

## Polish Government Extinguishing Rule of Law

### The United States Must Make Clear to Its Close Ally that Values Matter, Authoritarian-Style Policies Not Acceptable in NATO

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#### Overview

In October 2015, the Law and Justice party (PiS) won an outright majority in parliament with 37.6 percent of the vote, avoiding the need to form a coalition government. The party ran a moderate though populist campaign, but after the election took a decidedly nationalist turn. Party leader Jarosław Kaczyński (who is a member of parliament but holds no other public office) crafted a motto of “good change” as a revolt against what he deemed the privileged establishment: elites that had turned toward the EU and the liberal world order and, according to him, against the interests of Poland.

The Law and Justice party’s philosophy is grounded in the belief that when domestic and other European elites created a post-communist constitution in 1997 they did not represent the interests of the “real Poles” that are members of PiS, so party members may freely violate its provisions.<sup>1</sup> Interpreting its election victory as a broad mandate from the people, PiS believes that it alone may define rights and obligations under the Constitution, therefore courts should have no power to defy or criticize the executive and legislative branches. Kaczyński’s disdain for constitutional checks and balances was solidified when, during the prior period of Law and Justice government, from 2005 to 2007, in which he served as prime minister, the Constitutional Tribunal repeatedly blocked his policies.

Combining attacks on the EU with xenophobic rhetoric to exploit the refugee crisis, the Law and Justice approach proved to be an overwhelming

political success and carried the party back to power.

The Law and Justice campaign against democratic institutions began in November 2015 with an effort to undermine the Constitutional Tribunal, but then went on to deconstruct step-by-step the entire judicial system, independent media, electoral systems at every level, and civil society – basically, any institution that could challenge its power. Many of the government’s methods violated the Constitution and accepted legal procedures. Employing a new method of expedited legislating, Law and Justice uses “Private Member Bills” so that expert consultation is not required and votes can be fast-tracked. When the Constitutional Tribunal ruled such actions unconstitutional, or mandated stays, the government ignored the rulings. In addition, shortly after taking power, Law and Justice purged the public administration and civil service, keeping only loyalists.<sup>2</sup> This focus on loyalty above legality, and on centralization of control, have earned the government comparisons to a neo-Soviet leadership.<sup>3</sup> While legislated changes have been incremental, the cumulative effect has resulted in structural transformation, likened by some to boiling a frog.

#### Undermining Judicial Independence

##### The Constitutional Tribunal / The Office of the Prosecutor

On November 12, 2015, the new Sejm had its first sitting. Within a week, the government imposed term limits on the Constitutional Tribunal’s leadership. It then cancelled five nominations for the Tribunal proposed by the outgoing Civic Platform government (two of which were later found by the Tribunal to be improper). Despite a formal petition to stay its actions as possibly unconstitutional, the Sejm nominated five new judges and confirmed them in

rapid-fire proceedings, late at night on December 2, 2015. Four took their oaths in the early hours of December 3, the last on December 9.<sup>4</sup>

When the Tribunal ruled three of the judicial appointments unconstitutional, and found several other constitutional violations, then-Prime Minister Beata Szydło, in an unprecedented action, prohibited publication of the rulings so as to prevent them from taking effect.

On December 22, 2015, Law and Justice passed additional legislation radically overhauling the Tribunal's functions. The legislation, which took effect immediately, gave the unconstitutionally appointed judges the power to veto key decisions. One key provision required the Tribunal to hear cases only in the order in which they were filed. In March 2016, the Tribunal (under its old rules) struck down the legislation as intended to paralyze the Tribunal in violation of separation of powers. The government again refused to publish or recognize the ruling.

In the same time frame, in February 2016, the government consolidated the offices of General Prosecutor and Minister of Justice, making the head prosecutor a political position subordinate to the executive. Under the terms of the new Law on the Prosecutor's Office, a recent report established that over six thousand prosecutors were forced out for perceived disagreements with the ruling party on policy, including 1000 officers, the managing prosecutors in charge of most major departments, and six of seven Deputy Prosecutors General.<sup>5</sup>

To complete its takeover of the Tribunal, in late 2016, the pro-government judges colluded with parliament to ensure that a vote for head judge occurred when only pro-government judges were present. Despite the lack of a quorum present for the vote, President Duda honored the outcome. The new head judge put the deputy on indefinite leave. Another judge resigned. These changes, plus the illegal-seating of judges gave Law and Justice a majority on the Tribunal. Without further protests from the (newly-reconstituted) Constitutional Tribunal, decisions striking down recent laws were taken off the Tribunal's website and no longer considered binding. And suddenly, the government's caustic criticisms of the Tribunal stopped.

## The Supreme Court/ Ordinary Courts

In January 2017, after completing its takeover of the Constitutional Tribunal, the government mounted a large-scale overhaul of the Supreme Court,<sup>6</sup> the lower (ordinary) courts, and the body charged with selecting judges and ensuring judicial independence, the National Council of the Judiciary. New laws, which gave the President and Minister of Justice more control over the judiciary, were signed by President Duda in July and December 2017. Duda signed the new legislation despite street protests by tens of thousands of Poles nationwide starting in mid-July 2017, sharp criticism from multilateral bodies and the international community, and the European Commission's threat to immediately activate the Article 7 Rule of Law Mechanism.<sup>7</sup>

The 2017 laws gave the President power to force the retirement of Supreme Court judges over 65 by July 2018. The reforms also expanded the Supreme Court to 120 judges, increasing party control with the appointment of new judges. They created two new political bodies: one empowered to re-decide any court ruling since October 1997 (called an "extraordinary appeal" body), and another charged with disciplining judges. Both bodies include lay persons, essentially political appointees, lacking any legal experience. New judges are now appointed by a body whose members are elected by the Sejm instead of being selected by judges, and selection is no longer transparent.

The laws also gave the Minister of Justice/General Prosecutor power to force the retirement of regional court heads and deputies. By February 28, 2018, 149 of them were forced out with no opportunity to appeal the decision. The Minister of Justice was given power to establish temporary rules governing courts.

On July 3, 2018, President Duda told 15 Supreme Court judges that they were to be "retired" under the new law. However, the President of the Court, Malgorzata Gersdorf, and the other "retired" judges continued to insist they remained on the bench. In hearings to confirm new Supreme Court judges, candidates were asked whether Gersdorf remained President of the Court. Only those that answered "no" were allowed to move forward.<sup>8</sup> A new National Council of the Judiciary was established and began

choosing judges using a non-transparent process; it created a blacklist of pro-democracy judges.<sup>9</sup>

On July 24, the president signed new legislation easing requirements for new appointments to the Supreme Court that were proposed and passed through extremely expedited procedures. Their aim was to quicken new appointments and re-fill the Supreme Court ahead of judicial review of the recent legislation by the European Court of Justice (ECJ). However, the ECJ invalidated the retirements and ordered reappointment of the retired judges. While the government eventually complied, it then began using the newly-created disciplinary body to discipline judges for charges that amounted to disagreeing with the government. As of December 2018, at least a dozen of the judges are on track to lose positions due to politicized disciplinary charges.<sup>10</sup>

In January 2018, the government passed a law politicizing appointments to the National Electoral Commission, formerly populated by judges appointed by independent judicial bodies. Now it is made up of one member of the (party-controlled) Constitutional Tribunal, one member of the (party-controlled) Supreme Court, and seven members elected by the Sejm.<sup>11</sup>

### Repressing Media and Civil Society

One of PiS's early purges of non-loyalists focused on public media. In January 2016, new legislation terminated broadcasters' supervisory boards and empowered the treasury minister to hire and fire broadcasting chiefs, formerly selected through a competitive process. More than 225 journalists and managers were fired or quit in protest. In December 2016, the Constitutional Tribunal deemed the law unconstitutional. The ruling was ignored.

As a result, the main public television station, Telewizja Polska or TVP, was transformed into a government mouthpiece. Broadcasts slather compliments on the government and call critics and NGOs corrupt traitors. All government-associated support for independent media was halted and has been shifted to pro-government outlets.<sup>12</sup> Concerns remain that private media will be targeted.

In its quest to stamp out opposition, in 2016, the government abolished or defunded numerous organizations focused on human rights and combating xenophobia.<sup>13</sup> It legislated an education

reform that terminated programs on tolerance and equality in favor of increased discussions of religion and patriotism.

It created GONGOs to steer government-controlled funding from the EU and Norway towards these groups, de facto defunding independent NGOs, such as the Helsinki Foundation for Human Rights' and the Association for Legal Intervention's programs that assist refugees, and the Center for Women's Rights and BABA Lubuskie Center for Women's Rights that assisted victims of domestic violence.<sup>14</sup> In September 2017, the government created two new entities to govern NGOs. Unlike prior independent oversight entities, the new bodies are controlled by the Sejm and the Prime Minister.

### Purging Intelligence Services and the Military

In addition to targeting core democratic institutions, beginning in late 2015, and continuing to January 2017, Law and Justice systematically purged the military leadership and the intelligence community, targeting individual leaders and staff perceived to be insufficiently loyal to the party.<sup>15</sup> Between 2015 and 2017, 36 generals in the Polish armed forces were either dismissed or demoted, including a quarter of Poland's general staff.<sup>16</sup> Over the same period, Law and Justice dismissed and replaced all top officials in Poland's counterintelligence agency,<sup>17</sup> and 200 colonels resigned from the military to protest the purges (though many resignations seem to have occurred under pressure and in response to threat of dismissal).<sup>18</sup> The purge of military intelligence included a raid by Ministry of Defense officials on a NATO-affiliated intelligence training center in Warsaw, during which officers working at the center were dismissed.<sup>19</sup> As of 2018, the Polish security apparatus has been described by a Polish general as in "disarray" due to the purges.<sup>20</sup> ■

### Recommendations

Members of Congress Should:

- Authorize and appropriate a reintroduction of democracy funding in Central and Eastern Europe, including in Poland, to strengthen local civil society, independent media, and accountability/watchdog groups, especially those operating outside of large cities. In reintroducing funding in the region, Congress should cite the need to shore up democratic institutions in the country.

- In determining whether to create a permanent military base in Poland or permanently station U.S. military forces there, in response to Poland's 2018 requests, require the Departments of State and Defense to conduct as part of their feasibility study a review of the state of rule of law and judicial independence in Poland's legal system pursuant to international standards set by the Venice Commission, including the Rule of Law Checklist, to determine whether Polish institutions continue to function according to democratic principles of rule of law and protection of individual rights and freedoms.
- Place limits on U.S. provision of International Military Education and Training services to Polish officers unless and until the Polish government agrees to terminate disciplinary proceedings against all judges for criticism of the government; cancel the "extraordinary appeal" procedure, and provide review of all judicial, military, intelligence, prosecution, and civil service personnel that were forced to resign or retire.

<sup>1</sup> The party philosophy goes even further, into conspiracy-land, as it includes the belief that former Prime Minister (member of the Civic Platform party) Donald Tusk conspired with Russia to take down President Lech Kaczyński's plane in Smolensk in 2010, killing the president (Jarosław's twin brother) and 96 others. Investigations of the crash concluded that the causes were bad weather and pilot error. Tusk is currently serving his second term as the president of the European Council of the EU. See Emily Tamkin, "Has the Clock Run Out on the Smolensk Conspiracy?," *Foreign Policy*, April 10, 2018, <https://foreignpolicy.com/2018/04/10/has-the-clock-run-out-on-the-smolensk-conspiracy/>.

<sup>2</sup> According to one analysis, 37 new laws have led to the sacking of more than 11,300 civil servants as of spring 2018. "Change of State: Poland's ruling Law and Justice party is doing lasting damage," *The Economist*, April 21, 2018, <https://www.economist.com/europe/2018/04/21/polands-ruling-law-and-justice-party-is-doing-lasting-damage>.

<sup>3</sup> Venice Commission Opinion on the Draft Act Amending the Act on the Supreme Court, Opinion No. 904/2017, December 11, 2017, [http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=e=CDL-AD\(2017\)031-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=e=CDL-AD(2017)031-e); See also Gerald Knaus & Piotr Buras,

"Where the law ends: The collapse of the rule of law in Poland – and what to do," Batory Foundation IdeaForum and European Stability Initiative, May 29, 2018, [https://www.esiweb.org/index.php?lang=en&id=156&document\\_ID=190](https://www.esiweb.org/index.php?lang=en&id=156&document_ID=190).

<sup>4</sup> Venice Commission Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal, Opinion 833/2015, March 11, 2016; [http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=e=CDL-AD\(2016\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=e=CDL-AD(2016)001-e); see also Venice Commission Opinion on the Act on the Constitutional Tribunal, Opinion 860/2016, October 14, 2016, [http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=e=CDL-AD\(2016\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=e=CDL-AD(2016)026-e).

<sup>5</sup> "Raport: Prokuratura Pod Specjalnym Nadzorem," (Report: Prosecutors Office Under Special Supervision) Państwo PIS, November 26, 2018, accessed December 03, 2018, [http://www.panstwo-pis.pl/index.php/Państwo\\_PIS](http://www.panstwo-pis.pl/index.php/Państwo_PIS).

<sup>6</sup> The Supreme Court is the body charged with interpreting all laws in Poland that do not require interpretation of the Constitution. If necessary, the Supreme Court and lower courts can rule on constitutional issues, and had begun to do so after the Constitutional Tribunal was taken over by Law and Justice, resulting in these courts being targeted. Dariusz Mazur & Waldemar Zurek "So-called 'Good change' in the Polish system of the administration of justice," Public Prosecutor, October 6, 2017, <http://www.nsz.cz/index.php/en/magazine-public-prosecution> and on file with Human Rights First, Washington, D.C., July 2018, and Wojciech Sadurski, "How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding," Sydney Law School Legal Studies Research Paper No. 18/01, pp. 4-6, January 2018, <http://ssrn.com/abstract=3103491>.

<sup>7</sup> The Rule of Law Mechanism, outlined in Article 7 of the Treaty on European Union, allows the European Union to sanction a state if the Council on the European Union determines through a unanimous vote (after obtaining the consent of the European Parliament through a 2/3 majority of votes or an absolute majority of members) that the state's policies present a clear risk of a serious breach of EU values as set forth in Article 2 and Article 6 of the Treaty on the European Union as well as the European Charter of Fundamental Rights. After this first step has been taken, the Council can suspend certain membership rights of the violating member state, including voting rights in the Council. This second step must be agreed to by a qualified majority of Council members. Sanctions include limitation of the state's voting rights in the EU. This provision had never been used before it was applied to Poland. Prior to 2014, the EU had no framework for engaging in preventive action once a member state had begun to violate principles of rule of law, it had only the sanctions mechanism set forth in Article 7. However, in 2014, via the Treaty of Nice, it added Article 7.1, a preventive mechanism, that set forth a framework for a structured dialogue for negotiating with a state at risk of sanction under Article 7 due to a systemic threat to the rule of law. This mechanism was applied to Poland

beginning in December 2017. See Briefing: Understanding the EU Rule of Law mechanisms, European Parliament, January 2016, <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-573922-Understanding-EU-rule-of-law-mechanisms-FINAL.pdf>.

<sup>8</sup> Twitter Post by Christian Davies, July 12, 2018, <https://twitter.com/crsdavies/status/1017380612263567360>.

<sup>9</sup> Twitter Post by IUSTICIA Polish Judges Association, July 14, 2018, <https://twitter.com/JudgesSsp/status/1017811397030432769>. The pro-democracy judges on the blacklist are those that the government should not hire or promote.

<sup>10</sup> Adam Bodnar, Testimony in front of European Parliament Committee on Civil Liberties, Justice, and Home Affairs, November 20, 2018, <https://www.rpo.gov.pl/en/content/adam-bodnar-public-hearing-%E2%80%9C-situation-rule-law-poland-particular-regards-independence-judiciary%E2%80%9D>.

<sup>11</sup> Kamil Marcinkiewicz & Mary Stegmaier, "Democratic elections in Poland face a new threat," *Washington Post*, January 11, 2018, [https://www.washingtonpost.com/news/monkey-cage/wp/2018/01/11/free-elections-in-poland-face-new-threats-from-a-new-electoral-reform-bill/?utm\\_term=.80834aa5cc7d](https://www.washingtonpost.com/news/monkey-cage/wp/2018/01/11/free-elections-in-poland-face-new-threats-from-a-new-electoral-reform-bill/?utm_term=.80834aa5cc7d).

<sup>12</sup> This included government's advertising funding – a major source of revenue for press in the country – as well as funding from state-owned companies. Critical media, such as *Gazeta Wyborcza*, also have had their distribution limited. Annabelle Chapman, "Pluralism Under Attack: The Assault on Press Freedom in Poland," Freedom House, June 2017, <https://freedomhouse.org/report/special-reports/assault-press-freedom-poland>.

<sup>13</sup> In May 2017 it abolished the anti-racism council, called the Council for Counteracting Racial Discrimination, Xenophobia and Related Intolerance. Zoya Sheftalovich, "Polish PiS abolishes anti-racism body," *Politico*, May 5, 2016, <https://www.politico.eu/article/polands-pis-lae-and-justice-party-abolishes-anti-racism-body/>. In November, it merged into a larger body (and therefore abolished) the Interior Ministry's Human Rights Protection Team. Christian Davies, "Polish PM angers human rights campaigners with plan to shake up NGOs," *The Guardian*, November 28, 2016, <https://www.theguardian.com/world/2016/nov/28/polish-pm-beata-szydo-angers-human-rights-campaigners-ngos>. It withheld migration-related funds for NGOs provided by the European Commission and cut the Commissioner for Human Rights' budget by seven million zloty (\$1.9 million). Human Rights First, "Poland's New Front: A Government War Against Civil Society," August 2017, pp. 10-12, <http://www.humanrightsfirst.org/sites/default/files/Poland-Report-August-2017.pdf>.

<sup>14</sup> In spring 2017, the government initiated surprise audits of NGOs it disfavored, and then suspiciously ordered them to repay funds, defunding many. Those that were audited and defunded served refugees, LGBT groups, and battered women. An auditor in one case was told to find a violation for each NGO, regardless of the facts. The new GONGOs serve only communities the government favors: Christian refugees, family-focused NGOs

(instead of battered women's groups), and far-right and xenophobic Father Rydzyk's projects. They also include fringe groups that support the government's Smolenski conspiracy theories. Sometimes grant competitions were stalled until a GONGO could be created to accept the grant. Human Rights First, Poland's New Front: A Government War Against Civil Society, August 2017, <http://www.humanrightsfirst.org/sites/default/files/Poland-Report-August-2017.pdf>.

<sup>15</sup> Henry Foy, "Poland raids NATO office in Warsaw," *Financial Times*, December 8, 2015, <https://www.ft.com/content/0dd663d7-de3c-30f5-a81a-29dcc59c4b6a>; regarding purges of the civil service see also Hubert Tworzecki and Radoslaw Markowski, "Why is Poland's Law and Justice Party trying to rein in the judiciary?," *Washington Post*, July 26, 2017, [https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/26/why-is-polands-law-and-justice-party-trying-to-rein-in-the-judiciary/?utm\\_term=.b97fecb3f915](https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/26/why-is-polands-law-and-justice-party-trying-to-rein-in-the-judiciary/?utm_term=.b97fecb3f915).

<sup>16</sup> Pawel Wronski, "Antoni Macierewicz's purge: The minister wants to have his generals," *Gazeta Wyborcza*, Aug. 2, 2017, <http://wyborcza.pl/7,75398,22178325,czystka-antoniego-macierewicza-minister-chce-miec-swoich-generalow.html> (available in English via [Lexis Advance Research](#)).

<sup>17</sup> Robert Beckhusen, "Warsaw's Generals are Fed Up with Poland's Ted Cruz," *War is Boring*, March 12, 2016 <https://warisboring.com/warsaws-generals-are-fed-up-with-polands-ted-cruz/>.

<sup>18</sup> Lidia Kelly, "NATO deploys troops to Poland while concerns about country's army rise," *Reuters*, April 13, 2017, <https://www.reuters.com/article/us-nato-russia-poland/nato-deploys-troops-to-poland-while-concerns-about-countrys-army-rise-idUSKBN17F290>.

<sup>19</sup> Annabelle Chapman, "Why Did Poland Raid a NATO-Linked Training Center?," *Daily Beast*, December 19, 2015, <https://www.thedailybeast.com/why-did-poland-raid-a-nato-linked-training-center>; see also Atlantic Council summary: Poland raids NATO center in Warsaw, December 2015, <http://www.atlanticcouncil.org/?view=article&id=27787:poland-raids-nato-center-in-warsaw>.

<sup>20</sup> Marek Swierczynski, "Gen. Mieczyslaw Gocul on the dramatic condition of the Polish army: Polish forces disarmed," *Polytyka*, July 10, 2018, <https://www.polityka.pl/tygodnikpolityka/kraj/1755560,1,gen-mieczyslaw-gocul-o-dramatycznym-stanie-polskiej-armii.read> (available via [Lexis Advanced Research](#)).