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Re: Judicial Independence, Separation of Powers, and the Rule of Law in Poland

Dear Representative Royce, Representative Engel, Senator Corker, and Senator Cardin:

I write on behalf of the New York City Bar Association to convey our concerns about the mixed messages that the United States seems to be sending to the government of Poland as its parliament has been aggressively advancing legislation designed to place Poland's judiciary under legislative and executive control. Although we welcome the State Department's recent statement in support of judicial independence and separation of powers in Poland, the Trump administration has sent other signals suggesting that it is not concerned with (and may even support) the Polish government's attacks on independent institutions, including judicial institutions, the free press, and independent civil society.¹ Especially in light of the Trump

¹ Melissa Hooper, *Poland's New Front: A Government War Against Civil Society*, HUMAN RIGHTS FIRST

Administration's general lack of engagement with respect to human rights issues during its first year in office,² we urge you to take renewed action in support of judicial independence in Poland and to urge the Trump administration to make human rights and rule-of-law values higher priorities in its engagement with the government of Poland and the European Union.

The Association is an independent nongovernmental organization of over 24,000 lawyers, judges, law professors and government officials from throughout the United States and over 50 other countries. Throughout its 145-year history, the Association has consistently maintained that respect for human rights and the rule of law is essential in all jurisdictions and has a long history of investigating and reporting on human rights concerns around the world, including within the United States, through the work of its International Human Rights Committee, its Task Force on the Independence of Lawyers and Judges, and other Association committees.

As you are aware, the Polish parliament recently passed three bills that sought to place the judiciary under legislative and executive control:³

- (1) The Law on the Supreme Court, which would force the resignation of all eighty-three of Poland's Supreme Court judges, except those asked by the Minister of Justice to remain; would give the Minister the power to appoint replacements; would lower the qualifications for the Supreme Court; allow the Ministry of Justice to author new bylaws regulating the structure and organization of the Court; and create a new disciplinary chamber to hear complaints against Supreme Court judges, giving the Minister of Justice power to appoint all disciplinary judges.
- (2) The Law on the National Council of the Judiciary, which would terminate the terms of all 15 judges that are current members; break this judicial selection body into two units, including one made up of political appointees; and give these new members appointed by parliament veto power over judicial selections, thereby subjecting judicial appointments to political considerations.
- (3) The Law on Ordinary Courts which would give the Minister of Justice the power to fire the presidents of all regional and local courts; and to appoint new ones; and would institute new retirement ages – 60 for women and 65 for men. The Minister of Justice, who also serves as Prosecutor General, would under this law be able to control in some cases both the prosecutor

(Aug. 3, 2017) <http://www.humanrightsfirst.org/press-release/new-report-reveals-escalating-assault-activists-ngos-poland>.

² See, e.g., Letter from John S. Kiernan, President, New York City Bar Ass'n, to Hon. Paul Ryan et al., Apr. 28, 2017, <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/letter-to-congressional-leaders-on-the-trump-administrations-handling-of-human-rights-and-international-engagement-in-its-first-100-days> [hereinafter New York City Bar Association Letter, *Human Rights During the Trump Administration's First 100 Days*, Apr. 28, 2017].

³ Helsinki Foundation for Human Rights of Poland, *Polish Supreme Court Under Attack As Crucial Vote Looms* (July 19, 2017) <http://www.hfhr.pl/en/attack-on-the-supreme-court-of-the-republic-of-poland/> (describing the three pieces of legislation under consideration).

on a case and the judge hearing it.

All three laws were pushed through in an abridged time frame. The Law on the Supreme Court was not even made public—or shared with the Supreme Court itself—until it was introduced for enactment, a process which was then rushed to completion within ten days.

After both houses of parliament passed all three bills, President Andrzej Duda unexpectedly vetoed two of them, signing only the Law on Ordinary Courts. However, Duda did not express concern over the constitutionality of provisions of the bills. Instead, he noted that the Polish parliament had not accepted certain amendments he had proposed—for example, regarding the number of votes need to make particular decisions. It remains likely that the Polish parliament will rewrite the two vetoed bills and reintroduce them.

The Law on Ordinary Courts, which will now go into effect, threatens the independence of all regional and local courts, because the judges of these courts can be dismissed by the Minister of Justice simply for failing to rule in the way he desires—or for any other reason. The current Minister of Justice and Prosecutor General, Zbigniew Ziobro—who has been particularly outspoken in criticizing judicial opinions with which he disagrees—has justified this exercise of additional control over the judiciary by charging that Polish courts are corrupt and unethical,⁴ and Law and Justice leader Jaroslaw Kaczynski has argued that they are subject to “foreign forces.”⁵ Other government officials have leveled similar attacks on the judiciary.⁶

Giving the Minister of Justice complete control over judicial appointments makes it likely that political considerations will factor into these appointments. The law therefore threatens fair trial rights under the International Covenant on Civil and Political Rights, including the right to be heard by an independent and impartial tribunal, the right to equal treatment under the law, and general due process rights. It also threatens the rights of free expression and free association, since statements against the current government – made by judges or by litigants – will likely be taken into account in decisions related to firing or hiring of judges. Finally, the variance in mandated retirement ages for men and women violates the right against discrimination based on gender.

The Law on the Supreme Court and Law on the National Council of the Judiciary suffer from most of the same deficiencies, since each one again subjects judicial appointments, and therefore judicial decision-making, to the will of the political party that holds power in

⁴ Agata Lukaszewicz, *Zbigniew Ziobro: Corruption in the Court and Prosecution Is a Crime*, RP.PL (Sept 16, 2016) <http://www.rp.pl/Sedziowie-i-sady/309169989-Zbigniew-Ziobro-Korupcja-w-sadzie-i-prokuraturze-to-zbrodnia.html#ap-1>.

⁵ Christian Davies, *Polish Government Brings Forward Plans to Assert Control over Judges*, GUARDIAN (July 18, 2017), <https://www.theguardian.com/world/2017/jul/18/polish-government-brings-forward-plans-to-assert-control-over-judges>.

⁶ Jan Cienski, *Poland's PiS Tells Top Court to Stuff It*, POLITICO (Mar. 11, 2016) <http://www.politico.eu/article/poland-constitution-tribunal-democracy-kaczynski-rule-of-law-pis/> (quoting Polish foreign minister's comparison of Constitutional Tribunal to religious “ayatollah[s]” in Iran, where “it’s not the law as determined by democratically elected parliaments, governments, presidents which is the dominating law, but the interpretation of that law through jurisprudence”).

Parliament. If these laws are enacted, they would violate fair trial and due process rights, including the right to be tried by an independent tribunal and the right to equal treatment, as well as rights to free speech and free association.

We are greatly concerned by the mixed messages that the United States has been sending to the government of Poland as its parliament has debated these bills and engaged in other actions that threaten judicial independence. On the one hand, we greatly welcome the bipartisan efforts by members of Congress to raise concerns about the Polish government’s attempts to interfere with judicial independence. In February 2016, as the Polish government prepared to launch similarly worrisome legislation regarding the Constitutional Tribunal, Senators McCain, Cardin, and Durbin expressed concerns about that legislation in a letter to the Polish government, urging it to “recommit to the core principles of the OSCE and the EU, including the respect for democracy, human rights, and rule of law that has made Poland . . . a stalwart ally of the United States.”⁷ In May 2016, Senators Burr, Coats, King, Mikulski, and Warner raised concerns about judicial independence in a meeting with President Duda.⁸ We also welcome the State Department’s July 21, 2017 statement, which called upon Poland to “ensure that any judicial reform does not violate Poland’s constitution or international legal obligations and respects the principles of judicial independence and separation of powers.”⁹

However, these efforts to encourage the government of Poland to respect judicial independence have been undermined by other, contradictory signals that President Trump and his senior advisors have sent while these bills have been under consideration.¹⁰ On July 6, 2017, shortly before the bills were introduced—but after Poland’s government had already implemented legislation and policies placing the country’s Constitutional Tribunal, and the public media, under executive control—President Trump lauded the work of the Polish government in a speech delivered in Warsaw. He stated that today’s Poland serves as an “example for others who seek freedom and who wish to summon the courage and the will to defend our civilization.”¹¹ In a recent op-ed in *The Hill*, then-Trump adviser Sebastian Gorka claimed that the administration “will stand shoulder to shoulder with any nation, for example

⁷ Press Release, *Cardin, McCain, Durbin Urge Polish Government to Recommit to the Rule of Law, Human Rights, Protection of Media* (Feb. 11, 2016), <https://www.cardin.senate.gov/newsroom/press/release/cardin-mccain-durbin-urge-polish-government-to-recommit-to-the-rule-of-law-human-rights-protection-of-media>.

⁸ Vanessa Gera, *US Senators Meet Polish President Amid Rising Strains*, ASSOCIATED PRESS (Mar. 18, 2016), available at <http://www.sandiegouniontribune.com/sdut-us-senators-meet-polish-president-amid-rising-2016mar18-story.html>.

⁹ Heather Nauert, U.S. Department of State, Press Statement, *Poland: Independence of the Judiciary* (July 21, 2017), <https://www.state.gov/r/pa/prs/ps/2017/07/272791.htm>.

¹⁰ *Trump In Speech to Poles, Praises Sovereignty, Condemns Bureaucracy*, REUTERS (July 6, 2017) <https://www.reuters.com/article/us-usa-poland-trump-excerpts-idUSKBN19R0TS>; Marcin Gocłowski & Marcin Goettig, *Trump Praises Poland as an Ally to Russian ‘Destabilizing Behavior,’* BUSINESS INSIDER (July 6, 2017), <http://www.businessinsider.com/trump-warsaw-poland-speech-2017-7>; Editorial, *The Trump Effect Overseas: Praise From The President, Then a Crackdown*, WASH. POST (July 21, 2017), https://www.washingtonpost.com/opinions/global-opinions/the-trump-effect-overseas-praise-from-the-president-then-a-crackdown/2017/07/21/d3988926-6cbb-11e7-b9e2-2056e768a7e5_story.html?utm_term=.1a9dfa29487e.

¹¹ *Remarks by President Trump to the People of Poland*, July 6, 2017, <https://www.whitehouse.gov/the-press-office/2017/07/06/remarks-president-trump-people-poland-july-6-2017>.

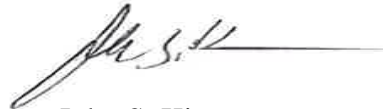
Poland, which shares the values that made the West great and is prepared to defend them.”¹²

These remarks praising a government that has actively been seeking to severely curtail judicial independence and undermine the rule of law send an unsettling message. For decades, the executive branch has been subject to congressional directives that require the promotion of human rights to be a “principal goal” of U.S. foreign policy.¹³ It is in the interest of the United States not only to maintain its own leadership on human rights and rule of law, but also to fulfill these congressional mandates by urging that these standards be observed by partners and allies.

We encourage you, as congressional leaders, to take steps to ensure that the executive branch maintains human rights standards and values as a core foundation of its foreign policy, and—based on that foundation—to urge the Polish government to reconsider policies that will undermine the independence of judges and lawyers, violate human rights principles, and impair the rule of law. We encourage Congress to pass resolutions calling on the Polish government to repair the damage already done to judicial authority and independence in its country and calling on the EU to take action to correct the damage pursuant to pending infringement proceedings against Poland as well as under its Rule of Law Framework.

Congressional leadership has always played an important role in the formulation and exercise of U.S. foreign policy, including policies that seek to promote human rights. We hope that you will continue to play that role by demanding thoughtful engagement by the White House with respect to Poland and more broadly on the international stage.

Respectfully,



John S. Kiernan

¹² Sebastian Gorka, *America Is Back with the First 6 Months of Trump*, THE HILL (July 20, 2017), <http://thehill.com/blogs/pundits-blog/the-administration/342864-opinion-america-is-back-the-first-6-months>.

¹³ As Congress mandated by statute in 1974:

The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

22 U.S.C. § 2304(a)(1); *see generally* New York City Bar Association Letter, *Human Rights During the Trump Administration's First 100 Days*, Apr. 28, 2017, *supra* note 2.

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