United States House of Representatives
Committee on Oversight and Government Reform
Subcommittee on National Security and Foreign Affairs

"Crisis in Kyrgyzstan: Fuel, Contractors and Revolution Along the Afghan Supply Chain"

Hearing on April 22, 2010

Rm. 2154 – Rayburn House Office Building

Prepared Remarks of

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Chairman Tierney, Ranking Member Flake, esteemed members, it is an honor for me to be able to appear before you today to address how U.S. government contracting has affected the situation in Kyrgyzstan and to suggest a few conclusions Congress may be able to draw from the recent developments. In March 2005, and then again on April 6-7 of this year, the Kyrgyz government fell as a result of a popular uprising. In 2005, the police and military refused to use lethal force to stop the uprising. In 2010, 84 fatalities resulted from efforts to suppress the uprising—but it again appears that a substantial part of the police and the military refused orders to use lethal force, some of them going over to the opposition when the orders issued. There are some remarkable differences between the so-called "Tulip Revolution" of 2005 and the one that just transpired, but there are also a number of similarities. One of the strongest similarities is directly relevant to today's hearing: Allegations of corruption targeting the president and his immediate family figured prominently in the case the opposition made against the government both times—and both times the president's family was accused of having enriched itself with U.S. government contracts.

One lesson from these experiences is clear: The *perception* of corrupt U.S. government contracting undermined the legitimacy of the governments of Askar Akayev and Kurmanbek Bakiyev and contributed to the fall of each. I stress the word "perception," because it is not a legal process but rather public opinion, formed through rumor and innuendo as much as fact, that drives this process. One opposition figure explained to me that he viewed the questions surrounding the Manas Transit Center in general, and the fuel contracts written to supply the base in particular, as a sort of Achilles heel for Bakiyev. The Kyrgyz people were prepared to accept that their leader would use his office for personal gain up to a point, he said, but they would be far more concerned about corruption involving a foreign power because of the risk that national interests and sovereignty might be betrayed. In both 2005 and 2010, this perception was effectively exploited by the opposition to mobilize demonstrations against the government.

I want to stress two things at the outset. *First,* there is little reliable information now in the public sector that would legally establish that Bakiyev or members of his family profited from U.S. government contracts. The claims that circulate to this effect are red flags that justify a careful investigation, but they do not constitute the sort of evidence that a prosecutor would need to bring a case. On the other hand, the absence of information points to the lack of transparency surrounding the entire contracting process, and the use of shadowy offshore companies with little historical record in furnishing the services they are now providing the United States on a large scale. In this setting, people are prepared to expect the worst, and they may well be right.

Second, there is no reason at this point to believe that the U.S. government officials who were involved in this contracting were motivated by any corrupt purpose – least of all personal financial gain – in authorizing any of the contracts that were issued. Their purpose appears simply to have been to secure fuel for the base and for U.S. military operations in Afghanistan. That purpose is not only legitimate but essential to the safety and well being of Americans now serving in Afghanistan. But the lingering question is whether they consciously wrote contracts that benefited members of the president's family, or whether they closed their eyes to the involvement of the president's family in the deal. Moreover, all the evidence I see concerning these dealings suggests to me that if a conscious decision was taken to make these payments, that decision was

reached at a very high policy-making level in the government, not by low-level contract administrators.

The current developments in Kyrgyzstan present a sort of acid test for the decision to anchor the base on business dealings with the president's family. These developments suggest that doing sweet deals from which political leaders benefit may make the process of procurement and relationship building easier in the short term, but in the longer run it will impede the United States' effort to build a positive relationship with the host. Officials of the new government are unanimous in stating that the United States closed its eyes to corruption and human rights abuses under Bakiyev in order to protect the base, for instance. That criticism finds broad popular resonance. These criticisms match our own historical experience—and I say this as someone who spent a good part of his life living on American military installations overseas—that our interests are best served by a long-term perspective, in which we support democratic development, the rule of law, transparency and education in the nations we pick as our security partners. American installations abroad generally survive and gain acceptance when they are well integrated into the larger community. Economic relations are an essential aspect of this process. When the surrounding community recognizes the military base as a source of business and employment, it views the base not as something hostile but as an asset. But when contracts are awarded through a non-transparent process to political insiders, the base will be viewed not as a source of economic opportunity but rather as a corrupting wound on the body politic.

This raises important questions that I want to examine from the perspective of the law and legal policy. Does the law allow Department of Defense procurement officers to write contracts that personally benefit foreign government officials? And is that a wise thing, even if it does?

We should start this process by noting that the presence of the American logistical center at Manas grew out of shared interests between the United States and Kyrgyzstan. Long before 9/11, Kyrgyzstan was the constant target of attacks by terrorist groups—especially the Islamic Movement of Uzbekistan—which were organized and trained by and formally affiliated with Al Qaeda, and which operated out of a safe haven furnished by Taliban-controlled Afghanistan. Between 1999-2001, for instance, fifty Kyrgyz soldiers and security personnel died in clashes with Al Qaeda-linked forces in the nation's south, mostly in Batken Province.[1] Kyrgyzstan had therefore identified its top national security priority as stemming this terrorist violence. When the United States decided to respond to the events of 9/11 by launching a military campaign to destroy Al Qaeda in Afghanistan and stop the use of Afghan territory as a haven for terrorists, few countries were as supportive of this effort as Kyrgyzstan. In much of the current discussion of developments surrounding the base, this fundamental basis of shared interest is largely disregarded.

Notwithstanding their shared objectives, the Kyrgyz also extended the invitation to the United States with an expectation that it would have some economic benefits. They did not initially press for a lease or rent, but they did expect to get a significant upgrade at the Manas Airport and some income from the added traffic. And they expected that the economy would get a lift

[1] Abdrisaev, "Last Flight out of Kyrgyzstan," *Washington Post,* Feb. 20, 2009.

from U.S. procurements to support the base. Contracts were therefore an important part of the formula from the outset, and the subject of a good deal of public attention and discussion. But this process accelerated after the focus of U.S. military operations turned from Afghanistan to Iraq. The decision to invade Iraq was less popular in Kyrgyzstan than it was with the U.S. public; moreover, it severely undermined the sense of shared purpose in pursuing security on which the base deal was built. After March 2003, the Kyrgyz government came under increasing pressure, led by opposition political parties and the country's vibrant civil society, to justify the continuing presence of the base in light of America's claims of success in Afghanistan and refocus on Iraq. The Kyrgyz government was forced to justify its decisions economically. Hence the role of supply and service contracts, landing fees and lease payments became far more prominent in the Kyrgyz domestic political scene.

The information we have about the contracts written in the wake of the 2005 revolution is highly fragmentary. We have a good deal more information about the contracts in place at the time of that revolution, and it's interesting that by far the most detailed information was furnished by Kyrgyz criminal investigators who were looking into the possibility of bringing criminal charges concerning the contracts in 2005 and 2006. This information tended to show, and Kyrgyz prosecutors with whom I conferred believed, that a number of contracts were written that benefited the Akayev family and that these contracts did not reflect market terms. They viewed these contracts as *sub rosa* payments designed to incentivize the Akayev government to keep the Manas operation, then called Ganci Air Force Base, in place because the Akayev family itself had a "stake in the game."

There were two principle prongs to the arrangements concerning the Akayev family. The first involved Manas International Airport ("MIA"), the private operating company for the airport, which was then controlled by Aydar Akayev, the president's son. MIA collected $2 million annually in lease payments, as well as landing fees set at $7,000 per takeoff. MIA also was held a significant share of the base-related service contracts. This income was given a privileged position because it does not appear to have been taxed as other corporate income would have been. Kyrgyz criminal investigators believe that a substantial part of this money was moved offshore by the Akayev clan through an elaborate system of transfers involving banks in Russia and Latvia as well as the Netherlands and the United States and companies maintained in typical shelter jurisdictions such as the Isle of Man and the British Virgin Islands. Manas International Services Ltd. and Aalam Services Ltd., which appear to have been controlled by Adil Toiganbayev, Akayev's son-in-law, netted a still more significant catch. A *New York Times* investigative story by David Cloud revealed that out of a total of $207 million spent by the U.S. Department of Defense on fuel contracts during the Akayev era, Manas International Services received $87 million and Aalam Services received $32 million in subcontracts.[2] The *Times* report also notes that the possibility that the two companies had engaged in money laundering at two New York banks was also studied by the FBI. NBC News, which states that it secured a copy of the FBI report, claims that over $100 million in fuel contracts were steered to the Akayev family's fuel supply companies. It also quotes economist Anders Åslund estimating that the Akayev family siphoned

[2] Cloud, "Pentagon Fuel Deal is Lesson in Risks of Graft-Prone Region," *New York Times,* Nov. 15, 2005.

off between $500 million and $1 billion from the Kyrgyz state during Askar Akayev's tenure as president,[3] an astonishing figure considering the nation's poverty and the size of its annual budget.

It's very significant that Red Star Enterprises, which plays an essential role in the Manas contract relationship today, was involved before the Tulip Revolution. In its October 2006 story, NBC News explained,

> In 2002, when the Pentagon had a competitive bidding selection to choose a new contractor, a company named Red Star Enterprises won. It received a total of more than $240 million over the next several years, and tells NBC News it paid $120 million to the two firms. In an e-mail to NBC News, a company official said: "These companies were used because DESC [the defense agency handling fuel contracts] directed all bidders to use them since they were the only registered companies to provide services."

After the Tulip Revolution, Red Star has continued to manage fuel supply to the Manas operation and it holds a substantial fuel supply contract for Bagram as well. While we know little about Red Star, its face in Kyrgyzstan is a retired Army intelligence officer who previously served as defense attaché to the U.S. Embassy in Bishkek, Lieutenant Colonel Charles "Chuck" Squires.[4] A graduate of the Russian studies program at Harvard University,[5] Squires appears to enjoy excellent rapport with American diplomats and military officers and good relations with senior figures in Kyrgyzstan, including President Bakiyev's son Maksim, in whose company I have previously observed Squires at Bishkek's Hyatt Regency Hotel.

While the Bakiyev government requested FBI assistance in investigating the Manas contracts and threatened to bring enforcement actions, ultimately no prosecutions were brought. A prosecutor who spoke with me off the record stated that the president's office had directed that the effort to prepare a criminal case stand down. He stated that no reason was given for the decision, but said that it was widely understood that the Bakiyev family had simply stepped into the shoes of the Akayevs with respect to the fuel supply contracts. Last week, the *New York Times* reported similar facts,[6] citing an unidentified independent investigator who assisted the Kyrgyz authorities in their study of the matter:

> [The] outside investigator met with Mr. Bakiyev to present the initial findings, and characterized his responses as: "Thank you very much for your job. Your services are no longer needed." The investigator said he suspected the new president was in fact taking over the same business model. "They changed the names of the companies but the scheme remained the same," he said.

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[3] Roston, "A Crooked Alliance in the War on Terror," *NBC Nightly News*, Oct. 30, 2006.
[4] Tynan, "Manas Contracts Could be Re-Bid," *Eurasianet*, Apr. 15, 2010. Colonel Squires can be seen on p. 27 of the October 2008 issue of *Fuel Line,* a publication of the Defense Energy Support Center, surrounded by uniformed soldiers at the Bagram base.
[5] *Novosti:* Newsletter of the Davis Center for Russian and Eurasian Studies, Harvard University, Summer 2008, p. 10. (Squires advises his fellow alumni that he is managing "fuel supply contracts for U.S. forces in support of Operation Enduring Freedom.")
[6] Kramer, "Fuel Sales to U.S. at Issue in Kyrgyzstan," *New York Times,* Apr. 11, 2010.

I was able to confirm independently that lawyers with a major Washington-based law firm in fact conducted an independent investigation of the Manas contracts, and presented their conclusions in a meeting with Mr. Bakiyev, as reported by the *New York Times*.

These reports are all red flags suggesting that Bakiyev family-controlled entities had assumed critical supply arrangements with Red Star respecting the Manas contracts. The precise details of this relationship remain to be developed—but some evidence has emerged concerning pulse points. The Akayev family's approach to rent-seeking in connection with the American presence at Manas seems to have started with its privatization and control of MIA. MIA exercised a monopoly over services provided at the airport, and this monopoly seems to have been extended to the American operation across the way from the civilian air terminal. In this way, the Akayevs were apparently able to exclude competition for many supply arrangements. There is evidence that the Bakiyev family followed the same approach, and by reputation the airport was controlled by Maksim Bakiyev. There is some formal documentation of this take over, including the public announcement in 2009, that Eugene Gourevitch, a financial consultant to the Bakiyev family, was elected to the MIA board. Incidentally, an Italian investigating magistrate issued a warrant for Gourevitch's arrest in connection with a major telecommunications fraud in March.[7] The matter was considered so sensational and damaging to the Bakiyev regime that it blocked Internet traffic for several days in an apparent effort to obscure reporting of the fact.[8] The interim government has now opened its own criminal investigation into Gourevitch and his business dealings.[9]

When questions are raised about the legality of these relationships, the Department of Defense responds that its contracts have been issued following proper contracting guidelines. "There is nothing per se improper about relatives of a foreign leader having an ownership interest in a company that is a U.S. government contractor or subcontractor," a spokesman for the Defense Energy Support Center told the *New York Times*.[10] A Pentagon spokesman made a similar statement to NBC News in 2006:

> "We are aware of the allegations of the current Kyrgyz government," said Lt. Col. Joe Carpenter…, "that former Kyrgyz regime leadership may have misappropriated funds from U.S. payments for goods or services," and added any "misappropriation of funds is an internal Kyrgyz matter. All DoD contracts for goods and services in Kyrgyzstan were negotiated in accordance with U.S. laws and DoD contracting regulations."

When pressed on these questions in public settings, David Samuel Sedney, Deputy Assistant Secretary of Defense for Afghanistan, Pakistan and Central Asia, has simply stressed the need

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[7] Silverstein, "Two Former Senators Find Themselves Out of Board Positions with Kyrgyz Revolution," *Harper's Magazine*, Apr. 9, 2010.
[8] Carr, "Microsoft Denial on Kyrgyzstan Censorship Conflicts with the Facts," *Forbes,* Apr. 14, 2010.
[9] "General Prosecutor's Office launches Criminal Probe against Maxim Bakiev, Alexey Eliseev, Eugen Gurevich in connection with misuse of Russian Loan," AKIPress, Apr. 16, 2010.
[10] Cloud, fn. 2 supra.

for flexibility in the contracting process and the importance of doing whatever it takes to maintain the vital supply chain to U.S. forces in Afghanistan.

Obviously, however, there are very serious questions under U.S. law surrounding these dealings. The political accusations in Kyrgyzstan boil down to a claim that American officials made corrupt payments to Kyrgyz government officials in order to secure the Manas base arrangements. American criminal law contains a number of anti-bribery rules, including provisions that prohibit a U.S. person from providing consideration, directly or indirectly, to a foreign government official to secure or retain business. This prohibition is contained in the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, et seq.

To understand the application of this statute, let's assume that a U.S. corporation was seeking to operate a private commercial cargo shipping concession at Manas as an expansion of its global shipping services. The shipping firm would need a number of licenses and permits as well as physical facilities, the use of Manas's 14,000-foot runways and the right to park, maintain and refuel its aircraft at the airport. It would have to secure these things from several government agencies, and it would have to obtain the airport authority's permission to use the runway and its storage facilities. This bundle of rights could also be viewed, under Kyrgyz law, as a concession, subject to a strict regime of transparency and competitive bidding before an award is made.[11] Now let's suppose that the shipping company, hoping to get or retain that concession without the formal competitive process dictated by the Concession Law, decides that its best bet is to insure that the president's family benefits from its business operation. Being a public company, it's very troubled by the prospect of having any direct commercial dealings with the presidential family. The shipping company therefore awards a series of contracts to support the operation at Manas to a company which it claims is independent, but actually has a suspiciously close relationship with the shipping company and is headed by a former shipping company officer. That contractor then concludes support contracts worth tens of millions of dollars with companies controlled by the presidential family. The president then decides to grant the concession to the shipping company. These facts present a *prima facie* violation of the Foreign Corrupt Practices Act that could easily lead to prosecution of officers of the shipping company, the intermediary contractor and the local government officials (or their family members) who solicited and secured the contracts. If the Justice Department were to launch a serious investigation, it would likely not be impressed by the shipping company's claims that its contractor, not it, was dealing with the presidential family for the supply arrangements. Nor would it give much credit to claims by the shipping company executives that they knew nothing about the involvement of government officials or members of their immediate family. Consider this passage from the Justice Department's brochure for businessmen about the FCPA:

> To avoid being held liable for corrupt third party payments, U.S. companies are encouraged to exercise due diligence and to take all necessary precautions to ensure that they have formed a business relationship with reputable and qualified partners and representatives. Such due diligence may include investigating potential foreign representatives and joint venture partners to determine if they are in fact qualified for the

[11] Law of the Kyrgyz Republic On Concessions and Foreign Concessionary Enterprises ("Concession Law") dated March 6, 1992.

> position, whether they have personal or professional ties to the government, the number and reputation of their clientele, and their reputation with the U.S. Embassy or Consulate and with local bankers, clients, and other business associates. In addition, in negotiating a business relationship, the U.S. firm should be aware of so-called "red flags," i.e., unusual payment patterns or financial arrangements, a history of corruption in the country, a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the U.S. firm to be in violation of the FCPA, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer.[12]

The transactions surrounding the Manas contracts raise a significant number of red flags, starting with the presence of Red Star, a company which appears out of nowhere to administer hundreds of millions of dollars in supply contracts and which appears to have no significant customers besides the Defense Department. If this were a commercial setting, an investigator would probably start by studying whether there is really an arm's-length relationship between Red Star and the Pentagon contractors. If not, investigators might quickly conclude that it is a shell interposed to provide a buffer between the procurement officers and companies controlled by the president's family. This concern would be fueled by the fact that the principal officer now managing Red Star's business was formerly an intelligence officer with the Department of Defense, and as military attaché at the U.S. Embassy, a person whose core function was attending to the needs of the Defense Department in Kyrgyzstan. Indeed Colonel Squires appears in a Department of Defense Energy Support Center ("DESC") publication postured as if he were a member of the extended family.[13] At least one other figure involved in the London management of Red Star has close ties to the U.S. intelligence community. Moreover, the carefully obscured ownership of Red Star, its Gibraltar registry, its lack of business activities other than cash management, the lack of transparency surrounding the contracts, and the absence of records showing its payment of taxes—in Kyrgyzstan or anywhere else—raise troubling questions. The Justice Department also insists that we consider Kyrgyzstan's reputation for corruption. It ranks as number 162 of 180 nations in Transparency International's 2009 Corruption Perceptions Index.[14]

The Defense Department's statement that there is no prohibition *per se* on doing business with relatives of a foreign government leader is of course correct. The prohibition is on awarding such contracts as consideration for securing or retaining business. And that suggests that awarding contracts to members of the family of a foreign head of state as he is making a decision about a base concession is, indeed, presumptively corrupt and probably also unlawful.

[12] U.S. Department of Justice, *Lay Person's Guide to the Foreign Corrupt Practices Act*, p. 4.
[13] *See* p. 27 of the October 2008 issue of *Fuel Line,* a publication of the Defense Energy Support Center
[14] http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table

In the wake of the Tulip Revolution, an FBI investigation was launched into the Manas contracts and related matters, with the involvement of Betsy Burke, a counsel in the Criminal Division's Office of International Affairs, at Main Justice. Individuals I interviewed who met in Washington with the government on these matters on several occasions reported that up to fifteen government officials were present at the meetings, including representatives of the FBI, Justice Department and Treasury Department. The investigation appears to have focused on the Akayev-controlled companies and how they moved money obtained under these contracts, with the objective of assisting the new Kyrgyz government in their efforts to recover assets. My interlocutors also state that the federal investigators displayed extraordinary reticence to disclose information about or discuss Red Star, its principals and its operations, even when pressed on these points. There is no suggestion that these investigations considered whether the transactions violated anti-bribery restrictions of American law, even though the FBI apparently concluded that the contracts did channel money into the coffers of the president's family. It also appears that the task force arranged to freeze assets at both Citibank and the ABN-Amro Bank branch in New York. Moreover, it is particularly striking that notwithstanding these disclosures, Red Star continued to manage the supply arrangements and it introduced Mina, a company it seems to control, perhaps to create the illusion of a change in the contract.

What should we make of this Justice Department investigation, particularly in the face of its apparent decision not to inquire into the role played by Red Star or to bring any charges notwithstanding its apparent conclusions about Red Star's dealings with the Akayev family? The Justice Department clearly gave a "wink and nod" to the Defense Department about the Manas arrangements. In my mind that suggests less a conclusion by prosecutors that the arrangements were lawful than that whatever arrangements reached were approved at very high levels within the government. The Justice Department's conduct in investigating the Manas contracts is troubling, seems starkly at odds with the Department's announced policy of battling bribery and corruption in overseas contracting, and merits some probing questions by Congressional oversight.

Has the Justice Department concluded that the FCPA's anti-bribery provisions do not apply to Defense Department contracting? That seems improbable, because a large part of the prosecutions brought under the FCPA have historically related to military contractors. On the other hand, it is possible that Justice Department lawyers concluded that the base arrangements at Manas are not what the FCPA means when it talks about "obtaining or retaining business." But as I noted, if this were a commercial business seeking the same arrangements, that conclusion would be impossible to justify.

Alternatively, it could be that the Justice Department decided that national security concerns trump an application of the FCPA to these facts or that an exemption applicable to intelligence operations applies. The FCPA does contain a limited national security exception,[15] included at

[15] Section 78m(b)(3) of the FCPA provides: "With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the

the outset at the insistence of the CIA.[16] This provision relieves a U.S. business from its reporting obligations in certain circumstances. There is, however, no explicit provision stating that government contract officers may pay bribes when it is in the interest of national security for them to do so. However, in Britain, which has recently adopted an anti-bribery law which tracks the FCPA in large measure, the attorney general has attempted to fashion a national security exception where none exists on the face of the statute, using it to block the criminal investigation of two senior government officials by the Crown Prosecution Service in connection with the sale of aircraft by British Aerospace to the Saudi Arabian Air Force. His efforts have drawn sharp criticism from the British judiciary.[17]

Moreover, the Justice Department puts the national security concern on a different public footing. Mark Mendelsohn, the last head of the FCPA section at Main Justice, recently stated that "corruption is a national security issue and an impediment to stability in places like Iraq and Afghanistan."[18] The Justice Department claims that it is substantially increasing its efforts to enforce the FCPA and other anti-corruption and fraud statutes in connection with government contracts relating to military operations. This action is at least to some extent a response to this committee's press for closer contract oversight and is moved by published reports of staggering contract fraud connected with the contingency operations in Iraq and Afghanistan. It's hard to understand how the Justice Department can make such a claim credibly while taking no enforcement action with respect to hundred million dollar transactions that appear to benefit foreign heads of state, just as they are poised to decide critical concessions for the entity that awarded the contracts. It invites the suggestion that the Justice Department has decided to hold government officials to a lower standard of conduct than it applies to U.S. businesses.

In any event, the Defense Department's indirect award of substantial contracts to businesses controlled by the president's family—done at the same time that high-level political decisions are being taken about the future of the base rights—contributes to a culture of corruption both in Kyrgyzstan and in the United States. This makes it much more difficult for U.S. businesses to avoid rent-seeking by government officials by sending a conflicted message about U.S. policy. After all, if the Pentagon is willing to enter into such arrangements in the face of the FCPA, why can't a commercial entity do the same thing?

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specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance." One obvious question would therefore be whether any directive has been issued which is relevant to contracting at Manas.

[16] Kaikati et al., "The Price of International Business Morality: Twenty Years Under The Foreign Corrupt Practices Act," 26 J. BUS. ETHICS 213 (2000)(noting that CIA activities continue to be a carefully disguised exception to the FCPA.)

[17] Horton, "Mirror Image," *The American Lawyer,* Oct. 2008 (discussing the parallel use of a claimed national security exception to block criminal inquiry into government dealings in the United States and the United Kingdom).

[18] Hechler, "Roided Up Enforcement: DOJ Unit that Enforces FCPA to Bulk Up," *Corporate Counsel*, Feb. 25, 2010.

And even if the FCPA and other American anti-bribery laws don't apply to the deals cut with the families of the Kyrgyz presidents, of course, the contractors should still be concerned about Kyrgyz criminal law. Articles 311-314 of the Kyrgyz Criminal Code make it a crime to pay a bribe to a government official in order to secure some benefit or forbearance. These provisions specifically contemplate that the bribe may be paid using one or a series of intermediaries in order to conceal the bribe. Kyrgyz prosecutors apply the same group of "red flag" tests that American prosecutors use to ascertain whether a services contract is actually a disguised bribe payment.

In the end how our Defense Department contracts for services at Manas makes a statement about how we view Kyrgyzstan. Is this a fellow democracy that shares our values in the rule of law and transparency? Or do we view this country as congenitally corrupt and governed by competing bands of kleptocrats, the sort of Hobbesian nightmare where "walking around money" should be generously doled out to get what we need for the short-term—and the long-term is irrelevant, because America sees no need for a long-term relationship. The simple truth is that Kyrgyzstan falls into neither category—it is a country with high aspirations and an unpleasant current reality. But the choices that we and the Kyrgyz make will move the country forward on the road to a democracy that offers hope to its citizens—or down the path trod by delegitimized and failed states where might makes right and power is wielded by the kleptocrat of the moment. Over the last seven years, the rhetoric of diplomats has suggested the former approach, but the government's actual conduct has pointed to the latter. And that approach is as unworthy of the United States as it is of Kyrgyzstan.

The solution to this problem is the one I understand that Kyrgyzstan's interim leader Roza Otunbayeva put to Assistant Secretary of State Robert Blake in their recent meeting: "Clean up your act at Manas." The United States doesn't need new laws or rules. It simply needs to abide seriously by the laws that are now on the books. Blake promised to introduce transparency to contract process,[19] but there's no evidence of any action on this promise so far. And this Committee's request for information from the Defense Department, State Department and FBI furnishes an important opportunity to the Obama Administration to make good on that promise.

The United States also needs to avoid repeating the mistake it made in the wake of the 2005 revolution, when it dithered for months avoiding engagement with the new government and making its anxiety about the airbase painfully obvious. The United States should embrace the new government and help it fulfill its promise to restore democracy, human rights and free elections in Kyrgyzstan. The United States should also demonstrate its commitment to transparency by putting its supply and service contracts at Manas up to rebid, open to all qualified providers, on terms that focus on the bidder's ability to perform or supply quality on the best economic terms rather than their connection to those in power. The democratic process and the competitive bidding of public contracts may not appear to be the easiest route forward at first glance, but to paraphrase Winston Churchill, we've tried the other options and they're even worse.

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[19] "What's Next for Kyrgystan: An Interview with Roza Otunbayeva," *Washington Post,* Apr. 16, 2010.

Short Biography

Scott Horton is an adjunct professor at Columbia Law School where he teaches law of armed conflict and international commercial law courses. He obtained his B.A. in 1977 from the University of Maryland and his J.D. in 1981 from The University of Texas, following studies at the Universities of Munich and Mainz in Germany where he was a Fulbright scholar. Horton has served as chair of a number of committees at the Association of the Bar of the City of New York, including the Committee on International Law, the Committee on International Human Rights and the Committee on the Commonwealth of Independent States; he currently serves on the Association's Task Force on National Security Law Issues. In 2007-08, he managed the Project on Accountability of Private Military Contractors at Human Rights First, leading to the publication of *Private Security Contractors at War,* a comprehensive study of legal accountability issues surrounding government contractors. He has also served as a legal affairs commentator for a number of network and cable news broadcasters and is a contributing editor covering legal and national security affairs for *Harper's Magazine* and a columnist for *The American Lawyer.*

Prof. Horton has practiced for more than twenty-five years as an international transactional lawyer, specializing on commercial dealings in emerging markets. He is the son of an Air Force colonel and spent half of his early life growing up on U.S. military installations overseas. He has worked for over twenty-five years on international commercial matters, including in the Kyrgyz Republic, which he first visited in 1992 and which he has visited repeatedly every year since. Horton handled many of the most significant foreign investment projects in the country. He has been a member of the Kyrgyzstan Bar Association since 1995. Horton has also been active in human rights matters, serving as counsel to Andrei Sakharov, Elena Bonner and other leaders of the Russian human rights and democracy movements. He is a founder and trustee of the American University in Central Asia in Bishkek, Kyrgyzstan, a former officer and director of the American Branch of the International Law Association (where he now chairs the Committee on International Human Rights), a member of the Council on Foreign Relations, chair of the advisory board of the EurasiaGroup and a member of the advisory board of the National Institute of Military Justice.

He has previously testified three times before the House Judiciary Committee on questions relating to federal jurisdiction over government contractors and the internal investigation into the case of Maher Arar by the Department of Homeland Security and the Department of Justice and he testified last November before the Senate Armed Services Committee concerning the tort liability of contractors relating to injury to U.S. service personnel abroad.