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Oil, bribery and the CIA

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In June 2004, the lawyers for James Giffen, the defendant in the “Kazakh-gate” bribery case being heard in the US relating to offences allegedly committed in Kazakhstan in the 1990s, made an application to the presiding Judge William Pauley III: they wanted classified government documents. Lots of them.

These, they said, would show that anything Mr Giffen had allegedly done – he was charged with arranging about US\$80 million (Dh293.7m) in bribes for Kazakh oil contracts – had been done with the full backing of the US Central Intelligence Agency (CIA).

To Mr Giffen’s lawyers, it was a “public authority defence”. To others, it looked like something else.

“The practice is referred to as ‘greymail’,” says Scott Horton, an assistant professor of law at Columbia University.

The Kashagan offshore field in western Kazakhstan is the world’s biggest oil discovery since 1968. Shamil Zhumatov / Reuters

“This is an increasingly popular defence because you can put the intelligence community on the defensive and the intelligence community’s instinctive reaction is to say, ‘Let’s get rid of this’.”

In Mr Giffen’s case it worked like a charm: more than six years after the defence team’s request, the CIA had still not provided some of the documents.

The original prosecutor has long since given up the case and moved to private practice. And this month, his replacement agreed to let Mr Giffen plead guilty to nothing more than a “misdemeanour tax count”.

“Kazakh-gate”, the scandal that inspired the George Clooney film *Syriana* and became one of the largest US foreign corruption cases in history, is nothing if not colourful.

By the mid-1990s, Mr Giffen had established himself as “Mr Kazakhstan”, the personal adviser to the country’s president Nursultan Nazarbayev, at the peak of the new “great game” – the battle involving Russia, the US and the world’s major oil companies for access to the Caspian Sea’s vast energy resources.

What Mr Giffen was alleged to have done to achieve this, however, was revealed only after a Kazakh government attempt to discredit the former prime minister Akezhan Kazhegeldin badly backfired.

A search of Swiss bank accounts set in motion by the Kazakh government, intended to prove Mr Kazhegeldin had been siphoning money from public coffers, instead turned up a Kazakh government account holding \$85m, most of which, allegedly, had indirectly come from oil companies.

By 2000, the US department of justice claimed it had followed the trail of the account back to Mr Giffen who, it alleged, was acting as a middleman for oil companies. It was then alleged that they wished to bribe the Kazakh government in return for contracts.

The prosecution’s 2003 indictment detailed the lavish gifts Mr Giffen had allegedly bestowed on Kazakh officials to win contracts: two snow-mobiles; \$180,000 in jewellery; \$30,000 in fur coats; and a luxury speedboat. He had even allegedly paid the fees for the Kazakh president’s daughter’s Swiss boarding school.

But when the court concludes later in the year Mr Giffen could be convicted of nothing more than incorrectly filling in a tax form.

The greymail defence was most famously used by Lt Col Oliver North and Joseph Fernandes in the Iran-Contra trial, and by the former FBI acting director L Patrick Gray after the Watergate scandal.

But the aftermath of George W Bush's presidency has seen it back with a vengeance, with lawyers for officials such as Lewis "Scooter" Libby, Dick Cheney's former chief of staff, using versions of the defence to fend off cases.

Sometimes, even if graymail is not an option, it seems US government connections can drastically slow down an investigation, in central Asia at any rate.

Corruption allegations have for several years hovered over Mina Corp and a closely related company Red Star Enterprises, two Gibraltar-based companies that had won contracts since 2002 to supply fuel to the US air base in Kyrgyzstan.

The FBI began an investigation in 2005 into whether Red Star and Mina Corp were involved in allegedly corrupt contracts that enriched the former Kyrgyz president Askar Akayev to ensure the continuation of lucrative fuel contracts with the US department of defence on Kyrgyz soil.

The Kyrgyz state police have investigated the companies' Kyrgyz subcontractors for suspected financial links to the president's family, but so far the US department of justice has not become involved.

Meanwhile, a US Congressional investigation into the contracts has experienced long delays in obtaining documents and the investigators only recently managed to talk to Chuck Squires, the operations director for both companies (who is also a former US defence attache), Erkin Bekbolotov, a Kyrgyz partner in both companies, and Doug Edelman, a US partner with both companies.

US investigators visited Kyrgystan on August 13 and 14 and have since conducted interviews in London with Mr Squires and Mr Bekbolotov, after serving a subpoena on the companies in the US last month.

The classified information procedures act (CIPA), enacted in 1980, was supposed to limit the graymail defence but according to Abbe Lowell, the head of the white collar crime practice at the Washington law firm McDermott Will, "embarrassing" cases can still be shelved.

"Today, under CIPA, there is still the inherent pressure on the intelligence community to decide if any prosecution that may result in the disclosure of classified information is worth the leak or offence it wants to prosecute," Mr Lowell says.

What's new in the Giffen case is the use of the strategy by a businessman.

Mr Giffen, whatever he may claim, was not in Kazakhstan primarily to further the interests of the US: he was there to make money via Mercator, the merchant bank he controls.

Attempts by businessmen to use graymail in the past have had little success. That Mr Giffen's graymail defence looks likely to be so successful raises worrying problems for the Organisation for Economic Co-operation and Development's campaign against corruption, which has seen anti-bribery laws such the US foreign and corrupt practices act put in place in 38 member countries.

Almost any US businessman working in "difficult" countries is likely to keep the CIA informed of much of what happens to them.

"There is this whole arm of the CIA that interviews businessmen who are doing business overseas, so it's pretty easy to construct a graymail defence for anyone," says Mr Horton.