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In view of the forthcoming 148th Plenary Session of the Venice Commission (9–10 October 2026), at which the Commission is to examine the *Draft Opinion on the powers of the President in the context of the oath-taking of the judges of the Constitutional Tribunal and of other judicial appointments* concerning Poland, the Ordo Iuris Institute for Legal Culture wishes to submit to the Commission the report it has prepared on this very question: *Rola Prezydenta RP w procedurze objęcia stanowiska sędziego Trybunału Konstytucyjnego* by Łukasz Bernaciński and Jędrzej Jabłoński (Warsaw 2026). The full Polish version of the report is enclosed as an annex to this letter; an abridged English version is set out below.

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The Role of the President of the Republic of Poland in the Procedure for Assuming the Office of a Constitutional Tribunal Judge (Abridged Version)

Key theses

- As the organ that “ensures observance of the Constitution”, the President plays a special role in the appointment of judges. It is beyond doubt that he may refuse to appoint a person nominated by the National Council of the Judiciary (KRS), guided by the values set out in the Constitution.
- Judges of the Constitutional Tribunal are judges within the meaning of the Constitution – a deliberate choice of the constitution-maker – and the constitutional guarantees relating to judges, such as irremovability, therefore apply to them.
- Receiving the oath from a person elected as a judge of the Constitutional Tribunal (CT) is not a merely ceremonial act but a necessary step towards assuming that office. The oath cannot be taken before anyone else.
- The CT’s own case law allows the oath to be deferred in justified and particularly serious cases; under certain conditions, the President may do so where there are doubts as to whether the person elected meets the criteria required of a CT judge.
- Alongside the President’s duty to receive the oath from CT judges elected by the Sejm, his constitutional role in reviewing that election should be recognised: he may openly express his doubts and defer the oath until they are dispelled, for instance by referring the matter to the CT.
- The theses of the report have been confirmed by the Constitutional Tribunal in its judgment of 12 May 2026 (K 3/26), in which the Tribunal stressed that the President – as the guardian of the Constitution – is under no absolute obligation to receive the oath from a person elected by the Sejm.

1. Subject and context of the report

The report is set against the background of the current dispute in which persons elected to the CT by the Sejm have attempted to take the oath of office not before the President but in the Sejm – a practice which, as the authors warn, “fits into a wider process of the erosion of constitutional standards”.

2. The President as guardian of the Constitution and a “moderating power”

Although Article 10(2) of the Constitution places the President within the executive, the authors endorse the view that this classification does not reflect his actual constitutional position. As his competences touch upon all three branches of power, his position may be more accurately described as that of a *moderating power*. A strong and active President thus serves the separation and balance of powers (Article 10(1)), especially in the light of Article 126(2), under which his first duty is to “ensure observance of the Constitution”. This guardianship is especially significant vis-à-vis the legislature and the executive which, in a parliamentary-cabinet system, are in practice wielded by one and the same actor – the Sejm majority that forms the government.

Nowhere is this clearer than in the shaping of the judiciary. Under Article 179 of the Constitution, judges are appointed by the President on the motion of the KRS, and under Article 144(3)(17) this is a personal prerogative exercised without the countersignature of the Prime Minister. As the CT explained



in its judgment of 5 June 2012 (K 18/09), this arrangement is “not so much a strengthening of the President’s independent constitutional position as an emphasis on the independence of the judiciary from the government and its subordinate bodies”. Consequently, the isolated doctrinal voices denying the President any right to refuse an appointment are difficult to reconcile with his active role as guardian of the Constitution and moderator of the other powers. Were they correct, the President would be reduced to a mere executor of the will of the KRS.

3. Refusal to appoint as an integral part of the prerogative

In K 18/09 the Tribunal stated in terms that the President’s role in the nomination procedure “is not confined to that of a ‘notary’ confirming decisions taken elsewhere”; rather, he “makes an independent assessment of the candidatures presented to him and may consequently refuse to grant the motion of the KRS” where, in his view, it “would be contrary to the values which the Constitution has placed him to guard”. The Tribunal noted without criticism the first such refusal (of nine candidates) of January 2008, which the Supreme Administrative Court held to be outside its jurisdiction.

As to its grounds, the doctrine rightly stresses that a refusal may not be arbitrary and should be reasoned; and K 18/09 indicates that reservations should first be voiced within the KRS by the President’s representative. The authors do not accept, however, that the absence of such reservations precludes a refusal, since an extraordinary situation may arise even after the KRS has submitted its motion. This reading is supported in the doctrine, which speaks of the President’s “fully autonomous assessment” of the candidate, “the outcome of which depends solely on the head of state”. The most persuasive position, therefore, is that the grounds for refusal must be rooted in the constitutional values entrusted to the President’s care – as the doctrine puts it, the refusal “should result from the performance of the tasks set for him by the Basic Law, namely ensuring observance of the Constitution, safeguarding the sovereignty of the State, and the inviolability and integrity of its territory”. It follows that the President may legitimately refuse to appoint persons who call the constitutional order of the Republic into question – which is precisely how President Karol Nawrocki justified his refusal to appoint 46 judges on 12 November 2025.

This does not mean, however, that the President’s power is unlimited. He may appoint only a person in respect of whom the KRS has submitted a motion – which, as has been observed in the doctrine, is “the only, yet highly significant, limitation” of this “unconditional and personal” power. The resulting arrangement is a model example of checks and balances: the President can neither initiate the procedure nor choose the candidate, yet his consent is indispensable to complete it. From the candidate’s perspective it is thus a *double-consent procedure*.

An instructive comparison may be drawn with the United States, widely regarded as a paradigm of the separation and balance of powers. The Polish system is, in essence, a mirror image – or, more precisely, an *inversion* – of the American mechanism, in which the order of roles is reversed: it is the President of the United States who nominates a candidate for the federal bench, whom the Senate must then confirm. In both systems the President’s decision is a necessary, though not sufficient, element of the appointment. The stage at which the President acts is itself telling: in the United States, where he is genuinely the head of the executive, he initiates the procedure, whereas in Poland, where his position is best described as a moderating power, it is the President who has the final word.

4. CT judges as judges, and the oath before the President

The Constitution unequivocally refers to the members of the Constitutional Tribunal as *judges* (Article 194(1)) – a deliberate choice of the constitution-maker, as is evident from the contrast with the



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State Tribunal, whose composition is described in terms of *members* (Article 199(1)). And although Article 194(1) does not mention the President, his role has never been questioned: since 1997 the statute has required the oath to be taken before him, a refusal being equated with a renunciation of office.

Practice confirms that an elected person may adjudicate only from the moment of the oath. The case of Lidia Bagińska is the most telling: elected on 8 December 2006, she took the oath only on 6 March 2007, the delay resulting from her dismissal, a few days after the election, as a bankruptcy trustee for misleading the court. It was stressed at the time that until she had taken the oath before the President she was “not yet fully a judge”; she ultimately resigned on 12 March 2007. The same has applied to every judge elected to a seat that was already vacant.

The Tribunal spoke most forcefully on this point in its judgment of 3 December 2015 in case K 34/15, holding that the oath taken before the President “is not merely a solemn ceremony of a symbolic character [...] taking the oath allows the judge to commence office, i.e. to exercise the mandate entrusted to him”, and that as long as “the last legally significant act (i.e. the oath of the judges of the Tribunal before the President)” has not been performed, “the judicial posts have not yet been filled”. Accordingly, just as a judge of the ordinary courts or of the Supreme Court may be only a person nominated by the KRS and appointed by the President, so a CT judge may be only a person elected by the Sejm *who then takes the oath before the President*. This is reinforced by Article 5 of the 2016 Act on the Status of CT Judges, under which the service relationship is established upon taking the oath, and by the doctrine, which describes the oath as “an absolute condition for commencing judicial office” and the day on which the person “formally becomes a judge of the Constitutional Tribunal” and begins his nine-year term.

In the light of the principle of legality (Article 7 of the Constitution), the oath cannot be taken before any other body, nor can it be taken by implication – merely in the President’s presence, without his active receipt of it. This is refuted both by the Bagińska case and by the case of Roman Hauser, Krzysztof Ślebzak and Andrzej Jakubecki, elected in October 2015, who waited until their potential terms expired. In none of these cases was it argued that the oath could be taken in a substitute form, and K 34/15 – which concerned precisely those three persons – did not envisage one either. The present interpretive attempts aimed at showing that the oath may be taken in almost any form therefore stem, the authors conclude, solely from the political needs of the moment.

5. May the President refuse to receive the oath?

Some authors extend the President’s appointment prerogative to CT judges as well. At first glance K 34/15 answers the question in the negative, since the Tribunal “excludes an understanding of Article 21(1) [of the CT Act] that would give the President grounds to refuse to receive the oath from a CT judge elected by the Sejm”. Yet the Tribunal itself qualified that statement, accepting that extraordinary circumstances may extend the “time necessary” to receive the oath where it is beyond doubt that: the Sejm did not adopt a resolution within the meaning of Article 120 of the Constitution; the person lacks the legal capacity to assume the mandate; or permanent and irremovable obstacles connected with the judge’s previously unknown personal situation have come to light after the election.

As to the procedure for dispelling such doubts, the Tribunal observed that “in a democratic state ruled by law, disputes in this respect are most often resolved through judicial review” – a position consonant with the view of M. Florczak-Wątor that excluding “the procedure for electing CT judges and the procedure for appointing the President and Vice-President of the CT from any review whatsoever is



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unacceptable in a democratic state ruled by law”.¹ Indeed, regarding two persons elected on 8 October 2015, the Tribunal suggested that, where the provisions underlying an election raise doubts, the President should refer them to the CT, withhold the oath for the duration of the proceedings and, should the provisions be found unconstitutional, decline to receive it, since “completing the procedure is inadmissible”. Although the CT’s competence in all these situations – especially those concerning personal qualities – is debatable, absent a better solution its proposal merits consideration.

6. A person elected who does not meet the required criteria

A further situation may justify deferring the oath. Article 194 of the Constitution requires the Sejm to elect CT judges solely from among persons “distinguished by their knowledge of the law”. Linguistic interpretation (“to prove different from others, usually better”) together with functional interpretation shows that candidates must stand out decidedly positively. Article 3 of the Act on the Status of CT Judges adds the requirements for the office of a Supreme Court or Supreme Administrative Court judge, which include an impeccable character and a high level of legal knowledge. M. Florczak-Wątor and M. Pach draw the conclusion clearly:

“Not every practitioner with sufficiently long experience, and not every professor or habilitated doctor, may become a CT judge, but only one who meets those requirements and, in addition, is of impeccable character and stands out for a high level of legal knowledge among other persons with the same qualifications and the same professional experience.”²

Where the Sejm is guided by non-substantive considerations, or solely by the political interest of the majority, examining whether the candidate meets the constitutional requirement appears possible. Similar doubts may arise in far less dramatic circumstances, too: a candidate may, for instance, hold only a degree in canon law, or a master’s degree in administration or in a discipline other than law, while being a doctor of social sciences in the discipline of legal sciences and a practitioner or academic with sufficiently long experience. Although these cases are purely theoretical, the very fact that the Sejm retains such a possibility is an argument for recognising a *controlling or signalling* role of the President in the broadly understood procedure for electing a CT judge. A signalling role of this kind has been proposed in the doctrine and linked to the President’s role as guardian of the Constitution, able to “invoke the principle of legality and indicate that the Sejm broke the law in making the election”; it has likewise been accepted that the President may withhold the oath in case of doubt, given the absence of “any system for verifying the correctness of the election made by the Sejm”. Notably, the consideration which under K 34/15 should guide the President in deferring the oath – “the principle of protecting the supremacy of the Constitution” – is similar to the grounds which, under K 18/09, allow him to refuse an appointment despite a KRS motion.

7. The paradox of the Sejm as sole arbiter

Who, then, should be entitled to verify whether candidates meet these criteria? To hold that this competence belongs to the Sejm alone would lead to a rather peculiar situation. The primary task of the Constitutional Tribunal under Article 188(1) and (2) of the Constitution is to review the conformity of statutes and international agreements with the Constitution – in other words, to review *the activity of the*

¹ M. Florczak-Wątor, “Dopuszczalność sądowej kontroli prawidłowości wyboru sędziego TK oraz Prezesa i Wiceprezesa TK. Głos do wyroku TK z dnia 11 września 2017 r., K 10/17”, LEX 2017.

² M. Florczak-Wątor, M. Pach, “Co wymaga zmiany w procedurze wyboru sędziów Trybunału Konstytucyjnego w Polsce?”, *Państwo i Prawo* 2018, no. 5, pp. 31–32.



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Sejm itself. The Tribunal's causative role, moreover, can only be negative: it may strike down statutes passed by the Sejm and thereby restrict its activity. The Sejm would thus be the sole decision-maker in selecting the members of a body whose principal function is to scrutinise the Sejm's own law-making – an obvious conflict of interest. Furthermore, under the principle of a democratic state ruled by law (Article 2), the Sejm's election of a CT judge cannot be exempt from review.

8. Conclusions and recommendations

Having regard to the separation and balance of powers, the authors recommend that, alongside the President's duty to receive the oath, his constitutional role in reviewing the election be recognised – expressed in openly voicing his doubts and deferring the oath until they are dispelled, whether by requesting explanations from the Marshal of the Sejm or by referring an appropriate application to the CT. Such an application could concern the constitutionality of the duty to receive the oath from CT judges elected by the Sejm in the light of Article 194(1) in conjunction with Article 144(3)(17) of the Constitution: should the Tribunal find that the prerogative extends to this procedure, the possibility of refusal would follow naturally. It could also seek to specify when the President may defer the oath, in particular where he doubts that the person elected has distinguished legal knowledge; the President would then merely execute the judgment. In the authors' view, this is the only admissible way in a democratic state ruled by law to end the present crisis, since only the CT may resolve such disputes finally and with universally binding effect (Article 190(1)). The theses of the report have since been confirmed by the Constitutional Tribunal in its judgment of 12 May 2026 (K 3/26), which stressed that the President, as the guardian of the Constitution, is under no absolute obligation to receive the oath.