

Constitutional Politics In Germany

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Suggested Citation: Donald P. Kommers, *Constitutional Politics In Germany*, 3 German Law Journal (2002), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=142>

[1] A landmark in German immigration law could founder on a technical point of procedure in the *Bundesrat*, the legislative body in Germany that represents the states at the national level. A bill acknowledging, for the first time, that Germany is a country of immigration won a majority of votes in the popularly elected branch of the national parliament. Introduced and championed by the governing Social Democratic-Green coalition, the controversial bill survived the stiff opposition of Christian Democrats, the minority party. But Germany is a *federal* republic and, accordingly, this bill, like others involving vital state interests, constitutionally requires the *Bundesrat's* consent.

[2] In Germany's federal system, however, unlike the American brand, the sixteen states are corporately represented in the *Bundesrat*. Each state, depending on its population, claims a certain number of votes, ranging from three to six, and these votes, according to Article 51, paragraph 3, of the *Grundgesetz* (Basic Law), must be cast *nur einheitlich* ("only as a block"). But most states, like the nation, are governed by coalitions. This means that they are disabled from casting their votes as a block unless the parties in the coalition are in agreement. Barring an accord, a state would normally abstain from voting.

[3] For weighty political reasons, Chancellor Gerhard Schröder and his Interior Minister, Otto Schily, needed a victory in the *Bundesrat*. Brandenburg was crucial because its four votes were needed to win 35 – a bare majority – of the *Bundesrat's* 69 votes. But the state's coalition of Social and Christian Democrats was divided. Nevertheless, the *Bundesrat's* presiding officer, Klaus Wowereit, Berlin's Social Democratic major, ruled that Brandenburg had consented to the bill after the state's Social Democratic Prime Minister voted for it, a ruling that triggered indignant cries of foul play among Christian Democrats, with some charging that a "constitutional crisis" was in the making. Social Democrats responded by accusing Christian Democrats of bombast and sour grapes.

[4] It was interesting political theater. But the political stakes were high. Schröder needed a victory to keep Christian Democrats from exploiting the issue in the forthcoming national election campaign. He had pulled out all the stops to pressure Brandenburg into voting for the immigration bill, even over the reported doubts of his party's Prime Minister. On the other hand, these tactics risked the collapse of Brandenburg's government, raising the possibility of a new coalition between Social Democrats and the Party of Democratic Socialism, the successor to the old East German Communist party, a result that would arm Christian Democrats with a devastating campaign weapon.

[5] The scene has now shifted to Germany's Social Democratic President, Johannes Rau, whose signature is necessary if the bill is to become law. As President, he could demonstrate his political independence by refusing to sign the bill on constitutional grounds. He has already been urged to do so by seven Christian Democratic Prime Ministers and two former Presidents of the Federal Constitutional Court, both Christian Democrats, one of whom preceded Rau as Germany's President. But since the law would not take effect until January, Rau could delay signing the bill until after the September election, but that would be seen as sheer opportunism. If he decides to sign the bill before then, Christian Democrats, with some degree of confidence, are sure to challenge the law in the Federal Constitutional Court.

[6] The brush in the *Bundesrat* could have been avoided. A less tenacious Chancellor might have asked for the usually required mediation committee to resolve the apparent conflict between the two houses, during which time Brandenburg's two coalition partners would probably have resolved their differences. The immigration bill, if it becomes law, may be constitutionally challenged in any case, but the current procedural dispute can only get in the way of the benign social objective that the ruling national coalition had in mind.

[7] As for the disputed procedure, legal authorities are divided over its constitutionality, largely along party lines. The case resembles *Bush v. Gore*, the decision resulting in the election of George W. Bush. The German story, like the American, is an interesting chapter in constitutional politics, with one side invoking the constitution and the other claiming that the issue has been decided politically. Brandenburg argues that its own constitution allows the Prime Minister to speak for the state in all fora beyond the state and that it was perfectly proper for him to cast the block vote in the *Bundesrat*, especially since the state's Christian Democratic Interior Minister, Jörg Schönbohm, did not *expressly* insist on voting "no" when asked for his consent a second time.

[8] The view of constitutional scholars with no partisan ax to grind is more plausible. This view holds that a state's Prime Minister may have the deciding vote in case of conflict, but any such decision must be taken at the cabinet level within the state in advance of the *Bundesrat's* convening, which is to say that a conflict within a ruling state coalition may not be settled in the *Bundesrat*. Any other procedure would transpose the *Bundesrat* into a conventional legislative body. In short, a divided vote, such as occurred here, seems incompatible with the literal language of

Article 51 (3). On the judicial resolution of this procedural technicality may hinge the fate of Germany's epoch-making immigration reform.