

## Government Commits to Seeking a Ban of the Extreme Right-Wing National Democratic Party of Germany (NPD).

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[1] Through the Federal Minister of the Interior, Otto Schily, and Chancellor Gerhard Schroeder (both Social Democratic Party - "SPD"), the Federal Government has clearly expressed its intent to move ahead with a motion before the Federal Constitutional Court (FCC) seeking a ban of the extreme right-wing National Democratic Party of Germany ("NPD"). The Government's insistence comes in spite of mere acquiescence on the issue from its coalition partner the Bündnis 90/GRÜNEN (Alliance 90/The Greens). It seemed as if Interior Minister Schily would be able to summon the support of a majority of the State Interior Ministers making it possible for a coalition of entities to bring the motion (including both Parliamentary Chambers, the executive branch of Government as well as a majority of the individual states) and thus thinly spreading the political risks associated with the move. The CDU (Christian Democratic Union) fraction in the Bundestag has recently announced, however, that it will oppose any efforts to submit a motion seeking a ban on the NPD and several States have announced their intention not to participate in the motion, leaving Interior Minister Schily in an awkward alliance with Bavarian (State) Interior Minister Günther Beckstein while prominent Social Democrats at the state level and Greens at the federal level continue to express reservations about the necessity for, the likely success of, and the ultimate effectiveness of a motion seeking a ban. If the FCC grants such a motion the NPD would be dissolved, there would be a ban on all of its activities (present and future, whether by the party itself or by proven alternative manifestations of the party) and the party's property could be confiscated.

[2] The motion seeking a ban of the NPD invokes some of the most dramatic, fundamental and unique issues in modern German constitutional and political history. The FCC has entertained only a handful of such motions and has on only two previous occasions banned a political party. The constitutional authority to impose such a ban has obvious, direct links to Germany's experience under Hitler's National Socialists. Germany's self-conscious sensitivity to that history has combined with a dramatic, recent rise in the number of severe and emotionally inflammatory right-wing offenses to spur the present calls for a ban of the NPD. Included among the recent offences are attacks on synagogues in Düsseldorf and Erfurt, the murder of an African immigrant, and the desecration of a number of Holocaust memorials, including at Buchenwald.

[3] Political parties have constitutional, quasi-official status in the German parliamentary democracy. Article 21.1 of the German Basic Law (GG) holds that political parties "shall participate in the formation of the political will of the people" and requires that political parties maintain internal structures that "conform to democratic principles." In the *Socialist Reich Party Case*, one of only two previous party bans imposed by the FCC (the other being the ban of the Communist Party of Germany: "KPD"), the Court justified the constitutional, quasi-official status of political parties in this way: "part of the nature of every democracy consists in the people exercising their supreme power in elections and voting. In the reality of the large modern democratic state, however, this popular will can emerge only through parties as operating political units." (2 BVerfGE 1 (1952)). Such status, as regulated and defined by the Political Parties Act, affords political parties, among other privileges, state funds for operating and campaign costs and the right to appear before the Federal Constitutional Court pursuant to the special jurisdiction provided for conflicts between "supreme federal bodies" (*Organstreit*). (GG - Basic Law - Article 93.1.1).

[4] The privileges extended to political parties by Article 21.1 are offset, however, by the power Article 21.2 grants the FCC to declare a political party unconstitutional if a party "by reason of [its] aims or the behavior of [its] adherents, seek[s] to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany . . ." The Basic Law gives no more guidance than this regarding the standards to be applied by the FCC when exercising this extraordinary authority.

[5] The FCC has twice declared a party unconstitutional pursuant to Article 21.2. The Government of Konrad Adenauer filed motions to ban the Socialist Reich Party and the Communist Party of Germany in 1951. In separate decisions the Court outlined some of the standards governing the application of Article 21.2. In the *Socialist Reich Party Case*, the Court concentrated on the internal structure of the political party that openly held itself out to be the immediate successor to Hitler's National Socialists. The Court concluded that "[i]f a party's internal organization does not correspond to democratic principles, [one] may generally conclude that the party seeks to impose upon the state the structural principles that it has implemented within its own organization . . ." (2 BVerfGE 1 (1952)). The Court especially noted, as the basis for imposing a ban on the SRP, the undemocratic nature of the party's exclusive membership rules (limited to those loyal to Hitler's National Socialists) and its top-down leadership structure. The thrust of the Court's SRP decision, however, was the very obvious links between the SRP and the Nazis. As threatening as those links may have been, especially in the immediate post-war years, the Court's reliance on those

subjective factors does little to illuminate the seemingly objective intent of Article 21.2. Article 21.2, after all, proposes to serve as more than a mere instrument for banning Nazi or Neo-Nazi political activity.

[6] Four years after issuing its decision in the *Socialist Reich Party Case* the FCC banned the Communist Party of Germany. The Court's decision undertook a relatively more objective approach to the Communists, setting down a pair of standards that can more easily be employed in the potential NPD case which arises in a German political landscape still conscious of the Nazi experience but wholly different and immeasurably more mature than that which existed in the early post-war years. First, the Court held that the party activity ultimately judged to merit the ban need not constitute illegal activity or "concrete undertaking[s]" to overthrow the constitutional order. It is sufficient, the Court held, that the party advocates the overthrow of the constitutional order. Second, the Court explained that such advocacy justifies a ban if it is accompanied by "political action according to a fixed plan." (5 BVerfGE 85 (1956)).

[7] The FCC is directed by its precedent to consider the internal structure of the NPD and, without regard to the legality of specific actions taken by the party, evaluate whether the party's ideology advocates the overthrow of the constitutional order. The FCC has never before been asked to decide on the constitutionality of the NPD though it has ruled that Government declarations describing the NPD as "anti-constitutional" and as an "enemy of freedom" did not constitute a violation of the NPD's Article 21.1 constitutional, quasi-official status. (40 BVerfGE 287 (1975)). The FCC, in the *Holocaust Denial Case* (90 BVerfGE 241 (1994)), also upheld limitations imposed by local administrative authorities on the NPD's right to promote Neo-Nazi ideology, especially when such ideology constitutes criminal actions. In the Holocaust Denial Case the criminal actions consisted of denigration of the memory of the dead, criminal agitation and criminal insult.

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**For more information:**

English language version of the Basic Law on-line:

<http://www.uni-wuerzburg.de/law/gm00000>">www.uni-wuerzburg.de/law/gm00000

The Political Parties Act on the web and in English at the German Law Archive web page. Select "Statutes" and then "Political Parties Act":

<http://iuscomp.org/gla>"><http://iuscomp.org/gla>

The decisions of the FCC in the *Socialist Reich Party Case*, the *Communist Party Case* and the previous *National Democratic Party Case* can be found on the web at:

<http://www.uni-wuerzburg.de/dfr/bv002001>">www.uni-wuerzburg.de/dfr/bv002001;

<http://www.uni-wuerzburg.de/dfr/bv005085>">www.uni-wuerzburg.de/dfr/bv005085; and

<http://www.uni-wuerzburg.de/dfr/>">www.uni-wuerzburg.de/dfr/

See, authoritative treatment of this issue in Donald Kommer's *The Constitutional Jurisprudence of the Federal Republic of Germany* (2d ed.) Duke University Press (1997).