

DISCOVERING SECRETS: ACT OF STATE DEFENSES TO BRIBERY CASES

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Prosecution of white collar crime, particularly grand corruption bribery, is increasing. High-level bribery is structurally similar to illegal drug cartels and terrorist organizations. Bribe-givers are serviced by multinational networks of attorneys and bankers—the “gatekeepers.”

The prosecution of New York attorney and banker, James H. Giffen, in the Southern District of New York generated a pair of landmark opinions on significant issues of first impression rejecting act of state doctrine defenses to bribery cases. Act of state doctrine defenses involve complex legal issues at obscure intersections of U.S. criminal law, constitutional law, conflicts of law, and international comity.

The first opinion in the Giffen case provides helpful precedent on a central legal hurdle facing prosecutors developing cases—discovering the facts of bribery schemes where documents are ostensibly protected by foreign law. The second opinion arose in an important factual context, where the alleged U.S. bribe-giver also held official titles inside a foreign government.

That the U.S. Department of Justice was apparently not undermined in the Giffen case despite the best efforts of powerful U.S. lobbyists and law firms in a case allegedly involving \$105 million in bribes from major oil companies should not be worthy of a law review article under normal circumstances. The prosecution of the Giffen case, at the time the largest in the history of the Foreign Corrupt Practices Act, during one of the darkest periods in the history of the U.S. Department of Justice, demonstrates the rule of law operating even handedly, even when major oil interests are at stake.

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I. INTRODUCTION

Law enforcement officials in the United States are increasingly prosecuting Americans who bribe foreign officials.¹ Bribing officials inside the United States has never been accorded much tolerance.²

1. See Donald Zarin, *Introduction to THE FOREIGN CORRUPT PRACTICES ACT 2009: COPING WITH HEIGHTENED ENFORCEMENT RISKS*, 102-03 (PLI Corporate Law & Practice, Course Handbook Series No. B-1737, 2009) [hereinafter *FOREIGN CORRUPT PRACTICES ACT 2009*]; *Attorney Sees More Individuals Named in Ramped Up FCPA Enforcement Effort*, 41 Sec. Reg. & L. (BNA) No. 32, at 1495 (Aug. 10, 2009). An range of other Organisation for Economic Co-operation and Development ("OECD") member nations' prosecutors are also focusing on their own domestic businesses' corrupt activities abroad including, for example, the German crackdown on Siemens and the French crackdown on its national oil company, Elf-Aquitaine. See FRITZ HEIMANN & GILLIAN DELL, *TRANSPARENCY INT'L, PROGRESS REPORT 2008: ENFORCEMENT OF THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS* 10-11, 21-22, 45-46 (2008), available at http://www.transparency.org/news_room/in_focus/2008/oecd_report; see also OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1, available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf> [hereinafter *OECD Anti-Bribery Convention*] (establishing legally binding standards to criminalize acts of bribery by a foreign public official). The British, despite public relations statements, continue to lag in actual enforcement actions where their own self-interest might be damaged. See, e.g., HEIMANN & DELL, *supra*, at 40-42 (describing the action of the House of Lords in the BAE bribery scandal).

2. Bribing government officials inside the United States results in major prosecutions, such as those of Jack Abramoff and former Illinois Governor Rod Blagojevich. Susan Schmidt & James

Where bribes were paid to foreign officials, however, some prosecutors in the past chose to look the other way, allocating scarce prosecutorial resources to “more significant” criminal activity.³

The notion that bribery abroad is a “victimless” crime has been fundamentally challenged by evidence from a wide array of respected economists.⁴ The consensus is that widespread corruption, especially grand corruption (big bribes paid to high-level foreign officials) greatly exacerbates—some would even say causes—grinding global poverty.⁵ Global aid agencies agree, from U.S. AID,⁶ World Bank,⁷ and the International Monetary Fund⁸ to non-governmental agencies such as International Catholic Relief Services⁹ and Transparency International.¹⁰

Free market fiscal conservatives are also joining the chorus of concern because of the negative impact of irrational bribe-motivated decisions on market discipline.¹¹ Contracts are granted not based any

V. Grimaldi, *The Fast Rise and Steep Fall of Jack Abramoff: How a Well-Connected Lobbyist Became the Center of a Far-Reaching Corruption Scandal*, WASH. POST, Dec. 29, 2005, at A1; The Caucus: The New York Times Politics Blog, <http://thecaucus.blogs.nytimes.com/2009/04/02/illinois-governor-is-indicted-on-corruption-charges/> (Apr. 2, 2006, 18:28 EST).

3. A double standard of prosecuting bribery at home, but tolerating bribery of (non-Caucasian) foreigners is the subject of a very significant legal history article disclosing the racial bias inherent in such a double standard. Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 VAND. J. TRANSNAT'L L. 877, 889-93, 930 (2000); see also Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT'L L. 155, 190-92 (2009) (commending Ala'i's contribution to the modern corruption debates).

4. ERIC CHETWYND ET AL., CORRUPTION AND POVERTY: A REVIEW OF RECENT LITERATURE 7-11 (2003), available at http://pdf.usaid.gov/pdf_docs/PNACW645.pdf; Elizabeth Spahn, *No Body Gets Hurt?*, 42 GEO. J. INT'L LAW (forthcoming 2010) (reviewing the economics literature). See generally INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION (Susan Rose-Ackerman ed., 2006) (providing a wide sample of the work of various economists analyzing the economics of corruption with an excellent introduction by Rose-Ackerman surveying the field).

5. CHETWYND ET AL., *supra* note 4, at 11-12. A concise, readable introduction to the effects of corruption on development and poverty, this technical U.S. AID pamphlet “shows an inverse correlation between aggregate economic growth and corruption; in general, countries with higher corruption experience less economic growth.” *Id.* at 7.

6. USAID, Democracy and Governance: Fighting Corruption, http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/anti-corruption (last visited Apr. 14, 2010).

7. World Bank, Anticorruption, <http://web.worldbank.org> (follow “Topics” hyperlink; then follow “Anticorruption” hyperlink) (last visited Apr. 14, 2010).

8. Int'l Monetary Fund, The IMF and Good Governance, <http://www.imf.org/external/np/etr/facts/gov.htm> (last visited Apr. 14, 2010).

9. Catholic Relief Servs., Human Trafficking: An Overview, http://crs.org/public-policy/in_depth.cfm (last visited Apr. 14, 2010).

10. See generally TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2009: CORRUPTION AND THE PRIVATE SECTOR (2009) (discussing the role the private sector plays in fighting corruption worldwide and identifying areas of reform).

11. See the considerable body of scholarship from University of Pennsylvania Wharton Business School Professor Philip Nichols. Philip M. Nichols et al., *Corruption as a Pan-Cultural Phenomenon: An Empirical Study in Countries at Opposite Ends of the Former Soviet Empire*, 39

“rational” market factors such as price, service, or quality, but rather based upon who pays the biggest bribe. Responsible corporations doing business by the rules are crippled when competing with bribe-givers. The amount of business lost by law-abiding corporations is staggering.¹²

Consumer and environmental advocates are also examining the impact of bribery abroad on Americans. Regulatory enforcement of safety and environmental standards are undermined by bribe-giving corporations abroad leading to deaths of consumers inside the United States¹³ as well as abroad.¹⁴ In a globally integrated economy, activity “abroad” directly affects ordinary consumers at home.

TEX. INT’L L.J. 215, 217 & n.10 (2004) (“Bribery distorts economic decisions because rather than purchasing a good or service based on price, quality, and fit of that good or service, a purchase is based on the size and quality of a bribe.”); Philip M. Nichols, *The Fit Between Changes to the International Corruption Regime and Indigenous Perceptions of Corruption in Kazakhstan*, 22 U. PA. J. INT’L ECON. L. 863, 872 (2001) (“[P]ublic corruption distorts economic decisions (which, in statist countries, can distort the entire economy).”); see also YASHENG HUANG, *SELLING CHINA: FOREIGN DIRECT INVESTMENT DURING THE REFORM ERA* 112 (2005) (describing the negative effects of bribery on the Chinese economy).

12. The U.S. Department of Commerce estimates that U.S. corporations lost between \$45 billion and \$80 billion in contracts by competing with European bribe-giving corporations prior to ratification of the OECD convention. See Duane Windsor & Kathleen A. Getz, *Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values*, 33 CORNELL INT’L L.J. 731, 761-62 (2000). Although speculative, the World Bank estimates the annual cost of corruption to be more than \$80 billion, while the International Monetary Fund estimates that a country’s growth rate can reduce by 0.5% a year due to corruption. See Nancy Zucker Boswell & Peter Richardson, *Anti-Corruption: Unshackling Economic Development*, ECON. PERSP., Mar. 2003, at 16, 16, <http://italy.usembassy.gov/pdf/ej/ijec0303.pdf>. The vast amount of money lost to corruption “is virtually impossible to calculate since payments of bribes are not publicly recorded.” Transparency Int’l, *Frequently Asked Questions About Corruption*, http://www.transparency.org/news_room/faq/corruption_faq#faqcorr4 (last visited Apr. 14, 2010).

13. See Mark Levin, *Lighting Up the Foreign Corrupt Practices Act: A Case Study of U.S. Tobacco Industry Political Influence Buying in Japan*, 34 N.C. J. INT’L L. & COM. REG. 471, 506 (2009); *Black Money: Introduction*, FRONTLINE, Apr. 7, 2009, <http://www.pbs.org/wgbh/pages/frontline/blackmoney/etc/synopsis.html>. Toothpaste manufactured in China and imported to the United States was found to have diethylene glycol, a toxic chemical that has a severe impact on children and people with liver or kidney disease. *Colgate Warns of Fake Toothpaste in U.S.*, REUTERS, June 14, 2007, <http://www.alertnet.org/thenews/newsdesk/N14427041.htm>. The toothpaste was sold at discount stores in the United States and was pulled from shelves by the Food and Drug Administration. *Id.* For a small sample of a few more of the many incidents, see Walt Bogdanich, *China Prohibits Poisonous Industrial Solvent in Toothpaste*, N.Y. TIMES, July 12, 2007, at C4; Walt Bogdanich, *Chinese Chemicals Flow Unchecked to Market*, N.Y. TIMES, Oct. 31, 2007, at A1; Jane Spencer & Nicholas Casey, *Toy Recall Shows Challenge China Poses to Partner*, WALL ST. J., Aug. 3, 2007, at A1; and Jim Yardley, *Chinese Baby Formula Scandal Widens as 2nd Death Is Announced*, N.Y. TIMES, Sept. 16, 2008, at A6; *Japan Scare Over China Dumplings*, BBC NEWS, Jan. 31, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7219365.stm>. For examples of regulatory efforts to increase product safety, see Consumer Product Safety Modernization Act of 2007, H.R. 4040, 110th Cong. (1st Sess. 2007), and *Legislation to Improve Consumer Product Safety for Children: Hearing on H.R. 2474, H.R. 1699, H.R. 814, and H.R. 1721 Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 110th Cong. 67-68 (2007) (testimony of Hon. Nancy A. Nord, Chairman, U.S. Consumer Product Safety

Although many U.S. prosecutors recognize the devastating harm caused by grand corruption bribery, they face difficult decisions about allocating scarce resources to hunting down this particular variety of white collar criminals. These targets are not easy pickings. Highly organized, sophisticated bribery schemes (with suitable money laundering devices to hide the criminal activity) are more akin to international illegal drug cartels or terrorist organizations than local street crime. Bribe-givers are serviced by highly paid organized networks of attorneys, accountants, and bankers—“[g]atekeepers”¹⁵—developing intricate loophole devices to discourage or derail underfunded and under-staffed government prosecutors. This is true big game hunting.

Despite the almost biblical David and Goliath proportions of the problems, the U.S. Department of Justice (“DOJ”) and many state and local prosecutors are gearing up to address the problem of Americans bribing abroad.¹⁶ U.S. law enforcement officials and judges are not well trained under the current U.S. legal education system for these modern legal issues that integrate “domestic,” “international,” and “foreign” law.¹⁷ Raising the spectre of complex foreign sovereignty doctrines has sometimes been sufficient to deflect U.S. law enforcers and judges.

Commission), expressing the “understandable concern over the growing number of product recalls of imported products, including those from China.”

14. Walt Bogdanich & Jake Hooker, *From China to Panama, a Trail of Poisoned Medicine*, N.Y. TIMES, May 6, 2007, at A1. At least one hundred Panamanians died from ingesting diethylene glycol that was substituted for the more expensive glycerin in cough syrup. *Id.*

15. Rebecca Gregory, *The Lawyer's Role: Will Uncle Sam Want You in the Fight Against Money Laundering and Terrorism?*, 72 UMKC L. REV. 23, 32-33 (2003). One of these suggestions requires lawyers to report suspicious financial transactions, making them a responsible “gatekeeper.” FIN. ACTION TASK FORCE, 40 RECOMMENDATIONS 5-6 (2003). There is controversy about the implementation of a gatekeeper initiative in the European Union, but the practice was mandated in 2001. Edward J. Krauland & Aaron R. Hutman, *Money Laundering Enforcement and Policy*, 38 INT’L LAW. 509, 516 (2004). The reaction is different in the United States, where the American Bar Association is the main lobbyist behind Congress’s rejection of mandated gatekeeper initiatives. Am. Bar Ass’n, Task Force on Gatekeeper Regulation and the Profession: Task Force Actions and Related Documents, <http://www.abanet.org/crimjust/taskforce/actions.html> (last visited Apr. 14, 2010).

16. Timothy L. Dickinson et al., *The Past Year in Review: Another Banner Year for Enforcement*, in FOREIGN CORRUPT PRACTICES ACT 2009, *supra* note 1, at 185, 191, 193-97, 205. The Manhattan District Attorney’s Office is also very active in prosecuting bribery and international money laundering cases, such as the July 28, 2009 indictment of check-cashing stores for avoiding money laundering regulations and the April 7, 2009 indictment of a Chinese citizen who used Manhattan banks to facilitate money laundering and “the proliferation of illicit missile and nuclear technology to the Government of Iran.” New York County District Attorney’s Office, What’s New, <http://manhattanda.org/whatsnew/> (last visited Apr. 14, 2010).

17. See Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT’L L. 301, 317, 319 (2008); Linda

One landmark case, the prosecution of New York attorney and merchant banker, James Giffen, in the Southern District of New York,¹⁸ should provide some welcome legal analysis and precedent to redress this omission in our legal education and to ease the analytical burdens facing prosecutors and judges enforcing U.S. laws. This Article will examine one complex legal issue, the act of state doctrine, used to shield an alleged American bribe-giver facing prosecution in the Southern District of New York.

The act of state doctrine is not typical fare for most prosecutors or judges in U.S. criminal proceedings. The first opinion addressing the act of state doctrine in a U.S. bribery case was issued in 2002 in the *Giffen*¹⁹ prosecution by Judge Denny Chin (more recently famous for sentencing white collar criminal, Ponzi scheme architect Bernie Madoff). The 2002 Chin opinion is a landmark case of first impression.²⁰ It provides helpful precedent for future decisions on the most significant legal hurdle facing prosecutors developing a case—discovering the facts of complicated bribery schemes where the documents are ostensibly protected by foreign law.²¹

The second opinion discussing the act of state doctrine in a bribery case was written by Judge William H. Pauley in 2004, also in the *Giffen* prosecution.²² Judge Pauley's opinion is also a landmark case of first impression.²³ The Pauley opinion arose in a significant factual context, where the alleged U.S. bribe-giver also holds official titles inside a foreign government.²⁴

Together, these two landmark opinions in the *Giffen* case regarding the application of the act of state doctrine to bribery cases should provide helpful guidance to future courts, prosecutors, and defense attorneys. Carefully examining these opinions will also provide suitable materials for training law students in these complex problems which will increasingly face the next generation of U.S. lawyers.

Silberman, *Transnational Litigation: Is There a "Field"? A Tribute to Hal Maier*, 39 VAND. J. TRANSNAT'L L. 1427, 1429 (2006).

18. United States v. Giffen (*Giffen I*), 326 F. Supp. 2d 497, 499 (S.D.N.Y. 2004).

19. *In re Grand Jury Subpoena Dated August 9, 2000 (In re Grand Jury Subpoena I)*, 218 F. Supp. 2d 544, 547, 551 (S.D.N.Y. 2002).

20. *Id.* at 547.

21. *Id.*

22. *Giffen I*, 326 F. Supp. 2d at 501-03.

23. *Id.* at 505.

24. *Id.* at 499-500.

II. THE SAGA OF UNITED STATES V. JAMES H. GIFFEN

The *Giffen* case itself, which is still on-going, provides a gripping story of alleged grand corruption bribery suitable for a Hollywood movie. The epic saga involves a New York lawyer and merchant banker, U.S. citizen James H. Giffen.²⁵ Giffen served as the gatekeeper and consultant for the President of Kazakhstan, Nursultan Nazarbaev.²⁶ Immensely lucrative oil and gas contracts are at stake in the litigation.²⁷ U.S. intelligence services may or may not be involved.²⁸ The alleged bribe money—about \$105 million U.S. dollars²⁹—was allegedly laundered through pass-through accounts at three U.S. banks in New York to at least thirty accounts at four different Swiss banks.³⁰ The money was allegedly used for the personal benefit of President Nazarbaev, the Oil Minister Nurlan Balgimaev, and one additional Kazakh official (still un-named) allegedly to buy millions of dollars in jewelry, furs, jet skis and snowmobiles, tuition, vacations, and to pay off credit cards.³¹

25. Rod Stodghill, *Oil, Cash and Corruption: How Influence Flowed Through Political Pipelines*, N.Y. TIMES, Nov. 5, 2006, § 3 (Sunday Business), at 1.

26. See STEVE LEVINE, *THE OIL AND THE GLORY: THE PURSUIT OF EMPIRE AND FORTUNE ON THE CASPIAN SEA* 375-76 (2007). Chapters eight, fifteen, and sixteen provide a fascinating introduction to the history of Kazakh oil and gas developments. *Id.* Levine, a reporter for the Wall Street Journal, discusses James Giffen's role in Kazakhstan. *Id.* at 373-78.

27. Kazakhstan's proven and probable oil and gas reserves are estimated at about 30 billion barrels, according to the International Monetary Fund ("IMF"). See *Republic of Kazakhstan: Selected Issues*, at 23 tbl.3, IMF Country Report No. 0/362, (July 6, 2004), available at <http://www.imf.org/external/pubs/ft/scr/2004/cr04362.pdf>; see also Energy Info. Admin., Kazakhstan: Major Oil and Natural Gas Projects, <http://www.eia.doe.gov/emeu/cabs/kazaproj.html> (last visited Apr. 14, 2010) (listing various oil and gas fields and corporate interests in particular Kazakh reserves).

28. *United States v. Giffen (Giffen III)*, 473 F.3d 30, 32, 34 (2d Cir. 2006). In March, 2004, defendant James Giffen for the first time raised an affirmative defense based on the public authority doctrine. *Id.* at 32. The district court permitted discovery of classified material based on Giffen's proffer under the public authority defense. *United States v. Giffen (Giffen II)*, 379 F. Supp. 2d 337, 342 (S.D.N.Y. 2004). The Second Circuit Court of Appeals denied the government's interlocutory appeal, while expressing substantial doubt whether Giffen's proffer actually satisfied the elements of either the public authority or entrapment by estoppel defenses. *Giffen III*, 473 F.3d at 44.

29. The opinions refer to \$78 and \$80 million in bribes. *Giffen III*, 473 F.3d at 31-32; *Giffen II*, 379 F. Supp. 2d at 340. However, our math, adding up the actual amounts alleged in the indictments resulted in a total of at least \$105 million. See Brian Cowan, *Cost/Benefit Analysis of Gatekeeper Risk in International Business Transactions* 7 & n.36 (May 2009) (unpublished student research project, on file with the Hofstra Law Review).

30. *In re Grand Jury Subpoenas Dated March 19, 2002 & August 2, 2002 (In re Grand Jury Subpoenas II)*, 318 F.3d 379, 381 (2d Cir. 2002). More than thirty Swiss bank accounts were allegedly involved. *Id.* at 382. Four different Swiss banks were allegedly involved. *Id.* at 381. Only one Swiss bank has been publicly identified in the court opinions so far, Credit Agricole Indosuez, at the time Banque Indosuez. *Giffen III*, 473 F.3d. at 35.

31. *Giffen III*, 473 F.3d at 32.

The unveiling of the factual allegations came gradually over an eight year period,³² with various parties fighting disclosure every step of the way.³³ Initially the proceeding was protected by the secrecy of grand jury deliberations. The initial opinion published in the case in 2002 by Judge Chin, which is one main subject of this Article, does not name either the targets of the grand jury's investigations (James H. Giffen and Mercator Corporation) or the foreign country allegedly involved in the bribery (the Republic of Kazakhstan). Instead, the 2002 opinion states that "[t]his is a redacted version of an Opinion filed under seal."³⁴ Giffen is identified only as "John Doe"; Mercator is the "Corporation"; Kazakhstan is the "Republic."³⁵

One short year later, in 2003, as the defendants appealed discovery orders, the Court of Appeals for the Second Circuit identified all the various U.S. defendants by name.³⁶ By 2004, in the opinion by Judge Pauley that is the second main subject of this Article, the names of individual Kazakh officials allegedly involved were published: President Nazarbaev and Nurlan Balgimaev, former Prime Minister and then-Oil Minister of the Republic.³⁷ Friedhelm Eronat's involvement has not yet been disclosed in the *Giffen* prosecution documents; he is identified only

32. My thanks to Brian Cowan, NESL class of 2009, for his tenacious work digging out these facts. See Cowan, *supra* note 29, at 6-12.

33. For example, prosecutors indicated they had filed Mutual Legal Assistance Treaty ("MLAT") requests with the Swiss government seeking bank records related to the *Giffen* case, but that more than two years had elapsed and "the response received from [the government of] Switzerland . . . has been incomplete or unsatisfactory." *In re Grand Jury Subpoenas II*, 318 F.3d at 381-82. The United States, in 1987 under President Ronald Reagan, negotiated a Memorandum of Understanding ("MOU") with Switzerland limiting United States' attempts to subpoena information from United States branches of Swiss banks. *Id.* at 382-83.

34. *In re Grand Jury Subpoena I*, 218 F. Supp. 2d 544, 547 (S.D.N.Y. 2002).

35. *Id.* at 548. The Second Circuit panel which first identified the parties involved by name included then-Judge, now United States Supreme Court Justice Sonia Sotomayer. See *Giffen III*, 473 F.3d at 31.

36. See *In re Grand Jury Subpoena II*, 318 F.3d at 381.

37. *Giffen I*, 326 F. Supp. 2d 497, 499 (S.D.N.Y. 2004); see also *Giffen II*, 379 F. Supp. 337, 340 (S.D.N.Y. 2004) (referring to defendants by name in the discovery disclosure opinion decided the same year).

as co-conspirator #1.³⁸ Jean Jacques Bovay is most likely co-conspirator #3 according to a related Swiss bribery probe.³⁹

None of the seven banks allegedly involved has been publicly indicted so far.⁴⁰ Of the alleged sources of the money, U.S.-listed oil and gas companies seeking lucrative contracts in Kazakhstan, only one Mobil Oil executive, J. Bryan Williams (co-conspirator #2), has been charged with or convicted of criminal activity.⁴¹ The U.S.-listed oil and gas companies allegedly supplying the bribe money are named in the indictment of Giffen, but have not themselves been publicly indicted.⁴² The indictment names Mobil Oil, Amoco, Phillips, and Texaco.⁴³ British Petroleum (“BP”), Statoil, and British Gas have been implicated in a separate civil lawsuit involving Giffen’s role in Kazakh oil and gas contracts, but have largely been protected so far from embarrassing public disclosures, although their names have been leaked on the Internet.⁴⁴

38. See Indictment at 10, 12, *United States v. James H. Giffen*, No. 03 Crim. 404 (S.D.N.Y. 2008). Mr. Eronat, a former U.S. citizen now believed to be a citizen of the United Kingdom, has been involved with numerous controversial oil deals including Darfur. Johnathan Miller, *Briton Involved in Sudan Oil Drill*, CHANNEL 4 NEWS, June 9, 2005, <http://www.channel4.com/news/articles/world/briton%20involved%20in%20sudan%20oil%20drill/108405>. As owner of two shell companies, Nichem Energy, Ltd., and Vaeko Europe Ltd., Eronat was involved in a civil breach of contract case involving the Giffen/Kazakhstan transactions which is how we discovered his identity. See *Eronat v. Tabbah*, [2002] EWCA (Civ) 950, [2] (Eng.).

39. Steve LeVine & Marcus Walker, *Swiss Launch Bribery Probe in Kazakh Case*, WALL ST. J., May 6, 2003, at A22.

40. Chase Manhattan, Citibank, Bankers Trust, Credit Agricole Indosuez (at the time Banque Indosuez), Banque Bruxelles Lambert (Suisse), Pictet & Cie, and Credit Suisse. Indictment, *supra* note 38, at 3, 10, 19, 62-63, 70-71. The Indictment names three Swiss banks and one U.S. bank seeking attachments of funds Giffen allegedly laundered as part of the alleged bribery scheme. Paragraph 48 names the fourth Swiss bank, Credit Suisse, as having wired over \$100 million in funds allegedly involved in the scheme. *Id.* at 19.

41. See Indictment, *supra* note 38, at 11, 63-64, 67. Mr. Williams, a vice president at Mobil Oil at the time, was sentenced to forty-six months in prison and a \$25,000 fine on tax charges related to his participation in the Giffen/Kazakhstan alleged bribery scheme. See *United States v. Williams*, 92 A.F.T.R.2d (RIA) 2003-6785, 2003-6785, 2003-6792 (S.D.N.Y. 2003). He refused to testify against Giffen.

42. See Indictment, *supra* note 38, at 9, 14, 21, 50.

43. *Id.* (Mobil Oil at paragraph 17, Amoco at paragraph 32, Phillips at paragraph 53, and Texaco at paragraph 87J).

44. The FCPA Blog, *Grynberg v. BP et al.*, <http://www.fcpcbog.com/blog/2008/4/15/grynberg-v-bp-et-al.html> (Apr. 14, 2008, 21:46 EST). The names of the other oil companies were leaked through a civil suit filed in the U.S. District Court for the District of Columbia by Colorado oilman Jack Grynberg. See *id.* In the complaint Grynberg alleges that BP, Statoil, and British Gas used Grynberg’s money to bribe Kazakh officials through James Giffen. *Id.* A prominent scientific analyst in the U.S. Army Research and Development Command, Grynberg has forty years experience in international petroleum exploration, spending \$20 million to file several False Claims Act *qui tam* lawsuits against 305 corporations who were allegedly mismeasuring the volume of natural gas in an attempt to defraud Native Americans of natural gas royalties. *Id.*; see, e.g., *In re Natural Gas Royalties Qui Tam Litigation*, 467 F. Supp. 2d 1117, 1127 (D. Wyo. 2006); United

The heroic efforts to maintain the secrecy of the identities of the players even extended to James Giffen's first legal defense team at Akin Gump Hauer & Feld LLP ("Akin Gump"), which tried to shield some of the documents (from the thirty Swiss bank accounts at four different Swiss banks plus Chase Manhattan, Citibank, and Bankers Trust) under the attorney-client privilege as work product based on their work compiling the bank records. The Second Circuit rejected the attorney work-product shield out of hand, expressing some chagrin about the "carefully orchestrated defense strategy."⁴⁵ "Similarly troubling is the [law] firm's failure to identify or submit the responsive documents for in camera review, a practice both long standing and routine in cases involving claims of privilege."⁴⁶

By 2004, Giffen had changed law firms. Now represented by Kronish Lieb Weiner & Hellman of New York, Giffen raised secrecy again, this time on the offense.⁴⁷ Seeking classified U.S. intelligence agencies' documents to explore whether a public authority defense might be available to him, Giffen filed broad discovery requests.⁴⁸ (This is known informally as the "Ollie North defense" strategy.)⁴⁹ Giffen

States *ex rel.* Grynberg v. Alaska Pipeline Co., No. Civ. 95-725(TFH), 1997 WL 33763820, at *1 (D.D.C. Mar. 27, 1997). The *qui tam* actions are currently pending before the U.S. Tenth Circuit Court of Appeals. The FCPA Blog, *supra*.

45. *In re Grand Jury Subpoena II*, 318 F.3d 379, 386 (2d Cir. 2002).

46. *Id.*

47. *Giffen II*, 379 F. Supp. 2d 337, 340-41 (S.D.N.Y. 2004).

48. *Id.* at 340-41. Giffen's proffer in 2004 alleges that he was encouraged by an unnamed U.S. intelligence agency "to stay close to" the President of Kazakhstan and to "continue to report." *Giffen III*, 473 F.3d 30, 35 (2d Cir. 2006). The Second Circuit observed, at some length, that Giffen's proffer does not appear to meet the legal standards for either a public authority defense or an entrapment by estoppel defense. *Id.* at 39-43. There are three versions of the public authority defense: (1) the defendant may offer evidence that he or she mistakenly believed that the crimes were performed in cooperation with the government; (2) the defendant knowingly committed a criminal act in reliance on a grant of authority from a government official; and (3) "entrapment by estoppel," in which the government agent makes a mistake that the defendant relied on when breaking the law. These defenses are examined in *United States v. Abcasis*, 45 F.3d 39, 43-44 (2d Cir. 1995) and *United States v. Duggan*, 743 F.2d 59, 83-84 (2d Cir. 1984). For a concise explanation of the public authority defenses and applicable law, see generally U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 2055 (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00000.htm (click links at top of page for specific sections).

49. Using a public authority defense to compel wide-ranging discovery of classified U.S. intelligence documents in the hopes that the government will dismiss the case rather than face public embarrassment is a fairly standard defense ploy. See *Giffen III*, 473 F.3d at 33. ("If the court declines to permit such a substitution, and the government objects to disclosure of the classified information, the presumptive remedy is dismissal of the indictment.") It is known informally as the "Ollie North defense." See Kathleen A. Ravotti, Note, *Caplin & Drysdale, Chartered v. United States and United States v. Monsanto: The "War on Drugs" Gets a New Recruit*, 22 LOY. U. CHI. L.J. 297, 333 n.254 (1990). Sometimes it is referred to as the "Nuremberg" defense, referring to Nazi officials who defended war crimes charges on the grounds that they were just following orders.

apparently believes that virtually the entire gamut of U.S. intelligence agencies authorized his alleged bribery of Nazarbaev as well as the alleged money laundering and tax evasion schemes.⁵⁰ Giffen claims that an un-named U.S. intelligence agent's alleged statement "to remain close to" President Nazarbaev and "continue reporting" constituted actual or apparent government authorization or entrapment to engage in the alleged bribery, money laundering, and tax evasion activities.⁵¹

District Court Judge Pauley agreed to allow Giffen discovery access to U.S. government classified documents regarding U.S. intelligence activities in Kazakhstan during the period in question.⁵² The Second Circuit dismissed the government's interlocutory appeal of Giffen's discovery motions, but remanded to the district court with very detailed dicta about the applicable legal standards regarding the public authority defenses, indicating that Giffen's proffer did not appear to

See John M. Burman, *The Ethical Duties of Prosecutors of Detainees Who Appear Before Military Commissions*, 18 TEMP. POL. & CIV. RTS. L. REV. 69, 87, 109 (2008); Ross L. Weiner, Note, *The Office of Legal Counsel and Torture: The Law as Both a Sword and Shield*, 77 GEO. WASH. L. REV. 524, 532 (2009).

North's new twist was to use embarrassing discovery requests attempting to derail the prosecution. During the Iran-Contra scandal under the Reagan administration, secret arms-for-hostages deals with the hostile government in Iran surfaced. Abraham D. Sofaer, *Iran-Contra: Ethical Conduct and Public Policy*, 40 HOUS. L. REV. 1081, 1084 (2003). Sofaer was Legal Advisor to the U.S. Department of State during this period. Lt. Colonel Oliver L. North defended delivery of U.S. missiles to the hostile Iranian government in violation of U.S. statutes claiming public authorization from President Ronald Reagan. *See id.* at 1081, 1085-86. The Court of Appeals affirmed the lower court's refusal to subpoena President Reagan regarding North's public authorization defense. *United States v. North*, 910 F.2d 843, 888-89 (D.C. Cir. 1990). The appellate court also affirmed the trial court's jury instructions severely limiting the public authorization defense and the trial court's limitations on discovery of classified materials. *Id.* at 881, 898. North's convictions on three felony counts were overturned on other grounds. *Id.* at 852. (Despite President Reagan's repeated public denials of secret arms-for-hostage deals with Iran at the time, it turned out that Reagan had actually authorized several arms-for-hostages deals. North had been authorized as it eventually turned out; President Reagan left him twisting in the wind. *See* Sofaer, *supra*, at 1084-86).

The Ollie North defense strategy is to hope that the embarrassment to the U.S. intelligence agencies will be sufficient to make the case go away, since the presumptive remedy for U.S. government's objections to disclosure of classified materials is dismissal of the criminal case. *See North*, 910 F.2d at 899. Perhaps it is payback—the U.S. government is embarrassing the President of Kazakhstan with disclosures of his secrets, so Giffen gets even by forcing disclosure of U.S. intelligence agency activities concerning Kazakhstan. Perhaps Giffen was actually a U.S. intelligence officer, although the U.S. intelligence communities deny this. North was an active duty member of the U.S. armed forces at the time he delivered U.S. missiles to Iran, and as it turns out, actually authorized to do so by President Reagan. Sofaer, *supra*, at 1085-86. Giffen was, and is, a private citizen.

50. *Giffen II*, 379 F. Supp. 2d at 341 ("Giffen contends that his activities with senior Kazakh officials were at the behest of the Central Intelligence Agency ("CIA"), the National Security Council ("NSC"), the Department of State, and the White House.")

51. *Giffen III*, 473 F.3d at 35.

52. *Giffen II*, 379 F. Supp. 2d at 343.

meet applicable legal standards for either public authority or entrapment by estoppel defenses.⁵³ “Remain close” and “continue reporting” are apparently not sufficient to constitute either authorization or entrapment by U.S. intelligence services; although as of 2010, Giffen continues successfully to seek discovery based on this defense in the district court.⁵⁴ Most recently an undated letter surfaced from Senator Mark Pryor (D-Ark.) to then-U.S. Attorney General Michael Mukasey, opposing a request for prosecutorial immunity from a prospective witness in the *Giffen* case on the grounds of the witness’s alleged human rights abuses.⁵⁵ The case is still pending, awaiting trial as of the spring of 2010.

The *Giffen* case was developed under then-U.S. Securities and Exchange Commission (“SEC”) Enforcement Director, Stan Sporkin. The case was apparently referred to the United States by Swiss banking authorities investigating an inquiry from Belgian officials.⁵⁶ Assistant U.S. Attorneys Peter G. Neiman and Philip E. Urofsky represented the people in both the 2002 and 2004 act of state aspects of the litigation, which are the main subjects of this Article.⁵⁷

This Article will not attempt to address all the myriad issues presented in the *Giffen* case. Instead it focuses on the specific legal issues arising where act of state defenses to bribery prosecutions are raised.

53. *Giffen III*, 473 F.3d at 39-43; *id.* at 44 (“[W]e doubt that Giffen has alleged facts satisfying the elements of actual public authority or entrapment by estoppel [T]he district court may find it useful to consider these observations when it returns . . . to the question whether Giffen can mount a public authority defense.”).

54. See *United States v. Giffen*, No. 03 Cr. 404, at 3 (S.D.N.Y. June 5, 2009), available at <http://www.fcpablog.com/blog/2009/7/16/james-giffen-and-americas-secrets.html> (follow hyperlink labeled “here” in the sixth paragraph).

55. Letter from Senator Mark Pryor to Michael Mukasey, Attorney Gen., (n.d.), available at <http://mainjustice.com/wp-content/uploads/2009/01/pryor-letter-to-doj.pdf>. The prospective witness, Mr. Rakhat Aliyev, was a high-ranking official in the Kazakh successor to the KGB and headed Kazakhstan’s Tax Police according to Senator Pryor’s letter. *Id.* Senator Pryor raised human rights objections to a grant of immunity because of Mr. Aliyev’s alleged past human rights abuses based on an undated article in the Washington Times referred to in Senator Pryor’s letter. *Id.*

56. LEVINE, *supra* note 26, at 373-75.

57. Philip Urofsky is, as of 2010, a partner at Shearman & Sterling, LLP. See Shearman & Sterling LLP, Philip Urofsky, <http://www.shearman.com/purofsky/> (last visited Apr. 14, 2010). Peter G. Neiman is still listed on PACER as lead counsel for the United States, but now serves as counsel in the Litigation/Controversy Department of WilmerHale. See *United States v. Giffen*, Criminal Docket, No. 03-cr-00404-WHP-1 (*Criminal Docket*) (S.D.N.Y. Apr. 2, 2003); WilmerHale, Peter G. Neiman, http://www.wilmerhale.com/peter_neiman/ (last visited Apr. 14, 2010). Urofsky and Neiman have been replaced by prosecutors Lee Renzin and Stephen J. Ritchin. *Criminal Docket, supra*.

III. SECRECY

Secrecy is the key issue for both bribe-givers and bribe-takers. This is not merely because giving bribes violates the domestic criminal laws of the United States⁵⁸ and all other OECD member nations.⁵⁹ Every nation, including all the developing and transition economy countries, has domestic laws which prohibit their own government officials from taking bribes from foreigners.⁶⁰

Secrecy is crucial for those operating in a developed legal system to avoid criminal prosecutions as well as the dreaded tax and securities law enforcers. For those operating in a system where law is less of a threat and those operating in “weak legal regime” systems in which the will of the executive *is* the law, secrecy is equally important in maintaining a façade of legitimacy and access to foreign aid.⁶¹ Secrecy allows business as usual, looting the country for personal gain and/or funding private paramilitary security forces⁶² while maintaining the public mask of a

58. See, e.g., Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 (2006) (prohibiting the bribery of foreign officials).

59. OECD Anti-Bribery Convention, *supra* note 1, at 6.

60. Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 LAW & POL'Y INT'L BUS. 305, 306 (1997). Professor Nichols, of the Wharton Business School at the University of Pennsylvania, is the leading business ethics scholar on international bribery. For an example of his work in this area, see generally Nichols, *supra* note 11, analyzing attitudes and perceptions of corruption in Kazakhstan. Mark Levin's important article analyzing the history of U.S. tobacco industry bribery in Japan stresses the central importance of secrecy. See Levin, *supra* note 13, at 479-81.

Controversy does exist about whether a customary gift can constitute a bribe, and whether criminalizing such gifts is a form of moral imperialism. See Spahn, *supra* note 3, at 163. Under the Foreign Corrupt Practices Act, all a foreign sovereign needs to do to insulate “customary” gifts is to legalize them. *Id.* at 165.

61. See Esther Pan, *Foreign Aid: Millennium Challenge Account*, COUNCIL ON FOREIGN REL., May 28, 2004, <http://www.cfr.org/publication/7748/>. President George W. Bush initiated a new program of development aid that “takes into account a country's credit rating, annual rate of inflation, three-year budget deficit, trade barriers, and the number of days needed to start a business,” indicators that, if made public, give a measure of government corruption. *Id.* The sixteen nations that made the information available to the public to qualify for the program are Armenia, Benin, Bolivia, Cape Verde, Georgia, Ghana, Honduras, Lesotho, Madagascar, Mali, Mongolia, Mozambique, Nicaragua, Senegal, Sri Lanka, and Vanuatu. *Id.*

The World Bank also requires openness for 167 of its development programs. The World Bank, Projects and Operations, <http://worldbank.org> (follow “Projects & Operations” hyperlink) (last visited Apr. 14, 2010).

62. The movie analogy is Nicholas Cage in the gripping *Lord of War*. See LORD OF WAR (Lions Gate Films 2005). For real legal scholarship, see generally Craig S. Jordan, Note, *Who Will Guard the Guards? The Accountability of Private Military Contractors in Areas of Armed Conflict*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 309 (2009), discussing the need to address the accountability of private military contractors. Global Witness, a non-profit human rights watchdog organization, found “direct links between Liberia's timber industry and the network of illegal arms transfers, private militias and human rights abuses that threaten international peace and security in

“legitimate” sovereign doing business with “legitimate” multinational businesses.⁶³

The crucial issue for U.S. law enforcement contemplating criminal charges against the supply side, U.S. bribe-givers, is discovery of documents and collection of evidence abroad. While the targets of prosecution are U.S.-listed corporations, citizens, or resident aliens,⁶⁴ the documentary evidence trail often leads abroad. Although MLATs,⁶⁵ letters rogatory,⁶⁶ and the Hague Convention⁶⁷ are available to both federal and state prosecutors (and in some cases private civil lawsuit plaintiffs), more efficient international mechanisms for cross-border cooperation between law enforcement officials are still sorely needed, particularly where more than two jurisdictions are involved in the complex financial maneuvering.⁶⁸

western Africa.” Douglas Farah, *Liberian Leader Again Finds Means to Hang On: Taylor Exploits Timber to Keep Power*, WASH. POST, June 4, 2002, at A1.

63. The “resource curse” is a notorious problem where multinational businesses contract to extract a country’s natural resources, but the large amount of money paid by the multinational corporations rarely reaches the local people or improves living conditions. Art Durnev & Sergei Guriev, *Resource Abundance and Corporate Transparency*, VOX, Nov. 21, 2007, <http://www.voxeu.org/index.php?q=node/737>. Studies show that resource abundance is correlated with declining corporate transparency, capital allocation, and growth. *Id.*; see also Republic of Kazakhstan: Selected Issues, *supra* note 27, at 7-13 (discussing the IMF report on the natural resources curse and Kazakhstan).

64. The jurisdiction of the FCPA is limited to U.S. “persons” and listed corporations. Lucinda Low et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, in THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH HEIGHTENED ENFORCEMENT RISKS 2007, at 63, 73-74 (PLI Corporate Law & Practice, Course Handbook Series No. B-1588, 2007); Donald Zarin, *The Foreign Payments Provision*, in FOREIGN CORRUPT PRACTICES ACT 2009, *supra* note 1, at 109, 124.

65. See ELLEN S. PODGOR & ROGER S. CLARK, UNDERSTANDING INTERNATIONAL CRIMINAL LAW 121 (2d ed. 2008). Guides to MLATs are available from the DOJ website. U.S. DEP’T OF JUSTICE, *supra* note 48, § 276. Kazakhstan does not currently have a mutual legal assistance agreement with the United States. U.S. DEP’T OF STATE, TREATIES IN FORCE 150-51 (2009).

66. See PODGOR & CLARK, *supra* note 65, at 119-21. Both the U.S. Attorney’s Office and the State Department have manuals on the use of letters rogatory. U.S. DEP’T OF JUSTICE, *supra* note 48, § 275; U.S. Dep’t of State, Service of Legal Documents Abroad, http://travel.state.gov/law/info/judicial/judicial_680.html (last visited Apr. 15, 2010). For a guide on the use of multiple methods of evidence collection for FCPA investigations, see PODGOR & CLARK, *supra* note 65, at 119-24, describing the process for obtaining letters rogatory and MLATs, and Rochelle Meddoff, *Bring Out the Big Guns: Using International Law for FCPA Prosecutions Broadens the Availability of Foreign Discovery Mechanisms* 12-22 (Dec. 2008) (unpublished student research project, on file with Hofstra Law Review).

67. See 1 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE: CIVIL AND COMMERCIAL 233 (2000); Meddoff, *supra* note 66, at 22, 25-26; see also United Nations Convention Against Corruption, G.A. Res 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003).

68. See Michael D. Mann & William P. Barry, *Attachment: Developments in Cross Border Cooperation in Securities Enforcement*, in PARALLEL PROCEEDINGS IN SECURITIES CASES 359, 387, 399 (PLI Corporate Law & Practice, Course Handbook Series No. B-1644, 2008).

Foreign officials are often touchingly loyal to, and protective of, their American business partner/alleged bribe-supplier; the foreign sovereign may also wish to prevent embarrassing public disclosure of the gifts or bribes allegedly received by his or her own officials, relatives, and cronies. Legal defenses based on notions of foreign sovereignty to cross-border evidence gathering efforts have been a major hurdle for U.S. criminal law enforcement. Because bribery under the U.S. statute by definition involves a foreign official, foreign sovereignty defenses have been raised to shield the American alleged bribe-giver as well as the foreign official alleged bribe-taker.

IV. SOVEREIGNTY

From the very beginning of the *Giffen* case, foreign sovereignty defenses were asserted to protect the business transactions from discovery in the U.S. grand jury proceedings. The Republic of Kazakhstan, through their attorneys at Steptoe & Johnson, entered an appearance in the proceedings three different times⁶⁹ to assert shields based on foreign sovereignty notions to protect James Giffen, his bank Mercator, Mobil and the other oil companies, the four Swiss and three U.S. banks, and most importantly to protect the secrets of President Nazarbaev and Oil Minister Balgimaev.

*A. The Foreign Sovereign Immunity Act*⁷⁰

One might fairly ask why foreign sovereignty-based defenses are even relevant to the U.S. prosecution of U.S. persons for alleged violations of U.S. law. The Foreign Sovereign Immunity Act (“FSIA”) does not apply to Foreign Corrupt Practices Act (“FCPA”) cases. The FSIA is limited to cases where a foreign official is named as a defendant

69. See *In re Grand Jury Subpoena I*, 218 F. Supp. 2d 544, 549 (S.D.N.Y. 2002). The Republic of Kazakhstan also lobbied to squelch the proceedings discussed below.

70. The FSIA covers cases where a claim is made against a foreign sovereign. See 28 U.S.C. §§ 1602-1603 (2006). The FSIA is codified in 28 U.S.C. §§ 1602-1611.

[P]rior to the enactment of the Foreign Sovereign Immunities Act of 1976, foreign states enjoyed absolute immunity from suit in U.S. courts. Thus, Americans with claims against foreign nations had no recourse other than presidential espousal and settlement of their claims. . . . To the extent that Congress has constitutional power to abrogate foreign sovereign immunity and has exercised such power, the federal government can countermand existing state and federal law claims only by adopting a contrary federal statute or treaty.

Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1618 (2007). Clark provides a useful, short introduction to the enactment of the FSIA in 1976. *Id.* at 1618-24.

in U.S. judicial proceedings.⁷¹ By contrast, the FCPA does not cover foreign officials.⁷² “Foreign officials who [allegedly] receive bribes are not covered by the FCPA, nor can they be prosecuted for conspiracy to violate it” under U.S. domestic law.⁷³

There is an explicit statutory provision which provides that the foreign sovereign and its officials are not subject to the American FCPA statute.⁷⁴ The foreign sovereign cannot be a party or a target, nor is it directly involved in the actual proceeding.⁷⁵ Therefore, the FSIA does not apply at all to FCPA cases since the FSIA is limited to cases where a foreign official is a defendant in a U.S. action.⁷⁶

Yet the *interests* of the foreign sovereign are very much in play, even though the foreign sovereign him or herself can never personally become a defendant or target in an FCPA criminal investigation in the United States. Loyalty to the U.S. business partner and alleged bribe-supplier is one potential interest of the foreign sovereign. Of course the real interest of the foreign sovereign is to avoid public disclosure of his or her own secrets about how he or she has amassed and hidden the allegedly ill-gotten wealth.

Raising legal defenses based on notions of foreign sovereignty are also tactically useful. These affirmative defenses are intricate and technical, drifting off into obscure and scary intersections of not only foreign law, but also international comity, conflicts of law, and U.S. constitutional law. U.S. prosecutors and judges are understandably reluctant to take on these very well-funded alleged bribe-givers and their accomplished battalions of high-priced attorneys. One need only imagine a prosecutor who comes face-to-face for the first time with foreign sovereign immunity, act of state, international comity, or separation of powers based shields to see the tactical value for the defense in raising such issues.

It is helpful before plunging into the intricacies of act of state defenses to a bribery case to fix firmly in our own minds the simple

71. See 28 U.S.C. §§ 1603, 1605. FSIA covers a “foreign state” and its “agenc[ies] or instrumentalit[ies].” 28 U.S.C. § 1603(a)-(b). “An agency or instrumentality of a foreign state” must be “a separate legal person . . . which is an organ of a foreign state” and is not a citizen of the United States. *Id.*; see also 28 U.S.C. § 1332 (2006).

72. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2006); see also Zarin, *supra* note 1, at 112 (“In enacting the FCPA, Congress intentionally limited its jurisdictional scope principally to U.S. entities.”).

73. *In re Grand Jury Subpoena I*, 218 F. Supp. 2d at 550.

74. 15 U.S.C. § 78dd-1(a)(1)(A) (2006).

75. *In re Grand Jury Subpoena I*, 218 F. Supp. 2d at 550; see 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

76. See 28 U.S.C. § 1604 (2006).

uncontroverted fact that the foreign sovereign is not, and cannot become, a defendant in an FCPA action.

B. The Foreign Corrupt Practices Act

FCPA cases involve the United States asserting jurisdiction over U.S. actors. The FCPA covers U.S. citizens and residents, U.S.-listed corporations, their agents, consultants, subcontractors, subsidiaries, and joint ventures.⁷⁷ The FCPA is a domestic law applied to U.S. persons.⁷⁸ It does not provide that a foreign sovereign can be named as a defendant.⁷⁹ It is not meddling in the internal affairs of a foreign nation.

77. See 15 U.S.C. §§ 78dd-1 to -3; see also Zarin, *supra* note 64, at 112-13 (describing the FCPA's jurisdictional scope). Businesses with headquarters and operations entirely outside the United States might not be covered under the FCPA. See Zarin, *supra* note 64, at 112. However, if the foreign business has listed itself on a U.S. stock exchange or has operations inside the United States, it will not escape FCPA coverage. See *id.* Some London-based banks are reportedly attempting to attract clients away from New York by claiming that relocating to the United Kingdom will reduce exposure to American laws banning bribery and money laundering. If the London-based bank or the foreign business itself have listed on the U.S. exchanges or have operations inside the United States, this claim is not true. The United States asserts jurisdiction over businesses listed on U.S. exchanges or with operations inside the United States regardless of forum shopping in placing bank business or incorporation. See *id.* at 112-13.

Although the United Kingdom has been scandalously lax in enforcing its own laws and meeting its treaty obligations to combat bribery, this situation may be improving since Jessica de Grazia, the chief of the Serious Fraud Unit in the Manhattan District Attorney's Office, was recently named head of the U.K. Serious Fraud Office. The FCPA Blog, <http://www.fcpablog.com/blog/2009/7/24/here-comes-the-sfo-part-one.html> (July 24, 2009, 08:22 EST). She has fired half the staff in the U.K. office. See David Leppard, *She Came, She Saw, She Scythed Through the SFO*, SUNDAY TIMES (UK), Feb. 1, 2009, at 4, available at <http://business.timesonline.co.uk/tol/business/economics/article5627453.ece>. France (Elf-Aquitaine) and Germany (Siemens) have aggressively prosecuted their own corporations for bribery abroad. See John Tagliabue, *At a French Trial, a Tale Unfolds of Graft on High*, N.Y. TIMES, Apr. 18, 2003, at A8; Posting of Cyndee Todgham Cherniak to Trade Lawyers Blog, [http://tradelawyersblog.com/blog/archive/2008/september/article/german-court-decision-in-one-of-many-siemens-corruption-of-foreign-pulbic-officials-cases/?tx_ttnews\[day\]=21&cHash=424b6fd49c](http://tradelawyersblog.com/blog/archive/2008/september/article/german-court-decision-in-one-of-many-siemens-corruption-of-foreign-pulbic-officials-cases/?tx_ttnews[day]=21&cHash=424b6fd49c) (Sept. 21, 2008, 11:43 EST).

Japan has done nothing of significance against Japanese business interests; it has sanctioned the notorious money launderers at Citibank Private Banking. On June 26, 2009 the Japanese Financial Services Agency ordered Citibank to suspend all sales activities in Japan for one month as punishment for slack money-laundering controls that allowed crime syndicates to open hundreds of accounts. *Citibank Division to Halt Sales for Month*, JAPAN TIMES, July 15, 2009, at 7; Press Release, Citibank Japan Ltd., *Citibank Japan Receives Administrative Action from the Financial Services Agency* (June 26, 2009), available at http://www.citigroup.jp/english/press_release/2009/20090626_en.pdf. This closure came after Citibank failed to rectify compliance problems that resulted in the license revocation of Citibank Private Banking on September 30, 2004. Mayumi Negishi, *Citibank Japan Ordered to Close Four Offices over Legal Breaches*, JAPAN TIMES ONLINE, Sept. 18, 2004, <http://search.japantimes.co.jp/cgi-bin/nn20040918a1.html>.

78. See 15 U.S.C. §§ 78dd-1(g), 78dd-2(i), 78dd-3(f).

79. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a); see also *In re Grand Jury Subpoena I*, 218 F. Supp. 2d at 550.

This is not legal, moral, or cultural imperialism.⁸⁰ The United States is asserting legal control over its own U.S. persons, such as James Giffen, who is a U.S. citizen, an attorney admitted to the practice of law in the State of New York, and a merchant banker whose bank is a New York corporation.

The confusion arises because one element of an FCPA action is that the payment or gift (alleged bribe) must be made to an official of a foreign government. Although the foreign official him or herself is not, and can never be, named as a party to an FCPA case, evidence of a payment made to a foreign official by the U.S. actor must be presented.⁸¹ Thus, while the foreign official is not directly involved in an FCPA case, his or her interest in preserving the secrecy of payments made by Americans is involved. Tangential disclosure of the foreign official's secrets is the real risk to foreign sovereigns in FCPA cases.

Not all payments or gifts made by Americans to foreign officials are banned under U.S. law. There are two significant exceptions to the FCPA. First, the U.S. statute banning bribery of foreign officials provides a statutory exception for what are colloquially known as "grease payments"—small routine facilitating payments (like a tip to a waiter), which are customary in many countries with underpaid low-level government workers.⁸² This grease payment exception to FCPA coverage is limited to payments to foreign officials performing routine, ministerial acts such as issuing a routine license or hooking up electrical service.⁸³ The grease payment exception is basically in accord with some act of state doctrine cases which have found a ministerial exception for routine, ministerial functions such as issuing a patent.⁸⁴

James Giffen did not claim that the alleged \$105 million payments to the highest levels of the Kazakh government constituted a grease payment exempted from FCPA coverage. The \$105 million was allegedly designed to influence high Kazakh officials to award oil business to certain U.S.-listed oil corporations, which goes to the core of the FCPA prohibitions.⁸⁵

80. See Spahn, *supra* note 3, at 172.

81. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

82. See 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b); Andrea Dahms & Nicolas Mitchell, *Foreign Corrupt Practices Act*, 44 AM. CRIM. L. REV. 605, 617 (2007); Low, *supra* note 64, at 76.

83. See 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b); Low, *supra* note 64, at 76.

84. See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293-94 (3d Cir. 1979); *Forbo-Giubiasco S.A. v. Congoleum Corp.*, 516 F. Supp 1210, 1217 (S.D.N.Y. 1981); *Sage Int'l Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 904 (E.D. Mich. 1981).

85. "Giffen does not argue that the \$78 million was a 'facilitating' payment. Nor could the alleged payments be characterized as 'facilitating' a routine governmental action because, as alleged in the indictment, they were primarily intended to influence the senior Kazakh officials to award

A second, more significant defense under the FCPA statute occurs where the payments are legal under the written laws of the foreign sovereign.⁸⁶ The FCPA provides that “[i]t shall be an affirmative defense to actions . . . that (1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country.”⁸⁷

This exception is centrally important when considering act of state doctrine defenses to bribery cases. Each sovereign jealously guards its power to tax and regulate its own business actors. For one sovereign to hand over the power to regulate what constitutes a legitimate business expense to a foreign sovereign is an impressive demonstration of international comity and respect for foreign sovereigns. Yet this is precisely what the United States has done. The United States has given away its own sovereign power to regulate payments made by U.S. persons.

Any potential conflict between the laws of the two sovereigns regarding whether the payment is an illegal bribe or a legal payment (a gift, commission, tax, or fee) is statutorily resolved in favor of the foreign sovereign by U.S. law. If the payments in question are legal under the written law of the foreign country, the United States does not attempt to regulate.⁸⁸ Any concern regarding appropriate deference to the legitimate sovereign interests of a foreign nation are exceptionally well protected under the FCPA. This provision of the FCPA is truly astonishing when examined in light of international comity and respect for equal sovereignty between nations.

The FCPA statutory provisions provide considerably more international comity protection to foreign sovereign interests than the judge-made act of state doctrine. Under the FCPA, the payment must merely be “lawful” under the law of the foreign sovereign, while under

new business to Mercator.” *Giffen I*, 326 F. Supp. 2d 497, 501 (S.D.N.Y. 2004) (citing *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 409-10 (1990)).

86. *See* 15 U.S.C. § 78dd-1(c).

87. *Id.*

88. *See id.* One business professor has argued that requiring a formal written statute by the foreign state authorizing payments constitutes cultural imperialism by the United States. *See* Steven R. Salbu, *Battling Global Corruption in the New Millennium*, 31 *LAW & POL’Y INT’L BUS.* 47, 68 (1999); Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 *WASH. & LEE L. REV.* 229, 275-80 (1997); Steven R. Salbu, *Colloquy, Extracurricular Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 *YALE J. INT’L L.* 223, 227, 231 (1999); Steven R. Salbu, *Information Technology in the War Against International Bribery and Corruption: The Next Frontier of Institutional Reform*, 38 *HARV. J. ON LEGIS.* 67, 84 (2001).

the act of state doctrine the action must be “official.”⁸⁹ Proof that an action is “lawful” under foreign law is a considerably lower threshold than proof that it is an “official” act as defined by U.S. law.

To prevent disclosure of payments allegedly made by James Giffen in U.S. judicial proceedings, the Republic of Kazakhstan merely needed to pass a statute authorizing payments, commissions, or gifts by foreigners to Kazakh officials in return for business contracts as part of Kazakhstan’s ancient, customary, and widely accepted alleged cultural practices.⁹⁰ A simple legal rule codifying the allegedly widely accepted practice of personal payments to officials in return for official business would completely insulate Kazakh officials from having their U.S. business partners face criminal prosecutions in the United States and the collateral embarrassment of having Kazakh officials’ personal financial secrets made public.

C. *The Act of State Doctrine in Bribery Cases*

Having firmly established that a foreign official cannot become a defendant in an FCPA action (the FSIA does not apply to FCPA cases), and that if a payment is legal under the law of the foreign state, there is no FCPA violation in the first place, we then come to the third legal problem, the act of state doctrine. The act of state doctrine is a judge-made doctrine resting on both international comity and domestic separation of powers policy underpinnings.⁹¹ Act of state doctrine cases

89. See 15 U.S.C. § 78dd-1(c); *Giffen I*, 326 F. Supp. at 501.

90. Philip Nichols of the Wharton School of Business at the University of Pennsylvania, the leading business ethics scholar on bribery, has a very significant empirical study regarding whether there is in fact a widespread cultural tolerance for bribery inside Kazakhstan. See generally Nichols, *supra* note 11 (providing a detailed analysis of the study’s findings and implications). Professor Nichols’s findings, that local people in Kazakhstan do not accept bribery as part of their customary culture, provide relatively hard data evidence to counter Dean Salbu’s policy arguments. See *id.* at 867; see also Spahn, *supra* note 3, at 203-08 (reiterating the empirical significance of Nichols’s study).

91. See *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp.*, 493 U.S. 400, 404 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303-04 (1918). Historically, the act of state doctrine was seen primarily as a function of international comity policies. *Kirkpatrick*, 493 U.S. at 404; *Sabbatino*, 376 U.S. at 423; *Oetjen*, 246 U.S. at 303-04. More recently the Court has emphasized the domestic U.S. separation of powers underpinnings. Justice Scalia described this evolution as follows:

This Court’s description of the jurisprudential foundation for the act of state doctrine has undergone some evolution over the years. We once viewed the doctrine as an expression of international law, resting upon “the highest considerations of international comity and expediency.” We have more recently described it, however, as a consequence of domestic separation of powers, reflecting ‘the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder’ the conduct of foreign affairs.

historically have involved lawsuits in U.S. courts challenging a foreign government's seizure, appropriation, or nationalization of private property abroad, most famously the seizure of cigar companies' property by Fidel Castro's government in the 1960s.⁹²

The modern statement of the act of state doctrine is found in the Supreme Court's 1990 case *W.S. Kirkpatrick & Co. v. Environmental Tectonics*.⁹³ *Kirkpatrick* involved U.S. bribery⁹⁴ of Nigerian officials in the context of a private lawsuit for damages under U.S. antitrust and civil RICO laws against the winning bidder, Kirkpatrick, brought by the disappointed competitor, Environmental Tectonics.⁹⁵ (Note that the foreign sovereign, Nigeria, was not a party to *Kirkpatrick*, thus the FSIA did not apply.) Writing for a unanimous Court rejecting the application of an act of state doctrine shield, conservative intellectual powerhouse, Justice Scalia, held:

In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine.⁹⁶

The elements of an act of state doctrine defense, then, require that the act be “official” and “performed within the territory” of the foreign sovereign.⁹⁷ The third element of the act of state doctrine as articulated

Kirkpatrick, 493 U.S. at 404 (citations omitted).

92. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 685 (1976) (plurality opinion).

93. 493 U.S. at 401.

94. The bribery at issue in *Kirkpatrick* was not “alleged” but proven in a prior criminal FCPA proceeding. *See* *Envtl. Tectonics v. W.S. Kirkpatrick & Co.*, 659 F. Supp. 1381, 1387 (D.N.J. 1987).

95. *Kirkpatrick*, 493 U.S. at 400-01. Private lawsuits launched by disappointed competitors are clearly the most significant tool available to combat grand corruption at this point. An excellent law review article, Ethan S. Burger & Mary S. Holland, *Why the Private Sector is Likely to Lead the Next Stage in the Global Fight Against Corruption*, 30 *FORDHAM INT'L L.J.* 45, 47 (2006), examines private lawsuits. The article notes that German law already provides for a private lawsuit by disappointed competitors, *id.* at 69, that the United Nation's new Convention Against Corruption has private lawsuit provisions, *id.* at 61, and outlines numerous U.S. civil cases, *id.* at 63-68. Burger and Holland provide a major contribution to the field.

96. *Kirkpatrick*, 493 U.S. at 405-06.

97. *Id.* at 405. *See* GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 762-63 (4th ed. 2007); RALPH G. STEINHARDT, *INTERNATIONAL CIVIL LITIGATION: CASES AND MATERIALS ON THE RISE OF INTERMESTIC LAW* 507 (2002). Born, however, describes the element as “public” rather than the *Kirkpatrick* language of “official.”

by the Court in *Kirkpatrick* is met only where the outcome of the U.S. proceeding *requires* the U.S. court to decide on the validity of an official act performed within the territory of the foreign sovereign.⁹⁸ Unlike the Cuban cigar cases, where the validity of the new Cuban government's seizure of formerly private property was at the center of the litigation, resolution of the *Kirkpatrick* lawsuit did not require an American court to invalidate any Nigerian contracts tainted by bribery.⁹⁹ The lawsuit in *Kirkpatrick* sought money damages from the winning bribe-giving bidder, Kirkpatrick, not re-opening the Nigerian bidding process for the contract.¹⁰⁰ Thus, the Court rejected application of the act of state doctrine shield to the *Kirkpatrick* litigation.¹⁰¹

The judge-made act of state doctrine differs from both the FSIA and FCPA. Unlike the FSIA, the act of state doctrine may be raised in cases where the foreign sovereign is not him or herself personally a defendant.¹⁰² In this respect, the act of state doctrine provides broader shields than the FSIA. Unlike the FSIA, which protects virtually any acts of a foreign sovereign wherever they may geographically occur,¹⁰³ the act of state doctrine applies only to "official" acts which are performed within the foreign sovereign's physical territory.¹⁰⁴ In these two respects, the act of state doctrine is significantly narrower than the FSIA.

Unlike the FCPA, which provides an absolute defense for any payments which are "legal" under the law of the foreign sovereign, the act of state doctrine requires that the act be "official."¹⁰⁵ The act of state doctrine also requires that the official act be made "within the physical

98. *Kirkpatrick*, 493 U.S. at 406.

99. *See id.*

100. *Id.* at 402.

101. *Id.* at 409-10. Rejecting act of state doctrine shields to private lawsuits is a significant breakthrough in anti-corruption litigation, opening the door for private civil lawsuits. A plaintiff's bar is developing. *See* Burger & Holland, *supra* note 95, at 72-73.

102. *Compare supra* notes 70-71 and accompanying text (stating that the FSIA is limited to cases where a foreign official is named a defendant), *with Kirkpatrick*, 423 U.S. at 401, 409 (determining that the act of state doctrine is applicable when a foreign sovereign is not actually a defendant).

103. *See, e.g.,* Gang Chen v. China Cent. Television, 320 F. App'x 71, 73 (2d Cir. 2009) (describing "the *Filler* factors" to aid in the determination of what constitutes an "'organ' of a foreign state"); *Belhas v. Ya'alon*, 515 F.3d 1279, 1283 (D.C. Cir. 2008) ("But the FSIA is not written so narrowly as to exclude all but foreign states in name. It applies to foreign states, their political subdivisions, and their agencies and instrumentalities."); *see also* Daniel M. Singerman, Comment, *It's Still Good to Be King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity*, 21 EMORY INT'L L. REV. 413, 451-52 (2007) (discussing case law that denied applications for head of state immunity).

104. *Kirkpatrick*, 493 U.S. at 406, 409.

105. *Compare supra* notes 86-87 and accompanying text (discussing the most significant affirmative defenses under the FCPA), *with Kirkpatrick*, 493 U.S. at 406 (discussing the required elements of the act of state doctrine).

territory” of the foreign sovereign,¹⁰⁶ unlike the FCPA which does not limit “legal” acts to any particular geographical location.¹⁰⁷ If Kazakh statutes permit payments by foreigners to Kazakh officials via Swiss banks, the FCPA respects Kazakh law. In both aspects, the FCPA statutorily provides broader shields for foreign sovereign comity interests than the judge-made act of state doctrine.

How much additional judicial respect, over and above the very considerable international comity already provided in the FCPA statute itself, should be given to the interest in preserving the secrets of a foreign sovereign which may be tangentially exposed in a U.S. prosecution of a U.S. person? This question could take us off into the rarified world of theories of international comity.¹⁰⁸ Or, as in the prosecution of James Giffen, it could take us down into the very practical weeds of the act of state defenses to bribery cases.

Given how closely on point the *Giffen* fact pattern is to the Supreme Court’s unanimous 1990 decision in *Kirkpatrick*,¹⁰⁹ one might fairly ask what possible defenses Giffen could have raised based on the act of state doctrine after *Kirkpatrick* unanimously rejected use of the doctrine in the context of Americans bribing Nigerians. Preserving the secrets of Kazakh officials, the Swiss banks, and the U.S. oil companies allegedly involved in bribing them provided an incentive for some clever legal arguments on behalf of Giffen’s defense.

V. THE ACT OF STATE DOCTRINE: THE 2002 CHIN OPINION

Giffen first raised the act of state doctrine as a defense to a subpoena in the U.S. grand jury investigation.¹¹⁰ The Republic of Kazakhstan entered an appearance in the *Giffen* case through their attorneys at Steptoe & Johnson, arguing that the documents held by Giffen and Mercator were protected under Kazakh law and not subject to U.S. discovery proceedings.¹¹¹ Giffen and Mercator applied three

106. *Kirkpatrick*, 493 U.S. at 409.

107. See 15 U.S.C. § 78dd-1(a) (2006).

108. See generally Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS. 19 (2008) (discussing the evolving theories of comity over four centuries—from the Middle Ages through the early twenty-first century). John Cerone’s take on international comity is more skeptical, concluding that the United States “employ[s] international judicial authority when it suits U.S. interests.” John Cerone, *Making Sense of the U.S. President’s Intervention in Medellín*, 31 SUFFOLK TRANSNAT’L L. REV. 279, 284 (2008).

109. Compare *supra* Part II, with *Kirkpatrick*, 493 U.S. at 400-04.

110. See *In re Grand Jury Subpoena I*, 218 F. Supp. 2d 544, 556 (2002). An introduction to the act of state doctrine can be found in BORN & RUTLEDGE, *supra* note 97, at 751-806, and in STEINHARDT, *supra* note 97, at 507-08.

111. *In re Grand Jury Subpoena I*, 218 F. Supp. 2d at 547, 550.

separate times to the Kazakh Ministry of Justice for a “formal clarification” regarding the discovery of records in the U.S. grand jury proceeding.¹¹² Each request from Giffen through his attorneys at Akin Gump suggested a basis under Kazakh law for protecting the documents held by Giffen and Mercator.¹¹³ Each time, Kazakh legal officials (represented by Steptoe & Johnson) replied that the documents were indeed protected from discovery in the United States based on Kazakh law.¹¹⁴

The act of state doctrine argument was that by questioning Kazakh officials’ interpretation of Kazakh law, the U.S. court was declaring invalid an official act (the legal opinions regarding production of documents under Kazakh law) within their territory.¹¹⁵ The legal opinions of the Kazakh Minister of Justice originated in Kazakhstan (at least technically, although the basis for the Kazakh legal opinions were suggested by Giffen’s attorneys at Akin Gump, together with Kazakhstan’s attorneys at Steptoe & Johnson).¹¹⁶ Giffen and Kazakhstan argued the act of state doctrine prevented a U.S. court from questioning the decision of the foreign sovereign made within the foreign sovereign’s territory, and therefore the documents were shielded from subpoena discovery.¹¹⁷

Judge Chin emphasized the actual effects of the Kazakh Minister of Justice’s legal opinions rather than the geographical location where they were ostensibly created. “Although the ‘acts’ in question—the Minister’s Declaration, for instance—presumably originated in the Republic [of Kazakhstan], they were *prompted by and are now being*

112. *Id.* at 548-49.

113. *Id.*

114. The first request from Giffen and Mercator to the Kazakh Ministry of Justice and Supreme Court of Kazakhstan was in June, 2000. *Id.* at 548. Two of the highest legal officials of Kazakhstan replied that “[a]ny communication between [Kazakhstan] and [Giffen] . . . is part of the executive deliberative process of the executive power of [Kazakhstan]’ . . . [and] is considered ‘highly confidential and under the protection of executive privilege.’” *Id.* (first alteration in original). The second request followed in December, 2000, asking whether the documents in the possession of Giffen and Mercator belong to the American corporation or to the government of Kazakhstan under Kazakh law. *Id.* at 548-49. The Kazakh Minister of Justice promptly replied, in January, 2001, that the documents were “‘protected by the sovereign rights of the Republic,’ and ‘not subject to transfer to any third parties’” based on their status as commercial and official secrets. *Id.* at 549 (quoting the Kazakh Minister of Justice). The third request from Giffen to Kazakhstan occurred on April 12, 2002, asking whether any civil or criminal penalties could arise under Kazakh law if the documents were released to the U.S. grand jury. *Id.* The Kazakh Minister of Justice replied that criminal sanctions under Kazakh law for disclosure of state secrets may be punished by incarceration for up to three years. *Id.*

115. *Id.* at 556.

116. *Id.*

117. *Id.* at 549.

directed at a proceeding in the United States.”¹¹⁸ Judge Chin highlighted both the intended and the actual effect of the Kazakh legal opinions:

Even if the acts at issue can be seen as originating in the Republic, the intended effect is here in New York. That effect will be to deny the grand jury access to records of an American corporation based in New York. Thus, as a threshold matter, I conclude that the act of state doctrine is not applicable.¹¹⁹

Judge Chin’s reasoning and holding on this first aspect of the act of state doctrine closely follows prior U.S. act of state doctrine precedent as articulated by the Supreme Court in *Kirkpatrick*.¹²⁰ Judge Chin characterized the doctrine as follows:

The act of state doctrine counsels a court to avoid examining the validity of an official act of a sovereign state taken on its own soil. . . . [W]here the relief sought or the defense interposed would require a federal court to declare invalid the foreign government’s official act[, t]he foreign government need not be party to the action; the [act of state] doctrine may apply if the validity of the acts of a foreign sovereign will be passed on by the court.¹²¹

Noting that the judge-made act of state doctrine is not constitutionally mandated and has been preempted by acts of Congress,¹²² Judge Chin further observed that the “doctrine has been described both as a principle of abstention and as a rule of decision.”¹²³ The major policy supporting the act of state doctrine is the courts’ efforts to avoid adjudication of foreign sovereigns’ official acts within their own territory which might embarrass the United States in the conduct of our foreign policy.¹²⁴

118. *Id.* at 556 (emphasis added).

119. *Id.*

120. *Compare In re Grand Jury Subpoena I*, 218 F. Supp. 2d at 551-52, with *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 406 (1990).

121. *In re Grand Jury Subpoena I*, 218 F. Supp. 2d at 551-52 (citations and footnote omitted). Judge Chin relied on *Sabbatino* in his analysis of the act of state doctrine: “The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.” *Id.* at 551 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)).

122. The Second Hickenlooper Amendment is an example of a congressional reaction to *Sabbatino* that resulted in the Foreign Assistance Act of 1965. STEINHARDT, *supra* note 97, at 567. The Second Hickenlooper Amendment says that “no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on . . . a claim of title or other right to property.” *Id.*

123. *In re Grand Jury Subpoena I*, 218 F. Supp. 2d at 551 n.1.

124. *Id.* at 551-52.

Applying this formulation of the act of state doctrine to the government's subpoena of documents in the possession of Giffen and Mercator, Judge Chin held that the act of state doctrine did not apply.¹²⁵ Judge Chin questioned whether the act of state doctrine was even technically available under these facts. Relying on *Kirkpatrick*, Judge Chin's reasoning was that the act of state doctrine only applies where "the outcome of the case turns upon—the effect of official action by a foreign sovereign."¹²⁶ In the *Giffen* case, Judge Chin reasoned, the validity of any action taken by officials of Kazakhstan inside Kazakhstan is not at issue.¹²⁷ Here, "[Kazakhstan] intervened in an American grand jury proceeding targeting an American citizen and an American corporation, seeking to prevent access to records in New York and in the New York corporation's offices in [Kazakhstan]."¹²⁸

Judge Chin's understated opinion highlights the irony of a foreign government intruding into a U.S. judicial proceeding against a U.S. citizen while simultaneously requesting deference, comity, and respect from the United States. Protecting secrets cannot be accomplished by simply having the foreign minister of justice proclaim that the American's actions and documents are shielded by foreign law.

A. Comity for a Potentially Embarrassed Foreign Sovereign?

Potential embarrassment of a foreign sovereign is also not dispositive. Rejecting attempts to expand act of state shields to protect secrets that might embarrass foreign officials in *Kirkpatrick*, the Supreme Court unanimously held that:

Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. *The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments*, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. That doctrine has no application to the present case because the validity of no foreign sovereign act is at issue.¹²⁹

125. *Id.* at 556.

126. *Id.* (quoting *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp.*, 493 U.S. 400, 406 (1990)).

127. *Id.*

128. *Id.*

129. *Kirkpatrick*, 493 U.S. at 409-10 (emphasis added). *Kirkpatrick* disapproved of the Ninth Circuit's earlier decision in *Clayco* that the act of state doctrine shields foreign sovereigns from the embarrassment of inquiry into the foreign sovereign's motivation for a particular commercial transaction. See *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 407-09 (9th Cir. 1983).

Judge Chin's opinion in *Giffen* closely tracks binding Supreme Court precedent in *Kirkpatrick*, rejecting the potential embarrassment of a foreign sovereign as justification for invoking the act of state doctrine barriers to American judicial proceedings:

[T]he expansive formulation of the act of state doctrine advocated by the Corporation and the Republic—that the doctrine should be applied when there is a risk of embarrassment—would make enforcement of the FCPA practically impossible. *By definition, violations of the FCPA touch upon “official acts” of sovereign nations, and every investigation of a suspected violation of the FCPA has the potential to impugn the integrity of the officials of foreign sovereigns.* Congress determined to enact the FCPA despite this probability, and has more recently expanded its reach to accord with international agreements the United States encouraged.¹³⁰

Every FCPA bribery case by definition involves a payment to a foreign official, as Judge Chin notes.¹³¹ Thus, application of the act of state doctrine to prevent potential embarrassment of a foreign sovereign would emasculate the U.S. statute. Potentially or actually embarrassing a foreign sovereign as a barrier to U.S. judicial proceedings rests fundamentally on judge-made notions of international comity, a topic of great interest to academics and theorists. Delving into the finer points of the various theoretical approaches to international comity would normally cause any red-blooded American prosecutor or judge to run fleeing in the other direction.¹³² Indeed this defense strategy worked for Mobil Oil, among others, prior to the *Kirkpatrick* decision.¹³³ International comity has historically been one of the linchpin policies for act of state doctrine cases.¹³⁴

130. *In re Grand Jury Subpoena I*, 218 F. Supp. 2d at 557 (emphasis added).

131. *See id.* at 550, 557.

132. For those inclined to delve, I highly recommend Professor Joel Paul's concise, eleven-page, elegant *tour de force* intellectual history of the evolution of notions of international comity. *See generally* Paul, *supra* note 108.

133. *See Clayco*, 712 F.2d at 407, 409; *Hunt v. Mobil Oil Corp.*, 654 F. Supp. 1487, 1514-20 (S.D.N.Y. 1987).

134. In *Underhill v. Hernandez*, the Court stated:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

168 U.S. 250, 252 (1897). This principle of comity hails from England in the seventeenth-century case *Blad v. Bamfield*, (1674) 36 Eng. Rep. 992, 992-93 (Ch.). For a history of the act of state doctrine and international comity, see generally Michael Singer, *The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice*, 75 AM. J. INT'L L. 283 (1981), identifying differences between the past and present application of the act of state doctrine

Avoiding potential embarrassment to a sovereign is, in fact, one historic policy underpinning of the act of state doctrine. The confusion instigated by defendants in *Kirkpatrick* and *Giffen* is that under modern formulations, the sovereign to be protected from embarrassment is not primarily the foreign sovereign. Multinational corporations, even oil companies however powerful, are not legally recognized as sovereigns.¹³⁵ The sovereign to be protected from embarrassment is the U.S. executive branch. The specific policy concern is to ensure that U.S. judges do not inadvertently undermine the U.S. executive branch's ability to conduct foreign relations.¹³⁶

Relying again on *Kirkpatrick*, Judge Chin observed:

To the extent that the investigation, aided by the enforcement of this subpoena, might embarrass the [U.S.] executive branch, or hinder its conduct of foreign relations—presumably because it *risks angering an ever more important strategic ally over mere allegations bribery*—it is not for this Court to prevent it. It is the [U.S.] executive's “independence the act of state doctrine primarily protects.”¹³⁷

B. Separation of Powers

The second major policy underlying the act of state doctrine is domestic U.S. separation of powers, particularly the notion that courts should not interfere with or undermine the U.S. executive branch's ability to conduct foreign policy.¹³⁸ Tracing the evolution of the

in the United Kingdom and the United States, and Joseph W. Dellapenna, *Deciphering the Act of State Doctrine*, 35 VILL. L. REV. 1 (1990), articulating the history and present scope of the act of state doctrine.

135. See Andrew D. Patterson, *The Act of State Doctrine is Alive and Well: Why Critics of the Doctrine are Wrong*, 15 U.C. DAVIS J. INT'L L. & POL'Y 111, 134-38 (2008) (discussing oil company corruption as well as human rights and torture cases).

136. Indeed Justices Brennan, Marshall, and Powell in earlier act of state cases described the doctrine as a function of the political question doctrine under *Baker v. Carr*, 369 U.S. 186 (1962). *Goldwater v. Carter*, 444 U.S. 996, 997-98 (1979) (Powell, J., concurring); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 727-28 (1976) (Marshall, J., dissenting); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 785-90 (1972) (Brennan, J., dissenting). This has not been the prevailing view; however, it does highlight the jurisprudential concerns of U.S. courts, which are to restrain the judicial branch from interfering with executive foreign policy discretion. See BORN & RUTLEDGE, *supra* note 97, at 764.

137. *In re Grand Jury Subpoena I*, 218 F. Supp. 2d 544, 557 (S.D.N.Y. 2002) (emphasis added) (quoting *Associated Container Transp. (Austl.) Ltd. v. United States*, 705 F.2d 53, 61 (2d Cir. 1983)).

138. The unanimous Court in *Kirkpatrick* stated:

This Court's description of the jurisprudential foundation for the act of state doctrine has undergone some evolution over the years. We once viewed the doctrine as an expression of international law, resting upon “the highest considerations of international comity and expediency.” We have more recently described it, however, as a consequence of

doctrine, Justice Scalia in *Kirkpatrick* noted that the Court once viewed the act of state doctrine as an “expression of international law, resting upon ‘the highest considerations of international comity and expediency.’”¹³⁹ In modern times, however, the Court views the act of state doctrine as a “consequence of domestic separation of powers” and gives deference to the U.S. executive branch’s exercise of its foreign affairs powers.¹⁴⁰

The conflation of appropriate judicial deference to the U.S. executive branch with deference to a foreign sovereign is a feature of the defense strategy based on the act of state doctrine.¹⁴¹ Fortunately, the Supreme Court in *Kirkpatrick* as well as Judge Chin in *Giffen* are not buying it.

While *Kirkpatrick* and *Giffen* are similar in their Americans-bribing-abroad fact patterns and in their rejection of act of state defenses, there is one major difference between the two cases, which significantly impacts the separation of powers policy aspect of the act of state doctrine. The major difference between these two cases is that while *Kirkpatrick* was a private, civil lawsuit brought by a disappointed competitor,¹⁴² *Giffen* is a criminal prosecution brought by the U.S. government itself.¹⁴³ For act of state doctrine purposes, this distinction between a private civil action and a criminal prosecution launched by the federal government itself is significant.

Kirkpatrick rejects application of the act of state doctrine to shield alleged bribe-givers in a private, civil action, rejecting the notion that embarrassing a foreign sovereign would undermine the U.S. executive

domestic separation of powers, reflecting “the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder” the conduct of foreign affairs.

W.S. *Kirkpatrick & Co. v. Evtl. Tectonics Corp.*, 493 U.S. 400, 404 (1990) (citations omitted).

There is a cottage industry of academics debating whether the act of state doctrine is a function of international comity, domestic U.S. conflicts of law or choice of law, or separation of powers doctrine jurisprudences, and whether it is a rule of abstention or a rule of decision. See BORN & RUTLEDGE, *supra* note 97, at 763-65. For federal prosecutors in FCPA actions, fortunately, this debate is moot after *Kirkpatrick*. See *Kirkpatrick*, 493 U.S. at 406.

139. *Kirkpatrick*, 493 U.S. at 404 (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303-04 (1918)).

140. *See id.*

141. Exactly how much deference U.S. courts should appropriately give to the U.S. executive branch is a hotly contested political and legal topic at this historical moment. *See generally* Derek Jinks & Neil Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007) (arguing that broad judicial deference to the executive branch will lead to undesirable and detrimental results). Fortunately, we do not need to reach that problem. *But see infra* note 147 (discussing the Bernstein letter exception to the act of state doctrine).

142. *Kirkpatrick*, 493 U.S. at 402.

143. *In re Grand Jury Subpoena I*, 218 F. Supp. 2d 544, 547 (S.D.N.Y. 2002).

branch's ability to conduct foreign affairs.¹⁴⁴ *Giffen*, as a criminal prosecution, has the U.S. executive branch through the DOJ, as the moving party.¹⁴⁵ Presumably any danger of undermining U.S. foreign policy has already been considered inside the U.S. executive branch before the DOJ launches a major lawsuit as Judge Chin recognized:

Here, the "major underpinning" that justifies invoking the doctrine is absent, for separation of powers concerns are not implicated. The act of state doctrine serves to caution a court to defer to the executive branch when it appears its decision will "embarrass or hinder the executive in the realm of foreign relations." This motion is brought by the executive branch itself, and granting the Government's motion merely ratifies the considered aims of the political branch. "The conduct of foreign relations is committed largely to the Executive Branch The doctrine of separation of powers prohibits the federal courts from excursions into areas committed to the Executive Branch or the Legislative Branch."¹⁴⁶

The act of state doctrine separation of powers underpinnings are not as significant when the executive branch launches the lawsuit as they might potentially be in a privately launched civil suit such as *Kirkpatrick*.¹⁴⁷ Because the Supreme Court unanimously rejected the application of the act of state doctrine to protect non-party foreign sovereigns from collateral embarrassment in a private suit, Judge Chin's conclusion rejecting the act of state doctrine is even more firmly grounded in the context of a criminal case.

144. *Kirkpatrick*, 493 U.S. at 409-10.

145. *See In re Grand Jury Subpoena I*, 218 F. Supp. 2d at 557.

146. *Id.* (alteration in original) (citations omitted).

147. The "Bernstein exception" involves the executive branch, which submits a letter to the court stating it has no objection to the court exercising jurisdiction. *See Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 375-76 (2d Cir. 1954). Putting the executive branch on record prevents a court from inadvertently undermining executive branch foreign policy. Submission of a *Bernstein* letter thus creates an exception to the act of state doctrine. *See id.* The Supreme Court has not accepted the *Bernstein* exception, with Justice Rehnquist embracing the exception in a plurality opinion for *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972), and Justice Brennan writing that the *Bernstein* exception would "require us to abdicate our judicial responsibility." *Id.* at 778.

A "Bernstein letter" was proffered in the *Giffen* prosecution after Kazakhstan objected to their secrets being made public. *See In re Grand Jury Subpoena I*, 218 F. Supp. 2d at 557. In *Kirkpatrick*, the Supreme Court specifically declined to require or approve of the "Bernstein letter" practice, raising as it does difficult issues regarding the independence of the judicial branch. *See Kirkpatrick*, 493 U.S. at 404-05, 409. Where state or local prosecutors seek to enforce various criminal laws against multinational corruption, the advisability of a "Bernstein letter" might be considered to prevent dismissal on federalism or preemption grounds.

C. Political Expediency

Lobbying the U.S. Department of State and other highly placed officials within the U.S. executive branch to squelch the grand jury investigation, Kazakhstan, through its attorneys at Steptoe & Johnson, took the position that their secrets should not be discovered as a matter of political and economic expediency for the United States.¹⁴⁸

To their credit, the U.S. executive branch seems to have rejected,¹⁴⁹ at least so far,¹⁵⁰ this lobbying effort. Judge Chin noted:

In addition to these responses to the Corporation [Giffen and Mercator], the Republic [Kazakhstan] made *efforts to persuade the United States Government to stop the investigation, including a personal appeal* from high officials of the Republic to the United States Department of State. The Corporation and the Republic also sought, and were denied permission, to disclose the Government's motion papers in this case as part of an existing *effort to lobby other executive agencies to halt the investigation. These efforts have not been successful.*¹⁵¹

Lobbying efforts were not successful in derailing the prosecution. The fact that the U.S. political and economic interests in maintaining good relationships with Kazakh officials controlling huge oil and gas reserves did not undermine the criminal prosecution of U.S. actors for alleged bribery in violation of U.S. criminal laws is significant from a number of perspectives. The cynical view that our government is always corrupt and partisan, and that the United States bases its policies on economic expediency, particularly where oil is involved, is widespread at home and abroad.¹⁵² Another cynical view is that the idea of rule of law is merely a window dressing for protecting the interests of elite power players.¹⁵³

148. See *In re Grand Jury Subpoena I*, 218 F. Supp. 2d at 547, 549. It has been proven that Kazakhstan has vast untapped oil and gas reserves, which are estimated at about 30 billion barrels, according to the IMF. *Republic of Kazakhstan: Selected Issues*, *supra* note 27, at 17. See the U.S. Department of Energy's listing of various oil and gas fields and corporate interests in particular Kazakh reserves at Energy Info. Admin., *supra* note 27.

149. The *Giffen* investigation was initiated during Bill Clinton's tenure after a referral from Swiss banking authorities acting on a request from Belgian officials. See LEVINE, *supra* note 26, at 373-75. After George W. Bush became President in 2000, the *Giffen* investigation and prosecution continued. The *Giffen* case is still open under the new administration of President Barack Obama.

150. Cf. Letter from Senator Mark Pryor, State of Arkansas, to Attorney General Michael Mukasey, *supra* note 55 (urging former Attorney General Michael Mukasey to deny Rakhat Aliyev prosecutorial immunity in exchange for his offer to testify in the *Giffen* investigation).

151. *In re Grand Jury Subpoena I*, 218 F. Supp. 2d at 549 (emphasis added).

152. Stodghill, *supra* note 25, at 1.

153. Cf. JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 349 (2004).

The *Giffen* case is a concrete example to counter these cynical views of U.S. law. I do not mean to suggest that cynicism is always misplaced when it comes to the operation of the U.S. legal system.¹⁵⁴ I merely suggest that there are significant counter-examples. To the best of my current understanding, the frontline prosecutors in *Giffen* in 2002 were not undermined by the State Department or the White House even though Kazakhstan's oil and gas reserves are very impressive.¹⁵⁵ Despite the lobbying attempts by Kazakhstan and its oil company alleged bribe-suppliers, I believe that the *Giffen* prosecution may in fact be a significant example of the U.S. rule of law operating properly, without political, economic, or national self interest or favoritism. Or as Judge Chin more judiciously stated the point:

The Corporation [Giffen and Mercator] and the Republic [Kazakhstan] have raised the issue of *whether the "line prosecutor" in*

154. See, e.g., Barbara Crutchfield George & Kathleen A. Lacey, *Investigation of Halliburton Co./TSKJ's Nigerian Business Practices: Model for Analysis of the Current Anti-Corruption Environment on Foreign Corrupt Practices Act Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 503, 505-06 (2006). French magistrates referred Halliburton, a U.S. company, for participating in a scheme of about \$180 million in bribes to Nigerian officials. *Id.* at 505. Halliburton's bribery, through its then-subsiary Kellogg, Brown, and Root ("KBR"), began in 1994, during the period when Dick Cheney, later Vice President of the United States, was CEO of Halliburton. *Id.* at 505-06 & n.18. KBR pled guilty to a five-count criminal indictment resulting in the second largest fine in FCPA history, \$402 million, just before the end of the Bush and Cheney administration. See Halliburton Co., Litigation Release No. 20,897A, 95 SEC Docket 570 (Feb. 11, 2009), available at <http://www.sec.gov/litigation/litreleases/2009/lr20897.htm>; Press Release, Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine (Feb. 11, 2009), available at http://www.usdoj.gov/criminal/pr/press_releases/2009/02/02-11-09kellogg-guilty.pdf; The FCPA Blog, KBR and Halliburton Resolve Charges, <http://www.fcpablog.com/blog/2009/2/12/kbr-and-halliburton-resolve-charges.html> (Feb. 11, 2009, 19:08 EST). No prison terms were involved in the U.S. case. See Halliburton Co., Litigation Release No. 20,897A, 95 SEC Docket 570, *supra*; Press Release, Dep't of Justice, *supra*; The FCPA Blog, *supra*. To review the charges filed against Halliburton, see generally Complaint, SEC v. Halliburton Co., No. 4:09-399 (S.D. Tex. Feb. 11, 2009), available at <http://www.sec.gov/litigation/complaints/2009/comp20897.pdf>.

155. See *supra* notes 149-51 and accompanying text. It is possible that the *Giffen* prosecution was designed to take out certain oil companies in order to clear the field in Kazakhstan for more favored ones. Cynical conspiracy theorists might favor such an analysis; however, I have not one shred of evidence whatsoever to support such a theory. We did look carefully for such a pattern to the best of our ability in the publicly available records of which oil and gas companies were involved in developing Kazakhstan's reserves. See generally Cowan, *supra* note 29 (discussing various business decisions and subsequent criminal charges against Giffen).

The short answer is that pretty much every major company has a piece of the action there already. Operating through consortiums, virtually every major oil and gas company are already participating in the Kazakh reserves. See The FCPA Blog, Grynberg v. BP et al., *supra* note 44. See the U.S. Department of Energy's listing of various oil and gas fields and corporate interests, in particular Kazakh reserves, at Energy Info. Admin., *supra* note 27.

Favoritism to certain oil companies does not seem to be a factor. I think we are dealing with a relatively pure application of "equal justice under law." I could be wrong about this.

this matter adequately represents the executive branch. The Government provided a letter from Michael Chertoff, Assistant Attorney General in charge of the Criminal Division of the Department of Justice. The letter reiterates that the positions taken by the Government “represent the positions of the United States.” That letter also confirms that “the Department of State and other appropriate parts of the Executive Branch have been aware of the nature of this investigation for more than two years, both because the Department of Justice consulted within the executive branch, and because the Republic itself has contacted the State Department regarding the investigation.”

To the extent that the investigation, aided by the enforcement of this subpoena, might embarrass the [U.S.] executive branch, or hinder its conduct of foreign relations—presumably *because it risks angering an ever more important strategic ally over mere allegations of bribery*—it is not for this Court to prevent it. It is the [U.S.] executive’s “independence the act of state doctrine primarily protects.”¹⁵⁶

The request from the Republic of Kazakhstan for respect and deference under international comity doctrines is contrasted with Kazakhstan’s lack of respect for the United States. The foreign government intervened in a U.S. judicial proceeding against a U.S. person. Not content with intervening in the legal proceeding, the foreign government then attempted to subvert the prosecution by political lobbying inside the U.S. government. Fortunately, U.S. political and legal branches were not intimidated by this behavior. Sometimes the U.S. system works.

VI. ACT OF STATE PART DEUX: THE 2004 PAULEY OPINION

James Giffen himself, however, did not give up on his act of state defenses after the 2002 Chin opinion. By 2004, Giffen through his new attorneys at Kronish, Lieb, Weiner & Hellman, had re-formulated the act of state defense.¹⁵⁷ Instead of claiming that the acts of state were the legal opinions issued by the Kazakh government asserting the

156. *In re Grand Jury Subpoena I*, 218 F. Supp. 2d at 557 (emphasis added) (citations omitted). Michael Chertoff later served on the U.S. Court of Appeals for the Third Circuit and Secretary of the Department of Homeland Security. See Covington & Burling LLP, Michael Chertoff, <http://www.cov.com/mchertoff/> (last visited Apr. 15, 2010). He is now senior of counsel at Covington & Burling, LLP. *Id.* The U.S. Securities and Exchange Commission Enforcement Director was Stan Sporkin. See *Stanley Sporkin Appointed Director of Division of Enforcement*, SEC NEWS DIG., Feb. 13, 1974, at 1, 1, available at <http://www.sec.gov/news/digest/1974/dig021374.pdf>.

157. See *Giffen I*, 326 F. Supp. 2d 497, 499, 501-03 (S.D.N.Y. 2004).

documents were not discoverable under Kazakh law, Giffen now claimed that the acts of state were his entire business operations, protected because of his personal status as an official of the Kazakh government.¹⁵⁸

The revised act of state argument was that as an official agent of the Kazakh government, any acts Giffen performed constituted official Kazakh acts of state.¹⁵⁹ To support this re-formulation of the act of state doctrine's applicability, Giffen pointed to his appointment in 1995 as counselor to the President of Kazakhstan among other titles and appointments over the years.¹⁶⁰ Thus, he argued, all of the actions performed were in his capacity as an official agent of the Republic of Kazakhstan.¹⁶¹ As a U.S. citizen, James Giffen could not claim to be an official of a foreign sovereign under the FSIA, therefore his claim was made under the act of state doctrine.¹⁶²

This new strategy represents an interesting shift in the business practices of U.S. bribe-givers. In the past, Americans wishing to bribe foreign officials have attempted to shelter their activities by using foreign agents or subcontractors. Americans wishing to bribe Chinese officials, for example, would simply hire a Taiwanese or Hong Kong local agent, consultant, or sub-contractor, letting the locals actually deliver the bribes to Chinese officials while maintaining plausible deniability for the Americans.¹⁶³

Amendments to the FCPA statute required by the OECD Anti-Bribery Convention, however, have largely closed these loopholes.¹⁶⁴ Hiring foreign local agents, subcontractors, and consultants, as well as most joint-venture structures, no longer enable U.S. bribe-givers to put their heads into the sand and deliver the bribes while escaping criminal culpability under the FCPA.¹⁶⁵

158. *See id.* at 502-03.

159. *Id.*

160. *See id.* at 499-500; *id.* at 500 n.5 ("Giffen has submitted documents to show that the Kazakh government appointed him to various official positions. These documents establish that Giffen was appointed at various times as a representative, consultant or agent by different Kazakh government officials." (citation omitted)).

161. *Id.* at 502.

162. *See* 28 U.S.C. § 1603(b) (2006).

163. *See, e.g.,* Don Lee, *Avery Dennison Case a Window on the Pitfalls U.S. Firms Face in China*, L.A. TIMES, Jan, 12, 2009, at A1 ("Faced with the choice between bribing officials and losing business, some U.S. firms have turned to middlemen, often from Hong Kong or Taiwan, to grease the wheels for them.").

164. *See* Donald Zarin, *The Foreign Payments Provision, in* FOREIGN CORRUPT PRACTICES ACT 2009, *supra* note 1, at 117-18.

165. *See* Jacqueline C. Wolff & Jessica A. Clarke, *Liability Under the Foreign Corrupt Practices Act*, 40 REV. SEC. COMMODITIES REG. 13, 19-20 (2007); *Department of Justice Issues Opinion on U.S. Company Participation in Joint Ventures that Involve Foreign Government*

The interesting new twist is that Giffen claimed shelter from litigation by asserting his status as an appointed official of the Kazakh government itself.¹⁶⁶ Instead of hiring low-level, local foreign agents to act as the intermediary, here the alleged bag man is a U.S. attorney and banker, who is also a high-level, officially appointed agent of the Kazakh government itself. Because this is a direct appointment to the highest level of the Kazakh government, counselor to the President, Giffen arguably placed himself above the reach of the FCPA.¹⁶⁷

Although clever, this defense strategy was also unsuccessful. In 2004, Judge Pauley rejected the act of state doctrine defense based on Giffen's status as an official agent as counselor to the President of Kazakhstan. Like Judge Chin, Judge Pauley closely tracked the Supreme Court opinion in *Kirkpatrick*.¹⁶⁸ First, allegations of bribery, which might impugn the motives of a foreign sovereign, do not create act of state barriers to U.S. judicial proceedings under *Kirkpatrick*.¹⁶⁹ Second, the validity of any official act of Kazakhstan may not be second-guessed by a U.S. court. Judge Pauley stated:

While the Supreme Court [in *Kirkpatrick*] agreed that the district court would have to find facts that might impugn the Nigerian government's motives, it concluded that the act of state doctrine did not bar suit because the district court would not be required to rule on the legality or validity of any public act of the Nigerian government.

Similarly, this Court concludes that factual findings in this case might impugn the motives of the Kazakh government in its dealings with Mercator. However, this Court will not need to rule on the legality of any public acts of the Kazakh government. In essence, Giffen's argument is that his *de facto* position within the Kazakh government enabled him to pay the senior Kazakh officials—not that his official duties required him to make secret payments.¹⁷⁰

Judge Pauley rejected Giffen's claim that distributing personal payments and gifts to Kazakh officials in return for oil contracts was

Officials, FOREIGN CORRUPT PRAC. ACT UPDATES (Wilmer, Cutler & Pickering, Washington, D.C.), Sept. 18, 2001, available at <http://www.wilmerhale.com/files/Publication/7bc58d0e-73d1-4847-8225-af72b1f9202f/Presentation/PublicationAttachment/e60883f8-6643-4215-943b-cbb4dd436ca1/FCPA091801.pdf>. My thanks to Eryn K. Schornick for her excellent research on the subject of joint venture liability under the FCPA.

166. *Giffen I*, 326 F. Supp. 2d at 503.

167. James Giffen, as a U.S. citizen, cannot claim immunity as a foreign sovereign under FSIA despite his foreign titles. See 28 U.S.C. §§ 1603(b), 1604 (2006).

168. See *Giffen I*, 326 F. Supp. 2d at 501-03.

169. See *id.* at 501-02.

170. *Id.* at 502-03 (citing *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp.*, 493 U.S. 400, 408 (1990)).

protected because he was the official agent of a foreign sovereign by virtue of his appointment as counselor to the President of Kazakhstan.¹⁷¹ Judge Pauley correctly recognized that it is not the status or title of the gatekeeper, intermediary, or bag man which potentially insulates the payments from the FCPA.¹⁷² The central question for FCPA analysis is whether the payment, gift, or bribe itself is legal under the written laws of the foreign state.¹⁷³

Whether a payment, gift, or bribe could constitute an “act of state,” therefore, is the central legal issue.¹⁷⁴ Judge Pauley’s opinion carefully analyzes each element of the act of state doctrine as applied to the bribery prosecution of Giffen.¹⁷⁵

A. Territoriality or Situs Element

Under U.S. law, the act of state doctrine applies only to official acts performed within the territory of the foreign sovereign, as Justice Scalia succinctly notes in *Kirkpatrick*,¹⁷⁶ which reaffirms the Supreme Court’s earlier position in *Banco Nacional de Cuba v. Sabbatino*.¹⁷⁷ The act of state doctrine is unlike the FSIA provision on this point, which covers the actions of a foreign sovereign named as a defendant in a U.S. judicial proceeding regardless of the geographical location where the act was performed.¹⁷⁸ The act of state doctrine, by contrast, applies to protect foreign sovereigns’ feelings (comity) in cases in which they are not personally named as a party or a defendant. The act of state doctrine applies where the U.S. judicial proceeding might tangentially embarrass the foreign sovereign, but protects foreign delicate feelings more narrowly than the FSIA by only protecting official acts performed within the physical territory of the foreign sovereign.

The judge-made act of state doctrine appropriately operates more narrowly than the statutory FSIA protections. The act of state doctrine

171. *See id.* at 503.

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.* at 501-03.

176. *See* W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 406, 409 (1990).

177. 376 U.S. 398, 401 (1964).

178. *See* 28 U.S.C. §§ 1603, 1605 (2006); BORN & RUTLEDGE, *supra* note 97, at 763 (“[T]here are significant differences between the act of state and foreign sovereign immunity doctrines. First, the act of state doctrine is limited to a foreign government’s conduct that is consummated within its own territory, while foreign sovereign immunity can extend to conduct anywhere in the world.”); *see also* STEINHARDT, *supra* note 97, at 507 (“Under the act of state doctrine, the courts of the United States will not judge the validity of a foreign government’s official acts within its own territory.”).

protects only official actions of a foreign sovereign that are performed within its own territory.¹⁷⁹ There is no equivalent territorial or situs element in the FSIA.¹⁸⁰ Some commentators seeking to expand act of state shields have questioned the continuing viability of the territorial element of the act of state doctrine on the grounds that it is excessively formalist and that it no longer applies in a globally integrated world.¹⁸¹

The territorial element of the act of state doctrine is well grounded in a long line of precedent dating back to its origins during the heyday of legal formalism.¹⁸² The territorial element also significantly operates as a limitation to the judge-made act of state doctrine in modern separation of powers jurisprudence. It restrains the U.S. judiciary from excessive sua sponte deference to foreign sovereigns at the expense of performing judges' duty to apply U.S. law. As Justice Scalia observed in *Kirkpatrick*, the duty of U.S. courts and judges is to apply U.S. law to cases and controversies presented to them.¹⁸³

Arguably, excessive sua sponte U.S. judicial deference to avoid collaterally embarrassing foreign sovereigns not named as defendants via the act of state doctrine does present the spectre of judges making ad hoc American foreign policy decisions more appropriately vested in the political branches.¹⁸⁴ Restraining judicial discretion to duck hard cases involving embarrassed foreign sovereigns, the doctrine's situs element limits lower courts' evasion of these tough statutory cases. Thus, Judge Pauley's opinion appropriately stresses the significance of the

179. BORN & RUTLEDGE, *supra* note 97, at 763; STEINHARDT, *supra* note 97, at 507.

180. BORN & RUTLEDGE, *supra* note 97, at 763.

181. *See id.* at 787-91; Ariel Oscar Diaz, *The Territoriality Inquiry Under the Act of State Doctrine: Continuing the Search for an Appropriate Application of Situs of Debt Rules in International Debt Disputes*, 10 ILSA J. INT'L & COMP. L. 525, 536-37 (2004).

182. *See, e.g.*, *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (recognizing the principle of foreign sovereignty for "acts of the government of another done within its own territory").

183. *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp.*, 493 U.S. 400, 409 (1990).

184. *See* Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1411-12 (1999).

[C]ourts applying the effects test rarely take the test seriously. They do not consult pertinent foreign relations enactments or attempt to assess the content of pertinent U.S. foreign policy. Rather, they usually make a simple intuitive judgment about the foreign relations consequences of the adjudication. If the consequences seem sufficiently bad from a usually unarticulated normative perspective, the courts abstain or preempt, again usually without informed analysis of how such a decision actually affects U.S. foreign relations.

Id. at 1414-15.

Consider . . . the legitimacy of the horizontal abstention doctrines such as act of state and political question. Here abstention masks the exercise of extraordinary judicial power, for courts on which Congress has conferred jurisdiction are deciding which cases to adjudicate on the basis of their own analyses of U.S. foreign relations.

Id. at 1421-22.

territoriality element of the act of state doctrine, following the *Kirkpatrick* and *Sabbatino* precedent as well as implementing the underlying policy concerns of both international comity and domestic constitutional separation of powers.

Judge Pauley did not duck, noting that the physical location of the actions claimed as acts of state did not occur within the physical territory of Kazakhstan:

The act of state doctrine also has a territorial dimension in that it is limited to “acts done within their own States, in the exercise of Governmental authority.” Here, the illicit activities occurred in the United States and Switzerland—not Kazakhstan. Moreover, Giffen allegedly transferred funds from Swiss bank accounts to non-Kazakh corporations. Because these transactions were *dehors* the geographic boundaries of Kazakhstan and involved transactions among foreign corporations, the act of state doctrine does not prohibit this Court from ruling on their legality.¹⁸⁵

Because the actions alleged, delivering and laundering the alleged bribe money, occurred in the United States and in Switzerland, the territoriality element of the act of state doctrine cannot be met, even assuming *arguendo* that Giffen really was an official agent of the Republic of Kazakhstan.

The territoriality element of the act of state doctrine operates efficiently to mediate between appropriate U.S. judicial respect for collateral embarrassment to delicate foreign sovereign feelings while maintaining U.S. legal control over the actions of our own legal persons.

B. “Official” Acts Element

Not all actions performed within the territory of a foreign sovereign are protected under the act of state doctrine. Only actions which are “official” meet the elements of the act of state doctrine.¹⁸⁶ A central question, then, as Judge Pauley correctly reasoned, is whether the payments made by Giffen constitute official acts.¹⁸⁷ Can what American law defines as a “bribe” be an “official act” in Kazakhstan? This question could take us into the policy debates over claims of cultural imperialism,¹⁸⁸ into the stratosphere of competing international comity

185. *Giffen I*, 326 F. Supp. 2d 497, 503 (S.D.N.Y. 2004) (citations omitted).

186. *See supra* note 97 and accompanying text.

187. *Giffen I*, 326 F. Supp. 2d at 502-03.

188. *See Spahn, supra* note 3, at 168-79.

jurisprudences and international conflicts of law,¹⁸⁹ or right back down to the elements of the U.S. statutory standards for determining when a gift, commission, or customary payment becomes an illegal bribe under U.S. law.

As Judge Pauley held, “[t]he FCPA countenances an affirmative defense where the payments were ‘lawful under the written laws and regulations of the foreign official’s . . . country.’”¹⁹⁰

Despite the relative ease with which Kazakhstan produced opinions from its legal ministry regarding the protection of documents under Kazakh law in the 2002 litigation under Judge Chin, Kazakhstan was unable to provide written Kazakh law authorizing a foreigner to make personal payments for jewelry and jet skis to Kazakh officials in order to obtain business contracts.¹⁹¹ Empirical data from Kazakhstan indicates that although corruption is widespread, the vast majority of Kazakh people themselves do not approve of the practice of bribery; they view it as a harmful practice and wish that it could be stopped.¹⁹² Bribing Kazakh officials was and is illegal under Article 312 of the Kazakh criminal code.¹⁹³

But, Giffen does not assert that the challenged payments were lawful under Kazakh law. Rather, he argues that his actions were effected pursuant to the powers conferred by the Kazakh government. Because Giffen claims to have acted as a Kazakh government representative, he argues that his payments to senior Kazakh officials are shielded from FCPA scrutiny. The letters of appointment that Giffen offers, however, fail to show that his secret payments constituted official acts of Kazakhstan. Giffen’s various official titles do not exempt his actions from prosecution by the United States.¹⁹⁴

189. Joel Paul presents a wonderfully readable examination of international comity both as a classical conflict-of-laws idea and a modern concept of comity as a justification for deference in a wide range of cases. *See generally* Paul, *supra* note 108.

190. *Giffen I*, 326 F. Supp. 2d at 503 (alteration in original) (citing 15 U.S.C. § 78dd-2(c)(1) (2006)).

191. *See In re Grand Jury Subpoena I*, 218 F. Supp. 2d 544, 549 (S.D.N.Y. 2002).

192. *See Nichols*, *supra* note 11, at 917-18, 923, 929.

193. CODE CRIMINAL art. 312 (Kaz.), *translated in* Criminal Code of the Republic of Kazakhstan No. 167-1 dated 16 July 1997, <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019168.pdf>. Giving a bribe to a Kazakh official is punishable by up to five years in prison. *Id.* There is an exemption if the bribe-giver was extorted by the official. *Id.* Government officials are prohibited from receiving bribes under Article 311. *Id.*

194. *Giffen I*, 326 F. Supp. 2d at 503 (citations omitted). In order to determine that Giffen’s official titles did not exempt him from prosecution, Judge Pauley relied on *United States v. Noriega*, 746 F. Supp. 1506, 1521-22 (S.D. Fla. 1990), which held that the defendant’s alleged acts, drug trafficking and protection of money launderers, did not constitute public action for purposes of the act of state defense merely because the defendant was the leader of his country.

Giffen did not claim that personal payments were authorized by Kazakh law. Instead his act of state defense was based on his status as the designated agent for the President of Kazakhstan. His argument was that because of his status, everything, including secret personal payments, became an official act of a foreign sovereign.¹⁹⁵ U.S. business people abroad are often treated like kings. If you wanted to do business in Kazakhstan, according to one Chevron executive, then you had to go through President Nazarbaev's chosen gatekeeper, James Giffen.¹⁹⁶ *L'Etat c'est moi*.¹⁹⁷ Sadly for James Giffen, a U.S. citizen, our legal system does not accommodate such delusions of grandeur.

The FSIA prohibits U.S. citizens from claiming immunities based on alleged foreign sovereign official status.¹⁹⁸ As a U.S. citizen, Giffen cannot claim immunity as a foreign official regardless of how many foreign titles he possesses. If, on the other hand, James Giffen was, as he now claims, an authorized agent of the U.S. government, he could not also accept titles and emoluments from the Republic of Kazakhstan without violating the U.S. Constitution unless the U.S. Congress consented. The text of the U.S. Constitution itself prohibits U.S. officials from accepting "without the Consent of the Congress . . . any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."¹⁹⁹

Giffen's payments were not "legal" (authorized under Kazakh law), nor were they "official" acts under the act of state doctrine.²⁰⁰ Although the outer contours of what activities can be characterized as "official" acts for act of state doctrine purposes remains contested, Judge Pauley's opinion correctly held that U.S. payments to foreign officials that are not legally authorized by the written law of the foreign sovereign cannot be "official" acts, even when the intermediary has an official title from the foreign government.²⁰¹

Judge Pauley's citation of *United States v. Noriega*²⁰² is telling: just as drug trafficking and money laundering cannot constitute official acts, even when performed by the actual head of a foreign state, illegal bribes

195. *Giffen I*, 326 F. Supp. 2d at 502.

196. *Kazakhstan: Mobil, CIA Secrets May Come Out*, CORP WATCH, Aug. 25, 2005, <http://www.corpwatch.org/article.php?id=12586>.

197. The French phrase for "I am the State," which is attributed to Louis XIV. E. COBHAM BREWER, *DICTIONARY OF PHRASE AND FABLE* 630 (Cassell & Co. 1905) (1870). The French Revolution followed.

198. See 28 U.S.C. § 1603(b)(3) (2006).

199. U.S. CONST. art. I, § 9, cl. 8.

200. *Giffen I*, 326 F. Supp. 2d 497, 503 (S.D.N.Y. 2004).

201. *Id.*

202. 746 F. Supp. 1506 (S.D. Fla. 1990).

and money laundering cannot constitute an official act when performed by a “counselor” to the head of state.²⁰³ Judge Pauley’s 2004 opinion shuts the door on the new business strategy of insulating U.S. bribe-givers by having them named as “officials” to the bribe-taking foreign sovereign.

Judge Pauley’s conclusion is also supported by Supreme Court precedent regarding what is required for proof of an “official” act under the act of state doctrine outside of the bribery context. The Supreme Court rejected any expansion of the act of state doctrine in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, which held that absent a “statute, decree, order or resolution of the Cuban government itself,” no act of state occurred.²⁰⁴ Mere statements by counsel for the interveners during trial were not sufficient.²⁰⁵ *Dunhill* requires a “public [or sovereign] act of *those with authority to exercise sovereign powers.*”²⁰⁶

A “counselor” does not have authority to exercise sovereign powers, of course. Generally, lower courts have followed the Supreme Court’s narrower definition of “official” acts as an element required for act of state doctrine purposes.²⁰⁷ A small minority of lower courts have ignored this element in non-bribery private civil cases, allowing the doctrine to apply where the action is not “official” but merely condoned by the foreign government.²⁰⁸ No lower court has permitted the act of state doctrine to shield an alleged U.S. bribe-giver based on his status as an “official” of the foreign government since Judge Pauley’s 2004 opinion.

203. *Id.* at 500, 503 (citing *Noriega*, 746 F. Supp. at 1521-22).

204. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976).

205. *See id.* at 694-95.

206. *Id.* (emphasis added); *see also* BORN & RUTLEDGE, *supra* note 97, at 772.

207. *See* BORN & RUTLEDGE, *supra* note 97, at 775. It is important to distinguish between pre-*Kirkpatrick* and post-*Kirkpatrick* cases. Pre-*Kirkpatrick* cases stress the motive behind the act, while post-*Kirkpatrick* cases do not take motive into consideration when determining the validity of the act. *See id.* at 776; *see also* *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 407 (9th Cir. 1983) (holding that the act of state doctrine applies where inquiring into the motivations of the foreign sovereign would result in embarrassment to the foreign nation). *Clayco* was specifically rejected in *Kirkpatrick*. *See* *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 403, 409-10 (1990).

208. *See, e.g., Doe v. Qi*, 349 F. Supp. 2d 1258, 1294-95 (N.D. Cal. 2004) (holding the act of state doctrine applicable to unofficial acts supported by the government); *see also* BORN & RUTLEDGE, *supra* note 97, at 773 (discussing lower court cases that adopted a more expansive definition of what constitutes an official act). A small minority of courts have applied the act of state doctrine to unofficial acts. *See* BORN & RUTLEDGE, *supra* note 97, at 773.

C. A Commercial Exception?

While the FSIA statutorily creates an exception for foreign sovereign activity that is primarily “commercial” in nature,²⁰⁹ the judge-made act of state doctrine is not as settled. The Supreme Court has addressed the issue only once, generating a splintered decision²¹⁰ on this controversial issue.²¹¹ In *Dunhill*, the Court analyzed complex payments of money allegedly owed as a result of Fidel Castro’s Cuban government expropriating cigar companies’ formerly private property inside Cuba.²¹² One issue was whether statements by counsel for Cuba regarding the nationalization of formerly private companies constituted an act of state.²¹³ A majority of the Court rejected this notion.²¹⁴

The *Dunhill* majority did not, however, reach the issue of whether a commercial exception to the act of state doctrine should be recognized. A plurality of four (Justice White, joined by Chief Justice Burger and Justices Powell and Rehnquist) did opine that a commercial exception to the act of state doctrine is well founded.²¹⁵ Agreeing with the position of the DOJ through its amicus brief authored by then-attorney Antonin Scalia,²¹⁶ the *Dunhill* plurality stated that the major policy underlying the act of state doctrine is domestic separation of powers deference to the

209. See *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614-15 (1992).

210. In *Dunhill*, Justice White wrote for the majority and plurality. 425 U.S. at 684-715. Justices Powell and Stevens filed concurring opinions. *Id.* at 715. Justice Marshall’s dissent was joined by Justices Brennan, Stewart, and Blackmun. *Id.* at 715-37. The case was argued before the Supreme Court twice—first in 1974 and later in 1976. *Id.* at 682.

211. Antonin Scalia, as amicus curiae urging reversal, argued for the United States. *Id.* at 684. Solicitor General Bork, Assistant Attorney General Lee, Deputy Solicitor General Jones, and Bruno A. Ristau were on the brief. *Id.*

212. See *id.* at 685.

213. *Id.* at 689-90 (“[W]e requested the parties to address certain questions, the first being whether the statement by counsel for the Republic of Cuba that *Dunhill*’s unjust-enrichment claim would not be honored constituted an act of state. The case was argued twice in this Court. We have now concluded that nothing in the record reveals an act of state with respect to intervenors’ obligation to return monies mistakenly paid to them. Accordingly we reverse the judgment of the Court of Appeals.” (footnote omitted)).

214. *Id.* at 694. (“We thus disagree with the Court of Appeals that the mere refusal of the intervenors to repay funds followed by a failure to prove that intervenors ‘were not acting within the scope of their authority as agents of the Cuban government’ satisfied respondents’ burden of establishing their act of state defense.” (quoting *Mendez v. Saks & Co.*, 485 F.2d 1355, 1371 (2d Cir. 1973))).

215. *Id.* at 695 (“[W]e are nevertheless persuaded by the arguments of petitioner and by those of the United States that the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities. Our cases have not yet gone so far, and we decline to expand their reach to the extent necessary to affirm the Court of Appeals.”).

216. *Id.* at 696-97 (“[T]he Department of State . . . declares that ‘we do not believe that the *Dunhill* case raises an act of state question because the case involves an act which is commercial, and not public, in nature.’” (footnote omitted)).

U.S. executive branch.²¹⁷ Further, any notion of absolute foreign sovereign immunity has been restricted to “official” acts of a public or governmental character.²¹⁸ Actions taken by a foreign sovereign that are “commercial” in nature do not fall within the scope of the act of state doctrine under this view.²¹⁹ This position is in accord with the U.S. federal statutory exemptions for commercial activity under the FSIA, and in accord with the positions of other foreign sovereigns regarding protections for commercial activities by nation states.²²⁰ A spirited dissent authored by Justice Marshall and joined by Justices Brennan, Stewart, and Blackmun disagreed,²²¹ while concurring opinions by Justices Powell and Stevens reserved their decisions on the commercial exception issue.²²² Since *Dunhill*, academic commentators have been debating the proposed commercial exception to the act of state doctrine, while lower courts struggle with its uncertainty.

Fortunately, for the purposes of examining the application of act of state defenses in bribery cases, we could avoid the *Dunhill* commercial exception mess altogether. Unlike *Dunhill* and other nationalization/appropriation traditional act of state cases, *Giffen*-type bribery cases do not involve any conflict whatsoever between the actual laws of two sovereigns. A foreign nationalization of assets, such as the Cuban cigar companies in *Dunhill*, is viewed as “legal” and authorized

217. *Id.* at 697 (“The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations.”).

218. *Id.* at 698 (“[T]he United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state’s public or governmental actions and not with respect to those arising out of its commercial or proprietary actions.”).

219. *Id.* at 701-02 (“[T]he United States has adopted and adhered to the policy declining to extend sovereign immunity to the commercial dealings of foreign governments.”); *see id.* at 706.

220. *See id.* at 703-04 (“[S]ubjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts. In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens.” (footnote omitted)).

221. Justice Marshall rejected the restrictive version of the act of state doctrine. *Id.* at 725 (“In concluding that the act of state doctrine should not apply to the purely commercial acts of sovereign nations, Mr. Justice White relies heavily upon the widespread acceptance of the ‘restrictive theory’ of sovereign immunity, which declines to extend immunity to foreign governments acting in a ‘private,’ or commercial, capacity. The restrictive theory of sovereign immunity has not been adopted by this Court, but even if we assume that it is the law in this country, it does not follow that there should be a commercial act exception to the act of state doctrine.”).

222. *Id.* at 715 (Powell, J., concurring) (“Since the line between commercial and political acts of a foreign state often will be difficult to delineate, I write to reaffirm my view that even in cases deemed to involve purely political acts, it is the duty of the judiciary to decide for itself whether deference to the political branches of Government requires abstention.”).

under the foreign law of the foreign regime.²²³ This brings foreign law into potential conflict with U.S. laws protecting private property rights.²²⁴

There is no old Cold War-style conflict between sovereigns' competing laws in modern anti-bribery cases. If foreign law authorizes the payment of the alleged bribe as a legal payment, the United States adopts the foreign standard. There is no potential for conflict between the laws of two sovereigns in a bribery case. Only where the foreign law does not legalize payments to its officials does the U.S. anti-bribery law even begin to come into play. U.S. anti-bribery law supports whichever policy is chosen by the laws of the foreign government. There is no conflict of laws potential, and therefore the policies underlying the act of state doctrine do not come into play.

We could therefore avoid the sticky question of whether business transactions involving personal payments to foreign sovereigns are exempted from act of state shields under a commercial exception. Instead of looking to the FSIA statute, which does create a commercial exception as our closest analogy, we can look instead to the FCPA statute at issue in the actual bribery case before the courts. The FCPA statute prevents any potential international conflict of laws at the outset, rather than waiting for subsequent resource-consuming litigation to resolve exceptions or other gloss on judge-made international comity shields such as the act of state doctrine. There is no need for additional comity through the judge-made act of state doctrine in FCPA cases in the first place, and therefore we do not need to add extra layers of gloss such as the commercial exception to the act of state doctrine. A cleaner analysis simply rejects application of the act of state doctrine to bribery cases in the first instance.

This is, admittedly, a novel approach to act of state analysis. I do not mean to quibble with Judge Pauley's more traditional analysis closely following the Supreme Court's plurality lead in *Dunhill*. Considering whether a transaction such as \$105 million in personal payments by a U.S. citizen to Kazakh officials in order to obtain business falls under a commercial exception to act of state shields, and relying on the *Dunhill* plurality, Judge Pauley held:

223. *See id.* at 703-04.

224. Justice Marshall refers to the *Sabbatino* Court, which stated that few issues were as hotly contested in international conflicts of law as the right of a nation to appropriate private property of foreigners, particularly in 1976 prior to the fall of Soviet-style communism. *See id.* at 729-30 (Marshall, J., dissenting) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 428 (1964)).

Further, some courts have determined that the act of state doctrine does not reach “acts committed by foreign sovereigns in the course of their purely commercial operations.” The indictment alleges deposits of monies into foreign banks, which were then used by Giffen to fund offshore entities for the personal benefit of the senior Kazakh officials. These actions were commercial—not governmental, and are not immune under the act of state doctrine.²²⁵

A number of lower courts have followed Judge Pauley’s lead in the 2004 *Giffen* decision recognizing a general commercial exception to the act of state doctrine.²²⁶ No lower court has allowed act of state doctrine shields in a bribery case since the 2002 and 2004 *Giffen* opinions by Judges Chin and Pauley.

VII. CONCLUSION

The lessons of Judges Chin and Pauley in these two landmark opinions on issues of first impression in the *Giffen* prosecution, closely tracking the Supreme Court decision in *Kirkpatrick*, are clear. The act of state doctrine does not, and should not, act as a barrier to disclosing secrets in bribery cases. Instead of looking to the FSIA statute as our closest analogy for act of state defenses in bribery cases, we should look instead to the FCPA statute at issue in the actual cases before the courts. The FSIA can never apply to an FCPA action because the FCPA statutorily prohibits the foreign sovereign from being named as a defendant.²²⁷ The FSIA is not the appropriate analogy in FCPA cases.

The FCPA statute prevents any potential international conflict of laws at the very outset by providing a statutory affirmative defense for payments that are permitted under the law of the foreign nation.²²⁸ If the payment is legal under foreign law, the FCPA provides an absolute affirmative defense.²²⁹ The United States has handed over its own power to regulate U.S. payments to the law of the foreign sovereign. There is no possibility of any conflict of laws between the two sovereigns under the FCPA.

Under the FCPA, the payment must merely be “legal” under the laws or regulations of the foreign sovereign. Under the judge-made act of state doctrine, the threshold of proof is significantly more difficult;

225. *Giffen I*, 326 F. Supp. 2d 497, 503 (S.D.N.Y. 2004) (citations omitted).

226. For a discussion of these lower court decisions, see BORN & RUTLEDGE, *supra* note 97, at 798, and STEINHARDT, *supra* note 97, at 558-59.

227. See *supra* notes 78-79 and accompanying text.

228. See *supra* notes 86-87 and accompanying text.

229. See *supra* notes 86-87 and accompanying text.

the action must be “official.”²³⁰ Furthermore, while the act of state doctrine only protects official actions taken within the physical territory of the foreign sovereign, the FCPA protects any legal payment under the law of the foreign sovereign, even if the payments are made outside of the territory.²³¹ On both elements, the FCPA statutorily provides significantly greater protection for the legitimate comity interests of a foreign sovereign than the act of state doctrine.

Resource-consuming litigation to resolve gloss on judge-made international comity shields is not needed where the FCPA already statutorily provides an absolute affirmative defense protecting the foreign nation’s legitimate comity interests. Therefore, as Judges Chin and Pauley correctly decided, the act of state doctrine should not apply to bribery cases, civil or criminal.

Piercing the veils of secrecy goes to the very heart of the substantive problem of grand corruption bribery. Public disclosure of the names of individuals, gatekeeper lawyers, accountants, banks, and shell corporations servicing bribe-suppliers is a powerful deterrent to the pre-meditated, organized criminal business practice of bribe-giving. Public disclosure of the structure of the transactions and the amounts alleged to have been given as bribes allows ordinary people a glimpse into the secret world of major global business transactions. Discovery of the names of the actual people involved allows the international human rights strategy of name-and-shame to begin. The focus is not only on the “foreign bad guys,” but, more importantly, on their United States and OECD First World corporate, legal, accounting, and banking service suppliers—the supply side “gatekeepers.”

It is very unlikely that the President of Kazakhstan originated this complex First World alleged bribery and money laundering scheme himself. Focusing on New York attorney and merchant banker James Giffen, acting as an intermediary to U.S.-listed multinational oil and gas corporations, is difficult but significant public law enforcement.²³²

Responsible corporations are shut out when contracts are awarded based on bribery. The costs of the alleged bribes skew U.S. taxes and undermine investors’ abilities to accurately assess corporate value. The costs of the alleged bribes, plus tax deductible legal defense costs, are folded into the price of gasoline and heating oil paid for by U.S. consumers. Systemic grand corruption bribery exacerbates massive

230. See *supra* note 89 and accompanying text.

231. See *supra* notes 106-07 and accompanying text.

232. The oil companies allegedly involved are Mobil Oil, Amoco, Phillips, Texaco, BP, Statoil and British Gas. See *supra* notes 42-44 and accompanying text.

global poverty. Kazakhstan, despite vast oil and gas reserves, has one-third of its population living on \$4.30 a day or less (U.S. dollars).²³³

The fact that the DOJ does not appear to have been shackled despite the best efforts of powerful U.S. political lobbyists and law firms should not be worthy of a law review article under normal circumstances. Even-handed application of legal rules to the mighty elites as well as the poor and powerless is the linchpin idea of the rule of law in America; the DOJ has historically been the proud bearer of this standard. The prosecution of the *Giffen* case during one of the darkest periods in the history of the DOJ stands as a testament to the fidelity and bravery of at least some of our prosecutors.²³⁴ The *Giffen* prosecution may in fact represent the best of American values—the rule of law operating without favoritism or economic cronyism. The United States is taking responsibility to discipline a U.S. citizen alleged to have committed serious crimes. It also may stand as an example of the respect by at least some in the

233. World Bank, *Dimensions of Poverty in Kazakhstan: Volume II: Profile of Living Standards in Kazakhstan in 2002*, at 8, Report No. 30294-KZ (Nov. 9, 2004), http://siteresources.worldbank.org/INTKAZAKHSTAN/Resources/Poverty_Assessment_Vol1.pdf [hereinafter *Dimensions of Poverty in Kazakhstan*]. The shocking fact is that by global poverty standards, living on less than \$4.30 a day is not considered all that poor. *Id.* at 7-8. According to an August 2009 UNICEF report, Kazakhstan is

considered . . . one of the most economically developed countries among the Commonwealth of Independent States, with its gross domestic product (GDP) having increased at an average annual rate of 9-10 per cent during 2000-2007. However, the global financial crisis, which has reduced GDP by almost one third, is affecting the social sector.

UNICEF, UNIVERSAL PERIODIC REVIEW – HUMAN RIGHTS COUNCIL, UNICEF INPUTS – KAZAKHSTAN I (2009), available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session7/KZ/UNICEF_UPR_KAZ_S07_2010_UnitedNationsChildrensFund.pdf. Nevertheless, the government is currently maintaining social programs, especially those for children and families. *Id.* at 1-4. The level of poverty, concentrated in rural areas, decreased to fifteen percent by 2002. *Dimensions of Poverty in Kazakhstan, supra*, at 3.

234. During this period of history, Alberto Gonzales, through his positions at the Bush and Cheney White House, and later as Attorney General, politicized the DOJ's hiring and firing processes. See S.J. Res. 14, 110th Cong. (2007); *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearings Before the S. Comm. on the Judiciary*, 110th Cong. 5-6, 28-29, 134, 210 (2007); Bennett L. Gershman, Lecture, *The Most Dangerous Power of the Prosecutor*, 29 PACE L. REV. 1, 6-7 (2008); Bruce A. Green & Fred C. Zacharias, "The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187, 205-06 & nn.81-85 (2008). Gonzales fired nine prosecutors who insisted on bringing cases that could be harmful to Republicans' electoral chances or who refused to bring weak cases that would be used against Democrats. Editorial, *Investigating a Scandal*, N.Y. TIMES, Oct. 1, 2008, at A28. A 392-page congressional report on the scandal showed, among other crudely partisan decisions, that U.S. Attorney David Iglesias was fired for bringing cases on voter fraud and public corruption that were harmful to local Republicans. *Id.*

political and diplomatic sections of the U.S. executive branch for the independence of the rule of law as a fundamental American value.²³⁵

Transparency is the key to combating corruption. Discovery of secrets and hard, factual evidence is the key to transparency.

POST SCRIPT

As I write in the spring of 2010, the *Giffen* case remains open.²³⁶ Having failed in his claim to be an official agent of the Republic of Kazakhstan, James Giffen now claims he was authorized by U.S. intelligence services, asserting public authority defenses to the alleged bribery and money laundering scheme. U.S. intelligence services deny that they authorized his alleged bribery and money laundering schemes. U.S. law provides that James Giffen is presumed innocent until proven guilty beyond a reasonable doubt in an open and transparent trial before a jury of his peers.

None of the U.S. oil companies for which Giffen allegedly served as the intermediary, nor any of the four Swiss banks, nor the three U.S. banks through which Giffen allegedly laundered the alleged bribe money, have yet been publicly indicted.²³⁷

235. See CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 202, 208 (2007) (documenting the “assault” on the rule of law led by then-U.S. Vice President Dick Cheney during the same historical period as the *Giffen* prosecution).

236. See *supra* note 54.

237. Credit Agricole Indosuez is the only bank to be named in the court opinions thus far. See *supra* note 30. The other banks named in the indictment are Chase Manhattan, Citibank, Bankers Trust, Banque Bruxelles Lambert (Suisse), Pictet & Cie, and Credit Suisse. See *supra* note 40 and accompanying text.