2004/01/28 - PL. ÚS 41/02: CLEARANCE OF DEFENCE COUNSEL

HEADNOTES

1) Clearance of defense counsel in criminal proceedings for purposes of access to classified information through a security clearance by the National Security Office is inconsistent with Art. 37 par. 3, Art. 38 par. 2, and Art. 40 par. 3 of the Charter of Fundamental Rights and Freedoms and with Art. 6 par. 3 let. c) of the Convention on Protection of Human Rights and Fundamental Freedoms.

2) Access to classified information by an attorney acting as defense counsel in criminal proceedings is governed by the Criminal Code, and not by the Act on Classified Information, and thus under the existing valid legal framework, the Czech legal order does not require a clearance by the National Security Office for that purpose, i.e. for access to classified information by defense counsel in criminal proceedings.

CZECH REPUBLIC

CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, consisting of JUDr. František Duchoň, JUDr. Vojen Güttler, JUDr. Pavel Holländer, JUDr. Dagmar Lastovecká, JUDr. Jiří Malenovský, JUDr. Jiří Mucha, JUDr. Jan Musil, JUDr. Jiří Nykodým, JUDr. Pavel Rychetský, JUDr. Pavel Varvařovský, JUDr. Miloslav Výborný, and JUDr. Eliška Wagnerová, after oral proceedings on 28 January 2004, ruled in the matter of a petition from the District Court in Přerov seeking the annulment of § 42 par. 1 of Act no. 148/1998 Coll., on Protection of Classified Information and Amending Certain Acts, as amended by later regulations, as follows:

I. The petition is denied.

II. Clearance of defense counsel in criminal proceedings for purposes of access to classified information through a security clearance by the National Security Office is inconsistent with Art. 37 par. 3, Art. 38 par. 2, and Art. 40 par. 3 of the Charter of Fundamental Rights and Freedoms and with Art. 6 par. 3 let. c) of the Convention on Protection of Human Rights and Fundamental Freedoms.

REASONING

I.

Description of the Matter and Recapitulation of Petition The District Court in Přerov, under Art. 95 par. 2 of the Constitution and § 64 par. 3 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, submitted to the Constitutional Court a petition to annul § 42 par. 1 of Act no. 148/1998 Coll., on Protection of Classified Information and Amending Certain Acts, as amended by later regulations. The petitioner bases the petition to annul these parts of that Act on the following grounds:

Act no. 310/2002 Coll. amended Act no. no. 148/1998 Coll. as of 12 July 2002. Art. I point 4 amended § 42 par. 1 of Act no. 148/1998 Coll. so that the word "attorneys" was deleted, as a result of which, in the petitioner's opinion, attorneys were removed from the list of persons not subject to security clearance. However, Act no. 310/2002 Coll. did not amend the Criminal Procedure Code, and thus § 35 par. 4 of the Criminal Procedure Code remains in effect, unchanged, as established by Act no. 265/2001 Coll.

Under § 35 par. 1 of the Criminal Procedure Code, only an attorney can act as defense counsel in criminal proceedings. However, in the petitioner's opinion, the result of the amended wording of § 42 par. 1 of Act no. 148/1998 Coll. is that in criminal proceedings in which classified information protected by a special act is discussed, a mere instruction under § 35 par. 4 of the Criminal Procedure Code is no longer sufficient for counsel (attorneys), but the attorneys must undergo the appropriate clearance under Act no. 148/1998 Coll. This is also supported by the fact that an instruction to attorneys under § 35 par. 4 of the Criminal Procedure Code was already necessary under the previous legal framework, when attorneys were still exempt from clearance. Thus, this indicates that if attorneys who are to be given access to classified information must now undergo clearance under Act no. 148/1998 Coll., then in criminal proceedings in which classified information protected by a special act is discussed, an instruction to them under § 35 par. 4 of the Criminal Procedure Code is no longer sufficient. The opinion of the National Security Office (the "NSO", on p. 2275 of file no. 1 T 312/2001 of the District Court in Přerov) fully agrees with the petitioner's legal opinion in this.

The petitioner concludes that the present § 42 par. 1 of Act no. 148/1998 Coll., as amended by Act no. 310/2002 Coll., is inconsistent with Art. 37 par. 2 and Art. 40 par. 3 of the Charter of Fundamental Rights and Freedoms (the "Charter"), which guarantee the accused's right to free choice of defense counsel. One must also keep in mind Art. 6 par. 3 let. c) of the Convention on Protection of Human Rights and Fundamental Freedoms (the "Convention"), under which everyone charged with a crime has the minimum right to defend himself in person or through legal assistance of his own choosing. The petitioner also pointed to the legislative process concerning the amendment of Act no. 148/1998 Coll.; the Senate of the Parliament of the Czech Republic(the "Senate"), particularly in view of the removal of attorneys from the group of persons not subject to clearance, returned the amendment to the Chamber of Deputies of the Parliament of the Czech Republic (the "Chamber of Deputies") with amending proposals, which, however, the Chamber of Deputies subsequently did not accept.

As regards the grounds for filing the present petition, the petitioner also stated that in the criminal matter under file no. 1 T 312/2001 the defendants, (V. Hučín and MUDr. Chmelař) exercised their right and chose their own defense counsel, insist on their choice, and do not intend to choose other counsel. However, none of the selected defense counsel received the appropriate security clearance. In the court's opinion, these circumstances, in view of the legal framework in effect, indicate that none of the chosen attorneys can continue to act as defense counsel in these criminal proceedings. However, the District Court pointed to § 2 par. 4 of the Criminal Procedure Code, under which criminal matters must be handled as quickly as possible, and must fully preserve the rights and freedoms guaranteed by the Charter and by international treaties on human rights and fundamental freedoms. Under Art. 95 par. 1 of the Constitution, the judge is bound in his decision making by statutes and international treaties which are part of the legal order. Under Art. 95 par. 2 of the Constitution, if the court concludes that a statute which is to be applied in the matter is inconsistent with the constitutional order, it shall present the matter to the Constitutional Court. Article 95 par. 2 of the Constitution is further elaborated for criminal proceedings in § 224 par. 5 of the Criminal Procedure Code, under which a court shall interrupt criminal prosecution if it believes that a statute, the application of which is decisive for deciding on guilt and punishment in a given criminal matter, is inconsistent with a constitutional act or an international treaty which takes precedence before a statute; in that case it shall submit the matter to the Constitutional Court. The petitioner also added that in such cases it does not matter whether the court's questions concern a substantive or procedural statutory norm, or whether it is a norm or criminal law or a statute from another branch of law. In the petitioner's opinion, in the present matter it is quite indisputable that the court must apply Act no. 148/1998 Coll., as amended by Act no. 310/2002 Coll., to its procedure, as this legal framework directly affects the defendants' right to a defense, which is guaranteed to them by, in particular, Art. 37 par. 2 a Art. 40 par. 3 of the Charter, Art. 6 par. 3 let. c) of the Convention, and by § 2 par. 13 of the Criminal Procedure Code. The defendants have a right to have their chosen defense counsel participate in actions taken within criminal proceedings, in particular during presentation of evidence in the main trial. However, the Act de facto makes it impossible to implement this constitutional right of the defendants. For the sake of completeness, the petitioner added that with one of the defendants (V. Hučín) there are also grounds for compulsory defense under § 36 par. 3 of the Criminal Procedure Code, and in that case it is quite impossible to conduct main trial proceedings without the presence of defense counsel (§ 202 par. 4 of the Criminal Procedure Code).

The petitioner also pointed to certain wider connections and aspects of the legal issues at hand. First, it cited the fact that out of all the attorneys now in practice, apparently no one has received clearance, because thus far no one has been required to do so. In addition, one can not overlook the fact that there is no legal regulation under which attorneys can be forced to undergo clearance; this can lead to the situation that if attorneys refuse to undergo clearance voluntarily, there will be no attorney with clearance available who could provide legal assistance in matters concerning classified information. The Czech bar association also does not maintain, nor is it required to maintain, a special list of attorneys who can have access to classified information, as no legal regulation imposes any such obligation. This allegedly means, among other things, that at the present time not only can the defendant in such matters not choose defense counsel, but neither can the court appoint one in cases of so-called "compulsory defense", even though it is

obligated to by law. The petitioner also pointed out that an attorney also provides legal assistance beyond the are of criminal or civil law proceedings, not only in the Czech Republic but also abroad. In all these cases he may be given access to classified information by a client.

The petitioner added that in the Czech republic all attorneys are authorized to provide legal assistance without limitation. In that regard, all available European legal frameworks are comparable. The petitioner is not aware of any foreign legal framework which would provide an obligation for attorneys to undergo clearance in order to provide representation in matters involving classified information. Introducing some sort of special lists of attorneys in a way suggests a return to the time when the country wasn't free, when, during World War II, there was a list of attorneys authorized to provide representation before the Reich courts, or the period before 1990, when there was also a special list of attorneys authorized to have access to classified information, which is surely undesirable and incompatible with the principles of a democratic state governed by the rule of law. Providing an exception to attorneys, who, along with parliamentary deputies and senators, did not have to undergo clearance, was a de facto expression of the fundamental principles for the practice of law. Yet, disclosure of classified information is basically no longer a danger, in view of the absolute confidentiality obligation imposed on attorneys by law, which can not be canceled at the instruction of any third party with the exception of the client himself. In this regard, one of the fundamental principles for the practice of law must also be respected, i.e. the attorney's independence from the state such that the attorney can practice law freely, that is, provide legal representation, including cases against the state, without fear of state sanctions against him. If classified information were discussed in these cases, at attorney could be prevented by the state from providing legal services precisely because he would not be given the appropriate security clearance. The state would thus de facto be able to decide who would appear against it in a dispute. Thus, the now-annulled exception from security clearances was not an unjustified prerogative or some sort of groundless privilege for an attorney, but served to the benefit of the consumer of legal services.

Finally, the petitioner stated that it is fully aware of the fact that Act no. 148/1998 Coll. ceases to be in effect on 31 December 2003, and that therefore the Parliament of the CR will pass a new, comprehensive legal framework for this area. It added that it is aware that the Constitutional Court, as a "negative legislature," within its jurisdiction can decide only to annul statutes or individual provisions of statutes if they are inconsistent with the constitutional order, and that it therefore can not decide to re-include attorneys in the group of persons not subject to clearance. Thus, if the Constitutional Court, after conducting proceedings, concluded that there are no grounds to annul § 42 par. 1 of Act no. 148/1998 Coll. and denied the petition, it is appropriate that it at least, in the reasoning of the decision, state its legal opinion on the legal issue concerning clearance of attorneys. In conclusion, it proposed that the Constitutional Court rule that § 42 par. 1 of Act no. 148/1998 Coll., on Protection of Classified Information and Amending Certain Acts, as amended by later regulations, be annulled as of the day this judgment is promulgated in the Collection of Laws.

II.

Recapitulation of the Main Points of the Opinion of the Party to the Proceedings

At the request of the Constitutional Court, under § 69 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations (the "Act on the Constitutional Court") the Chamber of Deputies and the Senate filed opinions.

...

III.

Recapitulation of the Main Points of the Opinion under § 49 of Act no. 182/1993 Coll.

At the request of the Constitutional Court, an opinion was also filed by the Czech Bar Association (the "CBA"), under § 49 of Act no. 182/1993 Coll., on the Constitutional Court. It stated that it fully agrees with the petition from the District Court in Přerov, and added the following:

The denial of the free choice of an attorney (which follows from the contested provision of the Act) must be considered a fundamental issue. Free choice of an attorney is one of the fundamental principles of a state governed by the rule of law, and is reflected in the constitutional order of the Czech Republic. Denial of this opportunity because there will be no attorney whom a party (the accused or an injured party) can choose, having confidence in him, or because there will be (perhaps under the best scenario) a choice of several individual attorneys who will be able to provide representation in matters involving protection of classified information, is, in the opinion of the CBA, flagrantly inconsistent with the principles of a state governed by the rule of law.

The CBA pointed out that, although the petition from the District Court in Přerov logically concerns primarily criminal proceedings, one also can not overlook another legal area in which "the deficiency of the legal framework is also quite marked, particularly in those areas which concern so-called "compulsory representation" before the general courts (an appeal on a point of law ["dovolání"], or proceedings on a cassation complaint in the administrative courts). In these cases not only is the party's choice of attorney as representative more difficult, if not completely impossible; the court also finds itself in the same situation, if it is to appoint an attorney as the party's representative.

The CBA also relied on Art. 38 par. 2 of the Charter, under which everyone has the right to have his case considered without unnecessary delay. It pointed to the similar provision of Art. 6 par. 1 of the Convention. In this regard it states that – as is evident from the specific matter of the District Court in Přerov, and as logically be concluded from other matters handled in criminal and civil court proceedings, and in administrative court proceedings – "unnecessary delay" or the failure to make a decision "in an appropriate time" must, in these cases, paradoxically be ascribed to the legislature.

At the request of the Constitutional Court the CBA added to its statement an expert report prepared by Christian Wisskioschen, director of international relations at The Law Society in London, concerning the issue of application of § 42 par. 1 of Act no. 148/1998 Coll., as amended by Act no. 310/2002 Coll., to defense counsel, compared to the handling of this issue in England and Wales, and a brief description of the handling of similar situations in France and Austria.

At the request of the Constitutional Court the National Security Office (the "NSO") also filed an opinion, in which it said:

We must agree with the opinion of the District Court in Přerov, that after the amendment of Act no. 148/1998 Coll., by Act no. 310/2002 Coll., a mere instruction under § 35 par. 4 of the Criminal Procedure Code is no longer sufficient, even for attorneys who act as defense counsel in criminal proceedings. This provision refers to an instruction given under a special act, which governs the protection of classified information, Act no. 148/1998 Coll. It must be emphasized here that Act no. 148/1998 Coll. understands an instruction to be an institution of evidentiary character. Its purpose is primarily to instruct persons who will have access to classified information, but are not designated persons, on all their obligations, primarily the obligation to maintain confidentiality. Therefore, an instruction can not replace the fulfillment of conditions for providing access to classified information under § 17 par. 1 of Act no. 148/1998 Coll. To fulfill the purpose of Act no. 148/1998 Coll. it is desirable that activities where it is necessary to have access to classified information be conducted by persons who meet the conditions in § 17 par. 1 of that Act, that is, primarily, they must hold a valid clearance which designates them to have access to classified information. The interest of the state in protecting classified information must also be respected in the practice of law. In case of a conflict between the principle of protection of human rights and freedoms and the principle of protection of state interests and international interests in the area of security, the state has, in particular, the statutory right, and also, the obligation, imposed primarily by international treaties, to give certain information, i.e. classified information, special protection, i.e. it is obliged to handle that information in a special manner, and is required to prevent it from being made public or otherwise disclosed. This protection is implemented in a number of ways, primarily, however, through personnel security, i.e. by the state itself selecting persons who are authorized to have access to such classified information.

The NSO also stated that it is in accordance with the principle of free choice of profession for every individual to decide for himself whether he is willing to seek to be considered a suitable candidate and whether he is willing to allow the state to decide on his suitability or unsuitability as regards access to classified information. Thus, every attorney also has free choice of whether to accede to a certain professional "elevation" of his qualifications and to thus be able to accept representation in which he will have access to classified information discussed in a given matter. Persons who ask the state to allow them access to classified information – because they voluntarily chose to practice a profession or assume an office to which the state connects the possibility of access to classified information – must necessarily submit to those restrictions which the state sets forth for access to classified information; it is not only the right of the state, but above all an obligation, arising from international treaties.

In the opinion of the NSO, if attorneys who act as defense counsel in criminal proceedings were to have a special position in access to classified information, this would also be a certain disproportion in view of the requirements imposed on bodies acting in criminal proceedings, include state prosecutors, who are required to meet the conditions for access to classified information under Act no. 148/1998 Coll.. Concerning attorneys providing legal assistance in civil law and administrative proceedings, one must also point to the fundamental principle of protecting classified information, i.e. that access by person who do not hold a valid clearance may be only exceptional and justified. However, attorneys do not automatically meet this condition of "exceptional and justified."

As regards the objection that the current wording of Act no. 148/1998 Coll. makes it impossible to continue in criminal proceedings, the NSO state that if neither of the attorneys who are in the position of defense counsel to the accused (Hučín) meets the conditions under which he may have access to classified information, the District Court in Přerov should, by its official authority, provide an attorney ad hoc who has the necessary qualifications for the performance of those actions when classified information will be discussed. Of course, both of the chosen attorneys can continue to act as defense counsel, they will simply not participate in that part of the proceedings where classified information will have to be discussed. Proceeding in this way can not result in violation of the accused's rights, nor to inconsistency with the constitutional order of the Czech Republic.

The NSO added that the fact that the Czech Bar Association does not maintain a special list of attorneys who hold valid clearance does not rule out the possibility that such persons exist, and can thus be appropriately appointed to provide representation. It states that the District Court in Přerov should have inquired at the NSO whether it is possible to appoint defense counsel, and not merely stated the assumption that "apparently no attorney has received security clearance."

In addition, according to the NSO, one can assume that, even if the Constitutional Court granted the petition of the District Court in Přerov and annulled § 42 par. 1 of Act no. 148/1998 Coll., this would not achieve the obviously intended aim – i.e. to return to the legislative situation as before the amendment made by Act no. 310/2002 Coll.. Annulling this provision will have no effect on the position of attorneys generally, and thus also not on attorneys who act as defense counsel in criminal proceedings.

The NSO is aware that the present legal framework for access to classified information in individual types of court and administrative proceedings is inadequate in terms of protecting classified information and that it does not adequately observe the special characteristics of that area. Therefore, the future legal framework should provide that in proceedings where classified information will be discussed all person who will have any sort of access to such classified information, with the exception of the party to the proceedings, will need to hold clearances for the appropriate level of secrecy. In these cases the procedural regulations should also provided stricter rules than in proceedings where classified information is not discussed. It is not desirable for the legal framework, in the interest of protecting fundamental human rights, to establish – on the basis of only an instruction – practically unlimited access to classified information which will be discussed in the proceedings, e.g. to the results of investigations by the intelligence services.

In conclusion, the NSO stated that even the draft of the new legal framework for protecting classified information does not expect that attorneys would be included among persons who are not required to meet statutory conditions for access to classified information. On the contrary, the draft proposes to narrow the group of persons who will have access to classified information without further requirements, merely by reason of the position they hold, which is also fully in accordance with NATO requirements. In this regard, the NSO also referred to the Constitutional Court judgment published as no. 322/2001 Coll., under which the area of protection of classified information is sufficiently unique that it is legitimate to have a certain limitation on the standard procedural rights of persons with respect to whom the state is investigating whether they meet the conditions for access to classified information.

At the request of the Constitutional Court the National Security Office added to its statement, and identified and submitted regulations which govern the issue of protection of classified information in the framework of the European Communities. These are:

- EU Council Decision no. 2001/264/EC of 19 March 2001, adopting the Council's security regulations. Under to this regulation, the condition for access to information classified as CONFIDENTIEL UE is clearance of the person requesting access to information. The general rules are not weakened by any exceptions for person who were allowed access to classified information only by reason of the office they hold. Part I Art. 9 of the Security Directive provides that "All persons who require access to information classified CONFIDENTIEL UE or above shall be appropriately cleared before such access is authorised. Part II, section V., point 1 provides that "Access to EU classified information will be authorised only for persons having a "need-to-know" for carrying out their duties or missions. Access to TRÈS SECRET UE/EU TOP SECRET, SECRET UE and CONFIDENTIEL UE information will be authorised only for persons in possession of the appropriate security clearance";
- EU Commission Decision no. 2001/844/EC of 29 November 2001, amending its Internal Rules of Procedure. Under this regulation too, persons who request access to information classified as CONFIDENTIEL UE and higher must be appropriately cleared before access is permitted. Here too rules for access to information are not weakened by any exceptions. Part II, Art. 19 point 1 provides that "Access to EU classified information will be authorised only for persons having a "need-to-know" for carrying out their duties or missions. Access to TRÈS SECRET UE/EU TOP SECRET, SECRET UE and CONFIDENTIEL UE information will be authorised only for persons in possession of the appropriate security clearance."

The NSO added that the obligation to observe international undertakings also arises from the CR's membership in the North Atlantic Treaty Organization. Standards for protection of classified information are contained in the presented document, C-M (2002) 49 – Security within the North Atlantic Treaty Organization. Under the rules provided in this document, all persons who request access to information classified as "Confidential" or higher, or persons who may have access to such information by reason of their job or position, must be appropriately cleared and instructed in advance.

IV.

Wording of the Contested Statutory Provision

The Constitutional Court states that the wording of § 42 par. 1 of Act no. 148/1998 Coll., which was valid and in effect until 11 July 2002, was the following:

"§ 42
(1) Deputies and senators, with the exception of members of inspection bodies under special statutes,12) and attorneys shall not be subject to security clearance."
12) § 18 of Act no. 154/1994 Coll.

This provision was affected by Act no. 310/2002 Coll., which Amends Act no. 148/1998 Coll., on Protection of Classified Information and Amending Certain Acts, as amended by later regulations, of Act no. 101/2000 Coll., on Protection of Personal Data and Amending Certain Acts , as amended by later regulations, by Act no. 18/1997 Coll., on Peaceful Use of Nuclear Energy and Ionizing Radiation (the Atomic Energy Act) and Amending and Supplementing Certain Acts, as amended by later regulations, by Act no. 38/1994 Coll., on Foreign Trade with Military Materials and Supplementing Act no. 455/1991 Coll., on Trade Licensing (the Trade Licensing Act), as amended by later regulations, and by Act no. 140/1961 Coll., the Criminal Code, as amended by later regulations, by Act no. 283/1993 Coll., on the State Prosecution Office, as amended by later regulations, and by Act no. 42/1992 Coll., on Regulation of Property Relationships and Settling Property Claims in Co-operatives, as amended by later regulations ("Act no. 310/2002 Coll."). Act no. 310/2002 Coll. in Part One, Art. I, point 4, set forth a new wording of § 42 par. 1, with effect as of 12 July 2002, as follows:

"4. § 42 par. 1 including footnote no. 12) reads:

(1) Deputies and senators, with the exception of members of inspection bodies under special statutes,12) shall not be subject to security clearance.

12) § 18 of Act no. 154/1994 Coll.

§ 23a of Act no. 67/1992 Coll.'."

Thus, as a result of this amendment of Act no. 310/2002 Coll., the text of the contested § 42 par. 1 of Act no. 148/1998 Coll., in the wording in effect, is as follows:

"§ 42

(1) Deputies and senators, with the exception of members of inspection bodies under special statutes,12) shall not be subject to security clearance

12) § 18 of Act no. 154/1994 Coll.

§ 23a of Act no. 67/1992 Coll."

Under Art. IX of Act no. 310/2002 Coll., Act no. 148/1998 Coll., on Classified Information and Amending Certain Acts ceases to be in effect on 31 December 2003. Act no. 436/2003 Coll., which Amends Act no. 555/1992 Coll., on the Prison Service and the Justice Guard of the Czech Republic, as amended by later regulations, and Certain Other Acts, states in Art. VI: "In § 89 of Act no. 148/1998 Coll., on Protection of Classified Information and Amending Certain Acts, the existing text is marked as paragraph 1, and paragraph 2 is added, which reads:

(2) This Act ceases to be in effect on 30 June 2004."

Thus, the amendment of the Act on Classified Information, implemented by Art. VI of Act no. 426/2003 Coll., extended its validity until 30 June 2004.

V.

Conditions for the Petitioner's Active Standing

The Constitutional Court first considered the question of whether the petitioner – a general court – is authorized to file a petition to annul the contested provision. It concluded that it was. It is evident, as the petitioner correctly stated, that a general court must apply the contested provision to its actions in particular criminal proceedings, and that the current legal framework directly affects the rights of accused persons to a defense. The petition, although it basically concerns procedural law, is related to the decision-making activity of the general court, which is thus an authorized petitioner (§ 64 par. 3 of Act no. 182/1993 Coll., as amended by later regulations).

VI.

Constitutional Conformity of the Legislative Process

The Constitutional Court, in accordance with § 68 par. 2 of the Act on the Constitutional Court, then considered whether the contested provision of Act no. 148/1998 Coll., as amended by Act no. 310/2002 Coll., was passed and issued within the bounds of Constitutionally provided jurisdiction and in a constitutionally prescribed manner. The Court concluded that it was.

The Constitutional Court determined from the relevant stenographic records of the Chamber of Deputies and the Senate that the bill amending Act no. 148/1998 Coll., was passed at the 47th session of the Chamber of Deputies on 27 March 2002, in the 3rd term of office, by resolution no. 2201. When voting on the draft, 170 deputies were present, 152 deputies voted in favor of passing the bill, 18 deputies voted against passing the bill, and no one abstained. The bill was properly passed.

The bill was then discussed in the Senate, at its 17the session in the 3rd term of office on 3 May 2002. After substantive discussion, the Senate, by resolution no. 372, decided to return the draft act to the Chamber of Deputies, as amended by amending proposals. Sixty senators voted in favor of this proposal, and none against. The proposal to return the draft act to the Chamber of Deputies with amending proposals was duly passed.

The Chamber of Deputies again discussed the draft act, which amends Act no. 148/1998 Coll., at its 51st session on 13 June 2002 in the 3rd term of office. When voting whether to pass the draft act with the Senate's amending proposals there were 182 deputies present; 76 deputies voted in favor, and 98 deputies voted against. The draft act, as amended by the Senate's amending proposals was not passed, and the Chamber of Deputies thus confirmed the draft act in the original wording, passed at the 47th session on 27 March 2002 (resolution no. 2319).

The bill was signed by the president of the Czech Republic on 28 June 2002, and delivered to the prime minister for signature on 2 July 2002. The Act was promulgated on 12 July 2002 in the Collection of Laws, in Part 114 as number 310/2002.

The abovementioned Act no. 436/2003 Coll. was discussed in the Chamber of Deputies on 4 November 2003 and passed by resolution no. 750. There were 168 deputies present; 149 voted in favor, and 5 deputies voted against. The Act was discussed in the Senate on 3 December 2003, with 58 senators present; 49 senators voted in favor, and one senator voted against. The president signed the Act on 9 December 2003. The Act was promulgated in the Collection of Laws on 16 December 2003.

VII.

Definition of the Subject Matter of the Proceedings According to the Proposed Verdict in the Petition

The wording of the contested § 42 par. 1 of Act no. 148/1998 Coll., on Classified Information, as amended by later regulations, as already stated, is the following: "Deputies and senators, with the exception of members of inspection bodies under special statutes, shall not be subject to security clearance." This wording of the provision was inserted into the Act on Classified Information by the amendment made by Act no. 310/2002 Coll., with effect as of 12 July 2002, when the previous wording of the provision, set forth by the amendment of the Act on Classified information, made by Art. IX of Act no. 30/2000 Coll., was the following: "Deputies and senators, with the exception of members of inspection bodies under special statutes, and attorneys shall not be subject to security clearance." The original wording of § 42 par. 1 of Act no. 148/1998 Coll. was passed by the Parliament of the Czech Republic in this wording: "Deputies and senators, with the exception of members of inspection bodies under special statutes, and defense counsel shall not be subject to security clearance."

The text of the Act on Classified Information reviewed by the Constitutional Court was passed as amended by the amending proposal by deputy Jan Klas at the motion of deputies František Ondruš, Petr Nečas and Ivan Langer to issue an Act which amends Act no. 148/1998 Coll., on Classified Information, and Amending Certain Acts, as amended by Act no. 164/1999 Coll., Act no. 18/2000 Coll., Act no. 29/2000 Coll., Act no. 30/2000 Coll., Act no. 363/2000 Coll. and Act no. 60/2001 Coll. This amending proposal was presented in the second reading at the 47th session of the Chamber of Deputies of the Parliament of the Czech Republic on 22 March 2003, and its aim was not explicitly made clear by the sponsor. The issue was adding to the amending proposal from the guaranteeing Committee for Defense and Security of 15 March 2002, passed by resolution no. 206, which presented to the Chamber of Deputies the following wording of § 42 par. 1 of the Act: "Deputies and senators shall not be subject to security clearance." In the subsequent discussion, none of the deputies spoke concerning the issue, and the same occurred in the third reading, conducted in the continuation of the 47th session of the Chamber of Deputies on 27 March 2002.

After substantive discussion, the Senate, by resolution no. 372 of 3 May 2002, returned the bill to the Chamber of Deputies as amended by its amending proposals, in which it also included a new wording of § 38 par. 7 of the Act on Classified information: "The manner of designating a person in the scope necessary for access to classified information in civil law court proceedings, criminal proceedings, and in administrative court proceedings shall be provided by special regulations." The senate also identified these regulations in note no. 11a) to that provision: "11a) § 40a of the Civil Procedure Code, as amended by Act no.30/2000 Coll. § 35 par. 4, § 50 par. 3, §198a and § 201 par. 3 of the Criminal Procedure Code, as amended by Act no. /2002 Coll." As the discussion from the 17th session of the Senate on 3 May 2002 shows, the Senate considered conditioning the access of an attorney acting as defense counsel in criminal proceedings on security clearance to be a limitation on the right of the accused to a defense, in the sense of his right to choose an attorney.

The Chamber of Deputies, at its 51st session on 13 June 2002, by resolution no. 2319 reject the draft act as amended by the Senate's amending proposals, and approved it in the wording passed at the 47th session on 27 March 2002.

VIII.

Ratio Decidendi

VIII/a Review of the Matter on the Level of Simple Law

The arguments contained in the petition from the District Court in Přerov to annul § 42 par. 1 of the Act on Classified Information implicitly contain a balancing of the public interest in ensuring protection of information (classified information) on the one hand, and, on the other hand, the public interest in ensuring the right to a defense in criminal proceedings, which includes the right of the accused to freely choose an attorney. The

arguments are based on giving priority to protecting the right to a defense and on emphasizing the principle of an attorney's independence from the state, which are undermined by state approval of fitness for access to classified information, and also by unacceptable inequality, i.e. the unacceptability of categorizing attorneys into a group authorized to have access to classified information and a group which does not have that right. On that basis, the contested statutory provision is seen to have a gap, and the democratic legislature's filling in of that gap (i.e. the wording of the Act before the amendment made by Act no. 310/2002 Coll.) is seen to fulfill the cited constitutional principles.

Review of these arguments by the Constitutional Court requires reconstruction of the purpose and wording of those provisions of simple law which affect the issue of access to classified information by attorneys acting as defense counsel in criminal proceedings.

Under § 1 of the Act on Classified Information, the subject matter of the Act is defining information which must be classified in the interests of the Czech Republic, how the information is to be protected, the jurisdiction and authority of state bodies in conducting state administration in the area of classified information, the obligations of state bodies, the rights and obligations of natural persons and legal entities, liability for violation of obligations imposed by the Act, and establishing the position of the National Security Office. In other words, the subject matter of the Act is the normative definition of the concept of classified information, procedural regulation for setting classification levels, conditions for access to classified information, protection of classified information, and the authority of state bodies in conducting state administration in that area.

Under § 1 par. 1 of the Criminal Procedure Code, the purpose of criminal proceedings is to govern the actions of bodies acting in criminal proceedings so that crimes will be duly discovered and their perpetrators justly punished under the law. The principles of criminal proceedings include the principle of the accused's right to a defense, including the right to choose defense counsel (§ 2 par. 13 of the Criminal Procedure Code). In a number of provisions, the Criminal Procedure Code responds to possible conflict of the public interest in protecting classified information with the constitutional order and the legally guaranteed right of the accused to a defense, including the right to respond to all evidence presented in criminal proceedings and the right to freely choose defense counsel. These provisions include § 35 par. 4, § 50 par. 3 and § 198a of the Criminal Procedure Code, governing the instruction and notification obligation of bodies acting in criminal proceedings, relating to issues of protection of classified information, as well as special conditions for access to classified information on the part of a representatives of a party and an injured person, as well as § 200 of the Criminal Procedure Code, on excluding the public from the main trial proceedings if discussion of the matter in public would endanger classified information protected by a special act, and § 8 and § 99 of the Criminal Procedure Code on questioning witnesses about circumstances concerning classified information. Also connected to these provisions of the Criminal Procedure Code for ensuring protection of classified information in criminal proceedings are § 5 and § 21 of Act no. 85/1996 Coll., on Advocacy, as amended by later regulations, and § 6 of Act no. 36/1967 Coll., on Experts and Interpreters, governing the obligation of confidentiality of attorneys, experts and interpreters, § 105, § 106, and, in particular, § 107 of the Criminal Code, enshrining the criminal law treatment of protection of classified information, and

finally § 21, § 24, § 39, § 44, § 51, § 86, § 132, § 139, § 162, § 166, § 183, § 188, and § 192 of Ministry of Justice instruction no. 1/2002 of 3 December 2001, file no. 505/2001-Org, which issues the internal and office rules of procedure for district, regional, and high courts, which provide measures to ensure the protection of classified information in managing court agendas.

The present issue is governed only indirectly, for purposes of systematic analysis, by § 38 par. 7 of the Act on Classified Information. Under it, the manner of designating a person, in the scope necessary, to have access to classified information in civil law court proceedings and in administrative court proceedings shall be provided by a special regulation. In civil law court proceedings that regulation is § 40a par. 1 of the Civil Procedure Code, under which, in proceedings in which classified information protected by a special act is discussed, the panel chairman is required to instruct in advance, under this special act, lay judges, the parties, persons authorized to act on their behalf (§ 21 to 21b of the Civil Procedure Code), the parties' representatives, i.e. including attorneys, interpreters, persons named in § 116 par. 3, and other persons who must take part in the proceedings by law, on the criminal consequences of violating the secrecy of classified information; this instruction is recorded in a protocol, and by signing the protocol the instructed persons become persons designated in the scope necessary to have access to classified information. In administrative court proceedings that regulation is § 45 of the Administrative Procedure Code, which governs the authorization of a party to the proceedings and his representative to view parts of the record which contain classified information and which were or will be presented as evidence by the court. Another such regulation is § 64 of the Administrative Procedure Code, which establishes the appropriate use of § 40a par. 1 of the Civil Procedure Code in the administrative courts.

At the level of simple law, we must answer the question of whether the issue of defense counsel's access to classified information in criminal proceedings is governed by the Act on classified Information or the Criminal Procedure Code, i.e. in comparing these statutes, which of them is lex generalis and which is lex specialis.

This complex of simple law norms permits two interpretations:

In the first interpretation, the issue of access to classified information by attorneys acting as defense counsel in criminal proceedings is governed by § 38 par. 7 and § 42 par. 1 of Act no. 148/1998 Coll., as amended by later regulations, under which, although the Act did not establish the same reference for criminal proceedings as it did for civil law court proceedings and administrative court proceedings and so on a contrario, as attorneys are not included in the list of persons not subject to security clearance, it is a condition for attorneys acting as defense counsel in criminal proceedings to have access to classified information that they pass a security clearance. This interpretation comes from linguistic analysis, i.e. from the literal wording of these provisions.

Whether it also flows from the presupposed subjective teleological analysis, i.e. from reconstruction of the original legislative intent, can not be claimed with certainty.

The original intent of the Chamber of Deputies can not be concluded simply from its rejection of the Senate's explicit arguments, which opposed making passing a security

CLEARANCE a condition for access to CLASSIFIED information by attorneys in criminal court proceedings and which proposed, in that regard, supplementing the referring norm, contained in § 38 par. 7 of Act no. 148/1998 Coll., as amended by later regulations, as the Chamber of Deputies voted on whether to pass the Act, as amended by changes proposed by the Senate, as a whole (Art. 47 par. 2, 3 of the Constitution).

Finally, the original intention also can not be concluded a contrario based on the deletion of a category of persons – attorneys – from the wording of § 42 par. 1 of Act no. 148/1998 Coll., implemented by Act no. 310/2002 Coll. This is because replacing the term "defense counsel" with the term "attorneys" in § 42 par. 1 of the Act on Classified Information, which the legislature did in Art. IX of Act no. 30/2000 Coll., was tied to the simultaneous establishment of a new provision, § 40a of the Civil Procedure Code (Art. I point 53. of Act no. 30/2000 Coll.), governing access to classified information by parties to civil law court proceedings and their representatives, as well as other persons, and thus also the establishment of a special framework for access to classified information by attorneys not only in the role of defense counsel in criminal court proceedings, but also as representatives in civil court proceedings. If the exception to the obligation for defense counsel to undergo a security clearance, before the amendment of the Act on Classified Information implemented by Act no. 30/2000 Coll., both from the Act on Classified Information, and from the Criminal Procedure Code, we can only consider that fact superfluous, and directly apply the interpretational maxim superfluum noc nocet (cf. judgment file no. Pl. ÚS 6/02).

If the hypothetical original intent of the Chamber of Deputies was to introduce security clearances of defense counsel in criminal proceedings by amendment of the Act on Classified Information, implemented by Act no. 310/2002 Coll., under the second possible interpretation of the complex of relevant simple law the intent of the legislature was not expressed adequately, i.e. there was inconsistency between the legislature's intent and the wording of the statutory provision.

Under the second interpretation, protection of classified information in criminal proceedings is a special area in protection of classified information, and therefore the regime for it is governed by the Criminal Procedure Code, and not by the Act on Classified Information, ergo in that context the Criminal Procedure Code is a lex specialis, and its framework takes precedence of the Act on Classified Information, which is a general law – lex generalis. This conclusion results not only from comparing the subject matter of both statutes, but also from other arguments:

Applying the Act on Classified Information to the present issue then by the argument reductionis ad absurdum leads to consequences which can hardly be supported.

The position of defense counsel in criminal proceedings, i.e. in particular his procedural authorization, is based on the position (rights) of the accused person. Establishing an exception for attorneys leaves open a fundamental question, that of the accused's access to classified information which is part of the evidence in criminal proceedings. From the viewpoint of Art. 37 par. 3 and Art. 38 par. 2 of the Charter, as well as Art. 6 par. 3 let. c) of the Convention, it is hard to imagine restricting such access. Similarly, it is hard to imagine the National Security Office "clearing" the accused person in order to permit his access to classified information (a hyperbolic example taking these consequences ad

absurdum would be the idea of security clearances on a person accused of crimes under § 105 and § 106 of the Criminal Code). This interpretation would then lead to another absurd consequence: It could create a situation where it would be necessary to require an attorney in criminal proceedings to pass a security clearance in order to have access to evidentiary material containing classified information, but in civil law court proceedings, or in administrative court proceedings, the same attorney, acting as representative of a party to those proceedings, would not be required to pass this security clearance for access to the identical evidentiary material, containing the identical classified information.

Here we must point to the fact that, in a number of its decisions (II. ÚS 315/2001, II. ÚS 326/98, Pl. ÚS 2/99, II. ÚS 221/98), the Constitutional Court applied analysis per reductione ad absurdum, which is a form of teleological analysis (teleological reduction): in that analysis, in the event of several alternative interpretations, any which leads to unacceptable results relative to the purpose and aim of a norm is ruled out.

Another argument is the conclusion arising from objective teleological analysis, i.e. from the principal difference in the roles which an attorney fulfils under the Act on Advocacy and under the codes of procedure: if, on the one hand, that role can mean that an attorney is authorized to manage another's property, including acting as bankruptcy trustee, on the other hand it can mean legal representation of parties, generally in civil law proceedings, criminal proceedings, or administrative court proceedings. In this regard, we must point to the amendment of the Act which amends Act no. 85/1996 Coll., on Advocacy, as amended by later regulations, and Act no. 6/2002 Coll., on Courts and Judges (which was passed on 9 May 2002 and published as no. 228/2002 Coll.). The provision of § 56 of the Act on Advocacy, as amended by this Act, established the authorization of an attorney to manage another's property, including acting as bankruptcy trustee; it provided for an attorney an exception from the obligation of confidentiality under § 21 of the Act on Advocacy, for information which he learns in connection with acting as bankruptcy trustee, and it preserved a bankruptcy trustee's obligation of confidentiality under the provisions of special legal regulations. The authorization to manage another's property, including the authorization to act as bankruptcy trustee, is, depending on the nature of the managed property, also tied to the potential need for access to classified information.

Based on this teleological differentiation, one can conclude that, precisely in view of § 56 of the Act on Advocacy, as amended by Act no. 228/2002 Coll., an attorney, under § 42 par. 1 of Act no. 148/1998 Coll., as amended by later regulations, is subject to a security clearance for access to classified information, unless a special act provides otherwise. Such special acts, according to the referring norm contained in § 38 par. 7 of the Act on Classified information are the Civil Procedure Code and the Administrative Procedure Code. In addition, special conditions, for access to classified information by an attorney acting as defense counsel in criminal court proceedings, different from those of the Act on Classified information, are also established in the Criminal Procedure Code (in particular § 35 par. 4 and § 198a of the Criminal Procedure Code): "If there is a conflict between a general and special rule, one can assume that the legislature wished to deviate from the general rule through the special statute." (Ch. Perelman, Logique Juridique. Paris 1976; citation from German translation: Juristische Logik als Argumentationslehre. Freiburg-München 1979, p. 65). However, the referring norm itself does not establish the

precedence of the special over the general, it only plays an informative role (in this regard, it is also appropriate to point out that, despite the formulations chosen by the legislature, § 38 par. 7 of Act no. 148/1998 Coll., as amended by later regulations, is not a delegation, but a reference – delegation is conceptually tied to the hierarchy of legal force of an authorizing norm and a delegated norm). Thus, a contrario, one can not conclude from the absence of a norm in § 38 par. 7 of Act no. 148/1998 Coll., as amended by later regulations, referring to a special regulation governing criminal proceedings, that the general framework in the Act on Classified information takes precedence over the special framework for access to classified information by an attorney acting as defense counsel in criminal proceedings, contained in the Criminal Procedure Code.

The conclusion reached by objective teleological analysis, as well as by analysis per reductionem ad absurdum, is also supported by an argument based on the maxim of internal lack of conflict and consistency of the legal order (in other words, it is based on the axiom of a rational legislature – e.g., when applying the current teleological analysis the Constitutional Court of the Republic of Poland relies on the theoretical concept of a "rational legislature" – see A. Kozak, Rodzaje wykladni prawa w uchwalach Trybunalu Konstytucyjnego. In: Z zagadnień wykladni prawa. Red. S. Kaźmierczyk, Wroclaw 1997, p. 57-60). If the legislature, in the Act on Classified information, were to regulate the obligation of attorneys acting as defense counsel in criminal proceedings to undergo security clearance when having access to classified information it would consequently have to reflect the results of that framework in a special definition establishing grounds for excluding chosen defense counsel under § 37a of the Criminal Procedure Code and removing appointed defense counsel from the defense under § 40a of the Criminal Procedure Code. If it did not do so, one can only conclude that the assumed premise was not met.

On the level of methodological analysis of simple law, in particular relying on the argument reductionis ad absurdum and the maxim of internal lack of conflict and consistency of the legal order, one can conclude that the second alternative analysis of § 38 par. 7 a § 42 par. 1 of Act no. 148/1998 Coll., as amended by later regulations is justified. This conclusion is based on a doctrinaire opinion, under which in the event of conflicting analyses, the decisive viewpoint, tertium comparationis, is teleological reduction (in other words, analysis per reductione ad absurdum): "Argumentum reductione ad absurdum is applied either independently, or if analysis under several different arguments leads to inconsistent (incompatible) conclusions." (V. Knapp, Teorie práva. Prague 1995, p. 173. Neil MacCormick calls Argumentum ad absurdum, or teleological reduction, the "golden rule" of analysis: N. MacCormick, Argumentation and Interpretation in Law. Ratio Juris, No. 1, 1993, p. 26).

Just this reconstruction of the relevant, valid simple law leads to the conclusion that access to classified information by an attorney acting as defense counsel in criminal proceedings is governed by the Criminal Code, and not by the Act on Classified information, and thus under the existing valid legal framework, the Czech legal order does not require a security clearance by the National Security Office for that purpose, i.e. for access to classified information by defense counsel in criminal proceedings.

VIII./b

Constitutional Law Review

Constitutional law review of the conflicting alternative interpretations of the relevant simple law is based on the principle of proportionality and on the principle of giving priority to a constitutionally consistent analysis over derogation of a law.

Based on the fact that the position of defense counsel in criminal proceedings is derived from the position of the accused, at the constitutional level the nucleus of the matter being adjudicated is conflict between the public value (on the concept of a public value see judgment file no. Pl. ÚS 15/96) of security of the state as an element of its sovereignty (Art. 1 of the Constitution), one component of which is ensuring protection of classified information, and the accused person's fundamental right to a defense under Art. 40 par. 3 of the Charter and Art. 6 par. 3 let. c) of the Convention, his fundamental right to express his views on all evidence admitted in the proceedings under Art. 38 par. 2 of the Charter, as well the fundamental right arising from the principle of equal "weapons" under Art. 37 par. 3 of the Charter.

Similarly as all democratic constitutional courts, so too the Constitutional Court of the Czech Republic applies the principle of proportionality to resolve conflicts between fundamental rights, or public values protected by the constitutional order, in proceedings on review of norms and in proceedings on constitutional complaints, (the Court first comprehensively analyzed the principle of proportionality when evaluating the constitutional institution of keeping secret the personal data of witnesses in criminal trials - Pl. ÚS 4/94).

The principle pf proportionality is methodologically based on three steps: The first is review of simple law from the viewpoint of suitability; this involves reviewing the chosen normative means in terms of whether they will fulfill the aim pursued. If given normative means are not capable of attaining the aim pursued, this is a manifestation of arbitrariness by the legislature, which is considered inconsistent with the principles of a state governed by the rule of law.

The second step in applying the principle of proportionality is reviewing simple law from the point of view of necessity, which analyzes a number of possible normative means in relation to the intended aim and their subsidiariness in terms of restricting constitutionally protected values – a fundamental right or a public good. If the aim pursued by the legislature can be achieved by alternative normative means, then the one which restricts the given constitutionally protected value in the smallest degree is the one which is constitutional.

If the reviewed simple right aims to protect a certain constitutionally protected value, but also restricts another, the third viewpoint of the principle of proportionality, balancing, is a methodology of weighing these conflicting constitutional values.

To arrive at a conclusion in the case of conflict of fundamental rights, or the public good, as principles, unlike the case of conflict of norms of simple law, the Constitutional Court is guided by the requirement to optimize, i.e. the postulate of minimizing the limitation of a fundamental right or freedom, or a public good. This involves the maxim that, if it is concluded that one of two conflicting fundamental rights or public estates has justified priority, a necessary condition of the final decision is to use all possibilities to minimize interference in one of them. The requirement to optimize can be normatively derived from Art. 4 par. 4 of the Charter, under which fundamental rights and freedoms must be preserved when applying provisions on the bounds of fundamental rights and freedoms, and thus, analogously, they must be preserved if they are limited as a result of being in conflict.

Based on these viewpoints for constitutional review of the issue, it must be said that in terms of the postulate of suitability, i.e. the relationship between the legal means used and the legislature's aims, having an attorney pass a security clearance is an effective means for achieving the pursued aim, a public value. However, in terms of the subsidiariness of possible alternative instruments which would ensure the given aim, i.e. in terms of the criterion of necessity, one can conclude that security clearances are not a proportional means to achieving the desired aim, because in criminal proceedings that can be achieved through a combination of other instruments (instruction by the court about obligations arising from the Act on Classified information and about criminal penalties, the obligation of confidentiality under the Act on Advocacy, etc.), which, in this context, do not affect, and in no way limit the fundamental rights which are in conflict with the public value (security of the state) – the fundamental right to a defense, to equal "weapons," or the right to express one's views on all evidence. The framework contained in the Criminal Procedure Code not only guarantees protection of fundamental rights under Art. 37 par. 3, Art. 38 par. 2, and Art. 40 par. 3 of the Charter and Art. 6 par. 3 let. c) of the Convention, but also, through a number of its norms, as well as a number of other related norms of simple law, meets the requirement of minimizing limitation of protection of a public good (ensuring security of the state by protecting classified information) that is in conflict in a given matter, and thus also follows the constitutional requirement of optimization.

In this regard, the framework contained in the Criminal Procedure Code can also be considered consistent with the results of interpretation of Art. 6 par. 3 let. c) of the Convention by the European Court of Human Rights. In the Court's judgment in the case of Meftah and others v. France, 2002: "The Court reiterates that the right for everyone charged with a criminal offence to be defended by counsel of his own choosing (see Pakelli v. Germany, judgment of 25 April 1983, Series A no. 64, p. 15, § 31) cannot be considered to be absolute and, consequently the national courts may override that person's choice when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (see Croissant, cited above, p. 33, § 29)." The European Court of Human Rights came closest to expressing a view regarding analysis of the concept "relevant and sufficient grounds required by the interests of justice, which limit the absolute nature of the right to choose an attorney," in the context of the matter being decided by the Constitutional Court, in the case Chazal v. United Kingdom, 1996, and Tunelky and others v. United Kingdom, 1998. Insofar as English law allows the appointment of a special attorney in certain types of proceedings, one who has access to classified

information concerning national security, but who is bound by an obligation of confidentiality in relation to the client, the European Court of Human Rights found this circumstance to be a limitation in terms of Art. 6 par. 1 of the Convention. Under a doctrinaire interpretation of these decisions, "it does not appear, however, that only an attorney registered on a special list, or an attorney specially cleared from a state security viewpoint could be appointed as a special attorney" (B. Repík, Advokát ve světle judikatury Evropského soudu pro lidská práva [The Attorney in Light of the Case Law of the European Court of Human Rights]. part I, Bulletin advokacie, no. 10, 2002, p. 19).

If the requirement to optimize two conflicting values guaranteed by the constitutional order leads one to conclude that security clearances on attorneys acting as defense counsel in criminal proceedings for purposes of permitting access to classified information are constitutionally unacceptable, but that the conditions for defense counsel's access to classified information which are established in the Criminal Procedure Code and do not limit the fundamental rights to a defense, equality of "weapons" and the right to express one's views on all evidence are acceptable, it becomes necessary to apply the principle of giving priority to a constitutional interpretation over derogation, when evaluating the constitutionality of § 42 par. 1 of Act no. 148/1998 Coll.. The Constitutional Court applied this principle in a number of its decisions. It first did so in judgment Pl. ÚS 48/95, in which it said that, in a situation where a certain provision of a legal regulation allows two different interpretations, one being in accordance with the constitutional order and the other is inconsistent with it, grounds for annulling that provision do not exist; when applying the provision, courts must interpret it in the constitutionally consistent manner. The Constitutional Court then applied the principle of preferring constitutionally consistent interpretation over annulment in a number of other decisions in proceedings to review norms (e.g. Pl. ÚS 5/96; Pl. ÚS 19/98; Pl. ÚS 15/98; Pl. ÚS 4/99; Pl. ÚS 10/99; Pl. ÚS 17/99).

These conclusions concerning optimization when resolving conflict between constitutionally guaranteed values, based on the content and purposes of the simple law reviewed, together with the method of giving priority to a constitutional interpretation over annulling a statute, are constitutional arguments for reviewing the constitutionality of § 42 par. 1 of Act no. 148/1998 Coll., as amended by later regulations, which fully correspond to the conclusions reached by applying the methodology of analyzing simple law, based on teleological reduction, objectively teleological analysis, and systematic analysis, which includes the rule lex specialis derogat legi generali. For this reason the Constitutional Court denied the petition of the District Court in Přerov to annul § 42 par. 1 of Act no. 148/1998 Coll., on Protection of Classified information and Amending Certain Acts, as amended by later regulations.

In a number of its decisions the Constitutional Court addressed the interpretation of Art. 89 par. 2 of the Constitution, in particular, in its most recent case law, in the judgment Pl. ÚS 2/03, under which, "it is not only the verdict of the judgment which is binding, but also the reasoning, or those parts of it which contain 'significant' grounds " (similarly, judgment file no. III. ÚS 200/2000). The Constitutional Court continues to hold these opinions.

A special situation arises in this regard with proceedings on the review of norms where the Constitutional Court denies a petition to annul a statute, other legal regulation, or their individual provisions, and bases its decision on the principle of giving priority to constitutional interpretation over annulment of a statute, other legal regulation, or their provisions, under which principle, in a situation where a certain provision of a legal regulation permits two different interpretations, one being consistent with the constitutional order and the other inconsistent, there are no grounds to annul that provision; when applying the statute, other legal regulation, or their provisions, the bodies of public power, in particular courts, must interpret that provision in a constitutional manner (Pl. ÚS 48/95 and other decisions). A different interpretation of Art. 89 par. 2 of the Constitution, in judgments which deny petitions to annul legal regulations on the grounds of giving priority to constitutional interpretation, would make the Constitutional Court's decisions legally meaningless, or confusing, and at the same time would force the Constitutional Court to steps which lead to absurd and unsustainable results: to not rely on the possibility of constitutionally consistent interpretation, abandon the principle of judicial self restraint, and if there is the slightest chance of constitutionally inconsistent interpretation of a contested regulation, to annul it. For these reasons, in these proceedings on review of norms, given a negative verdict with interpretative arguments, the Constitutional Court placed the fundamental constitutional principle, arising from a number of significant grounds, in the verdict section of the judgment.

Notice: Decisions of the Constitutional Court can not be appealed.

Brno, 28 January 2004

Dissenting Opinion
of Constitutional Court judge JUDr. Vojen Güttler to the decision of the Plenum of the Constitutional Court of 28 January 2004 in the matter of a petition from the District Court in Přerov seeking the annulment of § 42 par. 1 of Act no. 148/1998 Coll., on Protection of Classified Information and Amending Certain Acts, as amended by later regulation

I.

1) The Plenum of the Constitutional Court decided in part I. of its verdict that the petition is denied.
The nucleus of this verdict in the judgment of the Plenum of the Constitutional Court is the idea that protection of classified information is a special area in criminal proceedings, so that the regime for it is governed by the Criminal Procedure Code, and not by the Act on Classified information, which does not apply at all to this area (i.e. also not to the issue of access to classified information by attorneys acting as defense counsel).

I do not accept this thinking.

First of all, I point out – as was also said during the Plenum's discussions – that the wording of the contested provision of the statute – read outside of any particular context – does not in itself actually create unconstitutionality. Of course, the contested provision can not be read so narrowly. It is evident that the amended § 42 par. 1 of the Act deleted attorneys – to which it previously expressly applied – from the original text precisely because the amendment wished, in contrast to the previous legal framework, to include attorneys in the group of person who are generally subject to the regime of security clearances by the National Security Office (the "NSO"), including in criminal proceedings. If the Constitutional Court denied the petition to annul the contested provision, and in the reasoning of its judgment merely expressed the opinion that Act no. 148/1998 Coll. does not apply at all to the area of criminal proceedings (and thus also not to attorneys acting as defense counsel), in my opinion it created the risk that in practice, some (and not only in the courts) will not accept this, it being merely the reasoning section of the judgment. In this regard, it is appropriate to point out that the contested (amended) provision of the Act is a lex posterior in relation to the Criminal Procedure Code, on which the Plenum's judgment relies. For this reason as well, it is not indisputable whether the Criminal Procedure Code really is a lex specialis, as regards protection of classified information, in relation to Act no. 148/1998 Coll., or whether the opposite is the case. In my opinion, in this overall context, it is necessary to review the constitutionality of the contested provision, insofar as it deleted attorneys from the group of people who are not subject to security clearances by the NSO. I believe that there is an unconstitutional gap in the statute, which I discuss more closely elsewhere.

Therefore, I believe that the cited opinion should outweigh the arguments (though they are well worked out) in the Plenum's judgment, which are based particularly on comparison with the new § 40a of the Civil Procedure Code (which establishes a special framework for this area) and conclude that if, before the amendment of the Act on

Classified information, there was an exception for defense counsel from the obligation to undergo a security clearance, arising both from the Act on Classified information, and from the Criminal Procedure Code, this can only be seen as superfluous.

The Plenum's judgment argues – among other things – that the possible establishment of an exception (from NSO security clearances) for defense counsel does not address the fundamental issue, i.e. the access of the accused person to classified information. However, as far as we know, no relevant body of the Czech Republic has posed this question. In any case, the accused's right to have access to classified information in his own case is not questioned in the opinion from the NSO, which, on the substantive side, is most affected by this issue.

I emphasize that in relation to part I of the verdict this dissenting opinion is mainly guided by the attempt to ensure the highest possible degree of legal certainty in this exceptionally sensitive area.

2) In part II. of its verdict the Plenum of the Constitutional Court said that clearance of defense counsel in criminal proceedings for purposes of access to classified information through a security clearance by the National Security Office is inconsistent with Art. 37 par. 3, Art. 38 par. 2, and Art. 40 par. 3 of the Charter of Fundamental Rights and Freedoms and with Art. 6 par. 3 let. c) of the Convention on Protection of Human Rights and Fundamental Freedoms.

On the substantive side I naturally agree with this verdict. It corresponds to my opinion, discussed in more detail in the next part of this dissenting opinion. Therefore, I went on to say that the Constitutional Court should have annulled the contested provision.

However, on the formal side I do not agree with that verdict. This is because the statement of law given there is part of the verdict of the Constitutional Court's judgment, although it is undoubtedly a significant statement, which belongs in the reasoning of the Constitutional Court's judgment. Although I am basically against excessive formalism, I state that under Article 88 par. 2 of the Constitution judges of the Constitutional Court are (also) bound in their decision making … by the Act in paragraph 1, i.e. Act no. 182/1993 Coll., on the Constitutional Court. That Act provides, in § 70 par. 1 and 2, that the Constitutional Court – depending on the conclusion it reaches – shall decide either that a statute or other legal regulation or their individual provisions are annulled, or shall deny the petition. The Act on the Constitutional Court does not recognize any other type of verdict in proceedings to annul a statute or other legal regulation. So, if the Constitutional Court overlooked these provisions, it acted – in my opinion – in too activist a manner, and thus exceeded the bounds given to it by the Constitution and by the Act on the Constitutional Court. In this regard one can only add that this is a ground-breaking verdict, which has never yet been heard in the history of the Constitutional Court of the Czech Republic.

II.

I am of the opinion that the Constitutional Court should have granted the petition, annulled the contested § 42 par. 1 of Act no. 148/1998 Coll., as amended by later regulations, and postponed the enforceability of this judgment for an appropriate time so that the legislature would have the opportunity to pass a legal framework which would proportionately guarantee the constitutional right to a defense, but also reflect the public interest in protection of classified information.

On the substantive side, this opinion can be justified as follows:
A) The right to a defense is considered a fundamental right of the individual, which is provided in all the basic international documents concerning fundamental human rights and freedoms.

The International Covenant on Civil and Political Rights, in Art. 14 par. 3 let. d) provides the right of everyone who is accused of a crime "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

The right to a defense is also enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms, in Art. 6 par. 3 let. c), under which everyone who is accused of a crime has the following minimum rights: "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

The extent of the right to a defense is also emphasized in decisions of the European Court of Human Rights, which concluded that the aim and subject matter of Art. 6 par. 3 let. c) is to ensure effective protection of the right to a defense, and therefore a person charged with a criminal offense who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing [Pakelli v. Germany, decision of 25 April 1983, series A no. 64, cited in Berger V., Judikatura Evropského soudu pro lidská práva, {Case Law of the European Court of Human Rights} IFEC, 2003 (Czech edition), p. 313]. the European Court of Human Rights also stated that Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial [Poitrimol v. France, decision of 23 November 1993, series A no. 277-A, id., p. 307].

The Constitutional Court of the CR also addressed the right to a defense; in its decisions it stated certain attributes of this fundamental right based on the Czech legal order, specifically the Charter of Fundamental Rights and Freedoms (see, e.g. Constitutional Court judgment file no. I. ÚS 592/2000, volume 25, p. 118 et seq.). Under Art. 37 par. 2 of the Charter of Fundamental Rights and Freedoms, in proceedings before courts, other state bodies, or public administrative authorities everyone shall have the right to assistance of counsel from the very beginning of such proceedings. Under Art. 40 par. 3 of the Charter an accused has the right to be given the time and opportunity to prepare a defense and to

be able to defend himself, either pro se or with the assistance of counsel. The judgment also refers to the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides in Art. 6 par. 3 let. b) and c), that everyone charged with a criminal offence has, among other things, the right to have adequate time and facilities for the preparation of his defence and the right to defend himself in person or through legal assistance of his own choosing. These provisions enshrine certain fundamental procedural guarantees of the right to a fair trial which are an indispensable part of the concept of a state governed by the rule of law. The right to a defense is one of the most important fundamental rights of persons prosecuted in criminal proceedings and is aimed at achieving a just decision, issued not only in the interest of the prosecuted person, but undoubtedly also in the interests of a democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens (Art. 1 of the Constitution of the CR). Therefore, the state must ensure conditions so that these principle can be realized through appropriate procedural guarantees of the position of the defense counsel and of the accused.

It must be emphasized that the constitutionally guaranteed right to a defense (Art. 37 par. 2, Art. 40 par. 3 of the Charter of Fundamental Rights and Freedoms – the "Charter") together with the presumption of innocence (Art. 40 par. 2 of the Charter) are fundamental conditions for a fair criminal trial (Art. 36 par. 1 of the Charter); these constitutional guarantees are also reflected in the applicable procedural regulation, the Criminal Procedure Code (§ 33 par. 1 of the Criminal Procedure Code), which, in accordance with the Constitution, is quite clearly built on the principle of giving priority to the choice of defense counsel (§§ 33 par. 1, 37 par. 2 of the Criminal Procedure Code), which the accused (defendant) is entitled to apply at any stage of proceedings in progress (§ 37 par. 2 of the Criminal Procedure Code); therefore, it is fundamentally up to the accused (defendant), when and whom of the persons authorized to provide legal assistance through defense in criminal proceedings (§ 37 of the Criminal Procedure Code) he will entrust with his defense, or whether he will make use of his right to choose. Of course, the accused (defendant) bears responsibility himself for his choice, once made, and therefore a general court is not authorized to evaluate the "quality" of the defense or the "inactivity" of defense counsel, as he (the defendant) may not be denied the right to choose the trial tactics which he intends to use to present his case in proceedings before the court; the contrary situation would be obvious interference by the state power in the constitutionally guaranteed fundamental right to a defense, and perhaps also a certain – clearly undesirable and primarily constitutionally inadmissible – form of state control over exercise of that right.

B) The Constitutional Court also relies on these principles in these proceedings, even though, naturally, it also weights arguments emphasizing the lawful need of the state to reflect its legitimate interests (public interests in the area of classified information). Therefore, one must evaluate whether the fundamental right to a defense may be limited by the public interest in protecting classified information (the public disclosure of which could damage the security interest of the state) and whether – if so – including attorneys (specifically defense counsel in criminal proceedings) in the group of persons subject to the regime of Act no. 148/1998 Coll. and therefore NSO clearance is a limitation which, in

the matter being adjudicated, is sufficiently proportional that it still preserves the essence and significance of the fundamental right to a defense.

The Constitutional Court concludes that protection of classified information can basically be described as a legitimate public interest which can – in some aspects – also affect the fundamental right to a defense. This can also be concluded from a number of comparable articles of the Charter of Fundamental Rights and Freedoms, which govern the possibility of limiting one or another freedom by statute, if it is a measure which is necessary in a democratic society for – among other things – the security of the state (cf. Articles 14 par. 3, 17 par. 4, 19 par. 2, 20 par. 3, and 27 par. 3 of the Charter). However, the Constitutional Court nevertheless believes that including attorneys – defense counsel – in the group of persons subject to NSO clearance would be such a necessary measure which is proportional to the essence and significance of the fundamental right to a defense. It concludes this based on, in particular, the following considerations:

a) The primary essential point is that including attorneys (defense counsel) in the group of persons subject to clearance means violating one of the fundamental principles of advocacy, the principle of the attorney's independence from the state, so that he can practice advocacy freely, that is, act as the legal representative of a natural person or legal entity, including against the state, without fear of state penalties against him. Imposing security clearance on an attorney as a condition for providing legal services in a trial in which classified information may appear could mean as a consequence that the state could determine who is entitled to provide such legal services, and in practice thereby eliminate those attorneys who are "uncomfortable" persons. This would naturally be flagrant interference in the accused's right to a defense. It must be emphasized here that a client fundamentally has a right to representation by an attorney of his choosing. It is obvious that there is no legal regulation under which attorneys can be forced to submit to security clearance. A contrary legal regime could lead to a situation where a "cleared" attorney would not be available at all, which would, as a consequence, also limit a general court, where it is required by law to designate defense counsel in cases of so-called "compulsory defense." Here one can also rely on the persuasive arguments of the petitioning general court and the grounds used by the Senate in its opinion on the petition to annul the contested provision.

b) Thus, the Constitutional Court must weigh whether – in view of the reasons presented – the contested § 42 par. 1 of Act no. 148/1998 Coll., as amended by later regulations (note: in particular as amended by Act no. 310/2002 Coll.), is inconsistent with Art. 37 par. 2 and Art. 40 par. 3 of the Charter, with Art. 14 par. 3 let. d) of the International Covenant on Civil and Political Rights, and with Art. 6 par. 3 let. c) of the Convention on Protection of Human Rights and Fundamental Freedoms, on which the petitioner relies. The Constitutional Court is convinced that such conflict exists. However, it does not lie in the actual text of the Act (in its wording) but in the gap which the Act created. Thus, what is unconstitutional is the legislature's silence – undoubtedly intentional – which results in the constitutionally unacceptable limitation of the right to a defense. (On a doctrinal concept of the term "legislative omission" cf. Šimíček V., Legislative Omission as violation of Fundamental Rights, in: Deset let Listiny základních práv a svobod v právním řádu České republiky a Slovenské republiky [Ten Years of the Charter of Fundamental Rights and Freedoms in the Legal Order of the Czech Republic and the Slovak Republic], Dančák, B.,

Šimíček, V., eds., Brno 2001 p. 144-159.) One can surely conclude that if the legislature's silence arising from simple omission can be found unconstitutional, this applies all the more to cases where the legislature – in a particular case – created a gap in the law intentionally.

However, in this particular case, the gap is not a false one, meaning incompleteness (absence) of written law, in contrast to the explicit regulation of similar cases, i.e. incompleteness in terms of the principle of equality or from the viewpoint of general legal principles. An illustration of how to address such a gap is the judgment file no. Pl. ÚS 48/95 (see Collection of Decisions, vol. 5, judgment no. 21), in which the Constitutional Court normatively filled in the gap created by inequality in the statutory framework using a constitutionally consistent interpretation of the statutory framework, and denied the petition to annul it, as it was not inconsistent with the constitutional order.

However, that method can not be used in the present matter. The provision whose current text removes attorneys from the list of persons not subject to NSO clearance – whereby it establishes unacceptable limitation of the right to a defense – should contain a legal framework under which a person who is being criminally prosecuted is not restricted as regards choosing from only a certain limited group of defense counsel. However, the wording of the contested provision completely rules out the possibility of that interpretation.

Finally, in this regard one can also point to Constitutional Court judgment file no. Pl. ÚS 36/01, vol. 26, p. 329, which specifically considered the question of unconstitutional legislative omission.

c) In its position statement, the NSO also stated that the unique position of attorneys in relation to classified information would be "a certain disproportion, in view of the requirements imposed on bodies acting in criminal proceedings, including state prosecutors, who are required to meet conditions for access to classified information under Act no. 148/1998 Coll." However, the Constitutional Court can not accept this argument either. This is because the NSO is comparing non-comparable things: the position of a state prosecutor, who represents the state in criminal proceedings, and the position of defense counsel, whom the accused can freely chose and who will defend him against the state. It is logical that the state can set rules for access to classified information for persons who are its, that is "state employees" and perform its tasks, which, in this context, applies to state prosecutors. However, one can not take the same view of the role of defense counsel, whose defense protects the client precisely against that state whom the state prosecutor represents in criminal proceedings.

d) For completeness, the Constitutional Court also considered the legal framework of some other democratic European countries concerning the issues under review.

According to the expert report from The Law Society in London, issuing of "state license" to attorneys does not exist in England and Wales. Thus, there is no privileged group of attorneys who would obtain information from the state to which another group of

attorneys would not have access. Under common law the judge in a criminal matter orders information to be made public which the state considers "sensitive" (i.e. which it tries to keep secret) if such material can prove the innocence of an accused person or otherwise prevent judicial error ?see Kean (1994) 99 CR.App.R 1 appendix 1?. In such case, the prosecution must either make the material public or stop the proceedings. If, on the contrary, the judge upholds the right to designate the material "sensitive," then the material is not made public; it is then edited so that key sensitive passages are removed. As regards the statutory framework, dissemination of certain information provided in the law is forbidden, so that the judge's options are limited thereby. The statutes which are cited in the expert report from The Law Society basically concern the ban on disseminating and making public sensitive or secret material (under these statutes), however, they do not directly address the issue of a state license for a certain group of attorneys. The Law Society says in conclusion that the English system does not create a special category of persons who are trustworthy for work with sensitive materials, but it is "the material itself" which is protected against unauthorized publication.

As regards France, the Constitutional Court has at its disposal a written report from the foreign department of the Czech Bar Association, reporting information from Me. Laurin, secretary of the Paris Bar Association. According to this information, France does not have a special list of attorneys or clearances. If the relevant ministry does not de-classify a matter – if it is part of a fact which is a state secret – the relevant document can not be part of the file, so that such fact is not proved, "doubts remain, and those act in favor of the accused." Neither the attorney, or the investigating judge, or the prosecutor are informed of the state secret, and neither the judge deciding the matter nor any of the others undergo any sort of clearance.

As regards, Austria, it was determined from a report from the Czech Bar Association (prepared according to information from Dr. Winternitz, an attorney in Vienna, registered in with the Czech Bar Association with authorization to practice in the Czech Republic), that there is no statutory norm in Austria which would require attorneys to have passed a special security exam if state secrets are to be discussed in proceedings. Nor is any such exam known to be required in practice. In such matters the attorney is, however, bound by the duty of confidentiality. In addition, in these cases the public can be excluded from proceedings; then neither the parties nor the attorney may disclose the contents of proceedings in which state secrets were discussed, subject to criminal penalties.

As regards Germany, these issues are addressed by the Directive for Criminal Proceedings and for Proceedings on Fines (RiStBv) of 1 January 1977, in the version in effect as of 1 June 1998 (Art. 213, Art. 214). These provide, in particular, the following:

a) Facts and information which must be kept secret, especially state secrets, may be contained in case files only if it is necessary for the proceedings. When handling classified information, regulations concerning them must be observed, and when handling classified information of inter-state or international origin, special regulations on protecting secrets which apply to them must be observed. This also applies to disclosing classified information to defense counsel, experts, and other participants in proceedings (e.g. interpreters) unless mandatory legal principles prevent it.

Likewise, when disclosing classified information to attorneys, experts, or other participants in proceedings, if there are mandatory legal principles cutting through regulations on classified information or special regulations on the protection of secrets, the recipients must be emphatically reminded of their duty to keep the secret; they must be advised, when handling classified information, to proceed according to regulations concerning individual cases, which will be explained to them. A note is entered in the file about these warnings and recommendations, which is to be signed by the recipient.

b) Disclosing classified information to defense counsel has the same regime as viewing files concerning classified information. Files containing classified information classified as confidential, secret, and top secret, it must be especially carefully verified

- whether there are any serious reasons which prevent giving files to the attorney to view in his office or home,

- whether there are legal stipulations as regards attorneys making notes, transcripts, extracts or photocopies by attorneys.

c) In appropriate cases the state prosecutor is to formally bind attorneys, experts, and other participants of the proceedings to keep secret information disclosed to them which requires secrecy, and to point out that violating the secrecy is subject to criminal penalties. It must be taken into account that this duty to preserve a secret is possible only on the basis of a statute or with the consent of the injured party.

d) In investigations which concern the loss or "issuing" of classified information (i.e., evidently, relevant materials) it is necessary to review whether there is an obligation to take into account foreign interests in preserving the secret. Therefore, it is recommended to consult the federal minister of the interior, who maintains a list of international treaties on protection of secrets.

Thus, one can close by saying that in the compared European countries, there are no special groups of attorneys who would be cleared for access to so-called classified information by the appropriate state body. That too can be considered one of the arguments in favor of the opinion presented in this text.

Brno, 28 January 2004