

Congress of the United States
House of Representatives
Washington, DC 20515-0913

Written Statement

On the Issues Surrounding a Ban of the AfD

(Regarding Printed Matter 8/1034 of the Thuringian State Parliament)

Dear Members of the Committee for Justice, Migration and Consumer Protection,

I would like to thank you for the opportunity to submit a statement as part of the debate in the Thuringian State Parliament concerning the motion contained in Printed Matter 8/1034 regarding the question of initiating proceedings to ban the Alternative for Germany (AfD).

Like the United States of America, the Federal Republic of Germany and its federal states belong to the Western tradition of the free constitutional state and stand within the corresponding constitutional tradition of an order based on liberty. In the United States, whose Constitution entered into force in 1789, and which constitutes the world's oldest constitutional republic, this tradition has been successfully maintained for two and a half centuries.

The debate over proceedings to ban the Alternative for Germany concerns a broader question that touches upon the liberal core of all Western constitutional states: Who may determine which party, and which opposition, is legitimate, and what safeguards apply when an agency subordinate to the government politically evaluates that government's political opponent?

The Constitution of the United States of America answers this question on the basis of a realistic assessment: On the one hand, governments and public authorities can abuse their power to impermissibly restrict civil liberty. The structure of the American constitutional order is intended above all to prevent such abuses by governments. It is always clear in this context that protecting the Constitution must not be confused with protecting the government currently in office. On the other hand, citizens or political movements can exploit freedom in order to fight against freedom and the Constitution. The state therefore requires effective means to combat violence, espionage, and concrete plans to overthrow the constitutional order.

There is thus a characteristic tension that, in a constitutional state, must be resolved in favor of liberty, because otherwise that state risks transforming itself into a tyranny. Protecting the republic from tyranny as well as from anarchy was a central concern of the authors of the U.S. Constitution and of the authors of the Federalist Papers. The latter are fundamental not only to understanding the U.S. Constitution, but to understanding a free constitutional order more generally. They therefore provide an appropriate point of reference here.

1. Liberty Through the Limitation of Power

In Federalist No. 10, James Madison treats political "factions" (social groups and interest groups) not as an anomaly to be eliminated. Such groups, which can also be understood to include political parties, arise from liberty and represent differing interests and views. Eliminating their diversity would destroy liberty and amount to imposing an artificial uniformity of opinion. The constitutional response is instead to limit the effects of factions through pluralism, competition, and representation. Federalist No. 51 supplements this idea with the principle of separation of powers: The government's dependence on the people and its accountability to them constitute the first safeguard of pluralism and competition among factions; institutional controls within a system of checks and balances through the separation of powers constitute the indispensable second safeguard.

Against this background, the First Amendment is more than an individual right to freedom of speech. It prevents the state from establishing political orthodoxy. As a general principle, public authorities should not decide which doctrines are reasonable, socially desirable, loyal, or the like. The American Constitution therefore accepts the risk posed by harsh and radical speech because it regards the countervailing risk as greater: that those currently in power will remove their opponents from political competition under the pretext of protecting the state.

This principle yields a criterion: The more strongly a measure restricts political opinions, political speech, associations, or electoral choices, the less its factual basis may be defined by the branch of state authority that stands to gain a political advantage from those restrictions.

2. The Decisive Criterion: Unlawful Conduct

In American jurisprudence the Supreme Court does not distinguish between moderate and extreme political views, but rather between generally protected abstract speech and incitement directed toward imminent unlawful action.

The U.S. Supreme Court has exercised similar restraint regarding government sanctions based solely on membership in an organization. In *Scales v. United States*, the Court required, for criminal liability, active membership, knowledge of the organization's unlawful objectives, and the specific intent to further those objectives. In *Elfbrandt v. Russell* and *Keyishian v. Board of Regents*, it held loyalty requirements unconstitutional insofar as they attached consequences merely to membership, or knowingly continued membership, without proof of a corresponding intent to further the organization's objectives. The jurisprudence thus rejects "guilt by association," meaning the attribution of responsibility solely on the basis of organizational proximity, sympathy, or formal membership.

In the same way, unlawful statements or actions by individual members cannot be automatically attributed to an organization as its own position. In *NAACP v. Claiborne Hardware Co.*, the U.S. Supreme Court made clear that an association cannot be held responsible solely on the basis of unlawful statements or actions by individual members or officials.

With respect to state action against a political party, it therefore also follows that individual statements may constitute evidence but cannot substitute for an examination of the party's official platform, authorized resolutions, the conduct of its responsible governing bodies, and a

demonstrable organizational plan. In addition, incriminating and exculpatory material must be objectively evaluated according to the same criteria, without presupposing the alleged wrongdoing. An intelligence-service compilation of quotations that selects only the most incriminating possible interpretation can therefore by no means be sufficient to justify banning an organization.

3. Implications for the German Debate Over a Party Ban

Whereas the U.S. Constitution makes no provision for banning a political party, Germany's Basic Law provides for that possibility. A party ban, which may be imposed only by the Federal Constitutional Court, is regarded as an *ultima ratio* and is considered, even under constitutional law, to be an extremely ambivalent "weapon" of the constitutional state. For a political party to be banned, it must be demonstrated that the party is actively, systematically, and aggressively seeking to undermine the free democratic basic order, and there must be concrete indications suggesting that the actual achievement of those objectives is at least possible. According to the jurisprudence of Germany's highest court, a party ban is expressly not intended to constitute a ban on beliefs or ideology.

More specifically, a legitimate party-ban proceeding would have to satisfy four criteria. First, its subject must be a demonstrable attack on the German constitutional order. Even the harshest criticism of the government, or a political platform rejected by a government, governing parties, or other competing parties, is in no way sufficient. Second, the objectives in question must, on the basis of the party's actual practices, be attributable to the party as a whole. Intentions must not be imputed to the party that cannot be derived from its platform and actual policies and that instead more closely resemble conspiracy theories originating within the intelligence services. Third, political strength may be relevant only to the possibility of implementing an already proven anti-constitutional objective. In other words, the fact that a party is successful in elections or opinion polls cannot substitute for the absence of proof of such an objective. Fourth, the principal evidence must be independently examined in a fair judicial proceeding.

On the basis of the publicly available information, in my view there currently appear to be insufficient indications that, in light of Criteria One through Three, would justify proceedings to ban the AfD as a party in its entirety. In fact, the impression arises that proponents of an AfD ban seek to eliminate the AfD as an unwelcome competitor and are also making use of the domestic intelligence services for this purpose, while those agencies themselves are, in a problematic manner, engaging in political agitation against the AfD.

I do want to make clear that this does not mean that all statements originating from within the AfD must automatically be regarded as unproblematic. My statement today is not endorsing this position. In a free constitutional state, however, AfD positions or statements by AfD officials must be answered through argument in political debate and through the free contest of opinions protected by fundamental rights. Excluding a political choice available to millions of citizens by banning a political party would, however, require convincing evidence of a systematic plan supported by the AfD to abolish the free constitutional order, as well as a realistic possibility that such a plan could be implemented. Neither is apparent in the case of the AfD.

A free constitutional state may certainly take decisive action against its actual enemies. But it must not equate criticism of the government with hostility toward the Constitution, or a successful opposition with a threat to democracy. The state may punish perpetrators, but not thoughts or opinions. The political decision regarding the role of a particular party within a political system always belongs to the citizens of that country and never the controlling party in government. Lastly, if you ban AfD, I will speak to Secretary Rubio and seek a travel ban on any Member who put forward the resolution and those who support it. This should never happen in a democracy and it should not happen in this case either.

Sincerely,

ANNA PAULINA LUNA
Member of Congress