

THE SECOND ATTEMPT AT A THIRD SUCCESSFUL BAN OF AN ESTABLISHED GERMAN POLITICAL PARTY

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I. INTRODUCTION

With the events that enabled the rise to power of Adolf Hitler in mind, Germany set out to protect itself from future anti-democratic groups, which threatened their new government.¹ To ensure that the opportunity for a similar party to the Nazi regime would never again have the chance to take control, Germany declared anti-democratic politics to be illegal inside their borders.² Unlike the United States' bipartisan democracy, Germany's current democracy is home to multiple political parties, many donning members of parliament.³

Most anti-democratic groups in Germany can be outlawed and disbanded by the Ministry of the Interior.⁴ However, if a group is able to form a political party, they may be banned solely at the direction of the *Bundesverfassungsgericht*, also known as the German Federal Constitutional Court.⁵ The German democratic government intentionally made it difficult to ban a political party to avoid acts similar to those culminating in Adolf Hitler's July 14, 1933 declaration that the Nazi regime was the only political party in Germany, thereby outlawing the development of any opposing party.⁶

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¹ Cas Mudde, *Germany Wants To Ban The Neo-Nazis of The NPD Again, But Why Now?*, THE GUARDIAN (Mar. 4, 2016), www.theguardian.com/world/commentisfree/2016/mar/04/germany-ban-neo-nazi-npd-refugees-far-right.

² *Id.*

³ *Parliamentary Groups*, DEUTSCHER BUNDESTAG, https://www.bundestag.de/htdocs_e/bundestag/groups (last visited May 20, 2016).

⁴ Mudde, *supra* note 2.

⁵ The Federal Constitutional Court is the highest court in Germany and is similar to the Supreme Court of the United States. If the Federal Constitutional Court successfully bans a party, the party is unable to immediately reform and subsequent parties of similar nature are outlawed as well. *Id.*

⁶ The Nazi party outlawed the Social Democratic Party (the only other party with significant influence at the time) and disbanded all other smaller parties in German government at the time. On July 14, 1933, the Nazi regime passed the Law Against the Establishment of Parties, which stated that, "the National Socialist German Workers Party constitutes the only political party in

Only two political parties have officially been banned in German history, and the last successful ban was approved 60 years ago.⁷ On March 1, 2016, the *Bundesrat*, also called the Upper House of Parliament⁸, brought a case in front of the Federal Constitutional Court in an effort to ban the extreme right wing party in Germany known as the National Democratic Party.⁹ In German, the party is named the *Nationaldemokratische Partei Deutschlands*¹⁰ (hereinafter referred to as NPD).¹¹

II. GERMAN GOVERNMENTAL STRUCTURE

In order to understand the process of banning a German political party, some basic knowledge of their governmental structure is helpful. The structure of modern day Germany's government is bicameral.¹² The two houses are the *Bundesrat* (Upper House) and the *Bundestag* (Lower House).¹³ Either chamber may initiate legislation and the majority of bills must gain approval from both houses in order to pass.¹⁴ When the federal government proposes a bill, it must first be reviewed by the

Germany" and that attempts to create any other party would be punishable with "penal servitude up to three years or with imprisonment of six months to three years." Denis Cummings, *On This Day: Nazis Ban All Other Political Parties*, FINDING DULCINIA (Jul. 14, 2011, 6:00 AM), <http://www.findingdulcinea.com/news/on-this-day/July-August-08/On-this-Day--Nazis-Ban-All-Other-Political-Parties.html>.

⁷ Peter Schwarz, *German Constitutional Court Considers Banning Neo-Fascist NPD*, WORLD SOCIALIST WEB SITE (Mar. 4, 2016), <https://www.wsws.org/en/articles/2016/03/04/npdb-m04.html>.

⁸ The *Bundesrat* (Federal Council) consists of 69 members and acts as an advisory committee. The members are not popularly elected but their advisement is required in order to pass any laws, including all constitutional amendments. *Bundesrat*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/Bundesrat-German-government> (last visited May 20, 2016); Eric Solsten, *Germany: A Country Study*, WASHINGTON: GPO FOR THE LIBRARY OF CONGRESS (1995), <http://countrystudies.us/germany/154.htm>.

⁹ Cynthia Kroet, *German Court Urged To Ban Far-Right Party*, POLITICO (Mar. 1, 2016 3:44 PM), <http://www.politico.eu/article/germany-federal-court-urged-ban-far-right-party-npd-extremist-pegida/>.

¹⁰ Oyvind Strommen, *Troubled Times For German NPD*, HATE SPEECH INTERNATIONAL (Jan. 27, 2014), <https://www.hate-speech.org/troubled-times-for-german-npd/>.

¹¹ Kroet, *supra* note 10.

¹² Solsten, *supra* note 9.

¹³ *Id.*

¹⁴ *Bundesrat*, *supra* note 9; Solsten, *supra* note 9.

Upper House, and is then sent to the Lower House for approval.¹⁵ The Upper House serves as somewhat of an advisory board.¹⁶

The Upper House consists of 69 members who represent the 16 *Land* governments.¹⁷ These members are appointed by their respective *Land* governments, and the number of delegates for each *Land* is directly proportionate to the population of that area.¹⁸ Although the Upper House is subordinate to the Lower House, the Upper House holds the power of absolute veto over any legislation affecting *Land* interests.¹⁹

The Lower House is similar to the House of Representatives in the United States.²⁰ This House consists of hundreds of members, each elected, and is the chief legislative body in Germany.²¹ The Lower House considers its legislative ability to be its most important responsibility.²²

III. THE NPD POLITICAL PARTY

The NPD was founded in 1964 and served as a catchall party for far-right activists, most of whom migrated from other smaller political parties.²³ The founders of the party were former supporters of the Nazi regime and the early goal of the party was to stifle German guilt after World War II.²⁴ In the late 1960's, the NPD was nearly 30,000 members strong and was becoming an influential political party in Germany.²⁵ With growing authority, and the horrors of World War II still fresh in the world's mind, the party's actions began to threaten West Germany's relations with

¹⁵ *Id.*

¹⁶ *Bundesrat, supra* note 9.

¹⁷ *Id.*

¹⁸ *Id.*; Solsten, *supra* note 9. The relation of power between the Upper and Lower Houses is loosely similar to the state and federal governments in the United States. In this analogy, the Upper House is comparable to the state government and the Lower House is more closely related to the Federal government.

¹⁹ *Bundesrat, supra* note 9.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Kroet, *supra* note 10.

²⁴ *National Democratic Party of Germany (NPD)*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/National-Democratic-Party-of-Germany> (last visited May 20, 2016);

²⁵ Kroet, *supra* note 10.

other European countries.²⁶ Even today, the NPD is widely considered a neo-Nazi party by many German citizens.²⁷

The NPD's influence waxed and waned over the past half a century but they were never able to earn a seat in German Parliament, thereby reaching Federal status, because they have never successfully secured the necessary percentage of voting supporters.²⁸ In order to earn a seat in German Parliament, a political party must grasp 5% of the voting population to reach the threshold for representation.²⁹ At their most influential time in the late 1960's, the NPD was only able to secure 4.3%, falling just short of the required benchmark.³⁰ Failing to reach the number of members necessary, the party began to lose power. From the 1970's to early 1990's the NPD was negligible in German society and was not even the most popular far-right political party in Deutschland.³¹

In 1991, Gunter Deckert took over leadership of the NPD, and under his management the party polished their neo-Nazi attitude and ideology.³² In 1995, after only four years of leadership, Deckert was imprisoned for hate speech and was succeeded by Udo Voigt, who pushed the neo-Nazi ideology even further with the NPD party.³³ Voigt is known for holding protest marches, which bring out mostly skinheads, and for his connections with David Duke, a known white supremacist who was a grand wizard in the American Ku Klux Klan.³⁴ In an interview on Duke's web radio show, Voigt referred to himself as the "true Chancellor of Germany," claiming that Germany was an occupied country, and that he was working to gain control of the Republic to bring it back to the Germans.³⁵ In 2006, Voigt, along with two other senior party officials, was handed a suspended 4-

²⁶ *National Democratic Party of Germany (NPD)*, *supra* note 25.

²⁷ Christopher Woolf, *Germany Attempts To Ban A Far Right Party To Stop It From Getting Tax Dollars*, PUBLIC RADIO INTERNATIONAL (Mar. 1, 2015, 5:00 PM), <http://www.pri.org/stories/2016-03-01/germany-attempts-ban-far-right-party-stop-it-getting-tax-dollars>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Kroet, *supra* note 10.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

year jail sentence for inciting racial hatred and defamation by use of propaganda³⁶ during the World Cup in Germany.³⁷

Between 2004 and 2006,³⁸ under Voigt's leadership, the NPD established itself once again as a growing force in the German government by achieving status and gaining seats in two state parliaments as well as several local councils.³⁹ Current members of the NPD number around 5,200.⁴⁰ They hold seats in the state parliaments of Mecklenburg-Western Pomerania and Saxony, both of which are in eastern Germany and are known for having many far-right thinkers.⁴¹ They also hold one seat in European Parliament, which is held by former party leader Udo Voigt.⁴² Keeping true to the party's tradition, their seat-holding representative in Mecklenburg-Western Pomerania, Udo Pastoers, was charged for "inciting racial hatred" at a rally in 2009 for calling Germany a "Jews' Republic" and using other racially charged epithets.⁴³ Also Ralf Wohlleben, former NPD senior

³⁶ The three NPD officials were handing out pamphlets stating that a black player was not worthy of playing on the Germany national team and that positions on the team should be reserved for white players only. The pamphlet was titled, "White, not just a jersey color! For a real NATIONAL team!" On the pamphlet was the picture of a white German soccer jersey with the number 25 printed on it. Patrick Owomoyela, a black footballer who was born in Hamburg, Germany, wore the number 25. *Far-Right Politician Convicted Over Racist World Cup Flyers*, DEUTSCHE WELLE (Apr. 24, 2009), <http://www.dw.com/en/far-right-politician-convicted-over-racist-world-cup-flyers/a-4204566>.

³⁷ *Id.*; Matt Hermann, *German Police Seek Arrest of Far-Right Politician*, DEUTSCHE WELLE (Jul. 28, 2009), <http://www.dw.com/en/german-police-seek-arrest-of-far-right-politician/a-4522521>.

³⁸ Renuka Rayasam, *Could Germany's Attempt to Ban Neo-Nazis Backfire?*, REUTERS (Feb. 18, 2016), <http://blogs.reuters.com/great-debate/2016/02/18/could-germanys-attempt-to-ban-neo-nazis-backfire/>.

³⁹ The NPD still failed to reach Federal Parliament status. Strommen, *supra* note 11.

⁴⁰ Ursula Knapp, *Germany's Top Court Starts Hearings on Banning Far-Right NPD Party*, REUTERS NEWS (Mar. 1, 2016, 8:59 PM), <https://www.rt.com/news/334181-mpd-court-germany-ban/>.

⁴¹ *Germany's Federal Constitutional Court Opens Case Against NPD*, DEUTSCHE WELLE (Dec. 7, 2015), <http://www.dw.com/en/germanys-federal-constitutional-court-opens-case-against-mpd/a-18900239>.

⁴² Juegen Oeder, *Germany's Top Court Weighs Ban on Far-Right NPD Party*, YAHOO NEWS, (Mar. 1, 2016, 10:51 AM) <http://news.yahoo.com/germanys-top-court-weighs-ban-far-mpd-party-015642716.html>. David Crossland, *Germany Launches New Bid to Outlaw Far Right NPD Party*, SPIEGEL ONLINE (Dec. 3, 2013, 6:58 PM), <http://www.spiegel.de/international/germany/germany-launches-new-bid-to-outlaw-far-right-mpd-party-a-937008.html>.

⁴³ Pastoers was also quoted for his maligning of Turkish men as "semen cannons" who were, in his opinion, spoiling German blood by spreading their

member, is currently on trial for supporting the far-right militant group National Socialist Underground, which was found to have murdered 10 people between 2000 and 2006.⁴⁴ Most of those murdered were of Turkish origin.⁴⁵

More recently, the NPD has attempted to change their image to attract a younger generation of supporters.⁴⁶ Current chairman Frank Franz is a well-dressed, 37-year-old, self-described “sartorial enthusiast”, who uses his image and social media accounts to appeal to Germany’s youth.⁴⁷ European reporters have dubbed Franz a neo-Nazi hipster or “Nipster” and this image is part of the NPD’s revamped efforts to gain more followers.⁴⁸ Neo-Nazis have “copied left-wing movements on how to act in public and dress”.⁴⁹

NPD spokesman Klaus Beier has responded to such comments by stating, “Our goals have not changed [the NPD is merely trying] to conduct politics in 2015.”⁵⁰ He also claims that they have been elected by 18-24 year-olds and that the party wishes to “speak their language”.⁵¹ NPD official Patrick Schroeder has also been referred to as a “Nipster”.⁵² Schroeder operates a nationalist YouTube channel named FSN.tv and is known as the “nice-neo-Nazi” by German press due to his easy going demeanor and his openness to work with journalists.⁵³ Schroeder claims that the NPD is in a political fight saying, “We’re not trying to be a subculture. As a movement, we should work in that way - that

offspring in the country. Prosecutors accused Pastoers of further anti-Semitic statements, personal attacks, historical distortions and tasteless remarks which, however, lacked criminal significance. Matt Hermann, *German Police Seek Arrest of Far-Right Politician*, DEUTSCHE WELLE (Jul. 28, 2009), <http://www.dw.com/en/german-police-seek-arrest-of-far-right-politician/a-4522521>.

⁴⁴ Germany’s Top Court Weighs Ban on Far-Right NPD Party, BREITBART, (Feb. 29, 2016), <http://www.breitbart.com/news/germanys-top-court-weighs-ban-on-far-right-npd-party/>.

⁴⁵ *Id.*

⁴⁶ Elizabeth Schumacher, The ‘Nipsters’: NPD and Neo-Nazis Change Their Style, DEUTSCHE WELLE, (Aug. 12, 2015), <http://www.dw.com/en/the-nipsters-npd-and-neo-nazis-change-their-style/a-18902369>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* Quoting Felix Huesmann, freelance journalist specializing in far-right politics and youth movements.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Schumacher, *supra* note 47.

⁵³ *Id.*

more people become the so-called Nipsters so they can go better into the mainstream."⁵⁴ Freelance Journalist Felix Huesmann warns that even though many neo-Nazis have altered their image, “they all share the same ideology—and that’s an ideology from 1933, not 2015.”⁵⁵ The NPD’s newfound image has not generated dramatic gains at the ballot box, but the reimage efforts are still young.⁵⁶

IV. BANNING A POLITICAL PARTY IN GERMANY

The post-war Federal Constitutional Court has only banned two parties in Germany, both in the 1950’s.⁵⁷ In 1952, the Socialist Reich Party (known in Germany as SPR), a successor of the Nazi party, was outlawed, and some members even faced criminal charges because they adamantly advocated for a “solution to the Jewish question”.⁵⁸ The process was then repeated against the German Communist Party in 1956 and was eventually successful after the party called for a “revolutionary overthrow” of Chancellor Konrad Adenauer.⁵⁹ The German Communist Party believed that there was “no peaceful path to socialism” and pursued a “dictatorship of the proletariat”.⁶⁰ The ban resulted in a confiscation of the party’s finances and finances of many of the members, many members received long prison terms, and public shaming of members including loss of positions in their professions.⁶¹ Post war German politicians made it possible to ban a political party because they believed that if the Nazi party had been disallowed early enough, Hitler would not have risen to power and the dark cloud over Germany’s history would have never amassed.⁶²

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ The more moderate right-wing party, Alternative for Germany (AfD) is however, growing in popularity having entered five state parliaments and currently polling around 10 percent. BREITBART, *supra* note 45.

⁵⁷ Knapp, *supra* note 41.

⁵⁸ *Id.*; Wolfgang Dick, *Germany’s Constitutional Court Could Ban Extremist NPD*, DEUTSCHE WELLE (Feb. 28, 2016), <http://www.dw.com/en/germanys-constitutional-court-could-ban-extremist-npd/a-19080965>.

⁵⁹ The initial filing for banning the KPD took place in 1952 but was not decided until 1956. Dick, *supra* note 59.

⁶⁰ *Id.*

⁶¹ Schwartz, *supra* note 8.

⁶² Reyasam, *supra* note 39.

Since the gravity of consequences to the members of a banned political party is so devastating, only a constitutional body may submit an application to disband and forever ban a political party.⁶³ Plainly stated, the application must be filed by the Upper House, the Lower House, the Federal Government, or any mix of the three.⁶⁴ In order for the ban to be successful, it must be proven that the party is unconstitutional⁶⁵ and it must receive six judges' approval out of the possible eight Constitutional Court judges.⁶⁶

Although the two previously banned parties held significant resemblances to the Nazi party, a mere similarity to the Nazi regime is not enough to ban a political party from existence.⁶⁷ The key to a successful ban is convincing the Court that the party is attempting to, and indeed has potential to, destroy democracy through violent acts⁶⁸ and is creating a "climate of fear".⁶⁹ They must show that under the *Grundgesetz*, Germany's Basic Law⁷⁰, the party possesses an "aggressive and combative attitude."⁷¹ It must also be shown under article 21 of the *Grundgesetz* that the party, "by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany."⁷² Furthermore, even if the Constitutional Court agrees to the ban, the losing party may appeal to the European Court of Human

⁶³ Dick, *supra* note 59.

⁶⁴ *Id.*

⁶⁵ *Should Germany Ban the NPD?*, DEUTSCHE WELLE (Dec. 3, 2013), <http://www.dw.com/en/should-germany-ban-the-npd/a-15917878>. (The ability to ban political parties that threaten German democracy was not the only safeguard Germany took in attempting to eradicate the possibility of a rise of power for another hate group: After being banned for 70-years, a heavily annotated version of *Mein Kampf*, Hitler's manifesto, returned to German bookshelves in 2016. Germany's interior minister also recently banned an extremist Internet portal in January of 2016, and two people who were allegedly responsible for running the Internet portal were arrested).

⁶⁶ BREITBART, *supra* note 45.

⁶⁷ Crossland, *supra* note 43.

⁶⁸ *Id.*; Schwarz, *supra* note 8.

⁶⁹ Knapp, *supra* note 41.

⁷⁰ The Basic Law, to Germany, is the equivalent of the Constitution to the United States. *Documents - Founding Of Two States: The Federal Republic Of Germany And The German Democratic Republic*, GHDI, http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=2858 (last visited May 20, 2016).

⁷¹ Oeder, *supra* note 43.

⁷² Crossland, *supra* note 43; Schwarz, *supra* note 8.

Rights on contentions that it violates free speech.⁷³ This makes a lasting ban even more time consuming and difficult.

There are many obstacles to banning a political party in Germany. President of the Federal Constitutional Court⁷⁴, Andreas Voßkuhle, has said the exercising of this political power “is a sharp and double-edged sword that must be used with great caution . . . it limits freedom in order to preserve freedom. . . freedom can be abused to abolish freedom and thus turned against itself.”⁷⁵ For this reason, the bar to banning a party in Germany was set intentionally high. German politicians did not wish to impede too heavily on free speech and did not wish to easily outlaw political opponents the way the Nazi regime did leading into World War II.⁷⁶

V. ATTEMPT NUMBER ONE

In 2001,⁷⁷ the Upper House, Lower House, and Federal Government worked together to file an application to force the NPD to stand trial in front of the Federal Constitutional Court in an attempt to ban the political party in Germany.⁷⁸ In 2003, the Court denied the application because it was discovered that the Office for the Protection of the Constitution, a high level governmental agency, had infiltrated the NPD and achieved executive status in the party.⁷⁹

According to the government, the informants were only supposed to observe the party’s actions and gather information to report back to investigating officials.⁸⁰ The agents however reached leadership positions within the NPD, thereby placing themselves in a position to create evidence against the party by

⁷³ Reyasam, *supra* note 39.

⁷⁴ The President of the Federal Constitutional Court is similar to a Chief Justice.

⁷⁵ Germany’s Top Court Weighs Ban On Far-Right NPD Party *supra* note 45; Schwarz, *supra* note 8.

⁷⁶ Reyasam, *supra* note 39.

⁷⁷ Dick, *supra* note 59.

⁷⁸ *Germany’s Federal Constitutional Court Opens Case Against NPD*, DEUTSCHE WELLE (Dec. 7, 2015), <http://www.dw.com/en/germanys-federal-constitutional-court-opens-case-against-npd/a-18900239>; *Germany’s Top Court Mulls Banning Extremist NPD*, DEUTSCHE WELLE (Mar. 1, 2016), <http://www.dw.com/en/germanys-top-court-mulls-banning-extremist-npd/a-19083756>.

⁷⁹ Dick, *supra* note 59. The NPD received a bump in supporters after the failed attempt. Crossland, *supra* note 43.

⁸⁰ *Germany’s Top Court Mulls Banning Extremist NPD*, *supra* note 79.

facilitating illegal acts.⁸¹ Judges were skeptical to grant the application because they feared that government spies had reached high levels in the organization in a deliberate attempt to create an exaggerated extremist image of the party.⁸² Judges were wary to attempt to distinguish NPD actions from those of undercover government informants.⁸³ This notion of impropriety prejudiced the case enough for the Federal Constitutional Court to dismiss the application without prejudice.⁸⁴

VI. A SECOND BITE AT THE APPLE

Germany's recent efforts to provide asylum to displaced people from Syria are commendable and are viewed by some nations as incredibly altruistic.⁸⁵ However, many other nations and some of its own citizens have criticized their government's empathy.⁸⁶ As record numbers of refugees cross German borders,⁸⁷ the country is becoming polarized and some right wing extremists are growing increasingly dangerous, creating a surge in hate crimes.⁸⁸ German authorities reported 817 assaults against centers for refugees in 2015, which is four times as many reported the year before.⁸⁹ In total, Germany reported 1610 crimes classified as offenses against refugees in 2015, nearly double the amount from the previous year.⁹⁰ Even more disturbing is the fact that the German Federal Criminal Police Office reported that more than two thirds of the recorded offenders of these crimes lacked previous criminal records.⁹¹

The Minister of the Interior, Thomas de Maiziere, fears that this data may indicate that "xenophobia and right-wing

⁸¹ *Id.*

⁸² *Germany's Federal Constitutional Court Opens Case Against NPD*, *supra* note 79.

⁸³ *Id.*

⁸⁴ Crossland, *supra* note 43.

⁸⁵ Felicity Capon, *Why Germany Is More Accepting of Asylum Seekers than the Rest of Europe*, NEWSWEEK (Sept. 2, 2015, 4:43 PM), <http://europe.newsweek.com/why-germany-more-accepting-asylum-seekers-rest-europe-332401>.

⁸⁶ *Id.*

⁸⁷ Over 1 million refugees entered Germany's borders in 2015 in search of asylum. Reyasam, *supra* note 39.

⁸⁸ Oeder, *supra* note 43.

⁸⁹ Florian Zollmann, *The New Right in Germany*, TELESUR (Jan.,5, 2016), <http://www.telesurtv.net/english/opinion/The-New-Right-in-Germany-20160105-0001.html>.

⁹⁰ *Id.*

⁹¹ *Id.*

extremism could creep into the center of [German] society.”⁹² Security Officials in Germany believe that the far-right NPD political party orchestrates many of the attacks.⁹³ German politicians have accused the NPD of, at least indirectly, being the “intellectual instigators” of violent attacks on minorities within the country’s borders.⁹⁴ Justice Minister Hieko Maas called recent attacks on refugee camps by extremists, who may or may not be connected to the NPD party, “shameful” and vowed to bring the culprits to justice.⁹⁵

Fueling the belief that the NPD is behind the violence is the fact that the party has been particularly outspoken with its opinions against Germany accepting refugees. In late January 2016, the NPD proposed a bill to the Mucklenberg-Western Pomeranian Government, advocating fines or imprisonment for every foreigner entering Germany without proper paperwork.⁹⁶ This proposal, like several other similarly minded proposals initiated by the NPD,⁹⁷ was voted down.⁹⁸ The party has also referred to immigration as genocide, claiming that the mixing of other ethnicities into the German gene pool is dampening the German race.⁹⁹ Party leaders have also preached the belief that people with Asian or African backgrounds will “never be German,” no matter their citizenship.¹⁰⁰ Also, in early 2016, Frank Franz sent letters to police and army troops, reminding them that former

⁹² *Id.*

⁹³ Ruth Bender, *Germany’s Top Court Is Urged to Ban Extreme-Right Party NPD*, WALL STREET J., (Mar. 2, 2016, 7:49 AM). <http://www.wsj.com/articles/germanys-top-court-is-urged-to-ban-extreme-right-party-npd-1456862021?cb=logged0.12263581599108875>.

⁹⁴ Woolf, *supra* note 28.

⁹⁵ *Germany’s Top Court Mulls Banning Extremist NPD*, *supra* note 79.

⁹⁶ Reyasam, *supra* note 39.

⁹⁷ In 2013, the NPD proposed a bill that called for any products sold in Germany that were manufactured in Israel must be prominently marked for “clear designation of origin.” Benjamin Weinthal, *German Neo-Nazis Submit Anti-Israel Legislation*, JEWISH WORLD (June 15, 2013, 11:57 PM). <http://www.jpost.com/Jewish-World/Jewish-News/German-neo-Nazis-submit-anti-Israel-legislation-316667>. The idea behind the bill mirrors the Nazi model of boycotting Jewish business in 1933. *Id.* This model brought about the slogan, “Germans defend yourselves. Do not buy from Jews!” *Id.*

⁹⁸ Reyasam, *supra* note 39.

⁹⁹ Elisabeth Braw, *Germany’s Far Right NPD Party Faces Political Exile. Will A Ban Really Help?*, CHRISTIAN SCI. MONITOR (Mar. 7, 2016). <http://m.csmonitor.com/World/Europe/2016/0307/Germany-s-far-right-NPD-party-faces-political-exile.-Will-a-ban-really-help>.

¹⁰⁰ Reyasam, *supra* note 39.

East Germany security forces defied the state and stood by the people.¹⁰¹ Some observers viewed these letters as an attempt at a coup d'état.¹⁰²

Galvanized by the fear of future race crimes and xenophobic actions, and armed with over 1,000 pages of new evidence,¹⁰³ the Upper House of Parliament once again filed an application to the Federal Constitutional Court in a second attempt to ban the NPD in 2013.¹⁰⁴ This time however, although all parties in the Upper House supported the motion, the Upper House acted without the help of the Lower House or the Federal Government.¹⁰⁵

When the application was filed, the Upper House assured the Court that all of their undercover agents had been "deactivated."¹⁰⁶ The Upper House's new investigation into the NPD does not involve undercover agents, but instead relies upon surveillance of the party. After it was shown that the undercover agents were deactivated and that new developments had been made,¹⁰⁷ the Constitutional Court accepted the application and granted hearings on the topic, which are currently underway.¹⁰⁸ The Upper House intends to show that the NPD "shares essential characteristics with the Nazi party," although that assertion will not be enough to complete a successful ban of the party.¹⁰⁹

On March 1, 2016, the hearings began.¹¹⁰ On the first day, the Constitutional Court listened to the NPD's argument that undercover state officials were still in the ranks of the NPD and that they have not only made the party seem more violent than

¹⁰¹ *Germany's Top Court Weighs Ban on Far-Right NPD Party*, *supra* note 45.

¹⁰² *Id.*

¹⁰³ Michael Levitin, *Germany Seeks to Ban a Far-Right Party*, TIME (Dec. 14, 2012), <http://world.time.com/2012/12/14/germany-seeks-to-ban-a-far-right-party/>.

¹⁰⁴ *Germany's Top Court Weighs Up Ban on Neo-Nazi Party*, LOCAL (Mar. 1, 2016, 8:34 AM), <http://www.thelocal.de/20160301/top-court-weighs-up-ban-on-neo-nazi-party>.

¹⁰⁵ Schwarz, *supra* note 8; Dick, *supra* note 59.

¹⁰⁶ Dick, *supra* note 59.

¹⁰⁷ The Upper House claims to have gathered hundreds of pieces of new evidence. Dick, *supra* note 59.

¹⁰⁸ Mirijan Murat, *German Top Court Weighs Ban on Neo-Nazi Fringe NPD Party*, FRANCE 24 (Mar. 1, 2016), <http://www.france24.com/en/20160301-germany-top-court-hearing-ban-german-neo-nazi-fringe-far-right-npd-party>.

¹⁰⁹ Knapp, *supra* note 41.

¹¹⁰ Murat, *supra* note 109.

they truly are, but that they also spied on the NPD's legal arguments in an unfair and illegal manner.¹¹¹ The Justices have already denied the viability of these arguments and the Court has refused to entertain further discussion concerning the issue of governmental informants.¹¹²

On March 1, 2016, NPD leader, Franz,¹¹³ was effectively cross-examined¹¹⁴ in the Federal Constitutional Court.¹¹⁵ When asked if the NPD considered the "national community" of Germany to be all citizens or just "ethnic Germans," Franz's reply was that a "nation is defined by a common language, culture, and history, and . . . the members of a nation are not interchangeable."¹¹⁶ Franz further stated that a "national community comprises citizens" and that the NPD follows the 1913 Citizenship Law.¹¹⁷ This law is based on the idea known as *Jus sanguinis*, or the "right of blood principle."¹¹⁸ Citizenship is therefore determined by bloodline rather than place of birth.¹¹⁹

When further pressed as to whether or not a person born in Germany but an offspring of an Asian mother and an African father could be German, Franz answered that he would not

¹¹¹ *Germany's Top Court Weighs Ban on Far-Right NPD Party*, *supra* note 45.

¹¹² Bender, *supra* note 94.

¹¹³ Franz was elected as the NPD leader in November 2014 after the former leader, Holger Apfel (known anti-Semite who has said on record that the Holocaust Memorial in Berlin should be razed to the ground), resigned under a shroud of personal controversy. *Germany's NPD Leader Slams German Authorities' Banning of Latest Dresden Anti-Islamification Rally*, NEW OBSERVER (Jan. 19, 2015), <http://newobserveronline.com/germanys-ndp-leader-slams-german-authorities-banning-latest-dresden-anti-islamification-rally>; Crossland, *supra* note 43. Franz took control after an extended period of instability for the party, has since been working to modernize the country's view of the NPD, and has begun what he believes to be a makeover of the party's propaganda. *Id.*

¹¹⁴ Cross-examination or questioning in an adversarial fashion is rare in the Federal Constitutional Court. *Germany: Attempts to Ban NPD Faltering*, DAILY STORMER (Mar. 4, 2016), <http://www.dailystormer.com/germany-attempts-to-ban-ndp-faltering>.

¹¹⁵ *Id.* Interestingly, some of the eight judges hearing the case, including Judge Peter Muller and Judge Peter Huber, have publicly shown their distaste for the NPD in speeches and publications. Schwarz, *supra* note 8. Normally, this type of personal prejudice would require a judge to recuse themselves from the proceedings. *Id.* However, judges have the last word on their own impartiality and all claims of conflict of interest were overruled. *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Schwarz, *supra* note 8.

entertain hypothetical questions.¹²⁰ At this point, one Justice peppered Franz with questions about an NPD brochure saying, “Integration is genocide.”¹²¹ Franz replied that he agrees that this is bold language but also admitted that the NPD advocates for disallowing foreigners to own German land and excluding foreigners from health and pension insurance.¹²² Franz claimed that the NPD also wants to withdraw citizenship from migrants who have been granted it and that the only people who should be granted citizenship are those who have “rendered outstanding services to the country.”¹²³

However, the trial was not one sided and the Upper House seemed to lack compelling evidence that the party threatened democracy in Germany.¹²⁴ Some of the Justices pointed out that the NPD is a small party with minimal political influence.¹²⁵ After reading statements from the Government’s own reports echoing this fact, Judge Muller asked the Government, “Where is there a danger for democracy?”¹²⁶ The question was met with silence.¹²⁷ Vosskuhle later asked the Government to provide evidence that the NPD engaged in “destructive behavior, which threatened the democratic order.”¹²⁸ One report claimed that the prosecution could provide no evidence to the request.¹²⁹

The Justices are currently deliberating over the arguments that were presented.¹³⁰ From the final date of the trial, the NPD has six weeks to submit any further comments.¹³¹ At the end of the six weeks, the prosecution will be given six weeks to respond.¹³²

¹²⁰ *Id.*

¹²¹ It has been reported that the Justices were not pleased with Franz’s refusal to respond to the question. *Germany: Attempts to Ban NPD Faltering*, *supra* note 115.

¹²² Dieter Schroeder, *Attempts to Ban NPD Faltering*, NEW OBSERVER (Mar. 3, 2016), <http://newobserveronline.com/attempts-ban-npd-faltering/>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Schroeder, *supra* note 123.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

The NPD has been considered xenophobic and anti-Semitic ever since the party was established in the 1960's. Germany's Upper House, *Bundesrat*, is currently arguing that the NPD is "essentially identical" to the platform on which Hitler stood.¹³³ German law does not ensure the same rights as the American Constitution; for example, freedom of speech is more limited in Germany than it is in America, partially due to the events that gave rise to the Second World War.¹³⁴ For example, it is illegal in Germany to publicly deny or downplay the holocaust.¹³⁵ This type of restriction on speech would not survive the scrutiny of the First Amendment to the American Constitution.¹³⁶

VII. IS THE EFFORT TO BAN THE NPD FROM GERMANY A WINNING VENTURE?

One may ask if it is worth it to face the uphill battle and exert considerable effort in attempting to ban a political party with such little influence. Proponents of the attempt argue that legitimate political parties in Germany receive federal funding and it is not right to to endow such a party with taxpayer money.¹³⁷ Huesmann explains these concerns by stating, "We don't want to fund Nazi propaganda and right-wing violence."¹³⁸ Further, many believe that the NPD tarnishes Germany's reputation in the global community and gives neo-Nazis a political platform to spread ideas of racism, xenophobia, and hate.¹³⁹

Germany has placed considerable effort in painting themselves in a favorable light for foreign affairs since the Second World War; as the Interior Minister of Mecklenberg-Western Pomerania has stated, "No other country has a history like ours, . . . [b]ecause of that, we have a responsibility to make sure that history is never again repeated on German soil."¹⁴⁰

¹³³ *Germany's Top Court Mulls Banning Extremist NPD*, *supra* note 79.

¹³⁴ Bender, *supra* note 93; Schwarz, *supra* note 8.

¹³⁵ Klaus Dahmann, *No Room for Holocaust Denial in Germany*, DEUTSCHE WELLE (Dec. 23, 2005), <http://www.dw.com/en/no-room-for-holocaust-denial-in-germany/a-1833619-1>.

¹³⁶ Bender, *supra* note 94.

¹³⁷ *Id.*; Schwarz, *supra* note 8.

¹³⁸ Woolf, *supra* note 28.

¹³⁹ *Id.*

¹⁴⁰ Lorenz Caffier is the Mecklenberg-Western Pomerania Interior Minister, and is also a leader of the movement for banning the NPD. Rayasam, *supra* note 39.

Many people, including Justice Minister Heiko Maas, believe that this effort to ban the NPD is a waste of time because even a successful ban will not eradicate far-right extremists.¹⁴¹ Some scholars believe that a successful ban will just push current NPD members into other parties or that they will create dangerous underground groups.¹⁴² Other critics lack confidence that the Upper House will be able to meet the high bar necessary for the attempted ban to be successful¹⁴³ Other concerns include a worry: that a second failed attempt to disband the NPD may work against the government by giving an image of legitimacy to the NPD, thereby affording them more strength; that the campaign will give the NPD a national stage; and that even a successful ban will only turn the party members into martyrs for their racist cause.¹⁴⁴ Timo Reinfrank, of the anti-racist Amadeu Antonio Foundation, argues, “Right now, there are so many other things to do rather than focus on a ban of the NPD, which is only part of the problem The urgent priority is to prevent right-wing attacks against refugee shelters.”¹⁴⁵

Perhaps these are all reasons why the Lower House and the Federal Government declined to join the Upper House’s renewed efforts. They may also have refused in order to avoid the embarrassment of a potentially second failed attempt.

Renewing the application to ban this party is a bold move by the Upper House.¹⁴⁶ However, if it is true that the NPD is the puppet master behind some of the violent acts against refugees, then something does need to be done to protect the lives of those in danger. This is especially true with the recent enormous influx of migrants into Germany who seek asylum from the persecution taking place in their own countries.

¹⁴¹ Dick, *supra* note 59; *Germany’s Top Court Weighs Ban on Far-Right NPD Party*, *supra* note 45; Schwarz, *supra* note 8 (stating that, even when the NPD was in turmoil over the last few years, far-right extreme organizations, like PEGIDA and Alternative for Deutschland (AfD), have thrived on anti-refugee agitation). Many former NPD members are already involved in these organizations and other similar organizations, some which are more aggressively militant than the NPD. Schwarz, *supra* note 8.

¹⁴² Bender, *supra* note 94.

¹⁴³ *Id.*

¹⁴⁴ *Id.*; *Germany’s Top Court Weighs Ban on Far-Right NPD Party*, *supra* note 45.

¹⁴⁵ *Germany’s Top Court Weighs Ban on Far-Right NPD Party*, *supra* note 45.

¹⁴⁶ *Id.*

Unfortunately, if this attempted ban is premature,¹⁴⁷ the repercussions could potentially be an embarrassed government and a stronger extreme right party. If the Upper House fails for a second time against this party, it is possible that the Federal Constitutional Court will decline to entertain a third attempt. Therefore, this may be the last chance to officially cut off the party from government funding, barring any outrageous future acts that may be attributed to the NPD. For this reason, the Upper House probably desires aid from the Lower House and Federal Government in this ongoing attempt. Although Angela Merkel's¹⁴⁸ government supports the effort, they have not officially joined the legal campaign.¹⁴⁹

This author, however, believes that it was a wise tactical decision for the Lower House and the Federal Government to refrain from joining the effort if they believe that the Upper House lacks evidence to make a successful ban. Perhaps the refusal to join will allow a renewed attempt in the future, if the current effort is unsuccessful, that may be led by the Lower House and the Federal Government since the case and parties will be new.

¹⁴⁷ I.e., the Upper House does not have considerable evidence to support its case.

¹⁴⁸ Angela Merkel is the Chancellor of Germany.

¹⁴⁹ *Germany's Top Court Weighs Ban on Far-Right NPD Party*, *supra* note 45.