CONSTITUTIONAL COURT'S RULING

Number 20/PUU-XIV/2016

FOR THE SAKE OF JUSTICE BASED ON THE ALMIGHTY GOD

CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] The Constitutional Court who adjudicates the constitutional case at the first and final instance, hereby, renders its ruling for the case of judicial review of the Law Number 11 of 2008 on the Electronic Information and Transactions and the Law Number 20 of 2001 on the Amendment to the Law Number 31 of 1999 on the Eradication of the Criminal Acts of Corruption against the 1945 Constitution of the Republic of Indonesia, lodged by:

Name : **Drs. Setya Novanto**

Occupation : Member of the House of People's Representatives of the Republic of Indonesia (DPR RI)

Address : Jalan Wijaya XIII, Nomor 19, RT/RW 003/03, Kelurahan Melawai, Kecamatan Kebayoran Baru, Jakarta Selatan.

The person of which, in this case, by virtue of the Special Power of Attorney Number 28/SK-SHP/I/2016 dated 28th January 2016, had vested an authority to Muhammad Ainul Syamsu, S.H.,M.H., Syaefullah Hamid, S.H., Hafisullah Amin Nasution, S.H., dan Teuku Mahdar Ardian, S.HI, attorneys at the Law Firm

SYAMSU HAMID & PARTNERS, having its registered address at Gedung Graha Samali, Lantai 2, R. 2001, Jalan H. Samali Nomor 31B, Pancoran, Kalibatan - Pasar Minggu, Jakarta Selatan 12740, either collectively or individually, to act for and on behalf of the principal;

Henceforth referred to as ---------- **Petitioner**;

[1.2] Having read the petition filed by the Petitioner;

Having heard the evidence given by the Petitioner;

Having heard and read the evidence given by the President;

Having heard and read the evidence given by the House of People's Representatives;

Having heard and read the testimony given by the expert witness of the Petitioner and President;

Having investigated all evidences proposed by the Petitioner;

Having read the conclusion proposed by the Petitioner;

2. **Fact of the Case**

[2.1] Considering that, the Petitioner had filed a petition under the Petition dated 10th February 2016, received at the Registrar's Office of the Constitutional Court (henceforth referred to as the Registrar's Office of the Constitutional Court) on 10th February 2016, according to the Certificate of Receipt of Petitions Number : 6.4/PAN.MK/2016 and recorded in

the Register of Constitutional Court Number 20/PUU-XIV/2016 dated 17th February 2016, the petition of which had been improved and received by the Registrar's Office of the Constitutional Court on 7th March 2016, substantially, detailing these following matters:

A. AUTHORITY OF THE CONSTITUTIONAL COURT

1. Whereas, the Petitioner pleas the willingness of the Constitutional Court to conduct a judicial review over the Article 5 clause (1) and clause (2) and the Article 44 letter *b* of the Law Number 11 of 2008 on the Electronic Information and Transactions (the State Gazette of the Republic of Indonesia of 2008 Number 58 and the Supplement to the State Gazette of the Republic of Indonesia Number 4843, henceforth referred to as the "IET Law") and the Article 26A of the Law Number 20 of 2001 on the Amendment to the Law Number 31 of 1999 on the Eradication of the Criminal Acts of Corruption (the State Gazette of the Republic of Indonesia of 2001 Number 134 and the Supplement to the State Gazette of the Republic of Indonesia Number 4150) against the 1945 Constitution;
2. Whereas, according to the provision set out in the Article 24 C clause (1) of the 1945 Constitution, stating "The Constitutional Court shall have an authority to make final decision in cases of the first

and last instance handling a review of the law against the Constitution. The Article 10 clause (1) letter *a* of the Law Number 24 of 2003 on the Constitutional Court (henceforth referred to as the "Constitutional Court Law") (the State Gazette of the Republic of Indonesia of 2003 Number 98, the Supplement to the State Gazette of the Republic of Indonesia Number 4316), as amended by the Law Number 8 of 2011 on the Amendment to the Law Number 24 of 2003 on the Constitutional Court, affirms the same matter, stating that the Constitutional Court holds jurisdiction of first and final instance whose decision shall be final: to review a Law agains the 1945 Constitution of the Republic of Indonesia (evidence P-5);

3. Whereas, the same affirmation is also set out under the Article 29 clause (1) letter *a* of the Law Number 48 of 2009 on the Judicial Power, stating: "*The Constitutional Court is authorised to adjudicate the cases of the first and final instance whose ruling shall be final and binding, to review any Law against the 1945 Constitution of the Republic of Indonesia" (evidence P-6);*
4. Whereas, moreover, the Article 7 of the Law Number 12 of 2011 on the Formulation of the Laws and Regulations (henceforth referred to as the Law Number 12 of 2011) sets out that hierarchically, the 1945 Constitution has

a higher hierarchy level than the other Laws (evidence P-7); Accordingly, any provision of the Law must not contradict the 1945 Constitution (*constitutie is de hoogste wet*). Should any provision set out under a specific Law goes against the 1945 Constitution, consequently, such provision may be pledged for the review by the mechanism of the judicial review of legislation. This has been affirmed by the Article 9 clause (1) of the Law Number 12 of 2011, stating "*In case of a Law alleged conflict with the 1945 Constitution of the Republic of Indonesia, a review shall be carried out by the Constitutional Court";*

5. Whereas, as the constitutional enforcement and guardian agent, the Constitutional Court also reserves the right to provide an interpretation towards a provision set out in a particular clause, article or any part of a Law for the purpose of complying with the constitutional values which continuously evolve in the society's life (the living of constitution). The way the Constitutional Court construes the constitutionality embodied in any clause, article or any part of a Law shall serve as the sole interpretation of constitution which has a legal force, thence, towards any ambiguous, obscure and or multi-interpreted clause, article or any part of a Law may be proposed for the new interpretation by the

Constitutional Court. In quite a few cases of the judicial review of legislation, the Constitutional Court has, for several times, declared any parts of Law is conditionally constitutional, to the extent it is construed in accordance with the interpretation provided by the Constitutional Court or otherwise, conditionally unconstitutional provided that it is not construed in accordance with the interpretation of the Constitutional Court;

6. According to the foregoing, the Petitioner argues that the Constitutional Court holds jurisdiction to investigate and render a decision upon this petition for the judicial review of legislation.

B. LEGAL STANDING OF THE PETITIONER

1. Whereas, the recognition and protection over the constitutional rights owned by any Indonesian Citizen to lodge the petition for the judicial review of 1945 Constitution serve as a positive indicator for the development of constitutionality in reflecting the growth of enforcement of the Nation of Laws (*Rechtsstat*)principles in Indonesia ;
2. Whereas, one of the many functions of the Constitutional Court is as the “guardian” of the constitutional right for any Indonesian Citizen. The Constitutional Court is a judicial body having a function of the human rights

protection, as the form of protection over the constitutional right and legal right of any of its citizen. Relying on this fact, the Petitioner lodges the petition for the judicial review against the articles of the Law Number 11 of 2008 on the Electronic Information and Transactions and the Law Number 20 of 2001 on the Amendment to the Law Number 31 of 1999 on the Eradication of the Criminal Acts of Corruption, which go against the spirit and soul embodied in and provisions set out under the 1945 Constitution;

3. Whereas, the Article 51 clause (1) of the Law Number 24 of 2003 on the Constitutional Court as amended by the Law Number 8 of 2011 on the Amendment to the Law Number 24 of 2003 on the Constitutional Court (Constitutional Court Law), sets out that "the Petitioner is a party who claims that his/ her constitutional rights and/ or authorities are injured by the enactment of a Law", the party of which in letter *a* may be an "Indonesian Citizen". It is yet a further, the elaboration of the Article 51 clause (1) of the Constitutional Court Law defines the "constitutional rights" as the rights regulating under the 1945 Constitution of the Republic of Indonesia;
4. Whereas, referring to the Constitutional Court's Ruling Number 006/PUU-III/2005 dated 31st May 2005 and Ruling

Number 11/PUU-V/2007 dated 20th September 2007, and subsequent rulings, any constitutional right and/ or authority which are deemed to be injured as referred to in the Article 51 clause (1) of the Constitutional Law, must satisfy 5 (five) conditions, namely:

a the existence of any constitutional right and/ or authority which are granted by the 1945 Constitution to the Petitioner;

b The Petitioner deems that the constitutional right and/ or authority in question are injured by the Law proposed for the judicial review;

c The constitutional damages must be specific and actual, or at least according to the reasonable reasoning, potential to happen;

d The existence of causal verband between the damages in question and enactment of the law lodged for the judicial review;

e The availability of likelihood such petition to be granted, accordingly, the said constitutional damages shall not or should have not happen;

5. Whereas, before we step into further elaboration on the legal standing of the Petitioner in this *a quo* case, the Petitioner, at the first instance, shall affirm his qualification within this petition, as the Indonesian citizen. Even now the Petitioner is the member of the

House of People's Representatives of the Republic of Indonesia (DPR RI), however, in such case, the Petitioner waives his capacity/ privilege as the Member of the House of People's Representatives of the Republic of Indonesia (DPR RI) who obtains a different constitutional right to the same held by non-member of (DPR RI). The Petitioner, in such a quo case, uses the substance of judicial review of the constitutional right of the Petitioner as the Indonesia Citizen which is granted under the 1945 Constitution.

6. Whereas, referring to the Constitutional Court's Ruling Number 20/PUU-V/2007 , which declares: ***"Whereas, the terms of Indonesian individual citizen under the Article 51 clause (1) letter a of the Constitutional Court Law shall not be equivalent to the words "Indonesian individual citizen in his/ her capacity as the Member of DPR RI" as argued by the Petitioner. As any of Indonesian citizen who does not seat at the bench of DPR RI shall not obtain any constitutional right as set out under the Article 11 clause (2) and Article 20A clause (1) of the 1945 Constitution, namely any rights which are used as the argumentation upon the injured constitutional right to lodge the petition for a quo case"***, thence, on the contrary, it can be concluded that to the extend the petition for the judicial review of

legislation lodged by the Indonesian Citizen who is also the member of DPR RI, does not argue over the constitutional damages in his capacity as the member of DPR RI as set out under the Article 11 clause 2 and Article 20A clause (1) of the 1945 Constitution, wherefore, the petitioner shall have a legal standing to file the petiotion for the judicial review of Legislation. Indeed, in the Constitutional Court's Ruling Number 23-26 / PUU-VIII / 2010, it is stated that members of the DPR have a legal standing to submit a petition for judicial review, to the extent it is related to constitutional rights exclusively owned by members of the DPR, not the constitutional rights of the DPR and associated with the minority position of the members of DPR in decision making. For more details, we have quoted the legal consideration by the Constitutional Court in concern: "*…Having regard to this petition, the constitutional right to take part in the determination of the use of "the right to express opinions" as the control mechanism of DPR over the government policies, may be precluded or unenforceable by the provision set out in the Article 184 clause (4) pof the a quo Law. Furthermore, should it is associated with the capacity of the Petitioner as the member of DPR to which numbers are minority in connection with any*

particular matters which must be decided by the DPR, in which case, in order to submit such petition, the Petitioner must be supported by and obtain 3/4 (three-fourths) of the members of DPR''s approvals, whereas the right to raise an opinion is of use in achieving a sound democratic system, namely check and balance between the DPR and Government. If so, there shall no be any mechanism to align the enforcement of democratic system through the House of People's Representative, as the requirements of approval and quorum to be satisfied are considerably high (absolute majority is 3/4 (three-fourths) of the members of DPR. Wherefore, in this case, the capacity as the member of DPR shall differ from the capacity as the member of DPR under the Constitutional Court's RUling Number 20/PUU-V/2007 dated 17th December 2007 and the Ruling Number 151/PUU-XIV/2009 dated 3rd June 2010, as, to which case, the main concern is the exclusive right which is only held by the members of DPR. Accordingly, the Constitutional Court suggest that, all Petitioners in their capacity as the members of DPR, specifically for this petition, shall have a valid legal standing to file the petition for a quo case. It is clear that the capacity of an Indonesian Citizen as the member of DRP RI shall not merely dismiss its rights as the Indonesian individual citizen to file

the petition for the judicial review of Law to the Constitutional Court;

7. Whereas, the Petitioner as the individual Indonesian citizen reserves the constitutional rights as set out under the 1945 Constitution, namely the right to obtain a fair treatment in all legal stages of criminal proceeding pursuant to the due process of law principles which constitutes as the consequence of the declaration of the Republic of Indonesia as the Nation of Law, as set out under the Article 1 clause (3); and right for the fair recognition, assurance, protection and legal certainty as well as the same treatment before the law, as set out under the Article 28D clause (1) ; and the right over personal privacy, as well as the right to feel secure from the unauthorised and high-handed recording as affirmed by the Article 28G clause (1) of the 1945 Constitution;
8. Whereas, the Petitioner argues that his constitutional rights as set out under the 1945 Constitution, which have been previously detailed in point 7, aforementioned, have been injured or at least, potentially violated by the enactment of the Law Number 11 of 2008 on the Electronic Information and Transactions, particularly the Article 5 clause (1) and clause (2) and the Article 44 letter *b* and Article 26A

of the Law Number 20 of 2001 on the Amendment to the Law Number 31 1991 on the Eradication of the Criminal Acts of Corruption. The foregoing Articles shall be read as follow:

Article 5 of the Electronic Information and Transactions Law

(1) Any Electronic Information and/ or Electronic Documents and/ or any print out thereof shall be lawful and valid evidences.

(2) The Electronic Information and/ or Electronic Documents and/ or any print out thereof as referred to in clause (1) constitute the expansion of the lawful and valid evidences pursuant to the prevailing Law Procedures in Indonesia.

Article 44 letter b of the Electronic Information and Transactions Law

b. Any other evidences in the form of Electronic Information and/ or Electronic Documents, as referred to in the Article 1 point 1 and point 4 and Article 5 clause (1), clause (2) and, clause (3).

Article 26A of the Law Number 20 of 2001

The lawful and valid documentary evidences as referred to in the Article 188 clause (2) of the Law Number 8 of 1981 on the Criminal Procedures Law, particularly for

the criminal acts of corruption may also be obtained from:

a. *Any other evidences in the form of information being spoken, sent, received, or electronically saved/ recoded by the means of optical; device or any similar equipment; and*

b. *Documents, namely any data or information records which are visible, readable, and or hearable, issued by or without the help of equipment, either those printed on paper, physical material other than papers, or those electronically recorded in the form of writing, voice, figure, map, design, image, letter, symbol, number or perforation that have meaning.*

9. Whereas, the Article 5 clause (1) and clause (20 and the Article 44 letter *b* of the Electronic Information and Transactions Law have categorised "t*he Electronic Information and/ or Electronic Documents and/ or any print out thereof as the lawful and valid evidences and also the expansion of the lawful and valid evidences pursuant to the prevailing Law Procedures in Indonesia*", while the Article 26A of the Law Number 20 of 2011 has categorised "*the electronic information and/ or electronic documents"* as the lawful and valid evidences in the form of the documentary evidences as referred to

in the Article 188 clause (2) of the Criminal Procedures Law, thence, substantially, both Laws, in the essence, set down and qualify "*the electronic information and/ or electronic documents and/ or the print out thereof*" as the lawful and valid evidenced pursuant to the prevailing Laws in Indonesia, therefore, it may be employed in confirming any undertaking taken by someone alleged as the criminal acts.

Whereas, the provisions of the Electronic Information and Transactions Law differ from those under the Law Number 20 of 2001, by which the Article 5 clause (1) and clause (2) and the Article 44 letter b of the Electronic Information and Transactions Law expand the scope of the evidences, which embraces both criminal act procedures and also other legal procedures such as civil procedures. Upon the implementation of the provisions of the Article 5 clause (1) and clause (2) and the Article 44 letter b of the Electronic Information and Transactions Law, accordingly, the conditions of lawful and valid evidences n the Indonesia criminal procedures law are not only limited by those 5 (five) evidences specified in the Article 184 clause (1) of the Criminal Procedures Law, but also those specified in the Article 5 clause (1) and clause (20 and the Article 44 letter b of the Electronic Information and Transactions Law,

namely the electronic information and/ or electronic documents and / or any print out thereof. Meanwhile, the Article 26A of the Law Number 20 of 2001 is merely intended to extend the meaning of documentary evidences as set out under the Article 188 clause (2) of the Criminal Procedures Law, and this provision shall only be applicable specifically for the criminal acts of corruption. Upon the implementation of the Article 26A of the Law Number 20 of 2001, accordingly, the documentary evidences can be obtained not only from the witness's testimony, letter and testimony provided by the accussed/ respondent as specified in the Article 188 clause (2) of the Criminal Procedures Law, but also from the "electronic information and/ or electronic documents."

Whereas, the provisions of the Article 44 letter b of the Electronic Information and Transactions Law and the Article 26A of the Law Number 20 of 2001 have never mentioned the phrase "and/ or the print out thereof" as we can find in the Article 5 clause (1) and clause (2) of the Electronic Information and Transactions Law, however, when we observe thoroughly the purpose of such article, we can come into a conclusion that the Article 44 letter b of the Electronic Information and Transactions Law and the Article 26A of the Law Number

20 of 2001 also cover the "electronic information and / or electronic documents and/ or the print out thereof".

10. Whereas, the Petitioner intends to explain any injured and potentially violated constitutional right as referred to in point 8, aforementioned, as follow:

a. Whereas, by the time the Petitioner filed this petition, the Petitioner had been summoned 3 (three) times by the Attorney General of the Republic of Indonesia, to provide the Petitioner's testimony in regard to the alleged criminal acts of corruption, bad faith agreement or attempted criminal offence of corruption in the terms of the contract renewal of PT. Freeport Indonesia as referred to in the Article 15 of the Law Number 31 of 1999 on the Eradication of the Criminal Acts of Corruption in conjunction with the Law Number 20 of 2001 on the Amendment to the Law Number 31 of 1999 on the Eradication of the Criminal Acts of Corruption (Anti-Corruption Law), the summons of which were made by virtue of the Minor Investigation Order issued by the Director of Investigation, Assistant Attorney General for Special Criminal Acts Number Print-133/F.2/Fd.1/11/2015 dated 30th November 2015, Print Number -134/F.2/Fd.1/12/2015 dated 2nd December 2015, and Print Number -

135/F.2/Fd.1/01/2016 dated 4th January 2016 (evidence P-8, evidence P-9 and Evidence P-10);

b. Whereas, these alleged criminal acts of corruption, bad faith agreement or attempted criminal offence of corruption in the terms of the contract renewal of PT. Freeport Indonesia were raised by the wide-spreading personal conversation records, supposed to be the voice of the Petitioner and Mr. Ma'roef Sjamsudin (the President Director PT. Freeport Indonesia) andMuhammad Riza Chalid, the conversation of which was done in a closed room in Ritz Carlton hotel, located at Pacific Place Kawasan, SCBD, Jakarta Pusat, and this conversation had been confirmed by Mr. Ma'roef Sjamsudin, who secretly recorded the conversation, without being known and upon the consent of any other parties thereto and later, the record was reported to Mr. . Sudirman Said (the Minister of Energy and Mineral Resources) (evidence P-11);

c. Whereas, quod non (which is not true in this case), Should it is proven the voice in the records is the Petitioner's voice, thence, according the Petitioner, this record, based on the legal perspective, shall be held illegal record, as the recoding was done by the unauthorised party and in an unauthorised manner. Mr. Ma'roef Sjamsudin is not a law enforcer and has never

been ordered by law enforcers to carry out the recording secretly without the consent of the Petitioner or the parties thereto even though the conversation was conducted in a closed and non-public space. The action taken by Mr. Ma'roef Sjamsudin who secretly and illegally recorded this conversation shall be deemed to blatantly violate the constitutional right. This has been set out by the Constitutional Court's Ruling Number 006/PUU-I/2003, in its legal consideration, in which due to the tapping and recording conversations are the form of a limitation of human rights, in which such limitation may only be performed bylaws, as set out under the Article 28J clause (2) of the 1945 Constitution. The recording done by Mr. Ma'roef Sjamsudin cannot be equated with CCTV footage carried out in the public space so this should be in public domain and television media recording which is carried out based on the power of the prevailing laws and regulations. Because the conversation carried out was private and in a closed room, then all forms of recording should be done with the approval or at least notified to the parties thereto. Without any approval or notification, the recordings must be considered illegal because their position is the same as illegal wire-tapping.

d. Whereas, later, Mr. Ma'roed Sjamsudi reported such illegal recording to Mr. Sudirman Said (the Minister of Energy and Mineral Resources). And, in that case, Mr. Sudirman Said used the recording as the support basis to report the Petitioner to the Assembly of Honour of the House of the People's Representatives with the accusation of violating the House Ethics Code (please refer to evidence P-11), and later, this case turned out to be "***the profiteering the President's and Vice President's name***" case, even within such recording, the Petitioner had never mentioned the President's and Vice President's name.

e. Whereas, along with the reporting done by Mr. Sudirman Said, the record began to spread widely, making the political condition became heated and unstable while giving rise to bad prejudice and report which harms and tend to downgrade the dignity of the Petitioner, either personally or in his capacity as the Speaker of the House of People's Representative of the Republic of Indonesia (DPR RI) at that time, wherefore, ultimately, for the greatest sake, the Petitioner resigned from his position as the Speaker of the House of People's Representatives of the Republic of Indonesia (evidence P-12);

f. Whereasn,upon the Petitioner resigned from its position as the Speaker of DPR RI, this decision did not necessarily stop the polemic inflicted by the wide-spreading illegal records, since the Attorney General of the Republic of Indonesia, upon the basis of such illegal records, had performed a minor investigation with the allegation of criminal acts of corruption, bad-faith agreement or attempted criminal acts of corruption in the terms of the contract renewal of PT. Freeport Indonesia as referred to in the Article 15 of the Law Number 31 of 1999 on the Eradication of the Criminal Acts of Corruption in conjunction with the Law Number 20 of 2001 on the Amendment to the Law Number 31 of 1999 on the Eradication of the Criminal Acts of Corruption (Anti-Corruption Law), the investigation of which was then reflected in the Minor Investigation Order issued by the Director of Investigation, Assistant Attorney General for Special Criminal Acts Number Print-133/F.2/Fd.1/11/2015 dated 30th November 2015, Print Number -134/F.2/Fd.1/12/2015 dated 2nd December 2015, and Print Number -135/F.2/Fd.1/01/2016 dated 4th January 2016 (evidence P-8, evidence P-9 and Evidence P-10), and summoned the Petitioner 3 (three) times in order to provide his testimony over such allegation,

nevertheless, such summons do not explain the status of summons to the Petitioner, whether as the witness, respondent or any other capacity.

g. Whereas, for some people, perhaps the summons by investigators, such as the summons by the Attorney General to the Petitioner, is considered as a normal undertaking, as it does not have a significant effect on their dignity and position or employment. However, this is not the case with the Petitioner who had actually become "a victim" of the illegal recordings because of the circulation of these illegal recordings - which later became the basis for summons upon the Petitioner - making the Petitioner must resign from his position as the Speaker of DPR RI. Whereas, these summons had considerably affected the Petitioner's career as a politician (the member of the House of People's Representatives of the Republic of Indonesia (DPR RI)) which is highly determined by the public image and perception, especially, these summons were intensively reported, either on printed media, on-line media or television, this kind of report, according to the Petitioner's opinion, had led into a trial by press, through the formation of public opinions and perceptions, namely by raising a tag line such as "papa asking for stock" or "Freeport stock brokers",

which seemed to have confirmed that the Petitioner's had purportedly demanded for some of stake, so that indirectly, the tagline had become a 'machine' forming opinions and negative public perceptions of the Petitioner. Actually, Mr. Ma'roef Sjamsoedin, himself, during the investigation performed by the Assembly of Honour of DPR RI, confirmed that the Petitioner had never demanded for stock (evidence P-12a and evidence P-12a2).

Whereas, in so far, the Petitioner deemed that these summons were made in a force and hurry, neglecting the provisions of the applicable laws and regulations, one of many provisions is to obtain the President's consent to investigate the Petitioner as the member of the DPR RI, as set out under the Law Number 17 of 2014 on the People's Consultative Assembly (MPR), House of People's Representatives (DPR), Regional Representatives Council (DPD), and Regional House of People's Representatives (DPRD) and the Constitutional Court's Ruling Number 76/PUU-XIV/2014. Although the Attorney General previously argued that the investigation of the Petitioner has to be upon the President's consent, at this time, the Attorney General had changed his views and conveyed in several reports that the investigation held towards the

Petitioners did not need the President's consent because of 2 (two) conditions, namely: (1) the meeting between the Petitioner and businessman Riza Chalid and the President Director of PT Freeport Indonesia, Ma'roef Sjamsoeddin was beyond the work schedule, i n the Petitioner’s capacity as the Speaker of the House of People’s Representatives, and (2) the case was a special criminal offence (evidence P-12b.1 and evidence P-12b.2). A sudden change in the point of view of the Attorney General should also be questioned. What was going on and Why did the Attorney General change his point of view? Is this change solely based on **an sich** legal judgement or in fact there is a hidden non-law consideration or interest in this legal process which is nothing but aims only to destroy the character of the Petitioner (character assassination) as a politician. In addition, the two reasons that were the basis for the change in attitudes of the Attorney General are legally very unreasonable because they were not based on the provisions of the applicable laws and regulations but only constituted a subjective interpretation of the Attorney General regarding the provisions of Article 224 of Law Number 17 of 2014 on People’s Consultative Assembly (MPR), House of People’s Representatives

(DPR), Regional Representatives Council (DPD), and Regional House of People's Representatives (DPRD) (evidence P-12c) and specifically for the second reason, this is the provision that applies during the temporary investigation, the summon done by the Attorney General's Office of the Republic of Indonesia to the Petitioner was currently still under minor investigation stage, so the reason was very irrelevant. If during the minor investigation phase, the President's consent is required for the purpose of investigation towards a member of the DPR even though at that stage, the member of DPR may have been declared as a suspect, then it is reasonable if at the stage of the new investigation to determine whether or not a crime has occurred, this is even more necessary in order to avoid the criminal law process being used as a political tool to disrupt or damage the political performance of a member of the DPR. The Article 245 clause (1) expressly sets out that "The summons and information request for the investigation of the members of DPR who allegedly committed the crime must obtain written approval from the Ethics Council" and the clause (3) letter c also specifies "The provision as referred to in clause (1) shall not apply in case of the related member of DPR is suspected of

committing the special criminal acts (please refer to evidence P-12c).

h. Whereas, the Petitioner considered the investigation and summons to the Petitioner should not need to occur because it was done solely based on illegitimate recordings. The investigation and summons based on illegal evidence clearly violate the principle of due process of law which is a reflection of the principle of the rule of law (the nation of law) adopted by the State of the Republic of Indonesia as set out in the Article 1 clause (3) of the 1945 Constitution and also violate the principle of fair legal recognition, assurance, protection and certainty as set out in the Article 28D clause (1) and violate the Petitioner's privacy (a reasonable expectation of privacy) guaranteed in the Article 28G clause (1) of the 1945 Constitution.

Article 1 clause (3) of the 1945 Constitution

"State of the Republic of Indonesia is a state based on the rule of law (nation of law)".

Article 28D clause (1)

Each person has the right for the fair and just legal recognition, assurance, protection and

certainty and to be treated as equal before the law.

Article 28G clause (1)

"Each person is entitled for the protection of him/ herself, his/her family, honour, dignity, the property he/she owns, and has the right to feel secure and to be protected against threats from fear to do or not to do something that is part of basic human rights."

i. That if the state through its law enforcement officers, in this case the Attorney General's Office of the Republic of Indonesia, justify the action taken by Mr. Ma'roef Sjamsoedin in using the illegally obtained recording as evidence, so there has been a clear violation of the principle of due process of law which is a reflection of the principle of the rule of law adopted by the Republic of Indonesia as set out in the Article 1 clause (3) of the 1945 Constitution and also violation towards the principle of fair and just legal recognition, assurance, protection and certainty as stipulated in the Article 28D clause (1) and violation towards the right of privacy (a reasonable expectation of privacy) of the Petitioner as set out in the Article 28G clause (1) of The 1945

Constitution. This justification can result in the assumption that the State has been in negligent in protecting its citizens from illegal acts that threaten the privacy rights of its citizens so as to cause its citizens to experience insecurity and fear because every time can be recorded / intercepted by unauthorized person. The Article 28I of the 1945 Constitution expressly states that the State is responsible for protecting and fulfilling human rights.

j. Whereas, the Petoitioner assumed that the summons byt he Attorney General's Office of the Republic of Indonesia towards the Petitioner happened due to the obscurity and opaqueness as well as multy-interpretation in ther norms of the Article 5 clause (1) and clause (20 and the Article 44 of the Electronic Information and Transactions Law and the Article 26A of the Law Number 20 of 2001. The Article 5 clause (1) and clause (2) and Article 44 letter b of the Electronic Information and Transactions Law and the Article 26A of the Law Number 20 of 2001 have not clearly set out the criteria of the electronic information and/ or electronic document and/ or print out thereof which may be proposed as the authorised and legal evidences pursuant to the procedures law

that prevails in Indonesia, consequently, it results in the multy-interpretation as if the entire electronic information and/ or electronic documents and/ or print out thereof can be used as the authorised and legal evidences, even the same is illegally obtained.

k. Whereas, should the issues of obscurity and opaqueness or multi-interpretation contained in the norms of the Article 5 clause (1) and clause (2) and Article 44 letter b of the Electronic Information and Transactions Law and the Article 26A of Law Number 20 Year 2001 are neglected or not corrected by the Constitutional Court by giving the only interpretation, then, in the long term, it will have the potential to give birth to a scary situation in the community to do or not do something because there is concern that it will be recorded / tapped by unauthorized parties so that eventually the state can be considered to fail in protecting the citizens' constitutional rights as stipulated in Article 28G of The 1945 Constitution.

11. Whereas, based on the matters outlined above, it proves that the Petitioner (individual Indonesian citizen) has the legal standing to act as the Petitioner in the petition for teh judicial review of this

Legislation. Therefore, the Petitioner plead to the Bench of Justices of the Constitutional Court, presumably in his decision it would be stated that the Petitioner has a legal standing in filing a petition for judicial review in this case

C. SUBSTANCE OF THE PETITION

1. Whereasm the State of the Republic of Indonesia as affirmed by the provision of the Article 1 clause (3) of the 1945 Constitution is "the state based on the rule of law (nation of law)". Julius Sthal suggests that there are three characteristics of the nation of law (rechtsstaat), namelu: (a) protection of human rights; (b) division of power; and (c) government based on the Constitution. AV Dicey formulates a rule of law with three characteristics, namely the existence of (a) legal supremacy; (b) equality before the law; and (c) due process of law. In understanding the current perspective of the state based on the rule of law, the characteristics of the nation of law formulated by Stahl and Dicey are combined and are generally accepted by legal academics as a feature of the modern nation of law.
2. Whereas, related to the above formulation by Dicey, *due process of law* can be defined as "*a fundamental, constitutional guarantee that all legal proceeding will*

be fair and that one will be given notice of the proceedings and an opportunity to be heard the government act take away one's life, liberty or property. Also, a constitutional guarantee that the law shall not be unreasonable, arbitrary, or capricious". While, the word "arbitration may be defined as "*a course of action or decicion that not based on the reason or judgement but on personal will or discreation without regards to rules standard*". The emphasis on due process of law as one of the characteristics of the nation of law has the consequence that the actions of state administrators must not only be based on fair material legal norms, but must also be based on formal law that regulates procedures for enforcing legal provisions material that meets the requirements of justice. The legal norms of the procedure must be fair. Any provisions regarding procedures must not be arbitrators according to the interests of the administrators of the State authority.

3. Whereas, all applicable formal criminal law must reflect the existence of a 'due process of law' that is fair, definite and just, far from arbitrary matters Because the material criminal law that wants to be enforced may result in the legal sanctions related to human rights such as imprisonment (which causes a person to lose his

independence) and even capital punishment (which results in the loss of someone's life that cannot be recovered), the procedure to enforce the material law, it must not only be fair, but also definite and just. Irregularities, uncertainties and procedural legal injustices can cause serious human rights violations, because someone can be convicted of losing independence, even losing their lives due to the application of a material law that does not meet the standard due process of law, legal certainty and justice.

4. Whereas, it is even more dangerous if this procedural law is carried out arbitrarily by law enforcement officers. The actions, steps and decisions of law enforcement officials are not based on definite and fair legal rules, but are based on the interests of law enforcers themselves Even though in the nation of law, a law which plays crucial role as the commander, not law enforcement officers. This is what in the United States is called by Dicey with the term 'the rule of law not of man' On one hand, the uncertain legal rules, or even the absence of legal rules governing procedures in the enforcement of criminal law, can not only damage the image of the nation of law as affirmed by the constitution, but also open wide opportunities for the use of power (machtsstaat) and human rights violations.

In fact, the Article 28I clause (5) of the 1945 Constitution has set out" Protecting, promoting, upholding, and the full realization of human rights are the responsibilities of the state, foremost of the government." Moreover, even in the General Elaboration of the Criminal Procedures Code, it is stated that "appreciation, practice of human rights and the rights and obligations of citizens to uphold justice should not be abandoned by every citizen, every state administrator, every state institution and social institution both at the centre and in the region, in and with the existence of this criminal procedure code";

5. Whereas, in the opinion of the Petitioner, the legal assurance, protection, and legal certainty as well as assurance of protection of privacy rights by which constitutional rules are regulated in Article 28D clause (1) and Article 28G clause (1) of the 1945 Constitution, shall be realized if Article 5 clause (1) and (2) and Article 44 letter b of the Electronic Information and Transactions Law and Article 26A of Law Number 20 Year 2001 do not allow the existence of multiple interpretation opportunities. As the Petitioner had said, the rules of criminal law include procedural law, as it has direct implications for human rights, must be firm and certain. In such certainty, there shall be

legal assurance and protection Should the multy-interpretation and uncertainty appear in such rules, how the rules of Law shall be able in providing he legal assurance and protection? The existence of the Article 5 clause (1) and clause (2) and Article 44 letter b of the Electronic Information and Transactions Law and the Article 26A of the Law Number 20 of 2001 which have not clearly set out the criteria of the electronic information and/ or electronic document and/ or print out thereof which may be proposed as the authorised and legal evidences pursuant to the procedures law that prevails in Indonesia, may result in the multi-interpretation as if the entire electronic information and/ or electronic documents and/ or print out thereof can be used as the authorised and legal evidences, even the same is illegally obtained and done by unauthorised parties. The absence of such regulation can create a situation or feeling of insecurity among the community due to suspicion among fellow nationals and concern that it will be recorded or tapped by anyone and the recordings or wire-tapping can be used as evidence to ensnare them. This condition clearly contradicts and violates the constitutional rights of citizens, namely: legal assurance, protection, and legal certainty and assurance for the protection of privacy rights whose

constitutional rules are set out in Article 28D clause (1) and Article 28G clause (1) of the 1945 Constitution.

6. Whereas, the recording is done illegally or without the permission / approval of the person who speaks on tape, or is carried out secretly without being known by the parties involved in the conversation even though the conversation is carried out in a closed room not in a public space that allows access for everyone to see and hear the conversation, it clearly violates the right of privacy (a reasonable expectation of privacy) of the person whose conversation was recorded so that such evidence of the record from the perspective of the law is the same as the result of wire-tapping which is done in violation of the provisions of the prevailing laws and regulations. The results of such recordings cannot be used as evidence because they were obtained illegally even though those who did the recording / tapping were law enforcement officials such as the Corruption Eradication Commission, State Intelligence Agency, Attorney General's Office or the Indonesian Police, when recording based on a valid recording order in accordance with the applicable laws, it cannot be used as evidence.
7. Whereas, based on Article 17 of the International Covenant on Civil and Political Rights in 1966 (Evidence P-13), as ratified by Indonesia through the Law Number

12 of 2005 stating that, 'No person should be arbitrarily or illegally treated regarding his personality, his/her family, his/her household or his/her correspondence, neither should he/she be downgraded with his/her honour and his/her reputation illegally '(Evidence P-14)

8. Whereas in General Comment No. 16 agreed upon by the United Nations (UN) Human Rights Committee at the twenty-third trial, in 1988, which commented on the material contained in Article 17 of the International Covenant on Civil and Political Rights, in point 8 stating that , '... that the integrity and confidentiality of correspondence must be guaranteed de jure and de facto. *Any correspondence must be directly delivered to the designated address without any constraint or being opened or read in prior.* Surveillance, both electronically and otherwise, telephone tapping, telegram, and other forms of communication, as well as recording conversations must be prohibited '(Evidence P-15);
9. Whereas, the Constitutional Court’s Ruling Number 012/PUU-I/2006, in its legal consideration, states that” in which due to the tapping and recording conversations are the form of a limitation of human rights, in which such limitation may only be performed by-laws, as set

out under the Article 28J clause (2) of the 1945 Constitution. *The said Law must then formulate, among other things, who has the authority to issue an order to intercept and record conversations and whether the order to tap and record the conversation can only be issued after sufficient initial evidence is obtained, which means that tapping and recording the conversation is to support evidence, or even tapping and recording the conversation can be done to find sufficient initial evidence. In accordance with Article 28J clause (2) of the 1945 Constitution, all these must be regulated by law in order to avoid abuse of authority that violates human rights ';*

Based on the consideration of the Constitutional Court above, it is clear that recording is a human rights limitation that must be regulated by law and should not be carried out carelessly by people who are not authorized for it. And therefore, it is logical that the recordings made by an unauthorized person or not based on the force of the applicable legislation, must be legally considered illegal and therefore, cannot be used as legal evidence.

10. That the recording action carried out by an unauthorized person or not based on the authority of the prevailing laws and regulations is i conflict with the

provisions of the 1945 Constitution, Article 1 clause (3) which states that 'The State of Indonesia is a state based on the rule of law (Nation of Law)', Article 28D clause (1) 'Everyone has the right for legal recognition, assurance, protection, and fair legal certainty and equal treatment before the law, and the provisions of the 1945 Constitution Article 28G clause (1) which states that' Each person is entitled to protection of self, his family, honour, dignity, the property he owns, and has the right to feel secure and to be protected against threats from fear to do or not to do something that is part of basic rights';

11. Whereas, based on the descriptions above, it is clear that the norms of the Law as stipulated in Article 5 clause (1) and clause (2) and Article 44 letter b of the Electronic Information and Transaction Law and the Article 26A of Law Number 20 Year 2001 are contrary to the constitutional rules which state that the State of the Republic of Indonesia is a state based on the rule of law (nation of law), as set out in the Article 1 clause (3) of the 1945 Constitution and constitutional rules governing the legal recognition, assurance, protection and fair legal certainty and equal treatment before the law, as set out in Article 28D clause (1) The 1945 Constitution and violating the constitutional rules

as set out in the Article 28G clause (1) of the 1945 Constitution (conditionally unconstitutional) To the extent that it is not interpreted that electronic information and / or electronic documents and/ or print out thereof which can be used as valid evidence according to procedural law applicable in Indonesia, shall be the electronic information and / or electronic documents and / or print out thereof obtained according to the provisions of the prevailing laws and regulations and / or carried out in the context of law enforcement at the request of the police, attorney general, and / or other law enforcement institutions;

11. Whereas, facing the above facts, by considering the Constitutional Court which is known as the 'guardian and the final interpreter of constitution' and refers to the Constitutional Court's Ruling Number 49 / PUU-VIII / 2010 and previous Rulings, which state that the Constitutional Court can provide interpretation for interpreting a rule of law as a positive law in force, so that there is constitutionality with the constitutional rules, the Petitioner plead the Bench of Justices of the Constitutional Court to interpret the rules of the Law as contained in Article 5 clause (1) and clause (2) and Article 44 letter b of the Electronic Information and Transaction Law and Article 26A of Law Number 20 Year

2001 and states that the rules of the Law are regulated in Article 5 clause (1) and clause (2) and Article 44 letter b of the Electronic Information and Transactions Law and Article 26A of Law Number 20 Year 2001 is contrary to Article 1 clause (3), Article 28D clause (1) and Article 28G clause (1) of the 1945 Constitution (conditionally unconstitutional) to the extent that it is not interpreted that the (conditionally unconstitutional) To the extent that it is not interpreted that electronic information and / or electronic documents and/ or print out thereof which can be used as valid evidence according to procedural law applicable in Indonesia, shall be the electronic information and / or electronic documents and / or print out thereof obtained according to the provisions of the prevailing laws and regulations and / or carried out in the context of law enforcement at the request of the police, attorney general, and / or other law enforcement institutions, so that the following articles read as follows:

Article 5 of the Electronic Information and Transactions Law

(3) Any electronic information and/ or electronic Documents and/ or print out thereof ***obtained in accordance with the provisions of the prevailing laws and regulations and/ or done for the purpose of law enforcement upon the request of the Police, Attorney General's Office, Corruption Erdication Commission and/ or other law enforcement officers*** *shall be lawful and valid evidences.*

(4) Any electronic information and/ or electronic Documents and/ or print out thereof ***obtained in accordance with the provisions of the prevailing laws and regulations and/ or done for the purpose of law enforcement upon the request of the Police, Attorney General's Office, Corruption Erdication Commission and/ or other law enforcement officers*** *as referred to in clause (1) shall constitute the extension of the meaning of lawful evidences pursuant to the prevailing Procedures Code in Indonesia.*

Article 44 letter b of the Electronic Information and Transactions Law

b. Any other evidences in the form of electronic information and/ or electronic Documents and/ or

print out thereof ***obtained in accordance with the provisions of the prevailing laws and regulations and/ or done for the purpose of law enforcement upon the request of the Police, Attorney General's Office, Corruption Eradication Commission and/ or other law enforcement officers*** *as referred to in clause (1) point q, and point 4, as well as the Article 5 clause (1), clause (2) and clause (3).*

Article 26A of the Law Number 20 of 2001

The lawful and valid documentary evidences as referred to in the Article 188 clause (2) of the Law Number 8 of 1981 on the Criminal Procedures Law, particularly for the criminal acts of corruption may also be obtained from:

c. *Any other evidences in the form of information being spoken, sent, received, or electronically saved/ recoded by the means of optical; device or any similar equipment* ***which are obtained pursuant to the provisions of the prevailing laws and regulations and/ or done for the purpose of law enforcement upon the request of the Police, Attorney General's Office, Corruption Eradication***

Commission and/ or other law enforcement officers, *and*

d. *Documents, namely any data or information records which are visible, readable, and or hearable, issued by or without the help of equipment, either those printed on paper, physical material other than papers, or those electronically recorded in the form of writing, voice, figure, map, design, image, letter, symbol, number or perforation that have meaning* ***which are obtained pursuant to the provisions of the prevailing laws and regulations and/ or done for the purpose of law enforcement upon the request of the Police, Attorney General's Office, Corruption Eradication Commission and/ or other law enforcement officers***.

12. Whereas, in order to enforce the rules of law which contain the norms of electronic information and / or electronic documents and / or their print out thereof as valid evidence as intended in Article 5 clause (1) and clause (2) and Article 44 letter b of the Electronic Information and Transactions Law and Article 26A of the Law Number 20 of 2001 to be constitutionally conditional (conditionally constitutional), then such rules must be interpreted as the electronic information and / or

electronic documents and/ or print out thereof which can be used as valid evidences according to procedural law applicable in Indonesia, shall be the electronic information and / or electronic documents and / or print out thereof obtained according to the provisions of the prevailing laws and regulations and / or carried out in the context of law enforcement at the request of the police, attorney general, and / or other law enforcement institutions. The Interpretation by means of this definition, in the opinion of the Petitioner,would make the rules of the Law as set out in Article 5 clause (1) and clause (2) and Article 44 letter b of the Information and Transactions Law and Article 26A of Law Number 20 Year 2001 to be conditionally constitutional towards the constitutional rules as set out in the Article 1 clause (3), Article 28D clause (1) and Article 28G clause (1) of the 1945 Constitution.

13. Whereas, with the meaning as requested by the Petitioner, aforementioned, the concern upon the elimination of television broadcast recordings or others conducts based on the prevailing laws and regulations as valid evidences shall not occur because the results of such recordings are clearly made based on the provisions of the prevailing laws and regulations, in this case the Broadcasting Law. In the meaning that the Applicant

requested above, there are 2 (two) alternative-cumulative criteria which cause electronic information and / or electronic documents and / or print out thereof can be used as valid evidences, namely (1) it is obtained according to the provisions of the prevailing laws and regulations, and / or (2) such recording is carried out in the context of law enforcement at the request of the Police, Prosecutor's Office, Corruption Eradication Commission and / or other law enforcement institutions. With the fulfilment of one or both of these criteria, the electronic information and / or electronic documents and / or print out thereof can be used as valid and lawful evidences.

14. Whereas, since this petition is based on the loss of specific constitutional rights, as explained in the description of the Petitioner's legal standing related to the summons of the Petitioner to provide his testimony during the investigation process of the case of alleged criminal acts of corruption in the contract extension of PT. Freeport Indonesia, which had been carried out by the Attorney General's Office based on the Minor Investigation Order issued by the Director of Investigation, Assistant Attorney General for Special Criminal Acts print Number -133/F.2/Fd.1/11/2015 dated 30th November 2015, Print Number: -134/F.2/Fd.1/12/2015

dated 2nd December 2015, and Print Number-135/F.2/Fd.1/01/2016 dated 4th January 2016, it would be very reasonable if the Petitioner, with all modesty heart, pleas the Chief of Justice of the Constitutional Court to be willing to prioritize the investigation of the a quo case;

15. That in order to strengthen the arguments that the Petitioner stated above, in the investigation of this case, the Petitioner, in addition to submitting his evidences, shall also present expert witnesses to strengthen the Petitioner's arguments;

D. PETITUM

According to the foregoing elaboration and attached evidences as well as the testimonies provided by the expert witnesses during the investigation of this a quo case, the Petitioner, hereby, pleas to the Honourable Bench of Justices of the Constitutional Court to be willing to render a Ruling as follow:

1. To grand the petition lodged by the Petitioner, entirely:
2. To declare that the Article 5 clause (1) of the Law Number 11 of 2008 on the Electronic Information and Transactions (the State Gazette of the Republic of Indonesia of 2008 Number 58, the Supplement to the State Gazette of the Republic of Indonesia Number 4843) is **contrary to the 1945 Constitution of the Republic of**

Indonesia, throughout the phrase "*the electronic information and/ or electronic documents and/ or print out thereof*" in the Article 5 clause (1) of the Law Number 11 of 2008 on the Electronic Information and Transactions (the State Gazette of the Republic of Indonesia of 2008 Number 58, the Supplement to the State Gazette of the Republic of Indonesia Number 4843), **Should not be construed as** "*the electronic information and / or electronic documents and / or print out thereof obtained according to the provisions of the prevailing laws and regulations and / or carried out in the context of law enforcement at the request of the police, attorney general, and / or other law enforcement institutions*."

3. To declare that the Article 5 clause (1) of the Law Number 11 of 2008 on the Electronic Information and Transactions (the State Gazette of the Republic of Indonesia of 2008 Number 58, the Supplement to the State Gazette of the Republic of Indonesia Number 4843) **does not have a final and binding legal force, throughout the phrase** "*the electronic information and/ or electronic documents and/ or print out thereof*" in the Article 5 clause (1) of the Law Number 11 of 2008 on the Electronic Information and Transactions (the State Gazette of the Republic of Indonesia of 2008 Number 58, the Supplement to the State Gazette of the Republic of Indonesia Number

4843), **Should not be construed as** "*the electronic information and / or electronic documents and / or print out thereof obtained according to the provisions of the prevailing laws and regulations and / or carried out in the context of law enforcement at the request of the police, attorney general, and / or other law enforcement institutions*."

4. To declare that the Article 5 clause (2) of the Law Number 11 of 2008 on the Electronic Information and Transactions (the State Gazette of the Republic of Indonesia of 2008 Number 58, the Supplement to the State Gazette of the Republic of Indonesia Number 4843) is **contrary to the 1945 Constitution of the Republic of Indonesia, throughout the phrase** "*the electronic information and/ or electronic documents and/ or print out thereof*" in the Article 5 clause (2) of the Law Number 11 of 2008 on the Electronic Information and Transactions (the State Gazette of the Republic of Indonesia of 2008 Number 58, the Supplement to the State Gazette of the Republic of Indonesia Number 4843), **Should not be construed as** "*the electronic information and / or electronic documents and / or print out thereof obtained according to the provisions of the prevailing laws and regulations and / or carried out in the context of law*

enforcement at the request of the police, attorney general, and / or other law enforcement institutions."

5. To declare that the Article 5 clause (2) of the Law Number 11 of 2008 on the Electronic Information and Transactions (the State Gazette of the Republic of Indonesia of 2008 Number 58, the Supplement to the State Gazette of the Republic of Indonesia Number 4843) **does not have a final and binding legal force, throughout the phrase** "*the electronic information and/ or electronic documents and/ or print out thereof*" in the Article 5 clause (2) of the Law Number 11 of 2008 on the Electronic Information and Transactions (the State Gazette of the Republic of Indonesia of 2008 Number 58, the Supplement to the State Gazette of the Republic of Indonesia Number 4843), **Should not be construed as** "*the electronic information and / or electronic documents and / or print out thereof obtained according to the provisions of the prevailing laws and regulations and / or carried out in the context of law enforcement at the request of the police, attorney general, and / or other law enforcement institutions*."
6. To declare that the Article 44 letter *b* of the Law Number 11 of 2008 on the Electronic Information and Transactions (the State Gazette of the Republic of Indonesia of 2008 Number 58, the Supplement to the State

Gazette of the Republic of Indonesia Number 4843) is **contrary to the 1945 Constitution of the Republic of Indonesia, throughout the phrase** "*the electronic information and/ or electronic documents and/ or print out thereof*" in the Article 44 letter *b* of the Law Number 11 of 2008 on the Electronic Information and Transactions (the State Gazette of the Republic of Indonesia of 2008 Number 58, the Supplement to the State Gazette of the Republic of Indonesia Number 4843), **Should not be construed as** "*the electronic information and / or electronic documents and / or print out thereof obtained according to the provisions of the prevailing laws and regulations and / or carried out in the context of law enforcement at the request of the police, attorney general, and / or other law enforcement institutions*."

7. To declare that the Article 44 letter *b* of the Law Number 11 of 2008 on the Electronic Information and Transactions (the State Gazette of the Republic of Indonesia of 2008 Number 58, the Supplement to the State Gazette of the Republic of Indonesia Number 4843) **does not have a final and binding legal force, throughout the phrase** "*the electronic information and/ or electronic documents and/ or print out thereof*" in the Article 44 letter *b* of the Law Number 11 of 2008 on the Electronic Information and Transactions (the State Gazette of the

Republic of Indonesia of 2008 Number 58, the Supplement to the State Gazette of the Republic of Indonesia Number 4843), **Should not be construed as** "*the electronic information and / or electronic documents and / or print out thereof obtained according to the provisions of the prevailing laws and regulations and / or carried out in the context of law enforcement at the request of the police, attorney general, and / or other law enforcement institutions*."

8. To declare that the Article 26A of the Law Number 20 of 2001 on the Amendment to the Law Number 31 of 1999 on the Eradication of the Criminal Acts of Corruption (the State Gazette of the Republic of Indonesia of 2001 Number 134, the Supplement to the State Gazette of the Republic of Indonesia Number 4150) is **contrary to the 1945 Constitution of the Republic of Indonesia, throughout the phrase** "*the electronic information and/ or electronic documents*" in the Article 26A of the Law Number 20 of 2001 on the Amendment to the Law Number 31 of 1999 on the Eradication of the Criminal Acts of Corruption (the State Gazette of the Republic of Indonesia of 2001 Number 134, the Supplement to the State Gazette of the Republic of Indonesia Number 4150), **Should not be construed as** "*the electronic information and / or electronic documents and / or print out thereof obtained according to the*

provisions of the prevailing laws and regulations and / or carried out in the context of law enforcement at the request of the police, attorney general, and / or other law enforcement institutions."

9. To declare that the Article 26A of the Law Number 20 of 2001 on the Amendment to the Law Number 31 of 1999 on the Eradication of the Criminal Acts of Corruption (the State Gazette of the Republic of Indonesia of 2001 Number 134, the Supplement to the State Gazette of the Republic of Indonesia Number 4150) **does not have a final and binding legal force, throughout the phrase** "*the electronic information and/ or electronic documents*" in the To declare that the Article 26A of the Law Number 20 of 2001 on the Amendment to the Law Number 31 of 1999 on the Eradication of the Criminal Acts of Corruption (the State Gazette of the Republic of Indonesia of 2001 Number 134, the Supplement to the State Gazette of the Republic of Indonesia Number 4150), **Should not be construed as** "*the electronic information and / or electronic documents and / or print out thereof obtained according to the provisions of the prevailing laws and regulations and / or carried out in the context of law enforcement at the request of the police, attorney general, and / or other law enforcement institutions*."

10. To order the establishment of the ruling of this case into the Official Gazette of the Republic of Indonesia appropriately.

or

Should the Constitutional Court provides otherwise, the Petitioner pleas for the utmost equitable and conscience Ruling (ex aequo et bono).

[2.2] Considering that, in order to prove his argumentations, the Petitioner had propose the written evidences/ documentary evidences as marked as the evidence P-1 to the Evidence P-15, validated during the trial held by the Constitutional Court on 8th March 2016 as follow:

1. Evidence P-1 : Copy of the Resident Identity Card, registered in the name of Mr. Setya Novanto, with the National Identificaton Number: 3174071211550002;
2. Evidence P-2 : Copy of the Law Number 11 of 2008 on the Electronic Information and Transactions;
3. Evidence P-3 : Copy of the Law Number 20 of 2001 on the Amendment to the Law Number 31 of 1999 on the Eradication of the Criminal Acts of Corruption;
4. Evidence P-4 : Copy of the 1945 Constitution of the Republic of Indonesia;

5. Evidence P-5 : Copy of the Law Number 24 of 2003 on the Constitutional Court;
6. Evidence P-6 : Copy of the Law Number 48 of 2009 on the Judicial Power;
7. Evidence P-7 : Copy of the Law Number 12 of 2011 on the Formulation of Laws and Regulations;
8. Evidence P-8 : Copy of the Letter of the Attorney General's Office Number R. 24/F.2/Fd.1/01/ 2016 dated 8th January 2016 on the request for information/ testimony;
9. Evidence P-9 : Copy of the Letter of the Attorney General's Office Number R. 56/F.2/Fd.1/01/ 2016 dated 13th January 2016 on the Request for Information/ testimony;
10. Evidence P-10 : Copy of the Letter of the Attorney General's Office Number R. 34/F.2/Fd.1/01/ 2016 dated 21st January 2016 on the Assistance of the Summon;
11. Evidence P-11 : Copy of the Letter of the Minister of Energy and Mineral Resources of the Republic of Indonesia Number 9011/04/MEM/2015 dated 16th November 2015 on the Report of the Disrespectful Action by Mr. Setya Novanto;
12. Evidence P-12 : Copy of the Decision of the Ethics Council Assembly dated 16th December

2015 upon the Report by Mr. Sudirman Said towards Drs. Setya Novanto, AK;

13. Evidence P-12a.1 : Copy of the General Comment No. 16 agreed upon by the United Nations (UN) Human Rights Committee at the twenty-third trial, in 1988;

14. Evidence P-12a.2 : Copy of the news www.suara.com "Ma'roef Diminta Buktikan Setya Novanto Minta Saham Freeport (Ma'roed asked to prove Setya Novanto's demand over an amount of Freeport's Stake", dated 3rd December 2015;

15. Evidence P-12b.1 : Copy of the news www.detik.com "The Attorney General affirmed No Need of the President's Consent in Summoning Novanto", dated 19th January 2016;

16. Evidence P-12b.2 : Copy of the news www.tempo.co.id "No Need for Jokowi's Permission, the Attorney General will continue the Investigation to Setya Novanto", dated 8th January 2016;

17. Evidence P-12c : The Law Number 17 of 2014 on the People's Consultative Assembly (MPR), House of People's Representatives (DPR), Regional Representatives Council (DPD), and

Regional House of People's Representatives (DPRD);

18. Evidence P-13 : Copy of the International Covenant on the Civil and Political Rights

19. Evidence P-14 : Copy of the Law Number 12 of 2005 on the Legalisation of the *Internasional Covenant On Civil And Political Right* s;

20. Evidence P-15 : Copy of the General Comment No. 16 agreed upon by the United Nations (UN) Human Rights Committee at the twenty-third trial, in 1988;

Moreover, the Petitioner had also presented 3 (three) expert witnessesm whose testimonies were heard under the oath during the hearing session on 20th April 2016, which substantially confirmed and clarified these following matters:

1. Prof. Dr. H. Muhammad Said Karim, S.H., M.H., M.Si

Related to the Petitioner's legal standing, the expert witness suggested:

Human Rights are a setof rights inherent in each human being who must always be maintained, upheld and must be recognized by everyone. According to John Locke, *the Human Right is a right that is gifted by God which is natural in nature where human rights are never and cannot be separated*

from their essence so that human rights are something sacred and must be maintained.

One of the rights that must always be maintained and upheld is the right of personality and correspondence. Some universally applicable provisions related to Human Rights have confirmed this matter. Among others:

The Article 12 of the Universal Declaration of Human Right.

"No one may be disturbed for his/ her personal business, his/her family, his/her household, and his/her correspondence relationship arbitrarily. Any forms of violation upon the dignity and good image of such person are highly prohibited. Everyone has the right to legal protection against such interference or violation".

The Article 17 of the International Covenant on Civil and Political Rights in 1966 which has been ratified by Indonesia through Law Number 12 of 2005:

1. In the Petitioner's Application, it is clear and can be proven in advance that there was a constitutional right and / or authority of the Petitioner as a legal subject who had been harmed by the enactment of the provisions petitioned to be reviewed, namely the Law Number 11 of 2008 on the Electronic Information and Transactions (Electronic Information and Transactions Law) and Law Number 20 Year 2001 on the Amendment to the Law Number 31 of 1999 on the Eradication of Criminal Acts of

Corruption Against Provisions of the 1945 Constitution of the Republic of Indonesia,

2. In the Petitioner's Petition, it is clear and can be proven the existence of a loss to the Petitioner's constitutional rights and / or authorities, as a result of the enactment of the provisions petitioned for reviewed.
3. As in the Petitioner's Petition, the Petitioner's constitutional impairment can be clearly described, then, it is reasonable the respective loss is specific or particular and actual or at least potential in nature which according to common sense can be ensured to be a loss, as it can be proven by the Petitioner.
4. In the Petitioner's Petition, it is clear and can be proven that there was a loss of the Petitioner's constitutional rights and / or authorities, so that, it can be also proven for the correlation between the enactment of provisions proposed to be reviewed and the loss of Petitioner’s constitutional rights and/ or authorities due to such violation.

Based on the description above, as an expert witness I am of the opinion that the Petitioner in this petition has fulfilled the qualification requirements as a party that has a legal standing to submit a Petition as intended and regulated in the Article 51 clause (1) of the Law on the

Constitutional Court, Law Number 24 of 2003 on the Constitutional Court as amended by the Law Number 8 of 2011 and based on the previous Constitutional Court's Ruling. Because the Petitioner in this Petition fulfils the qualification requirements as a party that has a legal standing to submit the Petition, according to my opinion it is appropriate if the Honourable the Chief of Justices/ Bench of Justices of the Constitutional Court declares that the Petitioner's Petition is appropriate to be granted.

Furthermore, in the Petitioner's Petition, There are several substantial things that require the experts view, among others:

1. Whether wire-tapping and recording a conversation can be interpreted as the same act according to the Electronic Information and Transactions Law?

   The action of wire-tapping, according to the Electronic Information and Transaction Law is an activity intended to hear, record, misuse, change, obstruct, and/ or record the transmission of the non-public electronic information mission, either by using communication cable system and wireless system, such as electromagnetic transmitter, or frequency radio.

   WIRE-TAPPING AND RECORDING IS DIFFERENT.

   The act of recording is clearly different from the act of wire-tapping because the act of recording is done

directly on the sound or event to which it is recorded on a tape recorder or camera, not electronic data, electronic information or electronic documents.

Basically, the act of Wire-Tapping and Interception,and illegal and secret recording is HIGHLY PROHIBITED act as set out in the Article 40 of the Law Number 36 of 1999 on the Telecommunication *"may not anyone who arbitrarily or illegitimately be treated regarding his personality, his family, his household or his correspondence, nor can his honour be dishonoured and his reputation illegally"*

The provisions above clearly imply that personal matters (not in public domain) including personal conversations concerning the honour and good image of a person must always be kept confidential, it should not be recorded without the permission of the relevant party, especially with the aim to be disseminated to other parties with the particular intentions, more so, if the conversation can lead to other perceptions or be interpreted differently by people who do not directly hear the conversation.

The act of Recording done without permission and not by an authorized institution is clearly a violation of human rights, violation of rights of privacy which is contrary to the 1945 Constitution, pursuant to the

Constitutional Court's Ruling Number 5 / PUU-VIII / 2010.

2. If the recording is categorized as a violation of human rights, can the results be used as a valid evidence in the process of investigation and trial?

   As we explained earlier that the act of illegal and secret recording is a violation of human rights, based on this, we suggest that, should such illegal recording is a form of violation to the HUMAN RIGHTS, thence, IT SHALL NOT BE USED AS A LAWFUL AND VALID EVIDENCE DURING THE PROCESS OF INVESTIGATION NOR IN TRIAL, as all forms of undertaking, including but not limited to the act of recording must be done pursuant to the provisions of prevailing laws and regulations.

   As we all know, the procedural laws in Indonesia highly upholds the values of human rights, so that, it is clear that anything obtained in a way of violating the Human Rights or at least in a unlawful method, shall not be justified by the procedural laws in Indonesia

3. What are the conditions for recording to be used as a valid Evidence?

   In order to be used as the lawful and valid evidence during the process investigation and trial, the evidence must meet these following conditions:

   a. THE ACT OF RECORDING MUST BE LEGALLY DONE.

b. THE ACT OF RECORDING MUST BE DONE BY THE AUTHORISED LAW ENFORCEMENT OFFICIALS PURSUANT TO THE PREVAILING LAWS.

c. THE ACT OF RECORDING MUST BE DONE FOR THE PURPOSE OF LEGAL ENFORCEMENT AND NOT CONTRARY TO THE PROVISIONS OF THE PREVAILING LAWS AND REGULATIONS.

4. Does the Ethical Violation also include the act of recording which is done without any permission and other than the authorised institution?

The act of recording that is done without permission and not by an authorized institution, is clearly an Ethics Violation, that in the life order of our society there is a high ethical value that governs what is appropriate and inappropriate, what is reasonable and unreasonable, when people violate ethical values in society, then ethical violators shall be defamed / considered as unethical, for example Shall it be polite and Appropriate when we invite someone to speak / discuss and secretly record their conversation without their permission and consent, of course it is not polite and inappropriate. Indeed, the Ethical values are also upheld and widely adopted in society, and ethical values also manifest in the rules of law.

5. What are the consequences if everyone can take Recording actions and the results are intended to be used as evidence in criminal case investigations?

The expert is of the opinion that if anyone can record without the permission of the relevant party and the results are intended to be used as evidences in criminal case investigation, it shall result in the legal dispute, disorder in carrying out criminal procedural law and further, may damage the criminal justice system in Indonesia (Integrated Criminal Justice System).

2. Prof. Dr. Eddy OS Hiariej, S.H, M.Hum

On the Fact of the Case

1) Whereas, the Article 44 letter *b* of the Electronic Information and Transaction Law states "*Any other evidences in the form of Electronic Information and/ or Electronic Documents, as referred to in the Article 1 point 1 and point 4 and Article 5 clause (1), clause (2) and, clause (3).*"

2) Whereas, the Article 5 clause (1) of the Electronic Information and Transactions Law shall be read "*Any Electronic Information and/ or Electronic Documents and/ or any print out thereof shall be lawful and valid evidences.*"

3) Whereas, The Article 5 clause (2) of the Electronic Information and Transaction Law shall be read "*The*

Electronic Information and/ or Electronic Documents and/ or any print out thereof as referred to in clause (1) constitute the expansion of the lawful and valid evidences pursuant to the prevailing Procedural Laws in Indonesia."

4) Whereas, the Article 26A of the Law on the Eradication of Criminal Acts of Corruption shall be read "*The lawful and valid documentary evidences as referred to in the Article 188 clause (2) of the Law Number 8 of 1981 on the Criminal Procedures Law, particularly for the criminal acts of corruption may also be obtained from: a) Any other evidences in the form of information being spoken, sent, received, or electronically saved/ recoded by the means of optical device or any similar equipment; and b) Documents, namely any data or information records which are visible, readable, and or hearable, issued by or without the help of equipment, either those printed on paper, physical material other than papers, or those electronically recorded in the form of writing, voice, figure, map, design, image, letter, symbol, number or perforation that have meaning.*"

5) Whereas, the foregoing articles in the a quo cas are deemed to be contrary to the Article 1 clause (3), Article 28D and Article 28G clause (1) of the 1945 Constitution.

Juridical Analysis

Based on the fact of the case above, there are at least 9 (nine) expert juridical analyses of the articles being reviewed in the a quo case investigation, as follows: FIRST, it must be realized, that the articles being reviewed are in the realm of criminal procedural law or also called formal criminal law. According to Vos, formal criminal law regulates how the law is implemented until the procedural law, namely the legal proceeding. According to Andi Hamzah, criminal procedure law has several objectives: FIRST, to seek for the material validity. SECOND, to protect the rights and freedom of people as well as any citizens. THIRD, any people under the same circumstances and sued for the same legal offence must be tried under the same provisions. FOURTH, to maintain the constitutional system against the criminal offence FIFTH, to maintain peace, human security and prevent any evil actions.

SECOND It must be understood, that criminal procedural law or formal criminal law, based on its philosophical basis and the purpose mentioned above, is to prevent the arbitrariness of the state apparatus, namely law enforcement officials owned by the state. Thus, it can be understood that criminal procedural law or formal criminal law is made not to process an individual suspected of committing a criminal act, but rather is intended as a

means of controlling the arbitrariness of law enforcement officials against citizens or individuals. This is in line with the Preamble part read as "Considering the letters a and c of Law Number 8 of 1981 (Criminal Procedures Code (KUHAP), which is the spirit or soul of the Criminal Procedures Code, which shall be read:

a) *" that the state of the Republic of Indonesia is a nation of law which relies on Pancasila and the 1945 Constitution which upholds basic human rights and guarantees for all its citizens equal status in law and administration and is obliged to respect the law and administration without exception".*

(c) *"that such a development of the national law in the field of criminal procedural law is in order to make the people truly aware of their rights and obligations and further promote the attitudes of enforcers upholders of the law in line with their respective functions and authorities towards the upholding of law, justice and protection f or the dignity and integrity of human beings, and ensuring order and legal certainty for the proper functioning of the nation of law in line with the 1945 Constitution".*

The spirit and soul of this Criminal Procedures Code have been reaffirmed in the General Elucidation of the Criminal

Procedures Code, particularly point 2 clause 6, which shall be read:

> *"...Such development in the field of criminal procedure aims, so that the community can live up to their rights and obligations and be able to achieve and improve the attitudes of law enforcement officials in accordance with their respective functions and authority towards upholding the law, justice and protection which is nobility of dignity and human dignity, order and legal certainty for the sake of the establishment of the Republic of Indonesia as a nation of law in accordance with Pancasila and the 1945 Constitution"*

THIRD Remain in the context of the criminal procedural law, it must be acknowledge, that the criminal procedural law, more or less, embodies some natures and characteristics which limit the implementation of the human rights. It can be imagined, when someone was arrested and detained then his/ her properties were investigated and confiscated, even though it was not necessarily the final verdict of the court would state him/ her guilty. Therefore, the criminal procedural law applies fundamental principles, namely: lex scripta (the criminal procedural law must be in writing, due to the nature of its confidentiality), lex certa (the criminal procedural law

must be clearly written), lex stricta (the interpretation of criminal procedural law must be done in prudence manner). This once again shows that criminal procedural law is made, which in turn, more or les to limit the human rights so that, even if an interpretation of criminal procedure is to be carried out, the interpretation must be restrictive.

FOURTH, the a quo articles being reviewed at the Constitutional Court are specifically within the realm of Procedural Law on Evidence, in this case the System of evidence on the criminal proceeding. In the context of criminal law, verification is the essence of criminal proceeding, as it looks for the material truth in the criminal law. However, the verification process in criminal case has begun since the minor investigation stage to search for and find an event alleged as criminal act, and whether such event is worthy of a minor investigation or not. At this stage, the verification process has been in progress, with the action of the investigator looking for evidence, this undertaking is intended to verify the occurrence of criminal act and to find out the suspected. Thus, it is understandable that , from the perspective of criminal procedural law, namely any provisions which restrain the judicial proceeding in seeking and defending the truth, either by the judges, public prosecutor,

defendant, and legal advisor, the verification process must comply the applicable provisions and procedures, and the assessment of evidence specified by the prevailing laws. The assessment of evidence must be done with permission and must not violate the prevailing Laws.

In criminal cases, the verification is always considered to be the utmost prominent and crucial aspect. The verification provides a strong foundation and argument for the public prosecutor to file a claim. The verification is seen as something that is impartial, objective and provides information to the judge to draw conclusions from a case that is being tried. Especially in criminal cases, the verification is very essential because what is sought in criminal cases is material truth. In contract with the other verification, the verification in the criminal case has been commence since the preliminary stage, namely during the minor investigation and investigation. At the preliminary stage, the procedure is far more complicated when compared to other procedural laws. As a postulate that must be held, *in criminalibus, probantiones bedent esse luce clariores*, which means that in criminal cases, the evidence must be brighter than light/ must be obvious.

FIFTH speaking of the verification, it cannot be separated from 4 fundamental things in the verification process: First, the evidence must be relevant to the

dispute or case being processed. Meaning that the evidence is related to facts which point to the truth of an event. Second, the evidence must be acceptable or admissible. The acceptable evidence must be relevant.. Otherwise, the irrelevant evidence shall be rejected. Specifically, the acceptable evidence must be relevant, yet not in vice versa, the relevant evidence is not always acceptable. Or, in any other words, primafacie (at the first appearance) of the acceptable evidence is the relevant evidence. Third, what is referred to as exclusionary rules, which are literally interpreted as ways to obtain evidence in accordance with the law. A further consequence is that if the evidence is obtained in a way that is not valid or in accordance with the applicable provisions, then by law, the evidence obtained illegally must not be taken into account in the investigation at the court. In several literatures, it is known as the exclusionary discretion. Phyllis B. Gerstenfeld provides the definition of exclusionary rules as a legal principle that requires no evidence to be obtained against the law. Strictly speaking, exclusionary rules apply as guidance requiring that evidence obtained illegally cannot be accepted in court. *Fourth, weight of proof.* In the context of court, any relevant and acceptable evidence must be able to evaluate. In this context, we steps into the evidentiary power or *bewijskracht*. At this

stage, the judges shall assess any evidence presented to the court, the conformity of one evidence to the other evidence and ultimately, use these evidences as the consideration basis in rendering a decision. In the other words, the evidentiary power is the utmost authority of the judges to adjudicate a case before the court.

SIXTH, still related to the law of evidence. Theoretically, the are 6 parameters in the verification. First, *bewijstheorie,* means that the verification theory is used by the judges as the verification basis. In general, the criminal justice system, including in Indonesia, adopts theory of *negatief wettelijk bewijstheorie* (negative verification system of Law). In the other words, the negative verification system refers to the verification system which engages the evidences specified by the Laws in prior and the judges' believe in order to render a final decision. Explicitly, this verification basis is set out under the Article 183 of the Criminal Procedures Code: "*A judge shall not penalize a person except when with two legal evidence materials he has come to the*

conviction that a criminal act has really been committed and that it is the defendant who is guilty of committing such illicit action". Second, *bewijsmiddelen* (source of evidence), means any evidences used to prove the occurrence

of legal event. Having regard to the evidence, then, we shall refer to the Article 184 of the Criminal Procedures Code: *"The lawful evidences shall comprise: a. the testimony of a witness; b. the the testimony of a expert; c. any letter; d. any documentary evidence/ indication; e. the testimony of a defendant".* Third, *bewijsvoering* (deductive reasoning), shall be meant as the elaboration of the process of reasoning of evidence to the judges before the court, either how to find, collect, obtain and present such evidence before the court. *Bewijsvoering,* fundamentally, is considerably corelated to the fundamental of verification, later known as the exclusionary rules. It indicates that, if an evidence is obtained illegally, consequently, the investigation of a case shall be null and void. This kind of evidence shall be known as the unlawful legal evidence, in which case, should the evidence is obtained in a unlawful method or procedure, then it shall abort the case investigated. As being taught by Herbert L. Packer, an illegally acquired evidence must be inappropriate to be used as the evidence during the trial. Fourth, *bewijslast,* atau *burden of proof* , shall be the statutory obligation of a party in a trial to produce an evidence that will proof the occurence of legal event. In the context of criminal case universally acceptable in the world, the obligation to produce an evidence upon a charge

being lied is on the public prosecutor. This is the consequence of the functional differentiation principle in the criminal process which allocates the function of minor investigation, investigation, prosecution, trial and criminal conduct on the authorised institutions, namely Indonesia Police, attorney general, court and community institution. In line with the context adopted by the Criminal Procedures Code, the Public Prosecutor shall be the one who is obliged to prove the legal action and offence committed by the defendant. Fifth, *bewijskracht*, or the evidentiary power which is held by each evidence within the set of assessment in order to verify an accusation. This assessment shall be on the authority of the judge. The judge shall assess and determine the conformity among one evidence to another. The power of evidence is also determined by the relevancy of the evidence to the case being tried. Once the evidence is confirmed to be relevant, then, the power of evidence shall lead into the next phase called the acceptance of evidence. In the criminal procedural law, all evidences essentially have the same power, none of them is more powerful than the others. Expressly, the evidence in the context of criminal procedural law shall not be categorised hierarchically. When we relates to the fundamental of evidence, thence, the Dutch term "*bewijskracht* " may have the same meaning as

"weight of proof", the both of them are under the judge's authority. Sixth, bewijsminimum, or simply saying as *bewijs minimmum* shall be the minimum evidence required during the verification process in order to enforce the judge's freedom and authority. In the context of the criminal procedural law applicable in Indonesia, the judge shall not penalise the defendant unless upon the consideration of two lawful evidences the judge has come to the conviction that such criminal offence has been really committed. Meaning that, in order to pass a criminal sentence, the conditions of bewijs minimum or in other words, conditions of two evidences must be met. The conditions of these two legal evidence, not to mention the concept of *negatiefwettelijk bewijstheorie* adopted by Indonesia, are also be regulated under the Article 183 of the Criminal Procedures Code.

SEVENTH, related to the electronic recording or wire-tapping. Under the context of the criminal law, particularly according to the Telecommunication Law, the action of wire-tapping is a criminal offence. Penyadapan sebagai perbuatan pidana dapatlah dipahami mengingat ketentuan dalam konstitusi yang menyatakan setiap orang berhak untuk berkomunikasi dan memperoleh informasi untuk mengembangkan pribadi dan lingkungan sosialnya, serta berhak untuk mencari, memperoleh, memiliki, menyimpan, mengolah, dan menyampaikan informasi dengan menggunakan

segala jenis saluran yang tersedia. *Mutatis mutandis*, the prohibition of wire-tapping is similar to the prohibition of recording, as basically, the wire-tapping refers to an unauthorised action of recording a communication or conversation someone else. Thence, it is clear that the action of conversation recording or wire-tapping is considerably prohibited by the Law, unless provided otherwise by the provisions of prevailing Laws.

Accordingly, in order to disclose a criminal act, it is basically prohibited to use the method of wire-tapping. As it is correlated to the concept of *bewijsvoering* in the procedural law on evidence. In its development, towards the context of *bijzondere delicten* (special delict/ criminal offence) which is regulated beyond the Criminal Procedures Code, the action of wire-tapping and recording are permissible for the purpose of disclosing a criminal offence. The consideration basis upon the acceptable use of wire-tapping is that the criminal offences are done in well-organised way and are difficult to be proven. From the perspective of constitutional law, the action of conversation wire-tapping and recording for the purpose of disclosing a criminal offence is exceptional and acceptable. As set out in the Article 28F of the 1945 Constitution, the provision on the right to communicate and obtain an information is flexible depended upon the actual

circumstances. Meaning that the conversation wire-tapping and recording may be performed for the purpose of disclosing a criminal offence, provided it is done pursuant with the principle of special law (*lex specialis derogat legigenerally*).

To date, a number of laws applicable in Indonesia vest a special authority for the Investigator to conduct a phone conversation wire-tapping and conversation recording, including the undercover investigation. At least, there are four prevailing Laws which vest such special authority, among others the Law on the Eradication of Criminal Acts of Corruption, Law on Narcotics, Law on the Eradication of Terrorism Crime, and Law on the Corruption Eradication Commission. Those laws give an insight that some action as the representation of *bewijsvoering,* yet basically prohibited, excetional and acceptable under the context of national laws applicable in Indonesia. This provision, later, has raised a question on who shall be authorised to conduct such wire-tapping or recording? According to the legal experts,only the law enforcement officers who are authorised to conduct wire-tapping and recording, namely Indonesia Police, Prosecutors, or Judges. However, as we all know, in the context of the criminal acts of corruption, it is also the Corruption Eradication Commission (KPK), in addition to the Indonesia Police and

Prosecutors who are appointed as the Law Enforcement Officers. Therefore, for the sake of investigating the criminal acts of corruption, the action of wire tapping and recording done by the police, prosecutor and KPK shall be legally valid.

EIGHTH, in regard to the Law Number 11 of 2008 on the Electronic Information and Transactions. In the law a quo, the word "evidence" experiences the expansion of meaning, the evidence may also comprise any electronic evidence or electronic document, in addition to those specified in the Article 184 clause (1) of Criminal Procedures Code. According to the Electronic Information and Transaction Law, Article 5 clause (1) and clause (2) in conjunction with the Article 44 letter *b*, the electronic evidence, electronic information, or electronic document shall be the lawful evidence. When the provisions in the Article 5 clause (1) and clause (2) in conjunction with the Article 44 letter b of the Electronic Information and Transactions Law are associated to the Article 26A of the Law Number 31 of 1999 on the Eradication of Criminal Acts of Corruption as amended by the Law Number 20 of 2001 on the Amendment to the Law number 31 of 1999 on the Eradication of Criminal Acts of Corruption, both provisions have expressly specify that the electronic evidence or electronic document shall constitute the documentary evidence.

Supposing that the Article 5 clause (1) and clause (2) in conjunction with the Article 44 letter b of the Electronic Information and Transactions Law and the Article 26A of the Law on the Eradication of Criminal Acts of Corruption are construed grammatically and systematically, thence, it is clear that the electronic information and/ or electronic document and/ or any print out thereof shall constitute the lawful evidences and extensive meaning of the lawful evidence under the applicable laws in Indonesia. According to the Article 26A of the Law on the Eradication of Criminal Acts of Corruption which classify the electronic information and/ or electronic document as the lawful documentary evidence, thence, as referred to in the Article 188 clause (2) of the Criminal Procedures Code, only the electronic information and/ or electronic evidence shall constitute the documentary evidence.

The Article 188 clause (1) of the Criminal Procedures Code defines the evidence as an act, event or situation which because of its concurrence, whether between one and the other, or with the criminal act itself, indicates the occurrence of a criminal act and the person committing it. The Judge shall wisely and prudentially assess the evidentiary power of the specific evidence under a specific circumstance, after the judge hold an investigation in full-compliance and accuracy based on his conscience.

Expressly, in order to be classified as the lawful evidence, any documentary evidence must have a conformity between one and another upon the committed action.

In the context of the investigation theory, the evidence shall refer to a circumstantial evidence or, in the other words, an indirect evidence which is complementary in nature or may be deemed as the accessories evidence. Meaning that the documentary evidence cannot stand independently as it is obtained from the primary evidence. The judge investigating the case being tried shall hold the full authority and subjectivity upon such documentary evidence. In order to draw a conclusive indication from the investigation being done, the Judge must correlate one evidence to the other evidences and they ought to have the conformity between one to the other. Correspondingly, the judge shall use this documentary evidence in case of the existing evidences are not enough to support the judge's believe that the criminal offences had been committed and such offence was committed by the defendant.

In the context of the court trial in Indonesia, the documentary evidence is mostly used to support the judge's conviction, instead of to support the existing evidence qualitatively (namely, as one of the two required evidences under the principle of *bewijsminimum*). Wherefore, it can be understood that the documentary evidence is under the

authority of the Judge pursuant to the Criminal Procedures Code. And as its legal consequence, not all electronic evidences (the electronic information, electronic documents, and/ or the print out thereof) can be used as the lawful evidences in the context of criminal procedural law, especially for the criminal act of corruption.

When the foregoing is associated with the Law Number 30 of 2002 on the Corruption Eradication Commission (KPK), Law Number 2 of 2002 on the Indonesian National Police (Law on the Indonesian National Police) and Law Number 16 of 2004 od the Attorney General's Office of the Republic of Indonesia (Law on the Attorney General's Office), as well as the Law on the Eradication of Criminal Acts of Corruption which allow the action of wire-tapping and electronic recording, thence, the result thereof may be legally used, provided that such wire-tapping or electronic recording is done by the competent authority (namely the aforementioned institution, such as Indonesian Police, Attorney General and KPK).

Wherefore, the provisions set out in the Article 5 clause (1) and clause (20 in conjunction with the Article 44 letter *b* of the Electronic Information and Transactions Law and Article 26A of the Law on the Eradication of Criminal Acts of Corruption MAY BE SAID TO FAIL IN ASSURE THE LEGAL CERTAINTY, to the extent such provisions are construed that

any electronic recording and wire-tapping done by any person and, any results thereof can be used as the lawful electronic evidences. Particularly, when such matter is associated to the foregoing explanation, that the electronic evidence is only applicable as the documentary evidence under the Judge's authority, thence, neither the investigator nor public prosecutor can arbitrarily use such electronic electronic evidence during both minor investigation and investigation stages, instead of in compliance with the guidance or provisions set out in the Law on the Eradication of Criminal Acts of Corruption, by which this electronic evidence is none than just the documentary evidence.

It can be concluded that, the electronic evidence shall be only lawful and valid in terms of documentary evidence, and this type of evidence shall be under the authority of the Judge. Accordingly, during the minor investigation, investigation or prosecution stage, the electronic evidence may be considered as the appropriate evidence provided that and if only the same is legally obtained (including through recording or wire-tapping), and not classified as the unlawful legal evidence, meaning that the action of recording or wire-tapping is done by the competent and authorised institutions above mentioned, namely the Indonesian Police, or Attorney General or KPK.

NINTH, related to when is exactly the conversation recording and wire-tapping conducted? Shall it be done by the time of minor investigation or by the time of investigation being commenced? Towards these inquiries, each law has different regulations from one to another. Generally, those differences shall be as follow: First, there is not exact time when the conversation wire-tapping or recording may be done. It is blatantly obvious elaborated in the construction of the articles under the Law on the Eradication of Criminal Acts of Corruption, Law on the Corruption Eradication Commission and Law on the Court for the Criminal Acts of Corruption (Tipikor Court). Second, the action of conversation wire-tapping and recording may be done upon the fulfilment of adequate preliminary evidence. It explains that the action of conversation wire-tapping and recording shall be done during the investigation stage, instead of the minor investigation stage. This conditions have been expressly set out under the Law on the Eradication of Criminal Acts of Terrorism, Law on the Narcotics, and Law on the Eradication of Criminal Acts of Human Trafficking.

The expert suggest that the action of conversation wire-tapping and recording may be only done upon the fulfilment of adequate preliminary evidence. Specifically, it has been affirmed that the conversation wire-tapping and recording

may only be done at the investigation stage. The theoretical argumentations of the foregoing action are as follow: First, fundamentally, the action of wire-tapping and recording violate the human rights, therefore, such actions shall be only permitted upon the fulfilment of conditions of the adequate preliminary evidence that a criminal offence has been committed. Second, the action of conversation wire-tapping and recording without the adequate preliminary evidence over the committed criminal offence shall lead into the unfair prejudice. It goes against the principles of due process of law. Third, particularly, under the Law on the Eradication of Criminal Acts of Corruption, the result of the conversation wire-tapping and recording shall only be used as the documentary evidence. Meaning that the preliminary evidence is required, whether it is the testimony of a witness, letter or testimony of an expert.

Conclusion

According to the matters explained above, it comes into these following conclusion:

1. The Article 5 clause (1) of the Law Number 11 of 2008 on the Electronic Information and Transaction is in conflict with the 1945 Constitution of the Republic of Indonesia, should throughout the phrase "the electronic information and/ or electronic document and/ or the printouts

thereof" in the Article 5 a quo is not construed as "the information electronic and/ or electronic document and/ or the printouts thereof are legally obtained pursuant to the provision of the prevailing laws and regulations and/ or carried out for the purpose of the law enforcement upon the request of the Indonesian Police, Attorney General, Corruption Eradication Commission and/ or other law enforcement officers.

2. The Article 5 clause (2) of the Law Number 11 of 2008 on the Electronic Information and Transaction is in conflict with the 1945 Constitution of the Republic of Indonesia, should throughout the phrase "the electronic information and/ or electronic document and/ or the printouts thereof" in the Article a quo is not construed as "the information electronic and/ or electronic document and/ or the printouts thereof are legally obtained pursuant to the provision of the prevailing laws and regulations and/ or carried out for the purpose of the law enforcement upon the request of the Indonesian Police, Attorney General, Corruption Eradication Commission and/ or other law enforcement officers."
3. The Article 44 letter *b* of the Law Number 11 of 2008 on the Electronic Information and Transaction is in conflict with the 1945 Constitution of the Republic of Indonesia, should throughout the phrase "the electronic information

and/ or electronic document" in the Article a quo is not construed as "the information electronic and/ or electronic document and/ or which are legally obtained pursuant to the provision of the prevailing laws and regulations and/ or carried out for the purpose of the law enforcement upon the request of the Indonesian Police, Attorney General, Corruption Eradication Commission and/ or other law enforcement officers."

4. The Article 26A of the Law Number 20 of 2001 on the Amendment to the Law Number 31 of 1999 on the Eradication of the Criminal Acts of Corruption is in conflict with the 1945 Constitution of the Republic of Indonesia, should throughout the phrase "the electronic information and/ or electronic document" in the Article a quo is not construed as "the information electronic and/ or electronic document which are legally obtained pursuant to the provision of the prevailing laws and regulations and/ or carried out for the purpose of the law enforcement upon the request of the Indonesian Police, Attorney General, Corruption Eradication Commission and/ or other law enforcement officers."

3. Dr. Dian Adriawan Daeng, S.H., M.H.

The Article 5 clause (1) and clause (2), as well as the Article 44 letter *b* of the Law Number 11 of 2008 on the Electronic Information and Transaction (Law on the Electronic

Information and Transaction) is multi-interpretive, consequently, it may results in the uncertainty and obscurity. This issue is caused by the factor that the formula of such article and clauses has not expressly set out the criteria of electronic information and/ or electronic document and/ or the printouts thereof which can be used as the lawful evidence pursuant to the prevailing criminal procedural law in Indonesia.

When it is carefully read, the concept of the nation of law as specified in the Article 1 clause (3) of the 1945 Constitution comprises 3 fundamental aspects, namely:

1. The recognition and protection of human rights where such human rights can only be confiscated or limited by the consent of the people;
2. The principle of legality in which all actions of all state agencies or institutions and its citizens must be based on the rule of law;
3. The existence of an sovereign, independent and impartial judiciary;

One of the principles that must be applied in a nation of law (*rechtstaat*) is the application of the legality principle, by which this principle is expected to realise the existence of legal certainty in a law enforcement process.

Any person is entitled to the constitutional right, as this becomes one of the mandatory requirements which cannot be

apart from the existence of the concept of nation of law. The manifestation of legal certainty is the existence of firmness regarding the enactment of a law or nullum crimen nulla poena sine lege certa. The existence of the lex certa principle requires that a legal rule applies strictly because there is no doubt in its enforcement The obscure formulation may only lead into the legal uncertainty.

The principle of legality applies both in material criminal law and formal criminal law. In the principle of legality, it requires the existence of firmness regarding the enactment of a legal rule in order to provide legal certainty which is a form of protection to human rights In the context of the formal criminal law, an evidence must be based on the lawful evidence. The lawful evidence is set out under the Article 184 of the Law Numbe 8 of 1981 of the Criminal Procedural Law.

This provision specifically regulates the form of lawful evidence and the expansive meaning of the Article 184 of the Electronic Information and Transactions Law as also mentioned in the Article 5 clause (1) and clause (2) and the Article 44 letter b of the Electronic Information and Transactions Law. This special arrangement should be applied to crimes that use electronic means because the norms and criminal formulations are separate from the Criminal Procedural Law.

Prior to the enactment of the Law on the Electronic Information and Transaction, the provision on the electronic evidence has been previously set out in the Article 26A of the Law Number 20 of 2002 on the Amendment to the Law Number 31 of 1991 on the Eradication of the Criminal Acts of Corruption. This certainly does not cause a problem in the process of enforcing criminal law against corruption that is handled by the Corruption Eradication Commission because it has the authority to carry out minor investigation, investigation and prosecution, conduct the conversation wire-tapping and recording as set out in Article 2 clause (1) of the Law on the Corruption Eradication Commission.

The regulation on the lawful evidence as set out in the Article 5 clause (1) and clause (2) of the Law on the Electronic Information and Transactions shall result in the multi-interpretation as the formulation is quite extensive Whereas, the Article 5 clause (1) of the Electronic Information and Transactions Law shall be read "Any Electronic Information and/ or Electronic Documents and/ or any print out thereof shall be lawful and valid evidences." And the clause (2) thereof shall be read as "The Electronic Information and/ or Electronic Documents and/ or any printouts thereof as referred to in clause (1) constitute the expansion of the lawful and valid evidences pursuant to the prevailing Law Procedures in Indonesia." The provision of the Article 5 is

later re-affirmed in the Article 44 letter *b* regulating the evidence during the investigation, prosecution and examination before the court trial, under the provisions of the Law on the Electronic Information and Transactions the evidence, aforementioned, may be in form of the electronic information and/ or electronic document as referred to in the Article 1 point 1 and point 4 as well as the Article 5 clause (1), clause (2) and clause (3).

The phrase " the electronic information and/ or electronic Documents and/ or any printouts thereof" shall be lawful and valid evidences, provided that there is no any limitation and obscure meaning therein. The phrase does not rule out the possibility of creating legal issues that can harm certain parties in the enforcement of criminal law in Indonesia. These legal issues relate to who obtains and finds the electronic information and / or electronic documents, and / or the printouts thereof if they are connected with the resulted recordings, which produce electronic information and / or electronic documents, and / or the printouts thereof. Another issue is whether the electronic information, and/ or electronic documents, and/ or the prinouts thereof through recording and/ or wire-tappinydone by any person can be used as the lawful evidence, or whether it is only limited to certain people or parties who have authority under the prevailing Law.

Should any electronic information and/ or electronic documents, and/ or their the printouts thereof which are obtained by any person without exeption through the action of recording and/ or wire-tapping can be used as lawful evidence in a criminal law enforcement process, then this constitutes a threat to the guarantee of personal privacy. The guarantee of human rights on the personal confidentiality/ privacy is a universal and internationally recognized as referred to in the Article 17 of the International Convention on Civil and Political Rights (ICCPR). Based on Article 17 of the ICCPR, no one may arbitrarily or illegally interfere with matters that are personal, family, household or correspondence, and their honor and reputation illegally. This formulation provides protection to someone so that they shan't be arbitrarily treated.

Although the right to privacy is not included in it as set out in Article 28I clause (1) of the 1945 Constitution, it can be limited through the Law which has regulation precedent as set out in the Article 28J clause (2) of the 1945 Constitution. Upon the inavailability of a Law which regulates in details the authority of any parties which may conduct the action of recording, then the action of recording carried out without the permission of the party who delivered something verbally, as well as recording carried out by an unauthorized

institution as set out under the prevailing Law shall be constitute as the violation of human rights.

In addition to the threat to the assurance of someone’s personal privacy, the above action also violates the citizens' right over the security and does not give an assurance over the legal protection and certainty. So that the action of recording or wire-tapping the conversation of another person and the action of which is carried out without authority, shall constitute the action violating the Article 28D clause (1) and Article 28G clause (1) of the 1945 Constitution.

Other issues related to Article 5 clause (1) and clause (2) of the Law on the Electronic Information and Transactions are regarding the status of electronic information and/ or electronic document, and/ or the printouts thereof obtained through the action of recording that shallb be used as lawful evidence within the extensive meaning accordingly, pursuant to the applicable procedural laws in Indonesia.

To address these issues, it needs to be understood in advance that the adequate preliminary evidence based on the Article 184 of the Criminal Procedural Law is the fulfillment of two evidences. This is affirmed by the Constitutional Court’s Ruling Number 21/PUU-XII/2014. The act of collecting evidence based on Article 1 point 2 of Criminal Procedural Law is carried out at the stage of the investigation. Therefore, the electronic information and/ or electronic documents, and /

or the printouts thereof obtained through the action of recording and/ or investigations should be obtained through investigation, not at the time of the minor investigation or even outside those activities. If the evidence is obtained outside of the investigation activities, such evidence may be deemed unlawful and cannot be used as the evidence in court proceedings. If the unlawful evidence is still used, it is contrary to the principle of due process of law, and this jeopardizes the criminal law enforcement process as this evidence, ultimately, shall determine whether someone is found guilty or not.

The state must step in in providing a protection to its citizens from any actions that can cause fear to speak. The Article of 28G clause (1) of the 1945 Consitution has regulated that each person is entitled to protection of self, his family, honor, dignity, the property he owns, and has the right to feel secure and to be protected against threats from fear to do or not to do something that is part of basic rights. However, the enactment of Article 5 clause (1) and clause (2) and Article 44 letter *b* of the Law on the Electronic Information and Transactions does not explicitly stipulate when the recordings obtained by investigators can be used as lawful evidence instead raises multi-interpretation problems and does not rule out the possibility of being

misused by certain people who certainly can benefit or drop someone's credibility.

[2.3] Considering that, towards the Petitioner's Petition, the President had presented his testimony during the trial held by the Constitutional Court on 11th April 2016, as follow:

I. LEGAL STANDING OF THE PETITIONER

In connection with the Legal Standing of the Petitioner, according to the Government towards the details presented by the Petitioner in his petition arguing that his constitutional rights were violated due to the enactment of the provisions aque which were multi-interpretative and resulted in the Petitioner being summoned by the Attorney General based on the recording which was later deemed as a legal evidence, the Government argued:

1. Whereas, it is necessary to question the interests of the Petitioner whether he is appropriate as a party whose the constitutional rights and / or authorities impaired by the application of Article 5 clause (1) and clause (2) and Article 44 letter b of the Law on the Electronic Information and Transactions and Article 26A of the Law on the Eradication of Criminal Acts of Corruption, besides it is questionable whether the constitutional impairment of the Petitioner in question is specific (special) and actual or at least potential in nature which, according to logical reasoning, will certainly occur, and whether there

is a causal relationship between the loss and enactment of the Act petitioned to be tested.

2. Whereas, the Government does not agree with the reasons of the Petitioner who stated the Minor Investigation Order issued by the Director of Investigation, Assistant Attorney General for Special Criminal Acts Print Number-133/F2:Fd.1/11/2015, dated 30th November 2015, Print Number-134/F.2/Fd.1/12/2015, dated 2nd December 2015, Print Number-135/F.2/Fd.1/01/2016, dated 4th January 2016 against the PETITIONER on the basis that due to the provisions of Article 5 clause (1) and clause (2) and Article 44 letter b of the Law on the Electronic Information and Transactions and Article 26A of the Law on the Eradication of Criminal Acts of Corruption, were considered to have impaired the Petitioners' constitutional rights and were therefore considered to be contrary to the 1945 Constitution.

According to the Government, the motivation of the Petitioner to submit this application is solely due to the Petitioner’s personal interest, namely that the electronic evidence that makes the basis for the summons of the Petitioner cannot be a lawful evidence in the case of alleged consensus. But not the constitutional loss experienced. Since, even if the Petitioner's petition is granted, not the least can stop or hinder the Prosecutor's

Office from continuing to summon the Petitioner in the law enforcement process.

3. Whereas, the action should be done by the Petitioner was assessing whether the entire minor investigation processes were in accordance with applicable procedures and prevailing laws and regulations, and reflected the due process of law. If this is the case, then the Petitioner's petition is only a matter of the application of legal norms which are not a matter of constitutionality.
4. Whereas, the losses conveyed by the Petitioner who felt being distrubted because he was summoned by the Attorney General's Office to be investigated, according to the Government, it is more of an obligation of any citizen to fulfil the summon of the Law Enforcement Officers who exercises its authority under the prevailing laws or regulation, instead of the violation to the constitutional rights.

Based on the foregoing, the Government is of the opinion that the Petitioner in this petition for the judicial review has no legal standing as referred to in Article 51 of the Law Number 24 of 2003 on the Constitutional Court. Wherefore, according to the Government it is very appropriate and deservedly for the Chief Justice and the Bench of Justices of the Constitutional Court wisely to **declare the Petitioner's petition unacceptable/ rejected.**

II. THE GOVERNMENT'S TESTIMONY UPON THE BASIC MATERIALS OF THE PETITION FOR THE JUDICIAL REVIEW

Before the Government presents its testimony related to the norms of the material that is petition for the judicial review by the Petitioner, the Government explains the following matters:

1. Fundamental of the Law on the Electronic Information and Transactions

That electronic systems are used to explain the existence of an information system which is the application of information technology based on telecommunications networks and electronic media, which functions to design, process, analyze, display and transmit or disseminate electronic information. Information systems technically and management are actually the embodiment of the application of information technology products into a form of organization and management in accordance with the characteristics of the needs of the organization and in accordance with the intended purpose. On the other hand, information systems are technically and functionally integrated systems between humans and machines that include hardware components, software, procedures, human resources, and the substance of information that includes the functions of input, process, output, storage, and communication.

In connection with the foregoing, the world of law has in fact long been expanding its basic interpretation and norms when facing intangible material problems, for example in the case of theft of electricity as a criminal act. In reality, cyber activities are no longer simple because their activities are no longer limited by a country's territory, which is easily accessible anytime and from anywhere. Losses can occur both on the transaction agent and on other people who have never made a transaction, for example the theft of credit card funds through spending on the Internet. **In addition, verification is a very important factor, considering that electronic information has not only been comprehensively accommodated in the Indonesian procedural law system, but also turns out to be very vulnerable to be changed, tapped, falsified, and sent to various parts of the world in a matter of seconds.** Thus, the impact caused can be so complex and complicated.

Activities through electronic media systems, also called cyber space, although virtual in nature can be categorized as real legal actions or actions. Juridically, activities in cyberspace cannot be approached with conventional legal measures and qualifications because if this method is pursued there will be too many difficulties and things that escape legal enforcement. Activities in cyber space

are virtual activities that have a very real impact even though the evidence tools are electronic.

Thus, the subject of the perpetrator must also qualify as a person who has committed a legal act in a real way. In e-commerce activities, among others, it is known that there are electronic documents whose position is synchronized with documents made on paper.

2. Fundamental of the Law on the Eradication of Criminal Acts of Corruption

Since the Law Number 31 of 1999 on the Eradication of Criminal Acts of Corruption (State Gazette of the Republic of Indonesia of 1999 Number 140, Supplement to the State Gazette of the Republic of Indonesia Number 3874) promulgated, there are various interpretations developing in the community especially regarding the application of the relevant law to corruption committed before Law Number 31 of 1999 promulgated. This is because Article 44 of the Law states that Law Number 3 of 1971 on the Eradication of Criminal Acts of Corruption had been declared bull and void since Law Number 31 of 1999 promulgated, resulting in an assumption that there is a legal vacuum to process the criminal acts of corruption that occurred before the enactment of Law Number 31 of 1999.

In addition to this, given that corruption in Indonesia occurs systematically and extends so that it not only

harms state finances, but also violates the social and economic rights of the community at large, the eradication of corruption needs to be done in an extraordinary way. Thus, the eradication of criminal acts of corruption must be carried out in a special way, including the application of a reverse verification system of which verification is burdened to the defendant.

To achieve legal certainty, eliminate the diversity of interpretations, and fair treatment in combating corruption, it is necessary to make amendment to Law Number 31 of 1999 on the Eradication of Criminal Acts of Corruption.

Provisions regarding the source of acquiring of legal evidence in the form of documentary evidence are formulated that regarding 'documentary evidence' other than obtained from the testimnony of a witness, letters and testimony of defendants, also obtained from other evidence in the form of information that is said, sent, received, or stored electronics with optical devices or similar but not limited to electronic data interchange, electronic mail (e-mail), telegram, telex, and facsimile, and from documents, that is, every record of data or information that can be seen , read and or heard that can be issued with or without the help of a facility, either it is written on paper, any physical object other than

paper, or electronically recorded, in the form of writing, sound, images, maps, designs, photos, letters, signs, numbers, or perforations that have meaning.

Furthermore, on the opinion of the Petitioner who argued that the provisions of Article 5 clause (1) and clause (2), Article 44 letter b of the Law on the Electronic Information and Transactions and Article 26A of the Law on the Eradication of Criminal Acts of Corruption are contrary to the provisions of Article 1 clause (3), Article 28D clause (1) and clause (2), and Article 28G clause (1) of the 1945 Constitution, the Government explains as follows:

1. Regarding the Petitioner's argument which basically considered that his constitutional rights violated by the enactment of the provisions a quo which according to the Petitioner extended the evidence not only in the field of criminal procedure law but also other legal fields such as civil, the Government provides the following explanation:
   a. a. That based on the legal basis a quo, the establishment of the Law on the Electronic Information and Transactions and the Law on the Eradication of Criminal Acts of Corruption is based on different aims and objectives. The Law on the Electronic Information and Transactions is based on increasingly rapid technological developments, among others, the existence of an electronic system that generates legal actions

electronically, since electronic information has not been comprehensively accommodated in the Indonesian procedural legal system but also turns out to be highly vulnerable, tapped, falsified and sent to various parts of the world in a matter of seconds, so a separate law is needed to regulate information and electronic transactions. Whereas one of the reasons for the amendment to the Law on the Eradication of Criminal Acts of Corruption was **due to the expansion of evidence in the case of corruption that in its communication uses an electronic system** So that the provisions of electronic evidence in the Law on the Electronic Information and Transactions and the Law on the Eradication of Criminal Acts of Corruption can mutually reinforce evidence in the national legal system.

b. Based on the information referred to in letter a, the existence of the a quo provision is intended to accommodate new legal actions that utilize information technology in the element of his actions. Therefore, the a quo provisions are implemented in order to ratify valid new evidence by utilizing electronic information and / or electronic documents and / or their printouts and at the same time expanding the evidence in the provisions of Article 184 clause (1) of the Criminal Procedure Code, with the aim of anticipating the

existence of the new law. The expansion of the evidence as referred to in the provisions of Article 5 clause (2) of the Law on the Electronic Information and Transactions, is intended by the Actors as a preventive and repressive measure for new legal actions in cyber crime. In addition, the expansion of evidence in the a quo provisions can also be used by Law Enforcement Officers (APH) in dealing with criminal offenders and / or other lawless actors who utilize information technology in electronic systems..

c. That based on the principle of lex posterior legi priori, the formulation of the a quo provisions is part of the norm extension of evidence in the provisions of Article 184 clause (1) of the Criminal Procedure Code which is used in the process of handling new criminal cases with the use of technology in electronic media systems, so that the evidence is not only in the form of witness statements, expert statements, letters, defendant's statements, or instructions, but also includes electronic information and / or electronic documents and / or printed results as referred to in the provisions of Article 5 clause (1) and clause (2) in conjunction with Article 44 letter b of the Law on the Electronic Information and Transactions, so that the arrangement is in accordance with the principle of

lex posterior derogat legi priori.

2. Regarding the argument of the Petitioner which basically assumed that the recording was done illegally or without the consent of the person speaking on the tape, even though the discussion was carried out in a closed room, the Government explains the following:

   a. Regarding the Petitioner's argument which argued that recording was equated with interception / wiretapping, the Government is of the following opinion:

      1) Interception / wiretapping is an activity to listen to, record, divert, change, inhibit and / or record the transmission of Electronic Information and / or Electronic Documents that are not public in nature, using either wired communication networks or wireless networks, such as electromagnetic emission or radio frequency (vide Explanation of Article 31 clause (1) of the Law on the Electronic Information and Transactions).

      2) One of the activities in interception / wire-tapping is through recording of Electronic Information and / or Electronic Documents belonging to other people, which if done without rights or against the law are threatened with criminal sanctions (vide Article 31 clause (1) in conjunction with Article 47 of the Law

on the Electronic Information and Transactions).

3) In essence, interception / wiretapping activities are prohibited [vide Article 31 clause (1) and clause (2) of the Law on the Electronic Information and Transactions], but for law enforcement purposes, the Law Enforcement Officers can conduct interception / tapping in accordance with the provisions of legislation [vide Article 31 clause (3) Law on the Electronic Information and Transactions].

b. Whereas the provisions of Article 5 clause (1) of the Law on the Electronic Information and Transactions are norms that state that Electronic Information and / or Electronic Documents are stipulated to be lawful legal evidence that can be used in the verifying and investigating of all cases.

c. Whereas, the recording as argued by the Petitioner in the case a quo, basically was the documentation activity **with the object of a process, fact, circumstance and/ or activity**, of which results thereof shall be in the form of the Electronic Information and/ or Electronic Document.

This is different from the act of recording which is one of the activities in interception/ wire-tapping, because the objects recorded in interception / wire-tapping are the Electronic Information and/ or

Electronic Documents [vide Article 31 clause (1) of the Law on the Electronic Information and Transactions]. In addition, interception / wiretapping can only be done by the Law Enforcement Officers, which are not involved in the activity of exchanging Electronic Information and/ or Electronic Documents.

d. Whereas, the Petitioner's argumentation which equalised the secretly/ unauthorised recording and the interseption/ wire-tapping results, is mistaken as principally, both of them are different activities.

The activity of recording in the general context to which object is in the form of a process, facts, circumstances, and / or activities (not electronic information and/ or electronic documents), shall not be classified as the interception / wire-tapping activity, therefore, everyone can do recording. However, specifically for interception / wirre-tapping of which object is Electronic Information and / or Electronic Documents, can only be done in the context of law enforcement and carried out by the Law Enforcement Officers.

According to the foregoinf, the result of recoding a quo shall not be classified as the result of interception/ wire-tapping as referred to in the Article 31 clause (1) of the Law on the Electronic Information and

Transactions. However, the result of such recording shall constitute the Electronic Information and Electronic Documents used as the acceptable evidence as referred to in the Article 44 letter *b* in conjunction with the Article 5 clause (1) and clause (2) of the Law on the Electronic Information and Transactions. The evidentiary power of the evidence, including mostly the electronic evidence, is on the originality or authenticacy of the electronic evidence, while observing the provisions of criminal procedural law applicable in Indonesia, in addition to the provisions of the Article 5 clause (3) of the Law on the Electronic Information and Transactions.

3. Towards the Petitioner’s argumentation which plead to the Honourable Bench of Justices of the Constitutional Court in order to set the conditionally constitutional of the provisions of the Article 5 clause (1) and clause (2) and the Article 44 letter *b* of the Law on the Electronic Information and Transactions, the Government gives this following explanation:
   a. a. Whereas, the legal norms contained in the provisions of Article 5 clause (1) and clause (2) and Article 44 letter b of the Law on the Electronic Information and Transactions are 'neutral' and subject to the evidentiary law in general. Therefore, Electronic Information and / or Electronic Documents and / or

Printouts thereof as evidences can be used in the verification of cases, either by obtaining the results of recording that occurred before the law enforcement was carried out by the Law Enforcement Officers, or obtained during the law enforcement process, namely in the stage of minor investigation and investigation. This is because the electronic evidence in general has existed before the crime / unlawful act occurred and at the time the crime / unlawful act was committed. The evidence of a criminal act / unlawful act are not prepared for or prepared at the request of the police, prosecutor's office, and / or other law enforcement institutions after a crime / unlawful act occurs.

b. If the rule of law which contains the norms of Electronic Information and / or Electronic Documents and / or their Print Results as valid evidence as referred to in the a quo provisions, it is interpreted as the Petitum of the Applicant, this will narrow the norms of Electronic Information and / or Electronic documents and / or printed results, and can simultaneously weaken law enforcement in protecting public interests. As a consequence of conditionally constitutional, Electronic Information and / or Electronic Documents obtained from recording or electronic transactions carried out by everyone, such

as CCTV footage in shopping centers, hotels, airports and proof of financial transactions through ATM, cannot be used as evidence in the court process, because Electronic Information and / or Electronic Documents are not obtained based on Law Enforcement Officers requests.

c. The conditionally constitutional application is not in line with the Arrangement of Article 5 clause (1) and clause (2) juncto Article 44 letter b of the Law on the Electronic Information and Transactions, which is intended to reach new legal action trends that use electronic systems either on-line or off-line which so far has not been able to be reached maximally by using evidence as referred to in Article 184 of the Criminal Procedure Code.

4. Accordingly, the Government is of the opinion that if the a quo provisions are interpreted as being applied by the applicant, it will have an impact on the verification of legal actions carried out in a manner that is stipulated in the overall a quo provisions in the lives of people who utilize electronic systems. In addition, it will also have an impact on the implementation of other laws and regulations such as the Anti-Corruption Law, Terrorism Law, Narcotics Law and Banking Law which underlie electronic evidence as stipulated in the a quo provisions

in criminal acts. Therefore, with the a quo provision providing guarantees of legal certainty to the public in their activities using electronic system media, among others, in banking, trade and education activities.

III. CONCLUSION

According to the foregoing, the Government has come into the conclusion:

1. Legal norms contained in Article 5 clause (1) and clause (2) and Article 44 letter b of the Law on the Electronic Information and Transactions and Article 26A of the Corruption Law are in accordance with the basic legal norms as contained in Article 1 clause (3), Article 28D clause (1) and clause (2), and Article 28G clause (1) of the 1945 Constitution. If requirements are added with:

   Any electronic information and/ or electronic Documents and/ or print out thereof *obtained in accordance with the provisions of the prevailing laws and regulations and/ or done for the purpose of law enforcement upon the request of the Police, Attorney General's Office, Corruption Erdication Commission and/ or other law enforcement officers* shall be lawful and valid evidences.

   Then, it shall have these following effects:

   a. weakening the mandate in Article 1 clause (3), Article 28D clause (1) and clause (2), and Article 28G clause

(1) of the 1945 Constitution.

b. limiting and inhibiting the Law Enforcement Officers in exploring the elements of proof in criminal procedure in Indonesia if it has to wait and is limited only to requests from Law Enforcement Officers in order to utilize Electronic Information and / or Electronic Documents, and / or printouts thereof as evidence, especially such restrictions will complicate legal action which must be hastened, such as criminal acts of terrorism.

2. The a quo provisions are as an extension of the evidence set forth in the procedural law in Indonesia in anticipation of new legal actions carried out by utilizing new technology in electronic systems.

IV. PETITUM

Based on the explanations and arguments mentioned above, the Government pleaded with the Honourable Chief Justice / Bench of Justices of the Constitutional Court examining, adjudicating and granting a ruling for the petition for the judicial review of the a quo provisions of the Law on the Electronic Information and Transactions and the Law on the Eradication of Criminal Acts of Corruption towards the 1945 Constitution of the Republic of Indonesia, the deservedly grant a rulling as follows:

1) Declare that the Petitioner has no legal standing;
2) Reject the Petitioner's petition for the judicial review in whole or at least declare the Petitioner's petition for judicial review is unacceptable;
3) Approve the President's Statement as a whole;
4) Declare the provisions of Article 5 clause (1) and clause (2), Article 44 letter b of Law Number 11 of 2008 on the Electronic Information and Transactions and Article 26A Law Number 20 of 2001 on Amendment to Law Number 31 of 1999 on the Eradication of Criminal Acts of Corruption do not conflict with the provisions of Article 1 clause (3), Article 24C clause (1), Article 28A, Article 28H clause (1) and Article 33 clause (4) of the 1945 Constitution of the Republic of Indonesia.

In addition to the aforementioned written statement, the President also provided information regarding the questions raised by the Constitutional Justice, as follows:

1. Whereas, based on the provisions of Article 28F of the 1945 Constitution which reads: Each person has the right to communication and to acquiring information for his own and his social environment's development, as well as the right to seek, obtain, possess, store, process, and spread information via all kinds of channels available ', recording activities are the right of every person. In addition, recording activities have become a daily activity carried

out by everyone in the world such as photographing (recording in the form of pictures), recording sounds, and recording (recording in the form of pictures and sounds) of an event.

2. In order to maintain order in the life of the people, Article 28J of the 1945 Constitution states that in exercising its freedom, every person must submit to the restrictions set by law as respect for the human rights of others and fulfill just demands in accordance with moral considerations, values values of religion, security and public order in a democratic society.
3. Basically, there is no restriction on the right of every person to make a recording which then results into electronic information both publicly and privately. However, the provisions of Article 5 of the Law on the Electronic Information and Transactions have provided guarantees for the use of electronic information and / or electronic documents from recordings as lawful evidence so that there is no noise in public life as questioned by the Panel of Judges.

   This provision guarantees everyone to be able to carry out information storage activities using all types of available channels including recording. But in the event that the recordings will be used as evidence, it is the judge's authority to assess by considering the context or consent of

the parties involved as well as the provisions of the applicable legislation and procedural law.

4. In essence, interception / wire-tapping activities are prohibited, but for the sake of criminal law enforcement, Law Enforcement Officers can make forced efforts in the form of interception / wire-tapping actions in accordance with the provisions of legislation.
5. In principle, records in the form of Electronic Information and / or Electronic Documents and / or Printouts thereof that have legal values can be used as evidence in proof of cases, either by obtaining the results of recording before the law enforcement by Law Enforcement Officers, or obtained when the law enforcement process is carried out, namely in the stages of investigation and investigation.
6. Existence of electronic evidence can occur before a crime / unlawful act occurs and / or when the crime / unlawful act is committed. Therefore, legal norms contained in the provisions of Article 5 clause (1) and clause (2) and Article 44 letter b of the Law on the Electronic Information and Transactions, are 'neutral in nature' and are subject to general evidentiary laws. This is intended to accommodate new legal actions that utilize information technology in the element of his actions.
7. Based on the Law on the Electronic Information and Transactions, the strength of proof of evidence in general

including electronic evidence lies in the originality or authenticity of electronic evidence with due observance to the provisions of Article 5 clause (3) of the Law on the Electronic Information and Transactions and provisions of applicable legal provisions in Indonesia.

Based on the description above, if recording is interpreted as intended by the Petitioner, it will have an impact on limiting the use of record evidence in the field of criminal law, that is inhibiting Law Enforcement Officers from exploring evidence in criminal procedure in Indonesia if it has to wait and be limited to requests from Law Enforcement Officers for information utilization Electronics and / or Electronic Documents, and / or the printouts thereof as evidence, especially those restrictions will make it difficult for legal actions that must be hastened, such as criminal acts of terrorism.

In addition to the above, President presented three expert witnesses for their testimony hearing which was taken under oath at the trial session dated 3 May 2016 and 19 May 2016, outlining as follows::

1. Dr. Edmon Makarim, S.Kom., S.H., LL.M.

Whereas according to the research result by experts in 2011s on Constitutional Rights and ICT, it essentially stated that the ethical aspects of information and

communication are privacy, accuracy, property, accessibility, responsibility, accountability, due process, and liability. Pursuant to this matter, the 1945 Constitution governs the existing individual rights and public interests. Other standards for constitutional rights are also available in international conventions governing privacy and personal data.

Electronic information is a code containing digits commonly represented by binary digits 0 and 1. In the code, letter a is represented electronically in a set of asking code. It is growing larger, turning into a record, and finally forms a database. Hence, electronic information is basically a code.

Electronic information is generated by an electronic system, thus the legal basis of assumption is that the information is deemed reliable because it comes from a reliable system. Therefore, electronic information has a legal value which makes it admissible to be evidence for all laws of procedure. “A judge shall not repudiate the presence of electronic information merely because of its electronic form”, based on the statement, the president and the House of Representatives (DPR) agreed in the drafting of the Law to use affirmation, affirming that information may become admissible evidence not only in a hard copy form, but also in its original electronic form.

An example of electronic information that forms evidence is the information stored in a computer which is shown and viewed at this session. It means there is electronic content and no doubts arise as the system does not undergo any change. The system guarantees that there is no difference between what is stored and read, thus electronic information in its original form already has probative value.

The conception on information is that information either in electronic or hard copy form respectively has functional equivalent approach, meaning it is a type of information which can, when printed on paper, be read again and meet the written element, as well as electronic information which will be regarded as satisfying the written element in that when it is stored, it is retrievable.

Electronic information is deemed to having been signed when it indicates the responsible legal subject associated with it. Accordingly, a signature represents the subject who reads and is responsible for its content or in other words, being signed is deemed adequate, when the electronic information indicates the legal subject associated to the content.

Electronic information is regarded authentic or original if it is believed that such information when being

stored and read again does not contain any change. Take example SMS messaging, SMS may be admissible as evidence when the recipient is positioning as an "end user." Another example is a plane's black box, which when it is installed until in the plane crash incident does not change and is believed to remain unchanged, thus when it is converted from an analog to digital form and displayed, no doubt arises. For comparison, it is not the case with a notarial deed that is not truthfully made, although an authentic written evidence has the full strength of verification.

In relation to this context, Article 5 contemplates that electronic information is admissible to be evidence providing it is accessible, presentable, complete, accountable, and can be used to explain a condition.

Electronic information evidence has two charateristics, namely as documentary evidence and other evidence aside from those stated in the Civil Code of Procedure and Criminal Code of Procedure.

When the expert drafted the Law *a quo*, in the deliberation it mentioned that some procedural laws have acknowledged electronic information as evidence in two different matters, namely in a *lex specialis* law regarding ordinary crime, which specifies that electronic information is an expanded documentary evidence. However, there are

also other Laws, namely Law on Money Laundering, Law on Narcotics, and Law on Human Trafficking, which prescribes evidence aside from those stated under the Code of Criminal Procedure (KUHAP), and ITE Law which accommodates the two differences, electronic information thus expands as documentary evidence, it may also become an authentic written deed in electronic form if the system is available, and as other evidence if it is presented as a separate evidence.

Electronic system describes a legal event and the person committing it. Nevertheless, in electronic context its reliability should remain to be considered although it is not described by ITE Law as during the deliberation of the Law the system is regarded as based practices. IT community recognize that the integrity of electronic information is not guaranteed, thus it has the possibility of alteration. It is the authority of judges to assess it.

In regard to investigation, Article 42 of ITE Law dictates that criminal investigation as referred to in this Law shall be conducted in accordance with the provisions of the criminal law of procedure, for example when the investigator in in urgency, the court ruling will be made. Article 43 of ITE Law mandates that an investigator must observe the applicable laws on privacy, confidentiality, appropriate public services, data integrity, and system

integrity. It provides for restriction to prevent misuse of authority by investigators. In the Convention on Cybercrime, the terms of condition and safeguard are set forth.

In private communication regime, the term of confidentiality is known, which relates that no one is allowed to know the content of a conversation, it is only accessible by two parties for their legitimate interest, namely law enforcement and intelligence. Intelligence for the purpose of national security will never become evidence in court, thus it does not require a court warrant. If a certain content needs to be presented to silence the person, it should be done for the purpose of law enforcement, by using judicial power.

Communication is a process to convey information, and information is the object of exchange.

Communication has two rules, firstly it is private, which is intended for the concerned parties. The freedom of speech is only between the two parties, provided that they do not have objection. Yet, if any of them does not want it, the communication will be dropped. Secondly, public communication, in which the party to whom we communicate is public, thus care should be taken because there are public social norms to observe. The principle of mass communication is to transmit the broadcast content, and

deliver all the information to public, while in private communication, the information is confidential in nature.

In communication practice, there is oral communication, where if there are two people having conversation, other people outside the room shall not overhear it. Pertaining to the overhearing issue, in 1920s in the United States there was the Mob case, where the investigator had no access to collect evidence or known as duly exhausted, which made the investigator take oath before the judge to testify that the investigator had to enter the privacy area on the condition no privacy abuse is committed, signifying that overhearing is conducted only to the extent required and as the last resort and restricted.

In line with the advancement of technology, the recording device is no longer seen in a physical form, and the terms of interception or tapping emerged. On this basis, the tapping definition under Law on Telecommunication is slightly different from interception definition under the Law Number 11 of 2008. Tapping in Telecommunication Law is to connect a tap device to the network. As it is feared that the device installation will degrade the quality of services, the investigator is prohibited from recording directly, but the investigator may ask the operator to record by a request. With the advancement of technology, investigators only

needs to plug in the device to the service provider, and then recording it, or what is commonly known as remote interception, and the use of which must adhere to the prevailing standard.

According to the expert, the right to information and communication is the right to seek, collect, and not possess. However, the 1945 Constitution mentioned the possess word, which should be corrected;

Furthermore, when information is given to a person, but the person does not agree with it, it should not be forced because there exists the right against self-incrimination. Article 5 of ITE Law determines the object, if the Article does not exist, there will be no basis to assert that electronic information may be used as evidence. An example that electronic information may be used as evidence is expert testimony presented through teleconference.

In the Civil Code, letter review will require a special warrant. In 1981, telex and wire were already available and the information could also be received in the form of a letter. Hence, electronic information may expand into a letter form.

As regards of privacy, it is generally taken as the rights to be let alone. Other definitions are to not touch someone, not intrude into one’s private matters, if their

personal data are disclosed anywhere, it would potentially harm their privacy.

There is a separation between electronic information as evidence and the procedure to collect it. If the investigator's procedure is set out in its procedural law, it shall refer to the procedural law. It should be explained nonetheless that the investigator is authorized for tapping a particular crime only, and not all crimes. In a preliminary inquiry procedure, it is defined that electronic information will be valuable if it is seized by the investigator directly, if the investigator collects it from any other party, the investigator cannot refer to such information because it is not the investigator who rescues the data

Recording activities is part of human rights; thus, everyone has a record. Even angels cannot be prohibited from recording human's good deeds and bad deeds, but God never opens those records inappropriately anytime, as it will only be displayed at the doomsday, which would cause nonrepudiation. As for electronic information evidence, for example SMS messaging between the expert and a party, when it is consented and not repudiated, the SMS evidence will function similarly with an authentic certificate, such evidence has the full strength of verification. On the other hand, if it is

repudiated by either party, an expert is needed to prove the authenticity of such information through forensic examination.

If we refer to the prevailing regulation in the UK regarding investigator's authority, when the two persons do not give attention, forceful measures may be taken upon request to the judicial authority, by giving affidavit and stating under oath before the judge that the investigator will obtain a record without infringement of confidentiality. A confidential matter should, after recording, until it goes to the procedure, be kept in strict confidence. It should only be disclosed at trial session, after firstly selecting which parts need to be disclosed.

Whereas in short, the verification process is to describe a criminal event, which must be valid, correct, and relevant. The evidence must be obtained by the investigator through a proper procedure. The difference between the criminal and the investigator is the investigator acts with legal dignity and respect. If the investigator obtains it inappropriately and only with it the investigator starts off, it would be inappropriate, as it indicates the investigator conducts enforcement of law by performing an act against the law. Therefore, according to the expert, if two people are having conversation and

either of them pays attention, it already means communication. If either of them pays attention, the investigator is not required to ask for a court warrant

Whereas currently, the common concerns globally in relation to privacy are privacy and data protection, and their security.

Whereas that the Judge did not repudiate the case for its electronic form shall be highly upheld. If Article 5 of ITE Law is omitted, there will be no basis to assert that electronic information may be used as evidence for multilaws of procedure.

Whereas if a conversation is raised by both parties, but both or either of them does not agree with it, it means that infringement of privacy occurred. It is governed by ITE Law setting out that every person may file a claim against privacy infringement.

In the United States, privacy disclosure by investigation or theft or deliberate leaking to mass media shall fall into a crime. It is not a problem as to whether the privacy area be privately recorded or read, but when it is disclosed, such tapping is only allowed with court authorization. In the United States, to record an event in court may only be done by courtroom sketch drawing. The tapped information may be presented before the court to the necessary part only. In contrast, in Indonesia the criminal

element is corruption, but the one revealed is about cheating, which is irrelevant in order to deviate public opinion.

According to the expert, information disclosure on the grounds of freedom tends to be the abuse of power over such information. It is more felonious than the criminal itself; thus the expert perceives ithat any information that is private in nature should remain private. Disclosure of private information to public must be made properly.

Whereas in intellectual property right regime, it is expressly stated that anything recorded by a person will remain to be the possession of the recorded person or in other words, the copyrights will remain in the hands of the recorded person. Similarly with data, anything attached personally such as a photo taken by someone will remain the possession of the photographed person and not the the photographer. Hence, if the photo is released inappropriately, it may be sued for an infringement of privacy.

2. Dr. Drs. Henry Subiakto, S.H., MA

ITE Law is among the Laws that functions as an umbrella for our life activities as well as for the next generation in the future, as the next generation will inevitably spend most of their time in electronic media or in electronic transactions. Currently, most activities have shifted or

migrated from physical activities to electronic media or commonly known as the digital world, whether it be trading activities, communication activities, or any other activities such as e-commerce. It even includes educational-related matters

In communication science, it is widely known the term of digital natives, defined as children who grow up in the digital age, or known as digital immigrants. We all are the immigrants who have shifted to the digital native life. Despite such condition, we are the one who determines the life of our children in the future by establishing the relevant laws, including relating to omission and protection of their rights. According to the expert, ITE Law provides such protection.

Digital life is marked by big data, which is data in large amounts containing the records of human life. Big data have raised issues, both nationally and internationally. For this reason, the government is expected to manage big data to prevent it from being recorded by foreign countries.

In our communication activities at present time, it is hard to distinguish between private and public activities. Pursuant to this matter, ITE Law has anticipated by defining *anyone who deliberately without the right of transmitting,* the word of "transmitting: is for a small

quantity with a small amount, person to person and accessible," while distribution is intended for public communication as it comes from one to a large number of people.

In communication science, there is a term of mass self communication, formerly known as mass communications. Mass self communications is related to social media, among others Facebook, Twitter, Whatsapp, or digital devices such as smart phone. Communication in mass self communications comes across as private, but when it is continuously transmitted to many people, it would become public domain, and therefore, the ITE Law provisions on private may fall under criminal domain.

The current technology also enables capturing private communication. The recording capture result may be used as evidence.

In general, electronic transaction means a digital transaction and digital communication. While the law defines it as electronic transaction, it is an activity using internet or what is called digital transaction. Digital transaction has distinctive characteristics, for example grab taxi and uber taxi service application;

Nowadays, evidence is not always in the form of correspondence or any material written on a stamp duty paper, but it is also made electronically which leaves

traces in the form of digital forensic. Digital forensic may take the form of words, writings, photos, or any other forms. Therefore, the police will, when arresting criminals, firstly check their mobile phones, as it may contain various transactions, and any communication to find evidence with whom they communicate, and whom they contact.

Technology records all human activities, while it is in the form of back data, which records the data of physical activities, it actually goes more deeply by recording all our activities, including our voices.

All digital transactions can intrinsically be used as evidence, thus if a person communicates with another in private, and then any of them divulges their conversation, is it a crime? It will depend on whether or not it is governed by the Law. If it is governed, the *nullum delictum nulla poena sine praevia lege poenali* principle will prevail, or otherwise it willonly constitute a breach of ethics or a breach of agreement between them, ITE Law prohibits the act of leaking private conversations, the violation of which will be subject to sentencing;

3. Dr. Mudzakkir, S.H., M.H.

There is a difference between real evidence and evidence. Real evidence is defined as an instrument or object used in committing a crime or is the crime result. Meanwhile,

evidence definition is as referred to in Article 184 of Law on Criminal Procedure (UU HAP) and Article 5 of ITE Law. Evidence as defined by Law 20/2001 is that in the form of documentary evidence set out in Article 188 clause (2) UU 8/1981, which in corruption crime is obtained from among others:

1. Evidence in the form of information spoken, transmitted, received or stored electronically by an optic instrument or other similar instruments; and
2. Documents, meaning any record of data or information that can be viewed, read and or listened with or without any aid, which is laid down on paper, or other kinds of physical objects, or is electronically recorded, in the form of texts, sounds, pictures, maps, designs, photos, alphabets, symbols, numbers, or perforations having certain meaning.

Evidence as referred to in Law UU 20/2001 is evidence expanding as a documentary evidence as set out in Article 184 and further described in Article 188 clause (2) UU 8/1981. Documentary evidence is gathered from letters, witness testimony, and defendant testimony, which will be deduced by the judge to establish certainty by interconnecting all evidence. In corruption crime, documentary evidence has a broader definition as specified in Article 26A Law 20/2001. Electronic evidence in a broad ITE definition is anything

relating to criminal acts that use electronic facility which may be used concurrently as evidence and real evidence.

Corruption crime is a specific crime and electronic evidence is set forth in Article 5 Law 11/2008 which stipulates that the general rule of verification applies in cases involving electronic evidence. Accordingly, there are two definitions with respect to electronic evidence, firstly, with reference to Article 184 Law 8/1981, electronic evidence is the sixth evidence among the existing evidence, secondly, the position of electronic evidence under Article 26A Law 20/2001 specially applies to corruption crime.

The issue arising from the existing technology development in the state finance administration is that everything uses electronic documents. It has been applied by the BPK (the Audit Board of Indonesia) through electronic accountability reports, thus in this matter electronic documents are the object of inspection and accountability report from the Government to BPK. When it is implemented, for instance in the case of corruption crime allegation, electronic documents will be the one used as electronic evidence.

If the electronic evidence relating to corruption crime is focused on the corruption crime, such as state financial loss, the electronic evidence required will be obtained from the state financial documents, where the electronic evidence

may prove the crime element. Therefore, the evidence as referred to by Law 20/2001 is an expanded documentary evidence.

In regard to evidence and real evidence, it depends on the characteristics of the crime. The electronic evidence, if being used in a crime, may function as the real evidence and evidence as well. However, if it is only used to tender initial evidence in the main crime, the electronic evidence will be initial evidence to reveal other electronic evidence and is normally used as evidence in a preliminary inquiry. An example is in a fraud crime where electronic evidence is not used but it is done directly. In this matter, the meeting is initiated by communication through electronic evidence, as such the position of the electronic evidence is not the fraud evidence but it leads to the evidence on the occurrence of the fraud. As a result, in this case the primary evidence is the fraud in the field, and the secondary evidence that proves the fraud crime is electronic evidence.

Electronic evidence cannot be limited to its purpose. Electronics and the electronic operation result are neutral, whether it will become real evidence or evidence will depend on the related action. The status of electronics and the electronic operation result does not automatically change it to be real evidence or evidence. The existence of electronic real evidence and its strength of verification depends on its

originality or authenticity, rather than due to request from police, public attorney office, and/or other law enforcement institutions for the purpose of law enforcement.

Regarding the concern on whether or not approval shall exist to make such evidence admissible, according to Article 5 Law 11/2008, all forms of evidence are legal without having to be given any conditions. The legal norm set out in Article 5 clause (1) and clause (2), and Article 44 b of Law 11/2008 is neutral and complies with the law of evidence in general, when there is a condition as written stating, "any electronic information and/or electronic document and/or its printout may become legal evidence under the prevailing laws and shall be made for the purpose of law enforcement upon the request from police, public attorney office, and/or any other law enforcement institutions", such condition then becomes irrelevant and could disrupt the evidentiary system by the use of electronic real evidence and electronic evidence in the future, the condition should be intended for all real evidence or evidence in both electronic and non-electronic form.

As for recording, whether or not the recording result may be admissible as evidence will depend on its authenticity substantiated by an expert statement, but whether or not the record is obtained secretly is an issue of ethics. The next problem is what if the recording result (the record) contains crime allegation against a person? The expert holds a view

that, firstly, the action breaches the ethics. Nevertheless, the record is evidence of an alleged particular crime, thus the person recording it is obliged to report it to the police. The police must in this case keep the confidentiality of the record, both in terms of its content and the person submitting it because it constitutes the initial data of a preliminary inquiry process. Further, if it is a confidential record and contains slander or defamation for example, there shall be law enforcement process, the code of ethics etcetera that follow. Even when the record will be displayed at trial session, the expert said it should be held in closed session instead of open session, as holding it in open court will breach the constitutional rights of the person in the record. Next, in what method is the record obtained? The expert said it must be conducted in compliance with the applicable laws, if the electronic evidence (the record) is obtained in breach of law, the evidence will be regarded unlawful pertaining to the method for obtaining it. The record may, in terms of its content, be lawfully used as evidence.

According to the expert, the context of the provisions in Law 11/2008 and the evidence governed in Article 26A Law 20/2001 depend on the use by the law enforcement apparatus. According to the expert, Article 184 of Law 8/1981 sets a limit to the procedure. If the Article 184 of Law 8/1981 applies to Article 5 clause (1) and clause (2) of Law 11/2008,

the electronic evidence would not be able to be used for the purpose of verification in criminal cases. Such provisions should be acknowledged as addition to the legal evidence which has been previously governed by other laws and regulations.

In connection with Petitioner's petition, in which the record of his conversation is the matter of his objection, the expert said it must be examined first to determine whether or not it containedconspiracy element. If the person reports that the record involves conspiracy against the state, it must be proven further by an expert.

[2.4] Having considered that pursuant to Petitioner's petition, the House of Representatives presented a statement at the session in the Constitutional Court on 20 April 2016 and has submitted the statement in writing received by the Court on 20 April 2016, outlining as follows:

With respect to Petitioner's arguments as described in the petition *a quo*, the House of Representatives presented its view by firstly describing the legal standing as follows:

1. Petitioner's Legal Standing in Case Number 20/PUU-XIV/2016 and Case Number 21/PUU-XIV/2016.

The qualifications to fulfil by Petitioner as a Party are prescribed in the provisions of Article 51 clause (1) of Law on Constitutional Court, stating "*Petitioners are any parties who regard their constitutional rights and/or authority are impaired by the prevailing law, namely:*

a. *Individuals of Indonesian citizen;*
b. *Customary law community provided that it still exists and in line with community development and the principle of the Unitary State of the Republic of Indonesia as stipulated by the laws;*
c. *Public or private companies; or*
d. *Government institutions".*

The constitutional rights and/or authority as intended by the provisions of Article 51 clause (1), are further defined in its elucidation that "*the constitutional rights" are the rights as governed by the 1945 Constitution of the State of the Republic of Indonesia.*" The Elucidation Provision to Article 51 clause (1) affirms that only the rights that are explicitly stated in the 1945 Constitution fall into "constitutional rights".

Hence, according to the Law on Constitutional Court, in order for an individual or a party to be accepted as a Petitioner that has legal standing in a petition for judicial review of law over the 1945 Constitution, the petitioner must firstly explain and prove:

a. Qualification as Petitioner in the petition *a quo* as stated in Article 51 clause (1) of Law on Constitutional Court;
b. The constitutional rights and/or authority as intended in the "Elucidation Provision of Article 51 clause (1)" that

are deemed to have been impaired by the enactment of the Law *a quo*.

In connection with the damage to constitutional rights and/or authority, the Constitutional Court has given explanation and limitation that constitutional damage arising from the enactment of laws shall meet 5 (five) conditions (vide Ruling of Case Number 006/PUU-III/2005 and Case Number 011/PUU-V/2007) as follows:

a. Petitioner has the constitutional rights and/or authority vested by the 1945 Constitution;
b. Petitioner regarded that his/her constitutional rights and/or authority has been impaired by the law being judicially reviewed;
c. Damage to Petitioner's constitutional rights and/or authority is specific and actual or at least potential which, on a reasonable consideration, is certain to occur;
d. A *causal verband* relation between the damage and the enactment of Law against which a judicial review is requested;
e. A possibility that by granting the petition, the damage and/or the constitutional authority over which the argument was put forward will not or will no longer occur.

Based on the aforesaid, pertaining to the legal standing of Petitioner, the House of Representatives submitted to the Presiding Justice/Justices of the Constitutional Court to consider and assess the legal standing of Petitioner, as specified in Article 51 clause (1) of Law on Constitutional Court and Constitutional Court Ruling Number 006/PUU-III/2005 and Ruling Number 011/PUU-V/2007 regarding constitutional damage parameters.

A. General Overview.

Regarding the arguments raised by Petitioner, the House of Representatives holds a view by giving a Statement/explanation from the aspects of philosophy, sociology and juridical as follows:

1. Whereas Article 1 clause (2) of the 1945 Constitution governs. *"sovereignty shall be in the hands of the people and shall be exercised in accordance with the Constitution*. It implies that the 1945 Constitution is the highest source of law in the hierarchy of laws for state administrators in executing their functions, duties, and authority in the life of the people and of the nation. Whereas the House of Representatives according to the 1945 Constitution is a State institution which represents the people and

are granted sovereignty/power by the Constitution to draw up laws.

2. Whereas Article 1 clause (3) of the 1945 Constitution sets forth that Indonesia is a state based on the rule of law, meaning that the state and the government in executing the state and governmental affairs shall observe the laws and regulations. In relation to Article 1 clause (3) of the 1945 Constitution, the laws shall be highly upheld and adhered to in the life of the people and the nation. The conception of the rule of law-based state embraced by the 1945 Constitution confirms normative and empirical recognition to the supremacy of law principle that Laws are the juridical basis for resolving nation and state issues.
3. Whereas the normative recognition to the supremacy of law is a recognition reflected in the formulation of the law and/or laws and regulations. The empirical recognition is a recognition reflected in the people's attitude of compliance to the law. In addition to the supremacy of law principle under the rule of law-based concept mandated by the 1945 Constitution, is the Due Process of Law principle. The above concept requires the application of the Due Process of Law in any forms,

stating that any action taken by state and government administrators shall be based upon the laws and regulations. Correspondingly, all administrative activities or actions shall be based on the "rules and procedures" (regels).

4. Whereas Article 28D clause (1) of the 1945 Constitution mandates, "*every person shall have the right of recognition, guarantees, protection, and certainty of a just law and of equal treatment before the law*", denoting that the constitution has provided guarantees, protection, and certainty of a just law to all citizens from any actions by the government/law enforcement apparatus. Furthermore, every citizen also has the right to receive protection from the threat of fear to do nor not do something, as contemplated by Article 28G clause (1) of the 1945 Constitution which mandates, "*Every person shall have the right to protection of themselves, family, honour, dignity, and property under their control, and shall have the right to feel secure against and receive protection from the threat of fear to do nor not do something that is a human right.*"
5. Whereas in accordance with the 1945 Constitution, every citizen has the right to information as set out

in Article 28F of the 1945 Constitution which mandates, *"Every person shall have the right to communicate and to obtain information for the purpose of self-development and the development of their social environment, and shall have the right to seek, obtain, possess, store, process and convey information by using all available types of channels".* Whereas every citizen has the right to protection, advancement, and fulfilment of human rights as governed in Article 28I clause (4) of the 1945 Constitution which mandates, *"The protection, advancement, upholding and fulfilment of human rights are the responsibility of the State, especially the government".*

6. Whereas the Republic of Indonesia is a state based on the sovereignty of the people and the law, and guarantees the equality of every citizen before the law and government, as well as upholding the law and government without exception. As mandated by the 1945 Constitution, the Republic of Indonesia as a rule of law-based state shall, in administering the state and governmental affairs, adhere to the law and the laws and regulations, including the enforcement of the criminal law of procedure in relation to legal evidence which has been governed by Law Number 8 of

1981 on the Code of Criminal Procedure (KUHAP), ITE Law, and Law on Corruption Crimes.

7. Whereas by the enactment of ITE Law and Law on Corruption Crimes pertaining to the administering of the procedural law of verification, it stipulates that verification plays a critical role, considering that electronic information has not been comprehensively accommodated in the prevailing procedural laws in Indonesia, thus electronic information is susceptible to be modified, tapped, falsified, and transmitted to any places in the world within seconds. As a result, the impact arising therefrom can be complex and complicated.
8. Whereas in General Elucidation of the Law on Corruption, corruption crime is established as a formal crime. This is essential for verification. With the formal establishment by the Law, although the proceeds from corruption has been returned to the state, the person committing such a crime shall remain to be brought to the court and sentenced. The General Elucidation also provides for the provisions regarding the expansion of sources for acquiring legal evidence in the form of documentary, stating that the “documentary” are obtained, not only from witness testimony, letters, and the defendant’s

statement, but also from other evidence in the form of information spoken, transmitted, received, or stored electronically by an optic instrument or other similar instruments, including but not limited to electronic data interchange, e-mail, telegram, telex, facsimile, and documents, it covers any records of data or information that can be viewed, read and/or listened with or without any aid, which is laid down on paper, or other kinds of physical objects, or is electronically recorded, in the form of texts, sounds, pictures, maps, designs, photos, alphabets, symbols, numbers, or perforations having certain meaning.

B. View of the Subject Matter of Case

With regard to the arguments raised by Petitioner, the House of Representatives gave its view through the Statement/Explanation given as follows:

1. Whereas as the realization of Indonesia as the rule of law-based state, any action taken by the state and government administrators including law enforcement apparatus shall abide by the law and the laws and regulations in effect, in this matter the administering of legal evidence has been governed by the Code of Criminal Procedure (KUHAP) (formal

criminal law), comprising witness testimony, expert statement, letters, documentary, and the defendant's statement [vide Article 184 clause (1) of the Code of Criminal Procedure. Article 185 to Article 189 of the Code of Criminal Procedure also sets forth the requirement to qualify as legal evidence.

2. Apart from the Code of Criminal Procedure, legal evidence is also contemplated in Article 5 clause (1) and clause (2), and Article 44 b of ITE Law, setting out that Electronic Information and/or Electronic Documents and/or its printout are expanded documentary evidence under the prevailing Procedural Law in Indonesia. Whereas Article 26A Law on Corruption Crimes stipulates that legal evidence in the form of documentary as meant in Article 188 clause (2) Law Number 8 of 1981 on Criminal Law of Procedure for corruption crimes is obtainable from other legal evidence in the form of information spoken, transmitted, received, or stored electronically by an optic instrument or other similar instruments; and documents, namely records of data or information that can be viewed, read and/or listened with or without any aid, which is laid down on paper, or other kinds of physical objects, or is electronically recorded, in the form of texts, sounds, pictures, maps, designs,

photos, alphabets, symbols, numbers, or perforations having certain meaning.

3. Wheareas in connection with Article 5 clause (1) and clause (2) and Article 44 b of ITE Law the House of Representatives holds a view that electronic evidence is acceptable in the verification law system in Indonesia, including civil court, state administrative court, religious court, martial tribunal, Constitutional Court, and arbitration. While the ITE Law does not specify the definition of "expanded legal evidence", nevertheless Article 5 clause (2) thereof indicates that such evidence must "…adhere to the prevailing law of procedure in Indonesia".
4. Whereas it is true that the articles *a quo* in ITE Law and the articles *a quo* in Law on Corruption Crimes (as a formal crime) stipulates the expanded legal evidence. While legal evidence in the form of documentary is governed by the Code of Criminal Procedure (KUHAP), it does not specify or govern the method to collect, make, forward, transmit, receive, or store Electronic Information and/or Electronic Documents and/or its printout that can be used as a legal basis for law enforcement apparatus in executing their function of giving protection in a fair manner

in accordance with the 1945 Constitution. Nonetheless, the provisions of Article 5 clause (1) and clause (2) and Article 44 b of ITE Law and Article 26A of Law on Corruption Crimes apply in general to anyone in the law enforcement process with regard to the use of legal evidence, law enforcement apparatus must under the laws and regulations remain to provide protection and legal certainty in equal manner to all Indonesians.

5. Whereas with regard to Petitioner's argument that the article *a quo* of ITE Law and Article 26A were used as a legal basis by the Attorney General Office of the Republic of Indonesia resulting in Petitioner having been summoned 3 (three) times is part of law enforcement process. The House of Representatives holds that the law has no inclination toward anyone based on their status and title. Any person alleged of committing a crime may be summoned by law enforcement apparatus to give explanation under the criminal law of procedure.

6. Whereas in the petition *a quo*, Petitioner requested the Constitutional Court to clarify the rule of law contained in Article 5 clause (1) and clause (2) and Article 44 b of ITE Law and Article 26A of Law on Corruption Crimes and conveyed that the rule of law

set out in Article 5 clause (1) and clause (2) and Article 44 b of ITE Law and Article 26A of Law on Corruption Crimes are in conflict with Article 1 clause (3), Article 28D clause (1) and Article 28G clause (1) of the 1945 Constitution (conditionally unconstitutional), provided that it is not interpreted that electronic information and/or electronic documents and/or their printouts which may be used as legal evidence under the prevailing law of procedure in Indonesia is the electronic information and/or electronic documents and/or their printouts that are obtained in accordance with the provisions of the prevailing laws and regulations and/or made for the purpose of law enforcement upon the request from Police, Public Attorney Office, Corruption Eradication Commission and/or other law enforcement institutions.

7. Whereas Petitioner in the petition *a quo* also proposed a new formulation of Article 5 clause (1) and clause (2) and Article 44 b of ITE Law and Article 26A of Law on Corruption Crimes for consideration by the Justices of Constitutional Court to hand down a ruling.

8. Whereas pursuant to Petitioner’s petition proposing Article 5 clause (1) and clause (2) and Article 44 b of ITE Law and Article 26A of Law on Corruption Crimes

as conditionally unconstitutional, and proposing a new formulation of Article 5 clause (1) and clause (2) and Article 44 b of ITE Law and Article 26A of Law on Corruption Crimes, the House of Representatives holds that the formulation of the norms of Law according to the 1945 Constitution shall be the Lawmakers' authority.

[2.5] Considering that Petitioner has filed a conclusion received by the Court Registrar on 30 May 2016, essentially stating Petitioner was holding firm to his stance;

[2.6] Considering that to sum up the details of this ruling, anything occurs at the trial sessions shall be sufficiently specified in the court record, which constitutes an integral part hereof;

3. LEGAL CONSIDERATIONS

Authority of the Court

[3.1] Considering that based on Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), Article 10 paragraph (1) letter a of Act Number 24 of 2003 concerning the Constitutional Court as amended by Law Number 8 of 2011 concerning Amendments to Act Number 24 of 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Number 70 of 2011, Supplement to the State Gazette of the Republic of Indonesia Number 5226, hereinafter referred

to as the Constitutional Court Law), Article 29 paragraph (1) Subparagraph a of Law Number 48 of 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia of 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076), the Court has the authority to adjudicate at the first and last level whose rulings are final to examine the Law against the Constitution 1945;

[3.2] Considering that due to the Petitioners' petition is testing the constitutionality of the norms of the Act, in casu Law Number 11 of 2008 concerning Information and Electronic Transactions (State Gazette of the Republic of Indonesia Number 58 of 2008, Supplement to the State Gazette of the Republic of Indonesia Number 4843, hereinafter shall referred to as EIT Law) and Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption (State Gazette of the Republic of Indonesia of 2001 Number 134, Supplement to the State Gazette of the Republic of Indonesia Number 4150, hereinafter referred to as Corruption Act) with respect to the 1945 Constitution, the Court has the authority to hear the Petitioner's petition;

Legal Standing of the the Petitioner

[3.3] Considering that based on Article 51 paragraph (1) of Law of the Constitutional Court therewith its Explanation, those who can submit petitions for examining the Law against the 1945 Constitution are those who consider their

constitutional rights and / or authorities granted by the 1945 Constitution to be impaired by the coming into effect of a Law , which is:

a. Individual of Indonesian citizens (including groups of people who have the same interests);
b. customary law community unit while they are alive and in accordance with the development of the community and the principles of the Unitary of the State of the Republic of Indonesia as regulated in the Law;
c. public or private legal entity; or
d. state institutions;

Therefore, the Petitioner in examining the Law against the 1945 Constitution shall first explain and prove:

a. his position as a Petitioner as referred to in Article 51 paragraph (1) of the Constitutional Court Law;
b. the loss of constitutional rights and / or authority granted by the 1945 Constitution resulting from the coming into effect of the Law petitioned for examination;

[3.4] Considering that the Court has, since the Ruling of the Constitutional Court Number 006 / PUU-III / 2005, dated May 31, 2005 and the ruling of the Constitutional Court Number 11 / PUU-V / 2007, dated September 20, 2007, as well as subsequent decisions, argued that the impairment of constitutional rights and / or authorities as referred to in

Article 51 paragraph (1) of the Constitutional Court Law must fulfill five conditions, namely:

a. the existence of the Petitioner's constitutional rights and / or authority granted by the 1945 Constitution;
b. the aforsaid constitutional rights and / or authorities by the petitioner are deemed impaired by the coming into effect of the Law petitioned for review;
c. the constitutional impairment shall be specific and actual or at least potential in nature which, pursuant to logical reasoning, surely occurs;
d. the existence of a causal verband between the aforsaid impairment and the enactment of the Law petitioned for review;
e. the possibility that with the granting of the petition, the constitutional impairment argued will not or will no longer occur;

[3.5] Considering that concerning legal standing, the Petitioner argues which is in principle shall be the following:

a. That the Petitioner is an individual of Indonesian citizen who is also a member of the House of People’s Representatives of the Republic of Indonesia (DPR RI), but the Petitioner, in submitting the petition is not acting in the position of the Petitioner as an Indonesian citizen who is a member of the House of People’s

Representatives of the Republic of Indonesia. However, the Petitioner acts as an individual of Indonesian citizen who has constitutional rights regulated in the 1945 Constitution, which is the right to fair treatment in all stages of the criminal law process in accordance with the principle of due process of law as a consequence of the declaration of the Republic of Indonesia as a state of law, as stipulated in Article 1 paragraph (3); and the right to fair recognition, guarantee, protection, and legal certainty and equal treatment before the law, as regulated in Article 28D paragraph (1) and the right to privacy and the right to security from unauthorized recording and arbitrary actions as affirmed in Article 28G paragraph (1) of the 1945 Constitution;

b. That the Petitioner considers the Petitioner's constitutional rights as regulated in the 1945 Constitution as described above, have been harmed or at least potentially be violated by the coming into effect of Article 5 paragraph (1) and paragraph (2) and Article 44 letter b of the EIT Law and Article 26A on Corruption Act, specifically the phrase "electronic information and / or electronic documents".

c. That the Petitioner considers the investigation and the summons of the Petitioner commEITd solely based on the results of illegal recordings. The process of

investigation and summon based on illegal evidence is clearly violates the principle of due process of law which is a reflection of the principle of the rule of law adopted by the Republic of Indonesia as stipulated in Article 1 paragraph (3) of the 1945 Constitution and also violates the principle recognition, guarantee, protection and fair legal certainty as stipulated in Article 28D paragraph (1) and violating the rights to privacy (a reasonable expectation of privacy) of the Petitioner guaranteed in Article 28G paragraph (1) of the 1945 Constitution;

d. That in the event of the state through its law enforcement apparatus, in this case the Attorney General's Office confirms the actions of Ma'roef Sjamsoedin who illegally recorded and used recordings obtained illegally as evidence, it has a real presence of violation of the due process of law principle which is a reflection of the rule of law principle adopted by the Republic of Indonesia as stipulated in Article 1 paragraph (3) of the 1945 Constitution and also violates the principle of fair legal recognition, guarantee, protection and certainty as stipulated in Article 28D paragraph (1) and violates the Petitioner's rights to privacy (a reasonable expectation of privacy) guaranteed in Article 28G Paragraph (1) of the 1945 Constitution.

This justification action may result in the state being deemed negligent in protecting its citizens from illegal acts of recording which threatens the right to privacy of citizens so as resulting in citizens being seized with feeling of insecurity and fear since his conversation can be recorded / intercepted by anyone, unauthorized person at any time, even though Article 28I of the 1945 Constitution expressly states that the state is responsible for protecting and fulfilling human rights.

e. That in the event of unclear and obscure or multi-interpretive terms contained in the phrase "**electronic information and / or electronic documents**" contained in Article 5 paragraph (1) and paragraph (2) and Article 44 letter b of the EIT Law and Article 26A on Corruption Act is left alone or not corrected by the Court by giving an interpretation, then in the long run it shall potentially arise a situation of fear in the community to do or not do anything because of concerns to be recorded / intercepted by unauthorized parties that finally the state can be considered failed in protecting the constitutional rights of citizens as stipulated in Article 28G of the 1945 Constitution.

[3.6] Considering that after the Court thoroughly reviews the Petitioner's arguments, proof of letters / writings, and the facts as revealed during the trial relating to

the legal standing of the petitioner, the Court considers the following:

[3.6.1] Constitutional Ruling Number 7 / PUU-XIII / 2015, dated June 21, 2016 in paragraph [3.6] number 2 letter l states:

"That based on the abovementioned legal considerations in letters b to letter j, and by also explaining the facts of the ruling issued by the Court as described in letter k above, the Court, in the a quo case, needs to reEITrate that the related restrictions on the provision of legal status for member of political parties, whether a member of the House of People's Representatives , member of Regional House of People's Representatives , Candidate of House of People's Representatives or Regional House of People's Representatives , and those who are only members or administrators of political parties, to submit a judicial review of the Law, is to avoid violating political ethics or preventing the occurrence of a conflict of interest which is directly related to the existence of the rights and / or authority sticks to the House of People's Representatives institutionally to eatablish the Law and / or Member of the House of People's Representatives to propose a draft bill as considered by the Court in Ruling Number 20 / PUU-V /

2007, and those related to other rights and / or authorities owned by the House of Representatives and / or Members of the House of People's Representatives regulated in the 1945 Constitution by the Court, some of which have been considered in Ruling Number 23-26 / PUU-VIII / 2010 and Rulings Number 38 / PUU-VIII / 2010. As for other constitutionality issues, especially those related to their legal position as Indonesian citizens who question the constitutionality of any Law related to constitutional rights as Indonesian citizens, both individuals and / or groups of people - except for the Law that regulates the position, authority and / or rights of the House of People's Representatives institutionally and / or Members of the House of People's Representatives - The Court will carefully review and give its own legal consideration of their legal position in the case in accordance with the constitutional impairment argued; "

From the legal considerations of the Court's ruling, Indonesian citizens who also have status as member of House of People's Representatives of the Republic of Indonesia will be considered separately for their legal position in accordance with the argued constitutional impairment.

[3.6.2] that the Petitioner argues as an Indonesian citizen

who is also a member of the House of People's Representatives of the Republic of Indonesia having the constitutional rights specified in Article 28D paragraph (1) and Article 28G paragraph (1) of the 1945 Constitution which states:

Article 28D paragraph (1)

"Everyone has the right to the recognition, guarantee, protection and fair legal certainty and equal treatment before the law".

Article 28G paragraph (1)

"Every person has the right to protection of his personal, family, honor, dignity, and property under his control, and the right to a sense of security and protection from the threat of fear of doing or not doing something which is a human right".

The constitutional right, according to the Petitioner has been impaired by the entry into force of the phrase "electronic information and / or electronic documents" contained in Article 5 paragraph (1) and paragraph (2) and Article 44 letter b of the EIT Law and Article 26A of the Corruption Act. The phrase "electronic information and / or electronic documents" according to the Petitioner is unclear or multi-interpretive which if it is not given a clear interpretation by the Court it will potentially give rise to a situation of fear in

the community to do or not do something because of concerns will be recorded / intercepted by unauthorized parties;

[3.6.3] That based on the aforementioned description, the Petitioner as an Indonesian citizen who is also a member of the House of People's Representatives of the Republic of Indonesia has the constitutional rights specified in the 1945 Constitution which are actually impaired by the entry into force of the phrase **"electronic information and / or electronic documents"** contained in Article 5 paragraph (1) and paragraph (2) and Article 44 letter b of the EIT Law and Article 26A of the Corruption Act. Due to the obscurity of the phrase **"electronic information and / or electronic documents"** contained in Article 5 paragraph (1) and paragraph (2) and Article 44 letter b of the EIT Law and Article 26A of the Corruption Act, the Attorney General's Office has used **electronic information evidence and / or electronic documents** to investigate and summon the Petitioner, but actually the case is the **electronic information and / or electronic documentary** evidence was commEITd by an unauthorized person or institution. The constitutional impairment of the Petitioner has a causal relationship with the entry into force of **electronic information and / or**

electronic documents phrases contained in Article 5 paragraph (1) and paragraph (2) and Article 44 letter b of the EIT Law and Article 26A of the Corruption Act. If the Petitioner's petition is granted then the constitutional impairment argued will no longer occur;

Based on the above considerations, the Petitioner has a legal standing to file the a quo petition;

[3.7] Considering that because the Court has the authority to adjudicate the a quo petition and the Petitioner has the legal standing to file a petition, the Court further considers the subject matter of the petition;

Principal Petition

[3.8] Considering that basically interception includes recording is an illegal act since interception is an act that violates the privacy of others so that it violates human rights. Article 28G Paragraph (1) of the 1945 Constitution states *"Every person has the right to protection of his personal, family, honor, dignity, and property under his control, and the right to a sense of security and protection from the threat of fear of doing or not doing something which is a human right"*. Furthermore Article 28I paragraph (5) of the 1945 Constitution states *"To uphold and protect human rights in accordance with the principles of a democratic rule of law, the implementation of human rights is guaranteed, regulated, and set forth in legislation".* From the provisions

of the article of the 1945 Constitution a quo in relation to interception which includes recording may only be carried out under the Law. Even in the context of law enforcement, the granting of interception authority should be very limited to avoid the potential for arbitrary interception.

The Constitutional Court in Ruling Number 5 / PUU-VIII / 2010, dated February 24, 2011 in paragraph [3.21] stated "... *that interception is indeed a form of violation of rights of privacy which is in contrast to the 1945 Constitution. Rights of privacy is part of the human right that can be limited (derogable rights), but restrictions on rights of privacy can only be done by Law, as stipulated in Article 28J paragraph (2) of the 1945 Constitution ...* ";

In connection with interception which has been regulated in several laws, such as:

1. Article 40 of Law Number 36 of 1999 regarding Telecommunications which states, "*Everyone is prohibited from engaging in interception activities on information channeled through telecommunications networks in any form*";
2. Article 31 paragraph (1) and paragraph (2) of Law Number 11 of 2008 regarding Information and Electronic Transactions which states that:
   a. *Every person intentionally and without rights or unlawfully conducts interception or tapping of Electronic Information in a particular Computer and / or*

Electronic System belonging to another person;

b. *Every person intentionally and without rights or unlawfully conducts interception of the transmission of Electronic Information and / or Electronic Documents that are not public in nature from, to, and in a particular Computer and / or Electronic System belonging to others, whether or not cause any changes or cause any changes, omissions and / or terminations of Electronic Information and / or Electronic Documents that are being transmitted;*

3. Article 12 paragraph (1) of Law Number 30 of 2002 concerning the Corruption Eradication Commission which states, *"In carrying out the tasks of investigation, investigation and prosecution as referred to in Article 6 letter c, the Corruption Eradication Commission is authorized to intercept and record any conversations";*
4. Article 75 letter i Act Number 35 of 2009 concerning Narcotics states, *"In order to conduct an investigation, the National Narcotics Agency investigator is authorized: to conduct wireinterceptions related to misuse and illicit trafficking of Narcotics and Narcotics Precursors after having sufficient preliminary evidence";*
5. Article 31 paragraph (1) letter b of Act Number 15 of 2003 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 2002 concerning Eradication of Criminal

Acts of Terrorism into Law which states, "*Based on sufficient preliminary evidence as referred to in Article 26 paragraph (4), investigators have the right to: b. intercept telephone conversations or other means of communication that are allegedly used to prepare, plan, and commit acts of terrorism* ".

6. Article 31 of Law Number 17 of 2011 concerning State Intelligence states, *"In addition to the authority as referred to in Article 30, the State Intelligence Agency has the authority to conduct wireinterception, check the flow of funds, and dig for information on the Objectives related to: a. activities that threaten the national interests and security include ideology, politics, economy, social, culture, defense and security, and other sectors of community life, including food, energy, natural resources and the environment; and / or b. terrorism, separatism, espionage and sabotage activities that threaten national safety, security and sovereignty, including those undergoing legal proceedings* ". Article 32 of Law Number 17 of 2011 concerning State Intelligence states, *"(1) interception as referred to in Article 31 is carried out based on laws and regulations. (2) interception of Target which has indications as referred to in Article 31 is carried out with the following provisions: a. for the implementation of the Intelligence function; b. by order of*

the Head of the State Intelligence Agency; and c. the interception period is no longer than 6 (six) months and can be extended according to the needs. (3) Interception of Target who has sufficient preliminary evidence is carried out with the determination of the head of the district court ".

Based on some of the Acts above it turns out that it is clear that interception for legal purposes shall also be committed based on legal procedures that have been determined by the Law, therefore interception committed without passing through the procedures specified by the Law is not justified so as no violation of human rights as guaranteed by the 1945 Constitution;

That based on the above considerations, the Court will consider whether the phrase "electronic information and / or electronic documents" *in Article 5 paragraph (1) and paragraph (2), Article 44 letter b of the EIT Law contradict the 1945 Constitution to the extent it is not interpreted as, "electronic information and / or electronic documents obtained according to the prevailing laws and / or carried out in the context of law enforcement at the request of the Police, Attorney General's Office, Corruption Eradication Commission and / or other law enforcement institutions,* "as argued by the Petitioner;

[3.9] Considering that with respect to the Petitioner's

argument, the Court is of the opinion:

That activities and interception authority are very sensitive since on the one hand it is a limitation of human rights but on the other hand it has a legal interest aspect. Therefore, regulations regarding the legality of interception shall appropriately be established and formulated in accordance with the 1945 Constitution.

The EIT Law regulates that everyone is prohibited from intercepting or tapping as stipulated in CHAPTER VII PROHIBITED ACTIONS, particularly Article 31 paragraph (1) which determines, **"Every person intentionally and without rights or against the law conducts interception or tapping of Electronic Information and / or Electronic Documents in a particular Computer and / or Electronic System belongs to another person** ". Explanation of Article 31 paragraph (1) of the EIT Law provides any explanation of actions which are included in interception or tapping as specified in the explanation of Article 31 paragraph (1), which is "What is meant by" interception or tapping "is an activity to listen, record, divert, change , inhibit, and / or record the transmission of Electronic Information and / or Electronic Documents that are not public in nature, whether using a communication cable network or wireless network, such as electromagnetic or radio frequency emission. "

From the provisions of Article 31 paragraph (1) of the

EIT Law and its explanation, each person is prohibited from recording others, and the recording actors intentionally and without rights or unlawfully are subject to sanctions as stipulated in Article 46 paragraph (1) which states, ***"Every person who meets the elements as referred to in Article 30 paragraph (1) shall be sentenced to a maximum of 6 (six) years of imprisonment and / or a maximum fine of Rp. 600,000,000.00 (six hundred million rupiah)*** ";

In the context of protection of human rights, all interception activities are prohibited since they violate the constitutional rights of citizens, especially the rights of privacy of everyone to communicate as guaranteed by Article 28F of the 1945 Constitution. interception as deprivation of liberty can only be done as part of criminal procedural law, as confiscation and search. interception action is part of a forced effort which shall only can be done based on the Act and Procedure Law shall be regulated through the special law that specifically regulates formal law on material law enforcement. Even in the context of law enforcement, the granting of interception authority should be very limited to avoid the potential for arbitrary interception. The interception authority cannot be exercised without control and in the context of law enforcement that has the most authority to grant permits to conduct interception while exercising checks and balances authority over the authority is a court or

official authorized by the Law.

In comparison, in connection with wireinterception, in the UnEITd States is regulated in the Title III of the Ombnibus Crime and Safe Street Act of 1968. In the Ombnibus Crime and Safe Street Act 1968 which determines that all interception shall be authorized by the court, but the court's permission remains an exception, that is interception might be carried out without waiting for a court approval, which is interception of communication in urgent circumstances that endangers the safety of other people's lives, conspiracy activities that threaten national security and characteristics of conspiracy activities of any criminal organizations.

Based on the aforedmentioned considerations, interception shall be carefully carried out very in order that the rights of privacy of citizens guaranteed in the 1945 Constitution not to be violated. When needed, interception must be carried out under the court permission so that there is an institution controlling and supervising that interception is not carried out arbitrarily. Therefore interception in Indonesia has been regulated in the Law even though it is simply spread in several Laws as the Court has considered in paragraph [3.8] above, but it has not been regulated regarding the procedure law, thus according to the Court, to complete the lack of procedural law regarding interception the Court is required to give an interpretation

of the phrase "electronic information and / or electronic documents" contained in Article 5 paragraph (1) and paragraph (2) and Article 44 letter b of the EIT Law and Article 26A of the Corruption Act as mentioned in the ruling below;

As for Article 26A of the Corruption Act, after the Court examines the *a quo* article, the Court does not find the phrase ***"electronic information and / or electronic documents"*** in Article 26A. Full Read of Article 26A of the Corruption Act is: Legal evidence in the form of instructions as referred to in Article 188 paragraph (2) of Law Number 8 of 1981 concerning Criminal Procedure Law, specifically for corruption, can also be obtained from:

i. other evidence in the form of information that is said, sent, received, or electronically stored with an optical device or the like; and

ii. document, which is, every record of data or information that can be seen, read and / or heard that can be issued with or without the assistance of a facility, whether written on paper, any physical object other than paper, or recorded electronically, in the form of writing, voices, pictures, maps, designs, photos, letters, signs, numbers, or perforations that have meaning.

However, even if norms of Article 26A can be interpreted as the phrase **"electronic information and / or electronic documents"** as argued by the Petitioner, the Court's

consideration of the phrase **"electronic information and / or electronic documents"** in Article 5 paragraph (1) and paragraph (2) and Article 44 letter b of the EIT Law mutatis mutandis applies to Article 26A of the Corruption Act either;

[3.10] Considering that the Court is necessary to reaffirm the consideration of the Constitutional Ruling Number 006 / PUU-I / 2003, dated March 30, 2004 which was then reaffirmed in Ruling Number 5 / PUU-VIII / 2010, dated February 24, 2011 regarding interception stating:

> *"The Court considers it necessary to recall the sound of legal considerations of the Court in Ruling Number 006 / PUU-I / 2003 because the interception and recording of conversations constitute restrictions on human rights, where such restrictions may only be made by law, as determined by Article 28J paragraph (2) of the 1945 Constitution. The aforesaid law shall further formulate, among other things, who has the authority to issue interception and recording orders can be issued after sufficient preliminary evidence, which means that the interception and recording of the conversation is completing evidence, or even interception and recording the conversation can already be done to find sufficient preliminary evidence. In accordance with the orders of Article 28J paragraph (2) of the 1945 Constitution, all of the aforementioned shall be regulated by law in*

order to avoid misuse of authority violatinghuman rights ".,

From the consideration of the Court's ruling, up to the present there has not been a Law specifically regulating interception as mandated by the Court's ruling. Therefore, to fill in the lack of legal provisions regarding interception which includes recording so as not all people can do such interception which includes recording, the conditional interpretation petitioned by the petitioner against the phrase **"electronic information and / or electronic documents"** in Article 5 paragraph (1) and paragraph (2) and Article 44 letter b of the EIT Law and Article 26A of the Corruption Law, to the phrase **"electronic information and / or electronic documents"** is interpreted as evidence which is carried out in the context of law enforcement at the request of the police, Attorney General's Office, and / or other law enforcement institutions that are stipulated by law as specified in Article 31 paragraph (3) of the EIT Law.

According to the Court, that virtually the concerns raised by the Petitioner in their petition do not need to exist since it has been confirmed in Article 31 paragraph (3) which states, "*besides interception as referred to in paragraph (1) and paragraph (2), interception carried out in the context of law enforcement at the request of the police, Attorney General's Office, and / or other law enforcement*

institutions that are stipulated by law ". However, in order to prevent the interpretation of Article 5 paragraph (1) and paragraph (2) of the EIT Law, the Court shall affirm that every interception should be carried out legally, especially in the context of law enforcement. Therefore, the Court in the hereunder ruling will simply add a word or phrase **"specifically"** to the phrase petitioned for review by the Petitioner so that there is no interpretation that this Ruling will narrow the purpose or meaning contained in Article 5 paragraph (1) and paragraph (2) EIT Law;

The confirmation of the Court needs to be carried out in the framework of due process of law so that the protection of the rights of citizens as mandated by the 1945 Constitution is fulfilled. Besides that it is also the fulfillment of Article 1 paragraph (3) of the 1945 Constitution which states that the State of Indonesia is a state of law. All of this is intended to prevent arbitrary actions against the citizens' rights of privacy guaranteed in the 1945 Constitution;

[3.11] Considering that in addition to the Court needs to also consider the evidence of interception in the form of recording of conversation in accordance with the law of evidence. In the law of evidence, the recording of conversations is real evidence or physical evidence. Basically, real evidence is an object that is used to commit a criminal act or an object obtained from a criminal offense or an object that indicates a

crime occurred. Thus, the recording of the conversation may be used as evidence as an EITm indicating a crime has occurred. The problem is whether the recording of conversations is valid evidence in criminal procedur law? To assess the recording is as valid evidence is to use one of the legal parameters of criminal evidence known as *bewijsvoering*, which is the description of how to submit evidence to the judge in court. When law enforcement officials use the evidence obtained in illegal or unlawful legal evidence, the evidence is set aside by the judge or deemed not to have a value of proof by the court.

Based on all of the above considerations, according to the Court the Petitioner's petition is legally grounded in a part;

4. CONCLUSION

Based on an assessment of the facts and laws as the aforementioned, the Court concluded:

[4.1] The Court has the authority to hear the a quo petition

[4.2] The petitioner has a legal position to file the a quo petition;

[4.3] The subject matter of the request is legal for some;

Based on the 1945 Constitution of the Republic of Indonesia, Law Number 24 of 2003 regarding the Constitutional Court as amended by Act Number 8 of 2011 concerning Amendments to Law

Number 24 of 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia In 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226), and Law Number 48 of 2009 on Judicial Power (State Gazette of the Republic of Indonesia Number 157 of 2009, Supplement to the State Gazette of the Republic of Indonesia Number 5076);

5. JUDICIAL VERDICT

Judge,

Declare:

1. To grant the Petitioner's petition in part;

1.1 The phrase **"Electronic Information and / or Electronic Documents"** in Article 5 paragraph (1) and paragraph (2) and Article 44 letter b of Act Number 11 of 2008 concerning Information and Electronic Transactions (State Gazette of the Republic of Indonesia Number 58 of 2008, Additional State Gazette of the Republic of Indonesia Number 4843) contradicts the Constitution of the Republic of Indonesia in 1945 insofar as it is not interpreted specifically the phrase "Electronic Information and / or Electronic Documents" as evidence carried out in the context of law enforcement at the request of the police, Attorney General's Office, and / or other law enforcement institutions established based on the law as stipulated in Article 31 paragraph (3) of Law Number 11 of 2008 concerning Information and Electronic Transactions;

1.2 The phrase ***"Electronic Information and / or Electronic Documents"*** in Article 5 paragraph (1) and paragraph (2) and Article 44 letter b of Act Number 11 of 2008 concerning Information and Electronic Transactions (State Gazette of the Republic of Indonesia Number 58 of 2008, Additional State Gazette of the Republic of Indonesia Number 4843) does not have binding legal force insofar as it is not interpreted specifically the phrase **"Electronic Information and / or Electronic Documents"** as evidence carried out in the context of law enforcement at the request of the police, Attorney General's Office, and / or other established law enforcement institutions based on the law as stipulated in Article 31 paragraph (3) of Law Number 11 of 2008 concerning Information and Electronic Transactions;

1.3 The phrase ***"Electronic Information and / or Electronic Documents"*** in Article 26A of Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Corruption (State Gazette of the Republic of Indonesia of 2001 Number 134, Supplement to the State Gazette of the Republic of Indonesia Number 4150), contradicts the 1945 Constitution of the Republic of Indonesia insofar it is not interpreted as, specifically the phrase **"Electronic Information and / or Electronic Documents"** as evidence carried out in the context of law enforcement at the request of the police, Attorney General's Office, and / or law enforcement institutions other

stipulated by law as specified in Article 31 paragraph (3) of Law Number 11 of 2008 concerning Information and Electronic Transactions;

1.4 The phrase **"Electronic Information and / or Electronic Documents"** in Article 26A of Act Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Corruption Eradication (State Gazette of the Republic of Indonesia of 2001 Number 134 and Supplement to the State Gazette of the Republic of Indonesia Number 4150), does not have binding legal force insofar as it is not interpreted the phrase "Electronic Information and / or Electronic Documents" specifically as evidence which is carried out in the context of law enforcement at the request of the police, Attorney General's Office, and / or other law enforcement institutions stipulated by the law as stipulated in Article 31 paragraph (3) of Law Number 11 of 2008 on Information and Electronic Transactions;

2. Refuse the request of the Petitioner for the aside from and the rest.
3. Order the proper making of this ruling in the State Gazette of the Republic of Indonesia.

6. DISSENTING OPINIONS

Regarding this Ruling, there were 2 (two) Constitutional Justices, named I Dewa Gede Palguna and Suhartoyo who had dissenting opinions, as follows:

1. Constitutional Justice I Dewa Gede Palguna

The a quo petition, I am, Constitutional Justice I Dewa Gede Palguna, believe that the Petitioner does not have a legal position to submit this petition with the following arguments:

1. That the Petitioner is an individual Indonesian citizen who is a member of the People's House of Representatives while the Court has repeatedly stated his position that the one, in such qualifications, does not have a legal position to act as a petitioner in the petition to review the Law against the 1945 Constitution, as stated in legal considerations of these the following rulings:
    1. Ruling Number 20 / PUU-V / 2007, dated December 17, 2007 (in the petition to review Law Number 22 Year 2001 concerning Oil and Natural Gas), the Court essentially stated that the definition of "individual Indonesian citizens" in Article 51 paragraph (1) letter a of the Constitutional Court Law is not the same as "an individual Indonesian citizen in his position as a Member of the Parliament". Individual Indonesian citizens who

are not members of the House of Representative (DPR) do not have constitutional rights, which is as stipulated in Article 20A paragraph (3) of the 1945 Constitution which states, *"In addition to the rights stipulated in other articles of this Constitution, each member of the House of Representatives has the right to ask questions, submit proposals and opinions and immunity rights* "and Article 21 of the 1945 Constitution which states," *Members of the House of Representatives have the right to submit a draft bill* ". Then, the constitutional rights of the Hose of Representatives to carry out its functions, both the legislative function, budget function and supervision function [vide Article 20A paragraph (1) of the 1945 Constitution] are those as stipulated in Article 20A paragraph (2) of the 1945 Constitution which states, "In carrying out its functions , in addition to the rights stipulated in other articles of this Constitution, the House of People's Representatives has the right to interpellation, the right of inquiry and the right to express opinions. [vide Article 20 paragraph (4) of the 1945 Constitution].

In another part of the consideration of the Court in the ruling it was confirmed, such as:

"That those who have the power to form the laws based on Article 20 Paragraph (1) of the 1945 Constitution are the House of People's Representatives as an institution / body. Therefore, it is awkward if the law made by the House of People's Representatives and be the authority of the House of Representatives to form it still may be questioned by themshelve in casu by the Members of parliament who have discussed and agreed with the President. It is true that there is a possibility that minority groups in the parliament who are not satisfied with the law that has been approved by the majority in the Plenary Session. However, in political ethics (politieke fatsoen) if a law that has been approved by the House of Representatives as an institution that includes all its members with a democratic procedure and in accordance with the applicable laws and regulations, of course all members of the Parliament shall comply with it, including by those the minorities who disagree with it";

2) The establishment of the Court as described in number 1 above is reaffirmed in Ruling Number 51-52-59 / PUU-VI / 2008, dated February 18, 2009 (in the review of Law Number 42 of 2008 concerning General Elections of the

President and Vice President) which in essence emphasizes that political parties and / or members of parliament who participated in the discussion and decision-making of a Law petitioned for review will be declared as having no legal standing;

2. That the Court will only accept the legal position of members of parliament in examining the Law against the 1945 Constitution in very specific matters, which is:
    1) if the material for norms of law petitioned for review is related to the right of DPR members to express their opinions (vide of Ruling Number 23-26 / PUU-VIII / 2010, dated 12 January 2011);
    2) if the material for norms of the Law are petitioned for judicial review concerning the right of a person to become a representative of the people (vide of ruling Number 38 / PUU-VIII / 2010, dated March 11, 2011);
    3) if the material for norms of the law are petitioned for review in respect of the expiration of the term of office of members of parliament (vide of Ruling Number 39 / PUU-XI / 2013, dated July 31, 2013);
    4) if the material for norms of the law are petitioned for judicial review regarding the mechanism for selecting the district / city DPRD leaders (vide of

Ruling Number 93 / PUU-XII / 2014, dated March 24, 2015).

Meanwhile, the material for norms of law petitioned for review in the a quo petition is not included in one of the norms of the law as referred to in number 1) up to number 4) above.

Therefore, based on all of the abovementioned, I am of the opinion that the Court should decide and declare that the *a quo* petition cannot be accepted (*niet ontvankelijk verklaard*).

2. Constitutional Justice Suhartoyo

Considering that basically interception, including recording is a act against the law since interception is an act that violates the privacy of others so that violates human rights. Article 28I paragraph (5) of the 1945 Constitution states, "*To uphold and protect human rights in accordance with the principles of a democratic state of law, the implementation of human rights is guaranteed, regulated, and set forth in legislation*". From the provisions of the article of the 1945 Constitution a quo in relation to interception, it may only be done under the Law. Even in the context of law enforcement, the granting of interception authority should be very strickted in the purpose of avoiding the potential for arbitrary interception.

Considering that the Constitutional Court in Ruling Number 5 / PUU-VIII / 2010, dated February 24, 2011 in paragraph [3.21] states *"... that interception is indeed a form of violation of rights of privacy contradicts to the 1945 Constitution. Rights of privacy is a part of derogable rights, but this limitation of rights of privacy can only be done by law, as stipulated in Article 28J paragraph (2) of the 1945 Constitution ...* ";

Considering that Article 5 paragraph (1) and paragraph (2) and Article 44 letter b of the EIT Law are regarding with the form or type of evidence which is an extension of Article 184 of the Criminal Procedure Code, but the requests of the petitioner that the phrase "electronic information and / or electronic documents" be interpreted as "electronic information and / or electronic documents obtained according to the prevailing laws and / or is carried out in the context of law enforcement at the request of the Police, Attorney General's Office, Corruption Eradication Commission and / or other law enforcement institutions". In fact, the EIT Act actually regulates in detail that everyone is prohibited from tapping or interception as stipulated in CHAPTER VII PROHIBITED ACTIONS, especially Article 31 paragraph (1) which determines, "*Every person intentionally and without rights or against the law conducts interception or tapping of Electronic Information and / or Electronic Documents in a computer and /*

or certain Electronic Systems belonging to others ". From the provisions of Article 31 paragraph (1), each person is prohibited from recording other people, and for those as recorder who intentionally and without rights or unlawfully committed shall be subject to sanctions as stipulated in Article 46 paragraph (1) which states, *"Everyone who meets elements as referred to in Article 30 paragraph (1) shall be subject to a maximum imprisonment of 6 (six) years and / or a maximum fine of Rp. 600,000,000.00 (six hundred million rupiahs)* ".

Considering that in addition to the prohibition, the EIT Law also determines that interception or tapping may be done merely in the context of law enforcement as stipulated in Article 31 paragraph (3) which states, "*Except interception as referred to in paragraph (1) and paragraph (2), interception conducted in the context of law enforcement at the request of the police, Attorney General's Office, and / or other law enforcement institutions that are stipulated by law* ".

Considering that based on the aforementioned explanation, the matter requested by the Petitioner to interpret Article 5 paragraph (1) and paragraph (2) and Article 44 letter b of the EIT Law, has actually been regulated in the EIT Law so that if the Court interprets the phrase "electronic information and / or electronic documents "in Article 5 paragraph (1) and paragraph (2) and Article 44 letter b of the EIT Law as

requested by the petitioner to be redundant due to what is requested by the petitioner on recording is solely for law enforcement carried out by Law Enforcement Officials already regulated in Article 31 paragraph (3) of the EIT Law.

Considering that accordingly, it is true what the expert President Edmon Makarim said that there must be a separation between evidence and how to obtain it, I order that all electronic information and / or electronic documents and / or the printed constitute legal evidence. As for the procedure for obtaining evidence of electronic information and / or electronic documents and / or other printed materials shall be other thing. However, the Petitioner requested to combine the evidence or real evidence with how to obtaining them.

Considering that substantially the matter questioned by the Petitioner is the method of obtaining recording evidence relating to the Petitioner's case. If this is the case, it is not Article 5 paragraph (1) and paragraph (2) of the EIT Law in question but the method of obtaining it which should be questioned. The EIT Law basically prohibits every person from doing interception which, if violated, is subject to criminal sanctions, so that the Petitioner should take the legal matter as a victim through criminal and civil justice in order to enforce the a quo Law, not precisely examine Article 5 paragraph (1) and paragraph (2). Article 5 paragraph (1) and paragraph (2) which precisely accommodates and gives

protection to every citizen whose privacy rights are violated, since there are two fundamental essences which are materially contained in the article a quo, which are the provisions governing electronic information evidence and / or electronic documents and / or printed materials, on the one hand is an expansion of evidence as documentary evidence and on the other hand is evidence that stands alone outside the evidence set in civil procedure law and criminal procedure law. So that the provisions of Article 5 paragraph (1) and paragraph (2) of the EIT Law provide legal certainty that electronic information and / or electronic documents and / or printed results are legal evidence.

Considering that based on the aforementioned description, the Court should declare that the Petitioner's petition is rejected, since what is questioned by the Petitioner has been fulfilled by the EIT Law, particularly Article 31 paragraph (3) of the a quo Law, so that there is no conflict of norms between Article 5 paragraph (1) and (2), Article 44 letter b of the EIT Law and Article 26A of the Corruption Act with the 1945 Constitution, and is constitutional.

Decided in the Judicial Consultation Meeting by nine Constitutional Justices namely Arief Hidayat as Chairperson concurrently as Member, Anwar Usman, I Dewa Gede Palguna, Manahan MP Sitompul, Patrialis Akbar, Suhartoyo, Aswanto, Wahiduddin Adams, and Maria Farida Indrati, respectively as

Members , **on Wednesday, the twenty second of June, two thousand sixteen and Tuesday, the thirtieth of August, two thousand sixteen**, which was stated at the Plenary Session of the Constitutional Court open to the public on Wednesday, dated **on the seventh of September, two thousand sixteen**, was completed at 12.42 WIB, by nine Constitutional Justices namely Arief Hidayat as Chairperson concurrently as Member, Anwar Usman, I Dewa Gede Palguna, Manahan MP Sitompul, Patrialis Akbar, Suhartoyo, Aswanto, Wahiduddin Adams and Maria Farida Indrati, respectively as a Member, accompanied by Cholidin Nasir as Substitute Registrar, and attended by the Petitioner / his power of attorney, the President or the representative, and the House of Representatives or the representative.

CHIEF JUSTICE,

Signature

Arief Hidayat

MEMBERS,

Signature	**Signature**
Anwar Usman	**I Dewa Gede Palguna**
Signature	**Signature**
Manahan MP Sitompul	**Patrialis Akbar**
Signature	**Signature**
Suhartoyo	**Aswanto**
Signature	**Signature**
Wahiduddin Adams	**Maria Farida Indrati**

SUBTITUTE REGISTRAR,

Signature

Cholidin Nasir