To the Honorable Constitutional Court
Budapest

The Honorable Constitutional Court:

We the undersigned petitioners Dr. Beatrix Vissy (…………………..) and Dr. Máté Szabó (……………..) wish to exercise our right under Section 26 (2) of Act CLI of 2011 on the Constitutional Court (hereinafter: "Constitutional Court Act") and lodge a

constitutional complaint

as follows.

The power of a counter-terrorism organization to collect covert intelligence upon citizens based on a simple ministerial permission but without a court warrant violates our right to the protection of our privacy, family life, private home, private relations, and personal data — all rights enshrined in Article VI of the Fundamental Law. The infringement of our fundamental rights is specifically caused by the following language inserted, by agency of Section 8 of Act CCVII of 2011, into Section 7/E (3) of Act XXXIV of 1994 on the Police (hereinafter: "Police Act"):

"by the application, as appropriate, of Sections 53-60 of Act CXXV of 1995 on the National Security Services (hereinafter: "National Security Act")" as well as

"…in the course of performing which [the Counter Terrorism Center] *shall be entitled, in accordance with Sections 38-52 of the National Security Act, to request and hold information. Covert collection of intelligence within the meaning of Section 56 clauses a)-e) of the National Security Act shall be authorized by the minister responsible for justice. "*

We respectfully petition that the Constitutional Court annul these passages as being in conflict with the Fundamental Law.

Bearing in mind that the surveillance authorization of a new organization that is distinct from the old one is constitutionally problematic in and of itself, we further contend that our rights under Article VI of the Fundamental Law are also infringed by the conferring of similar powers upon the national security services. This infringement directly follows from a similarly unconstitutional passage in Section 58 (1) of Act CXXV on the National Security Services — namely, "*In the course of performing tasks relevant to national security as specified in Section 5 clauses b), d), and h) to j) and Section 6 clauses d), i),*

and l) to n)" — as well as from paragraph (2) of the same Section. However, we are barred from contesting these last two passages by Section 30 (4) of the Constitutional Court Act.

Our argument is as follows.

I.

First and foremost, we need to substantiate our entitlement to lodge the present petition.

1. We lodge this constitutional complaint pursuant to Section 26 § (2) of the Constitutional Court Act, because the violation we protest has occurred in consequence of the application of an unconstitutional provision directly, without a court decision in the matter, and further because there is no legal remedy available to address this violation.

1.1. As the provisions we contest affect us personally, effectively, and directly, our complaint satisfies all requirements for "affected" or "concerned" status as set forth in Order No. IV/2532/2012. AB of the Constitutional Court.

In a "concrete case," the contested provisions enable a restriction of our fundamental rights enshrined in Article VI of the Fundamental Law without any court participating in the relevant decision, and without allowing for a court review of that decision. These provisions require nothing more than a mere ministerial decision to authorize an agency to collect covert intelligence, which amounts to the most severe intrusion into our privacy imaginable. The staff of the counter-terrorism organization are free to search our homes, take samples of and record by technical means anything they find, open our mail and sealed packages addressed to us, accessing and recording the contents thereof, intercept and record our electronic communications, access and record our data forwarded by means of or stored on computers, as well as make use of the same.

Our involvement and concern in all of this is *personal* because, under these rules, we are potential victims of the infringement of fundamental rights caused by the surveillance. As we are going to explain in items II to VI of this complaint, the infringement of fundamental rights is manifested by the absence of constitutional safeguards to protect us against the surveillance, including the unavailability of legal remedy. The sheer possibility of surveillance that is opened up by the contested provisions without any intervening individual decision, the absence of any impediment by safeguards, and the covert nature of the surveillance accomplish an infringement of our fundamental rights that is *direct* and *immediate*. In this connection, the violation can be *effective* and *direct* not only when the subject is or has been actually under surveillance. We do not know whether we are or have been victimized by covert surveillance ordered by the minister as allowed by the provisions contested herein. We simply have no way of knowing, if only because of the inherent nature of covert surveillance, the point of which is to observe its target in secret. In the event the Constitutional Court chose to confine effective and direct concern to individuals actually targeted by surveillance, nobody would ever be able to lodge a

constitutional complaint, because under normal circumstances nobody would become cognizant of this fact, at the time of the surveillance or any time afterwards.

Covert surveillance creates a power relation grounded in a lopsided informational situation, and it is this asymmetry that causes an effective and direct infringement, even if no act of surveillance has been actually authorized. Where people can be kept under constant surveillance and that surveillance is covert, those people can be kept under total control as well. Surveillance of this description "normalizes" people in the sense of encouraging conformity. As a result, people will begin to act as if they are being watched regardless of whether they actually are, and this changes their conduct and interpersonal relations. Investigating the root of the problem from the perspective of fundamental rights, it is worthwhile to look at arguments about the deficit of self-determination and devastating consequences of social psychology that can ensue where citizens lose their control over information kept on them. [Cf. the Resolution of the FRG's Constitutional Court of December 15, 1983 concerning the Census Act; for the most accomplished domestic explication, see the Constitutional Court's Resolution No. 15/1991 (IV.13.) AB.] In other words, the helplessness of the surveillance victim is to a great extent caused by the covert nature of the act, which nurtures a sense that the surveillance is constant, far-reaching, and inevitable. [For more on this, see Jeremy Bentham: *Panopticon Or the Inspection House*, (1789) and Michel Foucault: *Discipline and Punish*: *The Birth of the Prison*, London, Penguin Books (1991; first published in 1977), particularly pp. 176-184.]

1.2. We wish to draw the attention of the Honorable Constitutional Court to the fact that other courts have taken a similar view of the affected status of the complainant in deciding whether the complaint can be formally admitted. For instance, The Federal Constitutional Court of Germany, based on a constitutional complaint against regulations permitting covert surveillance, deemed affected status to exist and acted on the complaint as follows:

> "In order to lodge an admissible constitutional complaint against a law, the complainant must demonstrate that the law itself, rather than its implementation only, represents a direct and effective violation of one his/her fundamental rights. […] At the same time, because the [petitioners] are not privy to any interference with their rights, they do not have the possibility to contest the act of applying the law. In such cases, it is of the essence to uphold the ability of concerned individuals to lodge a constitutional complaint against the law itself, as in all other cases where it is impossible, for divergent reasons, to file a constitutional complaint against the act of application." [Resolution of the Federal Constitutional Court of Germany of December 15, 1970, in the matter of secrets in telecommunications, commonly known as the *Klass Case/'Abhörurteil'* – BVerfGE 30, 1 (16 f.)]

Another, far more recent ruling of the Federal Constitutional Court of Germany, which examined the adequacy of constitutional safeguards associated with the so-called online search of premises (*"Online-Durchsuchungen"*) — a rather similar subject matter — also supports the perception that affected status can be readily demonstrated even if no accomplished act of covert surveillance is proven. [BVerfGE 120, 274 (297)].

In its turn, the European Court of Human Rights also deemed admissible a petition, lodged in the aftermath of one of the cases mentioned above, and it did so despite the fact that the complainants had turned to the Court over being *potentially* under surveillance. The defendant government of the Federal Republic of Germany itself took the view that what

the complainants had really sought to achieve was a constitutional review in the abstract. Yet the Court arrived at the following:

> "As to the facts of the particular case, the Court observes that the contested legislation institutes a system of surveillance under which all persons in the Federal Republic of Germany can potentially have their mail, post and telecommunications monitored, without their ever knowing this […]. To that extent, the disputed legislation directly affects all users or potential users of the postal and telecommunication services in the Federal Republic of Germany. Furthermore […] this menace of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8 (art. 8). […] Having regard to the specific circumstances of the present case, the Court concludes that each of the applicants is entitled to "(claim) to be the victim of a violation" of the Convention, even though he is not able to allege in support of his application that he has been subject to a concrete measure of surveillance. [*Case of Klass and Others v. Germany* (Application no. 5029/71) Judgment of 6 September 1978, pp. 37-38.]

1.3. Even though the fact that all individuals potentially under surveillance are affected by the provisions contested herein stands demonstrated by analogy, we nonetheless wish to emphasize that, by virtue of our profession, we are affected by the possibility of surveillance even more directly than is generally the case. We are both members of the staff of the Eötvös Károly Institute, a watchdog organization dedicated to scrutinizing the government that be using the civilian means at our disposal. We regularly voice harsh criticism of the government's measures that dismantle constitutionalism. [Cf. for instance the volume entitled *Az elveszejtett alkotmány* ("Constitution Lost", Eötvös Károly Institute: Budapest, 2011) and various positions drafted in collaboration with other watchdogs at http://www.alaptorveny.eu.] In this capacity, we are even more susceptible than the average citizen to being coerced into conformity by acts of actual or potential covert surveillance perpetrated by executive power.

1.4. When surveillance is made known to the public for any reason, it obviously cannot be covert by definition. Consequently, covert intelligence must be regarded as clearly distinct from the problem of stockpiling personal data for records, particularly in respect of the possibility of vindicating or enforcing certain rights. And because there can be no doubt that covert surveillance does happen, no remedy against them can be considered actually existing unless potential targets are recognized as being affected for purposes of a constitutional complaint. Should the Constitutional Court nevertheless determine the absence of *personal, effective, and direct influence* in spite of the precedents in the practice of courts in Karlsruhe and Strasbourg as discussed above, this would entirely remove legal protection from the sphere of life as well as minimize any risk of being held accountable for a violation in this context. (Here we refrain from addressing in detail the problem that the powers of the National Authority for Data Protection and Freedom of Information and the Parliamentary Committee for National Security do not even come close to presenting an alternative to the constitutional complaint, nor do they afford ancillary legal protection for the type of case contemplated here. Of course, we will be ready to elaborate an argument to this effect should the Honorable Constitutional Court deem it necessary.)

2. In our estimation, our complaint raises an issue of profound constitutional significance which the Constitutional Court has not addressed on the merits to date. The cause of constitutionalism and the constitutional compliance of the objective legal system, this latter being a precondition for the enforcement of the fundamental rights in the case at hand, demand that the Constitutional Court take a position on the question of whether, in the absence of a safeguard by means of judicial intervention or review, it is constitutionally admissible to allow the restriction — in effect, suspension — of the right to privacy by the contested provisions. This question cannot be answered simply by mutual reference to the abstract declaration of the right to privacy in the Fundamental Law and, respectively, to the fundamental rules of restricting privacy [Fundamental Law, Article I (3)], without any further interpretation. Therefore, our petition satisfies the criteria of admissibility spelled out in Section 29 of the Constitutional Court Act.

3. The provisions contested herein were set forth and inserted in the language of the Police Act by Section 8 of Act CCVII of 2011 on the Amendment of Certain Acts on Law Enforcement and on Other Related Amendments. Considering that these provisions entered into force on January 5, 2012, fewer than 180 days had elapsed by the time we submitted this petition. Consequently, the deadline for filing a constitutional complaint as stipulated under Section 30 (4) of the Constitutional Court Act has been met and therefore cannot form an obstacle to conducting the process.

The provisions of the National Security Act that we also claim to be unconstitutional entered into force more than 180 days ago, so we are barred by law from petitioning the abolition of these provisions. However, the fact that the scope of our petition cannot and does not cover the National Security Act should not be construed to mean that the provisions we do contest herein, which have recourse to very similar principles, would be constitutional.

4. Given that the Constitutional Court has not ruled on the compatibility of the provisions in question with the Fundamental Law to date, the prohibition under Section 30 of the Constitutional Court Act does not apply, so it cannot disqualify our petition either.

5. Mandatory legal representation in accordance with Section 51 of the Constitutional Court Act is provided by attorney at law Dr. László Majtényi of the Law Firm of Dr. László Majtényi, whose power of attorney is enclosed herewith.

II.

In what follows, we will demonstrate the unconstitutional nature of the contested provisions.

The provisions we object to violate our fundamental rights on account of enabling two organizations to collect covert intelligence on us without a court warrant, merely requiring authorization by a minister as a condition to proceed.

1. Pursuant to Section 56 of the National Security Act, the national security services may, subject to "extrinsic authorization," search homes, take samples of and record by technical means anything they find, open private mail and sealed packages, accessing and recording the contents thereof, intercept and record electronic communications, access and record data forwarded by means of or stored on computers.

The national security services must file a request for that external authorization, specifying the location where the covert intelligence will be collected, the name(s) of the targeted person(s), any identification data if available, the title of the covert intelligence, an explanation of the necessity thereof, as well as the starting and ending dates of the action. Section 58 of the National Security Act provides that "In the course of the fulfillment of the national security tasks […], the authorization for intelligence gathering shall be granted by the judge appointed by the President of the Metropolitan Court for this duty." For all other tasks, the intelligence is authorized by the Minister of Justice. The law also provides that the judge or the Minister of Justice (hereinafter collectively: "authorizer") must decide on the request in 72 hours of the time of submission, allowing the request or, if finding it to be without grounds, turning it down. No appeal shall lie against this decision. The intelligence may be authorized for a period of up to 90 days per case, with the possibility of a single extension for another 90 days if deemed justified. Furthermore, if the authorizer is a judge, in contemplating the decision regarding the extension he has the power to access the data collected and recorded in the course of the intelligence he has initially authorized. The minister is not entitled to do this, so he has less information to rely on in deciding upon the extension. Finally, the law provides that the authorizer shall not notify affected subjects of the procedure or indeed of the fact that intelligence has been collected on them.

2. Pursuant to 7/E of the Police Act, which was incorporated by Section 8 of Act CCVII of 2011 and has been in force since January 5, 2011, the counter-terrorism organization is, in certain cases, subject to different rules than the police in collecting covert intelligence. Within the meaning of the Police Act, the counter-terrorism outfit is part of the police but operates within the framework of its own separate organization, reports to the minister responsible for law enforcement instead of the national police chief, and has its director general appointed by the Prime Minister. Likewise, its duties are distinct from those of the police; for instance, it does not exercise investigative powers on its own. Instead, its mission is to prevent crimes, capture perpetrators, as well as keep individuals and objects under surveillance and protection.

The law authorizes the counter-terrorism organization to collect covert intelligence as part of performing its specific functions. As a rule of thumb, this activity is subject to the same rules that govern intelligence gathering by the police [Police Act, Section 7/E (2)]. However, when the task is associated with counter-terrorism, armed conflict, or protecting the lives and bodily integrity of citizens in distress abroad due to acts of terrorism, *the gathering of intelligence in such connections is no longer subject to the provisions of the Police Act but to the rules applicable to the national security services* [Police Act, Section 7/E (3)]. Like the National Security Act, the Police Act makes it possible to search homes, take samples of and record by technical devices anything found upon the premises, open private mail and sealed packages, accessing and recording the contents thereof, intercept

and record electronic communications, as well as access and record data forwarded by means of or stored on computers or computer networks [Police Act Section 69 (1), virtually identical to Section 56 of the National Security Act].

Which of the two regulations serves as the basis for an act of gathering covert intelligence becomes significant not in terms of the essence of the activity so much as of the difference between the respective institutional safeguards protecting the privacy of citizens vis á vis these activities. Indeed, the safeguards stipulated by the Police Act for the gathering of covert intelligence are more stringent than those provided by the National Security Act:

- Pursuant to the Police Act, covert intelligence is only allowed in the interest of locating individuals for whom a warrant has been issued on suspicion of a felony, or of investigating certain serious crimes specified by the Act. The National Security Act contains no such constraint.
- The intelligence under the Police Act is subject to prior court warrant. By contrast, covert intelligence under the National Security Act is authorized by the Minister of Justice.
- Under either Act, the authorization request must be explained by the requester. However, the Police Act sets forth the types of cases where such a process can be conducted, and therefore the legitimacy of the covert intelligence is legally bound because it can be justified by demonstrating the existence of specific legal conditions. By contrast, the National Security Act fails to specify any such conditions, effectively reducing any explanation to generic terms that are not legally bound.
- The Police Act orders all recorded information indifferent for the purpose of the intelligence, including the data of uninvolved persons, to be destroyed within eight days of the conclusion of the surveillance employing special devices. The National Security Act contains no such obligation.

3. The provision of the Police Act we challenge accomplishes a violation of our constitutional rights by enabling the counter-terrorism organization to collect covert intelligence under the rules of the National Security Act, which contain far fewer safeguards than do those of the Police Act. This injurious situation could thus be terminated by repealing the passages contested herein, while making the counter-terrorism organization's gathering of covert intelligence subject to the rules of the Police Act, which afford broader legal safeguards.

III.

Collecting intelligence by the means available to the secret services amounts to the most severe restriction of the right to privacy and family life as well as the intimately related right to informational self-determination. All of these rights are enshrined in Article VI of the Fundamental Law. As construed by the practice of the Constitutional Court as well as by others, these rights are closely affiliated with human dignity and are collectively destined to keep one's privacy immune to intrusions against one's will [Constitutional Court Resolution 36/2005. (X. 5.) AB]. There is no more drastic restriction of these rights

than covert intelligence. People targeted by such surveillance lose all control over information pertaining to their person and character. This is because of the very essence of covert intelligence, which lies in keeping the target unaware that the agencies are collecting intelligence on him. As a result, the subject becomes helplessly exposed in his communications with his most intimate relations without knowing about it. The secrecy of the observation and the hiding of the observer render the target powerless for the entire duration of the surveillance. In other words, the person who does not know he is being watched will not have the slightest chance to protest the intrusion into his privacy.

Admittedly, there are certain legitimate interests universally recognized in constitutional democracies, such as national and public security, the prevention and investigation of crimes, and the enforcement of the state's penal claims, that may justify restrictions on privacy. That said, the restriction of privacy must always pass the test necessity and commensurability as a condition for remaining constitutional. The criterion of necessity will not be satisfied unless the engagement of the weapons of secret intelligence is inevitably forced by one or more of the objectives listed above; in other words, when the qualified nature of the given threat would keep conventional methods of investigation ineffectual [Constitutional Court Resolution 2/2007 (I. 24.) AB]. As for the commensurability or proportionality of the restriction, that depends on the constitutional safeguards in place. Even when circumstances justifying the need for covert intelligence obtain, secret investigation cannot be legitimate unless underpinned by adequate institutional safeguards set forth by law in a rigorous and transparent procedural order, which cover every single detail of the invasion of privacy. In a constitutional democracy, there can be no consideration whatsoever, whether of utility or equity, that can sanctify disregard for safeguards ordered to protect the freedom of individuals. [Constitutional Court Resolutions 47/2003. (X. 27.) AB and 2/2007 (I. 24.) AB]

IV.

In its practice to date [cf. Resolution No. 2/2007. (I. 24.) AB and elsewhere], the Constitutional Court has always displayed unshakable resolve in thwarting attempts to curb fundamental rights that relied on arguments external to other constitutional rights. This resolve certainly does not obviate the need to oppose arguments less easily interpreted in the legal sense, such as those citing public security or public information as grounds for the restriction, because the boundaries are less than sharply clear. It is all the more vital that we counter such attempts because arguments citing the threat of terrorism follow precisely this logic. Perhaps the most precise and most famous summation of this situation comes from Chief Justice William H. Rehnquist, who ended his speech at the 100th anniversary celebration of the Norfolk and Portsmouth Bar Association on May 3, 2000, with the observation that "though the laws are not silent in wartime, they speak with a muted voice" (www.supremecourtus.gov/publicinfo/speeches/sp_05-03-00.html). At the same time, Rehnquist contends that it is very easy to slip across the line that separates genuine wartime emergency from vague or nonexistent threat. (Cited in Hungarian in Ronald Dworkin, *A terror és a szabadságjogok elleni támadás*. In: Beszélő, Vol. 8. No. 12, http://beszelo.c3.hu/cikkek/a-terror-es-a-szabadsagjogok-elleni-tamadas#2003-f12-07).

In light of the aforementioned observations, while we certainly concur with the Constitutional Court in rejecting the restriction of fundamental rights without sound constitutional reasons, it seems worthwhile to reexamine the problem for any utilitarian argument that could lend support to the omission of the court from the authorization scheme. In our opinion, no such argument exists. In fact, the very considerations of efficiency, such as the trust in constitutional democracy and speedy, professional process, speak in favor of judicial control as a form of protection building on the separation of powers. In any event, when it comes to authorizing covert intelligence or withholding that authorization, a court decision is not the least bit less efficient than a decision at the discretion of a minister.

Although the global threat of terrorism has had its ups and downs in recent years, its general tendency is one of abatement — let alone the fact that Hungary has never been a prime target of international terrorism. Therefore, there no reason whatsoever why such considerations could be used to justify the introduction in this country of restrictions on civil liberties that are more stringent than the standard in the mid-sized and greater powers of the West.

Pursuant to Section 58 (3) of the National Security Act, "the judge or the Minister of Justice (hereinafter collectively: "authorizer") must decide on the request in 72 hours of the time of submission, allowing the request or, if finding it to be without grounds, turning it down. No appeal shall lie against this decision." This means that the time frames legally available for obtaining the permission of the minister and, respectively, of the judge, are the same. For the judge who has passed national security vetting and is professionally qualified, issuing such authorizations forms one of his core activities, while this is but one of the many duties of the minister, whose professional background in this regard is doubtful at best. Furthermore, the statutory definitions to be applied in the context of permitting covert intelligence are extremely complex, making it very difficult to deliberate the level of suspicion involved — suffice it to recall Section 261 of the Criminal Code on acts of terrorism. This deliberation presupposes the professional qualifications and routine one might justly surmise a specialized judge, but hardly the minister, to possess.

The events of the recent past in Hungary also caution against ill-advised decisions. A case in point has been the allegation, apparently without grounds, of espionage on the part of senior officials of the national security services. In Hungary, social trust in public power has had to face tough tests more than once lately. More often than not — and certainly as of this writing — the Minister of Justice happens to be a party politician, whose decisions are of necessity motivated by considerations of party policy. Vesting such an official with the power to make decisions potentially involving a severe restriction of constitutional rights, which often carries consequences in party politics, is not only unconstitutional but positively counterproductive to the purpose at hand. Illegal surveillance of political opponents is not unheard of in Western Europe as well, but the further one goes from there the higher the likelihood of this happening quite regularly. This is evidenced by the numerous scandals that have erupted around surveillance in Hungary in recent years, rife with the suspicion that surveillance authorizations are being used to political ends.

All things considered, having a judge authorize covert intelligence is both more efficient and more conducive to the purpose than applying the unconstitutional provision we contest herein. There is simply nothing that would warrant sustaining that provision in force — no reason, citing efficiency or otherwise, for “muting the voice” of law in this specific instance.

V.

The point of stipulating extrinsic authorization for covert intelligence is to ensure that, in deliberating a decision on allowing a specific instance of surveillance, the interests of privacy are taken into consideration in addition to those of covert intelligence. This is the only way to guarantee that the infringement of privacy is kept to a bare practicable minimum. This in turn presupposes an extrinsic authorizer who is capable, by virtue of his legal status, of deliberating between the two conflicting interests. An independent court certainly meets this criterion.

Covert intelligence gathered as per 56 of the National Security Act and Section 69 of the Police Act cannot be constitutional if it is performed without a court permission. The rule that requires nothing more than authorization by the minister fails to furnish sufficient safeguards to protect the fundamental rights discussed above. To put it differently, we cannot talk about an adequate representation of fundamental rights when an arm of executive power (notably the Ministry of Justice) adopts its decision on the initiative of another organ of the same executive power (the CTC) — a case of two organs basically acting in unison because both are subordinated to the government and subservient to the interests thereof. In the disputed case, moreover, the minister cannot even be regarded as “extrinsic” to the system public administration. In fact, he is himself in charge of supervising the activities of the Counter Terrorism Center. This goes to show that not only is the contested provision objectionable from the point of view of fundamental rights, but it comes up short of meeting the constitutional principles of organizing and structuring executive power.

In a previous case not expressly concerned with the need for a court warrant, the Constitutional Court sustained the distinct rules of authorization (i.e. authorization by the court vs. the Minister of Justice) as set forth respectively in the Police Act and the National Security Act, on the grounds that the objectives of the two types of surveillance in question are themselves different. (It bears repeating that the need for judicial control did not form the subject of this constitutional review.) Here, the Constitutional Court argued that, “when the covert intelligence is gathered in the service of criminal investigation, one must deliberate between the infringement of the fundamental rights of the individuals concerned and the interest of that criminal investigation, whereas in issuing the authorization for purposes of national security, the object of the deliberation is the clash between the interests of national security (which does not necessarily entail consequences of criminal proceedings) and the violation of fundamental rights.” [Constitutional Court Resolution No. 2/2007. (I. 24.) AB] In our opinion, this assertion of the Constitutional Court needs revision, because the infringement is of the same nature and extent whether it serves the

interests of criminal investigation or national security. What happens in both cases is that a stranger intrudes upon the privacy of the surveillance target by becoming cognizant of what transpires in his home, correspondence, phone calls etc. In the case at hand, the key constitutional question is whether there is an end that can justify the means of avoiding independent judicial control over a specific act of restricting fundamental rights, namely the gathering of covert intelligence. It is our position that, when the decision exerts an influence on fundamental rights so far reaching as to virtually suspend those rights, it is inadmissible to proceed in the absence of judicial intervention. If this were permitted, the right to privacy, private family life, private relations, and the right to the protection of personal data would no longer simply be restricted but provisionally *rescinded* in order to accommodate the exigencies of surveillance in the interest of national security. (It goes without saying that the supervision of the national security services by Parliament is insufficient in this regard, given that it is a general form of oversight and not part of the process of authorizing specific acts of covert surveillance. Unless the regulation requires independent courts to participate in the authorization process, the right to privacy can no longer be enforced because that right will have ceased to be inherent and inalienable, In the absence of such a legal stipulation, the individual would be deprived of judicial protection once and for all, as the covert nature of the surveillance means that he will not have the chance further down the line to resort to legal remedy against intrusions into his privacy.

As we demonstrated in item II of our complaint, the twofold regulations afford levels of safeguards that differ in more ways than just in the person of the authorizer. They also diverge in defining the admissible objectives of covert surveillance, as well as specify different rules as regards the fate of wrongfully collected data. Ironically, the definitions of admissible objectives happen to afford fewer safeguards precisely when the covert intelligence is authorized at the exclusive discretion of executive power. Where the authorization requires the involvement of the judiciary, as a means of legal protection for the privacy of citizens, the law imposes far more stringent conditions on the intelligence.

VI.

The anomaly of the two-tiered system of safeguards protecting fundamental rights is readily apparent in the obligation of the counter-terrorism organization, when suspecting a crime, to first file charges and then to deliver the collected information to the investigative agency — including data that the police itself would not have been allowed to gather based on the more stringent rules applicable to its own procedures. As the case may be, this could make it easy to evade the safeguards binding for surveillance by the police, effectively rendering those safeguards meaningless.

Budapest, June 11, 2012

Dr. Beatrix Vissy Dr. Máté Szabó

Countersigned in witness hereof:

Budapest, June 11, 2012

Dr. László Majtényi

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Power of Attorney