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# Justice Purged

## Poland Politicizes its Judiciary

June 2018



## Introduction

Poland is soon approaching a point of no return concerning the independence of its judiciary. On July 3, more than 40 percent of the country's 73 Supreme Court judges as of July 3 are likely to be forced from office under the newly-enacted Law on the Supreme Court, passed by Poland's ruling Law and Justice (PiS) party.

Judges on the Court have heretofore been insulated from the current Polish government's mounting attacks on the rule of law. Under the new law, however, these judges will likely be replaced by Law and Justice loyalists appointed on the basis of fidelity to party rather than on juridical merit. In addition to the forced retirement of Supreme Court judges, the new law will create a body with powers to rehear nearly any court case decided since 1997 – meaning that civil and criminal cases can be reopened and critics of Law and Justice can be targeted for political purposes. Finally, the law will incentivize the disciplining of judges by creating a new body of highly-paid political appointees tasked with meting out judicial discipline. Having already routed Poland's Constitutional Tribunal and regional courts, the pending purge may complete Poland's transformation from a model of post-Communist governance to a country once again devoid of meaningful rule of law.

Poland's crisis is so acute that on June 13, 2018, all of the country's post-Communist living former presidents, along with a multi-party coalition of former prime ministers and foreign ministers, called on the European Union (EU) to respond to the Polish's government's actions by initiating an EU infringement procedure, stating "There will be no democratic Poland without the rule of law."<sup>1</sup> On June 14, leaders of the European Parliament's

<sup>1</sup> "Europe, defend the rule of law in Poland!," *Gazette Wyborcza*. June 13, 2018. <http://wyborcza.pl/7,75968,23531141,europe-defend-the-rule-of-law-in-poland.html>.

five main political parties joined the former Polish leaders' call for action, asking that the infringement procedure be initiated and recommending that the Law on the Supreme Court be referred to the European Court of Justice.<sup>2</sup> Thirty former Polish ambassadors wrote in a public letter on May 31 that the actions being taken in breach of rule of law "undermin[e] the democratic structure of the state" and "affect the quality of [Poland's] NATO and European Union membership."<sup>3</sup>

Finally, just as this report was going to press, Frans Timmermans (First Vice-President of the European Commission) received a green light from the EU College of Commissioners to initiate the infringement procedure concerning the Supreme Court Law.<sup>4</sup> Now the question is whether the Commission will bring the action, and how it will enforce a favorable decision.

Implementation of the Law on the Supreme Court follows a broader wave of what the Polish government has labeled "judicial reform," many aspects of which have been roundly criticized by the Polish legal community and international observers. Finally, just as this report was going to press, Frans Timmermans (First Vice-President of the European Commission) apparently received a green light from the EU College of Commissioners to initiate the infringement procedure concerning the Supreme Court Law.<sup>5</sup> Now the question is whether the Commission will bring the action, and how it will enforce a favorable decision.

<sup>2</sup> Verhofstadt, Guy. Twitter Post. June 14, 2018. 4:51am.

<https://twitter.com/guyverhofstadt/status/1007229076547960834>.

<sup>3</sup> Violating the Principle of the Rule of Law Weakens Poland's Position ...." May 31, 2018. <http://konstytucyjny.pl/wp-content/uploads/2018/06/Warsaw-31-May-2018-Position-of-KA2c-Final.pdf>.

<sup>4</sup> Gostynska, Agata, Twitter post, June 27, 2018 <https://twitter.com/AgataGostynska/status/1011994137934159872>.

<sup>5</sup> Gostynska, Agata, Twitter post, June 27, 2018 <https://twitter.com/AgataGostynska/status/1011994137934159872>.

**Since the second half of 2017, the Polish government has:**

- Forcibly removed at least 149 regional court presidents and vice-presidents for discretionary (i.e., non-performance-related) reasons.<sup>6</sup>
- Appointed new court presidents to replace those let go, including many with paltry experience and a history of disciplinary violations or complaints filed against them.
- Re-made the membership of the National Council of the Judiciary, a body formulated to guarantee judicial independence. Previously comprised entirely of judges, today the majority of appointments to the National Council are political in nature.

While the EU and numerous multilateral organizations, raised serious concerns and objections to the Polish government's actions, and decried the cumulative effect of attacks on other independent institutions such as media and non-governmental organizations (NGOs), the Polish government shows no signs of ceasing its assault.

Since Law and Justice assumed its parliamentary majority in 2015, Poland's governmental landscape has increasingly resembled that of a single-party state. In addition to politicizing its judiciary, the government turned the country's public media into a government mouthpiece, forcing out at least 220 journalists,<sup>7</sup> and slashing funds for non-state-aligned civil society organizations, including for those that advocate for

refugees and immigrants, LGBT communities, and women victims of domestic violence.<sup>8</sup>

Poland's turnaround from democracy darling to democracy dismantler couldn't be riskier for U.S. interests, affecting as it does a key American ally on NATO's eastern frontier.

Yet, nearly every source interviewed for this report told Human Rights First that U.S. President Donald Trump's July 2017 speech in Warsaw, in which he lauded Poland "as an example for others who seek freedom and who wish to summon the courage and the will to defend our civilization," signaled to the Polish government that its efforts to undercut independent courts, NGOs, and media were supported by the White House.<sup>9</sup> Occurring well after the Polish government began its campaign to dismantle the country's ordinary courts and take over the National Council of the Judiciary, Trump's failure to mention concerns surrounding rule of law left doubt as to the U.S. government's priorities.

Summarizing these views, an analyst from the Organization for Security and Cooperation in Europe's (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) noted that, "[Trump's] visit was encouraging to the [Polish] government to continue its so-called 'reforms.'"<sup>10</sup> Likewise, in the estimation of political scientist Andzej Turkowski, "Trump's visit was a boost to the conservative PiS camp."<sup>11</sup>

The president's framing of Poland as "an example for others who seek freedom," created for that government what Bartosz Wielinski, foreign editor of *Gazeta Wyborcza*, described as a "dangerous

<sup>6</sup> It Starts With The Personnel: Replacement of common court presidents and vice presidents from August 2017 to February 2018, Barbara Grabowska-Moroz and Malgorzata Szuleka, Report by the Helsinki Foundation for Human Rights, April 2018, <http://www.hfhr.pl/wp-content/uploads/2018/04/It-starts-with-the-personnel.pdf>.

<sup>7</sup> "In the run-up to Chancellor Merkel's visit, the Polish government must respect freedom of the press," Reporters Without Border, February 7, 2017, <https://rsf.org/en/news/run-chancellor-merkels-visit-polish-government-must-respect-freedom-press>.

<sup>8</sup> "Poland's New Front: A Government War Against Civil Society," Human Rights First, August 2017, <http://www.humanrightsfirst.org/sites/default/files/Poland-Report-August-2017.pdf>.

<sup>9</sup> <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-people-poland/>

<sup>10</sup> Interview by Melissa Hooper, May 2018.

<sup>11</sup> Interview by Melissa Hooper, May 2018.

[feeling of being] emboldened."<sup>12</sup> "PiS loved his speech," echoed Milosz Hodun of opposition party Nowoczesna.<sup>13</sup> And in the estimation of many observers, soon after Trump's speech, the Polish government took action on the basis of a perceived green light from Washington. On July 12, six days after President Trump's address, the Polish government introduced three new laws overhauling its court system and Supreme Court, the last of which will go into effect on July 3.

In the words of two Polish experts, with the implementation of these laws, the Law and Justice-led government is poised to complete the creation of a new justice system in which "the control of courts, prosecutors, and judges lies with the executive and a single party in an EU member state."<sup>14</sup>

### **Recommendation to the United States government:**

Given the strength of the U.S.-Polish relationship and the role played by the United States in Poland's emergence from communist-led authoritarianism, the United States has both unique sway with the government of Poland and a significant interest in its ally remaining a democratic state bound by governmental checks and balances. Allowing the dismantling of Poland's Supreme Court, particularly in light of the politicization of its other judicial bodies, will significantly undermine not only rule of law in Poland, but the standard for rule of law in the EU. Both the Trump administration and members of Congress should engage their Polish partners on

<sup>12</sup> "Polish Reporter Evaluates Trump's Warsaw Speech," CNN, July 7, 2017, <https://www.cnn.com/videos/world/2017/07/06/poland-intv-amanpour-bartosz-wielinski.cnn>.

<sup>13</sup> Interview by Melissa Hooper, May 2018.

<sup>14</sup> Piotr Buras and Gerald Knaus, *European Tragedy: The collapse of Poland's rule of law*, Stefan Batory Foundation and European Stability Initiative think tank, May 29, 2018, [https://www.esiweb.org/index.php?lang=en&id=67&newsletter\\_ID=125](https://www.esiweb.org/index.php?lang=en&id=67&newsletter_ID=125).

an emergency basis in support of rule of law in Poland, if possible before July 3. (*For additional recommendations, see pp. 15-17.*)

### **What Does the Law and Justice Party's 'Reform' Look Like?**

The Law on the Supreme Court makes sweeping changes to Poland's judicial system in at least four principal areas:

- Based on new, mandatory retirement ages, the law will force 27 of the 73 judges that make up Poland's Supreme Court on July 3 into early retirement. While an imprecise comparison, if the recently enacted law had occurred in the United States, given their respective ages, four Supreme Court Justices (Ginsburg, Breyer, Thomas, and Alito) would be compelled to ask President Trump, by July 3, for permission to continue in their jobs, and could be dismissed according to the executive branch's instructions. Those not submitting a request to maintain their position on the Court would be dismissed automatically.<sup>15</sup> The President (i.e., Chief Justice) of the Supreme Court, Malgorzata Gersdorf, is expected to be fired, despite the fact that she is in the fourth year of her six-year term. This is a direct violation of the Polish Constitution, which states that the President of the Court shall serve for six years and can only be removed for cause.
- The law will increase the number of judges on the Court from 79 to 120, allowing the current government to pack it with loyalists.
- The law will create a new "extraordinary appeal" body able to rehear all decisions issued by a court of law within the last 20 years (going back to October 1997), and the ability to rule on the validity of elections.<sup>16</sup> The new body will be able

<sup>15</sup> "Final Opinion on Draft Amendments to the act on the Supreme Court," OSCE. Accessed May 5th, 2017. <https://www.osce.org/odihr/315946?download=true>.

<sup>16</sup> Ibid.

to find new facts, and re-decide the application of the law in referred cases. Members of this body may include non-lawyers seated via political appointment. Prosecutors' offices are developing lists of cases they seek to have "reheard," which include:

- Cases against media outlets critical of the government (for defamation, antitrust actions, other civil actions);
  - Cases won previously by civil rights organizations to secure rights for women, refugees, LGBT persons, and other marginalized groups; and
  - Cases against political (and personal) opponents of the government and its individual members.
- The law will create a new body charged with disciplining judges. This body will be staffed by appointees of the current government, and will include those that have no prior experience as judges or lawyers. When deciding whether to discipline judges, members of this agency will be allowed to consider information obtained through wiretaps, even if the wiretaps do not meet the minimal legal requirements. This body will be able to find a judge guilty of disciplinary violations even if the judge in question was found not guilty in an initial proceeding.<sup>17</sup>

## Background: Poland Ransacks its Rule of Law

In 2015, shortly after earning 235 of 460 seats in the lower house of parliament, the Law and Justice government systematically politicized the country's Constitutional Tribunal to the extent that

<sup>17</sup> Dariusz Mazur, "New Mode of Disciplinary Proceedings in Respect of Judges and Members of Other Legal Professions in Poland," *Themis Association of Judges* (on file with Human Rights First).

it no longer is a viable check on the power of the ruling party. The government placed three judges on the court illegally, and passed six new procedural rules. It then refused to publish the decisions of the Constitutional Tribunal, which found these actions unconstitutional, as was required by law. To date, the government has not published or complied with key Constitutional Tribunal decisions, or grappled with the fact that the makeup of its highest court is currently in conflict with Poland's constitution.

According to a report presented in June 2018 to the United Nations General Assembly by the UN's Special Rapporteur on the independence of lawyers and judges, the "legitimacy and independence [of the Constitutional Tribunal] have been seriously undermined" by the Government bringing the Tribunal "under its control." "Today," he added, "the Tribunal cannot ensure an independent and effective review of the constitutionality of legislat[ion]," while the situation "casts serious doubts over [Poland's] capacity to protect constitutional principles and to uphold human rights and fundamental freedoms."<sup>18</sup>

If the history of the Constitutional Tribunal formed the first chapter of a systematic and continued dismantling of legal protections in Poland, the second chapter began in 2017, when the government turned its attention to other aspects of the country's court system.

Three laws proposed early in that year sought to overhaul the structure of regional courts, the Supreme Court, and the body tasked with ensuring judicial independence—the National Council of the Judiciary. In major protests across Poland, even in Law and Justice strongholds,

<sup>18</sup> "Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland," United Nations General Assembly Human Rights Council, June 2018, [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/38/38/Add.1](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/38/Add.1) .

Poles criticized the laws as constituting a takeover of the judiciary and an end to judicial independence; they waved signs urging protection of the constitution.<sup>19</sup>

In July 2017, President Andrzej Duda vetoed two of the draft laws—on the Supreme Court and on the National Council of the Judiciary. While Duda indicated that he would rework the vetoed laws to remove their objectionable elements, the process used to modify the laws involved no input from experts or judges. When Duda introduced new versions of the laws in September 2017, the Council of Europe’s Venice Commission observed that the laws remained fundamentally unchanged from their predecessors.<sup>20</sup>

The new drafts were met with alarm by the Venice Commission, ODIHR, the Consultative Council of European Judges (CCJE), the European Network of Councils for the Judiciary (ENCJ), the Council of Europe’s Human Rights Commissioner, and the European Commission itself.<sup>21</sup> The American Bar Association raised the possibility that the laws violated the Polish Constitution, and noted that they failed to meet international standards on the independence of the judiciary.<sup>22</sup> The Council of Europe’s Group of States Against Corruption (GRECO) issued its first-ever “ad hoc procedure,” which determined that due to the changes in the justice system, Poland’s process for preventing corruption via its judiciary did not comply with

GRECO’s standards. The organization further announced that it would reevaluate Poland’s membership.<sup>23</sup>

On December 20, 2017, as the laws were being considered, the European Commission issued a searing press release proposing action under Article 7(1) of the Treaty on the European Union if the laws were passed. Article 7 sets forth the Rule of Law Mechanism, a procedure by which EU states can face sanctions if members agree unanimously that the state is committing serious violations of the values of the Union as set forth in Article 2 of the Treaty on the European Union. The press release noted that over the previous two years, Polish authorities had “adopted more than 13 laws affecting the entire structure of the justice system;” and that “the executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration, and functioning of the judicial branch.” The Commission concluded by declaring that Poland’s “judiciary is now under the political control of the ruling majority” and “in the absence of judicial independence, serious questions are raised about the effective application of EU law” in the country.<sup>24</sup>

Despite the Commission’s stern warning, the Law and Justice government passed the laws hours after the Commission’s announcement.<sup>25</sup> In response, members of the European Parliament voted overwhelmingly (422 to 147) in support of triggering Article 7.1.<sup>26</sup> However, a 4/5 majority is

<sup>19</sup> “Poland’s President Duda vetoes judicial reforms after protests,” *BBC*. July 24, 2017.

<https://www.bbc.com/news/world-europe-40703909>

<sup>20</sup> “Poland Opinion on the draft act amending the act on the National Council of the Judiciary, on the draft act amending the act on the Supreme Court, proposed by the President of Poland, and on the act on the organisation of ordinary courts,” [http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=CDL-AD\(2017\)031-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=CDL-AD(2017)031-e).

<sup>21</sup> [http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=CDL-AD\(2017\)031-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=CDL-AD(2017)031-e).

<sup>22</sup> [https://www.americanbar.org/news/abanews/aba-news-archives/2017/12/statement\\_of\\_hilarie.html](https://www.americanbar.org/news/abanews/aba-news-archives/2017/12/statement_of_hilarie.html).

<sup>23</sup> <https://rm.coe.int/ad-hoc-report-on-poland-rule-34-adopted-by-greco-at-its-79th-plenary-m/168079c83c>.

<sup>24</sup> “Rule of Law: European Commission acts to defend judicial independence in Poland,” [http://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5367_en.htm).

<sup>25</sup> Vanessa Gera and Monika Scisłowska. “Polish president signs laws that led to EU sanction threat,” [https://apnews.com/21adf3ea436f4020b4164458b4d251de\\_](https://apnews.com/21adf3ea436f4020b4164458b4d251de_)

<sup>26</sup> “MEPs back triggering Article 7 against Poland” Politico Europe. Accessed June 18, 2018.

required to trigger proceedings, and so far the European Commission has not moved forward with this formal vote.

## The Extraordinary Appeal

The most alarming provision of the Law on the Supreme Court is the creation of the extraordinary appeal body, because it can be used to undo major progress on human rights in the country. It is therefore important to examine its effect more closely.

Using astonishing language, the Venice Commission, in its opinion on the Polish government's new laws, found that "In one respect the proposed [new Polish judicial] system is even worse than its Soviet predecessor."<sup>27</sup> This particularly egregious new entity, in the view of the Venice Commission's members, is the "extraordinary appeal" body. As briefly described above, this new body is tasked with rehearing cases that have already been decided by a common or martial law court, including those that have been closed for up to twenty years.

The body will include what are termed "lay judges"—individuals that do not need to have a law degree and who will be politically appointed by the Senate.<sup>28</sup> The procedure is unprecedented in modern legal systems, and as noted by the Venice Commission, goes further than even the Soviet Communist Party did to destroy legitimacy and certainty in the legal system.

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<https://www.politico.eu/article/european-parliament-triggering-article-7-poland-judicial-reform-voting-rights/>

<sup>27</sup> "Poland Opinion on the draft act amending the act on the National Council of the Judiciary, on the draft act amending the act on the Supreme Court, proposed by the President of Poland, and on the act on the organisation of ordinary courts," *Venice Commission, December 11, 2017.*

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)031-e\\_2](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e_2)

<sup>28</sup> "Opinion on Certain Provisions of the Draft Act on the Supreme Court ...." [https://www.osce.org/odihr/357621\\_2](https://www.osce.org/odihr/357621_2)

This body will also have the power to "rule on the validity" of the results of elections.<sup>29</sup> "This is extreme rainy-day planning," noted journalist Konstanty Gebert, who has extensively covered the new policies put in place by Law and Justice, "an insurance policy" for when the ruling party does not get the votes they need.<sup>30</sup>

The coupling of the extraordinary appeal body with the purging and packing of judges has led many in Poland to conclude that the rehearing process will be applied to favor Law and Justice policies and officials.<sup>31</sup> "There is a certain possibility this [extraordinary appeal procedure] will be used for political purposes," remarked Adam Bodnar, Poland's Ombudsman.<sup>32</sup>

So far, the government's initial efforts at implementation have borne out this concern. Prosecutors have been told to make lists of cases they would like to see reheard. Leaked reports indicate that the cases being selected feature instances in which an opponent of Law and Justice received a favorable outcome.<sup>33</sup> In one well-known case, the minister of justice/prosecutor general himself seeks to re-prosecute a case concerning medical treatment of his father, due to what is widely seen as a personal vendetta toward the relevant doctor (who was previously cleared in a malpractice case brought by the prosecutor general).

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<sup>29</sup> Extracts of the Draft Act on the Supreme Court of Poland, Annex 2 to the OSCE/ODIHR Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland of 26 September 2017, <https://www.osce.org/odihr/357621>.

<sup>30</sup> Konstanty Gebert (Gazeta Wyborcza journalist) interview by Melissa Hooper, May 2018.

<sup>31</sup> Sylwia Gregorczyk-Abram of Justice Defence Committee, interview by Melissa Hooper, May 2018.

<sup>32</sup> Adam Bodnar (Ombudsman for Human Rights of Poland), Interview by Melissa Hooper, June 2018.

<sup>33</sup> This was confirmed by two attorneys working in law firms in Poland that have been leaked this information from two different regional offices of the Prosecutor General.

## Attacks on Independent Media

As relayed to Human Rights First during a fact-finding mission in May 2018, independent media outlets and journalists fear that they will be one of the major targets of the new procedure, particularly if they have been critical of Law and Justice policies.

### Defamation suits

Agora, the company that owns the country's largest independent newspaper, *Gazeta Wyborcza*, already reports that they have been flooded with cease and desist letters and threats to initiate defamation suits recently brought by the prosecutor general. As of late May, the company had been sued 13 times in the previous two months on defamation-related grounds.<sup>34</sup> Even if Agora wins every case (recently they have won nearly all of them) they fear the new extraordinary appeal procedure will allow the government to reopen cases to be reheard by loyalist judges more likely to render a "correct" decision.<sup>35</sup>

### Antitrust investigations

The Ministry of Justice is conducting investigations of media outlets, stating that investigators are looking for examples of collusion in publishing news stories. These investigations could result in lawsuits that—even if won by the outlets—could be reheard on extraordinary appeal and overturned.

### Criminal prosecution

In one recent, illustrative case, Poland's former minister of justice filed a criminal case against a journalist in lieu of a defamation suit. The journalist, Tomasz Piatek, wrote articles and a book about the former minister's alleged ties with Polish businessmen who in turn associated with

Russian mafia figures. The minister initiated a criminal case against Piatek for "attacking a constitutional organ" and "coercing a civil servant into making a decision." In March 2018, after the minister resigned office on unrelated grounds, the case was dropped. However, the case established the precedent of allowing criminal cases against journalists over their publications.<sup>36</sup>

While not directly related, threats under the extraordinary appeal law can be used in combination with tax litigation and discretionary fines, which the Polish state appears to be using with growing frequency.<sup>37</sup> Media outlets report that they are receiving letters from tax authorities stating that they suddenly owe tax arrears that they were previously unaware of. In one recent case, a TV station owned by an American company, TVN24, was fined the equivalent of \$414,000 for showing political protests without criticizing them. The fine was ultimately revoked after the U.S. government expressed its displeasure to the Polish government. While tax cases and regulatory fines cannot be appealed using the extraordinary appeal process, the rise in such proceedings is concerning.

"It is unprecedented to have the ruling party sue media like it is now doing," said Jaroslaw Kurski, the Editor-in-Chief of *Gazeta Wyborcza*. "They act like a mafia state."<sup>38</sup> When the outlet wins in first instance courts, judges loyal to Minister of Justice Zbigniew Ziobro are happy to rule against them on

<sup>34</sup> Wanda Rapaczynska (Journalist at *Gazeta Wyborcza*), May 2018.

<sup>35</sup> Piotr Stasinski (Deputy Editor-in-Chief, *Gazeta Wyborcza*), Interview by Melissa Hooper, May 2018.

<sup>36</sup> Daphne Pellegrino (Program Officer at Reporters Without Borders) email message on June 5, 2018.

<sup>37</sup> Note that the extraordinary appeal concerns decisions issued only by the common courts and martial law courts. The appeal is not available for use regarding decisions issued by administrative courts, i.e. cases concerning taxes, access to public information, and most asylum-related cases.

<sup>38</sup> Jaroslaw Kurski (Editor-in-Chief, *Gazeta Wyborcza*) interview by Melissa Hooper, May 2018.

review. "This is a mechanism of opportunism for judges," he added.<sup>39</sup>

## Undermining Individual Rights and Freedoms

When it comes to NGOs, protest movements, and other government critics, Poland's governing majority is using a number of tools to silence critics and limit their activities; the extraordinary appeal adds to this arsenal. Under the new extraordinary appeal procedure, the government could go even further.

### Shutdown of NGOs and other organizations

Under current law, each NGO in Poland must be supervised by a government ministry, with the responsible ministry varying by organization. In May 2018, the Ministry of the Interior, which oversees an organization registered as the Foundation for the Citizens of the Republic, filed a motion to place the organization in receivership in response to public demonstrations that it organized.<sup>40</sup> This case is currently pending in a regional court. In a similar case, the Ministry of Foreign Affairs submitted a motion in 2017 to place in receivership the non-profit Open Dialogue Foundation after that group organized protests against the new laws on the judiciary.<sup>41</sup> In December 2017, a lower court dismissed the case. The extraordinary appeal procedure could be used to reopen any motion to place an NGO in receivership, effectively giving the government control over the organization and the ability to terminate its activities.

<sup>39</sup> Jaroslaw Kurski (Gazeta Wyborcza) interview by Melissa Hooper, May 2018.

<sup>40</sup> "Citizen's Declaration," *Obywatele RP (Citizens of the Republic)*. May 2018, press release on file with Human Rights First.

<sup>41</sup> Malgorzata Szuleka, Attorney at Helsinki Foundation of Human Rights interview by Melissa Hooper, June 2018.

### Roll back rights for marginalized groups.

Many Polish NGOs employ impact litigation as a means to change law and policy in support of marginalized groups such as refugees, LGBT groups, and ethnic and religious minorities. The government may use extraordinary appeals to roll back the rights gained for these groups. Gains in equal rights and access to justice may have to be re-fought and could be undone through the extraordinary appeal process.<sup>42</sup>

### Institute criminal proceedings against opponents

Since Law and Justice came to power, there have been more than one hundred detentions and criminal cases filed against individuals that have spoken out against government policies.<sup>43</sup> Those charged have included participants in the Black Protests (protests against strict laws against all access to abortion), and Dignity Marches in support of women's rights, Citizens of the Republic, an NGO that challenges the government's preservation of protest space for pro-government protesters, and Green Party

<sup>42</sup> Malgorzata Szuleka, Attorney at Helsinki Foundation of Human Rights interview by Melissa Hooper, June 2018.; "Foreigner awarded compensation for her placement at guarded centre," *Helsinki Foundation of Human Rights*. March 20, 2015. <http://www.hfhr.pl/en/foreigner-awarded-compensation-for-her-placement-at-guarded-centre/> (right of immigrants and refugees not to be detained); Vanessa Gera, *Poland's Supreme Court rules against printer who refused to make banners for LGBT+ group*, *The Independent*, (June 8, 2018) <https://www.independent.co.uk/news/world/europe/poland-printer-lgbt-group-refuse-work-supreme-court-ruling-gay-rights-a8399936.html> (prohibiting discrimination against LGBT groups in a case that closely resembles the recent U.S. Supreme Court case *Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Commission*).

<sup>43</sup> See the monthly bulletins put out by Citizens of the Republic of Poland/ Obywatele RP that detail police reactions to major protests (in Polish): <https://obywatelerp.org/biuletyn-obywateli-rp-3-listopada-5-grudnia-2017/>; <https://obywatelerp.org/biuletyn-obywateli-rp-6-grudnia-2017-6-stycznia-2018/>; <https://obywatelerp.org/biuletyn-obywateli-rp-1-28-lutego-2018/>; <https://obywatelerp.org/biuletyn-obywateli-rp-kwiecien-2018/>.

activists.<sup>44</sup> Although most of those charged have not been found guilty of the charges, including insulting police officers, participating in an unsanctioned protest, or crossing a barricade, their cases could be reopened and proceedings reinstated.

### **Party Loyalty in the Judiciary: Independent Judges as the Worst Kind of Humans**

Human Rights First's recent investigation indicates that the judicial disciplinary system is being used to conduct politicized investigations of judges that rule in ways that are not aligned with the Law and Justice party. The judicial disciplinary body has been given broad powers to investigate those that are perceived to disagree with the government. And soon it will have a large budget with which to do so.<sup>45</sup>

"There is immense pressure on judges to make decisions in line with government thinking," noted Jakub Wisniewski, Director of GLOBSEC Policy Institute and a former member of the Polish Ministry of Foreign Affairs. According to Wisniewski and others, this culling of the judiciary is part of a broad de-professionalizing of the government. "Many people who have been absolutely apolitical and worked for previous governments – civil servants, bureaucrats, specialists in their fields, have been treated like political figures – with distrust and discrimination. A lot of them have either left or been

marginalized...some have been sacked."<sup>46</sup> Wisniewski himself was let go after having worked as a civil servant under the prior government.

As of April 30, the Helsinki Foundation for Human Rights found that the minister of justice had used the power granted to him by the Law on Ordinary Courts (passed in December 2017) to force out regional court presidents and deputy presidents in 149 cases—turning over one-third of regional leadership.<sup>47</sup> As these new court presidents take the bench, they are using their power to order judges in their regions to face disciplinary proceedings.<sup>48</sup> Investigations may include a review of case files and case decisions, and in some cases interviews with individuals that have engaged with the judges in business. Judges may be investigated, sentenced, and expelled in absentia, according to Sylwia Gregorczyk-Abram of Justice Defence Committee.<sup>49</sup> Ongoing investigations are targeting judges that are critical of the government.

"The new disciplinary system is being used as a political tool," according to a law firm partner who focuses on medical-related cases.<sup>50</sup> "Every aspect of a judge's work, and even their life, is now governed by the ruling party," added a partner at a different firm.<sup>51</sup> These two corporate lawyers started an organization on June 4, 2018 called the Justice Defence Committee (KOS in Polish). The

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<sup>44</sup> One of the latest examples is a case involving Green Party activists: "Court rules for Green Party activists: pro-women rights poster does not ...." *Helsinki Foundation of Human Rights*. <http://www.hfhr.pl/en/court-rules-for-green-party-activists-pro-women-rights-poster-does-not-insult-ww2-resistance-symbol/>

<sup>45</sup> New mode of disciplinary proceedings in respect of judges and members of other legal professions in Poland, Themis Association of Judges, Dariusz Mazur, April 2018 (on file with Human Rights First).

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<sup>46</sup> Jakub Wisniewski, Director of GLOBSEC think tank, Interview with Melissa Hooper, May 23 2018.

<sup>47</sup> Małgorzata Szuleka. Twitter Post. April 30, 2018. 4:51am. [https://twitter.com/m\\_szuleka/status/990917495337910272](https://twitter.com/m_szuleka/status/990917495337910272); "It starts with the personnel." *Helsinki Foundation of Human Rights*. <http://www.hfhr.pl/wp-content/uploads/2018/04/It-starts-with-the-personnel.pdf>.

<sup>48</sup> Jarosław Kurski (Editor in Chief of *Gazeta Wyborcza*) and Piotr Stasiński (Deputy Editor in Chief), interview by Melissa Hooper, May 2018.

<sup>49</sup> Sylwia Gregorczyk-Abram (Law Firm Partner) and Justice Defence Committee, interview by Melissa Hooper, May 2018.

<sup>50</sup> Justice Defence Committee, Interview by Melissa Hooper, May 2018.

<sup>51</sup> Justice Defence Committee, Interview by Melissa Hooper, May 2018; Sylwia Gregorczyk-Abram, Interview by Melissa Hooper, May 2018.

date and name are significant – the date is the anniversary of the first free election in Poland held in 1989, and the name is a reference to the original name of the Workers’ Defence Committee (KOR), a political entity that was repressed by the country’s communist regime. The KOS was formed because of the increase in “cases of interference of the authorities in the independence of judges and the sovereignty of other legal professionals, including by initiating disciplinary actions, personal attacks and other forms of pressure.”<sup>52</sup>

Both KOS and journalists in Poland, including Christian Davies of *The Guardian*, have documented a recent surge of incidents of judges being investigated, summoned to appear before ethics committees, and threatened with disciplinary or criminal charges. The judges are being targeted for acts that include ruling against the government when it acts illegally and speaking out in support of rule of law.<sup>53</sup> Judges have also been threatened with physical violence, been placed under surveillance, and had their family members harassed and surveilled. In one case a judge’s home was attacked.<sup>54</sup> *The Guardian* recently reported that “judges have complained of a ‘state-led campaign of intimidation and harassment,’”<sup>55</sup> in which they are subjected to

allegations of corruption, and are targeted with hate campaigns orchestrated by leading Law and Justice politicians.<sup>56</sup> Judges who report these attacks do so under threat for their own safety.<sup>57</sup> A Law and Justice member of parliament, who is also now a member of the commission that conducts ethical reviews of judges, recently said that Poland should send judges to North Korean-style reeducation camps.<sup>58</sup>

In September 2017, the government paid the Polish National Foundation—a recently-created entity some have likened to a government propaganda mouthpiece<sup>59</sup>--the equivalent of 4.5 million Euro to conduct a billboard campaign against Poland’s judges.<sup>60</sup> This amount is more than some presidential candidates spend to campaign for office in Poland.<sup>61</sup> Said one judge who is particularly disliked by the government for

<sup>52</sup> Hooper, Melissa. Twitter Post. June 4, 2018. 1:02pm.

<https://twitter.com/melhoop10/status/1003728653153337344>

<sup>53</sup> Christian Davies, “They’re trying to break me’: Polish judges face state-led intimidation,” *The Guardian*, June 19, 2018, <https://www.theguardian.com/world/2018/jun/19/theyre-trying-to-break-me-polish-judges-face-state-led-intimidation>.

<sup>54</sup> *Ibid.* Christian Davies describes the cases of Waldemar Zurek, Wojciech Laczewski, and Igor Tuleya in his article. Human Rights First is also aware of pressure targeting Dariusz Mazur and Dominik Czeszkiewicz. Discussion of Czeszkiewicz’s case can be found in a press release entitled Disciplinary case of judge Czeszkiewicz, Themis Association of Judges, May 2018, on file with Human Rights First.

<sup>55</sup> Christian Davies, “They’re trying to break me’: Polish judges face state-led intimidation,” *The Guardian*, June 19, 2018, <https://www.theguardian.com/world/2018/jun/19/theyre-trying-to-break-me-polish-judges-face-state-led-intimidation>

<sup>56</sup> *Ibid.* See also Dariusz Mazur and Waldemar Zurek, “So called ‘Good change’ in the Polish system of the administration of justice,” *Public Prosecutor*, updated October 6, 2017.

<http://www.krs.pl/admin/files/nksp%20wersja%20angielska%20%2020170117%201.pdf>

<sup>57</sup> Partner at Denton’s Law Firm, interview by Melissa Hooper, May 2018.

<sup>58</sup> Christian Davies, “‘They’re trying to break me’: Polish judges face state-led intimidation,” *The Guardian*, June 19, 2018, <https://www.theguardian.com/world/2018/jun/19/theyre-trying-to-break-me-polish-judges-face-state-led-intimidation>.

<sup>59</sup> Aleksandra Pawlicka, “Fundacja Partyjnej Promocji,” *Newsweek Polska*, 2017 <http://www.newsweek.pl/plus/polska/polska-fundacja-narodowa-wspiera-propagande-pis-i-reforme-sadow,artykuly,416121,1,z.html>.

<sup>60</sup> The Foundation, funded by mandatory grants from state-owned companies, has a total budget of \$200 million Polish zloty, or \$54 million, which is more than any other NGO or quasi-NGO has ever received in Poland. Marcin Antosiewicz, “Nareszcie wiemy, ile pieniedzy ma PFN i na co dokladnie je wydaje,” *Newsweek Polska*, (April 23, 2018) <http://www.newsweek.pl/polska/polityka/polska-fundacja-narodowa-jakim-budzetem-dysponuje-i-na-co-go-wydaje,artykuly,426363,1.html> (in Polish).

<sup>61</sup> Dariusz Mazur and Waldemar Zurek, “So called ‘Good change’ in the Polish system of the administration of justice, Bonn University, [https://www.jura.uni-bonn.de/fileadmin/Fachbereich\\_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Sanders/Dokumente/Good\\_change\\_-\\_7\\_October\\_2017\\_-\\_word.pdf](https://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Sanders/Dokumente/Good_change_-_7_October_2017_-_word.pdf).

what his supporters describe as his commitment to rule of law, “According to the Polish Government, [a judge] is the worst kind of human.”<sup>62</sup>

## The Holocaust Law and Judicial Review

The resolution of Poland’s recently passed and highly contentious law on the Holocaust, which criminalized discussions of Polish culpability in that genocide, is also affected by the government’s attacks on the country’s judiciary. Since the law’s January 2018 passage, both Israel and the United States have criticized the law’s violations of free speech and strongly urged the government to repeal it.<sup>63</sup> Instead, President Duda announced that he would refer the criminal portions of the law to the Constitutional Tribunal. As detailed above, the Tribunal, which is charged with interpreting the Constitution, was unconstitutionally placed under political control by Law and Justice in 2015.<sup>64</sup> Given this state of affairs, it was highly likely the Tribunal would have ruled in accordance with the government’s wishes.

However, even after Duda’s announcement, international pressure continued and the government seemed unsure how to respond. On

June 14, the Tribunal announced it would review the “Holocaust Law” by August 2018.<sup>65</sup> This was not an ideal way out, because the review would have violated Law and Justice’s own laws, passed in 2015, which require the Tribunal hear cases in the order that they are filed.<sup>66</sup>

It was clear Law and Justice put itself in a bind by stating it would not repeal the law. “They have left themselves only bad choices,” said Konstanty Gebert in May.<sup>67</sup> “They either have to violate their own laws, or let the law stay and harm their international relationships.”

But when international pressure did not abate, the government capitulated, albeit in a procedure as slapdash as that used to pass the law: on June 27 (just as this report was going to press), an amendment was introduced in the Sejm to repeal the criminal provisions. The measure took most of the Sejm—including most Law and Justice representatives—by surprise. Kaczynski ordered all Law and Justice members to vote in favor, though he was too sick to appear and vote himself. The Senate also did as instructed, approving the measure the very same day; by the end of the day Duda signed it. In twelve hours the criminal provisions were gone, an example of what can be accomplished if the United States holds a clear line with respect to a harmful policy in Poland.

## Effects of the Destruction of Rule of Law: An Unreliable Partner?

Despite viewing its assault on Poland’s courts as an existential, and thus largely non-negotiable project, Law and Justice’s efforts at judicial

<sup>62</sup> Judge Dariusz Mazur, Presiding Judge of the Third Division, Krakow Regional Court, and member of Themis Association of Judges, email exchange, June 2018.

<sup>63</sup> Heather Nauert. “Legislation in Poland Regarding Crimes Committed During the Holocaust”, *U.S. Department of State*. January 31, 2018. <https://www.state.gov/r/pa/prs/ps/2018/01/277802.htm>; Rex W. Tillerson, “Recent Legislation in Poland”. *U.S. Department of State*. February 6, 2018.

<https://www.state.gov/secretary/20172018tillerson/remarks/2018/02/278020.htm>.

<sup>64</sup> “Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland,” United Nations General Assembly Human Rights Council, June 2018, [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/38/38/Add.1](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/38/Add.1).

<sup>65</sup> Szuleka, Malgorzata. Twitter Post. June 14, 2018. 1:16pm. [https://twitter.com/m\\_szuleka/status/1006993669835063305](https://twitter.com/m_szuleka/status/1006993669835063305).

<sup>66</sup> Representative of American Jewish Committee, interview by Melissa Hooper, May 2018.

<sup>67</sup> Konstanty Gebert (Gazeta Wyborcza journalist) interview by Melissa Hooper, May 2018, (statement made prior to the announcement that the Tribunal would review the case in August).

"reform" are proving increasingly costly to the country in economic, political, and diplomatic terms. Described below are impacts as described to Human Rights First.

### Business Community

"American businesses have told me they worry about the complete instability of the legal system," said one lawyer who works with investors considering coming to Poland.<sup>68</sup> She continued, "in advising clients who want to develop businesses here, I have to tell them that the justice system is unstable, [and] that in six months it will be completely altered and I cannot tell them what it will look like." As a result of the transformation of the legal system, "when investors consider whether to build a factory in Slovakia or in Poland, they will now clearly favor Slovakia."<sup>69</sup> The former Polish ambassador to the United States noted that Law and Justice has even tried to take over the business community by giving contracts and deals to its loyal connections.<sup>70</sup> "Even the business community has been coopted," he said.

### International Community

While remaining a steadfast American ally, Law and Justice's policies are breeding unpredictability. At times, they are also breeding tension within the U.S.-Poland bilateral relationship, as evidenced by the January 2018 passage of the Holocaust Law. "Passing that law showed they can't read the room," noted Radolsaw Markowski, a political scientist and professor at Budapest's Central European University and the University of Social Sciences

<sup>68</sup> Partner at a Polish law firm, interview by Melissa Hooper, May 2018.

<sup>69</sup> Partner at a Polish law firm, interview by Melissa Hooper, May 2018.; Konstany Gebert (Gazeta Wyborcza journalist and expert on Jewish life in Poland) interview by Melissa Hooper, May 2018.

<sup>70</sup> Ryszard Schnepf, former Ambassador to the United States from Poland, interview by Melissa Hooper, May 2018.

and Humanities in Warsaw.<sup>71</sup> "PiS believes that all is well with its relationship with the U.S.," said Michal Baronowski of the German Marshall Fund. "It is not trying to fix current issues that harm the relationship."<sup>72</sup> "They are not strategic," agreed Konstany Gebert. "PiS thinks they can control [the reform of the justice system], but it can get out of control."<sup>73</sup>

"Poland is being marginalized in international relations. We've alienated the EU, Israel, France, and Germany; not even Central Europe takes us seriously," added Markowski, the political scientist.<sup>74</sup> "We're even backstabbing our closest ally, Ukraine," added journalist Konstany Gebert. If Poland is unable to cooperate with other American allies, this should be a point of concern for the United States. Peter Kreko, Director of the Hungary-based think tank Political Capital, agrees. "Poland's ideological and fanatical bent makes it more difficult to make a deal with the Poles, and makes it harder to ensure that Poland will coordinate with the U.S. and with NATO.... They are an unreliable partner.... The government is always ready to engage in symbolic conflicts," for example the Holocaust Law.<sup>75</sup> This tendency makes the Polish government "a troublemaker".<sup>76</sup>

<sup>71</sup> Radolsaw Markowski (Political scientist and Professor at University of Social Sciences and Humanities, Warsaw (SWPS) and at Central European University in Budapest (CEU)) interview by Melissa Hooper, May 2018.

<sup>72</sup> Michal Baronowski (Director of the German Marshall Fund, Warsaw) interview by Melissa Hooper, May 2018.

<sup>73</sup> Konstany Gebert (Gazeta Wyborcza journalist) interview by Melissa Hooper, May 2018.

<sup>74</sup> Radoslaw Markowski, Political Scientist and Professor at Central European University, Budapest, and University of Social Sciences and Humanities (SWPS), Warsaw, Interview by Melissa Hooper, May 2018.

<sup>75</sup> Peter Kreko (Director, Political Capital Institute) interview by Melissa Hooper, May 2018.

<sup>76</sup> Peter Kreko (Director, Political Capital Institute) interview by Melissa Hooper, May 2018.

### Decreased civic trust

"The government's attacks on democratic institutions have further polarized an already divided public. A recent Eurobarometer survey showed that the Polish public gives significantly higher ratings to the European Commission and Parliament than the Polish government and national parliament," said Dr. Jacek Kuharczyk, policy analyst and president of the Institute of Public Affairs, a non-partisan think tank in Warsaw.<sup>77</sup>

"The quality of the judiciary is poor now," added Radislaw Markowski.

A representative of the American Jewish Committee noted, "[Law and Justice] policies give too much discretionary power to individuals with no accountability...In normal circumstances, the current head of the Constitutional Tribunal wouldn't be [considered] qualified to do his job."

<sup>78</sup>The party is focused on finding loyal, not qualified, judges.

### U.S. Mixed Messages Enable Anti-Democratic Trends

While the United States remains Poland's closest ally, and the most likely friend of Poland to advocate for the preservation of democratic institutions, many Poles concerned with their government's actions don't view the United States as appropriately voicing its concerns. Some

<sup>77</sup>

<http://ec.europa.eu/comfrontoffice/publicopinion/index.cfm/Chart/index>; see also Chapman, Annabelle, Twitter post June 26, 2018, [https://twitter.com/AB\\_Chapman/status/1011546469390745600](https://twitter.com/AB_Chapman/status/1011546469390745600) (48% of Poles blame the Polish government for dispute with EU; 21% blame EU Commission; 24% blame both).

<sup>78</sup> Opinion of Judge Aileen Donnelly in *Minister for Justice and Equality v. Artur Celmer*, <http://www.statewatch.org/news/2018/mar/ireland-Minister-v-Celmer-final.pdf>; See also Michelle Stoddart, "Ireland refers landmark Polish extradition case to Europe's top court," *Politico*, March 13, 2018, <https://www.politico.eu/article/ireland-poland-extradition-case-referred-to-europe-top-court-ecj/>.

expressed the sentiment that the United States is overly-focused on a narrow definition of security in its bilateral relationship with Poland, failing to see links between security and rule of law, judicial independence, and the protection of rights-protecting institutions. Many urge U.S. officials to use the close relationship between the two countries as a conduit for constructive engagement on issues of checks and balances, rather than as a reason to keep silent.

"If the EU and U.S. allow this to happen without speaking out, this will be a message to other governments that everything is allowed in the EU. Everything is allowed if they will allow it," said Milosz Hodun of *Nowoczesna*, an opposition political party.<sup>79</sup>

The U.S. silence sends a message out widely, not just to the Polish government. "If the U.S. communicates that rule of law issues and [not following] the Constitution are not a problem, it communicates this to many states in the EU," noted Michal Baronowski of the German Marshall Fund.<sup>80</sup> The European Network of Councils for the Judiciary (ENCJ) noted that the failure of the EU and U.S. to respond to Poland's backsliding has already produced emulators. "The disease of Poland and Hungary could spread. It could spread to the neighbouring countries," said the head of the ENCJ, Dutchman Kees Sterk. He added "Who says it won't spread to other parts of Europe?"<sup>81</sup>

Some emphasized the power of the U.S. to trigger change in Poland, and its role as a source of hope. "Poland is not Turkey or Hungary; it is not a hopeless case. There is a strong civil society

<sup>79</sup> Milosz Hodun (MP of Poland, *Nowoczesna* Party) interview by Melissa Hooper, May 2018.

<sup>80</sup> Michal Baronowski (Director, German Marshall Fund, Warsaw) Interview by Melissa Hooper, May 2018.

<sup>81</sup> Gabriela Baczynska, "Court 'disease' in Poland, Hungary could spread: judicial body chief," *Reuters*, May 21, 2018, <https://www.reuters.com/article/us-eu-courts/court-disease-in-poland-hungary-could-spread-judicial-body-chief-idUSKCN1IW2KK>

here. The situation is reversible if close allies like the U.S. decide to [speak out]," said Jakub Wisniewski,. "Poland must hear that if [it] want[s] to be in the Western club, there are rules [it] needs to follow."<sup>82</sup>

Though some noted that the role of the U.S. appears to be changing, and urged it to maintain its previously principled stance. When the U.S. responded to the fine of \$414,000 against TVN24 (the aforementioned channel owned by U.S. entities) with political pressure, to fix only its own case, "we worried," said the editor of *Gazeta Wyborcza*. "The U.S. acted to protect its business, not to protect the process – this is a real problem for Poles," he added.<sup>83</sup>

"The U.S. failure to criticize rule of law in Poland leads many to be concerned that Trump does not share the EU's values," said Michal Baronowski of German Marshall Fund. Judges and civil society in Poland "feel abandoned by the U.S.," which they previously perceived to be their closest ally, the one that should speak up for democracy when it is under threat.<sup>84</sup>

## Opening the Door to Russia

Rule of law deterioration and a de-professionalization of Poland's judicial, political, and even military sector—as discussed below—has a direct negative impact on the security interests that are the foundation of the U.S.-Poland bilateral relationship. The relationship not only rests on a foundation of mutual values, but assumes a certain level of stability and reliability of allied actions. If the United States cannot be sure that allied institutions rest on the same foundation of values, it cannot be sure that these

institutions will act in seamless partnership. If there is no guarantee allied institutions will act reliably and predictably—not only in concert with U.S. action, but also in concert with other allies—there can be no guarantee of mutual trust.

Likewise, in attacking its own democratic institutions, Poland creates an ever-widening opportunity for Russia to exploit divisions within the country, as well as within the EU and NATO, despite the Polish Government's professed antipathy for the Kremlin.

"The greatest vulnerability to our security is the current polarization of society," said Turkowski. "The temperature of discourse and political conflict keeps rising, and the dominant factions are unable to negotiate with each other."<sup>85</sup> This could paralyze politics, and even lead to a breakdown in society. "There is no 'Polish people' anymore," agreed Konstanty Gebert.<sup>86</sup>

These divisions are easily exploited by elements that seek to sow chaos within the EU and NATO. "Disinformation continues to be a vulnerability," said Dr. Jacek Kucharczyk of the Institute for Public Affairs. "Far-right websites and media that are not transparent in their ownership put out messages that replicate those put out by the Russians"—against the EU and NATO for example. "It is unclear whether they have links to Russia or just have the same opinion, but the result is the same.... They push Poland away from "Europe and the West and from liberal democratic values underpinning Western institutions."<sup>87</sup>

The rhetoric of nationalism contributes to a destabilized environment. "Polish nationalism is

<sup>82</sup> Jakub Wisniewski (Director, GLOBSEC Policy Institute in Bratislava) interview by Melissa Hooper, May 2018.

<sup>83</sup> Jaroslaw Kurski (Editor-in-Chief of *Gazeta Wyborcza*) Interview by Melissa Hooper, May 2018.

<sup>84</sup> Michal Baronowski (Director of the German Marshall Fund, Warsaw) interview by Melissa Hooper, May 2018.

<sup>85</sup> Andrzej Turkowski (Political Scientist) interview by Melissa Hooper, May 2018.

<sup>86</sup> Andrzej Turkowski (Political Scientist) interview by Melissa Hooper, May 2018.; Konstanty Gebert (*Gazeta Wyborcza* journalist) interview by Melissa Hooper, May 2018.

<sup>87</sup> Jacek Kucharczyk (Policy analyst and president, Institute of Public Affairs) interview by Melissa Hooper, May 2018.

destructive for the entire EU," noted Peter Kreko. "It fuels Russian interests and plays right into Russia's hands."<sup>88</sup> It particularly feeds the anti-EU messages that Hungarian Prime Minister Viktor Orban and Law and Justice leader Jaroslaw Kacynski are pushing, which help Russia gain a greater foothold in the region. "Destruction of EU unity is just what Russia wants, so if the United States does not act, in a way it is helping the Russian cause of contributing to disruption of the EU," added an analyst from ODIHR.<sup>89</sup>

The Law and Justice party has also shown support for factions of its coalition that are willing to cooperate with Russia and the far-right. Former minister of defense Antoni Macierewicz was exposed as having links to the far-right, including far-right contacts with links to Russia.<sup>90</sup> Yet, the government allowed him to develop a defense force, known as the Territorial Defense Force, that was not under the military chain of command. Instead, he commanded the force as the Minister of Defense. After it was created, scandals erupted over the fancy new weapons provided the force that were not given to the military, and over the failure to train members. "[The Territorial Defense Force] was not designed to cooperate with NATO or defend Poland against Russia," said Markowski. Gebbert added, "Now the government has a paramilitary force at its disposal, and the concern is that they could use it."<sup>91</sup>

<sup>88</sup> Peter Kreko (Director, Political Capital Institute) interview by Melissa Hooper, May 2018.

<sup>89</sup> Analyst from the Organization for Democratic Institutions and Human Rights (ODIHR), Interview by Melissa Hooper, May 2018.

<sup>90</sup> Tomasz Piątek, "Co by się działo, gdyby dwa lata temu minister obrony próbował postawić dziennikarza przed prokuraturą wojskową?," *Gazeta Wyborcza*, July 14, 2017, [https://translate.google.com/translate?hl=en&sl=pl&u=http://wyborcza.pl/0,128956.html%3Ftag%3Dtomasz%2Bpi%25B1tek%26str%3D2\\_12543298&prev=search](https://translate.google.com/translate?hl=en&sl=pl&u=http://wyborcza.pl/0,128956.html%3Ftag%3Dtomasz%2Bpi%25B1tek%26str%3D2_12543298&prev=search).

<sup>91</sup> Konstanty Gebert (*Gazeta Wyborcza* journalist) interview by Melissa Hooper, May 2018. Indeed, several interviewees

Macierewicz was eventually pushed out, in part because he is seen as a far-right conspiracy theorist who does not work well with the West.<sup>92</sup> However, some of Macierewicz's subordinates still staff the Ministry of Defense, and concerns over the influence of the far-right in Poland's defense ministry remain.<sup>93</sup> In addition, the effects of Macierewicz's policies have lingered. For example, as is occurring in other ministries—as shown above in comments from Jakub Wisniewski on the Ministry of Foreign Affairs—Macierewicz purged the military of many skilled officers educated in the West, including in the United States. The purge extended to 70 percent of military generals, according to some estimates.<sup>94</sup> As a result, many of those in the military lack important skills, including English language capability, which impacts cooperation with other NATO forces.<sup>95</sup>

## Conclusion

Poland is one of America's closest allies. Since the collapse of its communist system, Poland and the United States have built a strong alliance based on a foundation of democratic values, including rule of law and protection of institutions such as an independent judiciary, free media, and robust civil society. The United States has moved

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noted that the requirement that officers speak English has now been waived since so many do not meet the requirement.

<sup>92</sup> Jan Cieski, "Polish reshuffle removes controversial ministers," *Politico*, January 9, 2018,

<https://www.politico.eu/article/macierewicz-mateusz-morawiecki-polish-reshuffle-removes-controversial-ministers/>.

<sup>93</sup> Interview with journalist at international news outlet by Melissa Hooper, May 2018.

<sup>94</sup> Marek Strzelecki, "Exit by Polish Top Brass Guts Command on NATO Front Line," *Bloomberg*, February 23, 2017, <https://www.bloomberg.com/news/articles/2017-02-23/exodus-by-polish-top-brass-guts-command-of-front-line-nato-state>

<sup>95</sup> Konstanty Gebert (*Gazeta Wyborcza* journalist) interview by Melissa Hooper, May 2018. Indeed, several interviewees noted that the requirement that officers speak English has now been waived since so many do not.

closer to Poland in recent years, as concerns over Russian incursions have grown. Yet, at the same time, Poland has moved away from the protections its ally once guaranteed, such that were it to apply for membership in the EU or in NATO today, it likely would be declined admission.<sup>96</sup>

Poland's current trajectory demonstrates that it is no longer willing to ensure fairness or certainty in the application of laws in its society, and these things are no longer guaranteed by an independent court system. It has sacrificed the professionalism and expertise of its government in service of loyalty litmus tests. The court system is now almost entirely politicized, requiring party loyalty from prosecution to adjudication, and independent media and civil society also face shutdowns and "a starvation diet" if they disagree with the ruling party.<sup>97</sup> The United States must therefore ask whether it is wise to bind itself more and more closely to a nation that increasingly appears to be turning away from liberal democracy.

## Recommendations

As demonstrated by the Polish government's response to criticism from the United States concerning the recently-passed Holocaust Law, the United States enjoys immense diplomatic leverage in Poland. The United States should thus make every effort to work with its ally to ensure that Poland remains on a pro-democratic trajectory.

<sup>96</sup> Celeste Wallander, "NATO's Enemies Within: How Democratic Decline Could Destroy the Alliance," *Foreign Affairs*, July/August 2018. <https://www.foreignaffairs.com/articles/2018-06-14/natos-enemies-within>

<sup>97</sup> Malgorzata Szuleka (Helsinki Foundation for Human Rights) interview by Melissa Hooper, June 2018.

## Officials of the U.S. government should:

- Consistently and firmly raise issues of rule of law, judicial independence, and protection of democratic institutions, such as independent media and civil society, in all bilateral meetings with Polish officials; and meet with members of Polish civil society during official visits to Poland.
- Publicly announce that implementation of the Law on the Supreme Court will have negative consequences for the U.S.-Poland relationship, and urge the Polish government to delay or cancel implementation of the July 3 requirement that Supreme Court judges over 65 are forced into retirement.
- Urge the Polish government to repeal the extraordinary appeal procedure or refrain from implementing this procedure, as it undermines certainty and finality in Poland's legal system.
- Support the call for accountability by Polish legal organizations, and their allies in Europe, advocating for the EU to institute a new infringement proceeding against Poland (in addition to the three currently underway), which is a proceeding charging that the Law on the Supreme Court violates EU laws and principles—in this case those of rule of law and judicial independence.<sup>98</sup>
- Call on the Polish government to publish *all* decisions of the Constitutional Tribunal, even those with which the present government does not agree. The United States should also urge the Polish government to remove judges from the Constitutional Tribunal that were illegally appointed.

<sup>98</sup> "Europe! Save Polish Supreme Court!," *Civic Space Watch*. June 5, 2018. <https://civicspacewatch.eu/europe-save-polish-supreme-court/>

- Coinciding with the June 28 review by the European Court of Justice of Poland's legal system, issue a statement noting that according to the American Bar Association and other international legal organizations, including the Venice Commission and UN Special Rapporteur on the independence of lawyers and judges, the current legal system in Poland does not meet objective standards of rule of law and judicial independence—such as those that are required to be a member of the EU.
- Urge NATO allies to review Warsaw as an appropriate venue for future NATO meetings, contingent on Poland's upholding of democratic principles.
- Raise concerns about attacks on democratic institutions at the July 2018 NATO Summit in Brussels and November 2018 NATO Parliamentary Assembly meeting in Halifax, noting the link between these attacks and weakening security. The U.S. delegation to NATO should reiterate that rule of law and human rights are fundamental parts of its “essential mission,” echoing the 2016 Warsaw communique language agreed to by all NATO allies.
- Urge EU leaders to use budget discussions to give weight to how Poland and other European countries protect civil society and maintain the rule of law, including the independence of the judiciary.
- Urge Polish officials to repeal the Holocaust Law as a serious infringement on free speech, one of the fundamental freedoms that is the basis of the U.S.-Polish bilateral relationship.
- Promote on its website and elsewhere, in Polish and English, the State Department Fact Sheet “U.S. Support for Human Rights Defenders,” and encourage human rights defenders to publicly engage with U.S. government officials.

### **The new U.S. Ambassador to Poland should:**

- Meet with civil society groups, including the Helsinki Foundation for Human Rights, Justice Defence Committee and others that work on human rights, rule of law, and defense of government critics, in her first month in Poland; and consistently speak out, both publicly and privately, in support of rule of law and separation of powers, independent civil society and media, and the importance of protection of democratic institutions to the alliance between the U.S. and Poland.

### **Members of Congress should:**

- Place limits on U.S. provision of International Military Education and Training services to Polish officers unless and until the Polish government agrees NOT to force retirement of any Supreme Court judges and NOT to enforce the extraordinary appeal procedure.
- In determining whether to permanently station U.S. military forces in Poland in response to Poland's May 28 request, require the Departments of State and Defense to conduct an evaluation of the state of rule of law and judicial independence in Poland's legal system pursuant to international standards set by the Council of Europe, OSCE ODIHR, and other relevant bodies, to determine whether Polish institutions protect democratic institutions.
- Authorize and appropriate funding to strengthen Poland's civil society and independent media, citing the need to shore up democratic institutions in the country.

