2008/03/13 - Pl. ÚS 25/06: Institute for Study of Totalitarian Regime

13-03-2008

HEADNOTES

1. The Constitutional Court must preface its arguments by stating that the mere establishment of the Institute for the Study of Totalitarian Regimes has no constitutional dimension. The actual decision to establish it is a political decision which was approved by a legitimate majority of Parliament, and the Constitutional Court is not the third chamber of that body, so as to allow it to intrude upon that process. After all, it is the legitimate right of the State to establish such an institution, even despite the fact that there are already other institutions in this country which concern themselves with similar issues. As scholarly research is conceptually tied up with the category of freedom (see Art. 15 para. 2 of the Charter of Fundamental Rights and Basic Freedoms), all statutorily-established scholarly institutions are constructed on the principle of self-administration, independence and separateness from state power.

2. The Constitutional Court gauged the proportionality between the right of access to public office in the sense of Art. 21 of the Charter of Fundamental Rights and Basic Freedoms, on the one hand, and the principle of the protection of democracy, on the other. It came to the conclusion that the public interest consisting in the protection of democracy is preponderant. It inferred that the belonging to the totalitarian regime and institutions defined in the Act on the part of persons listed in § 19 para. 1 of Act No. 181/2007 Sb., on the Institute for the Study of Totalitarian Regimes and on the Archive of Security Organs and on the Amendment of Certain Statutes, remains a relevant circumstance which can cast doubt upon the political loyalty and harm the credibility of institutions such as the Institute for the Study of Totalitarian Regimes and the Archive of Security Organs.

3. In a situation where the dominant intent of the legislature, within the framework of the means which it has at its disposal, is to attain the maximum independence for this institution, it is legitimate to lay down non-partisanship as a condition for membership in it. If we conceive of the Institute for the Study of Totalitarian Regimes as an institution, the mission of which, as is postulated in the Preamble to the Act, is the protection of democracy, then the above-mentioned restrictions on the fundamental rights for membership in the Institute's Council are legitimate.

4. What must be designated as unacceptable, in terms of the guarantee of the freedom of research, is the method for removal of the members of the Institute's Council by the Senate of the Parliament of the Czech Republic pursuant to § 7 para. 9, which creates an unrestricted scope for removal. The Constitutional Court has already previously held (see Judgment No. II. ÚS 53/06 of 12 September 2006, published at www.judikatura.cz) that Art. 21 para. 4 of the Charter of Fundamental Rights and Basic Freedoms does not relate solely to access to public office in the sense of entry into office, rather it comprises also the right to

the undisturbed performance of the office, including the right to protection from unlawful deprivation of the office, as participation in the administration of public affairs, which is the sense of Article 21 in its entirety, is not exhausted merely by gaining office, but logically it persists throughout the period an office is held.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Constitutional Court, in its Plenum composed of its Chief Justice, Pavel Rychetský, and Justices Stanislav Balík, František Duchon, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, on the petition of a group of Deputies proposing the annulment of Act No. 181/2007 Sb., on the Institute for the Study of Totalitarian Regimes and on the Archive of Security Organs and on the Amendment of Certain Statutes, alternatively of particular provisions thereof, as well as the annulment of individual provisions of certain other acts, with the participation of 1) the Assembly of Deputies of the Parliament of the Czech Republic, and 2) the Senate of the Parliament of the Czech Republic, as parties to the proceeding, decided as follows:

I. The words, „in due fashion or“, in § 7 para. 9 of Act No. 181/2007 Sb., on the Institute for the Study of Totalitarian Regimes and on the Archive of Security Organs and on the Amendment of Certain Statutes, are annulled on the day this judgment is published in the Collection of Laws.
II. In other respects the petition is rejected on the merits.

REASONING

I.
Summary of the Petition

1. In conformity with Art. 87 para. 1, lit. a) of Constitutional Act of the Czech National Council No. 1/1993 Sb., the Constitution of the Czech Republic (hereinafter "Constitution"), a group of Deputies proposed the annulment of Act No. 181/2007 Sb., on the Institute for the Study of Totalitarian Regimes and on the Archive of Security Organs and on the Amendment of Certain Statutes (hereinafter "the Act"), or individual provisions thereof, and the annulment of individual provisions of certain further acts. This Act established the Institute for the Study of Totalitarian Regimes (hereinafter "the Institute") and the Archive of Security Organs (hereinafter "the Archive"). In the introduction to their petition, the petitioners emphasized that the Act raises a great number of doubts as regards its conformity with the constitutional order of the Czech Republic (Art. 112 para. 1 of the Constitution), of which, according to

the Constitutional Court's view, ratified and promulgated international agreements on human rights and fundamental freedoms also form a part [Judgment No. Pl. ÚS 36/01 (The Collection of Judgments and Rulings of the Constitutional Court, Volume 26, Judgment No. 80, published as No. 403/2002 Sb.), and Judgment No. I. ÚS 752/02 (The Collection of Judgments and Rulings of the Constitutional Court, as No. 54, Vol. 30)]. They therefore propose the annulment of the Act in its entirety, alternatively the annulment of those of its provisions expressly designated in the prayer for relief.

2. In the petitioners' view, basic doubts are raised by the mere establishment of the Institute as a state institution whose operation is covered from a separate chapter of the state budget (§ 3 para. 3 of the Act). The Institute is an organizational component of the state (§ 3 para. 2 of the Act). At the same time, there are several other public institutions, directly or indirectly financed from the state budget, which perform, or might perform, research tasks in the field of history, and the financing of the Institute would work to their detriment (as can, according to the petitioners' view, be expected). First and foremost, they are the university-level schools which, in accordance with Act No. 111/1998 Sb., on University-Level Schools and on Amendments and Supplements to Further Acts (Act on University-Level Schools), as subsequently amended, are the centers of education and independent learning and which are recognized as playing a key role in the scholarly development of society (§ 1 of Act No. 111/1998 Sb.). Further, there is the Academy of Sciences of the Czech Republic (Act of the Czech National Council No. 283/1992 Sb., on the Academy of Sciences of the Czech Republic (ASCR), as subsequently amended), which is an organizational component of the Czech Republic and whose operation is financed from the Czech Republic's state budget (for budgetary purposes it even has the status of a central body of the Czech Republic). In its capacity as a public research institute, the Academy in turn established, among others, the Historical Institute of the ASCR, the Institute for Contemporary History of the ASCR, and the Institute of State and Law of the ASCR. The Military History Institute of Prague is a further institution concerning itself with history. The freedom of scholarly research is also guaranteed in Art. 15 para. 2 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter „Charter").

3. The petitioners see in the establishment of the Institute and the Archive the etatization of historical research on „the period of non-freedom" and the „era of Communist totalitarian power„ [§ 2, lit. a) and b) of the Act], and that creates the genuine danger that its output will be considered as „official". They refer to the fact that members of the Institute's Council (hereinafter „the Council"), its highest body, are appointed and removed by the Senate, one of the chambers of the Parliament of the Czech Republic, and they see in this an actual restriction on the constitutionally-guaranteed freedom of scholarly research. Even though the Act does not explicitly speak to the precedence and binding nature of the research findings made by the Institute, nonetheless they are in actual fact introduced by the Act. According to the petitioners, this is evidenced by, among other things, the privileged status of the Institute in light of the obligation imposed by law upon all state bodies, contributory organizations of the state, territorial self-governing bodies, contributory organizations of territorial self-governing units, and archives managed by them which are in possession of documents and archival material relating to the Institute's tasks from the period defined in the Act, to extend to the Institute all necessary cooperation, free of charge and without unnecessary delay (§ 5 para. 2 of the Act). No such similar

obligation is found in the case of any other of the mentioned research scholarship institutions.

4. The petitioners criticize the Act because the period which should be the subject of the Institute‘s research is defined solely by its temporal designation, as if that would be fully sufficient; apart from that, it makes use of terminology which does not have scholarly, rather ideological, meaning. Thus, for ex., the Preamble speaks of the „totalitarian and authoritarian regimes of the 20th Century“, without taking into consideration that, according to the customary doctrinal opinion, there is a more or less significant difference between them (See, e.g., Aron, R.: Democracy and Totalitarianism, Atlantis, Prague 1993; also Pavlíček, V. and Jirásková, V., in Pavlíček. V. et al.: Constitutional Law and Politics, Part I, General Politics, Linde, Prague 1998). As far as concerns the period from 1938 until 1945, § 2 lit. a) of the Act designated this period as the „period of non-freedom“, even though there is a fundamental difference between the still independent Republic and the subsequent Protectorate of Bohemia and Moravia as a part of the Greater German Reich. In the case of the period from 1948 until 1989, the Act (in contrast to its Preamble) does not distinguish an authoritarian regime from a totalitarian regime, rather it speaks explicitly and unambiguously of the era of „Communist totalitarian power“ [§ 2 lit. b)], without distinguishing between the individual stages of that era, and includes into this „era of Communist totalitarian power“ the period „preceding“ the temporal segment of 25 February 1948 until 29 December 1989, „in which occurred events relating to the preparations for the totalitarian seizure of power by the Communist Party of Czechoslovakia“. The delimitation of this period is utterly indeterminate, yet the Institute‘s tasks are bound up to it, as is in connection therewith, for ex., its authorization to process personal data (§ 5 para. 1). The petitioners further criticize the Act because the segment of Czechoslovak history from 25 February 1948 until 29 December 1989 is authoritatively designated as the „era of Communist totalitarian power“ and does not take into account that this era was variable in terms of the manner in which state power was exercised. According to the petitioners, the comprehensive assessment, and explicit designation, of the entire period, from 25 February 1948 until 29 December 1989, as the era of „Communist totalitarian power“, does not correspond to reality and conflicts with the directive which the Constitution places upon the Act, namely to investigate and evaluate this era impartially, whereas the Act a priori designates this era as the era of „totalitarian“ power.

5. The petitioners object that the Institute‘s competence is defined in § 4 in a not very clear or comprehensible manner. In the first part of the sentence in lit. a), the Institute is given the obligation „to investigate and impartially evaluate the period of non-freedom and the era of Communist totalitarian power“. In another portion of the sentence, however, it is in addition given the obligation to investigate „anti-democratic and criminal activities of state bodies“ and „criminal activities of the Communist Party of Czechoslovakia, as well as further organizations founded on its ideology“. Since this second portion of the sentence concerns the two mentioned periods, it is not very clear, as far as the period of non-freedom is concerned, to which state organs it refers: state organs of the still free „Second Republic“, bodies of the Protectorate of Bohemia and Moravia, or even the bodies of the Great German Reich. The petitioners further criticize this provision because it speaks of „criminal activities“, which they consider as inappropriate since, in legal terminology until 1950, this referred to criminality in the sense of the commission of a certain type of criminal offenses, which was explicitly

distinguished in criminal law, whereas after 1950 this distinction had already disappeared. Further § 4 lit. e) makes use of the expression, „Nazi crimes“, which cannot only not concern the entire „period of non-freedom“, but in and of itself is imprecise and inapposite, as it would make sense only in the case that it concerned not only the „crimes“ which bodies of the Great German Reich committed on the territory of the Protectorate [for ex. no mention is made of the NSDAP (translator‘s note: This is the abbreviation for Nationalsozialistische Deutsche Arbeiterpartei or National Socialist German Workers‘ Party) in litera a) and e)], but also the crimes committed by bodies of the Protectorate government and collaborating organizations and individuals. The petitioners consider the expression, „Nazi and Communist crimes“, to be ideologizing. According to them it is, by its nature, „journalistic“ and not juristic, so that it cannot fulfill the task which it evidently is meant have, that is, to define in a legal manner the Institute‘s competence (tasks). The same as was stated of litera a) applies to the term, „crime“, in litera e).

6. According to the petitioners, in constitutional law terms, doubts arise from the condition of reliability for the purposes of this Act as set down in its § 19 para. 1, lit. a), according to which persons who were members or candidates for membership in the Communist Party of Czechoslovakia or the Communist Party of Slovakia are unreliable. They raise the objection that the grounds for finding unreliability is the formal membership in these political parties, but no further consideration is given to the actual conduct of these persons, for ex., whether they committed acts conflicting with the general moral principles, or even acts that are legally criminal. In addition, according to § 10 of the Act, membership in the Council is a public office and, according to Art. 21 para. 4 of the Charter, citizens shall have access, on an equal basis, to any elective and other public office. In this connection they refer also to Art. 15 of the International Covenant on Civil and Political Rights. According to the petitioners, to designate unreliability for membership in the Institute’s Council on the basis of strictly formal attributes resulting from citizens’ one-time political conviction without consideration of their actual conduct and attitudes violates the above-mentioned fundamental right guaranteed by the Charter and violates the Czech Republic’s obligations arising from the International Covenant on Civil and Political Rights.

7. They object that § 7 para. 6 of the Act, according to which „membership in the Council is incompatible with membership in a political party or political movement“, is in conflict with the prohibition of discrimination in the sense of Art. 3 para. 1 of the Charter (political conviction) and thereby results in a violation of the right to take part in the administration of public affairs through holding public office (Art. 21 paras. 1 and 4 of the Charter). The obligations resulting from the European Convention for the Protection of Human Rights and Fundamental Freedoms (the freedom of thought and conscience under Art. 9) are also violated, as are those resulting from the International Covenant on Civil and Political Rights (the right to take part in the conduct of public affairs without unreasonable restrictions and without distinction based, among others, on political or other opinion – Art. 25; equality before the law and the prohibition of discrimination, for ex., on the grounds of political or other conviction – Art. 26). The restriction upon these rights is possible only to the extent which follows from Art. 44 of the Charter and relates to the offices, employments and activities exhaustively enumerated therein.

8. They further analyze § 5 para. 1 of the Act, according to which „[t]he Institute is authorized to process personal data to the extent necessary for the fulfillment of the Institute‘s tasks“, and § 13 para. 3 of the Act, which says that „[t]he Archive is authorized to process personal data to the extent necessary for the fulfillment of its tasks“. The Charter provides (Art. 10 para. 3) that everyone has the right to be protected from the unauthorized gathering, public revelation, or other misuse of his personal data. According to the petitioners, the "authorization" of the Institute and the Archive in the mentioned provisions of the Act is formulated so indefinitely as to result in a violation of the principles of legal certainty and the protection of citizens' trust in the law, which belong inseparably among the attributes of a law-based state. They deduce this conclusion from the fact that the Institute's tasks defined in § 4 of the Act as its competencies are formulated indefinitely, as for ex. its pivotal competence „to investigate and impartially evaluate the period of non-freedom and the era of the Communist totalitarian power [§ 4 lit. a)]. Even less definite is the term, „to the extent necessary“, which is extremely subjective and would enable the Institute even to make arbitrary interpretations, for ex., also in connection with the Institute‘s competencies pursuant to § 4 lit. f), („The Institute shall provide the public with the results of its activities, in particular it shall publish information . . . on acts and fates of individuals“). The petitioners have analogous reservations also to the Archive‘s competencies in the sense of § 13 para. 3 of the Act.

9. According to § 9 para. 1, lit. a) of the Act, the Institute‘s Council has the competence „to lay down the methods for the fulfillment of the Institute‘s tasks“. The petitioners object that this provision is indefinite. Its own scholarly investigation and impartial evaluation of the „period of non-freedom and the era of Communist totalitarian power“, which according to § 4 of the Act is the Institute‘s task, cannot be the task of the Council or its members, rather of the Institute‘s employees. They state that a „method“ is generally understood to mean a purposeful, objectively substantiated manner for investigating phenomena and attaining scholarly knowledge, a systematic approach which leads to the objective in the given field, etc. If then the Council (in essence a political body, as its members are elected and removed by the Senate) should lay down „methods“ for scholarly investigation and impartial evaluation, a genuine danger arises that the laying down of these „methods“ could in reality encroach upon the freedom of scholarly research, constitutionally guaranteed in Art. 15 para. 2 of the Charter. The petitioners further call into question the constitutionality of § 9 para. 1, lit. e) of the Act, according to which the Council should establish a scholarly council, as an expert advisory body to the Director of the Institute for the Institute‘s research activities, and appoint its members. The Act does not provide more details; nonetheless, from the fact that it should be an expert advisory body to the Director of the Institute, it is clear that this presupposes that the Director directs the Institute‘s research activities , whereas employees will be obliged, pursuant to their employment contracts, to perform their work personally and in accordance with their employer‘s instructions, as follows from § 38 para. 1 of the Labor Code. They consider as normatively empty § 9 para. 1, lit. h) of the Act, according to which the Council has the competence „to decide appeals against decisions of the Institute“. That is to say, the Act does not provide for the case that the Institute (as an organizational component of the state) would make an authoritative decision such that an „appeal“ against its decision, as a procedural remedial step, could come into consideration.

10. According to the petitioners, the rules on the status of the Archive of Security Units also raise fundamental doubts. The amendments to Act No. 499/2004 Sb., on Archival Science and the Records Service and on the Amendment of Certain Other Acts, effected by Part Three (§ 24) of the Act, modified as well the wording of § 42 para. 2 of Act No. 499/2004 Sb., such that the Archive of Security Units was placed as another public archive among the group of archives [§ 42 para. 2, lit. b) of the mentioned act]. The status and competence of the Archive are thus regulated partly in the general Act on Archival Science and the Records Service and partly by separate provisions of Act No. 181/2007 Sb. (in particular §§ 12 to 17). Certain serious organizational and procedural confusions result from these provisions. According to § 12 para. 2 of the Act, the Archive is an administrative office (Art. 79 para. 1 of the Constitution), thus a body within the executive power; however it is not directly managed by the Ministry of the Interior (as are the National Archive and the state provincial archives), rather by the Institute, which, however, in contrast to the Ministry of the Interior, does not have the status of an administrative office, and is designated simply as „an organizational component of the state". Thus, it is not a body within the executive power. Among other things, the Archive also „supervises the performance of records service at the Institute" [§ 13 para. 1, lit. c) of the Act], thus at an organizational component of the state which is directly managed, that is, which is subordinate. This competence of the Archive is explicitly stated in § 71 para. 1, lit. d) of Act No. 499/2004 Sb. According to § 71 para. 1 of this Act, it carries out this supervision in accordance with „a separate legal enactment", which is identified in footnote No. 27 as Czech National Council Act No. 552/1991 Sb., on State Supervision, even though, according to § 3 para. 2 of that statute, state supervision pursuant to Czech National Council Act No. 552/1991 Sb. is not considered as supervision carried out within the framework of a relationship of subordination and superiority. According to the petitioners, an absurd situation thus comes about in which a subordinate administrative office supervises the activities of the organizational component of the state superior to it and asserts authority in relation to that organizational component in accordance with to the given Act (including decision-making on any perspective objections by the Institute against inspection protocols and the decision-making on disciplinary fines against a natural persons who caused the Institute, as a person subject to supervision, to violate its duties under § 14 of the given Act). Although the Archive is subordinate to the Institute, it is the Ministry of Interior which monitors the Archive as to is observation of its obligations in the sector of archival science and the performance of records service [§ 71 para. 1, lit. a), point 2 of Act No. 499/2004 Sb., as amended by Act No. 181/2007 Sb.]. Further, the petitioners refer to the fact that, according to the general statute on archival science and the records service, it is the case that a request to inspect archival materials and to make excerpts or to obtain duplicates or copies of archival materials, can be refused by a procedure to which the Administrative Code does not apply; then the competent administrative office in the sector of archival science and the performance of records service (§ 38 para. 2, § 40 para. 3 of Act No. 499/2004 Sb.) decides on a researcher's non-conforming submission in a proceeding pursuant to the Administrative Code. However, when refusing on the grounds laid out in § 15 of Act No. 181/2007 Sb., „the Archive's Director decides appeals against a decision to refuse", where the decision on the refusal is evidently made by a leading employee of the Archive, without the Act having prescribed whether, and in which cases, it shall decide in the first or second instance in accordance with the Administrative Code (otherwise the Act in no way lays down the extent to which the Administrative Code is

to be applied for matters regulated in the given Act).

11. They also criticize, as having little normative definiteness, § 17 of the Act, which provides that on 1 January 2030, the Archive (of Security Components) will become a part of the National Archive. It must be deduced from § 17 of the Act that on 1 January 2030, the Archive of Security Components will cease to exist as an administrative agency and organizationally will „dissolve“ into the National Archive, an administrative agency (thus, the Archive will be merged with it). To the extent that the legislature authoritatively laid down that, as of 1 January 2030, the Archive of Security Components will become a part of the National Archive, at the same time it must lay down the rules for the consequences resulting therefrom (the changes in the competencies of the Institute and the National Archive, especially in terms of the legal relations of employees of the Archive, etc.). However, the legislative did not do so, so that § 17 of the Act is incomplete and indefinite and has unforeseeable legal consequences.

12. The petitioners consider as incomprehensible and in part unimplementable § 21 para. 1 of the Act, according to which the exercise of rights and obligations arising from employment relations of employees of the Czech Republic, assigned to work in the Ministry of Interior, the Ministry of Defense, including Military Intelligence, the Ministry of Justice, the Security Information Services, the Office for International Relations and Information, and the Police of the Czech Republic – Office of Documentation and Investigation of the Crimes of Communism, pass to the Archive on the first day of the seventh calendar month following the promulgation of this Act, if these employees are performing activities which, as of the day this Act enters into force, shall be carried out by the Archive and if they fulfill the conditions pursuant to § 18 of the Act. They refer, in particular, to the fact that members of the mentioned security corps are not in employment relations, but are in a public-law service relation with the Czech Republic, so that the mentioned provisions cannot apply to them. Apart from that, they consider the compulsory transfer of rights and obligations of employees of the Czech Republic from employment relations to be in conflict with Art. 26 para. 1 of the Charter, according to which everybody has the right to the free choice of his profession. In this connection they draw attention to a number of dissimilarities from the ordinary delimitation of administration bodies, especially to the fact that reliability and irreproachability, newly defined only in § 18 of the Act, constitute a condition of the transfer.

13. The petitioners refer to the fact that, in the conditions of a democratic law-based state, a statute must be definite, clear, transparent, comprehensible, unambiguous, non-contradictory, linguistically and stylistically flawless, as the Constitutional Court has indicated in a number of its judgments [for ex., its judgment published as No. 331/2005 Sb.]; that it is necessary that an individual legal enactment to be comprehensible and that foreseeable consequences follow from it [for ex., Judgment No. 106, Volume 19 of The Collection of Judgments and Rulings of the Constitutional Court]; that solely a statute whose consequences are clearly foreseeable fulfills the conditions placed upon the functioning of the democratic law-based state, conceived in the substantive sense [for ex., Judgment No. 29, Volume 3 of The Collection of Judgments and Rulings of the Constitutional Court]; that from the concept of the law-based state follows the principle that neither the legislature nor the executive may deal arbitrarily with the forms of law, that is, with the sources of law, rather they must conduct themselves in

accordance with the criteria set by the Constituent Assembly, as well as other criteria, above all transparency, accessibility, and clarity [Judgment No. 73, Volume 18 of The Collection of Judgments and Rulings of the Constitutional Court]. According to the petitioners, to the extent that a statute comes into conflict with these principles, then it comes into conflict with the principles of the democratic, law-based state (Art. 1 para. 1 of the Constitution).

14. On the basis of the above-made arguments, the petitioners thus propose
1) alternatively:
a) the annulment in its entirety of Act No. 181/2007 Sb., on the Institute for the Study of Totalitarian Regimes and on the Archive of Security Organs and on the Amendment of Certain Statutes, as a large number of its provisions are in conflict with the constitutional order and, as a whole, conflict with the requirements which are placed upon the content of statutes in a democratic, law-based state.
b) should the Constitutional Court not grant the petition under a/, then to annul the following provisions of Act. No. 181/2007 Sb.:
- the word, „totalitarian“, (in its various forms) in the title of the Act, in the title of Part One and of Part Two, and in § 1, § 2 lit. b) and c), § 4 lit. a), b), c) and f), § 13 para. 1, lit. d), § 13 para. 2, lit. a);
- the words, „Nazi and Communist crimes“, in § 4 lit. e);
- § 5 para. 2;
- § 7 para. 6, the final sentence;
- § 9 para. 1, lit. a);
- § 9 para. 1, lit. h);
- § 13 para. 1, lit. c);
- § 15, the final sentence;
- § 17;
- § 19 para. 1, lit. a);
- §21 para. 1.
2) the annulment of the word, „totalitarian“, (in its various forms) in the following provisions of the statutes cited below:
- in § 10 para. 3, the third sentence, of Act No. 140/1996 Sb., on Access to Files Compiled by the Former State Security Agency, as amended by Act No. 181/2007 Sb.;
- in § 37 para. 6, § 71 para. 1, lit. d) and in Appendix No. 2, point 1, lit. q) of Act No. 499/2004 Sb., on Archival Science and the Records Service and on the Amendment of Certain Other Acts, as amended by Act No. 181/2007 Sb.;
- in § 1 lit. f), in the title to Part Eight, and in §§ 27c to 27e of Act No. 236/1995 Sb., on Salary and Additional Perquisites connected with the Holding of Office by Representatives of State Power and Certain State Bodies, Judges, and Members of the European Parliament, as amended by Act No. 181/2007 Sb.;
- in § 3 para. 1, lit. b), point 8 of Act of the Czech National Council No. 589/1992 Sb., on Insurance Premiums for Social Security and Contributions to the State Employment Policy, as amended by Act No. 181/2007 Sb.;
- in § 5 lit. a), point 9 of Act No. 48/1997 Sb., on Public Health Insurance and on Amendments and Supplements to Certain Other Related Acts, as amended by Act No. 181/2007 Sb.;
- in § 5 para. 1, lit. i) of Act No. 155/1995 Sb., on Pension Insurance, as amended by Act No. 181/2007 Sb.;
- in § 5, lit. a), point 10 and in § 92 para. 2, lit. k) of Act No. 187/2006 Sb., on Sickness Insurance, as amended by Act No. 181/2007 Sb.:

- in § 36 lit. zb) of Act of the Czech National Council No. 582/1991 Sb., on the Organization and Implementation of Social Security, as amended by Act No. 181/2007 Sb.;
- in § 25 para. 1, lit. o) of Act No. 435/2004 Sb., on Employment;
- in § 124 para. 3 and § 303 para. 1, lit. b), point 15 of Act No. 262/2006 Sb., the Labor Code, as amended by Act. No. 181/2007 Sb.

II.
Summary of the Main Parts of the Statements by Parties to the Proceeding
[omitted]

III.
The Wording of the Contested Provisions

40. In view of the fact that the Act is being contested in its entirety, the wording of the statutory provisions which are alternatively contested in the prayer for relief will not be given.

IV.
Conditions for the Petitioners' Standing, Constitutional Conformity of the Legislative Process

41. The petition proposing the annulment of the Act, alternatively specific provisions thereof, was submitted by a group of 57 Deputies of the Parliament of the Czech Republic, thus in conformity with the conditions contained in § 64 para. 1, lit. b) of the Act on the Constitutional Court. It has thus been established that, in the instant case, the conditions for the petitioner's standing have been satisfied.

42. In conformity with § 68 para. 1 of the Act on the Constitutional Court, in proceedings on the review of a statute or of individual provisions thereof, the Constitutional Court is obliged to adjudge whether the contested legal enactment was adopted and issued in the constitutionally prescribed manner.

43. The Court ascertained the following from the content of the petition, the parties' statements, and from the web-sites of both chambers of the Parliament of the Czech Republic: The Senate of the Czech Parliament initiated the legislative process on the Act. In its first reading (7 November 2006), the Assembly of Deputies referred it to committee for consideration. Its consideration in committee resulted in a comprehensive proposed amendment, which the Assembly of Deputies adopted as the basis for its further action in the second reading (16 March 2007). The bill was then adopted in its third reading (2 May 2007) by a majority of 92 of the 118 Deputies present; 24 Deputies voted against the bill.

44. The submitted bill was voted on by the full Senate on 8 June 2007, after it had been considered in committee. A majority of 46 of the 50 Senators present approved the bill in the wording submitted to it by the Assembly of Deputies; 3 Senators voted against

the bill, and one abstained.

45. The President of the Republic signed the Act on 12 July 2007, as did the Chairman of the Assembly of Deputies and the Prime Minister of the Czech Republic, after which the Act was promulgated in Part 59 of the Collection of Laws as Number 181/2007 Sb.

46. The Constitutional Court affirms that the contested act was adopted and issued in the prescribed manner.

V.
The Public Hearing

47. In the course of the public hearing, held on 13 March 2008, the parties adhered to their original positions, as stated in the petition and statements respectively. On the issue of whether, in the petitioners‘ view, there existed some time period, between 25 February 1948 and 29 December 1989, in which the Communist Party of Czechoslovakia [translator’s note: the party‘s name in the Czech language is “Komunistická strana Československa“, hence the abbreviation “KSČ”, which is used throughout the remainder of the opinion] ceased to assert its leading role or in which it distanced itself from Marxist Leninist ideology, the Communist Manifesto or Lenin‘s treatise, State and Revolution, the representative of the petitioners referred to the fact that such a long period cannot be precisely characterized, rather it is necessary to scrutinize how that regime evolved and changed. On the issue as to whether after 1960 the leadership of the KSČ actively strived to repeal Art. 4 of the Constitution of 1960, the representative of the petitioners state that „if we wish to make a substantive assessment of the possibility for change within the Communist regime, then we cannot seriously pose such a question.“ In response to questions, the representative of the Senate state that membership in the NSDAP [translator‘s note: this is the German abbreviation of the name of the Nazi Party, “Nationalsozialistische Deutsche Arbeiterpartei“] or Vlajce was not defined in the Act because, „people who were active during the period of the occupation have already passed their professional zenith so that it certainly would not affect them“. He further state that in the case of applicants for a position from the ranks of members of the former Communist Party „it would necessarily be complicated to scrutinize the degree to which they have themselves come to terms with their own past“. In searching for the legal form of the Institute, they benefited from the Slovak experience.

VI.
Actual Review

VI.a. In Relation to Objections to the Act as a Whole

48. In the first place the Constitutional Court concerned itself with the petitioners‘ general objection, according to which basic doubts were aroused by the very establishment of the Institute as a state institution whose activities are financed in a separate chapter of the state budget, and the petitioners‘ reference to the fact that

other public institutions financed directly or indirectly from the state budget perform research assignments in the field of history. It sees in the existence of the Institute a danger of etatization of historical research concerning the statutorily-defined segment of history and calls into doubt the formulation by which this era is defined in the Act, as it preempts how this era should be evaluated, in consequence of which the constitutionally guaranteed freedom of scholarly research is restricted.

49. The Constitutional Court must preface its arguments by stating that the mere establishment of the Institute has no constitutional dimension. After all, it is the legitimate right of the State to establish such an institution, even despite the fact that there are already other institutions in this country which concern themselves with similar issues. The Court may not, as the petitioners urge, include in its deliberations the issue of the expedience of an institution established by law because such considerations fall within the field of political decision-making and, to the extent it bases its decision on such considerations, it would violate the principle of the separation of powers.

50. The objection relating to the freedom of scholarly research, as guaranteed by Art. 15 para. 2 of the Charter, is, however, of constitutional dimension. The two historical periods which are meant to be the subject of the Institute‘s research are defined in § 2 of the Act: they are the „period of non-freedom“, which is the period from 30 September 1938 until 4 May 1945, and the „era of Communist totalitarian power“ which is the segment of Czechoslovak history from 25 February 1948 until 29 December 1989, as well as the period which preceded the latter temporal segment and in which, in the words of the Act, „events occurred relating to the preparations for the totalitarian seizure of power by the Communist Party of Czechoslovakia“. In the petitioners‘ view, this definition already implicitly contains an historical evaluation.

51. The designation of certain historical segments by a name always represents to some degree a simplification, which however also contains within itself certain characteristics of the given era. For ex., it is quite commonplace to speak of the era of Habsburg Dominion or the era of the Hussite Wars. The mere designation of an historical segment by the name „the period of non-freedom“ or the „era of Communist totalitarian power“ cannot, without more, imply restrictions on the scholarly research relating to these eras, as such names merely delimit the temporal segment of history which should be the subject of inquiry.

52. The petitioners criticize the Act for the use of terminology which has not only an academic, but also an ideological, significance; in particular, the Preamble speaks of „the totalitarian and authoritarian regimes of the 20th Century“. They object to the fact that the phrase, „the period of non-freedom“, designates the entire period from 1938 until 1945, although in their view there was a fundamental difference between the still independent Republic and the later Protectorate of Bohemia and Moravia, and that the period from 25 February 1948 until 29 December 1989 is designated as the „era of Communist totalitarian power“, without it being taken into account that the manner in which state power was exercised during this period varied.

53. The fundamental defect in the petitioners‘ arguments consists in the fact that it is they who are imputing to the text of the Act a signification which, in actuality, it does not have. The mentioned provisions do not constitute „comprehensive evaluations“ of

historical periods delimited in the Act, rather they are only their names. The intent of the Act is to form an institution which, once it is formed, should itself be engaged in the comprehensive evaluation of those periods, moreover under the conditions which are formulated in § 4 of the Act, which explicitly state that it should be done impartially. It is not the ambition of the Act, nor can it be, to make a scholarly treatise on a given period. Its objective is to create a state-financed institution which should concern itself with this problem, whereas the reasons for it to do so are expressed in the Act's preamble with the words: „The knowledge of historical sources and further evidence concerning the given regimes, as well as the events leading to them, making possible a better grasp of the consequences of the systematic destruction of the traditional values of European civilization, the deliberate violation of human rights and freedoms, the moral and economic bankruptcy carried out by means of judicial crimes and terror against those holding differing opinions, the replacement of a functioning market economy with a command system, the destruction of the traditional principles of ownership rights, the abuse of upbringing, education, science and culture for political and ideological purposes, and by the heedless destruction of the environment." That these consequences came to pass during the given historical periods is an objectively ascertained fact having no ideologically-loaded tincture.

54. The petitioners' objections aiming at the annulment of the Act in its entirety express their apprehension that such a nascent institution will be misused for a political battle. On the one hand, such considerations are legitimate insofar as each institution can be misused for purposes other then the ones for which it was established. In fact, the era which is meant to be the subject of the Institute's research was strewn with cases of such abuse, among other things. On the other hand, however, the possibility for such abuse depends on the conditions under which the institute must operate. If the conditions are those of a functioning democracy, then such abuse cannot occur. The petitioners' concerns in this respect are, in their essence, the expression of their mistrust in democracy, although as Deputies they partake, to a significant degree, in forming the outlines, and in the exercise, of democracy. It is thus up to them to prevent any prospective attempts at misuse of the Institute. The actual decision to establish it is, however, a political decision which was approved by a legitimate majority of Parliament, and the Constitutional Court is not the third chamber of that body, so as to allow it to intrude upon that process.

VI.b. In Relation to the Objections to Particular Provisions

55. The petitioners have called into question the constitutionality of specific provisions of the Act, or parts thereof. Above all they object to the provisions' conflict with the principles of the democratic, law-based state, enshrined in Art. 1 para. 1 of the Constitution of the Czech Republic, as well as their incomprehensibility, and the lack of predictability of interpretation resulting therefrom. They then propose the annulment of the phrase, "Nazi and Communist crimes", which is employed in § 4 lit. e) of the Act. In their view it is an ideologically-loaded phrase which, by its very nature, is journalistic and not legal. They call to mind the fact that, in legal terminology until 1950, this phrase defined a type of criminal activity, in consequence of which it is not clear whether, for the period up until that date, the phrase refers to this type of criminal activity or merely to the moral aspect of this activity. This provision does not, therefore, fulfill the task which it should perform, namely to define the Institute's

competences in a legal manner. It also considers the term, "totalitarian", as being ideologically-loaded and therefore proposes its annulment in all the various ways it is used – in the title to the Act, in the title of Part One, and in the title of Chapter Two, as well as in § 1, § 2 lit. b) and c), § 4 lit. a), b), c) and f), § 13 para. 1, lit. d), § 13 para. 2, lit. a), and further in all acts listed in point 2 of the relief requested in the petition (see point 14).

56. In relation to an analogous objection, the Constitutional Court adopted a position in its Judgment No. Pl. ÚS 19/93, published as No. 14/1994 Sb., in which it decided on the petition proposing the annulment of Act No. 198/1993 Sb., on the Lawlessness of the Communist Regime and on Resistance to It. In that case it stated the following: „The constitutional foundation of a democratic state does not deny the Parliament the right to express its will, as well as its moral and political viewpoint, by means which it considers suitable and reasonable within the confines of general legal principles – and possibly in the form of a statute, if it considers it suitable and expedient to stress its significance in the society and the scope of its declaration in the legal form of a statute. Such an example was the statute issued under the First Republic which stated that T. G. Masaryk deserves credit for the building of the state." It emphasized that the Parliament did not thereby formulate a new definition of the material elements of a criminal offense. Nor may anything of the sort be deduced from the wording of the Act presently under adjudication. Moreover, Article 40 para. 6 of the Charter (according to which the criminality of an act shall be considered, and penalties shall be imposed, in accordance with the law in effect at the time the act was committed) applies as a general norm for the assessment of the criminality of any act whatsoever. It can thus be concluded that the act under adjudication constitutes the Parliament's moral and political-legal proclamations, which cannot be criticized due to the fact that it did not make use of common legal terminology.

57. Further the constitutionality of § 5 para. 1 of the Act is called into doubt in point F of the petition; however, the petition does not propose the annulment of this provision (it is only proposed that § 5 para. 2 of the Act be annulled). The Constitutional Court is thus in no way obliged to give its substantive view on the reservations directed against § 5 para. 1 of the Act. Beyond the stated confines, however, it can note that, even if this provision of the Act had been included in the relief requested in the petition, that would not have resulted in its derogation. The designated provision is merely to supplement the general regulation on the protection of personal data contained in the Act itself. The objection of "brevity" does not have any constitutional foundation in the least.

58. The petition further proposes the annulment of § 5 para. 2 of the Act, which places a duty upon all state bodies, organizational units of the state, contributory organizations of the state, territorial self-governing bodies, contributory organizations of territorial self-governing units, and archives managed by them, to extend, free of charge, all necessary cooperation and assistance to the Institute, as far as concerns documents of the Archive relating to their duties from the period defined in the Act. The petitioners emphasize that such an obligation cannot be found in the case of any other scholarly institute concerned with historical research, so that they find in this provision a confirmation of the Institute's privileged status, which increases the risk that the results of its research will be considered as official.

59. In the first place, it follows from the mentioned provisions that this cooperation and assistance concerns solely the submission of requested documents, and the Institute is authorized ex lege to acquire, at its own expense, a copy thereof. Such an obligation does not go beyond the conditions of ordinary cooperation among state institutions and territorial autonomous regions. No infringement of a constitutionally-guaranteed right can be found in this obligation. Nor does it give grounds for the petitioners' conclusion that the freedom of scholarly research is threatened thereby. This provision does not establish for the Institute a monopoly on the study and analysis of historical documents from the period at issue. These documents will also remain accessible to other researchers dealing with the history of this period, and the Institute's research results will have to face comparison with the results of their work. This provision does not establish the Institute's competence, rather the conditions for cooperation with institutions listed in the cited statutory provision when gathering archival materials having some relation to the periods which are the subject of the Institute's research. Of course, that does not mean all materials deposited in the archives of the listed institutions, rather only those which are already of a merely historical nature.

60. The petitioners further propose the annulment of § 7 para. 6 of the Act, according to which membership in the Institute's Council is incompatible with membership in a political party or political movement. They refer to the fact that, according to Art. 20 para. 2 of the Charter, each citizen has the right to associate in political parties and movements and that restrictions upon this right are permitted only in connection with the holding of certain offices, or the performance of certain jobs or activities, exhaustively enumerated in Art. 44 of the Charter. According to them, the Institute's Council bears no relation to any such cases, nor with any of the cases for which the Charter permits a restriction of this fundamental right. They draw from this the conclusion that the contested provision results in a violation of the prohibition of discrimination (Art. 3 para. 1 of the Charter) and a violation of the right to take part in the administration of public affairs through holding public office (Art. 21 para. 1 and 4 Charter).

61. In order to assess these reservations, it is necessary, in the first place, to assess the objective which is pursued by the establishment of the Institute. It follows primarily from the Preamble to the Act, in which the Parliament of the Czech Republic declares that it is establishing the Institute with awareness of its obligation to come to terms with the consequences of the totalitarian and authoritarian regimes of the 20th Century. According to § 3 para. 2 of the Act, the Institute is an organizational component of the State, whose activities can be intervened into solely on the basis of a statute, and according to paragraph 3 it is an accounting unit and its operation is covered from a separate chapter of the state budget. It is thus a state organization endowed by law with a large measure of independence, which is further enabled also through its independent financing from a separate chapter in the state budget. As follows from § 9 para. 1 of the Act, the Institute's Council has a basic influence on the functioning of this institution. In a situation where the dominant intent of the legislature, within the framework of the means which it has at its disposal, is to attain the maximum independence for this institution, it is entirely legitimate to lay down non-partisanship as a condition for membership in it. The subject of the Institute's research will be a period which continues to be politically sensitive, and its findings may affect various political parties, including those which are in the Parliament. In its Judgment Pl. ÚS 9/01, published as No. 35/2002 Sb., the Constitutional Court formulated – even though in

a rather different context – the conclusion that a democratic state, and not only in a transitional period after the fall of totalitarianism, can tie an individual's entry into state administration and public services, as well as their continuance therein, to meeting certain prerequisites. This conclusion is significant for the matter under adjudication in the sense that the Court recognized the setting of certain limits on the exercise of fundamental rights, namely in cases where the protection of democracy is concerned. If we conceive of the Institute as an institution, the mission of which, as is postulated in the Preamble, is the protection of democracy, then the above-mentioned restrictions on the fundamental rights for membership in the Council are legitimate.

62. The petitioners further propose the annulment of § 9 para. 1, lit. a) and lit. h) of the Act, which provides that the Council has competence "to lay down the methods for the fulfillment of the Institute's tasks" and "to decide appeals against the Institute's decisions". It sees in the Council's power to lay down the methods for the fulfillment of the Institute's tasks a genuine danger of encroachment upon the freedom of scholarly research.

63. It can be said in relation thereto that there is always the risk of a statutory provision being abused. In its decision-making, through which it will fill in the content of its competences, the Council cannot decide outside of the constitutional framework, which, among other things, obliges it to respect the fundamental freedom of scholarly research found in Art. 15 para. 2 of the Charter. The Council can exercise its powers solely within the confines of this constitutional directive.

64. As far as concerns the Council's decision-making on appeals against the Institute's decisions, the petitioners consider this provision to be normatively empty, as the Act does not provide for any instances where the Institute would make authoritative decisions such that an appeal against its decision, as a procedural remedy, would be a genuine possibility

65. In relation thereto, the Constitutional Court observes that the referential criterion for its decision on the annulment of a statute or a part thereof is conflict with the Constitution. The circumstance that a statutory provision is normatively empty logically cannot be in conflict with anything, thus not even with the Constitution. There is no constitutional foundation for proposing the annulment of the above-mentioned provisions. Moreover, the Act establishes the competence of the Council as an appellate instance; the Council shall decide on appeals relating to the refusal to provide information pursuant to Act No. 106/1999 Sb. The Constitutional Court can also conceive of an interpretation according to which the Council should also decide in conformity with § 9 para. 1, lit. h) in conjunction with § 12 para. 2 of the Act, for ex., in matters under § 13 para. 1, lit. f), g), and h) of the Act. Naturally, the Constitutional Court is not called upon to adopt such interpretive conclusions without linkage to the Constitution. The way in which this problem is resolved will depend on ordinary court practice.

66. It is further proposed to annul § 13 para. 1, lit. c), which lays down the competence of the Archive to oversee the performance of the records service within the Institute. In the petitioners' view a curious situation results thereby, where a subordinate component of a body oversees its superior. This situation results from the existing statutory arrangement on archival science and records services. According to it, the Ministry of

Interior directs the National Archive, and the National Archive oversees the performance of the records services within the Ministry of Interior.

67. According to the petitioners, this is one of the provisions which, due to its lack of clarity, contradictory nature, and lack of foreseeability, comes into conflict with the principles of the democratic, law-based state. However, these concerns more or less relativize the analogous existing rules of the Act on Archival Science and the Records Service, according to which the Ministry of Interior manages the National Archive and the National Archive, a subordinate body, supervises the performance of records services within the Ministry of Interior, the body managing it. That legal arrangement and the administrative relations springing from it has already been in effect for several years, and the Constitutional Court is not aware that it has in practice caused complications in the sense of its comprehensibility, certainty, or foreseeability. In essence the petitioners are calling into doubt the conception of subordination in the given case. The specific rules on the relations of superiority and subordination, which make up one of the principles of the organization of public administration, are dependent upon the discretion of the legislature. It is up to it how it organizes individual subjects into vertical subordination, provided of course that it does not violate the basic constitutional principles, such as for ex. the principle of the separation of powers. Nothing of the kind was ascertained in this case. The Constitutional Court does not consider as absurd, all the less so from the constitutional law perspective, a legal framework in which is delegated to a body carrying out a certain specialized public-law agenda the supervision of the performance of that agenda by a subject which directs and manages that body in the case of its other activities. The Constitutional Court considers the case of police to be a very eloquent example – although they are subordinate to the Police President, they supervise him as regards whether he observes the rules of safety and the continuousness of highway traffic; thus it is also a subordinate body which monitor a body superior to it. Finally the Constitutional Court has doubts as to whether it is at all possible, in connection with the supervision of the performance of records services, to speak of a relation of superior and subordinate. It is led to this doubt by the content of § 71 para. 1 of the Act on Archival Science, according to which the supervision of the observation of duties in the field of archival science and the performance of records services are performed in according with a special legal act. That act is Act No. 552/1991 Sb., on State Supervision, as subsequently amended. However, according to § 3 para. 2 of that act, monitoring performed within the context of relations of superior and subordinate are not deemed to be state supervision in the sense of that act. It follows therefrom that Act No. 552/1991 Sb. exempts the supervision of the performance of records services from the regime of the relations of superior and subordinate. Thus the essence of the petitioners' objection does not correspond to the reality of legal regulation.

68. Insofar as the petition further proposes the annulment of the final sentence of § 15 of the Act, according to which the Director of the Archive shall decide appeals against decisions revoking the right to examine the documents of the Archive, there are no grounds to do so. It is a functional provisions governing the arrangements for examining specific [in relation to § 13 para. 1 lit. g) of the Act] categories of documents of the Archive, that is, those for which the level of classification has been cancelled. The Constitutional Court has found no defect of a constitutional character in the adopted legal scheme; otherwise the petitioners have not cited any specific reservations.

69. According to § 17, the Archive will become, as of 1 January 2030, a part of the National Archive. The petitioners have proposed the annulment of this provision as, in their view, it is incomplete and uncertain, and its consequences cannot be foreseen. Namely, it is missing rules governing the consequences of merging the Archive with the National Archive. In their view, such statutory provisions are in conflict with the principle of the democratic, law-based state on which, according to Art. 1 para. 1 of the Constitution, the Czech Republic is founded.

70. According to the Assembly of Deputies' statement, this provisions is of a solely declaratory nature and expresses the will of the legislature to merge the two archives by the given date. It was added to the Act when the comprehensive proposed amendment was being drafted and was the outcome of a discussion with the professional archivist community. While the formulation of this provision does not correspond to the intention merely to declare a merger, in the absence of detailed rules of the conditions for merging, it cannot be interpreted in any other way. If it can be interpreted in this way, then the objection, that it is an incomplete and uncertain provisions the consequences of which cannot be foreseen, falls out.

71. The petition also proposes the annulment of § 19 para. 1, lit. a), which lays down one of the criteria of reliability for election as a member of the Institute's Council, as well as for appointment as Director of the Institute, as Director of the Archive and as principal employees of the Institute and Archive working directly under the supervision of the director of either the Institute or the Archive. According to § 19 para. 1, lit. a), persons are considered reliable, for the purposes of this Act, if, in the period from 25 February 1948 until 15 February 1990, they were neither members of, nor candidates for membership in, the Communist Party of Czechoslovakia or the Communist Party of Slovakia. Other employees of the Institute and Archive must fulfill the prerequisites of Act No. 451/1991 Sb., which sets down some additional preconditions for holding certain offices in governmental bodies and organizations of the Czech and Slovak Federal Republic, the Czech Republic and the Slovak Republic, as subsequently amended (the "Lustration Act"). The petitioners object that the grounds for determining unreliability are formal membership in the given political parties, which grounds in no way take into consideration these persons' actual conduct. They further emphasize that membership in the Council is a public office (§ 10 of the Act) and that, under Art. 21 para. 4 of the Charter, each citizen has the right and opportunity to participate in the conduct of public affairs.

72. To begin with, the Constitutional Court must at this juncture once again call to mind that, in its Judgment No. Pl. ÚS 9/01, it concluded, also with consideration of the jurisprudence of the European Court for Human Rights, that it is a legitimate aim of the legislation of each democratic state, in whichever phase of its development, to promote the idea of "a democracy capable of defending itself" . On the basis thereof, it then reached the conclusion that a democratic state can tie an individual's entry into state administration and public service to meeting certain prerequisites. But in the cited judgment the Constitutional Court also unambiguously took a position to the effect that "an individual's attitudes to the democratic establishment are determined primarily by his actual actions." In this connection, it calls to mind Act No. 198/1993 Sb. on the Lawlessness of the Communist Regime and Resistance to It and to its judgment concerning this act published as No. 14/1994 Sb. The cited act enumerates crimes and other comparable events which occurred in the territory of the present-day Czech

Republic during 1948-1989 and, in the operative part of the text, assigns full joint-responsibility for them to those "who supported the communist regime as officials, organizers or agitators in the political as well as in the ideological areas." In the Preamble it states the special responsibility of the pre-November Communist Party, including its leadership and members. Thus, it is evident that an individual's close ties to the pre-November regime and its repressive components is a circumstance capable of having an adverse effect on the degree of trust accorded a public office which that individual holds in a democratic state, as the Communist regime was identified by the Parliament of the Czech democratic state as "criminal, illegitimate, and abominable." Even though this statute in its Preamble refers to the responsibility of members of the pre-November KSČ, in the normative part of the statute speaks about the threat for democracy posed by the „an individual's close ties to the pre-November regime and its repressive components"

73. The Constitutional Court observes that the cited Judgment No Pl. ÚS 9/01, the conclusions of which it now affirms, acknowledges the possibility to tie the access of the individual to state administration and public service to the satisfaction of certain prerequisites. It is the role of the legislature to lay down the prerequisites in a manner corresponding to the objective for which a particular office is established. It is not out of the question that, in certain specific conditions, it prescribe dissimilar criteria for different offices, albeit ones that are quite similar to each other, while preserving the elements they share in common. In this regard, various models can be found, for ex., a judge in the context of the administrative judiciary when reviewing the disciplinary decision against an attorney is not obliged to be insured against liability for damage as an attorney-member of the disciplinary senate is; in contrast to an attorney-member of the disciplinary senate, a judge of the Supreme Administrative Court cannot at the same time be an arbitrator, etc. In laying down the prerequisites, the legislature must always see to it that, in the relevant field, the due and constitutionally-conforming operation of state service or public service is guaranteed. The Constitutional Court is not entitled to direct the legislature to unify the prerequisites for the holding of various offices that are close to each other, for ex., by unifying the age limits for judges and attorneys-members of disciplinary senates or the education requirements of judges and representatives of the Public Defender of Rights. Thus, the resolution of the issue as to whether the stipulated criteria are suitable is also in principle already assigned to the will of the legislature. It cannot be overlooked in the matter under adjudication that the Institute and the Archive are institutions whose task it is to process historical sources and materials about a period which stands at the very "border of history", and, with the maximum degree of objectivity, to provide information about this period, with the aim of scrutinizing, learning about and assessing the practices of the totalitarian regime so that in the future it would be possible to recognize in time the characteristics of a totalitarian regime and, within the framework of the defense of democracy, prevent a totalitarian regime from being formed. Just as with other forms of close ties to the totalitarian regime enumerated in § 19 para. 1 of the Act, the Act does not lay down the issue of membership in the Communist Party in the period from 25 February 1948 until 15 February 1990 as a ground for a general finding of unreliability, as the wording of § 19 para. 1 merely negatively defines reliability for the purposes of the given Act. It is thus quite obvious that this provision does not disqualify or vilify, nor should it disqualify or vilify, persons who are not eligible in the sense of § 19 para. 1 of the Act, in any other sphere of activity, including the possibility of access to other public offices. The Constitutional Court is of the view that, in terms of content, this is more a form of

bias sui generis than of reliability or unreliability as viewed solely from the perspective of linguistic interpretation. The Constitutional Court then gauged the proportionality between the right of access to public office in the sense of Art. 21 of the Charter, on the one hand, and the principle of the protection of democracy, on the other. It came to the conclusion that the public interest consisting in the protection of democracy is preponderant. It inferred that the belonging to the totalitarian regime and institutions defined in the Act on the part of persons listed in § 19 para. 1 of the Act remains a relevant circumstance which can cast doubt upon the political loyalty and harm the credibility of institutions such as the Institute and Archive. An analogy of sorts can be found in the institute of the bias of judges (even here evidence is marshaled – archival materials, evidence is evaluated – the ascertained facts are analyzed, and a decision is made – substantiated with findings made from the heuristics of obtained information). Just as from time immemorial a person may not act as a judge in her own case, a person who is active in the field of historiography (and especially in positions which determine and create the conditions for the activities of the Institute and Archive, which have the statutorily-defined status as an impartial and objective institution) could himself, and figuratively with him the entire institution as well, be impugned due to his ties to the regime about which the Institute and Archive is meant to conduct research. Otherwise, a person who belonged to the regime appears to be a personal observer or a chronicler, rather than an historian. Moreover, the Constitutional Court took into account, in the given case, the fact that subject of such research is a regime, which by its propaganda and ideology, with the aid of censorship and other undemocratic methods under the leadership of the KSČ [Art. 4 of the Constitution of the Czechoslovak Socialist Republic (Constitutional Act No. 100/1960 Sb., as subsequently amended)], intentionally and artificially created its own image and generated documents which were meant to become historical sources, in such a manner that later generations would have an image of this regime that is fictitious, for its glorification and to conceal its totalitarian nature. If someone had been, for ex., a member of, or a candidate for membership in, the KSČ or the KSS, even if only briefly, then in relation to that person there are „grounds to doubt his impartiality“ and, precisely due to the lack of historical analysis of the given regime, evidence which would be adduced for and against this doubt, could for the moment only be relativized. The Constitutional Court is aware of the idea of American philosopher, George Santayana, that „those who cannot remember the past are condemned to repeat it.“ In the Constitutional Court‘s view, doubts about the Institute’s and the Archive’s loyalty would call into question their activities alone due the fact that they would not appear effective or rapid enough, sufficiently financed, or amply ably managed. In gauging the intensity of the interest in the protection of democracy and the interest in knowledge of the past against the right of access to a very narrowly-defined public office, which is an option for a decreasing group of persons, the Constitutional Court has come to the conclusion that the public interest in the protection of democracy is at this moment, that is, at the time of its decision, more intensive. Last but not least, one cannot overlook the fact that the contested § 19 of the Act does not concern researchers working in the Institute, only members of the Council and principal employees in the sense of § 18 of the Act. The Constitutional Court took into account the fact that the freedom of research is fully guaranteed for researchers in the Institute and that even those who would not, on grounds of the impediments laid down in § 19 of the Act, succeed as an applicant for one of the statutorily-defined group of offices, do have the opportunity to devote themselves to the given themes as internal or external researchers.

74. The cited interpretation can be concluded by the assertion that § 19 para. 1 lit. a) of the Act is not in conflict with the right guaranteed in Art. 21 para. 4 in conjunction with Art. 4 para. 3 of the Charter.

75. In the case of § 21 para. 1 of the Act, which resolves issues of the exercise of rights and performance of duties resulting from employment relations of employees of the Czech Republic affected by the creation of the Archive, the petitioners have called into question its constitutionality due to it incomprehensibility and partial unenforceability. After all, the provision speaks solely of employment relations, whereas the object of the merger are archives where service is performed by members of the armed forces, who are in service relations. In relation to state employees, the petitioners then express their doubts as to whether the passage, ex lege and without their consent, of rights and obligations arising from employment relations conforms with Art. 26 para. 1 of the Charter. They refer to the fact that the passage should occur from a number of diverse offices to an entirely different office, which is organizationally classified under the system of state administration entirely different from for ex. a ministry, so that an employee, for ex., from a ministry could justifiably view that as demeaning. Moreover, such passage ex lege occurs only if the conditions of reliability and irreproachability, as well as the conditions laid down in Act No. 451/1991 Sb., are met.

76. The Constitutional Court conceives of the contested provision above all as a provision for the protection of employees. There is no question of it being a violation of Art. 26 para. 1 of the Charter, because the Act was promulgated on 12 July 2007 and the rights and obligations arising from employment relations pass to the Archive only as of the first day of the seventh calendar month following its promulgation, that is, on 1 February 2008. Each employee had sufficient time in which, if he so desired, to exercise his right to terminate employment relations, thus, did not have to pass to the employer against his will. As far as the issue of members of the armed forced is concerned, it is evident that, if in the period from 12 July 2007 until 1 February 2008 they did not become employees in employment relations, they remained thereafter in service relations with their existing employers. As follows from the Assembly of Deputies' statement, they were given the opportunity to switch from service to employment relations.

77. In assessing the contested legal enactment, the Constitutional Court further came to the conclusion that the bounds of constitutionality were transgressed by the content of a portion of § 7 para. 9 of the Act, according to which the Senate may remove a member of the Council, if she fails to perform her duties in due fashion or for a period longer than six month, in particular the words „in due fashion or", with accent on the due performance in office. The Constitutional Court here hastens to point out that it did not neglect to consider whether the derogation of the provision at issue would exceed the scope of review defined by the petition, in other words, whether the given provision is even eligible for review on the merits. It is true that the petitioner did not include § 7 para. 9 of the Act in the list of provisions which, as an alternative to the annulment of the Act in its entirety, it proposed be annulled. The provision at issue was thereby neither put forward nor suggested as a separate argument for unconstitutionality. Nonetheless, one of the supporting grounds for proposing that the Act be annulled in its entirety is the institutional opportunity to politically influence the work of the Institute, consequently also an intrusion upon the freedom of research. On the grounds laid out

below, it did not find that the provision at issue presents the danger of such political intrusion into the work of the Institute in the form of unwarranted interference into the composition of its Council, that is, the body which directs the methodological aspects of the research. In this respect, the Constitutional Court is of the view that the petitioner has not met the burden of proving the asserted unconstitutionality.

78. The statutory regime for scholarly research in the Czech Republic proceeds from the constitutional standards contained in Art. 15 para. 2 of the Charter and is found in particular in Act No. 111/1998 Sb., on University-Level Schools and on Amendments and Supplements to Further Acts (the Act on University-Level Schools), as subsequently amended, Act No. 283/1992 Sb., on the Academy of Sciences of the Czech Republic, as subsequently amended, and Act No. 130/2002 Sb., on the Support of Research and Development from Public Funds and Amendments to Certain Related Acts (Act on the Support of Research and Development), as subsequently amended. As scholarly research is conceptually tied up with the category of freedom (see Art. 15 para. 2 of the Charter), all statutorily-established scholarly institutions are constructed on the principle of self-administration, independence and separateness from state power. Accordingly, the bodies of these institutions (university-level schools, the Academy of Sciences of the Czech Republic) are formed by the scholarly community (in the case of university-level schools, for example, the academic community). In this respect, the Institute's scholarly objective comes into conflict with the manner in which its highest organ, the Council, is composed. Pursuant to § 7 para. 1 of the Act, its members are elected and removed by the Senate of the Parliament of the Czech Republic. The Constitutional Court still considers this method for electing the Council's members as acceptable, since there is, in that case, at least a diversity among those who will propose candidates, and they are subjects external to the political milieu. The issue of the selection of individual candidates is thus more or less an issue of political culture and maturity, whether the electors are able to abstract from the political aspects and give priority to criteria of expertise. What must, however, be designated as unacceptable, in terms of the guarantee of the freedom of research, is the method for removal of Council members. Pursuant to Section 9 of the mentioned statutory provision, the Senate "may remove a member of the Council, if she fails to perform her duties in due fashion . . . ", which creates unrestricted scope for removal. It is the standard approach that, if a legal scheme provides for the installation of officials of an independent institution (body), not through some form of self-government, rather by the decision of political body (as is the case in this matter), their independence is thus provided by the guarantees of the non-removeability (if the opposite applies, that is, where appointment and removal power are aggregated, then a relationship of subordination is established). As was stated above, membership in the Council is a public office. According to Art. 21 para. 4 of the Charter, citizens are entitled to access, on an equal basis, to any elective and other public office. The Constitutional Court has already previously held (see Judgment No. II. ÚS 53/06 of 12 September 2006, published at www.judikatura.cz) that Art. 21 para. 4 of the Charter does not relate solely to access to public office in the sense of entry into office, rather it comprises also the right to the undisturbed performance of the office, including the right to protection from unlawful deprivation of the office, as participation in the administration of public affairs, which is the sense of Article 21 in its entirety, is not exhausted merely by gaining office, but logically it persists throughout the period an office is held. What follows therefrom, in relation to the matter presently under adjudication, is that membership in the Council must be protected from arbitrary

conduct by the state throughout the period that office is held, thus also in the formulation of the grounds for removal therefrom. However, the wording of the provision of the Act in question does not comport therewith.

79. The Constitutional Court has therefore annulled the words, „in due fashion or“, in § 7 para. 9 of the Act, as the formulation of this ground, which establishes the possibility for the Senate to recall a member of the Council, is in conflict with Art. 15 para. 2 and Art. 21 para. 4 of the Charter. The derogation of this provision will occur with effect from the day this Judgment is published in the Collection of Laws. Notice: The decision of the Constitutional Court cannot be appealed.

Brno, 13 March 2008

Pursuant to § 14 of Act No. 182/1993 Sb., on the Constitutional Court, as subsequently amended, Justices František Duchoň, Pavel Holländer, Vladimír Kůrka, Jan Musil, Jiří Nykodým, Pavel Rychetský and Eliška Wagnerová have filed dissenting opinions to the decision of the Plenum, and Vojen Güttler has filed a separate opinion dissenting from the reasoning.

1. Dissenting Opinion of Justice František Duchoň

The grounds of my dissenting opinion derive from my disagreement with the statement of judgment (better yet, with what was missing from it) and with the portions of the reasoning of Judgment Pl ÚS 25/07 corresponding thereto.

As concerns the statement of the cited judgment, I am of the view that the Constitutional Court Plenum should have, in its constitutional review of Act No. 181/2007 Sb., on the Institute for the Study of Totalitarian Regimes and on the Archive of Security Organs and on the Amendment of Certain Statutes, annulled § 7 para.6, the final sentence, which reads, “Membership in the Council is incompatible with membership in a political party or political movement”, as well as § 19 para. 1, lit. a), which reads, “Membership or candidate membership in the Communist Party of Czechoslovakia or the Communist Party of Slovakia”.

If we put to one side the petitioners‘ predominantly political, polemical-historical, or general legal arguments, the only arguments of constitutional relevance are, in my view, those faulting the mentioned Act for its conflict with Article 15 para. 2 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter „Charter“), guaranteeing the freedom of scholarly research and of artistic creation, as well as with Article 3 para. 1 of the Charter (the prohibition of discrimination), Art. 20 para. 2, Art. 21 para. 4, and Art. 44 of the Charter.

As far as concerns the assertion that the Act establishing the Institute for the Study of Totalitarian Regimes conflicts with Art. 15 para. 2 of the Charter, I share the view of the Plenum’s majority, according to which the mere establishment of the Institute is not of constitutional law dimension. Happily we live under democratic conditions, in which

the possibilities to abuse such an Institute, whether politically or otherwise, are substantially restricted, if not excluded. The freedom of historical research exists and is guaranteed. The establishment of the Institute does not threaten the etatization of historical research or the evaluation of the historical period of which the Act speaks. Thus, nothing prevents other historians or institutes from freely devoting themselves to the period at issue and, by the quality of their work, being able to compete with the output of the Institute at issue. What will prove decisive in the future will be the quality of their approach and probably the sole danger can be seen in the possibility that the Institute's output will come out on glossy paper bound in leather, whereas the output of others will only be in brochures made from recycled paper.

It must be pointed out that, in these regions, historical scholarship has not fared particularly well in any sense, especially in the second half of the 20th Century (consider for ex., the more or less regularly repeating "purge of historians"). Although the freedom of scholarly research was ensured after 1989, historical research has in no sense been viewed as attractive for the young generation, as the pay is dreadful. This circumstance is evidenced even by the flight into politics of certain historians (Bašta, Špidla) . Paradoxically, the Institute's existence could assist in reviving interest in history, which is currently declining to an ever greater degree.

The situation is different for § 7 para.6, the final sentence, of the mentioned Act, which reads "Membership in the Council is incompatible with membership in a political party or political movement". In my view, this provision is in conflict with Art. 3 para. 1, Art. 20 para. 2, Art. 21 para. 4, and

Art. 44 of the Charter.
According to Article 3 para. 1 of the Charter, everyone is guaranteed the enjoyment of her fundamental rights and basic freedoms without regard to gender, race, color of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status.

Art. 20 para. 2 of the Charter introduces the right of citizens to form political parties and political movements and to associate in them. This right may be restricted by law, if such is necessary in a democratic society for the security of the state, the protection of public security and public order, the prevention of crime, or the protection of the rights and freedoms of others.

Art. 21 para. 4 of the Charter provides that citizens shall have access, on an equal basis, to any elective or other public office.

According to Art. 44 of the Charter, restrictions may be placed upon the exercise, by judges and prosecutors, of the right to engage in business enterprises and other economic activities, as well as of the right enumerated in Article 20 para. 2; upon the exercise of those rights by employees in state administration and in local self-government, holding the positions specified therein, as well as upon their exercise of the right enumerated in Article 27 para. 4; and upon the exercise of those rights by members of security corps and members of the armed forces, as well as upon their exercise of the rights listed in Arts. 18, 19, and 27 paras. 1 to 3, insofar as such is related to the performance of their duties. The exercise of the right to strike by persons who engage in professions essential for the protection of human life and health can be

restricted by law.
The Council‘s powers are predominantly internal to the Institute, and the majority of them do not even have the status of the exercise of state administration. According to § 3 of the Act, the Institute is a public-law institution; hence membership in its Council is a public office. Thus, the exceptions to the general prohibition on discrimination, enshrined in Art. 20 para. 3 in conjunction with Art. 44 of the Charter, cannot be applied to membership in the Council, since, due to its competences as laid down in § 9 of the mentioned Act, membership in the Council cannot be subsumed under any of the activities enumerated in Art. 44 of the Charter.

In my view, the Court should also have annulled § 19 para. 1, lit. a) of the mentioned Act, according to which persons who were members or candidates for membership in the Communist Party of Czechoslovakia or the Communist Party of Slovakia at any time between 25 February 1948 and 15 February 1990 are deemed to be unreliable for the purposes of the Act under adjudication.

A citizens whose unreliability is defined in this way cannot be elected a member of the Institute‘s Council, cannot be appointed either the Director of the Institute, or the Director of the Archive or a principal employee of the Institute or Archive directly subordinate to either the director of the Institute or the Archive. Other employees must meet the prerequisites under Act No. 451/1991 Sb. (the „Lustration“ Act). This means that, according to the mentioned Act, the mere membership in the Communist Party during the decisive period, which might have lasted for only a brief time, is such a grave circumstance that to place such persons into any of the offices referred to it is capable of threatening the „democratic operation“ of the Institute and Archive.

According to Art. 4 para. 3 of the Charter, any statutory limitation upon the fundamental rights and basic freedoms must apply in the same way to all cases which meet the specified conditions. Under § 3 para. 2 of the Act, the Institute is an organizational component of the state. According to § 12 para. 2 of the Act, the Archive is an administrative office which is directly administered by the Institute. The employees and officials of this institution are state employees. Thus, no reason is adduced as to why the statutory restriction of their fundamental rights and basic freedoms should essentially differ from the relations governing other state employees. The requirement of “reliability” formulated in this way is disproportionate even in comparison with the definition of irreproachability as a formal requirement for holding other state offices.

The specific level of engagement of a given person is not even taken into account under § 19 para. 1, lit. a). Conditions set in this manner are not proportional, especially in relation to the prerequisite qualifications for the performance of other offices in the state, including those the performance of which directly influence the character of the country. The conditions prescribed for applicants for the principal offices in the Institute and the Archive are much stricter than are those, for example, for candidates for the office of President of the Republic, or for other highly significant constitutional offices in the State. Such prescribed conditions exclude from the given offices even such individual historians from the ranks of former Communists who, by their work and subsequent level of engagement have demonstrated their very valuable service to the evolution of democracy in this country.

In this connection I consider it suitable to note that not all of us were given the gift of „the true faith“ already at birth. It is always necessary to respect the right of each to the individual development of his own personhood. In my view it is high time to abandon „the revolutionary principle of collective responsibility“, which it has often been customary to apply following each significant historical turning point. Murder is statute-barred after 20 years; membership in the Communist Party is in effect never statute-barred. Thus paradoxically the Act once more ushers in, turned on its head, the old Bolshevik approach whereby, especially after 1968, persons expelled or struck out from the KSČ became, up until the end of their days (if they did not live to see 1989), citizens of a lower rank. As such it was not only they who permanently felt the effect of that status, but also their families, for ex., their children, by being excluded from university studies.

It is necessary always to formulate the conditions of reliability and irreproachability in a manner which will respect the requirements in a modern democratic society for the staffing of given specific offices and the interest in the protection of democratic values, expressed above all in the constitutional order of the Czech Republic.

2. Dissenting Opinion of Justice Vladimír Kůrka

I share with the other dissenting Justices the view that the Court should have granted the petitioners also as respects that part of the petition proposing the annulment of a) § 7 para. 6, second sentence, and b) § 19 para. 1, lit. a) of Act No. 181/2007 Sb., on the Institute for the Study of Totalitarian Regimes and on the Archive of Security Organs and on the Amendment of Certain Statutes.

Re a): the incompatibility of membership in the Institute's Council with membership in a political party or a political movement, which is found in § 7 para. 6 of the Act, conflicts with Art. 20 para. 2 of the Charter of Fundamental Rights and Basic Freedoms, as the proper restriction upon the right there enshrined to associate in political parties and movements, anticipated in Art. 20 para. 3, alternatively Art. 44 of the Charter, cannot – in view of the nature of the Institute and the status of the Council within it – even be asserted in this case; the conditions for the constitutionally possible restriction are not satisfied in relation to membership in the Council, either in terms of facts or of the proper subjects, which is entirely evident; alternatively, the decisive characteristics of that membership cannot even be likened to these conditions, much less could it be subsumed under them.

Re b): the opinion on the unconstitutionality of the definition of "reliability", in the sense of § 19 para. 1, lit. a) of the Act, in the form of membership or candidate membership in the Communist Party of Czechoslovakia or the Communist Party of Slovakia in the period from 25 February 1948 until 15 February 1990, and thus the creation of an impediment to such persons holding office as a member of the Council, follows from its generality and its all-inclusive nature, which completely gives up any attempt at individual evaluation, or assessment of the circumstances of a specific person's "involvement" in the regime, his reasons therefore, as well as external socio-political manifestations. In consequence of this alone, the statutory scheme lacks the constitutional quality of a measure that is purposeful, suitable (least intrusive), and proportional, which then appears in a particularly illustrative manner in

relation to the legal arrangements of the so-called lustration acts (their objects and the reason therefor). On the contrary, membership in the Communist Party during the decisive period could, in relation to the conditions of membership in the Council, be assessed solely individually, in the specific „story“ of the individual (including his externally manifested reflexes), namely in the setting of an individual moral assessment, which would allow for its outcome to be subsumed, not under the category of „reliability“, but of „irreproachability“; otherwise, such construction of this condition is made possible, without more, by the negative definition in § 19 para. 2 of the Act.

The majority opinion bases the existence (the contrary) of a relation of proportion between "the public interest in the protection of democracy" and the right of access to public office on a single argument, that is, of "bias sui generis" (by which is understood the bias of a former member of the Communist Party), which is not only an insufficient, but even an inapposite, argument, as naturally not even the prospective fear of "bias" by a member of the Council reaches the level of the protected public interest, nor is it prima facie sufficient for that purpose. The questionable effect of the asserted argument is then underlined by the fact that, according to the very reasoning of the Judgment, it is as if perceived in a positive light that the restriction under § 19 para. 1, lit. a) of the Act does not affect the actual internal researchers of the Institute, that is, this "bias" is not a cause for concern in relation to them.

3. Dissenting Opinion of Justice Jan Musil

I do not concur either with statement of judgment II or with the reasoning of Judgment No. Pl. ÚS 25/07. Pursuant to § 14 of Act No. 182/1993 Sb., on the Constitutional Court, as subsequently amended, I append a dissenting opinion to the Judgment.

I consider Act No. 181/2007 Sb., on the Institute for the Study of Totalitarian Regimes and on the Archive of Security Organs and on the Amendment of Certain Statutes, to be unconstitutional in its entirety due to its conflict with several provisions of the constitutional order:

I. Violation of the Freedom of Scholarly Research

1. In the first place, I believe that the Act violates the freedom of scholarly research, which is guaranteed by Article 15 para. 2 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter „Charter“). This provisions reads: "The freedom of scholarly research and of artistic creation is guaranteed."

The obligation of states "to respect the freedom indispensable for scientific research and creative activity" is enshrined also in Article 15 para. 3 of the International Covenant on Economic, Social and Cultural Rights (published as No. 120/1976 Sb.), to which the Czech Republic is a signatory state.

2. In terms of constitutional law, the freedom of scholarly research must be conceived of in a double sense:

a) First and foremost it is an individual human right – each person who engages in scholarly activity („scholar“) is protected from the state intervening in any way into her scholarly work. The encroachment by public authorities into the process of scholarly research is simply ruled out. In the free „protected area“ of scholarship, the scholar acts

autonomously, solely on his own responsibility. This freedom is absolute, is not subject to any exception and is entirely free from regimentation, does not require for its enjoyment any empowerment or implementing legal norm. The freedom of scholarly research accords to each scholar the right to free, personal self-realization, unrestricted by external intrusion from state power.

In this first sense, the principle of the freedom of scholarly research represents the prohibition of state intrusion into the content and methods of scholarly research.

It is obvious (as is the case for all human rights) that the freedom of scholarly research also has it boundaries – it ends in the place where it collides with other constitutional rights (for ex., with the right to life, to human dignity). Ethical norms also constitute the natural corrective of the freedom of scholarly research.

b) In the modern cultural state, the freedom of scholarly research has still another aspect, namely a social one. Scholarship and science are considered as a public good which accrue to the benefit of mankind. The evolution of contemporary scholarly and scientific knowledge is inconceivable solely through individual effort, as it requires the collective action of scholarly teams and the expenditure of immense sums, which the individual cannot provide for solely through his slight power. In consequence thereof, the state must take active steps for the benefit of scholarship and science – that it support scholarship and science by providing financial and other material resources toward its development and by adopting suitable organizational and legal measure for the cultivation of scholarship and science and pass on scholarly and scientific knowledge to future generations.

The state has a duty to ensure that it is possible for all citizens, if they manifest the interest, to take part in scholarly and scientific work. At the same time the state has to rule out any sort of monopoly on scholarship and science; that would, after all, contravene peoples' natural rights, as well as the progress and dissemination of education, peaceful coexistence of citizens, and the idea of pluralism. The principle of the freedom of scholarly research, in this second sense, represents a directive that the state protect and support scholarly research. However, even this sense does not give the state authority to use its power to intervene in any way into the content and method of scholarly research.

3. A discussion on the essence of scholarship and on the freedom of scholarly research has been ongoing for centuries and presumably will never be concluded. Nevertheless, it appears that this centuries-long evolution has up till now yielded several invariable and unquestionable conclusions, for ex.:

- there is no scholarly authority superior to others; any attempt to create just such an authority has often in history been the source of scholarly stagnation, error and limitation; a hierarchy, the relationship of superior and subordinate is anathema to the essence of scholarly research;
- it is impermissible to make an external selection of the issues into which scholarship should or should not inquire;
- nobody has a monopoly on scholarship; the routes toward understanding cannot be restricted, and one cannot impose his view so that it will be binding on others as well; the consequence of such efforts is homogenization, which leads to the stagnation of scholarly progress;

- the evolution of scholarship and science lies in the discussion by scholars and scientists both among themselves and with other members of human society;
- scholarship and science are open to new ideas and methods; disputes about methods and theory are necessary – it is important not to limit ourselves in the process of seeking paths and means to acquire knowledge;
- scholarship and science never yield, once and for all, „the definitive truth", rather it approaches possible truths by means of various approaches; interpretations considered at certain times as valid have been overturned many times in history; Thomas Kuhn deems it beneficial for the evolution of science to include also controversial problems into scholarly and scientific debates and not to exclude a priori the possibility that knowledge exists which exceeds the bounds of the standards recognized in a given period (Kuhn, T., The Structure of Scientific Revolutions, Prague : OIKOYMENH, 1997) [Translator's note: The judgment references the Czech translation of the original English version of this book.];
- scholarship and science subsists in the method, not in the issues dealt with; any issue whatsoever can be analyzed either in a scholarly or scientific, or in a non-scholarly or non-scientific, manner;
- research in all fields of human endeavor constantly brings with it new findings that are beneficial to mankind, but it is also full of trials, errors, dead ends, and surprising conclusions; if the permissible range of the investigation of the world is administratively restricted, or if only certain methods are "allowed", that creates the danger that we will pass by a great many desirable directions and resign ourselves to not coming to know the full multifarious character of the world.

4. History has recorded a large number of attempts at state-directed and legally regulated scholarly research, as well as the creation of state scholarly institutions or institutions subject to state supervision. Certain of these state-subordinated scholarly institutions were brought forth by absolutistic feudal lords, such as the French Minister, Cardinal Richelieu, who in 1635 established the French Academy (Académie française); also in 1666 King Louis XIV established the French Academy of Sciences (Académie des sciences); in 1700 the Prussian Elector, and later Prussian King Frederick I, established the Prussian Academy of Science (Preußische Akademie der Wissenschaften). These historical models, grounded on the conception of the „caretaker" state, very soon exhausted their developmental potential and later became rather a brake upon scholarly and scientific discovery. It was demonstrated that the guardianship of the state does not contribute to the advancement of scientific knowledge and produces a whole host of negative societal consequences.

5. It was recognized, already at the beginning of the 19th Century, that the genuine advancement of scholarship and science is possible only where the scholars and scholarly institutions, above all the universities, enjoy far-reaching autonomy and independence from the state. The idea of far-reaching academic autonomy was advanced, for ex., by the founder of the University of Berlin, Wilhelm von Humboldt (1810). In Central Europe the liberal principle of the freedom of scholarly research was first successfully enshrined in the German Imperial Constitution, adopted by the Frankfurt Assembly in 1849.

In the Twentieth Century the freedom of scholarly research found its way into the constitutional documents of nearly all democratic states. A provision to the effect that "scholarly research and the inculcation of its findings . . . shall be free, to the extent

they do not violate the Criminal Code", was contained in § 118 of the Constitutional Charter of the Czechoslovak Republic of 1920 (introduced by Act No. 121/1920 Sb.) Furthermore § 19 of the 1948 Constitution of the Czechoslovak Republic (No. 150/1948 Sb.) contained the following provision: „The freedom of creative spiritual activity is guaranteed. Scholarly research and the inculcation of its findings, as well as art and its expression, shall be free, to the extent they do not violate the Criminal Code".

6. The tragic historical turning point occurred in countries ruled by regimes which are designated as totalitarian. The encroachment into scholarly research assumed monstrous forms during the Nazi Regime in Germany, where a whole host of state pseudo-scientific institutions were established, producing mendacious arguments in support of racist theories [for ex., the Research Community of Ancestral Heritage (Forschungsgemeinschaft Deutsches Ahnenerbe) established by Himmler in 1935 or the Institute for Protected Scholarly Research (Institut für wehrwissenschaftliche Forschung) founded in 1941] and engaging in heinous "medical experiments" on humans.
The tendencies to establish state-directed scholarship and ideological indoctrination through scholarship and the educational system was also characteristic of the Communist state regimes, which strived especially to subjugate the social sciences.

7. After all the mentioned woeful historical experiences, unambiguously demonstrating that state and political influence is capable of retarding and distorting the direction and findings of scholarly knowledge and of misusing it for the establishment of utilitarian political, or even inhuman, objectives, the democratic states once again, after the fall of totalitarian regimes, unequivocally recognized the freedom of scholarly research as a constitutional principle. In Germany, the freedom of scholarly research was enshrined in Article 5 para. 3 of the Basic Law (Grundgesetz) from 1949; in 1991 the Czechoslovak (Federal) Constituent Assembly did the same in Article 15 para. 2 of the Charter.

8. It is generally acknowledged that political and ideological manipulation of scholarship or science is extraordinarily dangerous, above all due to the fact that scholarship and science commands great authority in the eyes of the public (especially for the young generation); scholarly or scientific knowledge, or anything presented as such, is often accepted uncritically and with trust. If the governing political force succeeds in harnessing scholarship and science to its service, it gains a powerful ally in pushing through its political objectives, which deforms the normal democratic milieu.

9. To the extent that foreign modern democratic states establish or finance from public funds scholarly institutions, they strive to create for them such a legal and organizational framework as would provide a high level of autonomy and free them from the direct influence of state bodies. In contemporary democratic states, scholarly institutions are decidedly not considered a component of the state. Although certain foreign scholarly societies are, in terms of their legal personality, considered as public-law bodies, the state's influence on the content of their work is either entirely excluded or is minimalized. For ex., the contemporary Germany scholarly institutions, of which there are a large number (Max-Planck-Gesellschaft zur Förderung der Wissenschaften, Berlin-Brandenburgische Akademie der Wissenschaften, Bayerische Akademie der Wissenschaften, Sächsische Akademie der Wissenschaften [the Max Planck Society for the Advancement of Science, the Berlin-Brandenburg Academy of Sciences and

Humanities, Saxon Academy of Sciences and Humanities, and the Bavarian Academy of Sciences and Humanities] and others) or the Austrian Österreichische Akademie der Wissenschaften [the Austrian Academy of Sciences] enjoy legal status as „public-law" corporations detached from the state (Staatsferne Körperschaften öffentlichen Rechts).

10. All modern states take it for granted that, while scholarly research is to enjoy financial support from public resources (often much more generous than is the case in the Czech Republic), still in the majority of countries the democratic law-based state meticulously restrains itself from in any way intermeddling into the methods or content of scholarly research or into the internal affairs of scholarly institutions. Scholarly institutions enjoy far-reaching autonomy in the establishment of their top bodies, in the selection and governance of their members and employees, and in the assessment of findings resulting from their scholarly work.

11. The above-mentioned principles of free scholarly research, which in developed European countries today are considered as the prevailing constitutional standard, can be well substantiated from the groundbreaking judgment of the German Federal Constitutional Court of 29 May 1973 (the „Hochschul-Urteil", BVerfGE 35, 79, Nos. 1 BvR 424/71 and 325/72). I take the liberty of citing several ideas from this judgment, which has made its way into all renowned European constitutional law textbooks:

- "To the extent that scholarship or science are pursued in institutions which are established by, or maintained from, public funds, the state must, through suitable organizational measures, take heed that the fundamental right to free scholarly activity not be disrupted by anybody, but only to the extent that such is possible with regard to other legitimate tasks of scholarly facilities and with regard to the fundamental rights of various participating persons. [Headnote to the Judgment]."
- "As follows from Article 5 para. 3 of the Basic Law, the bearers of the fundamental right to free scholarly activity enjoy the right to such state measures as are essential for the protection of the constitutionally-guaranteed free area, allowing for free scholarly activity . . . within this compass absolute freedom reigns, and any intrusion by state authorities is ruled out." [Headnote to the Judgment].
- „The freedom of scholarly research does not relate solely to one certain conception of science or scholarship or to one certain scientific or scholarly theory. The guarantee of this freedom is accorded more or less to any scholarly activity, that is, to anything which can, in its content and form, be considered as a serious and well thought out attempt to ascertain the truth." [Point 128 of the reasoning of the Judgment].
- „The freedom of scholarly research includes especially the freedom to decide on the questions to be researched (Fragestellung), the methodological principles, the assessment of the research findings and their dissemination." [Point 130 of the reasoning of the Judgment]
- „The freedom of scholarly research benefits both the self-realization of the individual and to the development of society as a whole . . . this entails not only the rejection of state intrusion into the field of scholarship, but also the state's engagement to protect and support scholarship and to prevent that the guarantee of this freedom be liquidated." [Point 131 of the reasoning of the Judgment]
- „The state should, through suitable organizational measures, take heed that the fundamental right to free scholarly activity remain inviolate . . . The crux of scholarly activity (Kernbereich) must in principle be reserved to the autonomy of individual scholars." [Point 133 of the reasoning of the Judgment]
- „As far as its content and methods are concerned, scholarly research must be freed

from the influence of state power. The state should limit itself solely to the governance of the external affairs of scholarship and university-level schools, namely to their financing within the bounds of the state budget and to indispensable administrative supervision.“ [Point 138 of the reasoning of the Judgment]

12. According to § 4 of the cited Act, the statutorily-established Institute for the Study of Totalitarian Regimes should carry out tasks which, by their nature, are typical scholarly work: it should conduct historical research, analyze and document the causes of historical events, cooperate with other scholarly and educational institutions, publish the results of its work, issue and disseminate publications, organize seminars, expert conferences and discussions, etc.

13. Act No. 181/2007 Sb. violates, in many respects, the freedom of scholarly research:
- the legislature employs a legal norm to prescribe with binding effect the subject of scholarly research, which in the given case is defined by a firmly-circumscribed time period; some justified doubts can be raised concerning the precision of this temporal designation, certain of which have been legitimately cited by the petitioner (for ex., whether, in terms of historical periodization, the blending together of the period of the Second Republic with the period of the Protectorate passes muster; whether all periods of the Communist Regime, for ex., the time of the „Prague Spring“ can be designated as a part of the totalitarian period). In place of diffusing or confirming these doubts through expert discussion, which should itself be a part of scholarly research, the legislature selected the route of normative decree – that is, an approach which scarcely has anything in common with scholarship;
- the legislature designated in advance the entire time period under investigation by the evaluative label, „totalitarian“, which brims with an a priori pejorative connotation; it thereby intimated in advance what the research findings should be; moreover, such a designation is not clearly and uniformly defined in political science, so that, to the extent it is transplanted into a legal norm, it fails to satisfy the constitutional requirement of certainty;
- the installation and removal from the highest bodies of the Institute for the Study of Totalitarian Regimes, that is, the Institute’s Council, is exclusively in the hands of state and political bodies; this Council’s members are elected and removed by the Senate of the Parliament of the Czech Republic, and not even its further operation is in any sense influenced by any elements of self-government, that is, by representatives of the scholarly community itself; and such self-governing bodies are a natural part of the life of scholarly and university institutions in a democratic state (see, for ex., the Assembly of the Academy of Sciences of the Czech Republic, and university senates and academic councils) and are regarded as an important guarantee of the freedom of scholarly research;
- According to § 9 para. 1, lit. a) of the Act, the Institute‘s Council even „lays down the methods for fulfilling the Institute‘s tasks“; in my view, such directive prescription of the methods of scholarly work is utterly incompatible with the freedom of scholarly research.

14. I have reached the conviction that the Institute for the Study of Totalitarian Regimes, such as it has been conceived in the Act, definitely came into being by political command and its proclaimed scholarly mission is merely feigned – in actuality it activities do not afford any guarantee of objective scholarly endeavor. The directive which § 4 lit. a) of the Act gives to the Institute, namely to investigate and assess

the circumscribed period „impartially“, is a mere empty proclamation, if there is no guarantee that it will be satisfied.

15. The considerations expressed in point 54 of the Judgment's reasoning, that supposedly "such abuse cannot occur" in the conditions "of a functioning democracy" and that the apprehension of abuse expressed by the petitioners is supposedly "the expression of their mistrust in democracy", are gross oversimplifications, to say the least. Human history has been witness to thousands of cases of the abuse of political power, even in democratic systems. Were democratic systems' "immunity" from the abuse of power to function so automatically as the Judgment presupposes, then evidently all supervisory and corrective mechanisms would be superfluous, including the constitutional review performed by the Constitutional Court. The argument also made there, that for that matter even "the era which is meant to be the subject of the Institute's research . . . [was] strewn with cases of such abuse", rather calls to mind the proverbial "the devil exorcised by Beelzebub"

16. I would like to add that I in no way call into doubt the need and utility of the historical investigation of the given period. However, institutions suitable for such research have been created in the Czech Republic, in the form of an extensive network of universities and offices of the Academy of Sciences of the Czech Republic, affording sufficient guarantee of unbiased and respectable scholarly work excluding the influence of power and politics. If the Government or the Parliament gained the impression that these institutions have insufficient personnel or material capacity to manage the job, there was nothing preventing them from increasing the financing of these institutions. In order to fulfill this task, it was in no way necessary to adopt special legislation, contributing to the hypertrophic proliferation of more and more new legal enactments and new state institutions. For me it is strange that the Government and that part of the Czech political representation which proclaim de-etatization, the notion of the "slimmed-down state", and austerity budget measures, create a new institution which decidedly does not correspond to these proclamations.

17. It is certainly also necessary to recognize that historical scholarly research of the given periods requires service and technical support for the processing of the large amount of documentary material. Even for this purpose, however, there exists in the Czech Republic, similarly to other democratic countries, a cadre of state and other archives with highly qualified expert personnel, and without doubt it was possible to improve their performance through suitable financial, organizational and legal measures. The Archive of Security Organs, created by the Act, is duplicative and superfluous.

18. If arguments in favor of pushing through this legislative enterprise were made from certain similar legal schemes and institutions from other „post-socialist“ countries, it is proper to note that not everything which is put forward as a foreign model is indeed worthy of being emulated. Moreover, far more suitable models can be found abroad.

As an example of foreign legal arrangements which acquitted themselves well, without at the same time raising constitutional objections, can be given the German statute on the documents of the state security services of the former German Democratic Republic (Stasi-Unterlagen-Gesetz of 20 December 1991- BGBl. I, 1991, p. 2272) establishing the Authority of the Special Trustee for the Documents of the Former Stasi

(the „Gauck“ Authority). This statute precisely defined the subject of the Authority‘s activities, the processing of documentary material of the Ministry of State Security of the former GDR, as well as of the services created by it, and lays down precise and constitutionally-conforming rules for the handling of citizens‘ personal data. This institution did not work with a previously defined ideological or political assignment and did not perform any separate scholarly task; at the same time, however, it provided scholars (historians from universities and other independent institutions) with perfect documentation services. This Authority gained general respect in Germany, and no serious excesses in its actions have been recorded. Accordingly, the constitutionality of this institution was in no way called into doubt in Germany.

19. As the conclusion to this part, I would, in passing, append the thought of one of the most significant Czech non-Marxist sociologists, Arnošt I. Bláha, who wrote that scholarship should represent an island of deliberation, against whose shores the waves of malevolent aggrandizement of political life do not crash (Bláha, A. I.: Sociology, Prague: Academia, 1968, p. 173). If only such a wish would come true in the Czech Republic!

II. The Violation of the Right to Associate in Political Parties and Movements

20. In my view, the last sentence of § 7 para. 6, to the effect that “membership in the Council is incompatible with membership in a political party or a political movement”, violates the fundamental right of citizens to associate in political parties or political movements, enshrined in Article 20 para. 2 of the Charter. I consider it out of the question for a restriction placed upon this fundamental right to be justified by reference to Article 20 para. 3 of the Charter, according to which this right can be limited “only in cases specified by law, if it involves measures that are necessary in a democratic society for the security of the state, the protection of public security and public order, the prevention of crime, or the protection of the rights and freedoms of others.” Membership in the Institute’s Council decidedly does not have the character of such activities from which the necessity to restrict the right of association would follow. In my view, the arguments made in point 61 of the Judgment’s reasoning for the purpose of refuting the petitioners’ objections is inapposite.

III. The Violation of the Prohibition of Discrimination and of the Right to Take Part in the Administration of Public Affairs through Holding Public Office

21. In my view, § 19 para. 1 of the contested Act, which lays down the conditions of reliability for the holding of office as a member of the Institute’s Council (§ 7 para. 5 of the Act), the Director of the Institute (§ 11 para. 2 of the Act), the Director of the Archive (§ 12 para. 4 of the Act), leading employees of the Institute directly subordinate to its Director and leading employees of the Archive directly subordinate to the Director of the Archive (§ 18 of the Act), results in a violation of the prohibition of discrimination in the sense of Article 3 para. 1 of the Charter and in the violation of the right to take part in the administration of public affairs through holding public office (Article 21 paras. 1 and 4 of the Charter).

22. I consider § 19 para. 1, lit. a) of the Act to be an especially flagrant case of the violation of the mentioned constitutional rights, in that membership in the Communist Party of Czechoslovakia or the Communist Party of Slovakia in the period from 25 February 1948 until 15 February 1990, are introduced as grounds for finding unreliability.
In my opinion, the arguments contained in point 73 of the Judgment's reasoning, proceeding from some sort of model of „bias or non-bias of judges", is entirely inapposite and lacking in constitutional relevance. If the likening to a judge of he „who is active in the field of historiography", is meant to be taken as a serious argument, then a question naturally arises: is the conception of the historiographer as judge really that conception which should provide a guarantee of objective scholarly knowledge, toward which the Institute should strive?

23. I also concur with the reasoning given by the Chief Justice of the Constitutional Court, Pavel Rychetský, in his dissenting opinion, and on the grounds of brevity I merely refer to it.

For all of the given reasons, I believe that entire Act No. 181/2007 Sb., on the Institute for the Study of Totalitarian Regimes and on the Archive of Security Organs and on the Amendment of Certain Statutes, should be annulled as unconstitutional.

4. Dissenting Opinion of Justice Jiří Nykodým and Pavel Holländer

It is entirely legitimate, on the academic plane, to hold a discussion on the issue of the expedience of establishing by law a state institution that should concern itself with historical developments in certain statutorily-defined periods in the situation where there are other state-established institutions which concern themselves with the study of the same periods. Within the framework of its abstract review of the constitutionality of an act, the Constitutional Court is not competent to assess its expedience, unless the lack of expedience itself represents an intrusion into a constitutionally-guaranteed right. The Act espouses the freedom of scholarly research, and one cannot, without more, deduce from its content that this constitutional principle will be violated in the Act's implementation. There are, however, provisions in the Act which have an obviously discriminatory content and which should have been annulled.

The petitioners proposed the annulment of § 7 para. 6 of the Act, according to which Membership in the Council is incompatible with membership in a political party or political movement. In their argument they refer to the fact that Art. 20 para. 2 of the Charter, according to which all citizens have the right to associate in political parties and political movements and restrictions on that right are permitted only in connection with the performance of certain offices, employment positions and activities exhaustively enumerated in Art. 44 of the Charter. According to them, the Institute's Council does not qualify as such a case nor is it one of the cases where the Charter permits the restriction of this fundamental right. They draw from this the conclusion that the contested provisions result in a violation of the prohibition of discrimination (Art. 3 para. 1 of the Charter) and in a violation of the right to take part in the administration of public affairs through holding public office (Art. 21 para. 1 and

4 Charter).
The status of the Institute is decisive for the assessment of these reservations. According to § 3 para. 2 of the Act, it is an organizational component of the state, and encroachment upon its activities are allowed only on the basis of law; pursuant to paragraph 3, it is an accounting unit and its operation is paid for from a separate chapter of the state budget. Thus, it is a state organization. As follows from § 9 para. 1 of the Act, the Institute‘s Council has basic influence on this institution‘s operation. According to § 4 para. 1 of the Act, the Institute‘s commission is to investigate and impartially evaluate the period of non-freedom and the era of Communist totalitarian power; to investigate anti-democratic and criminal activities by state bodies, including the state’s security components, and the criminal activities of the Communist Party of Czechoslovakia, as well as further organizations founded on its ideology; to analyze the causes and manner of liquidating the democratic regime in the era of Communist totalitarian power; to document the participation of domestic and foreign persons in supporting the Communist regime and resistance to it; to obtain and make available to the public documents bearing witness to the period of non-freedom and the era of Communist totalitarian power, especially on the actions of the security units and the forms of persecution and resistance; without unnecessary delay, to convert into electronic form the documents it has assembled; to document Nazi and Communist crimes; to make the results of its work available to the public, especially to make public information on the period of non-freedom, on the era of Communist totalitarian power, on actions by, and fates of, individuals; to issue and disseminate publications; to organize exhibitions, seminars, expert conferences and discussions; to cooperate with scholarly, cultural, educational, and other institutions for the purpose of exchanging information and experiences on expert issues; and to cooperate with foreign institutions or persons with relevant expertise.

According to Art. 20 para. 2 of the Charter, citizens have the right to form political parties and political movements and to associate in them. This right may be limited by law, if such is necessary in a democratic society for the security of the state, the protection of public security and public order, the prevention of crime, or the protection of the rights and freedoms of others. According to Art. 44 of the Charter, restrictions may be placed upon the exercise, by judges and prosecutors, of the right to engage in business enterprises and other economic activities, as well as of the right enumerated in Art. 20 para. 2; upon the exercise of those rights by employees in state administration and in local self-government, holding the positions specified therein, as well as upon their exercise of the right enumerated in Art. 27 para. 4; and upon the exercise of those rights by members of security corps and members of the armed forces, as well as upon their exercise of the rights listed in Arts. 18, 19, and 27 paras. 1 to 3, insofar as such is related to the performance of their duties. The exercise of the right to strike by persons who engage in professions essential for the protection of human life and health can be restricted by law.

Membership in the Council cannot be subsumed under any of the activities listed in Art. 44 of the Charter. According to § 9 of the Act the Council has the competence to lay down the methods for the fulfillment of the Institute‘s tasks; to appoint and remove the Director and to supervise his activities; to approve the Institute‘s organizational rules, as well as its other internal regulations; to approve the annual plan of the Institute‘s activities; to establish a scholarly council as the Director‘s expert advisory body for the Institute‘s research activities; to appoint, on the Director‘s proposal, that

body‘s members and to approve its standing orders, as well as the groundwork for the Institute‘s proposed budget and final accounting; to approve the annual report on the Institute‘s activities and submit it for the Senate‘s consideration; to decide on appeals against decisions of the Institute; to keep abreast of and evaluate whether access to documents and archival materials kept at the Archive is being properly ensured, and once annually to submit its findings for the Senate‘s consideration; it is further authorized, in exceptional cases, to request the Government‘s diplomatic support in acquiring access to important documents relating to the Archive‘s work which are stored in the archives of foreign states. The Council‘s powers are directly primarily to matters internal to the Institute and, in the majority of cases, do not have the character of the performance of state administration, for which is decisive the authorization to issue administrative acts, which establish, modify or extinguish rights and obligations of natural and legal persons. It is only the management of the Archive which is an exception, as it is an administrative office and carries out tasks of a state body, as is the Council‘s competence, based on § 9 para. 1, lit. h) of the Act, to decide on appeals against Institute decisions. As follows from to § 3 of the Act, the Institute is a public-law institution, and membership in its Council therefore constitutes a public office.

According to Art. 3 para. 1 of the Charter, everyone is guaranteed the enjoyment of her fundamental rights and basic freedoms without regard to gender, race, color of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status. The restriction arising from the final sentence of § 7 para. 6 of the Act, which reads „membership in the Council is incompatible with membership in a political party or political movement“, is a violation of the prohibition of discrimination laid down in the above-cited article of the Charter. Such is the case because the exceptions to the general prohibition of discrimination enshrined in Article 20 para. 3, in conjunction with Art. 44, of the Charter cannot be tied to membership in the Council. It can thus be concluded that the final sentence of

§ 7 para. 6 of the Act is in conflict with Art. 20 para. 2, in conjunction with Art. 44, Art. 21 para. 4, and Art. 3 para. 1 of the Charter.
Sec. 19 of the Act lays down the conditions of reliability and irreproachability. The petitioners‘ proposed the annulment of § 19 para. 1, lit a), which deems unreliable persons who at any time in the period from 25 February 1948 until 15 February 1990 were members or candidates for membership in the Communist Party of Czechoslovakia or the Communist Party of Slovakia. Citizens who, according to the Act, are not reliable can neither be elected a member of the Institute’s Council, nor appointed Director of the Institute, Director of the Archive, or a principal employee of either the Institute or the Archive who is directly subordinate to the Director of the Institute or the Archive. Other employees must fulfill the prerequisites under Act No. 451/1991 Sb. (the „Lustration“ Act). The grounds for finding unreliability is thus merely the formal membership in the mentioned political parties and does not in any way take into account the actual conduct of those persons. Membership in the Council is a public office (§ 10 of the Act) and, according to Art. 21 para. 4 of the Charter, each citizens has the right and opportunity to take part in the conduct of public affairs

In its Judgment No. Pl. ÚS 9/01, the Constitutional Court deduced, also with consideration of the jurisprudence of the European Court for Human Rights, that the promotion the idea of “a democracy capable of defending itself” is a legitimate aim

of the legislation of each democratic state, in whichever phase of its development. On the basis thereof, it then reached the conclusion that a democratic state can make an individual's entry into state administration and public services dependent on her meeting certain prerequisites. But in the cited judgment it also unambiguously declared itself in the sense that it is aware that "an individual's attitudes to the democratic establishment are determined primarily by his actual actions." In this connection it calls to mind Act no. 198/1993 Sb., on the Lawlessness of the Communist Regime and Resistance to It, and to its judgment concerning this Act published as No. 14/1994 Coll.. The cited act enumerates crimes and other comparable events which occurred in the territory of the present-day Czech Republic during 1948-1989, and in the operative part of the text assigns full joint-responsibility for them to those "who supported the Communist regime as officials, organizers or agitators in the political as well as in the ideological areas." In the Preamble it states the special responsibility of the pre-November Communist Party, including its leadership and members. Thus, it is evident that, as the Communist regime was identified by the Parliament of the Czech democratic state as "criminal, illegitimate, and abominable", an individual's close connection to the pre-November regime and its repressive components is a circumstance capable of having an adverse effect on the trustworthiness of a public position which that individual holds in a democratic state. Even though this statute in its Preamble refers to the responsibility of members of the pre-November KSČ, the normative part of the statute speaks about the threat for democracy in „individuals being closely bound to the pre-November regime and its repressive components".

One cannot deduce, from the purpose and essence of the Act under adjudication, why mere membership in the Communist Party in the decisive period, which might, for ex., have lasted only a few months, should constitute such a serious circumstance that it might threaten the democratic functioning of the Institute and Archive in the case that a person with such a past were to be placed into certain of the offices for which reliability and irreproachability, according to § 18 para. 1 of the Act, are required. According to Art. 4 para. 3 of the Charter, any statutory limitation upon the fundamental rights and basic freedoms must apply in the same way to all cases which meet the specified conditions. According to § 3 para. 2 of the Act, the Institute is an organizational component of the state. According to § 12 para. 2 of the Act, the Archive is an administrative office which is directly managed by the Institute. Employees and officeholders of these institutions are state employees; there is, therefore, no reason why the statutory limitation upon the fundamental rights and basic freedoms in relation to them should be fundamentally different than in relation to other state employees.

A requirement of a "clean past" formulated in this manner is disproportionate also in comparison with the definition of irreproachability as a formal requirement for holding other offices. In the above-cited Judgment No. Pl. ÚS 9/01, the Constitutional Court designated the Lustration Acts, with which it was dealing, as a legitimate instrument for the protection of the democratic state from the danger which could be brought on by an insufficiently loyal public service, or even a public service that had little credibility, as such a perception by the public would undermine confidence in the law-based state itself. In scrutinizing the contested Act, we proceed from the conviction that it is both the right and duty of a democratic, law-based state actively to protect its constitutional regime, even by means of restricting access to state and public service through the formulation of conditions of loyalty for applicants. Among the conditions thus laid

down, there must be concord, at least on essentials, even if it is evident that, in view of the various weights of individual offices, they cannot be formulated identically. The Lustration Acts, which in terms of substance are the closest to the contested provisions of the Act, lay down certain prerequisites for holding certain offices in the state. These prerequisites reflect the status which individual applicants had in the period from 1948 until 1989, thus whether this status meets the characteristics laid down in the Lustration Acts, restricting access to public office. In relation to the pre-November regime, they draw consequences only from a certain degree, certain qualified forms, of engagement. In contrast thereto, the contested provision of the Act lays down, as an impediment to holding office, the mere membership or candidacy for membership in the Communist Party of Czechoslovakia or the Communist Party of Slovakia. The specific level of engagement of actual candidates is not taken into consideration. We consider conditions set in this manner to be disproportionate, especially in relation to eligibility requirements for holding other offices in the state, namely those, the performance of which directly influences the democratic character of the country. After all the Act lays down, in this respect, more stringent conditions for applications to lead offices in the Institute and Archive than, for example, for candidates for the office of President of the Republic, the most significant constitutional function in the state.

A further fact should not be overlooked. The Institute, which „directly manages the Archive", which is an „administrative office" (§ 12 para. 2 of the Act), fulfills the function of a state body in the field of archival science [see, for ex., § 13 para. 1, lit. f), g), and h) of the Act]. At the same time, the Council is competent pursuant to § 9 para. 1, lit. h) of the Act to decide on appeals from the Institute's decisions. Thus, Council decisions pursuant to § 9 para. 1, lit. h) of the Act [that is, concerning on the merits, for ex., the refusal to provide information pursuant to Act No. 106/1999 Sb. (see Judgment No. III. ÚS 686/02, published in The Collection of Judgments and Rulings of the Constitutional Court, Vol. 29, Judgment No. 30), alternatively matters under § 13 para. 1, lit. f), g), h) of the Act (see above in point 67 of the Judgment)] are subject to administrative review in administrative court proceedings, in the sense of § 4 para. 1 of the Code of Administrative Justice, and possibly even by the Constitutional Court. The situation thereby arises in which, divergent conditions are laid down for the composition of state bodies deciding, one instance after the other, on the same legal issue since, for review bodies deciding in the same matter, the conditions under § 19 para. 1, lit. a) of the Act do not apply. For the creation of state bodies endowed with the same subject-matter jurisdiction, the maxim applies that the same or more stringent conditions must apply for holding office in a state body of a higher instance than for holding office in a state body of lower instance; in the given matter the opposite applies – which leads to absurd consequences. In terms of constitutional review methodology, this concerns the application of the first criterion of the principle of proportionality, the criterion of suitability, which requires the assessment of the chosen normative instrument from the perspective of possible fulfillment of the objective pursued (the protection of other fundamental rights or public goods), and that if the given normative instrument is not capable of attaining the objective pursued, then it constitutes an instance of arbitrary action on the part of the legislature, which is considered to be in conflict with the principle of the law-based state. In the given matter, the value of the protection of democracy must be weighed against the fundamental right of access to public office on an equal basis. To the extent that, in this case (as lex specialis in relation to Act No. 451/1991 Sb.), priority was given to the protection of democracy over access to the holding of a public office on an equal

basis, then the conditions under § 19 para. 1, lit. a) of the Act would have to apply as well for all review bodies, that is for the panels of the regional courts deciding in these matters in administrative judicial review, for the Supreme Administrative Court, as well as for the Constitutional Court.

Thus it can be concluded that § 19 para. 1, lit. a) of the Act is in conflict with the right guaranteed in Art. 21 para. 4, in conjunction with Art. 4 para. 3, of the Charter.

According to Art. 83 of the Constitutional of the Czech Republic, the Constitutional Court is the judicial body responsible for the protection of constitutionalism. It did not perform its function in this case since, within the confines of abstract norm control of the constitutionality of the Act at issue, it did not annul those of its provisions which are in evident conflict with the constitutional order of the Czech Republic, moreover by employing arguments that are more political than legal.

5. The Dissenting Opinion of Justice Pavel Rychetský

The dissenting opinion which I am filing pursuant § 14 of Act No. 182/1993 Sb., on the Constitutional Court, as amended, is directed both against the statement of judgment II, by which the petition proposing the annulment of the Act was, except for the annulment of some words from § 7 para. 9 of the contested Act, rejected on the merits, and also against the reasoning of the judgment itself.

1) I am of the view that, in adjudging the petition proposing the annulment of the Act in its entirety, the Constitutional Court should have concerned itself not merely with the petitioners' arguments, but in particular with the constitutional plane of the Act, which establishes an institute with the mission of scholarly research as a state organization sui generis under the political auspices of one chamber of Parliament – thus an entirely political body, resulting from the competition of political forces in general elections and constitutionally commissioned to perform legislative activity. I do not consider, as grounds for finding the adopted Act unconstitutional, the fact, in and of itself, that the contested Act, by the use of value judgments (for ex. "the era of Communist totalitarian power"), preordains the mission of a scholarly institution which should be entirely independent of political influence. In the main, I even agree with the evaluative terms employed; but I am of the opinion that the legislature is not competent, in the normative part of statutes, as opposed to their preamble, to evaluate history and thereby de facto "fill in" for the historical research institution to which this commission is entrusted. And to the extent that the political bodies of state power – that is, the legislative and executive powers – think that the results of scholarly research in a certain specifically designated area are unsatisfactory, it is their undoubted obligation to increase the forms of support for science and research, which has traditionally been inadequate in our country and, for example, ranks almost at the low end in comparison with other Member States of the European Union. A genuine democratic, law-based state does not need to adopt statutes which evaluate its own past; with regret I am compelled at this juncture to state my position that, as a general rule, it is precisely autocratic regimes which resort to such legislative practices. I base my arguments for the unconstitutionality of the contested Act on an entirely different criterion – which, in my view, is the violation, in the give case, of Art. 1, Art. 2 paras. 1 and 2, and Art.

15 para. 2 of the Charter of Fundamental Rights and Basic Freedoms, and Art. 1 para. 1 of the Constitution of the Czech Republic . According to the constitutional standards contained in these provisions, the Czech Republic is a democratic law-based state founded on democratic values and on respect for human rights and fundamental freedoms, which in view of the absolute freedom of thought and conscience, founded on plurality and on the contention of views, may not be bound either by an exclusive ideology or by a particular religious faith. The basic constitutional directive is laid down in the Charter with the words: "All people are free, have equal dignity, and enjoy equality of rights". In the field, into which the contested law intervenes, the mentioned constitutional standards must then be interpreted in conformity with Art. 15 para. 2 of the Charter, guaranteeing the freedom of scholarly research, in the posture of an absolute freedom which cannot be restricted. For the field of scholarly research, the Czech Republic has so far succeeded in fulfilling the imperative flowing from the requirement of freedom of scholarship due to the fact that both university-level schools and the Czech Academy of Sciences, the societal mission of which is to expand knowledge through independent scholarly research, have statutorily-guaranteed and institutionalized autonomy, academic freedom and independence of scholarly research. Thus university-level schools and the Czech Academy of Sciences were entirely separated from the state and were given by law the form of public law corporations; they themselves form their own bodies (in secret elections) and the state is not authorized to intervene into their scholarly and research activities, likewise not into personnel issues. In the case of the contested Act, an institution with the mission of performing scholarly investigation of our contemporary history was established as an organizational unit of the state, in which the upper chamber of the Parliament has, on the contrary, reserved to itself, in § 7, the exclusive power to elect and remove the Institute's leadership. It is my view that by adopting the contested Act, which failed to respect the mentioned principles of the organization and activities of a scholarly institution, not only did the Parliament manifest its lack of trust in the existing system of institutional set-up of scholarly and research institutions and university-level schools, but also its lack of trust in the democratic, law-based state and its existing institutions. In summary: without reservation I share the objective of making the most far-reaching and most scientific study and research of the tragic periods of our modern history, whether it be effected with increased funds for scholarship and research, through grant support, or even by the establishment of further scholarly institutions. However, to the extent that the legislature establishes such institutions by means of legislation in which it also lays down who may (or, on the other hand, may not) work in it, and the decision-making on this selection is reserved exclusively for political bodies, this legislative step can be evaluated in only one of two ways. In the first case, that it thus expressed lack of trust in (if not contempt for) the existing scholarly and pedagogical institutions and decided to entrust only to that institution which it is newly creating a privileged monopoly on historical truth. In the second case, it decided to create an exclusive workplace for the "chosen" who would not pass muster in a standard selection process for a scholarly and academic institution (selection procedure, competition). These of the Act's effects naturally violate the constitutional principle of the prohibition of discrimination, the freedom of scholarly research, and the ideological neutrality of the state. In my view, then, the contested Act does not pass the test of proportionality, suitability or reasonableness, and should be annulled.

2) In view of the above-stated conclusion that, in the given case, the contested Act should have been annulled in its entirety as unconstitutional, I will devote the remainder

of my dissenting opinion solely to two provisions, which the Justice Rapporteur correctly proposed to annul as in conflict with the constitutional order but whose proposal the majority of the Constitutional Court Plenum did not approve (even if by the smallest possible margin). The last sentence of § 7 para. 6 reads as follows: "Membership in the Institute's Council is incompatible with membership in a political party or political movement." Chapter Two of the Charter governs fundamental human rights and freedoms, among which is included, in Art. 20 para. 2, the right of citizens to form political parties and political movements and to associate in them. According to para. 3 of the cited article of the Charter, this right can be restricted only by law, while Art. 44 of the Charter explicitly lays down that the given right can be restricted only in relation to judges, prosecutors, employees of state administration and territorial autonomous units, and members of the security corps or the armed forces. In my opinion membership in the Council cannot be classified under any of the given professions, so that the final sentence of § 7 para. 6 is obviously unconstitutional. The original Justice Rapporteur, my colleague Nykodým, also proposed the annulment of § 19 para. 1, lit. a) of the contested Act, according to which everyone who was at any time in the period from 25 February 1948 until 15 February 1990 a member or a candidate for membership in the Communist Party of Czechoslovakia or the Communist Party of Slovakia is deemed to be unreliable. The Act ties to the conception of reliability introduced in this way a prohibition on serving as a member of the Institute's Council, the Director of the Institute, the Director of the Archive or a principal employee of either the Institute or the Archive. The Constitutional Court has, in a host of its judgments, repeatedly declared its position on the constitutionality of the prohibition of performing a profession, or on restricted access to selected state public offices, for ex. in relation to Act No. 451/1991 Sb., entitled lustration. The cited act introduces a prohibition on access to leading offices in state bodies, and this prohibition on performing a profession is tied to a minimal engagement with the repressive bodies of the Communist regime (StB, LM [Translator's Note: "StB" stands for "Státní bezpečnosti" which means State Security, and "LM" stands for "Lidové malice" which means People's Militia, the military organization of the Communist Party]) or with holding a high office in the KSČ. In its Judgment No. Pl. ÚS 1/92 of 26 November 1992 , the Constitutional Court of the ČSFR found to be constitutionally legitimate the insertion of such a prohibition into a statute, as the act then under consideration affected only a very limited group of employees, exclusively in the power, administrative, and economic apparatus, and it affects licensed trades which are or could be the source of certain risks, be it merely from the perspective of protecting the democratic establishment and its principles, the security of the state, or the protection of state secrets or of those positions from which it is possible, either overtly or covertly, to influence the development of society. At the same time the Constitutional Court of the ČSFR added that "the conditions prescribed by the statute for holding certain positions shall apply only during a relatively short time period by the end of which it is foreseen that the process of democratization will have been accomplished." Then in its Judgment No. Pl. ÚS 9/01, the Czech Constitutional Court deduced that it is a legitimate aim of the legislation of a democratic state to promote the idea of "a democracy capable of defending itself"; it also declared that "an individual's attitudes to the democratic establishment are determined primarily by his actual actions". The Act currently under adjudication entirely disregards these conclusions of the Constitutional Court. On the one hand it expands the prohibition of access to enumerated offices due to "mere" membership or candidate membership in the KSČ or the KSS (at any time during the newly defined decisive period) and further

applies this prohibition not to public offices in state bodies, but to a scholarly institutions. If on the contrary the basic mission of the Institute and the Archive is the development of free research, which must be based on pluralism and the contention of views, then the argument of the requirement to protect democracy cannot hold water. It was characteristic precisely of totalitarian regimes, which the Institute is meant to investigate, that they a priori excluded an entire group of citizens according to race, class or some other characteristics (for ex., the Jews in the case of Nazism) from, for ex., participation in scholarly (subsequently also any other type of) activity. The argument of the majority of my colleagues, that the conception of unreliability employed in the Act as a criterion for prohibiting access to the given functions in the Institute and the Archive, must be interpreted as a type of bias sui generis, thus seems to me to be nothing less than comical. In the spirit of the principle asserted in this way, access to scholarly work by an historian of, for ex., the period of the religious wars, the Inquisition, the Reformation and the Counter-Reformation, could be restricted for anybody who is a practicing member or believer of any of the churches or religious movement, or had been in the past even if only for a short period of time. At this juncture of my dissenting opinion I have decided to depart from the settled constitutional law limits of argumentation and state my own belief: The fall-out of § 19 para. 1 will be the exclusion from access to select offices in the Institute and Archive of a number of significant historians who have without doubt accomplished the most so far for the elucidation of the crimes of the authoritarian regimes in our country. From among them can be named Bartošek, Kaplan, Křen, Mlynárik, Otáhal, Pichlík, Prečan, Reiman, Tesař and others, from among which, in addition, a number were imprisoned or forced into emigration, as it was they who belonged among the courageous persons who offered resistance to the Communist despotism, which cannot be said either of the majority of legislators who voted for this discriminatory provision or of the Justices of the Constitutional Court who approved of this provision. In summary, in the context of constitutional review, § 7 para. 6 of the Act should be annulled for its direct conflict with Art. 20 para. 2 and Art. 44 of the Charter. If the criterion of proportionality is applied, § 19 para. 1, lit. a) of the Act is in conflict with the right guaranteed in Art. 21 para. 4, in conjunction with Art. 1 and Art. 4 para. 3 of the Charter.

6. The Dissenting Opinion of Justice Eliška Wagnerová

My dissenting opinion is directed against the statement of judgment, insofar as it rejected on the merits also that part of the petition proposing the annulment of § 19 para. 1, lit. a) and the last sentence of § 7 para. 6 of the contested Act, and I disavow the Judgment's reasoning, on the following grounds:

Pride or Self-Lulling?

1. Sec. 19 para. 1, lit. a) construes the concept of "reliability" for the purposes of the contested statute such that a person is deemed to have been reliable if, in the period from 25 February 1948 until 15 February 1990, he or she was neither a member nor a candidate for membership in either the KSČ or the KSS. This provision thus creates two categories of persons, the reliable and the unreliable, while the sole dividing line between them is mere membership in the KSČ or the KSS. Only the first category of

persons is eligible to compete, even if only for inclusion in the list of persons from which the Senate of the Czech Parliament elects the Institute's Council, as well as for leading positions in the Institute (§ 18, first sentence).

2. Before we begin to analyze the provisions, let us consider in more detail two foreign statutory schemes relating to the eligibility to hold certain offices in similar institutions. On the one hand, there is the Gauck Authority in the Federal Republic of Germany (FRG) established by the Act on the Stasi Materials (Stasi-Unterlagen-Gesetz- StUG). Its chief, the Federal Trustee, elected by the Bundestag, must fulfill the conditions laid down for all state employees. According to § 4 para. 1, point 2 of the Framework Act on the Rights of State Employees (BRRG) [Translator's note : „BRRG" is the abbreviation for the title of the Act in German, „Beamtenrechtsrahmengesetz"], which is the implementing act for the constitutional directive contained in Art. 33 para. 5 of the Basic Law, it is a prerequisite for acceptance into German public service that the applicant espouse the free, democratic basic order in the sense of the Basic Law. The Unification Treaty (Einigungsvertrag) provides, among other things, that mere membership in the SED [Translator's note: this abbreviation stands for „Sozialistische Einheitspartei Deutschlands", which in English means "the Socialist Unity Party of Germany"] does not constitute an impediment to being active in public service, as opposed to engagement on behalf of the SED in high positions of the nomenklatura. On the other hand, there is the Slovak Institute of National Memory, established by the Act on National Memory, No. 553/2002 Z. z. For the purposes of this Act, a person is considered as irreproachable (§ 11) if he or she was not a member of the KSČ, the KSS or any other political party associated in the National Front.

3. It is evident that both these legal arrangements pursue the objective of staffing for activities consisting in such treatment of the materials of the former secret police (including their interpretation in cases where the institution is permitted to do so) and in such processing of them as would guarantee elementary harmony with the "new" value order embodied in the constitutional order (that is, to the extent possible, a fair interpretation of the materials in the sense of taking into account all relevant facets of the problem, as well as taking into account all democratic and liberally-oriented points of view, i.e., value judgments manifesting themselves perhaps only in the selection of the methods for scrutinizing the materials being processed, but certainly also, for ex., in the non-use of materials for the purpose of causing a scandal or to blackmail, and so forth, through "leaks"). There is no question that such an objective can be considered as legitimate. The second question concerns the means which the legislature selected to attain this objective.

4. At first glance it is evident that, with their general statutory scheme, the Germans selected a means having impact on all persons who either were not capable or did not wish to internalize the values of the new constitutional order, that is, are tied up with various ideologies inimical to the constitutional order. It is a general regulation, affecting all "extra-constitutional positions" regardless of whether the democratic, law-based state, that is the democratic, law-based state understood in terms of values, is assailed in the opinions of persons endeavoring to enter into state or public service "from the right or from the left". Such a statutory scheme is certainly a manifestation of the recognition of the highest normative and active operation of the constitution which, through the values contained therein, lays down the limits of the acts and activities of all public authorities; in the given context carried over to their personal substratum,

who participate in the exercise of public power by carrying out the tasks reserved to them. This statutory scheme decidedly cannot be designated as deviating from the requirement of equality before the law, which results both from the principle of the substantive law-based state and from democracy conceived in terms of values, in which equal access to public office must be ensured. Considered from another perspective – this statutory scheme cannot even be considered as an impermissible restriction on the fundamental right of those persons whom the statutory scheme affects, as these persons have voluntarily placed themselves outside the sphere defined by the constitutional order; at the same time, however, they intend to participate in the exercise of public power which can be accomplished solely „within" the confines defined by this order.

5. It is a different case with the means selected in the Czech and the Slovak statutory scheme. It is evident at first glance that, first and foremost, they are not well-adapted, without qualification, to the task of protecting the value area created by the constitutional order when, instead of a general formulation of requirements for the moral profile of persons (covert in the concept of reliability) competing for certain positions in the Institute, they selected the temporally-conditioned membership in certain political parties, although the breadth of the enumeration differs in each scheme. The Czech scheme can be identified as the least general, thus also as the least capable of attaining, through the means chosen, the yearned-for objective – namely, to staff the statutorily-prescribed places in the Institute with persons devoted to the democratic, law-based state, so that they would be effective at fulfilling the Institute's duties in the manner defined above.

6. In addition, one cannot not know that the contested legal rules literally strike at the genuine human rights of those persons who, by means of an entirely unacceptable definition of reliability, somehow automatically fell into the second category, that of persons in no respect reliable (or, pointedly stated, unreliable persons), that is, persons who did not identify themselves with the values of the new constitutional order and who are still, according to the evident opinion of the legislature, in some way bound to the pre-November, totalitarian regime, since, according to its own words, participation in the Institute's Council could be used as a means to „condone" their own past. At the oral proceeding, the representative of the Senate of the Czech Parliament was above-board in communicating to the Constitutional Court this „concern" of the legislature. Naturally, circumscribed in this fashion, the aim of the statutory restriction on access to public office grossly affects the honor and reputation of all persons who have managed to break away from their own past. To demur that there are only a small number of such persons is lame. Since it is brazen and cavalier, this assessment rings entirely inappropriate in relation to those who left the KSČ or the KSS already prior to November, 1989 and began actively to stand up to the then political system, for which they were to varying degrees persecuted – from the loss of employment connected with the transfer to working class jobs (as was the case, for ex., with P. Pithart) to imprisonment imposed upon critics of the regime (as evidenced by the case of J. Mlynárik), to give examples of persons who would, in terms of their professional capacity, legitimately be able to compete for an office in the Institute. At the same time, both of the named persons through their life's work over the past forty years have demonstrated how profoundly their thinking has moved away from the ideological conceptions to which the legislature has across the board,

formalistically and, in consequence, brazenly yoked them.

7. The assertion made in point 73 of the judgment to the effect that "belonging" to the totalitarian regime of persons listed in § 19 para. 1 of the Act reputedly continues to be such a circumstance as could call into doubt political loyalty, evoking the notion that such belonging to the totalitarian regime was based solely on membership in the KSČ or the KSS, even though it is evident that all of us who were (adult) participants in this recent history embody such belonging and that, in actuality it really is a matter of the extent of belonging, or better yet of personal failings. This acknowledgement clearly continues to be painful . . .

8. A year after the Second World War, Karl Jaspers wrote (The Question of German Guilt, Praha Academia 2006 [Translator's note: this is a reference to the Czech translation of that work.]): "Each of us bears guilt to the extent that we remained inactive. Passivity knows that it is morally guilty for each failing which neglects the obligation to embrace any sort of action possible for the protection of the threatened, for the alleviation of injustice, for the rejection of evil." And as the author of the foreword to the Czech edition, the Christian philosopher and signatory of Charter 77, Ladislav Hejdánek, correctly pointed out: " . . . [T]he German word, Schuld, does not mean merely guilt, but also a debt; the Czech word, 'guilt', somewhat lacks that forward-looking dimension, calling for 'atonement', for the 'payment' of a debt and the 'expiation' of evil . . ." He continued as follows: "Often in our country voices are heard that we have not as yet come to terms with our past . . . . Do we want to simplify the entire problem and limit it only to fact that we did not criminally prosecute the majority of criminal acts . . . ? Or perhaps even to expand it to political and certain property consequences as redress for what took place? Who could think that some such thing would suffice . . . ? . . . [T]he fundamental problem does not even consist in something that can be resolved judicially or by some sort of legal or organizational measures." And he supplements this answer by a quotation from Jaspers: ". . . [W]e want to ask ourselves, inexorably to clarify for ourselves – when have I felt false, thought falsely, acted falsely – we want to look for guilt as far away as possible – in ourselves – and not in things or in others . . .". Evidently neither the makers of this statute nor my esteemed colleagues who voted for this judgment have posed this designated question for themselves. Each person much answer for themselves the question as to why, for according to Jaspers the sole instance in the resolution of moral guilt is one's own conscience . . .

9. There is one more reason why I cannot agree with the judgment upon which I am taking a position. It is the requirement of minimal fairness generally placed on the content of a statute. In other words, it is the minimal requirement of justice which results from the civilization-influenced concept of fairness or justice, which can be evidenced by a moral commandment in effect for thousands of years: „Why do you see the speck in your brother's eye, but do not notice the log in your own eye?" (Matthew, Chapter 7). Phrased in contemporary language - it is not compatible with the basic conceptions of justice to place on others moral demands more stringent than those you place on yourself. In the given case, higher moral demands are placed upon persons carrying out tasks of an administrative office than are placed upon judges, who will review the decisions of the office. The same applies for the members of the Constitutional Court, which, on a general plane I consider, to be an absolutely unacceptable and untenable arrangement. Is the office of ordinary court judge perchance

less exacting in terms of being coupled with the constitutional order? After all the members of the Constitutional Court are bound by nothing other than that very constitutional order (if we leave aside the Act on the Constitutional Court). Nonetheless, should they be perceived as having a lesser devotion to the constitutional order than that demanded of a member of the Institute? These questions are posed because even the uttered word is a fact, and even the words of the legislature are also facts. Such facts influence reality alone by their very existence, which also comes across in the case of the above-mentioned implicit evaluation of courts, and especially of the Constitutional Court. Naturally I make this reservation solely on the general plane of moral requirements placed on the holding of various public offices, while, for the reasons explained in the preceding paragraphs, I consider that the definition of "reliability", as formulated in the contested Act, is entirely false, even immoral, and should not be invoked in relation to any person regardless of the public office which they are holding.

10. Otherwise I am of the view that it is not possible in any way to come to terms with the past by means of statutory norms. Coming to terms with the past can only be accomplished through an open dialogue lead by the civil society itself, as well as by its individual member concerning their actions in the past.

Unbelievably Facile Abridgment of Political Rights in the Name of Democracy . . . Point 61 of the judgment contains very brief reasoning as to why the petition proposing the annulment of §7 para. 6 was rejected on the merits. In part the judgment refers to the need to ensure the Institute's independence, and therefore it finds as legitimate "the condition of non-partisanship"; in actuality the Judgment found as legitimate the actual prohibition of membership in a political party for members of the Institute's Council. And it did so despite the fact that, under Art. 44 of the Charter, the right guaranteed in Art. 20 para. 2 of the Charter can be restricted (!) by statute only in the case of judges and procurators; nevertheless, the reality is such that the legislature did not even make use of the latitude which the Charter leaves to it in relation to those cases. With reference (which is inapposite, thus misinterpretive) to the Constitutional Court's judgment No. Pl. ÚS 9/01, eight of the Constitutional Court's members were persuaded that the conclusion of the cited judgment that entry into public service can be tied to meeting "certain prerequisites", "is significant for the matter under adjudication in the sense that the Court recognized the setting of certain limits on the exercise of fundamental rights, namely in cases where the protection of democracy is concerned.". It was evident that the "words" were taken from the cited judgment, but not the context in which they were used. To be sure, this blanket "method" of restricting the fundamental rights seems to me to be rather irresponsible. . . As to further arguments substantiating the need to annul the contested provisions, I join in the joint dissenting opinion of Justices J. Nykodým and P. Holländer, and do so with their gracious consent.

The Separate Opinion of Justice Vojen Güttler Dissenting from the Reasoning of the judgment Pl. ÚS ÚS 25/07

The dissenting Justice is of the view that, in relation to § 19 para. 1, lit. a) of the contested Act, the reasoning of the above-mentioned judgment should be

supplemented as follows.

In the Constitutional Court's opinion, the Parliament should however – de lege ferenda – carefully consider such legislative provision as would make eligible to work in the Institute's Council and in its leading functions (§ 7 para. 5, § 18) those former members or candidate members of the KSČ or KSS who in their entire subsequent life have demonstrated, and continue to demonstrate, that they have and do stand for the protection of democracy, freedom and human rights.