

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2012

PHILADELPHIA, WEDNESDAY, FEBRUARY 6, 2013

VOL 247 • NO. 25

An **ALM** Publication

## COMMENTARY

### A Philadelphia Lawyer in Kazakhstan: A Look at Judicial Independence

BY ROBERT C. HEIM

*Special to the Legal*

To be honest, Kazakhstan was not on my bucket list. Nonetheless, when I was presented with the opportunity to speak on the subject of judicial independence at a meeting with the country's prime minister, I was intrigued.

The opportunity arose from a combination of circumstances, not the least of which was the prime minister's desire to improve the investment climate for Western companies by bolstering their confidence in the fairness and impartiality of Kazakhstan's judges. The American Chamber of Commerce organized the conference to include several ambassadors, distinguished jurists and a U.S. lawyer who had practiced in the federal courts and was familiar with the process for the selection of federal judges. I filled the latter spot, likely not so much a result of my credentials, but because my partner, Ken Mack, is the current head of the American Chamber of Commerce in Kazakhstan.

Kazakhstan is one of the former Soviet satellites that became an independent republic in 1991. It is rich in natural resources with large oil, gas and mineral deposits. Consumer goods and technology



**ROBERT C. HEIM** is a partner with Dechert in Philadelphia. He is a former chancellor of the Philadelphia Bar Association, former president of the National Conference of Bar Presidents and is currently the Third Circuit representative on the American Bar Association's Standing Committee on the Federal Judiciary.

sectors have also thrived. The city of Almaty, Kazakhstan, the business center of the country, appears both modern and prosperous and is surrounded on three sides by towering mountains. It is a hiker and skier's paradise. A number of American and European law firms have offices in Almaty or the capital city of Astana, where the conference was held.

Throughout the 1990s, the Kazakh people drafted and approved a constitution that was modeled on those of the Western democracies. The constitution provides the citizenry with the same kind of basic rights secured by the U.S. Constitution and provides for a parliamentary system of governance. This formulation had great appeal to not just the Kazakh citizens but to Western investors who sought to do business in Kazakhstan. Over time, however, Western investors

expressed concern about their treatment in the courts.

Despite assurances in the constitution of equality of all parties before the law and the independence of the judiciary, many complaints surfaced about the integrity and professional competence of the judges. Western critics were heard to say that it was very difficult, bordering on impossible, for a Western company to prevail in a lawsuit brought by or against the government. And since the government was a party to most of the transactions involving foreign companies, this cloud of uncertainty threatened the needed infusion of investment from the West.

To its credit, the government responded recently by focusing one of the prime minister's council sessions on the subject of judicial independence. The council session was held on November 23, 2012, with a number of invitees presenting remarks. U.S. Ambassador Kenneth Fairfax was the first speaker followed by the ambassadors from Canada and Switzerland and the European Union. On the non-ambassadorial side, remarks were presented by the chamber president, the chief justice of Nova Scotia, a distinguished representative from the French judiciary, and, batting

clean-up, at least I hoped, me.

My remarks were directed to the need for competent judges and the threat to independence posed by vague, liberal standards for their removal. Virtually all of the speakers favored lifetime tenure, a hallmark of our federal system since Alexander Hamilton first proposed it in the Federalist papers. Articles 12 and 16 of Kazakhstan's constitution are very close to the model that Hamilton envisaged. Like here, most judges in Kazakhstan have lifetime tenure. The difference, however, is decisively meaningful. In the United States, the prevailing view is that judges cannot be removed from office except by impeachment by the House of Representatives followed by conviction by the Senate. (I say "prevailing view" because several scholars, including former Chief Justice William Rehnquist, have argued that the "Good Behavior Clause" of Article III may, in theory, permit removal for proven misbehavior without resort to impeachment.) In any event, the practice in Kazakhstan has been contrary to the practice here. Since the founding of our republic, thousands of federal judges have served and yet, over this time, there have been only eight judges who have been impeached, convicted and removed. This is a far cry from Kazakhstan where vague and subjective reasons reportedly have been used to remove judges whom the executive branch have found to be "unreliable."

In addition to the ease of removal, Kazakh lawyers with whom I discussed the issue complained about the lack of standards for the selection of judges and the process by which they are appointed. In my presentation to the prime minister and his council, I noted that there was no formal organization

---

*In my presentation to the prime minister and his council, I noted that there was no formal organization of lawyers in Kazakhstan similar to the American Bar Association in the United States.*

---

of lawyers in Kazakhstan similar to the American Bar Association in the United States. I encouraged the formation of such an association and recommended especially the procedure for "vetting" prospective nominees employed by the Standing Committee on the Federal Judiciary of the ABA, of which I am a member. I explained that in the United States, the 13 members of the Standing Committee representing each of the 13 federal judicial circuits make a detailed inquiry into the ethics and professional competence of any person the president is considering for nomination as a federal judge. The lead investigator is the committee member for the circuit in which the federal judge would sit. In evaluating "integrity," the committee considers the candidate's character and general reputation in the community as well as his or her work habits and diligence. If there is any hint of any ethical lapses, the lead is pursued until the matter is resolved one way or the other. Through an extensive confidential interview process, the committee is able to

receive impartial peer-review evaluations and provide an independent assessment to the president and his advisers.

In addition to evaluating integrity, the committee also focuses heavily on professional competence. Ordinarily it expects that a candidate will have at least 12 years' experience practicing law and substantial courtroom and trial experience or distinguished accomplishments similar to in-court advocacy. The committee's interviews of judges, lawyers and others focus on the level of skill with which the candidate has conducted his or her legal practice and the candidate's ability to grasp complex legal issues. The committee also considers the candidate's likely judicial temperament such as his or her reputation for open-mindedness, courtesy, patience and freedom from bias. The committee does not consider whether a prospective nominee has a political sponsor or the candidate's philosophy or ideology.

I concluded my remarks by acknowledging that in the United States, like elsewhere, politics play a role in the initial selection of possible nominees. But there are safeguards in place to promote independence, competence and fairness. After the initial presentations, there was considerable discussion of these concepts, albeit through headphones and simultaneous interpretation, but it appeared that the remarks of all the participants were well-received. The fledging republic of Kazakhstan and its judicial function seems headed in the right direction. •