

## Observation of Parliamentarians by the Office for the Protection of the Constitution is Subject to Strict Proportionality Requirements

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In an order that was published today, the Second Senate of the Federal Constitutional Court commented on the prerequisites for the observation of members of Parliament by Offices for the Protection of the Constitution. According to this, the observation constitutes an interference with the independent mandate. It is subject to strict proportionality requirements. The longstanding observation of the complainant, a former member of the Bundestag (Federal Parliament) and current member of the Landtag (state Parliament) for the party DIE LINKE ("The Left"), does not meet these proportionality requirements.

**Facts of the Case and Course of the Procedure:**

1. The complainant has been a member of the Thuringia Landtag since October 1999. From October 2005 till September 2009, he was a member of the German Bundestag and the parliamentary group DIE LINKE as well as its vice-chairman. He has been the chairman of the parliamentary group DIE LINKE in the Thuringia Landtag since autumn 2009.

2. The Federal Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz) observes individual members of the German Bundestag who are members of the parliamentary group DIE LINKE. Since 1986 it has kept a personal file on the complainant, in which information is collected that dates back to the 1980s. The collected information concerns the complainant's work within and for the party as well as his work as a member of Parliament since 1999, with the exclusion of his voting behaviour and his statements both in Parliament and in the committees. However, the Federal Office for the Protection of the Constitution evaluates parliamentary documents and also gathers information about the complainant's other political activities. According to the facts found by the courts involved, the complainant himself is not suspected of pursuing activities against the free democratic fundamental order. The sole justification for his observation are his membership and his functions in the party DIE LINKE.

With his constitutional complaint, the complainant challenges a judgment by the Federal Administrative Court (Bundesverwaltungsgericht) of 21 July 2010 (BVerwGE 137, 275), which endorsed the observation.

**Essential Considerations of the Senate:**

The challenged judgment violates the complainant's independent mandate. It is reversed and the case is remitted to the Federal Administrative Court.

a) The independent mandate according to Art. 38 sec. 1 sentence 2 of the Basic Law (Grundgesetz - GG) safeguards the parliamentarians' unimpaired forming of opinions, which includes a communicative relationship between the parliamentarian and the voters that is free from governmental interference. The principle of free formation of opinions is closely connected to the principle of parliamentary democracy according to Art. 20 sec. 2 sentence 2 GG. In the Basic Law's representative democracy, the forming of opinions by the people and the forming of opinions in state bodies take place in a continuous and varied interplay. The communicative process in which the parliamentarian not only forwards, but also receives information, is covered by the independent mandate.

In this context, Art. 38 sec. 1 sentence 2 GG also safeguards the parliamentarians' right to be free from observation, supervision and control by the executive and is thus closely related to the principle of the separation of powers according to Art. 20 sec. 2 sentence 2 GG. It is true that the individual parliamentarians are not a priori exempt from any executive control. However, this is first and foremost the responsibility of the German Bundestag, which is acting here within the framework of parliamentary autonomy.

Via Art. 28 sec. 1 GG, the parliamentarians' right to be free from observation by the executive also applies to the members of Parliament in the Länder (Federal states). In the present case, it can be challenged via a constitutional complaint because the complainant challenges a Federal Courts judgment.

b) The observation of a member of Parliament by Offices for the Protection of the Constitution and the implied collection and saving of data constitutes an interference with the independent mandate. This interference can be justified in individual cases, but it is subject to strict proportionality requirements.

The interest in the protection of the free democratic fundamental order might in particular prevail if there are indications that the parliamentarian misuses his or her mandate for the fight against the free democratic fundamental order or fights this order in an active and aggressive way.

Belonging to a certain political party can constitute one aspect of the required overall assessment. Art. 21 GG assigns the parties a major role in the formation of the people's political will in the democratic order of the Constitution. Because of this, it can be assumed that the free democratic fundamental order is strengthened by partisan political activities that are also based on this order. Thus, the mere membership in a party can only justify a temporary observation which helps to clarify the parliamentarians' functions, importance and standing in the party, relationship to anti-constitutional segments, and to assess the relevance of such segments within the party and for the parliamentarians' work.

In addition to this, a limitation of the independent mandate via the observation of members of Parliament requires a statutory basis which meets the requirements of specificity and clarity according to the rule of law.

2. The judgment by the Federal Administrative Court of 21 July 2010 does not sufficiently meet these criteria. According to the aforementioned criteria, the complainant's observation by the Federal Office for the Protection of the Constitution constitutes an unjustified interference with the independent exercise of his mandate.

a) Regarding this, the Senate acts on the fact, as established by the courts involved, that the gathering of information is done without using methods of secret information gathering. When asserting that the Office for the Protection of the Constitution employed methods of secret information gathering, the complainant did not identify constitutionally relevant violations by the courts regarding their findings to the contrary.

b) The relevant provisions of the Act on the Federal Office for the Protection of the Constitution constitute a sufficiently specific statutory basis that meets the requirements of the statutory reservation. It is the legislature itself that answered in the affirmative the vital question whether members of the German Bundestag may be subject to the observation by the Federal Office for the Protection of the Constitution. By including in § 8 sec. 5 of the Act on the Federal Office for the Protection of the Constitution the stipulation that the observation must be proportionate, the legislature took the parliamentarians' special need for protection of members of Parliament sufficiently into consideration.

c) However, the longstanding observation of the complainant does not meet the requirements of the principle of proportionality. In an overall balancing of all factors, the minor additional insights which the Federal Administrative Court saw for the establishment of a comprehensive picture of the party are disproportionate compared to the severity of the interference with the complainant's independent mandate.

aa) The courts involved have explicitly stated that the complainant himself is not suspected of pursuing anti-constitutional activities. The courts only found factual indications for such a suspicion with regard to single subdivisions of the party DIE LINKE, none of which the complainant belongs to or supports. Even considering his relationship to the party and its segments, the complainant himself thus poses no relevant threat to the free democratic fundamental order. Furthermore, the complainant's behaviour - in particular, whether he actively fights the radical forces - could only justify his observation if these forces were a dominant influence within the party. No such findings were made in the court proceedings.

bb) According to the above criteria, the following assumption by the Federal Administrative Court is constitutionally untenable: That the complainant's behaviour was nevertheless objectively capable of supporting anti-constitutional activities because even people who were rooted in the free democratic fundamental order could be dangerous to this order if their behaviour indicated that they unwittingly furthered anti-constitutional activities or stayed with a such group of people who they supported for other reasons. With regard to this, the Federal Administrative Courts judgment does not realise that partisan political activities which are based on the free democratic fundamental order strengthen this order. This applies also, and in particular, if it happens within a party in which different forces and segments are struggling with each other for influence.

Furthermore, the Federal Administrative Court does not see that the instruments used by the Federal Office for the Protection of the Constitution are disproportionate with regard to the complainant's behaviour in the parliamentary sphere, which is especially protected by Art. 46 sec. 1 GG. There has been none of the necessary balancing of interests concerning the fact, as established by the Federal Administrative Court, that parliamentary documents are being collected and evaluated.

3. The complainant and the parliamentary group DIE LINKE are the applicants in the Organstreit proceedings. These applications are inadmissible, because Organstreit proceedings are not permitted here and because the applicants are not authorised to file. In so far as the applicants filed additional or amended applications in later pleadings, they did not meet the time limit of six months according to § 64 sec. 3 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG).

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Das Bundesverfassungsgericht in Karlsruhe wacht über die Einhaltung des Grundgesetzes für die Bundesrepublik Deutschland. Seit seiner Gründung im Jahr 1951 hat das Gericht dazu beigetragen, der freiheitlich-demokratischen Grundordnung Ansehen und Wirkung zu verschaffen. Das gilt vor allem für die Durchsetzung der Grundrechte. Zur Beachtung des Grundgesetzes sind alle staatlichen Stellen verpflichtet. Kommt es dabei zum Streit, kann das Bundesverfassungsgericht angerufen werden. Seine Entscheidung ist unanfechtbar. An seine Rechtsprechung sind alle übrigen Staatsorgane gebunden. Die Arbeit des Bundesverfassungsgerichts hat auch politische Wirkung. Das wird besonders deutlich, wenn das Gericht ein Gesetz für verfassungswidrig erklärt. Das Gericht ist aber kein politisches Organ. Sein Maßstab ist allein das Grundgesetz. Fragen der politischen Zweckmäßigkeit dürfen für das Gericht keine Rolle spielen. Es bestimmt nur den verfassungsrechtlichen Rahmen des politischen Entscheidungsspielraums. Die Begrenzung staatlicher Macht ist ein Kennzeichen des Rechtsstaats.