

111TH CONGRESS
1ST SESSION

S. 526

To provide in personam jurisdiction in civil actions against contractors of the United States Government performing contracts abroad with respect to serious bodily injuries of members of the Armed Forces, civilian employees of the United States Government, and United States citizen employees of companies performing work for the United States Government in connection with contractor activities, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 4, 2009

Mrs. MCCASKILL introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To provide in personam jurisdiction in civil actions against contractors of the United States Government performing contracts abroad with respect to serious bodily injuries of members of the Armed Forces, civilian employees of the United States Government, and United States citizen employees of companies performing work for the United States Government in connection with contractor activities, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Lieutenant Colonel
3 Dominic ‘Rocky’ Baragona Justice for American Heroes
4 Harmed by Contractors Act”.

5 **SEC. 2. FINDINGS.**

6 Congress makes the following findings:

7 (1) On May 19, 2003, Lieutenant Colonel
8 Dominic “Rocky” Baragona, United States Army,
9 was killed in Safwan, Iraq, when his vehicle was
10 struck by a truck being driven by a driver employed
11 by the Kuwait & Gulf Link Transport Company, a
12 Kuwait company under multiple contracts with the
13 Department of Defense to provide logistics services
14 in support of the United States military in Kuwait
15 and Iraq, after the truck struck a pile of debris,
16 jackknifed, and crossed two lanes of traffic.

17 (2) Lieutenant Colonel Baragona, who was born
18 on June 14, 1960, and commissioned into the
19 United States Army after graduating from the
20 United States Military Academy in 1982, was serv-
21 ing as a logistician in III Corps Artillery in Iraq at
22 the time of his death, and is now forever at rest in
23 Arlington National Cemetery.

24 (3) Lieutenant Colonel Baragona was, at the
25 time of his death, the highest-ranking United States
26 military officer to be killed in Iraq following the ini-

1 tial invasion of Iraq in March 2003 and since the
2 liberation of Kuwait by United States forces.

3 (4) In November 2007, the United States Dis-
4 trict Court for the Northern District of Georgia en-
5 tered a default judgment against Kuwait & Gulf
6 Link Transport Company and ordered that
7 \$4,900,000 be paid in damages for the death of
8 Lieutenant Colonel Baragona.

9 (5) In the legal proceeding brought against Ku-
10 wait & Gulf Link Transport Company in United
11 States district court, Kuwait & Gulf Link Transport
12 Company knowingly chose not to appear to answer
13 for the actions of its employee and similarly acted
14 inconsistently with the conduct of a responsible
15 party when it evaded or refused service of process in
16 the claim even when service of process was issued di-
17 rectly by the court, only appearing in the action
18 after the Department of Defense had issued a “re-
19 quest for information” letter, which was a follow-up
20 letter to an Army notice for Kuwait & Gulf Link
21 Transport Company to “show cause” why the com-
22 pany should not be debarred for its refusal to accept
23 service of process in the Baragona civil litigation, re-
24 questing information regarding the company’s intent
25 to either honor the court’s final judgment against it

1 or to otherwise respond to the judgment. A failure
2 to respond to the request for information would have
3 jeopardized the company's capacity to continue to
4 perform as a contractor of the United States Gov-
5 ernment.

6 (6) Kuwait & Gulf Link Transport Company
7 has stated that it neither evaded nor refused service
8 of process in the civil litigation, asserting that the
9 initial and multiple attempts at service of process
10 made in accordance with international law via cer-
11 tified international mail courier did not comply with
12 Kuwait law. Service of process was ultimately exe-
13 cuted in accordance with Kuwait law via the Kuwait
14 Ministry of Justice. The Federal district court over-
15 seeing the case ruled that service of process had
16 been properly executed prior to entering the default
17 judgment against Kuwait & Gulf Link Transport
18 Company. Kuwait & Gulf Link Transport Company
19 has not disputed in court that service of process was
20 properly executed and thereby has consented to the
21 court's determination that service of process in the
22 case was proper.

23 (7) Kuwait & Gulf Link Transport Company
24 has since made an appearance in the action only to
25 dispute the court's personal jurisdiction over it and

1 to request the dismissal of the judgment against it
2 and has not contested in court that its negligence
3 was the cause of Lieutenant Colonel Baragona’s
4 wrongful death. But for Kuwait & Gulf Link Trans-
5 port Company’s fear of debarment, it may not have
6 entered the action to answer for its negligence.

7 (8) The Honorable William S. Duffey, Jr.,
8 United States District Judge in the Northern Dis-
9 trict of Georgia, has described the conduct of Ku-
10 wait & Gulf Link Transport Company as “evasive
11 and disruptive to a significant jurisdictional issue”,
12 has further described the conduct of Kuwait & Gulf
13 Link Transport Company as “ghastly”, has ques-
14 tioned whether Kuwait & Gulf Link Transport Com-
15 pany “appreciate[s] the sacrifice of the citizens and
16 the men of our military”, and has further questioned
17 why the company would not compensate the
18 Baragona family when an employee of the company
19 “apparently by negligence, has caused the death and
20 caused damages to another person” and when the
21 company “has the wherewithal to compensate [the]
22 victims of [the] negligence”.

23 (9) In March 2009, the Baragona family sought
24 to amicably resolve their claim against Kuwait &
25 Gulf Link Transport Company through court ap-

1 pointed mediation. Kuwait & Gulf Link Transport
2 Company formally declined to join in or consent to
3 the Baragona's request for court appointed medi-
4 ation.

5 (10) Kuwait & Gulf Link Transport Company
6 is a foreign-owned contractor of the United States
7 Government whose earnings under United States
8 Government contracts exceed \$45,000,000 from
9 prime contracts and are reported to exceed
10 \$100,000,000 from subcontracts.

11 (11) In a special advertising section of the New
12 York Times, the Chairman of Kuwait & Gulf Link
13 Holding Company, a separate but related legal enti-
14 ty, described the business of Kuwait & Gulf Link
15 Holding Company with the United States Armed
16 Forces as follows: "[The] U.S. military is one of our
17 largest customers today. We have been working with
18 [the] U.S. military since 1992. Immediately after
19 [the] liberation of Kuwait, we established our busi-
20 ness again, and we started working with them, and
21 have continued now, for over 15 years".

22 (12) Kuwait & Gulf Link Transport Company
23 has asserted that it had insurance for its operations
24 in Iraq at the time of the death of Lieutenant Colo-
25 nel Baragona, such insurance having been a require-

1 ment under its contracts and subcontracts with the
2 Department of Defense. However, it has failed to
3 rely on that insurance to address the wrongful death
4 claim of the Baragona family, which appears incon-
5 sistent with its claim of insurance coverage and is
6 unjust to the Baragona family.

7 (13) The Government of Kuwait first failed to
8 respond to, and then declined to act on, requests by
9 members of Congress that it instruct Kuwait & Gulf
10 Link Transport Company, its corporate citizen, to
11 conduct itself honorably with respect to the claim of
12 the Baragona family.

13 (14) Kuwait & Gulf Link Transport Company,
14 the Kuwait Government, and others should act hon-
15 orably to deliver justice to the Baragona family and
16 to honor the service and sacrifice of Lieutenant
17 Colonel Dominic Baragona.

18 (15) The Baragona family has nobly sought
19 justice in the wrongful death of their son and broth-
20 er but has faced many obstacles from Kuwait & Gulf
21 Link Transport Company and others in their efforts.

22 (16) Members of the Armed Forces, civilian em-
23 ployees of the United States Government, and
24 United States citizen employees of companies per-
25 forming work for the United States Government, or,

1 in the event of their death, their family members,
 2 should be able to seek redress from Federal contrac-
 3 tors in a United States Federal court when the
 4 member of the Armed Forces, civilian employee, or
 5 United States citizen employee experiences serious
 6 bodily injury because of the negligent performance
 7 by the contractor of its work for the United States
 8 Government.

9 **SEC. 3. IN PERSONAM JURISDICTION IN CIVIL SUITS WITH**
 10 **RESPECT TO SERIOUS BODILY INJURIES OF**
 11 **MEMBERS OF THE ARMED FORCES, CIVILIAN**
 12 **EMPLOYEES OF THE UNITED STATES, AND**
 13 **UNITED STATES CITIZEN EMPLOYEES OF**
 14 **COMPANIES PERFORMING WORK FOR THE**
 15 **UNITED STATES AGAINST ENTITIES UNDER**
 16 **UNITED STATES GOVERNMENT CONTRACTS**
 17 **PERFORMED ABROAD.**

18 (a) IN GENERAL.—The Director of the Office of
 19 Management and Budget shall amend the Federal Acqui-
 20 sition Regulation to include in the regulation with respect
 21 to any contract for work to be performed outside the
 22 United States that is approved and financed by the United
 23 States Government, or any executive department, inde-
 24 pendent establishment, or agency thereof, or any sub-

1 contract or subordinate contract under such a contract,
2 the following:

3 (1) A requirement that the contractor consent
4 to in personam jurisdiction over the contractor by
5 the Federal courts of the United States with respect
6 to any suit alleging a serious bodily injury of a mem-
7 ber of the Armed Forces, civilian employee of the
8 United States Government, or United States citizen
9 employee of a company performing work for the
10 United States Government, including a suit for neg-
11 ligence against one or more employees of the con-
12 tractor for which the contractor may be liable under
13 theories of vicarious liability.

14 (2) A clause specifying that consent to in per-
15 sonam jurisdiction under paragraph (1) shall not op-
16 erate to deprive or terminate in personam jurisdic-
17 tion as described in that paragraph in any other
18 court that otherwise has in personam jurisdiction as
19 described in that paragraph under applicable law.

20 (3) A requirement that, where a cause of action
21 in a suit described in paragraph (1) arises from an
22 act or omission occurring outside the United States,
23 in personam jurisdiction in a suit covered by para-
24 graph (1)—

25 (A) may lie either—

1 (i) in the district court of the United
2 States of the legal residence of the injured
3 person, deceased, or heirs of the deceased,
4 or in the place of the estate established for
5 the deceased; or

6 (ii) in the district court of the United
7 States of the command issuing the con-
8 tract; or

9 (B) if in personam jurisdiction cannot be
10 established in a district court of the United
11 States under subparagraph (A), shall lie in the
12 United States District Court for the District of
13 Columbia.

14 (4) In the case of a contract covered by this
15 section with a value of \$5,000,000 or more and
16 awarded to a contractor that does not maintain an
17 office in the United States, a requirement that the
18 contractor designate an agent located in the United
19 States for service of process in any suit described in
20 paragraph (1).

21 (5) A requirement that—

22 (A) any suit described in paragraph (1)
23 shall be analyzed in accordance with the sub-
24 stantive laws of the United States; and

1 (B) if pursuant to such requirement the
2 law applicable to such suit is the law of the lo-
3 cation where the cause of such suit occurred
4 and the location is designated as a hazardous
5 duty zone by the Department of Defense, the
6 tort law of the State in which such suit is
7 brought shall be the law applicable to such case
8 rather than the law of the location where the
9 cause of such suit occurred.

10 (b) SERIOUS BODILY INJURY DEFINED.—In sub-
11 section (a), the term “serious bodily injury” means bodily
12 injury which involves—

- 13 (1) death or a substantial risk of death;
- 14 (2) extreme physical pain;
- 15 (3) protracted and obvious disfigurement; or
- 16 (4) protracted loss or impairment of the func-
17 tion of a bodily member, organ, or mental faculty.

18 (c) EFFECTIVE DATE.—The amendments to the Fed-
19 eral Acquisition Regulation made pursuant to subsection
20 (a) shall take effect on such date as the Director shall
21 specify, but not later than 90 days after the date of the
22 enactment of this Act.

23 (d) APPLICABILITY.—

- 24 (1) IN GENERAL.—The amendments to the
25 Federal Acquisition Regulation made pursuant to

1 subsection (a) shall apply with respect to any con-
2 tract covered by that subsection that is entered into
3 on or after the effective date of such amendments.

4 (2) PROSPECTIVE APPLICABILITY UNDER CER-
5 TAIN CURRENT CONTRACTS.—

6 (A) INDEFINITE DELIVERY, INDEFINITE
7 QUANTITY CONTRACTS.—In the case of an in-
8 definite delivery, indefinite quantity contract in
9 effect as of the effective date of the amend-
10 ments to the Federal Acquisition Regulation
11 made pursuant to subsection (a), the amend-
12 ments to the Federal Acquisition Regulation
13 made pursuant to subsection (a) shall apply to
14 any task order under such contract, or any sub-
15 contract of such contract, that is made on or
16 after the effective date of such amendments.

17 (B) MODIFICATIONS OF CURRENT CON-
18 TRACTS.—In the case of any contract or sub-
19 contract in effect as of the effective date of the
20 amendments to the Federal Acquisition Regula-
21 tion made pursuant to subsection (a) that is
22 modified after the effective date of such amend-
23 ments, the amendments to the Federal Acquisi-
24 tion Regulation made pursuant to subsection
25 (a) shall apply with respect to any modification

1 of such contract or subcontract after the effective date of such amendments.

2
3 (3) CERTAIN OTHER CONTRACTS.—In any civil
4 action commenced during the period beginning on
5 September 11, 2001, and ending on the date of the
6 enactment of this Act to which the requirement in
7 subsection (a)(1) would have applied if such sub-
8 section had been in effect during such period, the
9 contractor shall consent to the jurisdiction of the
10 Federal courts of the United States in such action
11 as a condition of—

12 (A) entering into any contract with the
13 United States Government on or after the date
14 of the enactment of this Act; or

15 (B) receiving any payment from the
16 United States Government for performing any
17 activity under a contract with the United States
18 Government on or after the date of the enact-
19 ment of this Act.

20 (4) ADDITIONAL DEFINITION OF CON-
21 TRACTOR.—For purposes of paragraph (3), the term
22 “contractor”—

23 (A) shall have the meaning given that term
24 in section 6(1); and

1 (B) shall also include any subsidiary, par-
2 ent company, or successor entity of a contractor
3 formed to act as a successor in interest of a
4 contractor for United States Government con-
5 tracting purposes.

6 **SEC. 4. IN PERSONAM JURISDICTION FOR CIVIL OR CRIMI-**
7 **NAL SUITS BROUGHT BY THE UNITED STATES**
8 **GOVERNMENT ALLEGING WRONGDOING**
9 **UNDER UNITED STATES GOVERNMENT CON-**
10 **TRACTS PERFORMED ABROAD.**

11 (a) IN GENERAL.—The Director of the Office of
12 Management and Budget shall amend the Federal Acqui-
13 sition Regulation to include in the regulation with respect
14 to any contract for work to be performed outside the
15 United States that is approved and financed by the United
16 States Government, or any executive department, inde-
17 pendent establishment, or agency thereof, or any subordi-
18 nate contract under such a contract, the following:

19 (1) A requirement that the contractor consent
20 to in personam jurisdiction over the contractor by
21 the Federal courts of the United States with respect
22 to any civil or criminal suit brought by the United
23 States Government alleging wrongdoing associated
24 with the performance of such a contract.

1 (2) A clause specifying that consent to in per-
2 sonam jurisdiction under paragraph (1) shall not op-
3 erate to deprive or terminate in personam jurisdic-
4 tion as described in that paragraph in any other
5 court that otherwise has in personam jurisdiction as
6 described in that paragraph under applicable law.

7 (3) A requirement that, where a cause of action
8 in a suit described in paragraph (1) arises from an
9 act or omission occurring outside the United States,
10 in personam jurisdiction in a suit covered by para-
11 graph (1) shall lie in the United States District
12 Court for the District of Columbia if it cannot be es-
13 tablished in another Federal court.

14 (4) In the case of a contract covered by this
15 section with a value of \$5,000,000 or more and
16 awarded to a contractor that does not maintain an
17 office in the United States, a requirement that the
18 contractor designate an agent located in the United
19 States for service of process in any suit described in
20 paragraph (1).

21 (b) EFFECTIVE DATE.—The amendments to the Fed-
22 eral Acquisition Regulation made pursuant to subsection
23 (a) shall take effect on such date as the Director shall
24 specify, but not later than 90 days after the date of the
25 enactment of this Act.

1 (c) APPLICABILITY.—

2 (1) IN GENERAL.—The amendments to the
3 Federal Acquisition Regulation made pursuant to
4 subsection (a) shall apply with respect to any con-
5 tract covered by that subsection that is entered into
6 on or after the effective date of such amendments.

7 (2) PROSPECTIVE APPLICABILITY UNDER CER-
8 TAIN CURRENT CONTRACTS.—

9 (A) INDEFINITE DELIVERY, INDEFINITE
10 QUANTITY CONTRACTS.—In the case of an in-
11 definite delivery, indefinite quantity contract in
12 effect as of the effective date of the amend-
13 ments to the Federal Acquisition Regulation
14 made pursuant to subsection (a), the amend-
15 ments to the Federal Acquisition Regulation
16 made pursuant to subsection (a) shall apply to
17 any task order under such contract, or any sub-
18 contract of such contract, that is made on or
19 after the effective date of such amendments.

20 (B) MODIFICATIONS OF CURRENT CON-
21 TRACTS.—In the case of any contract or sub-
22 contract in effect as of the effective date of the
23 amendments to the Federal Acquisition Regula-
24 tion made pursuant to subsection (a) that is
25 modified after the effective date of such amend-

1 ments, the amendments to the Federal Acquisi-
2 tion Regulation made pursuant to subsection
3 (a) shall apply with respect to any modification
4 of such contract or subcontract after the effec-
5 tive date of such amendments.

6 (3) CERTAIN OTHER CONTRACTS.—In any civil
7 or criminal action commenced during the period be-
8 ginning on September 11, 2001, and ending on the
9 date of the enactment of this Act to which the re-
10 quirement in subsection (a)(1) would have applied if
11 such subsection had been in effect during such pe-
12 riod, the contractor shall consent to the jurisdiction
13 of the Federal courts of the United States in such
14 action as a condition of—

15 (A) entering into any contract with the
16 United States Government on or after the date
17 of the enactment of this Act; or

18 (B) receiving any payment from the
19 United States Government for performing any
20 activity under a contract with the United States
21 Government on or after the date of the enact-
22 ment of this Act.

23 (4) ADDITIONAL DEFINITION OF CON-
24 TRACTOR.—For purposes of paragraph (3), the term
25 “contractor”—

1 (A) shall have the meaning given that term
2 in section 6(1); and

3 (B) shall also include any subsidiary, par-
4 ent company, or successor entity of a contractor
5 formed to act as a successor in interest of a
6 contractor for United States Government con-
7 tracting purposes.

8 **SEC. 5. DEBARMENT OR SUSPENSION OF UNITED STATES**
9 **GOVERNMENT CONTRACTORS FOR EVASION**
10 **OF PROCESS OR FAILURE TO APPEAR IN AC-**
11 **TIONS IN CONNECTION WITH GOVERNMENT**
12 **CONTRACTS.**

13 (a) IN GENERAL.—The Director of the Office of
14 Management and Budget shall amend the Federal Acqui-
15 sition Regulation to provide that a contractor of the
16 United States Government, whether a United States com-
17 pany or a foreign company, may be debarred or suspended
18 from contracting with the United States Government
19 under circumstances as follows:

20 (1) If the contractor evades service of process
21 in any suit brought against the contractor by the
22 United States Government or a citizen or national of
23 the United States in connection with the contractor's
24 performance of a contract with the United States
25 Government.

1 (2) If the contractor refuses or fails to appear
2 before a Federal court of the United States in a
3 matter brought against the contractor by the United
4 States Government or a citizen or national of the
5 United States in connection with the contractor's
6 performance of a contract with the United States
7 Government.

8 (b) APPLICABILITY.—The amendment to the Federal
9 Acquisition Regulation made pursuant to subsection (a)
10 shall apply to any action of a contractor covered by such
11 amendment that occurs on or after the effective date of
12 such amendment.

13 **SEC. 6. DEFINITIONS.**

14 In this Act:

15 (1) CONTRACTOR.—The term “contractor”,
16 with respect to a contract, includes the contractor
17 under the contract, any subcontractor under the
18 contract, any subordinate contractor under the con-
19 tract, and any employees thereof performing work
20 under or in connection with the contract.

21 (2) UNITED STATES.—The term “United
22 States”, in a geographic sense, means the several
23 States and the District of Columbia. The term does

- 1 not include any military installation or facility lo-
- 2 cated outside the United States, as so defined.

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