



American ideals. Universal values.

December 14, 2017

The Honorable A. Wess Mitchell
Assistant Secretary of State,
Bureau of European and Eurasian Affairs
U. S. Department of State
2201 C Street NW
Washington, DC 20520

Dear Assistant Secretary Mitchell:

I write today to request that you to use your considerable influence to respond to the Polish government's judicial reform proposals currently in process of becoming law. As has been highlighted by both Polish and American experts, these proposals would vitiate the rule of law in Poland, undermine judicial independence to such a degree that it would be difficult to reverse, and send a message that any political party in power is free to restructure institutions in order to support their own policies and viewpoints.

As a longtime scholar of political and economic development in the Central Europe region, you are no doubt aware of the recent setbacks to democratic progress impeding application of constitutional frameworks within the region. Proposals that threaten rule of law and constitutionalism in Poland have begun to harm the functioning of what have long been considered models of newly-transitioned democratic institutions; these include an independent judiciary, executive decision-making based on rule of law, and operation of a free and independent press and civil society sector. With your long term and deeply-rooted connections in the region, you are well-placed to be an influential voice urging Central European governments, and the Polish government in particular, to protect institutions from current policy approaches likely to undo the democratic gains made over the last twenty-five-plus years.

As you know, the Law and Justice government attempted to pass three laws concerning judicial reform in June and July of this year. President Duda vetoed two of them; signing only the Law on Ordinary Courts. This law gave the Minister of Justice the power to fire the presidents of all regional and local courts; and to appoint new ones. It also instituted new forced retirement ages – 60 for women and 65 for men. In some cases, under this law the Minister of Justice, who also serves as Prosecutor General is able to control both the prosecutor on a case and the judge hearing it.

The two laws that were previously vetoed have now been rewritten as new draft laws and passed by the Sejm. The first of the two, the Draft Law on the Supreme Court, has several very problematic provisions.

- It gives the President of Poland the power to make new rules regarding the structure and functioning of the Supreme Court.

President and CEO

Elisa Massimino

Chair

William D. Zabel

Vice-Chairs

Tom A. Bernstein

Michael K. Rozen

Board of Directors

J. Adam Abram

Antony Blinken

Elizabeth Bowyer

Lynda Clarizio

Daniel Doctoroff

Donald Francis Donovan

Matthew S. Dontzin

Leslie Gimbel

R. Scott Greathead

Myrna K. Greenberg

Gavin Hood

Lewis B. Kaden

Roberta Karp

Kerry Kennedy

Robert Todd Lang

Daryl A. Libow

Ambassador Robert A. Mandell (Ret.)

David P. Matthews

Alberto Mora

Admiral Mike Mullen (Ret.)

Matthew G. Olsen

Mona Sutphen

Lev A. Sviridov

- It establishes “lay judiciary” positions, making it easier for political supporters of the political party in power to gain appointment to judicial positions, even if not qualified.
- It allows for a new procedure called “extraordinary appeal,” through which a party can appeal any case, including for up to five years after final judgment, via the Prosecutor General’s office, among others.
- It forces the early retirement of about 40% of Poland’s Supreme Court by imposing a mandatory retirement age of 65, unless a judge is given special permission by the President to remain on the bench.

The second law, the Draft Law on the National Council of the Judiciary, would give parliamentary appointees power over judicial selection going forward – a power formerly overseen by a body made up of judges themselves.

These two draft laws continue a trajectory of problematic attempts at judicial reform that focus primarily on ceding control of the judiciary to other branches of government. In response to the passage of the Law on Ordinary Courts, the European Commission sent a reasoned opinion to the Polish government, noting the constitutional infirmities of giving the executive power to fire judges, and the discriminatory effects of the retirement provision. The Polish government nevertheless implemented the law. Were the two draft laws to pass, these problematic provisions would expand to cover the Supreme Court as well. On December 14, the European Commission indicated that if these draft laws pass, it will institute proceedings under the Rule of Law Framework in the Lisbon Treaty, something it has threatened to do for nearly two years.

On December 11, the Venice Commission of the Council of Europe issued its opinion on the current draft laws. It found that the new procedures regarding the National Council of the Judiciary do not meet European standards, because judges are appointed by politicians and not by their peers, and that the law’s new procedures would unnecessarily replace a system that already comports with such standards. Specifically, the Venice Commission noted that the new procedures leave the National Council of the Judiciary open to politicization.

Regarding the Law on the Supreme Court, the Venice Commission noted that the very idea of a new “extraordinary” chamber outside of the standard judicial system “jeopardizes the stability of the Polish legal order.” It also noted that with the President now empowered to create and staff new entities with national control over the Supreme Court system, judges dominated by the political majority would decide issues of importance, such as how often general elections will occur. The Commission noted that by making electoral judges vulnerable to political influence, the draft law “creates a serious risk for the functioning of Polish democracy.” The Venice Commission further considered the forced retirement provisions arbitrary, and the lay judiciary provisions “ill-advised”, given that they contribute to the appearance of political interference.

Additionally, the Council of Europe’s anti-corruption body announced on December 8, that it is conducting an “urgent evaluation” of the judicial reform proposals because, in its words, they may constitute a “serious violation” of Council of Europe anti-corruption standards.

These new provisions, if signed into law, will create legal chaos in Poland, with every decision essentially appealable through the extraordinary procedure to bodies controlled by the political majority. This will exacerbate the confusion and concern that began when Law and Justice forced off the Constitutional Tribunal those judges that disagreed with it last year, and successfully

undermined the independence of this supreme judicial body, which might have heard challenges to the current proposals. The legal disorder and confusion caused by the current proposals, as they combine with application of new rules regarding the Constitutional Tribunal and the Ordinary Courts, are likely to negatively affect the confidence of U.S. and multinational businesses. The resulting legal instability will also contribute to a broader sense of uncertainty and instability in Poland, caused by a lack of notice or agreed-upon definition of the rights of individuals and of the responsibilities of government or government-linked entities.

It is this push toward legal confusion and lack of independence that moved the European Commission to announce its readiness to act on the Rule of Law Framework. The United States should voice its strong support for the Commission's decision. These reform proposals cumulatively hamper the rule of law, damage the independent structure of an institution key to protecting democracy, and edge Poland closer to constitutional crisis, should be of great concern to Poland's NATO allies. As one of the country's closest partners, the United States should express its concern not to simply criticize the government, but to ensure that Poland's security – the security that the U.S. and NATO work diligently to protect – remains robust and supported in parallel from within.

I therefore ask you to urge your contacts in the Polish government to view the judicial reform proposals through the lens of their own security and future stability, and the security and stability concerns of their close allies. I also ask you to urge your Polish interlocutors to remove the named provisions from these draft laws and work with experts in the Warsaw Bar Association, the Helsinki Foundation for Human Rights, and elsewhere, to draft legislation that complies with European and international standards of rule of law and judicial independence. Finally, I ask you to urge your Polish colleagues to not pass the current draft laws identified as problematic by relevant experts, unless these provisions are removed.

I would be happy to discuss this matter further with you or members of your staff. Thank you for your attention.

Sincerely,


Melissa Hooper
Director of Human Rights and Civil Society