

FCC suspends hearing in NPD Party Ban Case

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[1] In a unanimous, surprising decision the Federal Constitutional Court (FCC) announced last Tuesday, 22 January 2002, that the hearing in the NPD Party Ban Case (1) - scheduled for five days in early and late February - was suspended. The Court did not yet set a new date (2). The Court explained that facts had now become known to the Court that raised serious legal questions which can not be resolved in the two weeks before the scheduled hearings. Even the decision from October 1st, 2001 (3), in which the motions by the *Bundesregierung* (German Federal Government), the *Bundestag* (Federal Parliament) and the *Bundesrat* (Federal Legislative Chamber of the *Länder*) seeking a ban of the extremist right wing National Democratic Party (NPD) were ruled to be admissible and not evidently unfounded is called into question by the Court. The FCC had been told by a senior civil servant from the Federal Ministry of the Interior that there would be one so-called "V-Mann" among the 14 people to appear as witnesses (4) before the FCC at the scheduled hearing. The motions to ban the NPD build upon numerous sources in order to show that the NPD seeks to undermine or abolish the "freiheitliche demokratische Grundordnung" (free democratic basic order) and therefore must be banned under Art. 21 (2) of the German Basic Law ("*Grundgesetz*" (5)). Among those quoted is the V-Mann, *Wolfgang Frenz*, a former high-ranking official of the NPD. The rather drastic reaction by the FCC (6) to these news is explained by the significance of the information about the V-Mann, an often dubious source (*infra I.*) and the way this information made its way to the Court, which is a scandal in itself (*infra II.*). The fallout from the decision will be the subject of the closing remarks (*infra III.*).

I.

[2] From early on the NPD had claimed that it would show at the Court hearings that the evidence presented against it had been fabricated by the government through V-Männer for the state's secret service, the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz, BfV*) (7) or one of its counterparts in each of the 16 *Länder* (*Landesamt für Verfassungsschutz, LfV*).

[3] The term V-Mann describes a person who is already part of a criminal or extremist organisation and then is paid to provide information on a regular basis over a longer period of time. These persons are not occasional informers but are continuously guided, directed and supervised by the agency receiving the information. They are not, however, undercover agents who worked their way into a targeted organisation from the outside but instead, V-Männer have generally become associated with that organisation out of their own free will. Thus their motives are far from clear. A V-Mann might successfully lead the police on in order to further his cause, he might make up information to appear as a valuable source and keep getting paid, or he might provide valuable information that could not have been gained any other way. Therefore the trustworthiness and accuracy of information gained by these means can be very questionable.

[4] If a V-Mann is a member of a political party, especially if he is a high-ranking official, the situation is even more delicate. It is not immediately obvious, to put it mildly, whether actions or a public statement in the name of the party are indeed attributable to the party or are a result of the guidance and direction the V-Mann received from the federal or state agency. In other words, a V-Mann can not only be used to gather information but also to exert influence. Therefore, in theory and according to standing instructions for example of the LfV in North-Rhine-Westphalia (8) a V-Mann should not have a decisive influence on the goals and actions of the organisation he is reporting on. In short: a V-Mann is a dubious source of information.

[5] The motions to ban the NPD are based on actions and public statements by party-officials or persons affiliated with the NPD. If any of these persons is a V-Mann, it has to be decided whether his or her statements should nevertheless be used and if they can still be attributed to the party. One way to do that would be to take the reaction of the party into consideration: Does the party accept or applaud the statement, have other officials made similar statements or was it a singular, isolated statement? Has the party possibly distanced itself from what was said or done? This is of course an intricate undertaking. However complicated that may be, in order to decide about the usefulness of a statement one needs to know whether the person quoted is a V-Mann in the first place. This proved, however, to be a most difficult task.

[6] As a consequence, the BfV and the LfVs of all the *Länder* have repeatedly - but to no avail - been asked to assure within their organizational oversight whether those NPD-officials that were quoted in the motions to ban the NPD had been functioning as V-Männer (9). Whether or not the agencies actually checked the motions, as a matter of fact, they did not tell anyone about the results. This policy serves the interest of the secretly operating BfV and LfVs in order to keep their operations undetected, not least so to protect their informants. On the other hand, this secrecy, as last week's events have shown, jeopardizes the motions to ban the NPD. Although the BfV and LfVs are responsible to the Federal Ministry of the Interior or the respective Ministries in the *Länder*, evidently no one was willing and/or

able to exert enough influence on the BfV and LfVs to make them divulge the necessary information. This does not cast a very reassuring light on the way these secretly operating offices are supervised.

II.

[7] The information about *Frenz* made its way to the FCC via a senior civil servant in the Ministry of the Interior, *Klaus-Dieter Schnappauff*. The LfV in North-Rhine-Westphalia had notified the Federal Ministry of the Interior about *Frenz* again (10), because he was to appear before the FCC during the scheduled hearing and might talk about his work as a *V-Mann* (11). On Wednesday, 16 January 2002, he decided to call the *Berichterstatter* (Reporting Justice at the FCC) for the NPD case, *Hans-Joachim Jentsch*, and amidst a discussion of organisational matters, passed on the information about *Frenz*. Not only is this a very unusual way to inform a Court about an important fact, even more significant is the fact that *Schnappauff* omitted a crucial detail: *Frenz* had been deactivated as a *V-Mann* in 1995 because, as the LfV in North-Rhine-Westphalia claims, he had become "too radical". This is, indeed, an important piece of information, because all statements made by *Frenz* quoted in the motions date from the year 1998 or later, and thus stem from a time when he had no longer been a *V-Mann* on the payroll of the LfV.

[8] Two days later, on Friday, Judge *Jentsch* asked *Schnappauff* for an official written confirmation about *Frenz*. Over the following weekend senior civil servants from both the federal level and the *Länder* plus the legal counsel to the Bundesregierung, Bundestag and Bundesrat in this case met and were informed about *Frenz*. *Schnappauff* who personally attended the meeting did not reveal to the other attendants a) that he already told the Court about *Frenz* and b) that he had been asked by Justice *Jentsch* for a written statement. The group discussed the issue and, against the votes of Professor Löwer from Bonn University and Professor Frankenberg from Frankfurt/Main University, who serve as counsel for the motions by the Bundestag, decided not to inform the Court immediately, because the Federal Ministry of the Interior claimed not to have the right of disposal regarding the information about *Frenz* (12). On the following Monday, *Schnappauff* told the FCC that the Ministry was not able to give the Court the written information the Court had requested. This did not change even after a discussion with a State Secretary (13). Understandably, the Court then decided it had had enough and on Tuesday announced its decision, apparently angered and not knowing about the deactivation of *Frenz*.

III.

[9] As just a few days have passed, it all might just be the tip of an ice-berg. Since the decision by the FCC had been announced on 22 January 2002, the name of yet another *V-Mann* was confirmed, *Udo Holtmann*. He, as opposed to *Frenz*, has – so far – not been deactivated but, instead, is currently chairman of the NPD in the *Land* North-Rhine-Westphalia. He, too, is quoted in the motions, albeit less frequently than *Frenz*. What is obvious at this point: The rule that a *V-Mann* should not have decisive influence in the organisation which he is reporting on has been violated in this case. Whether or not more *V-Männer* exist and whether or not they will be unmasked is impossible to say, speculation is abundant. For example, members of the German *Bundestag* claim they received information about at least two more *V-Männer*, yet so far nothing has been confirmed.

[10] The FCC has set no new dates for the hearing, what will happen to the case is uncertain. At this very moment the Court is waiting for legal briefs by Bundesregierung, Bundestag, Bundesrat and the NPD with regard to the new situation. At this point Bundesregierung, Bundesrat and a majority of the Bundestag are still committed to seeking a ban of the NPD. Even so, one would be hard pressed to even speculate about the future of the case in the present situation.

(1) See *Government Commits to Seeking a Ban of the Extreme Right-Wing National Democratic Party of Germany (NPD)*, 1 German L.J. 2 (November 1st, 2000); Federal Constitutional Court Issues Temporary Injunction in the NPD Party Ban Case, 2 German L.J. 13 (August 1st, 2001); Felix Hanschmann, *Federal Constitutional Court to Review NPD Party Ban Motion*, 2 German L.J. 17 (November 1st, 2001) all available at <http://www.germanlawjournal.com>.

(2) BVerfG, 2 BvB 1/01 u.a., January 22nd, 2002, available at <http://www.bundesverfassungsgericht.de>.

(3) See F. Hanschmann, , *supra* note 1.

(4) These 14 were not technically witnesses, the FCC called them "Auskunftspersonen" which roughly translates as a person who is expected to give information but is not awarded the legal status, rights and duties of a witness.

(5) All three motions together add up to close to 600 pages. For comments on all three motions see S. Lovens, *Parteiverbote in der Bundesrepublik Deutschland. Zur verfassungsrechtlichen Ausgangslage der Anträge gegen die NPD*, Zeitschrift für Parlamentsfragen 2001, 550, 564ff.

(6) The parties to the case were afforded no opportunity to react to the new facts before the decision to suspend the hearings.

(7) On the website of the Federal Ministry of the Interior (http://www.bmi.bund.de/english/bfv_einzel_engl.html) its responsibilities are described as follows: "The task of the Federal Office for the Protection of the Constitution is to gather and analyze information and other intelligence about:

- endeavours which are directed against the liberal and democratic fundamental order, against the existence or the security of the Federation as a whole or of one of its federal states (Länder), or which - by the use of un-lawful means
- aim at hampering the ability of the constitutional organs of the Federation or the Länder to fulfil their duties,
- activities endangering the security of the Federal Republic of Germany, or intelligence activities on behalf of a foreign power, as well as
- endeavours endangering foreign concerns of the Federal Republic of Germany by the use of force or pre-paratory arrangements for the use of force.

In addition, the BfV fulfils certain tasks in connection with security checks of persons."

(8) See Georg Bönisch/ Dominik Cziesche et. al., *Blamiert bis auf die Knochen*, Der Spiegel, Issue 5/2002, January 28th, 2002, 22, 27.

(9) See e.g. Matthias Gebauer, *Geheime Strichlisten, Verstaubte Vermerke*, Spiegel online, <http://www.spiegel.de/politik/deutschland/0,1518,179576,00.html>.

(10) In August of 2001 the LfV of North-Rhine-Westphalia had already informed another senior civil servant in the Ministry, *Werner Müller*, about *Frenz*. He reportedly forgot to pass the information on.

(11) The LfV had given *Frenz* a permission to give evidence on the subject if it came up at the hearing, after he contacted them and asked what he should do. Apart from this it is not entirely clear who knew what. The Minister of the Interior, *Otto Schily*, apparently was informed by the civil servants in his Ministry on the day the FCC announced its decision.

(12) See Karin Nink/Anton Notz, *Urteil im NPD-Verbotsverfahren verzögert sich*, Financial Times Deutschland, January 25th, 2002, available on the www at <http://www.ftd.de/pw/de/FTDK80F4UWC.html>.

(13) In the Ministry of the Interior there are four State Secretaries, they are second in the hierarchy and report to the Minister only.