

Judicature

BOLCH JUDICIAL INSTITUTE

Published by the Bolch Judicial Institute at Duke Law. Reprinted with permission. © 2020 Duke University School of Law. All rights reserved.

JUDICATURE.DUKE.EDU



'THE MARCH OF THOUSAND GOWNS,' JANUARY 2021, WARSAW, POLAND: JUDGES FROM AROUND THE EU JOINED POLISH JUDGES IN PROTESTING LAW AND JUSTICE PARTY REFORMS THAT MANY BELIEVE THREATEN JUDICIAL INDEPENDENCE. ZUMA PRESS INC / ALAMY IMAGES.

The Collapse of Judicial Independence in Poland: A Cautionary Tale

BY ALLYSON DUNCAN AND JOHN MACY

In late 2019, the Polish Sejm approved yet another law aimed at cabining the structure and function of the judiciary.¹ The new law, popularly referred to as a “muzzle” law,² empowers a disciplinary chamber to bring proceedings against judges for questioning the ruling party’s platform.³ The law allows the Polish government to fire judges, or cut their salaries, for speaking out against legislation aimed at the judiciary, or for questioning the legitimacy of new judicial appointees.⁴ Although the law extends the government’s disciplinary powers, disciplinary proceedings against judges are nothing new in Poland. Since Poland’s disciplinary chamber was founded in 2017, over a thousand judges have been targeted.⁵

Put into context, the new law is merely the latest addition to a succession of judicial changes. Since its return to power in 2015, Poland’s “Law and Justice” party has frequently targeted the independence of the judiciary. In doing so, the party has drawn the attention of the European Union (“EU”). EU bodies have warned the party that its judicial reforms contravene principles of judicial independence and could threaten the country’s membership in the Union. The Polish leadership has consistently failed to heed these warnings. Indeed, the Law and Justice party’s most recent enactment suggests that

it is determined to continue with its agenda. The EU is therefore faced with the challenge of how to respond to Poland’s apparent intransigence.

Here we examine the impact of Poland’s latest law on judicial discipline, as well as the implications of Poland’s challenges to judicial independence generally. The paper proceeds in three parts: First, it contextualizes Poland’s new law against the country’s broader judicial revisions; second, it examines the tension created by these actions with the EU; and third, it considers whether there are lessons to be learned from the Polish experience in seeking to understand and protect judicial independence in a country like the United States.

Since Poland’s disciplinary chamber was founded in 2017, over a thousand judges have been targeted.

HOW DID WE GET HERE? THE COLLAPSE OF JUDICIAL INDEPENDENCE IN POLAND

The so-called “muzzle” law on judicial discipline fits into a political process that spans several years. Since 2015, the “Law and Justice” party (Prawo i Sprawiedliwość, or PiS) has targeted Poland’s judicial branch with laws designed to mitigate the ability of the courts to act as a check against legislative and executive power. It has done so in various ways. It has imposed procedural rules that paralyze courts, packed courts with PiS-friendly appointees, and, in some cases, refused to follow or publish official opinions.

The changes to Poland’s Constitutional Tribunal, the court vested with the power of judicial review,⁶ are just one example. Not long after its transition to power, the PiS-controlled Sejm (lower house of parliament) refused to recognize Tribunal judges appointed by the outgoing regime,⁷ and instead replaced the previously appointed judges with their own “midnight appointees.”⁸ Then, in December 2015, the Sejm passed an act imposing new procedural rules on the Tribunal.⁹ The act increased the number of judges needed for the court to hear a case, and mandated a two-thirds supermajority voting requirement for the court to decide an issue.¹⁰

In response, incumbent judges on the Constitutional Tribunal released ►

an opinion questioning the constitutionality of the act.¹¹ They pointed out that, among other problems, the act contradicted the simple majority voting requirement mandated by Poland's constitution.¹² However, the ruling party maintained that the act was effective immediately.¹³ As such, the party argued that the Tribunal was required to follow the procedural rules of the act to overturn the act itself. In effect, the legislation was designed to evade judicial review. Ultimately, the PiS officials simply refused to publish the court's opinion.¹⁴

The reforms of the Constitutional Tribunal were an early demonstration of the PiS party's approach to the rule of law, and a troubling indication of its proclivity to evade checks on the party's power. Equally troubling was the party's willingness to do an about-face once its reforms were implemented. Once the Constitutional Tribunal had been packed with enough PiS-friendly judges, the PiS Minister of Justice threatened disciplinary sanction against any judge who refused to recognize the legitimacy of the newly constituted Tribunal.¹⁵ The "muzzle" law follows a similar line. Before telling that story, though, it is important to note the changes made to two other institutions: Poland's National Council of the Judiciary and the Polish Supreme Court.

In Poland, judicial appointments, including appointments to the Supreme Court, are largely handled by a facially independent body, the National Council of the Judiciary (KRS).¹⁶ The Council is composed of 25 members: 15 judges from Poland's various courts, four members of the Sejm appointed by the Sejm, two members appointed by the Senate, the President of the Supreme Court, the President of the Supreme Administrative Court,

the Minister of Justice, and one member appointed by the President of the Republic.¹⁷ Initially, the 15 judges sitting on the KRS were appointed from within the judiciary by various judicial assemblies.¹⁸ However, in 2017, President Andrzej Duda enacted legislation that gave the Sejm the authority to appoint the judicial members of the council.¹⁹ The legislation also immediately ended the terms of the council's sitting judges,²⁰ allowing the Sejm to quickly replace 15 members of the body with its own appointees.²¹ As a result, the Sejm had effectively taken control of judicial appointments in Poland. The action was met with sharp

criticism, and the KRS was subsequently suspended from the European Network of Councils for the Judiciary (ENCJ) as a result.²² In light of recent events, the KRS is in danger of being officially expelled from the ENCJ.²³

Following the reshaping of the KRS, the Sejm lowered the mandatory retirement age of sitting Supreme Court judges.²⁴ Had it been allowed to stand, the move would have enabled the new KRS to appoint as many PiS-loyal judges as possible as older members were forced to retire from the court.

In effect, the new retirement age would have allowed the KRS to replace roughly 40 percent of the judges on Poland's Supreme Court.²⁵ However,

Poland walked back the action after the European Court of Justice released an opinion criticizing the change as contrary to EU principles of judicial independence.²⁶ Even so, the PiS-friendly KRS has still had ample opportunity to appoint new judges to Poland's court of last resort. Sitting Supreme Court judges have been critical of the new appointees, and some have refused to recognize the legitimacy of the new judges.²⁷ Poland's latest disciplinary or "muzzle" law was passed in large part to silence these critical voices.²⁸ The weaponization of the

disciplinary sanction has been an integral part of PiS reform.

In Poland, disciplinary sanction of judges is handled by the disciplinary chamber, an institution created by the PiS in 2017.²⁹ The chamber is led by prosecutors appointed by the Minister of Justice, who is a PiS appointee.³⁰ The institution has been criticized as a tool designed to "ensure that judges [are] subservient to the political will."³¹ In a recent report, a group of Polish judges highlighted the repressive activities of the chamber. The report describes

The party argued that the Tribunal was required to follow the procedural rules of the act to overturn the act itself. In effect, the legislation was designed to evade judicial review.

instances of judges being prosecuted for engaging in allegedly political activities, such as chairing a meeting where judicial independence is discussed.³² In other cases, judges were prosecuted for referring questions to the European Court of Justice, an action referred to as “judicial excess” by the prosecutors.³³

Under the new “muzzle” law, the disciplinary chamber may impose salary cuts, or even outright dismissal, if judges speak out against the validity of the judicial restructuring.³⁴ Judges can also be punished for questioning the legitimacy of judges appointed by the KRS,³⁵ an institution that has been thoroughly captured by PiS appointees. The law also requires judges to disclose their memberships in associations, including associations of judges.³⁶ The law seeks to chill discourse between judges regarding reforms, and to dissuade judges from joining judicial associations that have been critical of PiS legislation. Indeed, it was a former president of Poland’s Supreme Court who aptly described the law as a “muzzle” law.³⁷

Through its reforms, the Law and Justice party has demonstrated a profound disrespect for judicial independence and the separation of powers. Moreover, it should be noted that PiS has waged an ideological public-relations battle against the judiciary in addition to its legislative assault. The party spins a narrative that identifies the judiciary with the bygone communist regime,³⁸ seeking to paint the judiciary as a “judicocracy”³⁹ of old communist elites that are bent on disregarding legislation.⁴⁰ At its core, the PiS’s rhetoric seeks to classify the judiciary as an impediment to democratic rule by the people, rather than a constitutionally mandated check on legislative and executive overreach.⁴¹ Of course, the end goal of the

rhetoric is to justify the use of executive and legislative power unfettered by judicial review.

The party has thus used social media and advertising to discredit judges and undermine public confidence in the judiciary. In 2017, the party launched an ad campaign that described instances of judges drunk driving, shoplifting, and starting bar fights.⁴² In 2019, Polish journalists exposed an online “trolling” campaign being organized within Poland’s Ministry of Justice.⁴³ The campaign hired professional trolls to harass and discredit judges on social media platforms such as Twitter.⁴⁴ In one instance, a professional troll sent defamatory information about a judge to all of the judge’s colleagues, and even to the judge himself at his home address.⁴⁵

The objective of the rhetoric is relatively clear: The PiS party seeks to justify its consolidation of power by sowing public distrust of the judicial branch. The strategy is a tried-and-true autocratic formula: a democratically elected body attacks constitutional institutions under the guise of a democratic mandate.⁴⁶ However, as a member of the EU, Poland is subject to democratic institutions outside of its borders. It is unsurprising, then, that the PiS has accompanied its skepticism of the Polish Constitution with a skepticism of the EU and its federal system of law. The party has been reluctant to conform to established EU values, and it has actively punished judges for referring questions to European Courts.⁴⁷

THE EU RESPONSE

In response, EU bodies have wrestled with Poland. An independent judiciary is one of the foundational principles of the EU. As Article 6 of the European Convention on Human Rights states: “[E]veryone is entitled to a fair and pub-

lic hearing within a reasonable time by *an independent and impartial tribunal established by law*”⁴⁸ (emphasis ours). This broad principle serves only as a starting point. In its official opinion on judicial independence, the Consultative Council of European Judges (CCJE) has described an independent judiciary as a “pre-requisite to the rule of law.”⁴⁹ Among other things, the CCJE recommends that judges be appointed by an independent body based on objective criteria, that they have guaranteed tenure subject to limited disciplinary sanction, and that they have salaries protected from reduction.⁵⁰ More recently, the European Commission on Democracy through Law (the “Venice Commission”) has reaffirmed the principles of independence described by the CCJE.⁵¹ The Venice Commission’s 2010 report on judicial independence frequently cites the CCJE opinion, and emphasizes the importance of objective appointment and guaranteed tenure and salary.⁵²

While judicial independence is important as a democratic ideal, it also plays a significant practical role in the EU. Under Article 19(1) of the Treaty on EU, the EU requires its member states to “provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”⁵³ Additionally, the European Court of Justice relies upon the tribunals of member states to request rulings from the court.⁵⁴ As such, the judiciaries of member states play an important role in the enforcement of EU law. In a recent decision, the European Court of Justice concluded that judicial independence is “essential” to this cooperative system.⁵⁵ In its opinion, the court offered its own succinct interpretation of what judicial independence entails. It wrote:

The concept of independence presupposes, in particular, that ►

the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.⁵⁶

It is not difficult to see how the judicial reforms in Poland have contravened these principles. By replacing the members of the National Council of the Judiciary, the PiS Sejm has undermined the independence of the body charged with judicial appointments. By creating a disciplinary chamber with the power to remove judges or reduce their salaries, the PiS Sejm has imposed “pressure liable to impair the independent judgment” of Polish judges.

In 2016, the European Commission began releasing official recommendations outlining concrete steps that Poland should take to restore the rule of law there.⁵⁷ The latest recommendation, released in 2017, asked the Polish government to walk back several of the reforms.⁵⁸ However, the European Commission noted that the recommendation followed nearly two years of Poland’s failure to respond to its attempts at dialogue.⁵⁹ Due to Poland’s lack of cooperation, the Commission also used the 2017 recommendation as an opportunity to initiate more drastic measures under Article 7(1) of the Treaty on EU.⁶⁰ Article 7 allows the Council of the EU to determine that there is a “clear risk of serious breach” of EU values by a member state.⁶¹ If such a determination is made, Poland could lose their voting rights within the Council.⁶² However, an official Article

7 determination requires unanimous support from the rest of the EU,⁶³ and some countries (namely Hungary) are reluctant to act against Poland.⁶⁴

Unperturbed by the EU’s threats, the Polish government has continued to stand behind its agenda. In 2018, the Polish government released a 94-page white paper defending the validity of its judicial reforms.⁶⁵ Not long after, members of the Polish Supreme Court criticized the white paper for containing “untrue” and “distorted” information.⁶⁶ The Court described the white paper’s analysis as methodologically inconsistent, unreasonable, and tendentious.⁶⁷ Despite this critique, the Law and Justice Party remained entrenched in its position. The recent “muzzle” law, approved in 2019, is further evidence of the party’s intransigence.

Poland’s defiance has escalated tensions with the EU, and this new disciplinary law has become a focal point. In early 2020, the European Court of Justice (“CJEU”) released an interim decision ordering the Polish government to suspend the activities of the disciplinary chamber regarding the discipline of judges.⁶⁸ In its decision, the CJEU concluded that the disciplinary chamber in its current form “may cause serious and irreparable harm with regard to the functioning of the EU legal order.”⁶⁹ As a result, the court found the situation sufficiently urgent to order interim measures suspending the chamber’s activities while it considers its ultimate disposition regarding the “muzzle” law. The court will come to its final decision in the case at a later date.⁷⁰

It is difficult to predict how Poland will react to the increasing international pressure. Shortly after the CJEU ordered the suspension of the disciplinary chamber, the chamber continued with proceedings against a

prominent Warsaw judge, Judge Igor Tuleya.⁷¹ The president of the Polish Supreme Court at the time (and former PiS official),⁷² Aleksander Stepkowski, defended the proceeding by claiming that it was a criminal matter, not a disciplinary matter,⁷³ and therefore not covered by the CJEU opinion. The concern was that the disciplinary chamber would attempt to circumvent the CJEU order by reframing its proceedings. Ultimately, however, in a somewhat unexpected turn, the disciplinary chamber bowed to international pressure and dropped the proceeding.⁷⁴ This is not the first time the PiS party has changed course in response to international pressure; as discussed above, the party walked back a reform lowering retirement ages in response to EU criticism.⁷⁵

That being said, a few instances of backpedaling, of course, may not mean a broader change of heart. The PiS party continued with reforms after reinstating the retirement age, and it may continue with reforms again after abandoning the proceedings against Judge Tuleya. It is important, then, to ensure that small capitulations do not excuse Poland from the international hot seat.

What, then, will the EU do next? The answer is unclear. One option is to continue Article 7 proceedings in an attempt to strip Poland of its voting rights in the EU Council. However, that path would be procedurally difficult. Under Article 7, the European Council must act unanimously to determine that there is a clear risk of serious breach of EU values.⁷⁶ The Council may struggle to achieve a unanimous vote. In the past, Hungary has expressed a willingness to defend Poland;⁷⁷ to quote Hungarian Prime Minister Viktor Orban: “the Inquisition offensive against Poland can never succeed because Hungary will use all legal options in the EU to show solidar-

ity with the Poles.”⁷⁸ Orban’s position is not surprising, as his own party has orchestrated the deterioration of democratic institutions in Hungary.⁷⁹

Nonetheless, the European Parliament’s Committee on Civil Liberties, Justice, and Home Affairs (LIBE) continues to push for Article 7 proceedings.⁸⁰ Whether such proceedings can succeed remains to be seen.

As an alternative, some EU members are advocating for direct monetary sanctions. Denmark, for example, has advocated for the EU’s 2021–2027 budget to include a link between EU funds and rule of law standards.⁸¹ The proposal would reduce EU funding to countries that fail to meet the Union’s expectations for democratic institutions. The LIBE has similarly advocated for the use of “budgetary tools” in addressing Poland’s breach of EU values.⁸² Considering the procedural hurdles involved in Article 7 proceedings, financial sanction is likely a more efficient way for the EU to exert pressure on Poland’s government. Undoubtedly, exerting financial pressure would be a bold move by the EU, but it is appropriate for members who continue to accept funds while simultaneously flouting the bloc’s core principles.

In addition to actions taken by the EU as a whole, member states have pushed back against Poland in their

individual capacities. In recent years, several nations have refused to honor European arrest warrants which, under normal circumstances, would

require them to extradite suspected criminals to Poland. In 2018, for example, an Irish judge refused to extradite a suspected drug trafficker,⁸³ explaining that the rule of law in Poland had been “systematically damaged” by Law and Justice reforms.⁸⁴ In an official order, the judge concluded that “[r]espect for the rule of law is essential for mutual trust in the operation

of the European arrest warrant.”⁸⁵ The EU Court of Justice agreed; in a 2018 ruling, the CJEU concluded that “[a] judicial authority called upon to execute a European arrest warrant must refrain from giving effect to it if it considers that there is a real risk that the individual concerned would suffer a breach of his fundamental right to an independent tribunal.”⁸⁶ In 2020, a German court followed this reasoning in its own refusal to extradite a suspect.⁸⁷ In a press conference, the court expressed that it had “profound doubts about the future independence of the Polish judiciary.”⁸⁸

These are only a few examples of ways that the EU and its members can apply external pressure on Poland. Since existing measures have failed to slow the deterioration of Poland’s insti-

tutions, it is likely that the EU will look for new avenues to force the issue. In doing so, the bloc will need to remain vigilant in its struggle with a Polish government that has consistently refused to conform to Union standards.

LESSONS FOR THE UNITED STATES

It is understandably difficult to compare the situation in Poland to the United States. The United States has relatively strong judicial institutions, and its norms of judicial independence have developed over centuries of American history. By contrast, those norms are young in Poland. Poland’s Constitution did not contain practical protections for judicial independence until 1989.⁸⁹ The country’s current Constitution, ratified in 1997, contains extensive safeguards for judicial independence,⁹⁰ but the fact remains that those safeguards are relatively new.

Notwithstanding the differences, there are concrete lessons to be learned from Poland’s political crisis. Speaking broadly, the Law and Justice reforms demonstrate that a constitutional order that lacks respect for an independent judiciary is apt to betray its own constitution. Although our situation is not nearly as drastic, a growing tendency to politicize the judiciary is of legitimate concern in the United States. Furthermore, the EU’s struggle with Poland highlights that a federal system of law depends upon the good faith cooperation of its members. As such, we are reminded that norms of judicial independence in the United States are crucial at both the federal and the state levels.

At the Federal Level

When discussing the politicization of the federal judiciary, it is tempting to focus on the judicial confirmation process. Indeed, the process has under- ►

The Law and Justice reforms demonstrate that a constitutional order that lacks respect for an independent judiciary is apt to betray its own constitution.

gone several political changes in recent years. Blue slips are given less deference,⁹¹ and the Senate has twice exercised the “nuclear option” to lower the threshold needed to invoke cloture on judicial confirmations.⁹² However, political battles during the confirmation process are not a new phenomenon.⁹³ In a recent article, constitutional law professor Josh Chafetz characterizes the history of legislative obstruction:

Broadly speaking, minorities look for procedural tools — things like mechanisms of quorum-counting or the lack of a formal procedural mechanism to bring a debate to a close — that they can employ to thwart or delay the majority’s agenda. When the obstruction becomes pervasive enough that the majority, over an extended period of time, find it intolerable, the obstructive tactics are restricted or eliminated.⁹⁴

According to Chafetz, recent developments, such as reducing deference to home-state Senators or using the “nuclear option,” fit well into this broader historical narrative.⁹⁵

As such, the politicization of the confirmation process should not be that surprising. What might be more concerning, though, is the increasing political skepticism regarding judicial independence. A few recent examples illustrate this shifting political narrative. In 2018, President Donald Trump posted a tweet referring to a federal judge as an “Obama judge” following a ruling that Trump found unfavorable.⁹⁶ The implication, of course, was that the judge’s decision was influenced by his political ideology, an ideology only confirmed by the fact that he was appointed by President Barack Obama. More recently, in 2020, Senate Minority Leader Chuck Schumer threatened

that Justices Neil Gorsuch and Brett Kavanaugh would “pay the price” if they came to a particular conclusion in a pending Supreme Court case.⁹⁷ The threat implied that judges, like political actors, should be subject to democratic pressure to make the “right” decision.

While not as overt, both instances have an alarming similarity to the narratives spun by the Law and Justice party. The remarks suggest a world view of judges not as neutral decision-makers, but rather as politically motivated actors working against the democratic will. When judges are seen as politically motivated, it might seem more acceptable to disregard an opinion as the policy determinations of an “Obama judge” as opposed to a good-faith determination of the rule of law. Likewise, it might seem more acceptable to threaten judges over their decisions, just as the public threatens elected politicians with the withdrawal of their vote. When judges are seen as just another political actor, judicial independence is apt to be seen as an impediment to, and not a protector of, the rule of law.

The judicial community has taken note of the narrative of distrust. In a response to President Trump, Chief Justice John Roberts wrote: “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.”⁹⁸ In a statement responding to Sen. Schumer, the Chief Justice remarked that “[s]tatements of this sort from the highest levels of government are not only inappropriate, they are dangerous.”⁹⁹

In early 2020, the Committee on Codes of Conduct released an advisory

opinion cautioning judges to carefully consider memberships in the American Constitution Society or the Federalist Society.¹⁰⁰ The opinion emphasized that it was not condemning those organizations or their activities.¹⁰¹ Rather, the opinion noted that “[a] reasonable and informed public would view judges holding membership in these organizations to hold, advocate, and serve liberal or conservative interests.”¹⁰² The advisory opinion was met with significant pushback,¹⁰³ and was eventually withdrawn.¹⁰⁴ Notwithstanding its alleged flaws, the advisory opinion, like the Chief Justice’s remarks, demonstrated an apprehension of the consequences of political narrative.

When the public begins to question the impartiality of judges, it becomes easier to justify reforms to the judiciary. The official Code of Conduct for federal judges recognizes this explicitly in the commentary to Canon 1. The Commentary states: “[d]eference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges.”¹⁰⁵ When that public confidence deteriorates, our politicians feel more confident in dismissing the decisions of judges as impartial, or in threatening consequences when judges step out of line. For now, those threats might be empty, but Poland’s political situation demonstrates that such threats can materialize.

However, it would be a mistake to think that judges are wholly responsible for this narrative. While judges can play their part in sustaining public confidence in the judiciary, there is little they can do against a government bent on cementing its own power. The Law and Justice party wants the public to believe that it is seeking to overthrow an artifact of the communist era.¹⁰⁶ In such a scenario, the govern-

ment itself is playing an active role in undermining public confidence in the judiciary. And, in some cases, there is little that judges can do to fight back. Even now, there is a fear that the Law and Justice party is willing to evade democratic accountability as well.¹⁰⁷ The collapse of judicial independence is only one part of the story. Regardless, the rhetoric in Poland can cast light on the dangerous implications of the rhetoric stirring in the United States.

At the State Level

As discussed above, Poland's reforms have triggered responses not only from EU bodies, but also from individual EU members. Some EU members have refused to extradite criminal suspects to Poland because of their lack of faith in the country's justice system. Those instances reveal an important consequence of Poland's attack on the judiciary. In federal systems with highly mobile populations, member states rely on each other for the administration of justice. There cannot be a coherent and consistent rule of law throughout unless all members stand behind basic principles of law. This is apparent in the United States as well, where the vast majority of criminal and civil cases are resolved in the state courts.¹⁰⁸ Just as the legal order in the EU depends upon the cooperation of member states, the maintenance of a reliable legal order in the United States depends upon the integrity of state judiciaries.

Certainly, politicization of the judiciary takes on a different form in the state courts. One difference derives from the varying methods of judicial selection. Some states have fully elected judiciaries; other states have appointments for limited tenure; and others have appointments subject to retention elections.¹⁰⁹ In each case,

what counts as "politicization" can be assessed differently. In states with fully elected judiciaries, for example, judges take part in an explicit political process. However, even an elected judiciary can still become "politicized" in a way that threatens judicial independence. As a former justice of the Oregon Supreme Court pointed out, judicial elections become politicized when discussions of policy outcomes dominate the election process.¹¹⁰ This kind of electoral politicization is only made worse by special interest groups, which see judicial elections as another avenue to finance campaigns and exert their policy preferences.¹¹¹ In response to this, some states with elected judiciaries have special rules that apply only to judicial elections. In Oregon, for example, candidates for judicial office are prohibited from soliciting campaign contributions directly.¹¹²

Regardless of the process by which a state selects its judges, judicial independence can always be threatened by pressure from the executive and legislative branches. The fight for impartiality in the selection process is futile if sitting judges can be disciplined for unfavorable rulings. It should be concerning, then, that some

state judiciaries have come under direct attack from the other branches. One recent example comes from the state of Alaska, where the governor used his line-item veto power to cut the state judiciary budget in response to an opinion of the Supreme Court.¹¹³ In a note accompanying the veto, the governor offered the following explanation:

"The Legislative and Executive Branch are opposed to State funded elective abortions; the only branch of government that insists on State funded elective abortions is the Supreme Court."¹¹⁴ Although such a veto is not directly analogous to the actions of Poland's disciplinary chamber, it has similar implications. A retaliatory budget reduction seeks to punish judges for the policy consequences of a legal conclusion, and such punishment is inconsistent with basic values of judicial independence.¹¹⁵

When public confidence deteriorates, our politicians feel more confident in dismissing the decisions of judges as impartial, or in threatening consequences when judges step out of line.

State-level transgressions against judicial independence demonstrate the necessity of strong political norms. The United States does not have a procedure similar to the EU's Article 7. The United States cannot, for example, deprive a state of its equal suffrage in the Senate without the state's consent.¹¹⁶ That said, avenues for redress ►

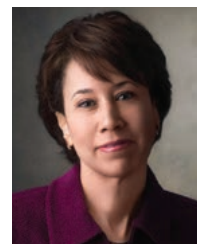
do exist in the states themselves. States can enact legislative safeguards against the politicization of their judiciaries, and courts can push back against the intrusion of the executive and legislative branches when a case highlights such issues.¹¹⁷ However, the success of each of these avenues relies on public confidence in the integrity of the judiciary. As the Law and Justice reforms demonstrate, courts are practically powerless to push back against judicial reforms when those reforms are based on a disrespect for judicial institutions in the first place.

The EU, like the United States, is built on the aspiration of a unified rule of law that reflects certain fundamental values. Undoubtedly, a unified rule of law requires mutual trust between judiciaries, founded upon reciprocal minimum standards.¹¹⁸ This reciprocity and trust is undermined when the political actors of a state cause the judicial branch to fall below the threshold of judicial independence. The struggle between Poland and the EU teaches an important lesson about the fragility of a unified rule of law. Both the European and American visions of justice rely upon the integrity of several judiciaries; when just one

judiciary is compromised, the entire unified system is jeopardized.

CONCLUSION

The crisis in Poland emphasizes both the importance and the fragility of the judicial branch. In democratic nations like Poland and the United States, the judiciary falls into somewhat of a paradox. Judges serve as a crucial check on the executive and legislative branches, and yet they rely, to an extent, on the respect of those branches to retain their independence. Nonetheless, while Poland's story may be a "cautionary tale," it can also be seen as a tale of hope as well. While the Law and Justice party has undermined the integrity of the justice system in Poland, advocates of an independent judiciary have refused to back down. The ruling party faces opponents from within Poland's borders and from without. The backlash that the party has received shows that the third branch still has plenty of supporters in Poland and throughout Europe. Likewise, there are still many in the United States who see an independent judiciary as "something we should all be thankful for."¹¹⁹



ALLYSON

DUNCAN served on the U.S. Court of Appeals for the Fourth Circuit from 2003 until her retirement in 2019. She served as

chair of the International Judicial Relations Committee of the U.S. Judicial Conference, appointed by Chief Justice John Roberts, and as president of the Federal Judges Association; she is currently vice president of the International Association of Judges. She earned her J.D. at Duke University School of Law in 1975 and is a member of the Duke University Board of Trustees and the Bolch Judicial Institute Advisory Board.



JOHN MACY is a second-year law student at Duke Law School and a graduate of the University of Alaska Anchorage. He is a staff editor on the *Duke Law*

Journal and the *Duke Environmental Law & Policy Forum* and has served as a judicial intern for Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit. He worked on this article with Judge Duncan as part of a research assistantship with the Bolch Judicial Institute at Duke Law School.

¹ See Jan Strupczewski, *Poland lower house adopts judiciary reform despite EU concerns*, REUTERS (Dec. 20, 2019), <https://www.reuters.com/article/us-poland-eu-judges/poland-lower-house-adopts-judiciary-reform-despite-eu-concerns-idUSKB-NIYO28G>.

² Nicolé M. Ford, *'Muzzle Law' Ends Poland's Ability to Call Itself a Democracy*, GLOBE POST (Jan. 30, 2020), <https://theglobepost.com/2020/01/30/poland-muzzle-law/>.

³ Freedom House, *Poland: Restrictive Judiciary Law Sets Dangerous Precedent*, (Jan 23, 2020), <https://freedomhouse.org/article/poland-restrictive-judiciary-law-sets-dangerous-precedent>.

⁴ *Id.*

⁵ According to a January 2020 report, 1,174 disciplinary investigations have been initiated against Polish judges; approximately 10% of Poland's judges have been investigated. CoE/PACE, *The functioning of democratic institutions in Poland*, 25 (Jan. 2020).

⁶ Const. of the Republic of Poland, art. 188(1).

⁷ See Arkadiusz Radwan, *Chess-boxing around the Rule of Law: Polish Constitutionalism at Trial*, VERFASSUNGSBLOG (Dec. 23, 2015), <https://verfassungsblog.de/chess-boxing-around-the-rule-of-law-polish-constitutionalism-at-trial/>.

⁸ *Id.*

⁹ Mikołaj Pietrzak, *The Constitutional Court of Poland: The Battle for Judicial Independence*, page 4, THE FOUNDATION FOR LAW, JUSTICE AND SOCIETY (May 24, 2017), <https://www.fljs.org/content/constitutional-court-poland-battle-judicial-independence>.

¹⁰ *Id.*

¹¹ Paulina Starski, *The Power of the Rule of Law: The Polish Constitutional Tribunal's Forceful Reaction*, VERFASSUNGSBLOG (Mar. 17, 2016), <https://verfassungsblog.de/the-power-of-the-rule-of-law-the-polish-constitutional-tribunals-forceful-reaction/>.

¹² CONST. OF THE REPUBLIC OF POLAND, Art. 190(5).

¹³ Radwan, *supra* note 7.

¹⁴ Starski, *supra* note 11.

¹⁵ Tomasz Tadeusz Koncewicz, *Living under the con-*

stitutional capture and hoping for the constitutional recapture, VERFASSUNGSBLOG (Jan. 3, 2017), <https://verfassungsblog.de/living-under-the-the-unconstitutional-capture-and-hoping-for-the-constitutional-recapture/>.

¹⁶ Christian Davies, *Hostile Takeover: How Law and Justice Captured Poland's Courts*, FREEDOM HOUSE (2018), <https://freedomhouse.org/report/analytical-brief/2018/hostile-takeover-how-law-and-justice-captured-polands-courts>.

¹⁷ CONST. OF THE REPUBLIC OF POLAND, Art. 187.

¹⁸ OSCE Office for Democratic Institutions and Human Rights, *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, page 11 (May 5, 2017) <https://www.osce.org/files/f/documents/f/c/315946.pdf>

¹⁹ Alistair Walsh, *What are Poland's controversial judicial reforms?*, DW (Nov. 5, 2019), <https://www.dw.com/en/what-are-polands-controversial-judicial-reforms/a-51121696>.

²⁰ *Id.*

²¹ *Id.*

- 22 *Id.*
- 23 See generally European Network of Councils for the Judiciary, *Draft Position Paper of the Executive Board of the ENCJ on the Membership of the KRS (expulsion)*, (Apr. 22, 2020) (explaining the ENCJ's position on expelling the KRS from the ENCJ).
- 24 Davies, *supra* note 17.
- 25 *Id.*
- 26 EU Court says Poland broke law by making judges retire early, DW (Jun. 24, 2019), <https://www.dw.com/en/eu-court-says-poland-broke-law-by-making-judges-retire-early/a-49332774>; C-192/18, *Commission v. Poland*, 2019 ECLI:EU:C:2019:529.
- 27 Cain Burdeau, *Fight Over Rule of Law in Poland Intensifies*, COURTHOUSE NEWS SERVICE (Jan. 24, 2020), <https://www.courthousenews.com/fight-over-rule-of-law-in-poland-intensifies/>
- 28 *Id.*
- 29 See C-791/19, *Commission v. Poland*, 2020 ECLI:EU:C:2020:277 (stating that the disciplinary chamber was created by legislation in 2017).
- 30 JAKUB KOŚCIERZYŃSKI ET AL., JUSTICE UNDER PRESSURE: REPRESSIONS AS A MEANS OF ATTEMPTING TO TAKE CONTROL OVER THE JUDICIARY AND THE PROSECUTION IN POLAND: YEARS 2015–2019 at 7 (2019).
- 31 *Id.*
- 32 *Id.* at 17.
- 33 *Id.* at 33.
- 34 Burdeau, *supra* note 28.
- 35 Adam Easton, *Poland lower house approves controversial judges law*, BBC (Dec. 20, 2019), <https://www.bbc.com/news/world-europe-50874320>.
- 36 Anne Sanders, *Muzzling Associations of Judges: The Duty of Judges to Declare Membership in an Association Under Poland's so-called "Muzzle Law,"* VERFASSUNGSBLOG (Mar. 5, 2020), <https://verfassungsblog.de/muzzling-associations-of-judges/>.
- 37 Ford, *supra* note 2.
- 38 See Michael Hoffman, *[PiS]sing off the Courts: The PiS Party's Effect on Judicial Independence in Poland*, 51 VAND. J. TRANSNAT. 1153, 1163 (2018) (describing PiS rhetoric that identifies judges as an "older generation of elites" affiliated with an old communist order).
- 39 See *Poland approves bill aimed at punishing judges*, FRANCE24 (Dec. 20, 2019), <https://www.france24.com/en/20191220-poland-approves-bill-aimed-at-punishing-judges> (quoting Justice Minister Zbigniew Ziobro: "This law protects the democratic rule of law against the 'judicocracy' ...").
- 40 See Davies, *supra* note 17 (stating that "PiS claims the right to disregard the provisions of the constitution so as to assert its control over the judiciary, which, it argues, has no right interfering with the people's will.").
- 41 *Id.*
- 42 Davies, *supra* note 17; Marek Strzelecki, *Poland Starts Ad Campaign to Back Court Overhaul Disputed in EU*, BLOOMBERG (Sep. 8, 2017), <https://www.bloomberg.com/news/articles/2017-09-08/poland-starts-ad-campaign-to-back-court-overhaul-disputed-in-eu>.
- 43 Anne Applebaum, *The Disturbing Campaign Against Poland's Judges*, THE ATLANTIC (Jan. 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/disturbing-campaign-against-polish-judges/605623/>.
- 44 *Id.*
- 45 *Id.*
- 46 See generally Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 545–549 (2018) (describing the formulaic approach of new auto-
- 47 cratic governments).
- 48 Kościarczyński, *supra* note 31.
- 49 European Convention on Human Rights, art. 6, Sept. 3, 1953.
- 50 CONSULTATIVE COUNCIL OF EUROPEAN JUDGES, OPINION NO. 1 CONCERNING THE INDEPENDENCE OF THE JUDICIARY, para. 10, (2001).
- 51 *Id.*
- 52 EUROPEAN COMMISSION ON DEMOCRACY THROUGH LAW, REPORT ON THE INDEPENDENCE OF THE JUDICIAL SYSTEM PART I: THE INDEPENDENCE OF JUDGES 4–5, (Mar. 12, 2010).
- 53 *Id.*
- 54 Treaty on European Union, Art. 19(1).
- 55 Treaty on the Functioning of the European Union, Art. 267.
- 56 C-64/16, Associação Sindical dos Juizes Portugueses v Tribunal de Contas, 2018 ECLI:EU:C:2018:117.
- 57 *Id.*
- 58 *Rule of Law: European Commission acts to defend judicial independence in Poland*, EUROPEAN COMMISSION (Dec. 20, 2017), https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367
- 59 *Id.*
- 60 *Id.*
- 61 Treaty on European Union, art. 7(1), Feb. 7, 1992.
- 62 *Id.*, art. 7(3).
- 63 *Id.*, art. 7(2).
- 64 See Hoffman, *supra* note 39 at 1180 ("Hungary steadfastly refuses to vote in favor of any punishments against Poland.")
- 65 Davies, *supra* note 17.
- 66 *Opinion on the White Paper on the Reform of the Polish Judiciary*, SUPREME COURT OF THE REPUBLIC OF POLAND (Mar. 16, 2018), <https://archiwumosiatsynskiego.pl/images/2018/04/Supreme-Court-Opinion-on-the-white-paper-on-the-Reform-of-the-Polish-Judiciary.pdf>
- 67 *Id.*
- 68 C-791/19, *Commission v. Poland*, 2020 ECLI:EU:C:2020:277.
- 69 *Id.*
- 70 *Id.*
- 71 Marcin Jabłoński, *Stępkowski: The case of the Judge Tuleya's immunity is not covered by the CJEU decision*, RULE OF LAW (May 28, 2020), <https://ruleoflaw.pl/stepkowski-the-case-of-the-judge-tuleyas-immunity-is-not-covered-by-the-cjeu-decision/>.
- 72 *New "commissioner" in the Supreme Court: Aleksander Stępkowski*, RULE OF LAW (May 15, 2020), <https://ruleoflaw.pl/new-commissioner-in-the-supreme-court-aleksander-stepkowski/>.
- 73 Jabłoński, *supra* note 72.
- 74 Claudia Ciobanu, *Polish Courts: Independent Judiciary Wins Battle, Not War*, REPORTING DEMOCRACY (Jun. 11, 2020), <https://balkaninsight.com/2020/06/11/polish-courts-independent-judiciary-wins-battle-not-war/>.
- 75 *Supra* note 27.
- 76 Treaty on European Union, Article 7(2).
- 77 See Hoffman, *supra* note 39 at 1180 ("Hungary steadfastly refuses to vote in favor of any punishments against Poland.").
- 78 Marton Dunai, *Hungarian PM offers support to Poland in row with EU*, REUTERS (Jul. 22, 2017), <https://www.reuters.com/article/us-poland-politics-judiciary-hungary/hungarian-pm-offers-support-to-poland-in-row-with-eu-idUSKBNIA70C1>.
- 79 For a concise overview of Orban's assault on democratic institutions in Hungary, see Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 549–550 (2018).
- 80 Committee on Civil Liberties, Justice, and Home Affairs, *Draft Interim Report on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law 17–18*, EUROPEAN PARLIAMENT (May 15, 2020), https://www.europarl.europa.eu/doceo/document/LIBE-PR-650665_EN.pdf.
- 81 Ayeë Macaraig, *Denmark wants EU funds linked to the rule of law*, CPH POST (Jun. 12, 2020), <http://cphpost.dk/?p=114740>.
- 82 *Supra* note 81 at 15.
- 83 Christian Davies, *Ireland refuses extradition over concern at Polish justice reforms*, THE GUARDIAN (Mar. 13, 2018), <https://www.theguardian.com/world/2018/mar/13/ireland-refuses-ar-tur-celmer-extradition-poland-justice-re-forms-ecj#>.
- 84 *Id.*
- 85 High Court of Ireland, *Minister for Justice and Equality v. Celmer* (No. 1), [2018] IEHC 119. This ruling was eventually overruled, and extradition was ordered. See Mary Carolan, *Extradition ordered of Polish man in controversial landmark case*, IRISH TIMES (Nov. 12, 2019), <https://www.irishtimes.com/news/crime-and-law/courts/supreme-court/extradition-ordered-of-polish-man-in-controversial-landmark-case-14080428>.
- 86 Court of Justice of the European, Press Release No 113/18: Judgment in Case C-216/18 PPU (July 25, 2018), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-07/cp180113en.pdf>.
- 87 Anna Wójcik, *Muzzle Law leads German court to refuse extradition of a Pole to Poland under the European Arrest Warrant*, RULE OF LAW (Mar. 6, 2020), <https://ruleoflaw.pl/muzzle-act-leads-german-to-refuse-extradition-of-a-pole-to-poland-under-the-european-arrest-warrant/>.
- 88 Jasmin Bauomy, *Germany refuses to extradite Pole under European arrest warrant due to fair trial fears*, EURONEWS (Mar. 10, 2020), <https://www.euronews.com/2020/03/09/germany-refuses-to-extradite-pole-under-european-arrest-warrant-due-to-fair-trial-fears>.
- 89 See Elzbieta Morawska, *Judicial Independence in Poland: From the 1952 Constitution to the 1989 Reforms*, 1 CJIL Y.B. 87, 88–90 (1992) (describing the lack of protection for judicial independence in Poland's Constitution prior to 1989).
- 90 See generally CONST. OF THE REPUBLIC OF POLAND, CH. VIII (outlining substantive protections for judicial independence).
- 91 See Carl Tobias, *Senate Blue Slips and Senate Regular Order*, 37 YALE L. & POL'Y REV. 1, 19 (2018) (describing Senator Grassley's new approach to blue slips).
- 92 See VALERIE HEITSHUSEN, CONGRESSIONAL RESEARCH SERV., SENATE PROCEEDINGS ESTABLISHING MAJORITY CLOTURE FOR SUPREME COURT NOMINATIONS 1 (2017) (discussing the use of the "nuclear option" to lower the cloture threshold in 2013 and 2017).
- 93 See Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 119 (2017) (arguing that "[c]onfirmation politics has been contentious throughout American history.").
- 94 *Id.* at 118.
- 95 *Id.*
- 96 See Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge,'*

- N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> (discussing Trump's tweet and the Chief Justice's response).
- ⁹⁷ Ian Millhiser, *The controversy over Chuck Schumer's attack on Gorsuch and Kavanaugh, explained*, VOX (Mar. 5, 2020), <https://www.vox.com/2020/3/5/21165479/chuck-schumer-neil-gorsuch-brett-kavanaugh-supreme-court-whirlwind-threat>.
- ⁹⁸ Mark Sherman, *Roberts, Trump spar in extraordinary scrap over judges*, AP NEWS (Nov. 21, 2018), <https://apnews.com/c4b34f9639e141069c08cf1e3deb6b84>.
- ⁹⁹ SUPREME COURT OF THE UNITED STATES, STATEMENT FROM CHIEF JUSTICE JOHN G. ROBERTS, JR. (Mar. 4, 2020).
- ¹⁰⁰ COMMITTEE ON CODES OF CONDUCT, ADVISORY OPINION NO. 117: JUDGES' INVOLVEMENT WITH THE AMERICAN CONSTITUTION SOCIETY, THE FEDERALIST SOCIETY, AND THE AMERICAN BAR ASSOCIATION (2020).
- ¹⁰¹ See *id.* at 1 (stating "the Committee has never suggested, and does not now suggest, that the organizations act improperly or that their goals and missions are inappropriate.")
- ¹⁰² *Id.* at 7.
- ¹⁰³ Several federal judges signed onto a letter opposing advisory opinion 117. Ed Whelan, *200-Judge Letter Against Draft Advisory Opinion on Judicial Membership*, NAT'L REV. (May 8, 2020), <https://www.nationalreview.com/bench-memos/200-judges-letter-against-draft-advisory-opinion-on-judicial-membership/>
- ¹⁰⁴ Thomas DeLorenzo, *US Judicial Conference committee drops proposal to limit membership of judges in Federalist Society*, ACS, JURIST (Aug. 3, 2020), <https://www.jurist.org/news/2020/08/us-judicial-conference-committee-drops-proposal-to-limit-membership-of-judges-in-federalist-society-ac/>
- ¹⁰⁵ COMMITTEE ON CODES OF CONDUCT, GUIDE TO JUDICIARY POLICY VOL. 2, Pt. A, Ch. 2: CODE OF CONDUCT FOR UNITED STATES JUDGES 3 (2019).
- ¹⁰⁶ See *supra* notes 39–41 and accompanying discussion.
- ¹⁰⁷ See, e.g., Annabelle Chapman, *Why Poland's "ghost election" sends a warning about its democracy*, NEW STATESMAN (May 12, 2020), <https://www.newstatesman.com/world/europe/2020/05/poland-president-Andrzej-Duda-elections-pis-ruling-party-democracy> (discussing an internal decision by PiS leadership to postpone an election, signaling the willingness of PiS to make unilateral decisions about election procedure).
- ¹⁰⁸ The fact that the vast majority of cases appear in state courts is generally known. Compare *State Court Caseload Statistics, Bureau of Justice Statistics (2006)*, <https://www.bjs.gov/index.cfm?ty=tp&tid=30>, with *Judicial Caseload Indicators, 12-Month Periods ending March 31, 1997, 2002, 2005, 2006, U.S. Cts. (2006)*, https://www.uscourts.gov/sites/default/files/statistics_import_dir/mar06indicators.pdf
- ¹⁰⁹ The Brennan Center provides a useful map showing the differing methods of judicial selection in the states. BRENNAN CTR. FOR JUSTICE, *Judicial Selection: An Interactive Map*, <http://judicialselection-map.brennancenter.org>.
- ¹¹⁰ See Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 387 (2002) (Expressing concern over the increasing tendency to attack judges based on the political implications of their decisions).
- ¹¹¹ See *id.* at 385–386 (discussing the negative implications of the involvement of special interest groups in judicial elections).
- ¹¹² *Id.* at 386.
- ¹¹³ Associated Press, *Dunleavy Cuts \$334K from Alaska court system over abortion dispute*, ANCHORAGE DAILY NEWS (Jun. 28, 2019), <https://www.adn.com/politics/2019/06/29/dunleavy-cuts-334k-from-alaska-court-system-over-abortion-dispute/>.
- ¹¹⁴ STATE OF ALASKA OFFICE OF MANAGEMENT AND BUDGET, CHANGE RECORD DETAIL WITH DESCRIPTION — IGNORING INCLUDED SCENARIOS 122, https://omb.alaska.gov/ombfiles/20_budget/FY20Enacted_cr_detail_6-28-19.pdf.
- ¹¹⁵ See De Muniz, *supra* note 98 (“[A]ttacking courts and judges — not because they are wrong on the law or the facts of a case, but because the decision is considered wrong simply as a matter of political judgment — maligns one of the basic tenets of judicial independence — intellectual honesty and dedication to enforcement of the rule of law regardless of popular sentiment.”)
- ¹¹⁶ U.S. CONST. art. V.
- ¹¹⁷ See, e.g., Order: Disposition of Appeal, *Alaska Div. of Elections v. Recall Dunleavy*, No. S-17706, (Alaska 2020) (affirming that the Governor's attacks on the judiciary could serve as a sufficient ground for recall under the state constitution).
- ¹¹⁸ José Igreja Matos, *Legal Pluralism and Creative Destruction*, UNIO EU LAW JOURNAL: IN HONOUR OF JUDGE CUNHA RODRIGUES, Jul. 2014, at 113, 117.
- ¹¹⁹ *Supra* note 99.

IN MEMORIAM

Our partner, **Larry A. Hammond**, a dedicated advocate for equal access to fair justice and an independent judiciary, passed away March 2, 2020, following a long illness.

A founding partner of our firm, he made us all better with his commitment as a lawyer and leader. He was honored in 2008 to receive the American Judicature Society's highest award, the Justice Award, presented to him by U.S. Attorney General Janet Reno. He had a lifetime of achievement inside and outside the courtroom. But he was most proud of founding the Arizona Justice Project, the fifth Innocence Project in the nation, for which he served as president for 22 years.



Larry A. Hammond, 1946-2020