
11 their negligence.

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

18 Mr. West. Well, the ones that--our record of
19 intervention has been good, Madam Chairman. In terms of the
20 cases that the Government intervenes in, they tend to be
21 successful, and they do tend to bring money back to the
22 Federal Treasury.

23 Senator McCaskill. So this is one of those things--
24 this is the speech I always make about more auditors.
25 Auditors save money.

UNOFFICIAL TRANSCRIPT

1 Mr. West. Right.

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

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

22 There are two other dynamics which also affect that
23 number. One is that if you were to take a snapshot of the
24 1,000 or so cases that were under seal a year ago and you
25 were to take a snapshot of those same 1,000 cases today, you

UNOFFICIAL TRANSCRIPT

1 would notice that the pool is actually different. There are
2 cases which are always moving in and cases which are always
3 being unsealed, moving out. And so they are actually not
4 the same cases.

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

15 Senator McCaskill. Well, I think it would behoove this
16 administration to make this a priority. It is of great
17 frustration to many people who have brought I think
18 meritorious action under this law that it appears to go into
19 a big black hole, not to be heard from for a while. And I
20 do not know what your resources are over there, but maybe
21 this is a subject matter that we can take up outside the
22 purview of this hearing. But the lack of transparency--I
23 understand the public policy reason behind the sealing. It
24 is abhorrent to me in Government that we have to seal
25 anything. But the lack of transparency provides a really

UNOFFICIAL TRANSCRIPT

1 fallow ground for cynicism about how aggressive the
2 Government is being in going after these actions, especially
3 in the field of contracting right now and the whistleblowing
4 that we have had as a result of contingency contracting in
5 Iraq and now carrying forward into Afghanistan. I think it
6 is really important that we continue to work those cases
7 very hard.

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

11 Mr. West. That is correct.

12 Senator McCaskill. Mr. Ginman, what is your line of
13 command?

14 Mr. Ginman. My immediate supervisor is Mr. Shay Assad,
15 who is Director of Defense Procurement.

16 Senator McCaskill. Okay. I know Mr. Shay Assad well.

17 Mr. Ginman. Who works for Under Secretary Carter for
18 Acquisition, Technology, and Logistics, who in turn works
19 for Secretary Lynn and Secretary Gates.

20 Senator McCaskill. Okay. And, Mr. Fiore, what is your
21 command?

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

25 Senator McCaskill. And who is the person who is

UNOFFICIAL TRANSCRIPT

85

1 responsible for actually--who fills your position? The JAG?
2 Is that who fills your position?

3 Mr. Fiore. The Judge Advocate General appoints the
4 suspension and debarment official under authority delegated
5 by the Secretary.

6 Senator McCaskill. Okay. I wanted to make sure I was
7 clear on that.

8 I think requiring these contractors to get liability
9 insurance is great, and I think that we do it for a reason.
10 And I think the notion that the Baragona family had to sit
11 in a courtroom and watch lawyers high-five because they
12 never even had to contact their insurance coverage is a gut
13 punch for justice in this country. And I think we need to
14 remedy that gut punch, and we are going to work really hard
15 on this legislation. And I ask for your help and support to
16 make this legislation. I know we have changed it already,
17 Mr. Ginman, because of some of the concerns of your office.
18 I would certainly ask for your guidance, Mr. Fiore, if there
19 are more tools you need to use the discretion as a
20 determinator of the facts, as you make a determination of
21 the facts, I would certainly hope you would speak up now,
22 because something is terribly wrong with this story, and I
23 think it is incumbent on all of us to get it fixed before
24 there is another Rocky Baragona laying on a highway
25 somewhere in Afghanistan with a foreign contractor that has

UNOFFICIAL TRANSCRIPT

86

1 an insurance policy but 6 years later high-fives a lawyer in
2 a courtroom somewhere in America and says, "Catch me if you
3 can. You cannot touch me." I think that is a very bad
4 result for our American military.

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

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