UNITED STATES SENATE
COMMITTEE ON HOMELAND SECURITY
SUBCOMMITTEE ON CONTRACTING OVERSIGHT

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

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PREPARED REMARKS OF

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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