

1 ACCOUNTABILITY FOR FOREIGN CONTRACTORS:  
2 THE LIEUTENANT COLONEL DOMINICI "ROCKY"  
3 BARAGONA JUSTICE FOR AMERICAN HEROES  
4 HARMED BY CONTRACTORS ACT

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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.

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

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.

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.

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

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

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

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

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

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

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.

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.

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

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

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

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.

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.

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

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

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

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

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

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

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:]

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.

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

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

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

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:]

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

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.

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

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

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.

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.

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

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.

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

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

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:]

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:]

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

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

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

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

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.

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

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.

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

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

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

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

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.

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

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

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

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

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

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

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

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.

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

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.

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

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

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

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

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.]