

## **Kazakhstan: United States vs. James H. Giffen**

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A EurasiaNet Partner Post from [Transitions Online](#)

Hearings in the most far-reaching Foreign Corrupt Practices Act case in U.S. history, scheduled to begin in Manhattan on 14 May in United States vs. James H. Giffen, have been delayed until 3 June.

This is the second delay for the court to hear pretrial motions submitted by attorneys for the defendant, who is charged with paying \$78 million in bribes between 1995 and 2000 to former Kazakh Prime Minister Nurlan Balgimbaev and President Nursultan Nazarbaev, identified in court documents only as KO-1 and KO-2 until last month. Giffen, 63, the CEO of Mercator Corp., a small New York-based merchant bank, was indicted by a grand jury in April 2003.

Giffen is charged on 13 counts of violating the FCPA and 33 counts of money laundering. In March 2004, the government filed additional charges of tax evasion, charging that he omitted \$2 million of income and reported only half of an \$800,000 bonus paid to a staffer.

The four-year investigation unearthed a labyrinth of complex financial transactions to accounts in Switzerland and the British Virgin Islands allegedly made by U.S. oil companies Mobil, (now ExxonMobil), Texaco (now ChevronTexaco), Phillips Petroleum (now ConocoPhillips) and Amoco, (now BP) in connection with various fees for the purchase of oil and gas rights in the 1990s.

Part of the fees paid by U.S. oil companies were allegedly used by Giffen to purchase an array of luxury items, including millions of dollars in jewelry; fur coats for President Nazarbaev's wife, Sara, and a daughter, costing nearly \$30,000; \$45,000 for tuition at an exclusive Swiss high school; and tuition at George Washington University in the U.S. capital for Nazarbaev's daughter Aliya. Giffen also allegedly bought an \$80,000 Donzi speedboat for Balgimbaev to present to Nazarbaev and two American snowmobiles for Nazarbaev and his wife.

The indictment revealed that Swiss authorities began investigating accounts "nominally owned by offshore companies but beneficially owned, directly or indirectly, by Balgimbaev and Nazarbaev ... into which Mr. Giffen had made tens of millions of dollars in unlawful payments" in 1999.

Nazarbaev has criticized the case, coined "Kazakhgate," as an empty ploy by his political opponents but has seldom commented in detail on the allegations in the five years since they first surfaced.

One week ago, on the same day that Giffen's hearings were to begin in New York, the president fielded a lengthy query about the case on a widely aired call-in television broadcast. "[This trial] is precisely against Giffen because he is a citizen of the U.S. and he is liable to that country's jurisdiction," Nazarbaev commented. "Therefore, I don't find it necessary to follow this process or comment on it, because from a political side, [or a] diplomatic side, a politician shouldn't comment on a trial in a foreign country."

Nazarbaev went on to assure the audience that the contracts Giffen facilitated for U.S. oil companies were done in the interest of the Kazakh people. "Today our oilmen say those contracts were executed on a high level; they completely met the interests of Kazakhstan," he said. "The oilmen are grateful to him."

### **THE FOREIGN CORRUPT PRACTICES ACT**

The Foreign Corrupt Practices Act, established in 1977 during the post-Watergate period, essentially made it unlawful for anyone in the United States to make a payment to foreign officials for the purpose of obtaining or

retaining business. It also made it illegal to pay intermediaries who have knowledge that the money would go to a foreign official.

As an acting head of state, Nazarbaev is immune from prosecution under the FCPA. Even if U.S. prosecutors definitively establish Nazarbaev's complicity while making their case against Giffen, the statute is not meant to be a prosecution tool against public officials, explains Donald Zarin, author of *Doing Business Under the Foreign Corrupt Practices Act*, a leading textbook on the law. "The FCPA focuses on the supply side, not the demand side," he says.

Although the statute explicitly states that in order for a case to be tried under the FCPA a "foreign official" must be involved, the investigation has received only nominal media coverage at home and has had little effect on Nazarbaev's presidency.

Paris-based Reporters Without Borders has expressed concern that the few opposition papers and websites that have printed articles about Kazakhgate have been sued for defamation, prosecuted for bureaucratic reasons, closed, or prevented from operating.

There has been only one attempt made in the FCPA's history to indict a foreign official, according to Zarin. In 1991, in *United States vs. Castle*, the Justice Department tried to prosecute Canadian officials under a general conspiracy statute, since the FCPA doesn't criminalize the receipt of a bribe by a foreign official. The judge ruled against the department.

But even being mentioned in conjunction with an FCPA case can be "politically disastrous," Zarin says.

Attorneys for Kazakhstan have long been concerned that Nazarbaev would be named as a target of the grand jury investigation, letters from his attorneys indicate. Reid Weingarten wrote that on two occasions -- on 27 July 2001 and on 18 March 2002 -- he met with prosecutors, seeking an effective guarantee that Nazarbaev would not be indicted.

"Such an assurance would be of significance to the Republic and have no impact on the investigation," Weingarten wrote in legal documents. He cautioned that, "any indictment naming a Kazakh official as an unindicted co-conspirator or the recipient of a bribe would be viewed as an affront to Kazakhstan, could have a destabilizing political effect in Kazakhstan, and could deteriorate [sic] US-Kazakh relations."

## **THE CHARGES**

The Justice Department argues that the unlawful payments Giffen made to Balgimbaev and Nazarbaev ensured that he and Mercator "obtained and retained lucrative business as advisers and counselors to the government of Kazakhstan," and that "these senior officials would remain in a position from which they could divert large sums from oil transactions into accounts for their benefit."

The indictment further charges that this "scheme" defrauded the people of Kazakhstan of "the right to the honest services of their elected and appointed officials."

At this stage, the charges against Giffen are accusations, and he is presumed innocent until proven guilty, in accordance with U.S. law.

To date, only Giffen and J. Bryan Williams, a former senior Mobil executive who was in charge of overseas crude-oil transactions in Kazakhstan, have been charged in connection with this case. In September 2003, Williams was sentenced to less than four years in prison for evading taxes on a \$2 million kickback from Mercator related to Mobil's \$1.05 billion stake in Tengiz and other Mobil projects in the country.

None of the companies or individuals named or unnamed in the indictments has been ruled in or out as a target for future prosecution. "Our investigation is continuing," says Marvin Smilon of the U.S. Attorney's office.

Legal insiders see the focus now turning to the oil companies themselves. Last April, the U.S. Attorney's office confirmed that it was looking at ExxonMobil, which denies any wrongdoing.

"Like other companies, we had a relationship with James Giffen because of his advisory role in the Kazakh government," says ExxonMobil spokesman Bob Davis, who was keen to clarify that Giffen "never represented Mobil." Davis says ExxonMobil has been cooperating with the investigation and "had no knowledge of any payments to Kazakh officials – none whatsoever."

### **DE FACTO APPROVAL?**

The news of another delay in the court proceedings follows a series of recent legal moves by Giffen attorney William Schwartz. On 25 March, Schwartz asked the court to turn over "all documents and records, including classified documents and records related to Mr. Giffen or Mercator Corporation," which he hopes will illustrate that "close and repeated contact with officials" at the CIA, FBI and State Department approved of Giffen's actions.

Records for nearly every major player from this time period whom Giffen could have come into contact with were requested, including CIA Director Robert Gates, Brent Scowcroft of the National Security Council, Secretaries of State James Baker and Lawrence Eagleburger, and former U.S. ambassadors to Kazakhstan William Courtney and Elizabeth Jones, now assistant secretary at the State Department.

It remains to be seen whether the judge decides these alleged contacts were simply the high-level networking required of a successful international oil consultant in a relatively small pond, or the de facto nod of approval his lawyer says they were.

Giffen's attorney has also asked that his client's high-profile and intimate role as a direct adviser to Nazarbaev be taken into consideration. In addition to access to intelligence documents, Giffen's legal team asked that the charges be dismissed altogether since the Kazakh government has said he acted properly, a request that raised the ire of Assistant U.S. Attorney Peter Neiman.

In a written response on 12 April, Neiman responded, "Whatever weight Giffen's allegedly lofty positions and contacts might carry in Kazakhstan, they are not decisive here. Giffen is a United States citizen, and he has no license to violate the FCPA, commit mail and wire fraud, or launder money."

### **THE ADVICE PEDDLERS**

In December 1984, as a member of the American Trade Consortium, Giffen became one of the first Americans to be received in Moscow by Mikhail Gorbachev. Giffen worked actively to cultivate relationships with officials of the Communist Party, including rising politician Nazarbaev. By the late 1980s, a booming new industry was emerging: providing advice on doing business in the former Soviet republics.

By 1991, Giffen was attending Gorbachev's Kremlin dinners with the political elite: President George H.W. Bush and his wife, Secretary of State James Baker, and National Security Adviser Brent Scowcroft.

William Courtney, who served as Kazakhstan's first ambassador, said people were open to the new U.S. presence. "They didn't know how to do business Western-style, but they were willing to pay intermediaries and legal and accounting firms coming in from the U.S. to show them how," he says.

Giffen soon became Nazarbaev's "consigliere" on Western business matters, according to Courtney. "Jim Giffen had a wide range of contacts in Washington and often appeared to be in contact with them," he says.

Back in Washington, after Kazakhstan had set up an embassy there, in May 1992, it was Giffen, not the embassy, who arranged Nazarbaev's first visit to Washington, where Nazarbaev met with Bush.

In the fall of 1995, Giffen was named a counselor to the president of Kazakhstan, a semiofficial title that enabled him to act as an adviser on numerous oil and gas transactions, which was when the troubles began, according to the indictment.

The oil consulting business was extremely lucrative for Giffen over the course of the next decade. Court

documents show Mercator made "approximately \$67 million in success fees for its work for Kazakhstan" between 1995 and 2000 alone.

In March 2003, nearly two decades after he first incorporated Mercator, Giffen was arrested by FBI agents at John F. Kennedy International Airport in New York while waiting to board a plane to Kazakhstan.

### **THE POTENTIAL FALLOUT**

Giffen faces 62 criminal counts ranging from mail and wire fraud, to FCPA violations, to money laundering. If found guilty, he faces millions of dollars in fines and significant jail time.

The indictment also seeks forfeiture of \$84.33 million, including the contents of various bank accounts in the United States and abroad.

The trial date is slated for 4 October in Manhattan.

EurasiaNet, May 31, 2004

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