Pl. ÚS 17/13 of 27 March, 2013
"High Treason - President of the Republic"

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

HEADNOTES

Constitutional-law delictual liability for high treason is linked with the exercise of the office of the President. This is evidenced also by the fact that procedural norms, relating to proceedings on the constitutional charge in the provisions of Article 65 paragraph 2 of the Constitution of the Czech Republic in the wording effective until 7 March 2013, and in § 96 to § 104 of the Act on the Constitutional Court, designate the person being charged always as "the President of the Republic". If then the law (generally) anticipated that such proceedings may be administered also against the President emeritus, the law would adapt also the terminology it uses.

As soon as the Presidential office ceases to exist (for any reason), its earlier holder (former President) principally loses eligibility to continue to be the party to the proceedings on instances of constitutional-law delict as the Charged Party. The option that proceedings on constitutional charge continue also after termination of the Presidential office is therefore generally excluded; exceptions allowing the possibility not to discontinue the proceedings after the termination of the exercise of the office must be explicitly determined by law. The legal arrangement effective until 7 March 2013 acknowledged, in § 98 paragraph 3 of the Act on the Constitutional Court, a single such exception for continuing such proceedings, that being resignation from the office of the President. In the case of termination of the office upon expiration of the period of time for which the President has been elected, no such exception existed so the same cannot be inferred through applying a new norm to the detriment of the Constitutionally Charged Party.

VERDICT

On 27 March 2013, the Constitutional Court, in a Plenum composed of Pavel Rychetský, the Chairman, and Justices Stanislav Balík, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jan Musil (Justice Rapporteur), Jiří Nykodým, Miloslav Výborný and Michaela Židlická, decided on a constitutional charge for high treason filed by the Senate of the Parliament of the Czech Republic, represented by a Member of the Senate, Mgr. Jiří Dienstbier, against the constitutionally charged President of the Republic, Prof. Ing. Václav Klaus, CSc., represented by JUDr. Marek Nespala, attorney-at-law with a registered office in Prague 2, Vyšehradská 21, as defence counsel, as follows:

The proceedings shall be discontinued.

REASONING

I.
Definition of the case

1. On 5 March 2013, the Constitutional Court received a constitutional charge by the Senate of the Parliament of the Czech Republic (hereinafter referred to only as the "Senate", possibly the "Constitutional Prosecutor") against Prof. Ing. Václav Klaus, CSc. (hereinafter referred to also as the "Constitutionally Charged Party") as the President of the Republic for high treason pursuant to Article 65 paragraph 2 of the Constitution of the Czech Republic in the wording effective until 7 March 2013, and pursuant to the provisions of § 96 of Act No. 182/1993 Coll. on the Constitutional Court (hereinafter referred to only as the "Act on the Constitutional Court") in the wording effective until 7 March 2013.

2. In terms of the facts, the Senate defined the constitutional delict of high treason being prosecuted in clauses A) to E) as follows:

"A. From 5 June 2012 until the date of filing this constitutional charge, the President of the Republic had not completed with his signature the ratification of the European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, regarding which approval was expressed, pursuant to the provisions of Article 39 paragraph 4 of the Constitution, by both chambers of the Parliament of the Czech Republic through a three-fifths majority, i.e. the Senate on 25 April 2012 and the Chamber of Deputies on 5 June 2012; after the President's inactivity had become apparent, he was explicitly requested to ratify the same by a resolution of the Senate on 6 December 2012; to this the President of the Republic responded in a public declaration of his own that he would not ratify the European Council Decision, whereby he violated his duty of the President of the Republic to ratify (that is to formally and outwardly confirm the proper course of a domestic approval procedure) without undue delay an international treaty which had been negotiated properly by the President himself or the Government under the President's authorisation, the ratification of which had been approved by a democratically elected legislative assembly, in particular when the acts concerned include international treaties pursuant to Article 10a of the Constitution, approved by a qualified constitutional majority of the Deputies and Senators.

B. From 20 March 2012 until the date of filing this constitutional charge, the President of the Republic had not appointed any single Justice of the Constitutional Court and its Vice-president from amongst the then-current Justices following the circumstance of three judicial positions at the Constitutional Court becoming vacant in the given period, this on 20 March 2012, 6 June 2012 and 28 January 2013, and the position of the Vice-president of the Constitutional Court on 20 March 2012, even when said circumstance of the positions of three Justices of the Constitutional Court, as well as the position of the Vice-president of the Constitutional Court, becoming vacant was known to the President of the Republic in advance, at least from the beginning of his term of office; at the same time, the President of the Republic did not make any appropriate endeavour aimed at filling said vacancies, with the exception of submitting to the Senate two proposals for appointments, which the Senate did not approve. On 25 January 2013, through his press secretary, the President of the Republic declared to the public that he would not propose any other candidate to the Senate, through which the President seriously endangered proper functioning of the Constitutional Court as the guardian of lawfulness and constitutionality of the conduct of the state, thus exposing to

jeopardy protection of the fundamental rights of persons and citizens and proper operation of the constitutional system of the Czech Republic and the system of its bodies of public power, thus completely relinquishing one of the most significant duties of the President of the Republic.

C. On 1 January 2013, the President of the Republic granted amnesty promulgated on 2 January 2013 in the Collection of Laws under No. 1/2013 Coll.; Article II of the same ordered that such criminal prosecution which has not been completed with legally binding effect be discontinued, where, as of 1 January 2013, more than 8 years had passed since initiating such prosecution, of criminal acts for which the Criminal Code prescribes penalty of imprisonment not exceeding ten years, with the exception of criminal prosecution against a fugitive. By this, the President materially infringed the functioning of criminal justice, significantly de-motivated the same with respect to their further work and independent activity according to the law and weakened the trust of the public in the enforceability of law and existence of the element of justice in the decision-making of courts and the activities of bodies involved in criminal proceedings and the President of the Republic.

D. During the entire period of his term of office, that is from 7 March 2008 until the date of filing this constitutional charge, the President of the Republic had not decided, including specifying reasons for such a decision, on the proposal for appointing JUDr. Petr Langer, Ph.D. a judge, even though the President was made obliged to do so within a period of six months by the Municipal Court of Justice in Prague through a decision by the same dated 15 June 2007, ref. No. 5 Ca 127/2006-122 which became legally binding on 17 July 2007 and which was, after dismissal of a cassational complaint filed by the President of the Republic, found to be lawful and correct, this by a judgment of the Supreme Administrative Court dated 21 May 2008, ref. No. 4 Ans 9/2007-197, which became legally binding on 13 June 2008. By this, the President grossly discredited the authority of the judicial power in the state, grossly impugned protection of the fundamental rights and freedoms by the judicial power and promoted malicious action and arbitrariness over the law.

E. For a considerable part of his term of office, that is from 7 March 2008 until 5 March 2012, the President of the Republic procrastinated over signing the ratification of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints dated 9 November 1995, which was approved by both chambers of the Parliament of the Czech Republic, i.e. the Chamber of Deputies on 21 May 2003 and the Senate on 10 September 2003. The President of the Republic completed ratification of the same only after being explicitly called on to do so by a resolution of the Senate from 29 February 2012, when his office of the President had lasted for over eight years, whereby the President had already in his second term of office violated over the long term and consistently, for almost four years, his duty as the President of the Republic to ratify (that is to formally and outwardly confirm the proper course of a domestic approval procedure) without undue delay an international treaty which had been negotiated properly by the President himself or the Government under the President's authorisation, the ratification of which had been approved by a democratically elected legislative assembly."

3. According to the Senate, the Constitutionally Charged Party, through deeds so defined, repeatedly committed acts directed against the sovereignty of the Republic as well as against its democratic order. Therefore, the Senate proposed that the Constitutional Court decide on the basis of its judgment that "the President of the Republic, Prof. Ing. Václav Klaus, CSc., by conduct specified above under clauses A) to E), committed high treason and shall forfeit his

Presidency and eligibility to reacquire the same, as well as the claim to the presidential salary and other benefits following termination of his office in accordance with special regulation".

4. The Senate further designated in detail appendices to the constitutional charge which they propose to be presented as documentary evidence regarding the individual points of the charge.

II.
Argumentation of the Senate

5. In the reasoning for the constitutional charge, the Senate firstly summarised its general view of the position of the President and their responsibilities within the constitutional order of the Czech Republic. They pointed out the republican form of government under which the President enjoys no specifically superior position or position of power as is true, for example, in constitutional monarchies. The President is not a governing person – the supreme body of executive power is the government. The function of the President must be perceived consistently as an office with specifically delineated powers, whose holder may assert their will against another person or a body only within the limits of explicit authorisation by law (cf. Article 2 paragraph 3 of the Constitution of the Czech Republic). As any officer of the state, also the President must execute their powers properly, not applying arbitrariness, or must not fail to perform their obligations at all. The Senate mentions the absence of responsibility of the President, their indemnity and immunity. The Senate sees the constitutional charge for high treason as the sole means available through which it is possible to make the President of the Republic responsible not only for violating constitutional regulations, but also for violating ordinary acts as well as for executing their office arbitrarily. The Senate arrives at these conclusions referring to, among other points, the wording of the Presidential oath and the fact that the elements for high treason have to date been regulated only on the basis of an ordinary act (§ 96 of the Act on the Constitutional Court in the wording effective until 7 March 2013). Furthermore, the Senate presents a detailed factual and legal commentary on each of the five acts for which the Constitutionally Charged Party is reproached.

6. Regarding the act described in clause A), the Senate repeatedly emphasised the obligation on the part of the President to ratify without undue delay an international treaty, that is to formally and outwardly confirm the proper course of a domestic approval procedure. In the stage of ratification, the President does not have available any right of veto relating to the international treaty and has no choice whether to conduct such ratification or not. When the Constitutionally Charged Party did not agree with the contents of the international treaty for political or ideological reasons, he had the possibility, based on his office, to express said attitude of his own during the process of approval both at the level of debates of the Government and in the course of debates in both chambers of the Parliament. In addition, the Constitutionally Charged Party was entitled to initiate proceedings before the Constitutional Court, in which compatibility of the international treaty under discussion with the constitutional order would be examined. However, the Constitutionally Charged Party did not employ any of these possibilities and instead decided to arbitrarily ignore the result of the approval procedure with a disdainful declaration which claimed the international treaty to be a "perversity". The Senate believes that through such conduct, the Constitutionally Charged Party grossly discredited the functions of all other constitutional bodies and in particular harmed the good reputation of the Czech Republic abroad. According to the Senate's opinion, the conduct described above is in the nature of interference with the sovereignty of the state.

7. In their explanation regarding the conduct under clause B), the Senate summarised the grave consequences of incomplete Constitutional Court. The Senate stated that the President of the Republic must not relinquish care for proper staffing of the Constitutional Court at the moment when the Senate repeatedly does not express consent to the candidates proposed by the President. The Constitutionally Charged Party was obligated to seek, in a legally acceptable and politically suitable manner, a way of reaching agreement with the Senate regarding persons of constitutional justices. The Senate quoted the declaration of the Constitutionally Charged Party that he did not intend to propose other candidates for justices of the Constitutional Court as he did not believe that the Senate would seriously consider them. It is an expression of open contempt of the Constitutionally Charged Party for the Senate and the Constitutional Court. According to the opinion of the Senate, from the viewpoint of the elements of high treason, this conduct may be subsumed under acts directed against the democratic order, as it weakens one of the most important safeguards for preserving the democratic system.

8. In the part of the reasoning for the constitutional charge which applies to the act under clause C), the Senate dealt with the function which may be legitimately fulfilled by the Presidential amnesty under various historic, social and political consequences. The Senate explicated in detail why, in their opinion, Article II of the amnesty proclaimed by the Constitutionally Charged Party failed to fulfil the legitimate purpose, and to the contrary, why it actually represents abuse of the authority of the President to declare said amnesty. The Senate referred to the wave of economic crime after November 1989, to which the state bodies were not able to effectively respond. According to the Senate, though, favourable progress has been taking place recently in terms of effectiveness of criminal proceedings. Due to a change in the social atmosphere, the police, public prosecution and courts only now manage to finish criminal prosecution of perpetrators of serious economic crimes. According to the Senate, this development, promising to overcome the generally shared feelings of injustice and inequality before the law, was grossly interrupted by the amnesty declared by the Constitutionally Charged Party. Instead of adjusting social relationships, said amnesty has led to exactly the opposite objective. The Senate considers the proclamation of amnesty, which seriously undermines trust in the enforceability of law, to be another case of such conduct by the Constitutionally Charged Party against the democratic order, as well as an attack against such part of the sovereignty of the state through which criminal justice is pursued.

9. In the explanation on the deed described under D), the Constitutional Prosecutor emphasised the dangerousness of the (as the Senate believes) ostentatious disdain by the President of the Republic regarding judicial power. Through his actions, the Constitutionally Charged Party made it obvious that the decisions of courts need not be respected if they do not suit a more powerful entity for one reason or another. The Senate remarked that the Constitutionally Charged Party has not made use of his right to submit to the Constitutional Court a jurisdictional dispute based on questioning the fact whether an ordinary court may, in the given case, interfere with the powers of the President of the Republic. Additionally, the Senate accentuated the fact that the case of the act under clause D) does not only concern the very violation of the legal obligation of the Constitutionally Charged Party, but also includes an infringement of the subjective rights of a specific natural person. The Senate believed that the seriousness of illegal conduct is deepened by the fact that it had been committed by the Constitutionally Charged Party during the entire period of his second term of office. Also, according to the Senate, such a deed must be qualified as action against the democratic order, since the Constitutionally Charged Party as the President of the Republic both ignored a

decision of judicial power and factually prevented one of the citizens from freely applying for public office.

10. As for the actions described under clause E), the Senate in particular emphasised that in this case the liability relationship did not cease to exist after the Constitutionally Charged Party had eventually agreed to ratify the international treaty. According to the Senate, when considering the intensity of the unlawful conduct of the Constitutionally Charged Party, it is necessary to take into account that the length of procrastination over ratification has reached almost four years. The Senate refuses to acknowledge that, upon expiration of less than a year from the termination of said unlawful condition, such act could become forfeited. In the case of high treason, constitutional law does not establish any period of limitation and the very length of the mandate of the President rather proves, according to the Senate, the conclusion that, during the term of the mandate, high treason is not forfeited, since such a notion does not find any support in valid law or constitutional principles.

11. With respect to the significance of the expiration of a longer period of time from the commitment of such high-treason deeds and filing the constitutional charge, the Senate remarks that, in their opinion, the principles of purely criminal law cannot be applied to such a liability relationship. The primary and dominant element of proceedings on high treason does not consist of the issue of infringement of the rights of the Constitutionally Charged Party. It is not analogous to a relationship of criminal proceedings since, according to the Senate, the Constitutionally Charged Party, even if found guilty, would find himself merely in the position of a "common citizen", not one sentenced in a criminal trial.

12. The Senate refers to the fact that as a Constitutional Prosecutor, they are the political body which does not have any obligation explicitly determined to prosecute every instance of delictual conduct, as is true for bodies involved in criminal proceedings. In considering the possible cessation of punishability, the political and collective nature of the Senate as the Constitutional Prosecutor cannot be omitted. First, the Senate alone, as a democratic collective body, must arrive at the conclusion that certain conduct by the President of the Republic truly is in the nature of constitutional delict of high treason. Under this circumstance, according to the Senate, it is not possible to see as illegitimate that the constitutional charge is filed only with a certain time delay at the moment when it is clear that there is a certain accumulation of high-treason steps by the President and "the situation is becoming unsustainable".

13. In the concluding part of the reasoning for the constitutional charge, the Senate expresses their opinion that delictual liability for high treason is closer to disciplinary liability than to criminal liability. The Senate is aware that according to the wording of the provisions of § 108 of the Act on the Constitutional Court, the Criminal Procedure Code shall be applied mutatis mutandis in proceedings on the constitutional charge. However, according to the Senate, the rule on using the norms of criminal procedure does not result in the fact that the liability relationship alone should be assessed according to the norms and principles of substantive criminal law; in particular, the Senate refuses to apply the principle of subsidiarity of criminal repression to the liability of the President of the Republic or to examine compliance with the "material attribute" of such delict. According to the Senate, the purpose of the proceedings on high treason is primarily the protection of constitutional-law relationships and the need to clarify such relationships for the future. Within the scope of deliberations on the application of the principle of subsidiarity, the Senate refers to the fact that, with respect to the majority of the deeds being prosecuted, there is no instrument of protection available other than the

constitutional charge. The Senate included, in the constitutional charge, only such acts which the Senate considers to be the most serious ones, complying with the elements of high treason; allegedly, the Senate intentionally omitted other, less serious, unlawful actions by President Václav Klaus.

14. To close their argumentation, the Senate expressed their opinion on the issue of reservation of conscience as a reason for exculpation. According to the Senate, possible reference by the Constitutionally Charged Party to the reservation of conscience in the case under consideration cannot be accepted if only for the reason that the Constitutionally Charged Party had available, in the case of almost all the acts imputed to the President, an option to assert his political standings using legal measures (initiating proceedings before the Constitutional Court, granting individual pardons, etc.) However, the Constitutionally Charged Party has not utilised such legal latitude and instead openly demonstrated his own arbitrariness.

III.
Announcement of the Senate regarding some procedural circumstances

15. On 8 March 2013, the Constitutional Court received a letter from the Senate described as "an announcement from the Constitutional Prosecutor regarding some procedural circumstances of the proceedings". In this address, the Senate responded to the fact that the mandate of the Constitutionally Charged Party for the exercise of the office of the President of the Republic had ended, and at the same time, the effectiveness of the then legal arrangement of the constitutional delict of high treason and proceedings regarding the same had ended as well. The Senate insists on the fact that the constitutional charge may still be heard in terms of merits.

16. The Senate believes that the hitherto legal arrangement, the effectiveness of which ended on 7 March 2013, made possible that the proceedings on the constitutional charge be administered also after the end of the mandate for execution of the office of the President of the Republic. This conclusion allegedly results both from general principles of disciplinary law and from the current (effective from 8 March 2013) wording of the provisions of § 98 paragraph 3 of the Act on the Constitutional Court, according to which the circumstance that the President of the Republic resigns from said office after commencement of the proceedings does not establish a reason for discontinuing proceedings on the constitutional charge. The provisions specified above are, according to the Senate, to be applied analogically also to other cases of cessation of the office of the President of the Republic, with the exception of such cases to which such a consequence is explicitly linked by law. Otherwise it would be imminent that high-treason conduct which a President could commit at the end of their mandate may actually be impossible to hear. In this, the Senate refers both to the explanatory report regarding the original wording of the Constitution effective from 1 January 1993, and to the amendment of the Act on the Constitutional Court effective from 8 March 2013, in which the Senate sees mere confirmation and specification of the hitherto condition, not a change of law.

17. Alternatively to the above-specified facts, the Senate presents its legal opinion that in the case under consideration the principle of false retroactivity of procedural norms may be applied, which represent application of new legal arrangement (effective from 8 March 2013). The same, in the provisions of § 98 paragraph 3 of the Act on the Constitutional Court, as amended by Act No. 275/2012 Coll., explicitly provides that the expiration of the term of

office of the President does not constitute a reason for discontinuance of proceedings on a constitutional charge. To the benefit of the interpretation above, the Senate argues that the issue of consequences of a change in the legal arrangement could be solved in proceedings before the Constitutional Court only at the moment of cessation of the mandate of the President, since before then the same factually did not exist.

18. Additionally, in their memorandum from 8 March 2013, the Senate insisted on the fact that the Constitutional Court hold public oral hearings on all issues on which the Court will make a decision. In this, the Senate refers to the provisions of § 101 paragraph 2 of the Act on the Constitutional Court, which is allegedly to be applied with priority over the provisions of § 43 of the same act; furthermore, the Constitutional Prosecutor appeals that the Criminal Procedure Code be applied as a subsidiary instrument.

IV.
Statement by the Constitutionally Charged Party

19. A letter received by the Constitutional Court on 14 March 2013 contained a response by the Constitutionally Charged Party, through his chosen attorney-at-law, to the legal opinions of the Senate expressed in the above-quoted notification dated 8 March 2013. The Constitutionally Charged Party believed that the application of the new legal arrangement to the actions of the President of the Republic, which occurred before 7 March 2013, would be in harsh collision with the principle nullum crimen sine lege with respect to the extension of the liability of the President to include also "gross violation of the Constitution or other parts of the constitutional order" pursuant to Article 65 paragraph 2 of the Constitution in the wording amended. Additionally, according to the Constitutionally Charged Party, it is not possibly to apply the principle of false retroactivity of procedural norms, since that would cause "unacceptable extension of criminal sanction, that is also infringement of the subjective rights of a natural person different from the President of the Republic".

20. In his statement, the Constitutionally Charged Party contemplates the differences between the past and the now valid arrangement of the delictual responsibility of the President for high treason; according to the past arrangement, the primary purpose of the proceedings on the constitutional charge was to remove the President from office, not to impose a sanction. Argumentation through the explanatory report would not stand; it is just a supportive means of interpretation, outdated by historical development.

21. The Constitutionally Charged Party developed his standpoint in another letter delivered to the Constitutional Court on 20 March 2013. The Constitutionally Charged Party repeatedly emphasised that the legal arrangement decisive in the case being heard and effective until 7 March 2013 regulated the discontinuance of proceedings with a living President of the Republic only under the precondition that the President of the Republic would resign from their office through abdication pursuant to Article 61 of the Constitution. In the case that the new legal arrangement should be applied, the Constitutionally Charged Party refers to the requirement of consent of the Chamber of Deputies of the Parliament of the Czech Republic regarding filing a constitutional charge by the Senate, which, according to the Constitutionally Charged Party, would have to be respected even in the case under consideration, this under adequate usage of § 163 of the Criminal Procedure Code. In another section of the statement, the Constitutionally Charged Party paid attention to factual issues regarding the course of action taken by the President of the Republic in ratifying international treaties. According to the Constitutionally Charged Party, the significance of his deeds as the President of the

Republic may be understood as "strengthening the sovereignty of the state and accentuating the role of the head of the state as a necessary keystone of the constitutional system, the authority of whom must be such so that he is capable of fulfilling said constitutional role of the same".

22. As for the factual dispute with the individual clauses of the constitutional charge, the Constitutionally Charged Party also referred to the expert report by Prof. JUDr. Jiří Jelínek, CSc., forming an appendix to the statement to the constitutional charge. According to the legal opinions developed therein in detail, the seriousness of acts described in the verdict of the constitutional charge under clauses A) to E) does not fulfil elements of the constitutional delict of high treason. With respect to the deed designated as C) in the constitutional charge, the entity possibly liable for the delict is missing – the President of the Republic cannot be the subject of a delictual liability for such an act.

23. In the conclusion, the Constitutionally Charged Party insists on his proposal that the Constitutional Court discontinues the proceedings without further consideration, possibly requests the Senate, pursuant to Article 65 paragraph 3, the second sentence of the Constitution, to submit the consent of the Chamber of Deputies to filing the constitutional charge. If the Chamber of Deputies fails to grant consent within a period of three months from the date on which the Senate requires the same, the proceedings on the constitutional charge should be discontinued as well. Alternatively, the proposal suggests rejection of the constitutional charge for its being manifestly unfounded pursuant to § 43 paragraph 2 of the Act on the Constitutional Court, or possibly acquittal of the charge in full pursuant to the provisions of § 104 paragraph 1 in fine of the Act on the Constitutional Court.

V.
Examination of requisites of a constitutional charge and approval of such a charge by the Senate

24. The Constitutional Court declares that the constitutional charge complies with the formal requisites resulting from the provisions of Article 65 paragraph 2 of the Constitution of the Czech Republic in the wording effective until 7 March 2013 and the provisions of § 97 paragraph 2 of the Act on the Constitutional Court in the wording effective until 7 March 2013.

25. The hearing of the motion for filing a constitutional charge by the Senate took place in the way anticipated by the provisions of § 137 to § 139 of Act No. 107/1999 Coll. on the Standing Rules of the Senate in the wording effective until 7 March 2013. The manner of dealing with such a motion may be seen in chamber print No. 56 (the ninth term of office 2012-2014), available on the website of the Senate of the Parliament of the Czech Republic (http://www.senat.cz/xqw/xervlet/pssenat/historie?ke_dni=17.3.2013&O=9&action=detail&value=3294).

26. The motion for filing the constitutional charge was approved by resolution of the Senate No. 103, adopted at the 7th session of the Senate held on 4 March 2013. The same resolution appointed Senator Mgr. Jiří Dienstbier to represent the Senate in the proceedings on the constitutional charge. The constitutional charge was delivered to the Constitutional Court on 5 March 2013, together with an accompanying memorandum from the President of the Senate Milan Štěch dated 4 March 2013 ref. No. 2847/2013/S.

VI.

Reasons for discontinuing the proceedings

27. Initially, the Constitutional Court had the task of evaluating the influence on the course of further proceedings of the fact that after the constitutional charge was filed, the office of the President being sued, Prof. Ing. Václav Klaus, ceased to exist due to expiration of his electoral term.

28. Furthermore it was necessary to take into consideration that amendments (administered by Constitutional Act No. 71/2012 Coll. whereby Constitutional Act No. 1/1993 Coll., the Constitution of the Czech Republic, is altered, as amended by subsequent constitutional acts and Act No. 275/2012 Coll. on Election of the President of the Republic and on Alteration to Some Acts) altered or amended, with effectiveness from 8 March 2013, also some provisions of the Constitution as well as the Act on the Constitutional Court, relevant for assessment of this case.

29. The Constitutional Court arrived at the conclusion that under the above-described factual and procedural situation, it was proper to discontinue the proceedings. In this, the Court applied the provisions of § 98 paragraphs 1, 2, 3 of the Act on the Constitutional Court in the wording effective until 7 March 2013, using the per analogiam application rule.

30. The Constitutional Court is aware of the fact that the amended provisions of § 98 paragraph 3 of the Act on the Constitutional Court, effective from 8 March 2013, state "The fact that the President resigns from office after the proceeding has been instituted or that his mandate lapses upon the expiration of his electoral term does not represent grounds for dismissal of the charge."

31. However, the Constitutional Court believes that the procedural provisions contained in § 98 paragraphs 1, 2, 3 of the Act on the Constitutional Court in the wording effective until 7 March 2013, are more favourable for the Charged Party than in the wording effective from 8 March 2013.

32. The new wording of the provisions of § 98 paragraph 3, effective from 8 March 2013, is less favourable for the Charged Party due to the fact that the same explicitly included in the list of reasons for which the proceedings cannot be discontinued (and to the contrary it is necessary to continue the proceedings) another reason, this being cessation of the office of the President upon expiration of their electoral term.

33. The instances of constitutional delict prosecuted were allegedly committed before 8 March 2013, that is during the period of time when the then valid legal arrangement did not contain any explicit arrangement on how to proceed in proceedings on a charge filed, when such proceedings were instituted but not completed, when the office of the President ceases upon expiration of the term for which the President was elected.

34. The absence of the explicit legal arrangement for the course of action taken by the Constitutional Court, under the circumstances of the office of the President ceasing by expiration of the electoral term after filing a constitutional charge, may be designated as a gap in the law which must be filled with interpretation per analogiam. In the law governing instances of delict, it is generally acknowledged that an analogy to the benefit of the accused

(analogia in bonam partem) is acceptable, this also in the area of procedural law. In the case under consideration, the Constitutional Court believes that the termination of the office of the President through expiration of the electoral term forms an analogical reason comparable with the explicitly specified reason leading to discontinuance of proceedings in § 98 paragraph 2 of the Act on the Constitutional Court.

35. The provisions of § 98 paragraphs 1 and 2 of the Act on the Constitutional Court in the wording effective to 8 March 2013 do not provide grounds for inferring any prohibition to discontinue proceedings possibly for reasons other than those which are specifically listed there (that is (1) withdrawing the charge by the Senate; (2) death of the prosecuted President).

36. Using the a contrario argument, it is possible to derive from the provisions of § 98 paragraph 3 of the Act on the Constitutional Court in the wording effective until 7 March 2013, that it is not possible to continue the proceedings on the constitutional charge for a reason other than the one herein specified (that is resignation from the Presidential office), after the person prosecuted no longer holds the office.

37. Also the opinions declared in legal science support the conclusion on the fact that the provisions of § 98 paragraph 3 of the Act on the Constitutional Court in the wording valid until 7 March 2013, containing the single reason eliminating discontinuance of proceedings on the constitutional complaint (resignation from the Presidential office after the commencement of proceedings), cannot be amended with other reasons (for example, the reason of expiration of the term of office) with the help of analogy or refinement of law. Commentary on the Act on the Constitutional Court, for example, reasons that such amendment with additional reasons "would decrease the protection of the fundamental rights of the head of the state, who is perceived as a person accused of constitutional delict, not a state body" (see Wagnerová, E. et al.: Act on the Constitutional Court. Commentary. Prague: ASPI - Wolters Kluwer, 2007, p. 506).

38. The opposite argument of the prosecutor is not convincing – inferring the acceptability of amending reasons for the continuance of proceedings on the constitutional charge above the framework of the explicit wording of § 98 paragraph 3 of the Act on the Constitutional Court from the explanatory report to Article 65 of the Constitution (which says that "it results from the nature of the matter that such a prosecution may only be applied to the President of the Republic..., however, nothing would prevent the proceedings before the Constitutional Court from taking place or continuing after the end of the term of office of the President, provided that the charge... was filed within the duration of the term of office"). A counterargument could be that the legislature included in the final wording of the provisions of § 98 paragraph 3 of the Act on the Constitutional Court (in the wording valid until 7 March 2013) explicitly merely a single reason preventing discontinuance of proceedings (that is resignation from the office); this represents grounds for a deliberation that the reasons supporting continuance of the proceedings were reduced by the legislature intentionally in order to prevent extensive expansion of such reasons.

39. If the new wording of the provisions of § 98 paragraph 3 of the Act on the Constitutional Court on the impossibility of discontinuing proceedings due to the fact that the Presidential office ceased to exist upon the expiration of the term of office of the President should be applied in this case, then constitutionally unacceptable true retroactivity to the detriment of the Constitutionally Charged Party would take place.

40. The Constitutional Court has not failed to see that the generally acknowledged legal principle defining time limits for effectiveness of procedural regulations consists of the rule that the new procedural law is principally applied also in the yet unfinished proceedings that had commenced prior to effectiveness of the new procedural law. However, this rule is not absolute. It is a completely standard legislative practice that the interim provisions contained in amendments make it possible to continually proceed with not yet completed proceedings according to the earlier procedural rules. Frequently, in the fields of procedural law on instances of delict any preceding procedural law takes priority over the later, if it is more favourable for the defendant. An example of such an arrangement is found in the provisions of § 463 paragraph 1 of the Criminal Procedure Code, which establish that the "conditions for allowing the rehearing of proceedings shall… be evaluated in accordance with such enactment which is more favourable for the defendant", this also in the case when the older procedural regulation, which governed the earlier proceedings, is no longer valid.

41. Constitutional-law delictual liability for high treason is linked with the exercise of the office of the President. This is evidenced also by the fact that procedural norms, relating to proceedings on the constitutional charge in the provisions of Article 65 paragraph 2 of the Constitution of the Czech Republic in the wording effective until 7 March 2013, and in § 96 to § 104 of the Act on the Constitutional Court, designate the person being charged always as "the President of the Republic". If then the law (generally) anticipated that such proceedings may be administered also against the President emeritus, the law would adapt also the terminology it uses.

42. As soon as the Presidential office ceases to exist (for any reason), its earlier holder (former President) principally loses eligibility to continue to be the party to the proceedings on instances of constitutional-law delict as the Charged Party. The option that proceedings on constitutional charge continue also after termination of the Presidential office is therefore generally excluded; exceptions allowing the possibility not to discontinue the proceedings after the termination of the exercise of the office must be explicitly determined by law. The legal arrangement effective until 7 March 2013 acknowledged, in § 98 paragraph 3 of the Act on the Constitutional Court, a single such exception for continuing such proceedings, that being resignation from the office of the President. In the case of termination of the office upon expiration of the period of time for which the President has been elected, no such exception existed so the same cannot be inferred through applying a new norm to the detriment of the Constitutionally Charged Party.

43. To support the opinion that the proceedings with the Constitutionally Charged Party, whose Presidential office ceased to exist upon expiration of the term of office, cannot continue, the provisions of § 104 of the Act on the Constitutional Court may also be used. The same declare that pronouncement of a legally binding verdict whereby a person is convicted brings about three sanctions, one of which being the loss of the Presidential office. These sanctions are always applied cumulatively; it is clear that after previous cessation of the office (upon expiration of the term of office), loss of the Presidential office cannot take place.

44. The needlessness to continue the proceedings with the Constitutionally Charged Party, whose office had already ceased to exist through expiration of the term of office, may be inferred also from the meaning (ratio legis) of the instrument of the constitutional charge. The constitutional framer was indubitably guided in particular by the need to establish a constitutional-law instrument that makes it possible to remove from the office of the President such a person who, through their extremely excessive and thus unconstitutional actions,

endangers or violates the very foundations of the state. Other constitutional possibilities of removing the office from the President do not exist as the President of the Republic is non-removable and is not responsible for the performance of their function (Article 54 paragraph 3 of the Constitution), and thus special constitutional-law delict of high treason and the procedural instrument of constitutional charge have been framed. These constitutional tools aim primarily at removing the President from their office so that they cannot further harm or jeopardise the interests of the state. Under the condition when the given person no longer holds their office after the expiration the term of office, continuance of proceedings on a constitutional charge loses its main purpose as the imposition of the anticipated primary constitutional sanction (degradation) is no longer available.

45. It is true that the current legal arrangement links such primary sanction (removal from office) also with accompanying cumulative sanctions (loss of eligibility to reacquire Presidential office, cessation of the claim to the presidential salary and other benefits following termination of office), but these are undoubtedly merely marginal and relatively minor objectives, and failure to attain them may, from the viewpoint of constitutional law, rather overlooked.

46. The opinion that termination of the office of the President upon expiration of the term of office should result in discontinuance of proceedings on a constitutional charge is held also by constitutional-law science. It was expressed, for example, by Prof. Jan Filip (see Filip, J.: K ústavní odpovědnosti a velezradě hlavy státu v ČR /On the constitutional responsibility and high treason of the head of the state in the Czech Republic. Časopis pro právní vědu a praxi /The Journal of Jurisprudence and Legal Practice/ No. 1/2010, p. 71) or Prof. Václav Pavlíček (see http://www.tyden.cz/rubriky/domaci/uspeje-zaloba-na-klause-ustavni-experti-se-neshodnou_263103.html).

VII.
Obiter dictum

47. Beyond the framework of what has already been said, the Constitutional Court deems it appropriate to comment on the requirement declared in the constitutional charge that the Constitutional Court makes use of these proceedings and in their verdict "clarifies for the future" the constitutional-law principles of functioning of the Presidential office and their relationships to other elements of the system of separation of powers. Such anticipations are, in discussions in the media, formulated in the form of a wish that the Constitutional Court "delineates the boundaries" for the powers of the President of the Republic (http://neviditelnypes.lidovky.cz/ustavni-soud-a-amnestie-0sz /p_cirkus.asp?c=A130305_202803_p_cirkus_nef).

48. However, within the scope of these proceedings, such a requirement cannot be satisfied by the Constitutional Court, as the Court would thus exceed the boundaries of its powers as determined in Article 87 of the Constitution. The interpretation of rights and obligations of the President of the Republic in the proceedings on a constitutional charge, should such need arise at all, could be delivered only in relationship to such acts which are in concreto seen as a constitutional delict of high treason, and this only in such a case that it would be possible to hear the constitutional charge in terms of merits. Such a condition was not fulfilled in this case.

49. The Constitutional Court does not possess the powers to provide generally, that is without any relation to a specific subject of the proceedings, any authoritative or even binding interpretation of the Constitution. Some foreign constitutional regulations grant such powers to their constitutional courts (for example Article 128 of the Constitution of the Slovak Republic – see Constitutional Act No. 460/1992 Coll.), but the Czech Constitution does not include such a possibility.

50. Besides, it may be added that amendment of Article 65 paragraph 2 of the Constitution of the Czech Republic, effected by Constitutional Act No. 71/2012 Coll., with effectiveness from 8 March 2013, has newly defined elements of constitutional delict by the President of the Republic, which now consists, in addition to high treason, of gross violation of the Constitution or other part of the constitutional order. In the current proceedings, there is no room for interpretation of such new provisions, the possible application of which comes into consideration in the future.

51. It is the duty of the constitutional drafter alone to formulate the wording of constitutional norms definitely and explicitly enough so that they are comprehensible to all addressees who consist not only of bodies of public power, but actually all citizens. A general requirement may be postulated that interpretation of the constitutional regulations does not raise, if possible, any doubts. The Senate of the Parliament of the Czech Republic alone may contribute to the attainment of this objective within the limits of its powers.

VIII.
Facit

52. Under the given factual and legal condition, the Constitutional Court cannot continue proceedings on the constitutional charge and pass a decision in terms of merits. Therefore, no other option remains than to discontinue the proceedings.

Note: Appeal against a decision of the Constitutional Court is not admissible.

In Brno on 27 March 2013

Dissenting opinion of Justice Stanislav Balík

I voted for discontinuance of the proceedings, but for completely different reasons.

The elements of the delict, which President Václav Klaus allegedly fulfilled, does not contain the words for which it would perhaps be possible to judge him:

“Donec eris felix, multos numerabis amicos, sed si tempora fuerint nubila, solus eris.”

Who are those who were harmed?

Those who used to welcome the President with bread and salt?

Those who expressed trust in him over the long term in opinion polls, counting to dozens of per cent?

Those who organised various events under the auspices of his name?

Those who queued to get his autograph in his books?

Lately, I have recalled a scene from Alexandre Dumas' The Three Musketeers: Twenty Years After. Let the passage on Charles I being escorted to the gallows be taken as part of this dissenting opinion.

In this case, jurisdiction belongs only to the judgment of history.

Dissenting opinion of Justice Ivana Janů

According to § 14 of Act No. 182/1993 Coll. on the Constitutional Court, in the wording of subsequent regulations (regarding the verdict and the reasoning)

The majority opinion concluded that the proceedings on the constitutional charge against the President of the Republic, if the same was filed pursuant to Article 65 of the Constitution in the wording effective until 7 March 2013, and if at the same time, in the interim period before the decision of the Constitutional Court, the election term of the President of the Republic expired (Article 55 of the Constitution), must be discontinued as such a charge can no longer be heard.

I have objections against the general concept of the majority opinion and details regarding its arguments. I have come to the conclusion that reasons for discontinuance of proceedings are not established and that the constitutional charge should have been heard in terms of its merits. This, however, does not in any case imply that I am convinced of the reasonableness of the constitutional charge filed.

I.
The majority opinion shows a deficit in terms of not interpreting Article 65 of the Constitution from the viewpoint of context of the entire constitutional order, but through the Act on the Constitutional Court (in the wording effective until 7 March 2013).

In my opinion, Article 65 paragraph 2, the second sentence of the Constitution, which says that "the only penalty that may be imposed is the loss of the Presidency and of further eligibility for the office" contains two different sanctions, these being 1) loss of the Presidential office; and 2) loss of eligibility to reacquire the same. When assessing the purpose of these "penalties", I do not see primarily their subjective function (against the perpetrator according to classic criminal law doctrine), but their function of protection of objective constitutionality in terms of the basic postulates on a democratic and law-based state. Primarily I do not ask myself a question whether there is a "need" (section 44) to punish the President being charged, that is the President in person, but whether it is necessary to provide protection to objective constitutionality (in the case of the instrument of high treason,

to the functionality of the supreme constitutional body) within the boundaries imposed on the Constitutional Court by the Constitution.

Even though I speak about a "penalty" or "sanction" and their purposes, I do not move at the level of classic criminal law doctrine. When I speak about a preventive function of a penalty, I do not mean prevention in relation to the "perpetrator" and their personal future actions, but prevention in relation to (future) proper functioning of the office of the President of the Republic.

I believe that each of the above-mentioned sanctions contained in Article 65 paragraph 2, the second sentence of the Constitution, has its own function of protecting objective constitutionality. Imposition of the sanction of loss of the Presidential office is to terminate the immediate dysfunction of the constitutional system (basically in accordance with clause 44 of the majority opinion). Imposition of the sanction of loss of eligibility to reacquire the Presidential office is to prevent constitutional collisions for the future.

Each of the above-mentioned sanctions individually has its own constitutional meaning. Article 65 paragraph 2, the second sentence of the Constitution, has then, for the Constitutional Court, such importance that it imposes on the same the obligation to provide protection to objective constitutionality using merely these two instruments. Only in such spirit is it necessary to interpret statutory provisions contained in the Act on the Constitutional Court. Majority opinion takes the opposite course when it interprets the provisions of the Constitution by way of the act.

In these systematic deliberations, specific and basically random circumstances of the given case are completely irrelevant: that a similar situation, due to the new legal arrangement, will occur no more in the future or that the prosecuted President would be prevented from running as a candidate for the third time by the provisions of Article 57 paragraph 2 of the Constitution.

II.
The provisions of § 98 of the Act on the Constitutional Court in the wording effective until 7 March 2013:

Dismissal of the Charge

(1) If prior to retiring for its final conference, the Senate delivers to the Court a resolution withdrawing the charge, the Court shall dismiss the charge.

(2) The Court shall also dismiss the charge in the event that the President dies after the proceeding is instituted. If the President's spouse or a relative in the direct line seeks the continuation of the proceeding within one month of the death, it shall be resumed.

(3) The fact that the President resigns from office after the proceeding has been instituted does not represent grounds for dismissal of the charge.

The provisions of § 98 paragraph 3 of the Act on the Constitutional Court in the wording effective from 8 March 2013:

(3) The fact that the President resigns from office after the proceeding has been instituted or that his mandate lapses upon the expiration of his electoral term does not represent grounds for dismissal of the charge.

As for the specific reasoning for the majority opinion, I object that it is a priori (improperly) based on the position that the legal arrangement effective until 7 March 2013 is "more favourable" for the President being prosecuted [introductory clauses of the actual argumentation 31-32], and this due to the fact that the former legal arrangement did not contain an explicit provision dealing with the cessation of the mandate after expiration of the term of office of the President. In my opinion, the very fact that the new wording of the Act [§ 98 paragraph 3 of the Act on the Constitutional Court] does contain such an explicit arrangement (i.e. cessation of the office is not a reason for discontinuing the proceedings), does not mean in any case that the same rule could not be applicable also under the former wording of the act. I believe that the a contrario argument contained in clause 36 of the majority opinion is inappropriate. The point is that it disregards the misleading structure of the complete provisions of § 98, when paragraphs 1 and 2 contain exhaustive enumeration of examples when the proceedings are discontinued (withdrawal of the charge and death of the President). Subsequently, paragraph 3, in a totally non-systematic way, declares that in the case of abdication, the proceedings shall not be discontinued. However, this "list" of one case when the proceedings are not discontinued must be construed merely as illustrative, since there is an indefinite number of possible procedural situations and factual situations when proceedings are not discontinued, and to list them in the text of the regulation is not feasible. A contrario argument (that is, briefly speaking, "if the act contains an explicit rule on continuing the proceedings in the case of abdication, it thus eliminates the possibility to continue the proceedings in the case of expiration of the election term") is, therefore, firstly applied to a situation when both interpretative options are legally and factually not mutually exclusive, to the contrary, they may rationally exist side by side, but in particular it is applied to an illustrative (non-systematic and, from the viewpoint of deliberations in part I of my dissenting opinion, also redundant) paragraph 3, and, for example, not to the previous paragraphs 1 and 2. The point is actually that by doing that we would arrive at a conclusion that when the act exhaustively lists two reasons for discontinuance of proceedings, it also eliminates other reasons (now termination of election term of the President). I infer the fact that this list is exhaustive simply from the nature of any judicial proceedings, when the duty of the court is to decide on the proposal filed, and, to the contrary, the court is not granted the option (beyond the scope of law) not to decide on the proposal [the concept of clause 42 is completely different].

This is where I see the reverse logic of the majority of the plenum, which leans towards the finding that the legal arrangement effective until 7 March 2013 does not "provide grounds for inferring any prohibition to discontinue proceedings possibly for reasons other than those which are specifically listed there"[clause 35]. The enumeration of all situations in which proceedings are not to be discontinued, however, cannot be required from the legislature. Therefore, if a gap in the law should be actually concerned [clause 34], it would be merely a gap in the law on the grounds of the absence of an explicit ban to discontinue the proceedings [in place of the provisions of § 98 paragraphs 1 and 2] if continuing the proceedings could obviously be obstructed by some non-neglectable constitutional value and the act would not reflect the same in its text. However, it is not possible to speak about a gap in the law on the grounds of absence of the ban to continue the proceedings [in place of § 98 paragraph 3], since, as stated above, there is an indefinite number of "gaps" in the law.

Furthermore it is necessary to emphasise that Article 65 paragraph 2, the second sentence of the Constitution in no way anticipates that both these sanctions would have to be imposed at the same time, that is "cumulatively", as is inferred merely from the text of the act (!) by the majority opinion [clause 43]. In my opinion, on the contrary, it is not possible to rule out that these sanctions will be imposed separately. That is, under specific circumstances upon cessation of the mandate of the President of the Republic, merely the sanction of loss of eligibility to reacquire the Presidential office will be imposed. This is indicated also by words "…The only penalty that may be imposed…" that is not that both sanctions must always be imposed cumulatively as a penalty upon committing high treason (this is not to say that the Constitutional Court may arbitrarily choose which of the sanctions they will impose).

Besides, not even at the level of interpretation of subconstitutional law, that is the Act on the Constitutional Court in the wording effective until 7 March 2013, the argument for the necessary cumulativeness of "three" sanctions [clause 43] is not valid, this upon application of § 98 paragraph 3, when after the abdication of the President, the penalty of loss of Presidential office also clearly cannot be imposed, and upon application of the provisions of § 98 paragraph 2, the second sentence, when even after death of the President, there is a possibility to continue the proceedings upon the request of a spouse or a relative in direct line. In such proceedings, it is clear that none of the two sanctions acknowledged by Article 65 paragraph 2, the second sentence of the Constitution, can be imposed. When the majority opinion includes also loss of the claim to the Presidential salary and other benefits pursuant to § 104 paragraph 2, the second sentence as one of the imposed sanctions, I object that such a penalty is not acknowledged by Article 65 paragraph 2, the second sentence of the Constitution. Loss of such claim is merely a statutory consequence of previous circumstances.

In this connection, I also do not agree with the hierarchisation of penalties being administered in the case of a decision on high treason, as the same was framed by clauses 44 and 45 of the majority opinion. The immediate loss of the Presidential office is not the "primary" sanction and the loss of eligibility to reacquire the same is not a "secondary" sanction (and these constitutional sanctions cannot be compared at all with truly insignificant loss of benefits). Each of the two sanctions above has its own constitutional justification and, in this sense, they are equivalent. The fact that the proceedings on high treason, even with factual impossibility to impose the "primary" penalty or even any foreseen penalty, is of importance ("need" pursuant to clause 44) for the current constitutional system, is supported in my opinion both by the former provisions of § 98 paragraph 2, the second sentence and § 98 paragraph 3 of the Act on the Constitutional Court (in both old and new wording). If proceedings without the possibility to impose the "primary" penalty do not have constitutional-law importance [clause 44], then there arises a question why such proceedings are actually regulated under § 98 paragraph 3 of the Act on the Constitutional Court (in both wordings considered).

Also the formalistic adherence to the text of the act in sections when the act speaks about the "President" and not about a former President, President emeritus or simply any ex-President [clause 41], seems to be unconvincing. In this, the majority of the plenum overestimates the legislative capacity of written law, even though the Constitutional Court alone in the past has repeatedly stated that the text of an act represents only a primary approximation to its contents. It was the legislature itself who, with the above provisions of § 98 paragraph 2, the second sentence and § 98 paragraph 3 of the Act on the Constitutional Court, clearly anticipated proceedings with an ex-President. The text of the Act on the Constitutional Court,

therefore, is not reliable support for the conclusion that the proceedings had to be discontinued.

I assert that not only the possibility to impose a penalty [pursuant to Article 65 paragraph 2], but also the actual verdict on the fact that the President committed high treason [§ 104 paragraph 1 the Act on the Constitutional Court], is of principal constitutional law importance, since the Constitutional Court through its verdict (interpretation of the constitutional order) objectively refines (specifies) the constitutional order. Such a verdict would influence the case law of the Constitutional Court for the future, but considerably also the constitutional practice. This conclusion has nothing in common with the alleged (possible) academism of the proposal now examined, or even with such proposal actually forming a purpose in itself; to this there is an objection in obiter dictum of the majority opinion. I agree with these (marginal) conclusions of the majority of the plenum in such sense that before the Constitutional Court there is no room for possible vexatious proposals for which the objective is merely to exhaust the intellectual capacity of the Constitutional Court or are motivated exclusively by political motives.

The majority opinion in no way reflects that fact that imposition of sanctions even "only" in the form of the loss of eligibility to acquire the Presidential office is at the same time a significant signal for society that no unlawful conduct, even in the case of the President of the Republic, shall go without response, which considerably strengthens the trust of citizens in the operation of democratic institutions.

III.
With respect to the facts stated above it is then redundant to argue with such elements of the majority opinion (even though not even those have been given my full support) which deal with the issues of the admissibility of false retroactivity in a criminal trial and the principle of application of time-preconditioned in bonam partem norms, since I infer that even the legal arrangement of the Act on the Constitutional Court in the wording effective until 7 March 2013 made it possible to continue proceedings after the end of the election term of the President of the Republic. In this, there is no conflict occurring between the old and the new legal norms of different contents.

By adopting the new wording of § 98 paragraph 3 of the Act on the Constitutional Court, which explicitly anticipates non-discontinuance of proceedings in the case of expiration of the election term of the President, the legislature then, in the context mentioned above, merely specified the legal arrangement and increased the legal certainty concerning its content, without thus indicating that exactly the opposite condition had been necessarily valid until then.

The deliberations above, aimed at preservation of the possibility to administer proceedings also after the expiration of the election term of the President, are then supported also by the explanatory report for Article 65 of the Constitution, which says that "the nature of the matter infers that such prosecution may be applied only against the President of the Republic…, but nothing prevents the proceedings before the Constitutional Court from taking place or continuing after the term of office of the President ends, when the charge… is filed during the term of office". The point of how the purpose of Article 65 of the Constitution (see section I of the dissenting opinion) was treated by the legislature in the text of the Act on the Constitutional Court is a different issue; the meaning and purpose of Article 65 of the Constitution cannot thus be changed or restricted [for the opposite see clause 38].

The impression from the majority opinion, being suggestive to some extent, when taken to practical consequences, ensures impunity of the President (now in the subjective sense, but still within the boundaries of Article 65 of the Constitution, but also the "non-protectability" of the objective office of the President), who has the possibility to set their intentional constitutional delict to the end of their election term. At the same time, the majority opinion gives to the Constitutional Court the possibility "not to decide in time", be it on the grounds of delays caused by the President being prosecuted or inactivity by the Constitutional Court alone. And finally, it gives the President an instrument to adroitly avoid responsibility for high treason, that is if they failed to discharge their constitutional duty to appoint Justices of the Constitutional Court, whereby the President would paralyse the decision-making activities of the Constitutional Court until the end of their mandate. I point out that now (under the new legal arrangement) these are merely hypothetical and academic factual deliberations, but ones resulting, in terms of legal aspects, from the majority opinion.

I believe that to allow this course of action described above was not the intention of the constitutional framer when they were defining Article 65 of the Constitution, or the legislature when they were defining the Act on the Constitutional Court. Therefore, I consider the conclusions of the majority of the plenum to be inappropriate.

IV.

The charge should have been heard in terms of merits as such process, in my opinion, has not been prevented in any way from the point of view of the constitutional law. Through their course of action, the Constitutional Court has left accusations, perceived by the public as grave ones, brought by the Senate against a high-ranking constitutional officer, as is the President, without factual evaluation; thus the Constitutional Court renounced the momentous role of an arbiter whose constitutional task is, besides others, to remove doubts held by the Constitutional Prosecutor, and clearly also some of the public, on the harmony of some acts of the President with the Constitution. For this reason, the Constitutional Court surely has not contributed to strengthening the trust of the public in a law-based state and the maturity of democracy.

In Brno on 27 March 2013