

Constitutional Council

Decision n° 2015-713 DC of July 23, 2015

On the Intelligence Act

In the conditions provided for by Article 61-2 of the Constitution, the Constitutional Council was seized by the President of the Senate with an application registered as 2015-713 DC relating to the Law on intelligence on 25 June 2015,

And on the same day by the President of the Republic,

And on the same day by Ms Laure de LA RAUDIÈRE, Mr Pierre LELLOUCHE, Ms Laurence ABEILLE, Mr Éric ALAUZET, Ms Brigitte ALLAIN, Ms Isabelle ATTARD, Ms Danielle AUROI, Mr Denis BAUPIN, Ms Michèle BONNETON, Mr Sergio CORONADO, Ms Cécile DUFLOT, Ms Véronique MASSONNEAU, Ms Barbara POMPILI, Mr Jean-Louis ROUMEGAS, Ms Eva SAS, Mr Damien ABAD, Mr Élie ABOUD, Mr Yves ALBARELLO, Mr Julien AUBERT, Mr Patrick BALKANY, Mr Sylvain BERRIOS, Mr Étienne BLANC, Mr Xavier BRETON, Mr Luc CHATEL, Mr Gérard CHERPION, Mr Alain CHRÉTIEN, Mr Philippe COCHET, Mr Jean-Louis COSTES, Mr Marc-Philippe DAUBRESSE, Mr Claude de GANAY, Mr Bernard DEBRÉ, Mr Jean-Pierre DECOOL, Mr Lucien DEGAUCHY, Mr Patrick DEVEDJIAN, Mr Nicolas DHUICQ, Ms Sophie DION, Ms Virginie DUBY-MULLER, Mr Sauveur GANDOLFI-SCHEIT, Mr Hervé GAYMARD, Mr Franck GILARD, Mr Charles-Ange GINESY, Mr Claude GOASGUEN, Mr Jean-Pierre GORGES, Ms Claude GREFF, Ms Anne GROMMERCH, Ms Arlette GROSSKOST, Mr Henri GUAINO, Mr Jean-Jacques GUILLET, Mr Antoine HERTH, Mr Patrick HETZEL, Mr Philippe HOUILLON, Mr Denis JACQUAT, Mr Jacques KOSSOWSKI, Ms Valérie LACROUTE, Mr Jean-François LAMOUR, Ms Isabelle LE CALLENNEC, Mr Marc LE FUR, Mr Bruno LE MAIRE, Mr Alain LEOEUF, Mr Jean LEONETTI, Mr Céleste LETT, Ms Véronique LOUWAGIE, Mr Lionel LUCA, Mr Jean-François MANCEL, Mr Thierry MARIANI, Mr Hervé MARITON, Mr Alain MARSAUD, Mr Philippe ARMAND, Mr Patrice MARTIN-LALANDE, Mr Alain MARTY, Mr Philippe MEUNIER, Mr Pierre MORANGE, Mr Yannick MOREAU, Mr Pierre MOREL-A-L'HUISSIER, Mr Alain MOYNE-BRESSAND, Ms Valérie PÉCRESSE, Mr Jacques PÉLISSARD, Mr Bernard PERRUT, Mr Jean-Frédéric POISSON, Ms Bérengère POLETTI, Mr Frédéric REISS, Mr Franck RIESTER, Mr Arnaud ROBINET, Mr Martial SADDIER, Mr Paul SALEN, Ms Claudine SCHMID, Mr Thierry SOLÈRE, Mr Éric STRAUMANN, Mr Alain SUGUENOT, Mr Lionel TARDY, Mr Jean-Charles TAUGOURDEAU, Mr Michel VOISIN, Ms Marie-Jo ZIMMERMANN, Ms Véronique BESSE, Mr Gilbert COLLARD, Mr Jean LASSALLE, Ms Marion MARÉCHAL-LE PEN, Mr Charles de COURSON, Mr Yannick FAVENNEC, Mr Jean-Christophe FROMANTIN, Mr Maurice LEROY, Mr Hervé MORIN, Mr Arnaud RICHARD, Mr Edouard PHILIPPE, Mr Noël MAMÈRE and Mr Jean-Claude MIGNON, Members of the National Assembly.

THE CONSTITUTIONAL COUNCIL,

Having regard to the Constitution;

Having regard to Ordinance no. 58-1067 of 7 November 1958 as amended, concerning the basic law on the Constitutional Council;

Having regard to basic law no. 2001-692 of 1 August 2001 regarding the laws on finance;

Having regard to the Defence Code;

Having regard to the Customs Code;

Having regard to the Code of Administrative Justice;

Having regard to the Criminal Code;

Having regard to the Postal and Electronic Communications Code;

Having regard to the Internal Security Code;

Having regard to Law no. 2004-575 of 21 June 2004 on confidence in the digital economy;

Having regard to the observations of the Government, registered on 7 July 2015;

Having regard to the observations in response presented by the applicant Members of Parliament registered on 21 July 2015;

Having heard the Rapporteur;

1. Considering that the President of the Republic, the President of the Senate and more than sixty members of the National Assembly have referred the Law on intelligence to the Constitutional Council; that the President of the Republic has requested the Constitutional Council to rule on the compatibility with the right to respect for private life, freedom of communication and the right to effective judicial relief of Articles L. 811-3, L. 821-5 to L. 821-7, L. 822-2 and L. 841-1 of the Internal Security Code as in force following the enactment of Article 2 of the Law, Articles L. 851-3, L. 851-5, L. 851-6 and paragraph II of Article L. 852-1 of the same Code as in force following the enactment of Article 5 of the Law, and Articles L. 853-1 to L. 853-3 of the same Code as in force following the enactment of Article 6 of the Law and Articles L. 773-2 to L. 773-7 of the Code of Administrative Justice as in force following the enactment of Article 10 of the Law; that the President of the Senate does not invoke any particular objection against the legislation; that the applicant members of the National Assembly dispute the constitutionality, with reference in particular to the right to respect for private life and freedom of expression, of Articles L. 811-3, L. 811-4, L. 821-1, L. 821-7 and L. 831-1 of the Internal Security Code as in force following the enactment of Article 2 of the Law, Articles L. 851-1 to L. 851-6 and Article L. 852-1 of the same Code as in force following the enactment of Article 5 of the Law, Articles L. 853-1 to L. 853-3 and L. 854-1 of the same Code as in force following the enactment of Article 6 of the Law and Articles L. 773-3 and L. 773-6 of the Code of Administrative Justice as in force following the enactment of Article 10 of the Law;

- THE REFERENCE LEGISLATION:

2. Considering that pursuant to Article 34 of the Constitution, statutes shall determine the rules concerning the fundamental guarantees granted to citizens for the exercise of their civil liberties; that it is for the legislator to ensure a reconciliation between the prevention of breaches of public order and crime on the one hand, which are necessary in order to safeguard rights and principles of constitutional standing, and on the other hand the exercise of freedoms guaranteed under the Constitution; that these include the right to respect for private life, the inviolability of the home and the secrecy of private correspondence, which are protected by Articles 2 and 4 of the 1789 Declaration of the Rights of Man and the Citizen;

3. Considering that according to Article 5 of the Constitution, the President of the Republic is the guarantor of national independence and territorial integrity; that according to the first subparagraph of Article 20: "The Government shall determine and conduct the policy of the Nation"; that pursuant to Article 21, the Prime Minister "shall direct the actions of the Government" and "shall be responsible for national defence"; that the existence of national defence secrets contributes to safeguarding the fundamental interests of the Nation, which include the independence of the Nation and its territorial integrity;

4. Considering that pursuant to Article 66 of the Constitution: "No one shall be arbitrarily detained. The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle under the conditions laid down in law";

5. Considering that pursuant to Article 16 of the 1789 Declaration: "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all"; that the right of persons who are affected to obtain judicial redress, the right to a fair trial and the principle of a fair hearing are guaranteed by this provision;

- CERTAIN PROVISIONS OF ARTICLE 2:

6. Considering that Article 2 of the Law referred completes, with titles I to IV, book VIII of the Internal Security Code, established by Article 1 of the Law; that title I is dedicated to general provisions and is comprised of Articles L. 811-1 to L. 811-4; that title II is dedicated to the procedure applicable to intelligence gathering techniques subject to authorisation and includes Articles L. 821-1 to L. 822-4; that title III concerns the National Commission for the Control of Intelligence Techniques and is comprised of Articles L. 831-1 to L. 833-11; that title IV concerns appeals against the implementation of intelligence techniques subject to authorisation and files of interest for state security and is comprised of Articles L. 841-1 and L. 841-2;

. Article L. 811-3 of the Internal Security Code:

7. Considering that Article L. 811-3 of the Internal Security Code states the grounds on which the special intelligence services may have recourse to the techniques defined in Articles L. 851-1 to L. 854-1 of the same Code as in force following the enactment of Articles 5 and 6 of the Law referred solely for the purpose of the exercise of their respective missions in order to gather intelligence; that these purposes correspond to "the defence and promotion of the following fundamental interests of the Nation: 1. National independence, territorial integrity and national defence;

- "2. Major foreign policy interests, the implementation of the European and international commitments of France and the prevention of any form of foreign interference;
- "3. The major economic, industrial and scientific interests of France;
- "4. The prevention of terrorism;
- "5. The prevention:
- "a) of attacks against the republican form of the institutions;
- "b) of actions seeking to maintain or reconstitute groups dissolved pursuant to Article L. 212-1;
- "c) of collective violence of such a nature as to cause a serious breach of public order;
- "6. The prevention of crime and organised crime;
- "7. The prevention of the proliferation of weapons of mass destruction";
8. Considering that the applicant members of the National Assembly assert that the purposes specified by the legislator are too broad, having regard to the intelligence gathering techniques provided for under the Law referred; that this results in a disproportionate violation of the right to respect for private life and freedom of expression;
9. Considering that the gathering of intelligence using the techniques defined under title V of book VIII of the Internal Security Code by the special intelligence services for the exercise of their respective missions is a matter solely for the administrative police; that its sole goal must thus be the preservation of public order and the prevention of crime; that it cannot be conducted in order to establish breaches of the criminal law, to gather evidence or to search for the perpetrators of offences;
10. Considering that in adopting definitions that refer to some of the interests mentioned in Article 410-1 of the Criminal Code in order to establish the purposes referred to in subparagraphs 1 to 4, the legislator specifically circumscribed the goals thereby pursued and did not adopt criteria at odds with the objective pursued by these administrative police measures; that the same applies in respect of the purposes defined in letter a) of subparagraph 5, which refer to the criminal offences provided for under chapter II of title I of book IV of the Criminal Code, in respect of those defined in letter b) of subparagraph 5, which refer to the provisions of Article L. 212-1 of the Internal Security Code, in respect of those defined in letter c) of subparagraph 5, which refer to the criminal offences provided for under Articles 431-1 to 431-10 of the Criminal Code, in respect of those defined in subparagraph 6, which refer to the criminal offences specified in Article 706-73 of the Code of Criminal Procedure and the major offences punished by Article 414 of the Customs Code committed by an organised band and in respect of those defined in subparagraph 7, which refer to the criminal offences provided for under Articles L. 2339-14 to L. 2339-18 of the Defence Code;
11. Considering that the provisions of Article L. 811-3 must be combined with those of Article L. 801-1, as in force following the enactment of Article 1 of the Law referred, according to which the decision to use intelligence techniques and the techniques chosen must be proportionate with the goal pursued and the grounds invoked; that it follows that the breaches of the right to respect for private life must be proportionate with the objective pursued; that the National Commission for the Control of Intelligence Techniques and the

Conseil d'État are charged with ensuring that this requirement of proportionality is respected;

12. Considering that it follows from the above that the provisions of Article L. 811-3 of the Internal Security Code must be ruled constitutional;

. Article L. 811-4 of the Internal Security Code:

13. Considering that Article L. 811-4 of the Internal Security Code authorises the Conseil d'État to adopt a decree designating the services other than the specialist intelligence services that may be authorised to use the techniques defined in title V of book VIII of the Internal Security Code; that this decree may also delineate for each service the purposes and techniques that are eligible for authorisation;

14. Considering that, according to the applicant members of the National Assembly, by deferring to the regulatory level the power to designate the non-specialist services that may use intelligence gathering techniques along with the techniques that they will be permitted to use, the legislator did not itself set the rules relating to the fundamental guarantees granted to individuals in order to exercise public freedoms; that the legislator is thus claimed to have acted in excess of its competence;

15. Considering that by defining the intelligence gathering techniques that may be used by the intelligence services and the purposes for which they may be used whilst deferring to the regulatory level the power to organise these services falling under Articles L. 811-2 and L. 811-4 of the Internal Security Code, the legislator did not act in excess of the competence vested in it under Article 34 of the Constitution in order to set "the rules concerning... the fundamental guarantees granted to citizens for the exercise of their civil liberties"; that the provisions of Article L. 811-4 of the Internal Security Code must be ruled constitutional;

. Article L. 821-1 of the Internal Security Code:

16. Considering that Article L. 821-1 of the Internal Security Code provides that the intelligence gathering techniques defined under Articles L. 851-1 to L. 853-3 of the same Code shall be used within the national territory by individually designated and accredited agents acting with the prior authorisation of the Prime Minister issued after obtaining the opinion of the National Commission for the Control of Intelligence Techniques;

17. Considering that, according to the applicant members of the National Assembly, in providing for authorisation issued by the executive after hearing the opinion of the National Commission for the Control of Intelligence Techniques and in permitting authorisation to be issued notwithstanding the unfavourable opinion of this commission, the contested provisions provide insufficient guarantees in relation to the rights and freedoms guaranteed by the Constitution, including in particular freedom of expression and communication; that in failing to subject the use of these techniques to control by the courts, the legislator violated both the requirements laid down in Article 66 of the Constitution as well as those in Article 16 of the 1789 Declaration;

18. Considering in the first place that, acting upon a written request supported by reasons of the Minister of Defence, the Minister of the Interior or the ministers responsible for the

economy, the budget or customs, authorisation is granted by the Prime Minister to agents individually designated and accredited to use intelligence gathering techniques within the national territory for a maximum period of four months; that it is conditional upon the prior opinion of the National Commission for the Control of Intelligence Techniques; that the legislator based its action on Article 21 of the Constitution when granting the Prime Minister the power to authorise the use of intelligence gathering techniques by the administrative police;

19. Considering that, in itself, the procedure providing for authorisation by the Prime Minister after obtaining the opinion of the National Commission for the Control of Intelligence Techniques does not violate the right to respect for private life, the inviolability of the home or the secrecy of private correspondence;

20. Considering in the second place that these provisions, which relate to the issue of authorisations for administrative policing measures by the Prime Minister after consulting with an independent administrative authority, do not deprive individuals of the right of judicial relief against the decisions to use intelligence gathering techniques against them; that the requirements of Article 16 of the 1789 Declaration have thus not been violated;

21. Considering thirdly that these provisions do not violate individual freedom;

22. Considering that it follows from all of the above that the provisions of Article L. 821-1 of the Internal Security Code must be ruled constitutional;

. Article L. 821-5 of the Internal Security Code:

23. Considering that Article L. 821-5 of the Internal Security Code establishes an exceptional procedure governing the issue of authorisations to engage in intelligence gathering techniques in situations of absolute urgency for the sole purposes specified in subparagraphs 1, 4 and 5(a) of Article L. 811-3 of the same Code; that in such cases, the authorisation of the Prime Minister is issued without obtaining the prior opinion of the National Commission for the Control of Intelligence Techniques, which is informed as soon as possible and is given notice of all reasons justifying the authorisation and those establishing its absolutely urgent nature within twenty four hours of the issue of the authorisation;

24. Considering on the one hand that the urgent procedure provided for under Article L. 821-5 is only applicable where the implementation of the intelligence gathering techniques requires entry into a private place used as a residence pursuant to paragraph V of Article L. 853-1 of paragraph V of Article L. 853-2 and is not accordingly liable to affect the inviolability of the home;

25. Considering on the other hand that the exceptional procedure provided for under Article L. 821-5 is reserved for some of the purposes mentioned in Article L. 811-3 relating to the prevention of particularly serious breaches of public order and must be justified on the grounds of absolute urgency for the usage of the intelligence gathering technique; that this procedure is not applicable to the intelligence gathering techniques provided for under Articles L. 851-2 and L. 851-3 and subparagraph 1 of paragraph I of Article L. 853-2; that it is no longer applicable where a technique provided for under Article L. 853-1 or

subparagraph 2 of Article L. 853-2 must involve entry into a private residence; that the National Commission for the Control of Intelligence Techniques, which must be informed thereof without delay, must receive the full motivation along with the grounds justifying the absolute urgency within a maximum period of twenty-four hours; that the commission disposes of full powers to control of the implementation of an intelligence gathering technique, which are vested in it by Articles L. 833-1 to L. 833-11, in order to satisfy it that the legal framework has been complied with; that the authorisation of the Prime Minister to use intelligence gathering techniques according to this exceptional procedure is subject to judicial review by the Conseil d'État, which is responsible for assessing the reasons justifying its use; that accordingly, the provisions of Article L. 821-5 of the Internal Security Code do not cause a manifestly disproportionate violation of the right to respect for private life and the secrecy of private correspondence;

26. Considering that it follows from the above that the provisions of Article L. 821-5 of the Internal Security Code must be ruled constitutional;

. Article L. 821-6 of the Internal Security Code:

27. Considering that Article L. 821-6 of the Internal Security Code establishes an exceptional procedure governing the installation, usage and operation of technical equipment and devices enabling the real-time localisation of a person, vehicle or object, the identification of terminal equipment or a subscription number as well as the localisation of that equipment or the interception of the correspondence sent from or received by that equipment in urgent situations involving an imminent threat or a very high risk that it may not subsequently be possible to carry out the operation; that this procedure enables individually designated and accredited agents to install, use and operate these devices or this technical equipment without prior authorisation; that the Prime Minister, the minister concerned and the National Commission for the Control of Intelligence Techniques are informed of this using any means without delay; that the Prime Minister may order at any time that the usage of the technique be halted and the intelligence collected be destroyed without delay; that an authorisation must subsequently be issued by the Prime Minister within a period of forty-eight hours of the opinion given by the Commission concerning the grounds for motivation referred to under Article L. 821-4 of the same Code and those justifying recourse to the urgent procedure;

28. Considering on the one hand that the procedure provided for under Article L. 821-6 may be used in order to engage in the intelligence gathering techniques provided for under Articles L. 851-5, L. 851-6 and paragraph II of Article L. 852-1 of the Internal Security Code; that these procedures enabling an administrative authority to use a technical device enabling a person, vehicle or object to be located in real time or, using equipment or a device, to gather or intercept without the consent of the author connection data enabling terminal equipment or the subscription number of its user to be identified along with data relating to the location of the terminal equipment used and the correspondence sent from or received by a piece of terminal equipment;

29. Considering on the other hand that, contrary to the other exceptional procedures, including those established by Article L. 821-5 of the same Code, the procedure provided for under

Article L. 821-6 enables exceptions to be made from the requirement of the issue of prior authorisation by the Prime Minister or by one of his staff members with national defence clearance to whom he or she has delegated this power, as well as the issue of a prior opinion by the National Commission for the Control of Intelligence Techniques; that it no longer provides that the Prime Minister and the minister concerned must be informed in advance of the adoption of a technique in this context; that accordingly, the provisions of Article L. 821-6 cause a manifestly disproportional violation of the right to respect for private life and the secrecy of private correspondence; that the provisions of Article L. 821-6 of the Internal Security Code must be ruled unconstitutional;

30. Considering that, consequently, the last phrase of the first subparagraph of Article L. 821-7 of the Internal Security Code as in force following the enactment of Article 2 of the Law referred, which is indissociable from the provisions of Article L. 821-6, must likewise be ruled unconstitutional; that the same applies for the phrase: "and L. 821-6" in the seventh subparagraph of Article L. 833-9 of the Internal Security Code as in force following the enactment of Article 2 of the Law referred;

. Article L. 821-7 of the Internal Security Code:

31. Considering that Article L. 821-7 of the Internal Security Code prevents a member of Parliament, a judge, a lawyer or a journalist from being subject to a request for the implementation within the national territory of an intelligence gathering technique defined under Articles L. 851-1 to L. 853-3 on account of the conduct of his or her mandate or profession; that it requires an examination by the National Commission for the Control of Intelligence Techniques in plenary form of any applications concerning any of these persons or his or her vehicles, offices or homes; that it prevents the use of the exceptional procedure provided for under Article L. 821-5; that the Commission, which is informed of the manner in which authorisations issued in accordance with this Article are implemented, and to which transcripts of the intelligence collected on this basis are transmitted, oversees compliance with the requirement that any breaches of the guarantees associated with the conduct of these professional activities or mandates must be necessary and proportionate;

32. Considering that, according to the applicant members of the National Assembly, these provisions do not assure sufficient protection against the indirect violation of the secrecy of journalistic sources and the confidential nature of discussions between lawyers and clients; that they result in a violation of the right to respect for private life and, for lawyers, of the rights of the defence and the right to a fair trial, and for journalists, of freedom of expression; that in addition, the failure to provide for criminal penalties against agents who disclose the contents of the intelligence collected would enable the legal guarantees relating to the protection of professional secrecy for these professions to be circumvented;

33. Considering that the applicant members of the National Assembly also dispute the failure to apply the contested provisions to university professors and lecturers, in breach of the fundamental principle recognised in the laws of the Republic of the independence of teaching and research;

34. Considering in the first place that the contested provisions require a systematic examination by the National Commission for the Control of Intelligence Gathering Techniques sitting in plenary form of any application to apply a technique in relation to a member of Parliament, a judge, a lawyer or a journalist or their vehicles, offices or homes, which cannot occur on account of the exercise of their mandate or profession; that the exceptional procedure provided for under Article L. 821-5 of the Internal Security Code is not applicable; that it falls to the Commission, which receives all transcripts of the intelligence collected in this regard, to oversee - subject to judicial review by the Conseil d'État - the proportional nature of breaches to the requirement to respect for private life and the violations of the guarantees associated with the conduct of these professional activities or mandates; that it follows from the above that the provisions of Article L. 821-7 do not cause a manifestly disproportionate violation to the right to respect for private life, the inviolability of the home and the secrecy of private correspondence;
35. Considering in the second place that Article 226-13 of the Criminal Code punishes the disclosure of secret information by a person to whom it has been entrusted; that accordingly, the objection alleging the failure to provide for criminal penalties against agents who disclose the intelligence or data collected is misconstrued;
36. Considering in the third place that the principle of the independence of teaching and research does not imply that university professors and lecturers must benefit from special protection in the event that intelligence gathering techniques are used against them by the administrative police;
37. Considering that it follows from all of the above that the remaining provisions of Article 821-7 of the Internal Security Code, which do not violate any requirement of constitutional law, must be ruled constitutional;

. Article L. 822-2 of the Internal Security Code:

38. Considering that Article L. 822-2 of the Internal Security Code specifies the maximum periods for which intelligence collected through the implementation of an intelligence gathering technique defined under Articles L. 851-1 to L. 853-3 of the same Code may be retained; that these periods are thirty days starting from collection for intercepted correspondence and speech, one hundred and twenty days from collection for electronic data and images, four years from collection for connection data and six years from collection for encrypted data;
39. Considering that in making provision for these retention periods with reference to the characteristics of the intelligence collected along with a maximum limit on retention of six years after collection of encrypted data, after which the intelligence collected must be destroyed, the legislator did not violate any requirement of constitutional law; that the provisions of Article L. 822-2 of the Internal Security Code must be ruled constitutional;

. Article L. 831-1 of the Internal Security Code:

40. Considering that Article L. 831-1 of the Internal Security Code concerns the composition of the National Commission for the Control of Intelligence Techniques, that it is classified as

an independent administrative authority; that it is comprised of nine members, including a chairperson; that it is comprised of two members of the National Assembly, two Senators (who are appointed respectively for the duration of the legislature for the National Assembly and for the duration of their mandate for the Senate), two members of the Conseil d'État appointed by the Vice-President of the Conseil d'État, two senior-ranking judges of the Cour de Cassation appointed jointly by the First President and the Prosecutor General at the Cour de Cassation and an individual qualified on account of his or her knowledge of electronic communications appointed in accordance with a proposal by the President of the Regulatory Authority for Electronic and Postal Communications; that its president is appointed by decree of the President of the Republic from the members of the Conseil d'État or the Cour de Cassation; that the duration of the term in office of the non-parliamentary members is set at six years; that the term in office of the members is non-renewable; that one half of the members of the Conseil d'État and the judges from the Cour de Cassation are reappointed every three years; that the Commission may suspend the term in office of any of its members or remove them in the event of incompatibility, impediment or breach of duty;

41. Considering that the applicant members of the National Assembly argue that the composition of the National Commission for the Control of Intelligence Techniques has been determined in breach of the principle of the separation of powers given that, on the one hand, only one of its nine members is appointed with reference to his or her expertise in the area of electronic communications and, on the other hand, the members of Parliament are in a minority;

42. Considering on the one hand that the inclusion of one single individual qualified on account of his or her knowledge of electronic communications within the National Commission for the Control of Intelligence Techniques does not impinge upon respect for the principle of the separation of powers;

43. Considering on the other hand that the inclusion of members of Parliament amongst the members of the National Commission for the Control of Intelligence Techniques does not have the effect of violating the principle of the separation of powers guaranteed by Article 16 of the 1789 Declaration since, according to the third subparagraph of Article L. 832-5 of the Internal Security Code, they are required to respect secrets protected under Articles 226-13 and 413-10 of the Criminal Code;

44. Considering that Article L. 831-1 of the Internal Security Code must be ruled constitutional;

. Certain provisions of Article L. 832-4 of the Internal Security Code:

45. Considering that Article L. 832-4 of the Internal Security Code concerns the resources allocated to the National Commission for the Control of Intelligence Techniques; that on this basis, the second phrase of the first subparagraph of this Article provides that the funds of the commission shall be registered under the "Protection of rights and freedoms" programme of the "Direction of Government action" mission;

46. Considering that subparagraph 1 of paragraph II of Article 34 of the aforementioned Organic Law of 1 August 2001, to which Article 34 of the Constitution refers, stipulates that the task

of setting "the general budget per mission, the amount of commitment authorisations and payment credits" must be reserved to a law on finance;

47. Considering that the second phrase of the first subparagraph of Article L. 832-4, which encroaches upon the area reserved to the exclusive domain of finance laws, must be declared unconstitutional;

. Article L. 841-1 of the Internal Security Code:

48. Considering that Article L. 841-1 of the Internal Security Code provides that "Without prejudice to the special provisions laid down in Article L. 854-1 of this Code, the Conseil d'État shall have competence, under the conditions laid down in chapter III-bis of title VII of book VII of the Code of Administrative Justice, to hear requests relating to the implementation of the intelligence techniques referred to in title V of this book"; that pursuant to subparagraph 1 of that Article, the Conseil d'État may also be apprised by any person who wishes to establish that he or she is or has not been subject to unlawful surveillance, subject to the submission of a previous complaint to the National Commission for the Control of Intelligence Techniques in accordance with Article L. 833-4 of the same Code; that pursuant to subparagraph 2 of Article L. 841-1, the Conseil d'État may be seized by the Commission where it considers that its opinions or recommendations have not been acted upon or that the follow-up action has been insufficient, or by at least three of its members; that according to the fifth subparagraph of Article L. 841-1, an administrative court or a judicial authority apprised of a procedure or dispute the solution to which depends upon an examination of the lawfulness of an intelligence gathering technique is entitled to refer an interlocutory question to the Conseil d'État;

49. Considering that Article L. 841-1 of the Internal Security Code, which implements the right to effective judicial relief, must be ruled constitutional, with the exception of the words: "Without prejudice to the special provisions laid down in Article L. 854-1 of this Code, ";

• CERTAIN PROVISIONS OF ARTICLE 5:

50. Considering that Article 5 of the Law completes book VIII of the Internal Security Code with a title V entitled "Intelligence gathering techniques subject to authorisation" which includes a chapter I entitled "Administrative access to connection data" including Articles L. 851-1 to L. 851-7 and a chapter II entitled "Security interceptions" including Article L. 852-1;

51. Considering that, unless specified otherwise, the intelligence gathering techniques provided for under Articles L. 851-1 to L. 851-6 and Article L. 852-1 are implemented in accordance with the conditions set forth in chapter I of title II of the Internal Security Code; that they are accordingly authorised by the Prime Minister on the basis of a written request supported by reasons of the Minister of Defence, the Minister of the Interior or the ministers responsible for the economy, the budget or customs, after obtaining a prior opinion from the National Commission for the Control of Intelligence Techniques; that these techniques can only be implemented by individually designated and accredited agents; that they are conducted under the control of the National Commission for the Control of Intelligence Techniques; that the composition and organisation of this independent authority are defined under

Articles L. 831-1 to L. 832-5 of the Internal Security Code under conditions that ensure its independence; that its missions are defined in Articles L. 833-1 to L. 833-11 of the same Code under conditions that ensure the efficacy of its oversight; that, according to the provisions of Article L. 841-1 of the same Code, the Conseil d'État may be apprised by any person who wishes to establish that no intelligence gathering technique has been implemented unlawfully in relation to him or her or by the National Commission for the Control of Intelligence Techniques; that finally, according to the provisions of Article L. 871-6 of the same Code, the operations physically necessary in order to implement the techniques referred to under Articles L. 851-1 to L. 851-4 and L. 852-1 may only be carried out in their respective networks by qualified agents from the services or bodies placed under the authority or protection of the minister responsible for electronic communications or the operators or networks or suppliers of telecommunications services;

. Articles L. 851-1 and L. 851-2 of the Internal Security Code:

52. Considering that Article L. 851-1 of the Internal Security Code reiterates the procedure governing the administrative capturing of technical connection data previously provided for under Article L. 246-1 of the same Code by authorising the administrative authority to collect information or documents processed or stored by their networks or electronic communications services from electronic communications operators, from persons offering to the public as their principal or ancillary business a connection enabling online communication through network access and from persons offering to the general public through public online communication services the storage of signals, text, images, sound or messages of any type provided by the recipients of these services; that, with the exception of the provisions of Article L. 821-2 of the same Code, where the request relates to the identification of subscription numbers or data relating to the connection to the electronic communication services or the inventory of all subscription numbers or connection data for a designated person, it shall be transmitted to the National Commission for the Control of Intelligence Techniques by individually designated and accredited agents from the intelligence services;
53. Considering that Article L. 851-2 of the Internal Security Code permits the administrative authorities, for the sole purposes of the prevention of terrorism, to collect in real time the information or documents referred to under Article L. 851-1 in relation to a person previously identified as constituting a threat from the networks of the operators and persons mentioned in that Article;
54. Considering that the applicant members of the National Assembly assert that the legislator has acted in excess of its competence by failing to define with sufficient precision the connection data that may be collected by the administrative authorities and that the procedure causes a disproportionate violation of the right to respect for private life, taking account of the nature of the data that may be collected, the scope of the techniques that may be used and the goals pursued;
55. Considering in the first place that the intelligence gathering authorisation provided for under Articles L. 851-1 and L. 851-2 relates exclusively to information or documents processed or stored by the electronic communications networks or services operated by the persons

referred to in recital 52; that according to the provisions of paragraph VI of Article L. 34-1 of the Postal and Electronic Communications Code, the data stored and processed by electronic communications operators and persons offering to the general public a connection enabling such communication relate exclusively to the identification of the users of the services provided by the operators, the technical characteristics of the communications provided by them and the location of terminal equipment and may not under any circumstances relate to the content of the correspondence exchanged or the information consulted in any form whatsoever during the course of such communication; that according to paragraph II of Article 6 of the Law of 21 June 2004, the data stored by persons offering access to online communication services and those offering the storage of miscellaneous information with a view to the provision of these services to the general public are those of such a nature as to enable any person who has contributed to the creation of the content or any aspect of the content of the services provided to be identified; that accordingly, the legislator provided a sufficient definition of connection data, which may not relate to the contents of the correspondence or information consulted;

56. Considering in the second place that this intelligence gathering technique is implemented under the conditions and subject to the guarantees set forth in recital 51; that it may only be implemented for the purposes specified under Article L. 811-3 of the Internal Security Code; that it is authorised for periods of four months, which may be renewed pursuant to Article L. 821-4 of the same Code; that in addition, where the collection of data occurs in real time, it may only be authorised for the purpose of the prevention of terrorism for renewable periods of two months exclusively in respect of a person who has been identified in advance as constituting a threat and without recourse to the procedure applicable to situations of absolute urgency provided for under Article L. 821-5 of the same Code; that accordingly, the legislator subjected the procedure governing the capturing of technical data to appropriate guarantees in order to ensure that on the one hand respect for the private life of individuals is reconciled on the other hand with the prevention of breaches of public order and crime in such a manner that is not manifestly disproportionate;

57. Considering that it follows from all of the above that Articles L 851-1 and L. 851-2 of the Internal Security Code must be ruled constitutional;

. Article L. 851-3 of the Internal Security Code:

58. Considering that Article L. 851-3 of the Internal Security Code provides that the operators and persons referred to under Article L. 851-1 of the same Code may be required to implement automated processing within their networks which, having regard to the parameters specified in the authorisation, are intended to detect connections liable to constitute a terrorist threat; that this automated processing must use exclusively the information or documents referred to under Article L. 851-1 and must not collect any data other than those compliant with their design parameters or enable the persons to which the information or documents relate to be identified; that where such processing detects data liable to suggest the existence of a terrorist threat, the identification of the person or persons concerned and the collection of the respective data may be authorised by the Prime Minister or by any of the persons designated by him;

59. Considering that the applicant members of the National Assembly argue that, taking account of the volume of data liable to be controlled and the inadequacy of the guarantees associated with "false positives", the technique provided for under these provisions causes a disproportionate violation of the right to respect for private life;

60. Considering that the intelligence gathering technique provided for under Article L. 851-3 is implemented under the conditions and with the guarantees referred to under recital 51; that it may only be implemented for the purposes of the prevention of terrorism; that both the recourse to the technique and the parameters applicable to the automated processing are authorised after obtaining the prior opinion of the National Commission for the Control of Intelligence Techniques; that the first authorisation to use this technique is issued for a period limited to two months and that the request for renewal must include a statement of the number of identifiers signalled by the automated processing and an analysis of the relevance of these signals; that the automated processing must use exclusively the information or documents referred to under Article L. 851-1, and must not collect any data other than those compliant with their design parameters or enable the persons to which the information or documents relate to be identified; that where such processing detects data that is indicative of the existence of a terrorist threat, a renewed authorisation by the Prime Minister, after obtaining the opinion of the National Commission for the Control of Intelligence Techniques, will be necessary in order to identify the person concerned; that this data must be exploited within a time limit of sixty days from the time it was collected and must be destroyed upon expiry of this time limit unless that are serious indications confirming the existence of a terrorist threat; that the authorisation to use this technique cannot be issued according to the procedure applicable to situations of absolute urgency provided for under Article L. 821-5; that accordingly these provisions do not cause a manifestly disproportionate violation of the right to respect for private life; that the provisions of Article L. 851-3 of the Internal Security Code must be ruled constitutional;

. Articles L. 851-4, L. 851-5 and L. 851-6 of the Internal Security Code:

61. Considering that Article L. 851-4 of the Internal Security Code authorises the administrative authorities to require operators to transmit in real time technical data relating to the location of the terminal equipment used as referred to under Article L. 851-1; that according to Article L. 851-5, the administrative authorities may use a technical device enabling a person, vehicle or object to be located in real time; that Article L. 851-6 provides that the same authority may use equipment or a device capable of interception to collect, without the consent of the author, text or correspondence sent, transmitted or received electronically or to access electronic data, connection data enabling terminal equipment or the subscription number of its user to be identified along with data relating to the location of the terminal equipment used;

62. Considering that, according to the applicant members of the National Assembly, taking account of the goals that justify their implementation, these techniques result in a disproportionate violation of the right to respect for private life;

63. Considering that the intelligence gathering techniques mentioned above are implemented under the conditions and with the guarantees referred to in recital 51 and for the purposes

specified in Article L. 811-3 of the Internal Security Code; that where the implementation of the technique provided for under Article L. 851-5 requires entry into a vehicle or into a private place, this measure must be implemented in the manner defined under Article L. 853-3; that the authorisation to use the technique provided for under Article L. 851-6 is issued for a period of two months, which may be renewed under the same conditions as to duration; that the equipment or devices used in relation to this last technique must be included in a special register available to the National Commission for the Control of Intelligence Techniques; that the maximum number of items of equipment or devices that may be used at the same time is specified by the Prime Minister, after obtaining the opinion of this Commission; that the information or documents gathered by this equipment or these devices must be destroyed as soon as it becomes apparent that they are not related to the authorisation for implementation and, in any case, within a maximum time limit of ninety days after collection; that under these conditions, the contested provisions do not cause a manifestly disproportionate violation of the right to respect for private life; that accordingly, the provisions of Articles L. 851-4, L. 851-5 and L. 851-6 of the Internal Security Code must be ruled constitutional;

. Article L. 852-1 of the Internal Security Code:

64. Considering that paragraph I of Article L. 852-1 of the Internal Security Code authorises the administrative interceptions of correspondence sent electronically; that the persons associated with a person who is subject to an authorisation to intercept may also be monitored where they are likely to provide information relevant for the purpose justifying the authorisation;
65. Considering that paragraph II of this Article provides that, for the purposes referred to under subparagraphs 1, 4 and 5(a) of Article L. 811-3, the use of equipment or a device capable of interception to collect, without the consent of the author, text or correspondence sent, transmitted or received electronically or to access electronic data may be authorised for the purpose of intercepting correspondence issued or received by terminal equipment; that the correspondence intercepted must be destroyed where it is clear that it is not related to the authorisation issued no later than thirty days after it was collected;
66. Considering that, according to the applicant members of the National Assembly, taking account of the goals that justify their implementation, these techniques result in a disproportionate violation of the right to respect for private life;
67. Considering that the techniques for intercepting correspondence provided for under paragraph I of Article L. 852-1 are implemented under the conditions and subject to the guarantees referred to under recital 51; that they may only be implemented for the purposes specified in Article L. 811-3 of the Internal Security Code; that the maximum number of interception authorisations that may be valid at the same time is specified by the Prime Minister after obtaining the opinion of the National Commission for the Control of Intelligence Techniques; that in order to facilitate the control by this Commission, the execution of interception work is centralised; that in addition, as regards interceptions implemented using the technique provided for under paragraph II of Article L. 851-2, the authorisation may only be issued for one of the purposes referred to under Article L. 811-3,

which include the prevention of particularly serious breaches of public order; that the correspondence thereby intercepted must be destroyed where it is clear that it is not related to the authorisation issued at the latest within thirty days of its collection; that it is clear from the above that, in enacting the aforementioned provisions, the legislator has not reconciled in a manifestly unbalanced manner on the one hand the prevention of breaches of public order and of crime and on the other hand the right to respect for private life and secrecy of private correspondence; that accordingly, the provisions of Article L. 852-1 of the Internal Security Code must be ruled constitutional;

- CERTAIN PROVISIONS OF ARTICLE 6:

68. Considering that Article 6 of the of the Law completes title V of book VIII of the Internal Security Code by chapter III entitled "The sound wiring of certain locations and vehicles and the capturing of electronic images and data" including Articles L. 853-1 to L. 853-3 and by chapter IV entitled "International surveillance measures" including Article L. 854-1;

. Articles L. 853-1 to L. 853-3 of the Internal Security Code:

69. Considering that Article L. 853-1 of the Internal Security Code authorises, upon condition that intelligence cannot be collected by other legally authorised means, the use of technical devices enabling the capturing, fixing, transmission and recording of private or confidential spoken language or images taken from a private place; that Article L. 853-2 of the same Code provides, under the same conditions, for the use of technical devices enabling electronic data stored in an electronic system to be accessed, along with their registration, storage and transmission, or for electronic data to be accessed and recorded, stored and transmitted as they appear on a screen for the user of an automated data processing system, as they are entered into that system by character input or as they are received and issued by audiovisual peripheral devices;

70. Considering that Article L. 853-3 of the Internal Security Code allows, upon condition that the intelligence cannot be collected by other legally authorised means, entry into a vehicle or into a private place for the sole purpose of placing, using or removing the technical devices referred to under Articles L. 851-5, L. 853-1 and L. 853-2;

71. Considering that the applicant members of the National Assembly assert that, taking account of their intrusive nature, these techniques must be controlled by the courts and that they result in a disproportionate encroachment on the inviolability of the home and the right to respect for private life;

72. Considering in the first place that, unless specifically provided otherwise, the intelligence gathering techniques provided for under Articles L. 853-1 and L. 853-2 put in place, as the case may be, pursuant to Article L. 853-3, following entry into a private place or into a vehicle not constituting a private place for residential usage are to be conducted in accordance with the conditions provided for under chapter I of title II of the Internal Security Code, as referred to in recital 51; that these techniques may only be used for the purposes specified in Article L. 811-3 of the Internal Security Code upon condition that the intelligence sought cannot be collected by other legally authorised means; that it is for the National Commission for the Control of Intelligence Techniques to ensure upon examination

of the request that this condition is complied with; that the authorisation is issued for a period of two months or thirty days, depending upon the technique used; that the service authorised to use the intelligence gathering technique presents a report to the National Commission for the Control of Intelligence Techniques concerning its implementation; that usage of technical devices and, as the case may be, entry into a private place or a vehicle, may only be engaged in by individually designated and accredited agents belonging to one of the services referred to under Articles L. 811-2 and L. 811-4, the list of which is specified by decree of the Conseil d'État; that where entry into a private place or into a vehicle is necessary in order to use a technical device enabling electronic data stored in an electronic system to be accessed, the authorisation may only be granted after an opinion has been given by the National Commission for the Control of Intelligence Techniques sitting as a sub-commission or in plenary session; that the requirement for this express prior opinion precludes the application of the urgent procedure provided for under Article L. 821-5; that it follows from the above that the legislator has associated the implementation of the techniques provided for under Articles L. 853-1 to L. 853-3, as the case may be where they involve entry into a private place or into a vehicle not used as a private residence, with provisions of such a nature as to guarantee that the restrictions imposed on the right to respect for private life are not manifestly disproportionate;

73. Considering secondly that where the implementation of the intelligence gathering techniques provided for under Articles L. 853-1 and L. 853-2 requires entry into a private place used for residential purposes, the authorisation may only be granted after an express opinion of the National Commission for the Control of Intelligence Techniques, ruling as a sub-commission or in plenary session, has been obtained; that the requirement for this express prior opinion precludes the application of the urgent procedure provided for under Article L. 821-5; that, where such entry is authorised notwithstanding the unfavourable opinion of the National Commission for the Control of Intelligence Techniques, the Conseil d'État is immediately seized by the President of the Commission or by one of the members mentioned under subparagraphs 2 and 3 of Article L. 831-1; that the decision on authorisation may not be implemented before the Conseil d'État has ruled on the matter, unless the authorisation was granted for the purpose of the prevention of terrorism and the Prime Minister has ordered its immediate implementation; that it follows from the above that the legislator associated the implementation of the techniques provided for under Articles L. 853-1 to L. 853-3, in situations in which they require entry into a private place used as a residence, with provisions of such a nature as to guarantee that the restrictions imposed on the right to respect for private life and the inviolability of the home are not manifestly disproportionate;

74. Considering thirdly that the contested provisions do not violate individual freedom;

75. Considering that it follows from all of the above that Articles L. 853-1, L. 853-2 and L. 853-3 of the Internal Security Code must be ruled constitutional;

. Article L. 854-1 of the Internal Security Code:

76. Considering that paragraph I of Article L. 854-1 of the Internal Security Code authorises the monitoring of communications issued from or received abroad for the sole purposes of

protecting the fundamental interests of the Nation as referred to in Article L. 811-3 of the same Code; that the second subparagraph of this paragraph provides the information which surveillance authorisations issued in accordance with this Article must contain; that the third subparagraph of this paragraph states that these authorisations are to be issued on the basis of a request supported by reasons of the ministers referred to in the first subparagraph of Article L. 821-2 of the same Code for a renewable period of four months; that the fourth subparagraph of this paragraph provides that a decree of the Conseil d'État, adopted after obtaining the opinion of the National Commission for the Control of Intelligence Techniques, shall define the conditions governing the exploitation, storage and destruction of the intelligence gathered along with the conditions governing traceability and control by the commission for the implementation of surveillance measures; that the fifth subparagraph provides that an unpublished decree of the Conseil d'État adopted after receiving the opinion of the said commission, which must be brought to the attention of the parliamentary delegation for intelligence, shall specify if necessary the arrangements applicable to the implementation of these surveillance measures;

77. Considering that the applicant members of the National Assembly assert that these provisions violate the right to respect for private life;
78. Considering that in failing to define in the Law either the conditions governing the exploitation, storage and destruction of the intelligence gathered pursuant to Article L. 854-1 or those governing the control by the National Commission for the Control of Intelligence Techniques of the legality of the authorisations granted under the terms of that Article and of the conditions regulating their implementation, the legislator did not specify the rules applicable to the fundamental guarantees afforded to citizens in relation to the exercise of their public freedoms; that accordingly, the provisions of paragraph I of Article L. 854-1, which violate Article 34 of the Constitution, must be ruled unconstitutional;
79. Considering that the same consequently applies for paragraphs II and III of Article L. 854-1, which are inseparable from it; that there are also grounds to rule unconstitutional as a consequence the phrase: ", with the exception of those referred to in Article L. 854-1" in the third subparagraph of Article L. 833-2 of the Internal Security Code as in force following the enactment of Article 2 of the Law; the phrase: "Without prejudice to the special provisions laid down in Article L. 854-1 of this Code" in the first subparagraph of Article L. 841-1 of the Internal Security Code as in force following the enactment of Article 2 of the Law; and the phrase: "and of Article L. 854-1 of the Internal Security Code" in Article L. 773-1 of the Code of Administrative Justice as in force following the enactment of Article 10 of the Law and paragraph IV of Article 26 of the Law;
- CERTAIN PROVISIONS OF ARTICLE 10:
80. Considering that Article 10 of the Law referred amends the Code of Administrative Justice; that subparagraph 1 of this Article introduces into the Code a new Article L. 311-4-1, which vests the Conseil d'État with the power to hear as a first and final instance any requests relating to the implementation of the intelligence gathering techniques subject to authorisation and files of interest for state security; that subparagraph 2 of this Article

introduces into title VII of book VII a new chapter III-bis entitled "Disputes relating to the implementation of intelligence techniques subject to authorisation and files of interest for state security" including Articles L. 773-1 to L. 773-8;

. Article L. 773-2 of the Code of Administrative Justice:

81. Considering that Article L. 773-2 of the Code of Administrative Justice concerns the organisation chosen within the Conseil d'État in order to rule upon such requests whilst ensuring respect for national defence secrets, the violation of which is punished by Articles 226-13 and 413-10 of the Criminal Code; that the first and second subparagraphs of Article L. 773-2 specify the adjudicating bodies that are required to rule upon these requests either on the merits or with regard to the questions of law that they are liable to raise; that the third subparagraph of this Article L. 773-2 on the one hand specifies the arrangements governing national security clearance for the members of the adjudicating bodies referred to in the first subparagraph of this Article, their rapporteur public and the agents assisting them, and on the other hand provides that the same persons shall be compelled to abide by professional secrecy and to uphold national defence secrets; that the fourth subparagraph of Article L. 773-2 provides that the members of the adjudicating body and rapporteur public shall be authorised to access all documents, including those relating to national defence secrets, available both to the National Commission for the Control of Intelligence Techniques and to the specialist intelligence services or the administrative services referred to respectively under Articles L. 811-2 and L. 811-4 of the Internal Security Code;

82. Considering that the provisions of Article L. 773-2 of the Code of Administrative Justice do not violate the principle of national defence secrecy, which is one of the constitutional requirements inherent within the safeguarding of the fundamental interests of the Nation; that they must be ruled constitutional;

. Articles L. 773-3, L. 773-4 and L. 773-5 of the Code of Administrative Justice:

83. Considering that Articles L. 773-3, L. 773-4 and L. 773-5 concern the relevance of considerations relating to national defence secrets in the organisation of the adversarial procedure;

84. Considering that Article L. 773-3 provides in its first subparagraph that the requirements relating to the right to make representations "shall be adjusted to fit those of national defence secrets"; that to this effect, the second subparagraph of this Article provides that the National Commission for the Control of Intelligence Techniques shall be informed of any request presented on the basis of Article L. 841-1 of the Internal Security Code; that it shall be informed of all documents filed by the parties and shall be invited to present written or oral observations; that the third subparagraph of this Article provides that the body charged with deciding on the matter shall hear the parties separately where issues of national defence secrecy arise; that Article L. 773-4 provides that the president of the adjudicatory body shall order that the hearing be held behind closed doors if the proceedings relate to secrets; that Article L. 773-5 provides that the adjudicatory body may apprise itself of any evidence *ex officio*;

85. Considering that the applicant members of the National Assembly object that Article L. 773-3 violates the right to a fair trial insofar it does not strike a fair balance between respect for the right to make representations and national defence secrets; that in their view, the possibility granted to the court to apprise itself ex officio of any evidence is insufficient in order to offset the failure to respect the right to make representations;

86. Considering that the provisions of Articles L. 773-3 and L. 773-4 only apply in cases involving national defence secrets; that having regard to the possibility of referral to the Conseil d'État, the information provided to the National Commission for the Control of Intelligence Techniques where a request is presented by an individual, the possibility given to that Commission under certain circumstances to present observations and finally the possibility given to the adjudicatory body to apprise itself of any evidence ex officio, the legislator reconciled on the one hand the right of the individuals involved to effective judicial relief, the right to a fair trial and the right to make representations with on the other hand the constitutional requirements inherent within the safeguarding of the fundamental interests of the Nation, which include national defence secrets, in a manner that was not manifestly imbalanced;

87. Considering that the provisions of Articles L. 773-3, L. 773-4 and L. 773-5 of the Code of Administrative Justice must be ruled constitutional;

. Articles L. 773-6 and L. 773-7 of the Code of Administrative Justice:

88. Considering that Article L. 773-6 concerns the motivation of the decisions of the Conseil d'État where it considers that the implementation of an intelligence gathering technique is not unlawful; that in such an eventuality, the decision is limited to informing the applicant or the referring court that no unlawful act has been committed, without confirming or reversing the implementation of an intelligence gathering technique; that the same applies in the event that the retention of intelligence is not unlawful;

89. Considering that Article L. 773-7 concerns the motivation of the decisions of the Conseil d'État and its prerogatives where it finds that an intelligence gathering technique is or has been implemented unlawfully or that information has been retained unlawfully; that the first subparagraph of this Article provides that the Conseil d'État is competent to cancel the authorisation and to order the destruction of any intelligence unlawfully gathered; that the second subparagraph provides that in the event that the Conseil d'État is seized by a court by way of an interlocutory reference or by the interested party, it shall inform the individual or the court that an unlawful act has been committed, without disclosing any information protected as a national defence secret; that this subparagraph also provides that the adjudicatory body may, when seized of claims seeking compensation, order the state to make good the damage suffered; that the third subparagraph of this Article provides that, where the adjudicatory body considers that the unlawful act ascertained is liable to constitute an offence, it shall inform the public prosecutor;

90. Considering that the applicant members of the National Assembly object that Article L. 773-6 violates the right to a fair trial on the grounds that the motivation for a decision of the Conseil d'État finding that no unlawful act has been committed during the implementation of

intelligence gathering techniques does not enable the person concerned to know whether or not he or she has been subject to a surveillance measure;

91. Considering that the provisions of Article L. 773-6 do not in themselves cause any violation of the right to a fair trial; that the Conseil d'État rules with full knowledge of the facts on requests concerning the implementation of intelligence gathering techniques received by it on the basis of Article L. 841-1 of the Internal Security Code since pursuant to Article L. 773-2 of the Code of Administrative Justice, the members of the adjudicatory body and the rapporteur public are authorised to access all documents, including those relating to national defence secrets, available both to the National Commission for the Control of Intelligence Techniques and to the specialist intelligence services or the other administrative services referred to under Articles L. 811-2 and L. 811-4 of the Internal Security Code; that pursuant to Article L. 773-3, the National Commission for the Control of Intelligence Techniques is informed of any request presented on the basis of Article L. 841-1, is given notice of all documents filed by the parties and is invited to present written or oral observations; that pursuant to Article L. 773-5, the adjudicatory body may apprise itself of any evidence ex officio; that accordingly, in adopting Articles L. 773-6 and L. 773-7, the legislator reconciled on the one hand the right of the persons concerned to effective judicial relief and the right to a fair trial with on the other hand national defence secrets in a manner that was not manifestly imbalanced;

92. Considering that the provisions of Articles L. 773-6 and L. 773-7 of the Code of Administrative Justice must be ruled constitutional;

93. Considering that there are no grounds for the Constitutional Council to raise any other question of compatibility with the Constitution ex officio,

HELD:

Article 1.- The following provisions of the Law on intelligence are unconstitutional:

- in Article 2, Article L. 821-6, the last phrase of the first subparagraph of Article L. 821-7, the second phrase of the first subparagraph of Article L. 832-4, the phrase: "with the exception of those referred to in Article L. 854-1" appearing in the third subparagraph of Article L. 833-2, the phrase: "and L. 821-6" appearing in the seventh subparagraph of Article L. 833-9 and the phrase: "Without prejudice to the special provisions laid down in Article L. 854-1 of this Code" appearing in the first subparagraph of Article L. 841-1 of the Internal Security Code;
- in Article 6, Article L. 854-1 of the Internal Security Code;
- in Article 10, the phrase: "and of Article L. 854-1 of the Internal Security Code" appearing in Article L. 773-1 of the Code of Administrative Justice;
- paragraph IV of Article 26.

Article 2.- The following provisions of the same Law are constitutional:

- in Article 2, Articles L. 811-3, L. 811-4, L. 821-1 and L. 821-5, the remainder of Article L. 821-7, Articles L. 822-2 and L. 831-1 and the remainder of Article L. 841-1 of the Internal Security Code;

- in Article 5, Articles L. 851-1, L. 851-2, L. 851-3, L. 851-4, L. 851-5, L. 851-6 and L. 852-1 of the Internal Security Code;
- in Article 6, Articles L. 853-1, L. 853-2, L. 853-3 of the Internal Security Code;
- in Article 10, Articles L. 773-2, L. 773-3, L. 773-4, L. 773-5, L. 773-6 and L. 773-7 of the Code of Administrative Justice.

Article 3.- This decision shall be published in the Journal Officiel of the French Republic.

Deliberated by the Constitutional Council in its session of 23 July 2015, sat on by: Mr Jean-Louis DEBRÉ, President, Ms Claire BAZY MALAURIE, Ms Nicole BELLOUBET, Mr Guy CANIVET, Mr Michel CHARASSE, Mr Renaud DENOIX de SAINT MARC, Mr Lionel JOSPIN and Ms Nicole MAESTRACC