

Headnotes

to the Judgment of the Second Senate of 18 December 2002

– 2 BvF 1/02 –

1. The *Bundesrat* is a collegiate constitutional body of the Federation which consists of members of the *Land* governments.
2. The *Länder* do not participate directly through the *Bundesrat* in the legislation and administration of the Federation and in matters related to the European Union, but by the agency of the Members of the *Bundesrat* coming from the midst of the *Land* governments. The *Länder* are in each case represented by their *Bundesrat* Members who are present.
3. The votes of a *Land* in the *Bundesrat* are cast by its *Bundesrat* Members. The Basic Law (*Grundgesetz*) expects a uniform casting of the votes and respects the practice of the block vote, the holders of which are designated by each *Land* autonomously, without in turn interfering in the constitutional sphere of the *Land* with instructions and determinations.
4. It follows from the conception of the Basic Law for the *Bundesrat* that the casting of the votes by a holder of the block vote at any time can be contradicted by another *Bundesrat* Member of the same *Land*, and that the preconditions of the block vote hence cease to apply altogether.
5. Where ambiguities occur in the course of the ballot, the President of the *Bundesrat* presiding over the ballot is in principle entitled to bring about a clarification with suitable measures and to work towards an effective vote by the *Land*. The right existing in this respect to enquire however ceases to apply if a uniform *Land* will recognisably does not exist and it cannot be expected in view of the overall circumstances for such a will to yet come into being during the ballot.



IN THE NAME OF THE PEOPLE

In the proceedings
on the constitutionality of a statute

regarding the application to find that the Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners – Immigration Act (*Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern – Zuwanderungsgesetz*) of 20 June 2002 (Federal Law Gazette (*Bundesgesetzblatt – BGBl*) I p. 1946) is void because of its formal incompatibility with the Basic Law, applicants:.

- Applicants:
1. *Land* government of the Saarland, represented by the Minister-President ...,
 2. *Land* government of Baden-Württemberg, represented by the Minister-President ...,
 3. State government of the Free State of Bavaria, represented by the Minister-President ...,
 4. Hesse *Land* government, represented by the Minister-President ...,
 5. State government of the Free State of Saxony ..., represented by the State Minister of Justice ...,
 6. *Land* government of the Free State of Thuringia, represented by the Minister of Justice ...

the Federal Constitutional Court – Second Senate –
with the participation of Justices

Vice-president Hassemer,
Sommer,

Jentsch,
Broß,
Osterloh,
Di Fabio,
Mellinghoff,
Lübbe-Wolff

held on the basis of the oral hearing of 23 October 2002:

JUDGMENT:

The Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners (Immigration Act) of 20 June 2002 (Federal Law Gazette I page 1946) is incompatible with Article 78 of the Basic Law (*Grundgesetz*), and hence void.

Reasons :

A.

With their application for proceedings on the constitutionality of a statute, the applicants object to the Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners of 20 June 2002 – Immigration Act – (Federal Law Gazette I p. 1946). 1

B.

1. The Immigration Act serves to control and restrict aliens moving to the Federal Republic of Germany, and at the same time is to meet the humanitarian obligations of the Federal Republic (see § 1.1 of the Immigration Act). It regulates the entry, residence, work and promotion of the integration of aliens. Furthermore, it contains provisions on the termination of residence and the liability of transport enterprises, as well as procedural provisions. 2

Individual provisions of the Immigration Act, which in the main relate to empowerments to issue ordinances and task definitions with regard to the enforcement of the Act, entered into force on 26 June and 1 July 2002 (see Article 15.1 and 15.2 of the Immigration Act). The other provisions – those relevant and with external effect – are to enter into force on 1 January 2003 in accordance with Article 15.3 of the Immigration Act. 3

2. a) The German *Bundestag* accepted the draft of the Immigration Act at its 222nd session on 1 March 2002 (*Bundesrat* document (*Bundesratsdrucksache – BRDrucks*) 921/01, *Bundestag* document (*Bundestagsdrucksache – BTDrucks*) 14/7387) that had been submitted by the Federal Government and the SPD parliamentary group 4

and the Alliance 90/The Greens parliamentary group on the basis of the recommendation for a decision and of the report of the Committee on Internal Affairs (*Bundestag* documents 14/8395; 14/8414). The legislative decision was forwarded to the *Bundesrat* on the same day for consent (*Bundesrat* document 157/02 (*Beschluss*)).

b) aa) The *Bundesrat* discussed the Immigration Act at its 774th session on 22 March 2002. The deliberations on the Act started as item 8 on the agenda after being called by the presiding President of the *Bundesrat*, the Governing Mayor of Berlin, Klaus Wowereit (see Minutes of plenary proceedings 774, Stenographic Record p. 131 D). 5

bb) In the plenary debate on this agenda item, most speakers expressed themselves not only on the significance and content of the Immigration Act, but also on the coming ballot and on the differences of opinion existing in this context. The President of the *Bundesrat* gave the floor, successively, to the Minister-President of the Free State of Saxony, Prof. Dr. Kurt Biedenkopf, the Minister-President of the *Land* Schleswig-Holstein, Heide Simonis, the Minister-President of the Saarland, Peter Müller, and the Minister-President of the *Land* Rhineland-Palatinate, Kurt Beck. Further explicit references to the imminent ballot were contained in the subsequent speeches by the Minister-Presidents of the *Land* Hesse, Roland Koch, and of the *Land* Lower Saxony, Sigmar Gabriel (see Minutes of plenary proceedings 774, Stenographic Record, pp. 131 D –146 C). 6

cc) It was followed by the speech of the Brandenburg Minister of the Interior, Jörg Schönbohm. A section of the speech which is devoted to the coming ballot in the *Bundesrat* reads as follows: 7

“[...] Against the background of what has just been said, I would like to inform you that I will be voting **against** this Act. In accordance with our coalition agreement, we should abstain. 8

Agreeing to this Act would constitute a violation of our coalition agreement. By voting against it, I would like to heal this caesura.

Minister-President Stolpe and I are in an extremely difficult situation personally. Despite our different personal biographies, we have been united so far in our striving to do something together for our *Land* Brandenburg, to which we are committed. We wish to complete the inner unity in our *Land*. No one in Brandenburg would understand if the coalition were to collapse because of this. We have an unemployment rate of 18.7 per cent in my home *Land*. 2 per cent of our population is foreign. We have no difficulties when it comes to the topic of ‘integration’, which is a major element of the Act. Nevertheless, the strategic goal is to expose and split Brandenburg; because the different views were known. 9

First and foremost, the strategy of the Federal Government has 10

brought Mr. Stolpe into a difficult situation with the demand, the expectation or the presumption to break our coalition agreement. Were he to do so, I would use the legal means available to heal the consequences. This is also an extremely difficult situation for me in human terms. The approach of the Federal Government, its timetable and its lack of willingness to call on the conciliation committee leave me no choice. I would have preferred a joint result in the conciliation committee. However, you, the SPD-led *Länder* and the Federal Government, were not ready to agree to this. This lack of willingness to negotiate leads to the situation which we are now in.

I know that my approach is unique so far. However, with its attempt to force majorities, the Federal Government provokes such a reaction. Federal Minister Schily, we have also had several personal conversations. I have frequently spoken to you in the Conference of Ministers of the Interior. Why is it not possible to take this last step towards a compromise? I have an explanation for this which I do not wish to go into in too much detail. From a public policy point of view, you have thus missed the opportunity to adopt a statute which is important for the future of our people in a broad political consensus. The Members of the *Bundesrat* decide on their own responsibility. The Members of the *Bundesrat* will not give you a majority for your procedure.

11

As the competent Minister of the Interior, I cannot therefore agree to this Act. If a *Land* government fails to vote in unanimity, the votes of this government are invalid according to the prevailing legal opinion. This view has also been heard from the administration of the *Bundesrat*. I would like, after Mr. Gabriel has mentioned this, to quote three passages from a **legal opinion** which I have had written by Mr. Isensee, a reputable Professor of Law. In the summary of his evaluation, he writes:

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1. If the four representatives of the *Land* Brandenburg in the *Bundesrat* do not agree to a uniform vote, they cannot submit a valid vote. In the event of disagreement, the *Land* will be treated as if it were not participating in the ballot.

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In order to ensure the uniformity of the vote, there are coalition agreements – I am saying this now – and agreements in cabinets. If it is impossible to agree in the cabinets, which last occurred in 1949, this case applies. That is the point.

14

The second point which he mentions:

15

Without an agreement on the merits, there is no holder of the block

16

vote. The Minister-President would not be empowered to cast the *Land's* 'block vote'.

The third point:

Dissent among the representatives must be shown clearly in the debate in good time and also made known in the ballot.

I believe that I have **shown** this **dissent** clearly enough.

President, I am describing my position so clearly so that you are not surprised afterwards when calling on the *Land* Brandenburg. I will formulate my rejection of the Act loudly and unmistakably in the knowledge of Article 51 subsection 3 of our Basic Law, as well as of the resulting statutes and ordinances as described in the '*Handbuch des Bundesrates*' by Reuter. Please save us the trouble of expecting or asking for different voting conduct by making enquiries. The first statement will be clear and unmistakable. [...]" (Minutes of plenary proceedings 774, Stenographic Record, pp. 147 D 148 D, emphasis in the original).

"Ladies and Gentlemen, I cannot decide differently than I have shown here. My responsibility to our fatherland imposes this on me. I would like to close with the declaration of General von der Marwitz, a contemporary of Frederick the Great, who said: 'Chose disrepute where obedience brought no honour.' Thank you very much." (Minutes of plenary proceedings 774, Stenographic Record, p. 149 A).

dd) Following on from this, the President of the *Bundesrat* gave the floor to the Minister of the Interior of the *Land* North-Rhine/Westphalia, Dr. Fritz Behrens, and the Minister of Justice of the *Land* Rhineland-Palatinate, Herbert Mertin. Both Ministers argued in favour of the *Bundesrat* approving the Immigration Act, but without touching on the imminent ballot. Such a reference was however found in the subsequent speech of the Hesse Minister for Science and Art, Ruth Wagner. The speech by the Minister-President of the *Land* Brandenburg, Dr. Manfred Stolpe, followed. Minister-President Dr. Stolpe explained his reservations about the Immigration Act in the version sent to the *Bundesrat*. In doing so, he mentioned the public employment services, arrangements for protection against deportation, the practicability of the hardship arrangement and the sharing of the integration costs; he did not refer to the voting procedure.

Contributions followed by the Federal Minister of the Interior, Otto Schily, by the Minister-President of the Free State of Bavaria, Dr. Edmund Stoiber, once more by the Federal Minister of the Interior, by the Minister-Presidents of the Saarland and of Lower Saxony, by the Minister of the Interior of the Free State of Bavaria, Dr. Günther Beckstein, as well as again by the Federal Minister of the Interior. In none of these contributions was the voting procedure referred to again at all.

c) At the request of the President of the <i>Bundesrat</i> , the Director of the <i>Bundesrat</i> administration had drafted a memorandum re Article 51.3 sentence 2 of the Basic Law prior to the 774th session of the <i>Bundesrat</i> . This reads as follows:	24
“Re:Uniform vote casting in the <i>Bundesrat</i>	25
here: Ballot on the Immigration Act in the session of the <i>Bundesrat</i> on 22 March 2002	26
I.Memorandum	27
1.In accordance with Article 51.3 sentence 2 of the Basic Law, the <i>Bundesrat</i> votes of a <i>Land</i> can be cast only uniformly. <i>Land</i> law provisions of whatever nature do not affect this rule.	28
One case is known from the early history of the <i>Bundesrat</i> in which the votes of a <i>Land</i> were not cast uniformly: Two representatives of the same <i>Land</i> voted differently in the session of the <i>Bundesrat</i> on 19.12.1949. The President thereupon found that the votes of a <i>Land</i> can be cast only uniformly, and, since it was the <i>Land</i> in which he himself was Minister-President, he cast the votes for the <i>Land</i> himself (Stenographic Record p. 116). The matter was not examined in court at the time.	29
There is no case-law on the question of what consequences result from a breach of the principle of uniform vote casting. By contrast, legal science has dealt with the question.	30
According to a view put forward in isolated instances in the somewhat more recent literature, the Head of the Government is to have the casting vote in the event of contradictory voting conduct.	31
Stern, <i>Staatsrecht</i> , vol. II (1980), § 27 III 2; in a similar vein Blumenwitz, in: <i>Bonner Kommentar zum Grundgesetz, Art. 51</i> , marginal no. 29. Another view by v. Mangoldt/Klein, <i>Das Bonner Grundgesetz</i> , vol. II, 2nd ed. (1964), <i>Art. 51</i> Note III 4 b, according to which the <i>Land</i> in question is to be afforded the opportunity to consult an instruction from the <i>Land</i> government, is obsolete.	32
This view is not compatible with the clear wording of the Basic Law	33
for instance also Bauer, in: Dreier, <i>Grundgesetz-Kommentar</i> vol. II (1998), <i>Art. 51</i> , marginal no. 22, with further references,	34
and ignores the constitutional principle of the equal weight of the votes of the <i>Bundesrat</i> Members.	35
The very prevalent teaching hence rightly considers all votes of the <i>Land</i> in question to be invalid if they are not cast uniformly. [The references from public law literature following at this point are left out.].	36

2. In the event that the votes of a <i>Land</i> have not been cast uniformly in a ballot when called on by <i>Länder</i> , it should be suggested to the President to refer the representatives of the <i>Land</i> in question to the principle of uniform casting of the votes as follows:	37
‘In accordance with Article 51 subsection 3 sentence 2 of the Basic Law, the votes of a <i>Land</i> can be cast only uniformly. I therefore request a uniform answer to the balloting issue, otherwise the vote casting will be held to be invalid.’	38
Should the non-uniform vote casting continue to stand, he should make the finding that the <i>Land</i> in question has not cast a valid vote, and continue with the ballot.”	39
d) aa) After no further contributions were made, the President of the <i>Bundesrat</i> initiated the ballot. The <i>Bundesrat’s</i> Committee on Internal Affairs, which had special responsibility for this matter, and the Committee on Economic Affairs, had submitted the recommendation not to approve of the Immigration Act (<i>Bundesrat</i> document 157/1/02). No recommendation was made in the other <i>Bundesrat</i> committees, who also had their contribution to make (<i>Bundesrat</i> document 157/1/02). Since initially a majority had come out in favour of a conciliation procedure, the <i>Bundesrat</i> initially voted on the individual reasons for convocation. The corresponding applications of the Saarland (<i>Bundesrat</i> document 157/3/02) and of the <i>Land</i> Rhineland-Palatinate (<i>Bundesrat</i> document 157/2/02) however did not find a majority, so that the proposal to convoke the conciliation committee was rejected as a whole (see Minutes of plenary proceedings 774, Stenographic Record, p. 171 B – C).	40
bb) At the request of the <i>Land</i> Rhineland-Palatinate, in accordance with § 29.1 sentence 2 of the Rules of Procedure of the <i>Bundesrat</i> (<i>Geschäftsordnung des Bundesrates – GOBR</i>) in the version of the proclamation of 26.11.1993 (Federal Law Gazette I p. 2007, amended by proclamation of 25.11.1994, Federal Law Gazette I p. 3736, <i>Bundesrat</i> document 990/94 (<i>Beschluss</i>)) the ballot was then carried out by calling on the <i>Länder</i> .	41
cc) The President of the <i>Bundesrat</i> asked the keeper of the minutes to call on the <i>Länder</i> . According to the stenographic report of the <i>Bundesrat</i> session, this section of the session took place as follows:	42
“Dr. Manfred Weiß (Bavaria), minute-taker:	43
Baden-Württemberg Abstention	44
Bavaria No	
Berlin Yes	
Brandenburg	
Alwin Ziel (Brandenburg): Yes!	

Jörg Schönbohm (Brandenburg): No!	
President Klaus Wowereit: Hence I find that the <i>Land</i> Brandenburg has not voted uniformly. I refer to Article 51.3 sentence 2 of the Basic Law. Accordingly, votes of a <i>Land</i> can be cast only uniformly.	45
I ask Minister-President Stolpe how the <i>Land</i> Brandenburg votes.	46
Dr. h.c. Manfred Stolpe (Brandenburg): As Minister-President of the <i>Land</i> Brandenburg I respond here with Yes.	47
(Jörg Schönbohm (Brandenburg): You know my view, President!)	48
President Klaus Wowereit: Hence I find that the <i>Land</i> Brandenburg has voted Yes.	49
(Peter Müller (Saarland): That's impossible! – Roland Koch (Hesse): That just about takes the biscuit! – Further calls: That's unconstitutional! – They can't do that!)	50
– Minister-President Stolpe declared for Brandenburg that he, that the <i>Land</i> Brandenburg voted Yes. That isn't – –	51
(Roland Koch (Hesse): Mr. Schönbohm contradicted him! That's just not on, Mr. President!)	52
– That's the way it is. Then let's continue with the – –	53
(Peter Müller (Saarland): Even you are bound by the constitution, Mr. President! – Roland Koch (Hesse): No, that's not on! – Another call: Quite out of the question! You don't know the constitution!)	54
Then it goes on – – Let's continue with the ballot.	55
(Peter Müller (Saarland): No! – Roland Koch (Hesse): No, Mr. President! You're breaking the law!)	56
– No!	57
(Roland Koch (Hesse): Mr. President, no!)	58
– I asked at the second question whether Minister-President Stolpe will submit a declaration for Brandenburg. He did so. And – –	59
(Peter Müller (Saarland): Even you are bound by the Basic Law, Mr. President! – Roland Koch (Hesse): That's not on! No, Mr. President, no! – Further calls)	60
And now it is found – –	61
(Peter Müller (Saarland): The Basic Law applies to you too!)	62
Now it is found – –	63

(Roland Koch (Hesse): Oh yes! This is unbelievable, it's a simple violation of the law!)	64
I can --	65
(Roland Koch (Hesse): It's incredible!)	66
-- Yes Mr. -- Please --	67
(Roland Koch (Hesse): Mr. President, please break so we can talk about this! This is incredible!)	68
-- Please, Mr. Koch, please control yourself.	69
(Roland Koch (Hesse): No, I will not control myself!)	70
-- Yes.	71
(Roland Koch (Hesse): This is a manifest and intentional violation of the law! This can't go on! -- Further calls: A premeditated violation of the law! -- Bending the law!)	72
So once again --	73
(Roland Koch (Hesse): If Mr. Schönbohm had kept silent just now, that may be! But he said: Not me!)	74
I can --	75
(Roland Koch (Hesse): There are four votes! They have been cast differently and you must take note of this!)	76
I can -- I can also --	77
(Peter Müller (Saarland): Stop the session so that this question can be clarified! This isn't the way to do it! -- Roland Koch (Hesse): That really is the limit! -- Further calls)	78
I can also ask Minister-President Stolpe once again if the <i>Land</i> still has any questions to clarify.	79
(Roland Koch (Hesse): The <i>Land</i> doesn't have any questions to clarify! You are manipulating a decision of the <i>Bundesrat</i> ! Who do you think you are! -- Call: You are breaking the constitution!)	80
-- No!	81
(Roland Koch (Hesse): Mr. President, no! -- Further lively calls)	82
Minister-President Stolpe.	83
Dr. h.c. Manfred Stolpe (Brandenburg): As Minister-President of the <i>Land</i> Brandenburg, I say Yes.	84

(Roland Koch (Hesse): OK! and what does Mr. Schönbohm say?)	85
President Klaus Wowereit: OK, so then it's determined.	86
Let us continue the ballot.	87
(Call: Shocking!)	88
– continue the ballot.	89
(Dr. Bernhard Vogel (Thuringia): Please allow me to make a point of order!)	90
– You can make a point of order after the ballot. We are now voting.	91
Dr. Manfred Weiß (Bavaria), minute-taker:	92
Bremen Abstention	93
Hamburg Abstention	
Hesse Abstention	
Mecklenburg-Western Pomerania Yes	
Lower Saxony Yes	
North-Rhine/Westphalia Yes	
Rhineland-Palatinate Yes	
Saarland No	
Saxony No	
Saxony-Anhalt Yes	
Schleswig-Holstein Yes	
Thuringia No	
President Klaus Wowereit: That is the majority.	94
The <i>Bundesrat</i> has approved the Act.”	95
dd) At the request of the Minister-President of the <i>Land</i> Thuringia, Dr. Bernhard Vogel, the session was interrupted by the President of the <i>Bundesrat</i> . After the resumption of the session, the Hesse Minister-President Koch made the point of order “In the name of the federal <i>Länder</i> Bavaria, Baden-Württemberg, Hamburg, Hesse, Saarland, Saxony and Thuringia” that the President of the <i>Bundesrat</i> correct his determination of the ballot result on the Immigration Act (see Minutes of plenary proceedings 774, Stenographic Record, p. 173 B).	96
The President of the <i>Bundesrat</i> answered – once more quoting the memorandum of the Director of the <i>Bundesrat</i> administration – that he had acted according to the	97

memorandum (see Minutes of plenary proceedings 774, Stenographic Record, p. 174 C). Then, the Lower Saxony Minister-President Gabriel was given the floor on a point of order. He made a statement against the application of Minister-President Koch. Thereupon, the President of the *Bundesrat* found that the voting conduct was not corrected. The ballot had been correct, the necessary majority of 35 votes had been obtained (see Minutes of plenary proceedings 774, Stenographic Record, p. 175 A).

ee) An application of the Thuringian Minister-President Dr. Vogel to adjourn the *Bundesrat* session, which the Rhineland-Palatinate Minister-President Beck contradicted, did not obtain a majority. When the session was continued by calling the next item on the agenda, the representatives of the *Länder* Baden-Württemberg, Bavaria, Hamburg, Hesse, Saarland, Saxony and Thuringia left the plenary hall of the *Bundesrat* (see Minutes of plenary proceedings 774, Stenographic Record, p. 175 B C). 98

3. The original document of the Act was transmitted to the Federal President on 17 April 2002 for promulgation in accordance with Article 82.1 of the Basic Law (*Grundgesetz – GG*). The Federal President promulgated the Immigration Act on 20 June 2002 and commissioned the proclamation in the Federal Law Gazette, which took place on 25 June 2002. On the occasion of the promulgation, the Federal President in his official residence submitted a declaration in which he touched on the circumstances of the *Bundesrat* session of 22 March 2002 and explained the most important points of view in favour of his decision to promulgate the Act (press release of the Office of the Federal President of 20 June 2002). 99

C.II.

In accordance with Article 93.1 no. 2 of the Basic Law in conjunction with §§ 13 no. 6 and 76.1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*), the applicants have applied for a declaration of the Immigration Act as void because of the lack of consent of the *Bundesrat*. 100

1. Because of the administrative-procedure-law nature of individual provisions, the Immigration Act in its entirety is alleged to require consent in accordance with Article 84.1 of the Basic Law. The consent of the *Bundesrat* is said not to be granted because the *Land* Brandenburg had not voted uniformly. The legal consequence of divergent votes by the representatives of a *Land* is said to be that the votes of the *Land* are invalid. This is said to follow from the wording, as well as the meaning and purpose of Article 51.3 sentence 2 of the Basic Law, and to be based on the experience of constitutional history. 101

2. *Bundesrat* Members are alleged to be natural persons with their own vote, even if it can only be cast jointly with the other Members from the same *Land* in the interest of the representation of the *Land*. The Basic Law only required the success of the uniformity, and did not make any pronouncements on the way in which the representatives of the *Land* formed their determination. From the point of view of the Basic Law, this agreement took place on the basis of free understanding among equals. Therefore 102

the Minister-President of a *Land* also did not have a prominent status among the other *Bundesrat* Members of the same *Land*. The hierarchical structures within a *Land* government did not continue to apply in the *Bundesrat*, and the requirements of a *Land* constitution were also not significant to the external representation of a *Land* at the level of the federal constitution. The instruction that a Member of the *Bundesrat* received from the *Land* government was said to have no impact on vote casting.

3. The institution of the holder of the block vote developed in the practice of the *Bundesrat* is said to have no basis in constitutional law. The holder of the block vote announced the joint vote of the *Land* as the spokesperson of the *Bundesrat* Members belonging to a *Land*. His vote was said to be valid only if it was supported by the other Members, the block vote collapsing if a Member contradicted it during the ballot. Who appeared as holder of the block vote in the *Bundesrat* was determined by an agreement reached freely among the representatives of the *Land*. The equal status of the *Bundesrat* Members ruled out either the Minister-President personally nominating himself or herself holder of the block vote or being designated as such by the President of the *Bundesrat*. 103

4. Finally, the Basic Law is said not to entail an obligation to cast votes uniformly since Article 51.3 sentence 2 of the Basic Law only provided for a legal “possibility”, but not for an “obligation”. That the representatives of a *Land* agreed to a uniform vote was merely a legally unsanctioned “constitutional expectation”. For this reason, the President of the *Bundesrat* also had no right to strive to achieve a uniform vote by means of measures he took as chairperson of the session. The diverging voting conduct of the representatives of the *Land* Brandenburg did not constitute a violation of the principle of loyalty towards a constitutional body because the functionality of the *Bundesrat* was not impaired by the invalid vote of a *Land*. A non-uniform vote ultimately had the effect of a “No” or of an abstention. 104

5. When voting in the *Bundesrat*, Brandenburg Ministers Ziel and Schönbohm had evidently cast non-uniform votes, as had also been found by the President of the *Bundesrat* in this manner. Since Minister Schönbohm had already announced his voting conduct when he spoke in the plenary debate, a non-uniform vote had been cast by the *Land* Brandenburg with final effect. The President of the *Bundesrat* had hence also had no right to enquire. 105

It is submitted by way of alternative that the dissent among the Brandenburg *Bundesrat* Members had also continued after the first enquiry, so that further enquiries had not been permissible at the latest from this time on. 106

D.III.

The *Bundestag*, the *Bundesrat*, the Federal Government and the governments of the *Länder* had the opportunity to make statements in accordance with § 77 no. 1 of the Federal Constitutional Court Act. 107

1. The Federal Government considers the application for proceedings on the constitutionality of a statute to be unfounded. The Immigration Act had allegedly come about constitutionally. 108

a) The ballot in the *Bundesrat* of 22 March 2002 met with the constitutional requirements. The President of the *Bundesrat* had the right to proceed in the sessions of the *Bundesrat* according to his duty-bound discretion, he had to chair them fairly, without bias and in accordance with the Rules of Procedure. In the context of this function as chairperson, he had discretion within the meaning of an interpretation prerogative within the sessions and ballots. It followed from the *Bundesrat's* status as a constitutional body that it had an individual sphere as regards the Federal Constitutional Court which was amenable to court examination only in the event of arbitrariness or evident impropriety. 109

b) The uniform casting of the votes of a *Land* as presupposed in Article 51.3 sentence 2 of the Basic Law also had a direct impact on the President of the *Bundesrat*. On the basis of the view that the votes of the *Bundesrat* Members of a *Land* were invalid if they were not cast uniformly, it was said to be the constitutional task of the President of the *Bundesrat* to afford the *Land* in question the opportunity to cast a valid vote. Invalid vote casting violated a vital political interest of the *Land* in question. 110

c) The principle of the uniform vote casting is also said to emphasise the function of the *Bundesrat* Members as representatives of their governments which took precedence over their individual freedom to decide. The Members of the *Bundesrat* exercised the votes of their *Land* since the will of the *Länder* was expressed in the *Bundesrat*. 111

d) The central position of the *Länder* as representatives of opinion in the *Bundesrat* gave rise to and legitimised the institution of the block vote. The exercise incorporated therein was said to have been introduced to prevent votes not being cast uniformly. The holder of the block vote was said to effectively announce the votes of the *Land* insofar as other *Land* representatives present did not contradict it. In response to the question put by the President of the *Bundesrat*, Minister-President Dr. Stolpe had claimed the block vote, Minister of the Interior Schönbohm had initially not contradicted with the necessary clarity and – after a new vote had been cast by the Minister-President – not at all. 112

e) aa) The *Bundesrat* Members were furthermore said to be subject to instructions by their government, and to be bound by the instruction of their Minister-President the context of a guideline competence. This ensued in a reversal conclusion from Article 53a.1 second half of sentence 3 of the Basic Law and Article 77.2 sentence 3 of the Basic Law. The Basic Law was said in Article 51.3 first half of sentence 2 of the Basic Law to presume procedures at *Land* level in which uniformity was guaranteed and instructions could be given. The President of the *Bundesrat* was obliged to afford adequate scope for such processes. 113

bb) The Minister-President of the *Land* Brandenburg was said to determine the guidelines of government policy in accordance with Article 89 sentence 1 of the Brandenburg Constitution. He was therefore also entitled to issue individual instructions in individual cases of particular political significance. The guideline competence thus understood was said to also encompass the voting conduct of the Members of the *Bundesrat*. By his declaration, Minister-President Dr. Stolpe had availed himself of the guideline competence to which he was entitled. 114

cc) The dissent initially existing between the *Bundesrat* Members of the *Land* Brandenburg had been resolved during the ballot. The ballot continued until the President of the *Bundesrat* determined the result. This was in line with § 32 sentence 1 of the Rules of Procedure of the *Bundesrat*, in accordance with which the decisions of the *Bundesrat* do not take effect until the session is concluded. 115

Accordingly, it was possible to deliberate and vote on procedural matters in accordance with § 32 sentence 2 of the Rules of Procedure of the *Bundesrat* until such time as their treatment was concluded in the legal sense. 116

dd) Brandenburg's vote casting had not been terminated after the statements of Ministers Ziel and Schönbohm. Rather, at that time, there had not yet been a vote by the *Land*. The Brandenburg *Bundesrat* Members had brought about their consensus on the voting conduct only in the course of the voting procedure, at the latest with their reply to the second enquiry of the President of the *Bundesrat* to Minister-President Dr. Stolpe. With the enquiries, the President of the *Bundesrat* had brought about the constitutionally required clarity of the voting conduct. Were ambiguities to exist, the Minister-President was the constitutionally correct point of contact. 117

ee) In accordance with the principle of federal comity, the President of the *Bundesrat* had been obliged, over and above this, to afford to *Land* constitutional law scope for a solution in case of a constitutional conflict within a *Land*. 118

f) Also the only case as yet of non-uniform voting of a *Land* in the *Bundesrat* in the 10th session of the *Bundesrat* of 19 December 1949 favoured the coming about of the Immigration Act. At that time, the contradicting votes of two Ministers of the *Land* North-Rhine/Westphalia had been neutralised by the then Minister-President of the *Land* casting the votes uniformly. 119

2. The government of the *Land* Mecklenburg-Western Pomerania takes the view that the *Bundesrat* effectively voted for the Immigration Act. 120

The declarations of the parties in the *Bundesrat* session of 22 March 2002 were allegedly a uniform vote casting of the *Land* Brandenburg. The fact of Minister Ziel casting the vote for the *Land* Brandenburg was to be regarded as the visible declaration, binding on the *Land* Brandenburg, that the Act was agreed to. If the government of a *Land* had decided to empower a Member of the *Bundesrat* to cast a vote, another Member could not contradict that by casting a divergent vote. Otherwise, a single Member could make all the votes of the *Land* invalid. 121

As an alternative, it had to be presumed that clarification could and should take place in the event of a vote being cast non-uniformly. The declaration of the Brandenburg Minister-President in response to an enquiry by the President of the *Bundesrat* had to be considered such a clarification. With his declaration, the Minister-President had claimed for himself the function of the holder of the block vote, whilst at the same time making use of his guideline competence. The conduct of Minister Schönbohm could not be evaluated as an explicit contradiction. 122

Furthermore, *Land* constitutional law led one to conclude that the Minister-President held the casting vote in the event of a conflict. State practice and the competences of the Minister-President determined by the *Land* Constitution gave rise to his or her mandate towards the other *Land* representatives in the *Bundesrat* to ensure a constitutionally correct voting conduct. 123

The legal consequence of a violation of Article 51.3 sentence 2 of the Basic Law was the ineffectiveness of the ballot as a whole. The presumption of the invalidity of the votes of a *Land* when a vote is cast non-uniformly was said ultimately to mean a content decision, namely to refuse to consent. Such a consequence of a procedural error could not be derived from the Basic Law. 124

3. The government of the *Land* Lower Saxony is of the view that the Immigration Act has come about in accordance with Article 78 of the Basic Law. 125

The votes of the *Land* Brandenburg had allegedly been uniformly cast. The President of the *Bundesrat* had correctly evaluated the conduct of the Brandenburg Minister of the Interior in factual terms such that the latter had not maintained his divergent voting conduct to the last moment of the voting by Brandenburg. 126

The arrangement of the voting conduct in the *Bundesrat*, as made by Article 51 of the Basic Law, was from a variety of points of view dependent on decisions and arrangements at *Land* level. This included the guideline competence of the Minister-President for government policy provided for in Article 89 sentence 1 of the Brandenburg Constitution. In cases in which on casting the vote in the *Bundesrat* on behalf of a *Land* different declarations were made by the departmental ministers, the Minister-President had the right on the basis of the guideline competence and of his or her special role to decide finally on the vote casting of the *Land*. 127

4. The government of the *Land* North-Rhine/Westphalia submits that voting in the *Bundesrat* by the holder of the block vote has developed as an unwritten procedural law. Since the Basic Law did not make provision for an arrangement on the exercise of the block vote because the question was concerned with *Land* organisational law, the question as to the person of the holder of the block vote was answered by means of arrangements or agreements at *Land* level. The *Land* Brandenburg provided in its Constitution for the guideline competence of the Minister-President; the voting conduct in the *Bundesrat* fell in its area of application, and Brandenburg's Minister-President had exercised the guideline competence by casting his vote on enquiry of 128

the President of the *Bundesrat*. Moreover, also no further *Bundesrat* Member of Brandenburg present had contradicted the block vote of the Minister-President. It was one of the duties of the President in chairing the *Bundesrat* to ensure that proper procedure was followed in the session, in particular constitutional voting. Where there are doubts as to the uniformity of the vote casting of a *Land*, also the constitutional principle of *Länder* comity requires an enquiry.

5. In its statement, with which the *Land* Berlin has concurred, the government of the *Land* Rhineland-Palatinate puts forward the view that the application for proceedings on the constitutionality of a statute is unfounded. 129

It is alleged to follow from the prohibition of non-uniform vote casting in accordance with Article 51.3 sentence 2 of the Basic Law that the President of the *Bundesrat* has the right to afford, by an enquiry, the representatives of the *Land* the possibility to cast a constitutional vote. Where there was an evident constitutional breach, as occurred in the case of the Immigration Act, the President of the *Bundesrat* indeed had a duty to strive to achieve a constitutional result. Since the vote casting of Brandenburg had been unclear, the President of the *Bundesrat* had rightly enquired. The Minister-President of Brandenburg had claimed the block vote by making reference to his office in the context of the vote casting, and the other *Bundesrat* Members of the *Land* had not contradicted this. Hence the conclusion suggested itself that it had been a matter of block vote elected in an implied consensus. 130

6. The government of the *Land* Schleswig-Holstein submits that the *Land* Brandenburg in the final analysis had voted uniformly by the Minister-President of Brandenburg having assumed the block vote in the course of the ballot, in accordance with Article 89 sentence 1 of the Brandenburg Constitution, and by the other Brandenburg *Bundesrat* Members not having explicitly contradicted it. The guideline competence guaranteed by the Constitution of the *Land* also covered the voting conduct of the Members of the *Bundesrat* where the matter was a question of fundamental significance. The exercise of the guideline competence by calling on the block vote could also take place informally in a *Bundesrat* session. If a *Bundesrat* Member wished to diverge from the instruction that had been issued thereby, he or she would have to insist explicitly on their divergent vote. 131

E.IV.

The Federal Constitutional Court held an oral hearing on 23 October 2002 at which the applicants, the Federal Government and the *Land* governments of Berlin, Lower Saxony and Mecklenburg-Western Pomerania explained and went into greater detail on their legal points of view. 132

F.B.

The application for proceedings on the constitutionality of a statute is admissible. In accordance with Article 93.1 no. 2 of the Basic Law, in the event of differences of opinion or doubts as to the formal and material compatibility of federal law with the 133

Basic Law, the Federal Constitutional Court decides at the request of a *Land* government. In accordance with § 76.1 no. 1 of the Federal Constitutional Court Act, the application filed by the *Land* governments of Baden-Württemberg, Bavaria, Hesse, Saxony, Saarland and Thuringia is admissible; the applicants consider the Immigration Act to be incompatible with the Basic Law.

G.C.

The application for proceedings on the constitutionality of a statute is well-founded. The Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners of 20 June 2002 – Immigration Act – (Federal Law Gazette I p. 1946) is incompatible with Article 78 of the Basic Law, and hence void. Because of the provisions concerning the administrative procedure to be carried out by the authorities of the *Länder* that it contains, the Immigration Act in its entirety requires the consent of the *Bundesrat* in accordance with Article 84.1 of the Basic Law. There was no majority of *Bundesrat* votes, which is required in accordance with Article 52.3 sentence 1 of the Basic Law for such consent. The President of the *Bundesrat* was not permitted to count the casting of the votes for the *Land* Brandenburg as agreement (I). Since there was no agreement of the *Land* Brandenburg to the Act, also the determination by the President of the *Bundesrat* which took place after the other *Länder* had been called on that the *Bundesrat* had agreed with the Act could not become legally effective (II).

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H.

I.I.

There is no agreement of the *Land* Brandenburg to the Immigration Act because when the *Land* was called on, the votes were not cast uniformly (1). The non-uniformity of the votes cast by Brandenburg was not eliminated by the further course of the ballot (2).

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1. a) The *Bundesrat* is a collegiate constitutional body of the Federation which consists of Members of the *Land* governments (see Article 51.1 sentence 1 of the Basic Law). It is not formed from the *Länder*. Article 50 of the Basic Law only describes the function of this federal constitutional body by stating: “The *Länder* participate through the *Bundesrat* in the legislation and administration of the Federation and in matters related to the European Union.” This participation takes place, not directly, but by the agency of the Members of the *Bundesrat* coming from the midst of the *Land* governments (see Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 8, 104 (120)). The *Länder* are in each case represented by their *Bundesrat* Members who are present.

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The votes of a *Land* are cast by its *Bundesrat* Members. The person from among these representatives who will cast the votes of a *Land* is as a rule determined by the representatives themselves or by the respective *Land* government in the run-up to a

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Bundesrat session. The Basic Law expects a uniform casting of the votes and respects the practice of the block vote, the holders of which are designated by each *Land* autonomously, without in turn interfering in the constitutional sphere of the *Land* with instructions and determinations.

It follows from this conception of the Basic Law for the *Bundesrat* that the casting of the votes by a holder of the block vote at any time can be contradicted by another *Bundesrat* Member of the same *Land*, and that the preconditions of the block vote hence cease to apply altogether. The President of the *Bundesrat* therefore accepts the vote of an individual *Bundesrat* Member as the casting of the votes for the whole *Land* unless another Member of the respective *Land* casts a divergent vote. 138

b) The votes of a *Land* are to be cast uniformly in accordance with Article 51.3 sentence 2 of the Basic Law. The act of casting of the vote is the voluntary announcement of the votes of a *Land*. Where several votes are cast by the *Bundesrat* Members of a *Land*, they must coincide. 139

Here, the *Land* Brandenburg called on in the voting procedure did not cast its four votes uniformly. In accordance with the requested type of voting by calling on the *Länder* in accordance with § 29.1 sentence 2 of the Rules of Procedure of the *Bundesrat*, the chairing President of the *Bundesrat* through his minute-keeper addressed the question to the *Bundesrat* Members present from the individual *Länder*, who cast its votes for the respective *Land*. In the present case, *Bundesrat* Member Ziel initially answered “Yes” for Brandenburg, directly following which *Bundesrat* Member Schönbohm responded “No”. The Brandenburg Minister-President Dr. Stolpe and Minister Prof. Dr. Schelter – *Bundesrat* Members also present – did not respond when the *Land* was called on. From the unambiguous declarations of *Bundesrat* Members Ziel and Schönbohm, it followed that the casting of the votes by the *Bundesrat* Members of the *Land* Brandenburg was non-uniform within the meaning of Article 51.3 sentence 2 of the Basic Law. The President of the *Bundesrat* correctly determined this formally directly after the casting of the votes (Minutes of plenary proceedings 774, Stenographic Record, p. 171 C). 140

2. During the ensuing course of the ballot, the non-uniformity of votes cast on the part of the *Land* Brandenburg was not resolved and changed to a uniform concurring vote. The course of the ballot which followed is no longer legally relevant because it took leave of the constitutionally required form of the voting procedure. In a voting procedure belonging to the legislation procedure, conduct that is contrary to the required form cannot change the legal impact of the preceding conduct that did correspond to such requirements as to form. The President of the *Bundesrat* as chairman had in this particular case no right to enquire of Minister-President Dr. Stolpe (a). If one nevertheless were to presume such a right, the enquiry should have been addressed not only to the Minister-President, but also at least to Minister Schönbohm (b). 141

a) After making his determination that the *Land* Brandenburg had not voted uniform- 142

ly, the President of the *Bundesrat* was not permitted to ask *Bundesrat* Member Dr. Stolpe how the *Land* Brandenburg voted. Such a question took leave of the form of calling on by *Länder* that had been selected with the voting procedure, and hence required a separate justification, which was lacking here.

aa) Where ambiguities occur in the course of the ballot, the President of the *Bundesrat* presiding over the ballot is in principle entitled to bring about a clarification with suitable measures and to work towards an effective vote by the *Land*. This corresponds to his or her duty as an unbiased session chair on whom the task is incumbent to clearly determine the will of the *Bundesrat* in the legislative procedure. Article 78 of the Basic Law in conjunction with the rule-of-law principle requires determining the will of the participating constitutional bodies in such a way that it is attributable to the constitutional bodies; this applies to the formal statutory order of the *Bundestag*, as well as to the agreement of the *Bundesrat*. When in this respect ambiguity as an occasion for enquiries must be presumed can be examined by the constitutional court; nevertheless, the chairing President of the *Bundesrat* has in this respect a prerogative for assessment. The right to enquire however ceases to apply if a uniform *Land* will recognisably does not exist and it cannot be expected in view of the overall circumstances for such a will to yet come into being during the ballot.

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The intention of the *Land* Brandenburg to vote non-uniformly was evident. *Bundesrat* Member Schönbohm had presented his political position in unmistakable form in the plenary debate immediately before the ballot. He would not agree to the Act, and he would formulate his rejection loudly and clearly in knowledge of Article 51.3 of the Basic Law (see Minutes of plenary proceedings 774, Stenographic Record, p. 147 C – D). *Bundesrat* Member Schönbohm had additionally also clearly outlined the goal of his conduct. He wished with his “No” to prevent uniform casting of the Brandenburg votes (see Minutes of plenary proceedings 774, Stenographic Record, p. 148 A – B). It was also generally known that the Brandenburg *Land* government had not passed a ruling on the casting of the *Land*’s votes. Certain of the contributions to the plenary debate, as well as the careful legal preparation by the parties involved, demonstrate that a uniform political *Land* decision was not determined prior to the *Bundesrat* session, nor was it expected to be achieved in the course of the session – there was clarity as to the dissent. The lack of uniformity was then formally declared as expected when the *Land* Brandenburg was called on.

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bb) In this atypical case in which there was, from the beginning of the vote, certainty about the intended non-uniform casting of the votes, the person presiding over the session had merely the duty to record this. With the subsequent enquiry to the *Bundesrat* Member Dr. Stolpe, the President of the *Bundesrat* interfered in the area of responsibility of the *Land*, and created the impression that it was now a matter of finding out the “real *Land* will”, or indeed of striving to achieve a uniform casting of the votes after all. The President of the *Bundesrat* was not entitled to influence the voting conduct of the *Land* Brandenburg in such a manner under the given circumstances.

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In contradistinction to the situation encountered in the 10th session of the *Bundesrat* of 19 December 1949, it could not be presumed that there was only confusion which required clarification to restore a clear situation in the course of the ballot. In the ballot held at that time, there had been no indication that political powers in the North-Rhine/Westphalian *Land* government were in unbridgeable opposition as to agreement to or rejection of the Act in the *Bundesrat*. From the overall circumstances, anyone had to conclude that it was not clear for which attitude the *Land* North-Rhine/Westphalia had opted in the cabinet (see in this respect *Bundesrat*, Minutes of 23.12.1949, p. 116 B – C). Whether the conduct of the then President of the *Bundesrat* corresponded to the constitutional requirements in every detail does not require discussion in the instant case. In such a case of non-uniformity, which had been unintentional and which had not been announced in advance, the President was permitted to take clarification measures in order to avoid a situation in which an allegedly uniform *Land* will has no impact simply because of a possible error. 146

In the 774th session of the *Bundesrat*, which is to be assessed here, the case was different. There had evidently not been a uniform will on the part of the *Land* – on the contrary. This was also the conclusion reached by all legal considerations of those concerned. Since in view of this initial situation it could not be expected for such a will to yet come into being during the ballot, there was no scope for an enquiry addressed to the Minister-President of the *Land* Brandenburg. 147

As there was no need to clarify, the enquiry addressed to the Minister-President of a *Land* by the President of the *Bundesrat* could only be justified if a Minister-President had been permitted to overrule in the ballot the casting of the votes by the other *Bundesrat* Members of the *Land*, be it that he could claim a right of instruction in the *Bundesrat*, be it that this was the only way to avert a threatened breach of the federal constitution. 148

Neither condition was met. Ranking within *Land* constitutional law has no role to play at federal level. The holder of a guideline competence under *Land* law has no prominent status under federal constitutional law permitting him or her to overcome a voting dissent of two other Members present solely by announcing his or her will. The instruction under *Land* law to *Bundesrat* Members, which is permitted by the Basic Law in the *Bundesrat* – unlike in the Joint Committee (Article 53a.1 sentence 3 of the Basic Law) or in the conciliation committee (Article 77.2 sentence 3 of the Basic Law) – is that of the *Land* government, not of the holder of the guideline competence. If there is no instruction of the *Land* government, and if a *Land* and the Members representing its *Land* government vote non-uniformly, this is not unconstitutional. Article 51.3 sentence 2 of the Basic Law merely prohibits accommodating a *Land* will that is split in the ballot result of the *Bundesrat* by splitting the votes of the *Land*. 149

b) Even if the President of the *Bundesrat* had had in principle a right to enquire, he would have been allowed to exercise it only in the neutral form required. For this, the *Land* Brandenburg would have had to be called on again, and hence the question of 150

how the *Land* would have had to be addressed to all *Bundesrat* Members of the *Land* who were present. However, if the President chairing the session decided for a question addressed directly to a Member, it was indispensable, after the “Yes” of the Minister-President, to subsequently address at least to Minister Schönbohm the question as to whether he wished to stand by his “No” after the vote had been cast by the Minister-President. By the question to Minister-President Dr. Stolpe, and his answer, it may be that a need for clarification had come about as to whether Minister Schönbohm would also stand by his “No” in direct confrontation with his Minister-President. The duty to ask both Members present was further amplified by the interruption by *Bundesrat* Member Schönbohm. Irrespective of the question of whether an interruption which, neither by a – renewed – calling on of the *Land*, nor by a word directed by the chair to Minister Schönbohm, attained the required form can at all be a legally effective announcement in the formal ballot, at least as to the content of the interruption a change of the No vote to a Yes vote or a recognition of the Minister-President’s block vote could not be concluded without a clarifying enquiry.

J.II.

1. The determination of the President of the *Bundesrat* that the *Land* Brandenburg had voted “Yes”, made formally directly after the interruption which was recorded in the minutes of *Bundesrat* Member Schönbohm (see Minutes of plenary proceedings 774, Stenographic Record, p. 171 D), was erroneous because Brandenburg did not vote uniformly. 151

The ballot was not re-opened for the *Land* Brandenburg after this invalid determination of the President of the *Bundesrat*. In response to reserves from the plenary, the President of the *Bundesrat* merely posed the following question: “I can also ask Minister-President Stolpe once again if the *Land* still has any questions to clarify.” This was not a question that complied with the form of the ballot. Neither was the *Land* called on once again, nor was also only a single Member asked to cast the votes of the *Land*. The statement of the President of the *Bundesrat*: “OK, so then it’s determined” following the renewed positive declaration of *Bundesrat* Member Dr. Stolpe merely confirmed the formal determination taken before of an agreement of the *Land* Brandenburg (see Minutes of plenary proceedings 774, Stenographic Record, p. 172 C). That Minister Schönbohm in turn did not speak again in response to the statement by Minister-President Dr. Stolpe in order to confirm the continuing dissent is irrelevant in this context. Minister Schönbohm’s silence can be neither considered to be a legal declaration, nor is there a duty to interrupt without invitation. 152

2. Since there was no valid agreement from the *Land* Brandenburg, also the determination made after calling on the other *Länder* that the *Bundesrat* had agreed to the Act had no legal effect.

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Hassemer

Sommer

Jentsch

Broß

Osterloh

Di Fabio

Mellinghoff

Lübbe-Wolff

**Dissenting opinion of Judges Osterloh and Lübbe-Wolff on the judgment of
the Second Senate of 18 December 2002**

– 2 BvF 1/02 –

K.I.

We concur with the Senate majority that the *Land* Brandenburg initially did not vote uniformly in the ballot on the Immigration Act. Were this to be the final finding – in this too we concur with the Senate majority – the Immigration Act would not have effectively been confirmed in the *Bundesrat* for lack of a sufficient number of valid Yes votes. The non-uniform vote casting in the first round however did not continue to apply. In contradistinction to the Senate majority, we are of the view that the President of the *Bundesrat* with his enquiry, in response to the non-uniform vote casting, as to how the *Land* Brandenburg voted, opened a new round of voting that was no longer dependent on the votes cast in the first round, but on whether the *Land* now would cast its votes uniformly. This took place. The Minister-President of the *Land* in the second round voted “Yes”. Minister Schönbohm no longer opposed this with a statement clearly identifiable as a vote casting. 154

The legal view on which the judgment is based, by contrast, claims that an effective correction of the first non-uniform vote casting did not take place because the President of the *Bundesrat* had not been entitled to enquire, and certainly not in the manner in which it took place, and that therefore no new round of voting had hence been opened by virtue of his making an enquiry in breach of his duty, so that the original “No” of Minister Schönbohm, which could not be annulled by a contrary vote casting, remained in force. In the final analysis, this legal view ignores the right of the *Land* Brandenburg to correct the non-uniform vote casting from the first round. 155

L.II.

The allegation of the applicants that “once an unmistakable vote was cast” it was “not revisable”, and hence was to be registered without enquiry by the President of the *Bundesrat*, has no foundation in the applicable constitutional law and law relating to rules of procedure. The *Land* Brandenburg was entitled to correct the voting conduct shown in the first round (1.). Even if the presumption of the Senate majority were to be correct that the President of the *Bundesrat* was not entitled to enquire subsequent to the first non-uniform ballot, the consequence of this would not have been that no effective corrective vote casting of the *Land* Brandenburg could have taken place in the second round (2.). The President of the *Bundesrat* was moreover very much entitled to enquire in the concrete situation (3.). Also, there were good reasons for the form of the enquiry. Furthermore, even if one held the form of the enquiry to be erroneous, the legal consequences cannot be assigned to such an error that the Senate majority assigns to it (4.). The *Land* Brandenburg effectively used its right of correction in the second round, and uniformly voted “Yes” (5.). 156

1. a) If one presumes that an effective vote casting of the *Land* itself had not yet tak- 157

en place at all in the first round because of the non-uniformity of the vote casting of two Brandenburg Ministers (for instance in the instant proceedings the statement by the *Land* Lower Saxony; see also v. Mutius/Pöbe, *Landes- und Kommunalverwaltung – LKV* 2002, p. 345 (348); Meyer, in: id. (ed.), *Abstimmungskonflikte im Bundesrat im Spiegel der Staatsrechtslehre* (about to appear), p. 153; another view in Lerche, *Bayrische Verwaltungsblätter – BayVBl* 2002, p. 577 (578); Gröschner, *Juristenzeitung – JZ* 2002, p. 621 (623)), it can be concluded from this alone that the *Land* had still to be afforded the opportunity to cast its votes. In this context, it is presumed that two forms of error in a ballot can be distinguished: ineffectiveness that already affects the act of voting (the vote was not actually cast in the legal sense) and ineffectiveness which only affects the transmission of the content of the vote (the vote was cast, but is counted as invalid, i.e. neither as a vote for one of the alternatives available, nor as an abstention).

The wording of Article 51.3 sentence 2 of the Basic Law speaks for the need of such a distinction and for the supposition that the non-uniform statement of the Brandenburg Ministers through the vote casting of the *Land* falls in the first category. Accordingly, the votes of a *Land* “can” only be cast uniformly, and only by Members present or their substitutes. This wording suggests that, in contradistinction to for instance the use of the word “may”, it is not the validity, but the very possibility of a non-uniform vote casting of the *Land* that is to be ruled out. The position of the requirement of uniformity in its context is in the same vein. In Article 51.3 sentence 2 of the Basic Law, this requirement is listed in the same line as the presence of the voting *Bundesrat* Members: “The votes of each *Land* can be cast only uniformly and only by Members present or their substitutes”. There is no doubt as to how the case should be treated if *Bundesrat* Members Ziel and Schönbohm had not been present at the session in question, but had tried to send off the votes of the *Land* Brandenburg to the session by fax from Potsdam. No one would have contested that the President of the *Bundesrat* in this case, after taking note of the faxes received, should have asked the representatives of the *Land* Brandenburg present in the room how the *Land* Brandenburg voted, and that if he had not asked this question on his own authority, the representatives of the *Land* Brandenburg present would have been able to require that the *Land* be afforded the opportunity to cast a vote. If in the event of a ballot by absentees it is to be presumed that here a casting of the votes of the *Land* which could block in any way the casting of the *Land* votes by other representatives present did not take place at all, it therefore seems reasonable to presume the same also for the case of non-uniform vote casting. Article 51.3 sentence 2 of the Basic Law states the requirements of presence and uniformity directly next to each other and without any gradation. There would therefore have to be special reasons for the presumption that non-adherence to these requirements is to be linked to different legal consequences.

The fact that the opinion quite prevalent in the literature to date regards votes that are not cast uniformly as invalid cannot be taken as a statement regarding the ques-

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tion of whether the *Land* votes have been cast at all if two Ministers do not cast their vote uniformly. Until the dispute arose on whether or not the Immigration Act was confirmed, there was so little awareness on the distinction between *Land* votes being cast invalidly and not being cast at all in the discussion on the legal consequences of non-uniform vote casting by several *Land* representatives that the use of the word “invalid” cannot be interpreted as a vote for one or other alternative. For a long time, no one thought of the possibility and the consequences of this distinction, as there was no dispute that had required the distinction. A late example of this is provided by the written application in the instant proceedings. Aiming to establish the legal consequence of invalidity, the applicants had argued here that if votes were cast non-uniformly by several *Land* representatives, these were acting not for the *Land*, but had to be judged to be “private” votes. They only placed this categorisation in perspective in the oral hearing after the statement of the *Land* Lower Saxony had introduced the distinction between *Land* votes cast invalidly and not cast at all, and it had become clear that, if one were to take account of this distinction, the presumption that the Ministers’ votes that were not cast uniformly were not to be judged as *Land* votes is not in the applicants’ interest.

It also cannot be put forward against the presumption that the vote casting of the *Land* had not taken place at all in the first round that the President of the *Bundesrat* himself had subsequently determined that “the *Land* Brandenburg has not voted uniformly”. This determination need not be understood such that it is conditional on the existence of a vote having been cast (as claimed however by Gröschner, *ibid.* p. 623). Apart from this, also in view of the state of discussion at that time, the wording chosen may not be interpreted as taking up a position in the contentious question of legal dogmatics concerned here. Moreover, a point of view formulated in this respect of the President of the *Bundesrat* in the framework of the chairing of the session would not be relevant *ipso iure* to the interpretation of Article 51.3 sentence 2 of the Basic Law. A view of the President of the *Bundesrat* on this question expressed in the procedure would be legally significant at best if it could be regarded as confirming a corresponding state practice. This is however not the case. In the only previous case of non-uniform vote casting by the representatives of a *Land* in the *Bundesrat*, after all the *Länder* had been called on in sequence to cast their votes, and when North-Rhine/Westphalia was called on Ministers Halbfell and Dr. Weitz had cast diverging votes, the then President of the *Bundesrat* had described the voting situation with the words: “Now there is not yet a vote from North-Rhine/Westphalia.” (*Bundesrat* minutes no. 10 of 23 December 1949, p. 116). Also in the minutes at that time the non-uniform statements by the Ministers were not noted as vote casting by the *Land*, but as interruptions by the Ministers (*ibid.*). It is irrelevant whether this historical choice of wording and minute-taking is to be afforded any legal relevance whatever – it certainly does not mark the start of a state practice according to which non-uniform Ministers’ votes are to be valued as *Land* votes which are “invalid but cast”. These circumstances all suggest that there are good reasons after the non-uniform statements of the *Bundesrat* Members Ziel and Schönbohm in favour of a decision that as yet no

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vote had been cast that was legally attributable to the *Land* Brandenburg at all, so that as the vote proceeded a still unused right of the *Land* to cast its votes had to be accommodated, and the President of the *Bundesrat* hence was not only entitled but indeed obliged to enquire.

If there were to be an opposing legal view, the constitutional court's case-law should have been taken into account in accordance with which only a legally evident error in the legislative procedure leads to the nullity of the legal provisions in question (see BVerfGE 34, 9 (25); 91, 148 (175); see also BVerfGE 31, 47 (53)). The question as to whether or not after the non-uniform vote by two Brandenburg *Bundesrat* Members a vote by the *Land* had already been cast as such was certainly not evidently to be answered in the first sense. 161

b) Even if one were to presume that an – invalid – vote had already been cast by the *Land* in the shape of the non-uniform vote by two *Land* Ministers, the *Land* certainly had the right to correct this vote. 162

In accordance with § 32 sentence 1 of the Rules of Procedure of the *Bundesrat*, the decisions of the *Bundesrat* become effective at the end of the session. The fact that until then a repeat of rounds of voting is not in principle ruled out emerges from § 32 sentence 2 of the Rules of Procedure of the *Bundesrat*. This provision only provides for a prohibition of renewed deliberation and voting on items the treatment of which is concluded for cases in which a *Land* opposes the renewed treatment. If a ballot result is doubted in a direct connection with its announcement by the President of the *Bundesrat*, the ballot is deemed not yet to have been concluded, with the consequence that the repetition is not to be regarded as a “new” ballot within the meaning of § 32 sentence 2 of the Rules of Procedure of the *Bundesrat*, and hence is admissible even against the opposition of a *Land* (so-called “unreal repetition”, see Reuter, *Praxis-handbuch Bundesrat*, 1991, marginal no. 16 re § 32 of the Rules of Procedure of the *Bundesrat*). It certainly does not yet bindingly follow from the restriction on the possibility of repetition provided for in § 32 sentence 2 of the Rules of Procedure of the *Bundesrat* that repetition is permissible without restriction in all cases not covered by it and can be called for (see also Reuter, *ibid.*, marginal no. 23 re § 32 of the Rules of Procedure of the *Bundesrat*). The Rules of Procedure do not contain a conclusive explicit provision in this respect. The state practice is therefore significant for its interpretation in this point (on the significance of the state practice for the interpretation of Rules of Procedures see BVerfGE 1, 144 (148-149); BVerfGE 91, 148 (171)). 163

It is a constant custom in the practice of the *Bundesrat* that the President of the *Bundesrat* has a ballot or a part of it repeated if a party to the ballot so requests. As shown by the plenary minutes of the past years, this takes place once or more in roughly half the sessions. In many cases, in such instances those who request the repetition do not state a reason for this request. Indeed, an enquiry of the President of the *Bundesrat* as to the reason does not take place in these cases. Custom hence evidently does not presume that repetitions are permissible exclusively to resolve ambiguities 164

or errors in the voting procedure, but not for instance because of changes of will, since if the permissible reasons for repetition were to be restricted in this manner, the President of the *Bundesrat* would have to examine in each instance whether a permissible reason for repetition pertains.

The principle of generous treatment of requests for repetition which is based on the state practice described, hence claims validity not only for the standard form of the vote by raising hands dominant in practice (§ 29.1 sentence 1 of the Rules of Procedure of the *Bundesrat*). Repetitions naturally take place above all with this type of voting because counting errors, other errors and ambiguities may easily take place. One may however not conclude from this that different principles apply to the practice of recording votes by calling on the *Länder* which is less error-prone in this respect (§ 29.1 sentences 2 and 3 of the Rules of Procedure of the *Bundesrat*), and hence to the vote on the Immigration Act. Rather, the practised indifference as to the reasons for repetition requests expressed in principle speaks for it also not being important with ballots by raising hands whether a repetition takes place in order to remedy ambiguities, correct errors or change voting intentions. Also, no distinction is made in the literature on the admissibility of – real or unreal – ballot repetitions in the *Bundesrat* between the two types of ballot named in § 29 of the Rules of Procedure of the *Bundesrat* (see Reuter, *Praxishandbuch Bundesrat*, 1991, marginal nos. 14 ff. re § 32 of the Rules of Procedure of the *Bundesrat*).

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Voting within the meaning of the provisions of the Rules of Procedure of the *Bundesrat* is the entire process of vote casting by the *Länder* on one (individual vote) or several (collective vote) subjects of deliberation. A distinction should be made from voting in this sense when it comes to votes cast by an individual *Land* in the context of a ballot. The “second attempt” of Brandenburg to cast a valid vote which the President of the *Bundesrat* initiated with his enquiry was accordingly not a ballot repetition within the meaning of § 32 sentence 2 of the Rules of Procedure of the *Bundesrat*. However, no stricter principles apply to the repetition of the vote casting of an individual *Land* in the context of a ballot than to the repetition of the entire ballot. On the contrary: Since in accordance with § 32 of the Rules of Procedure of the *Bundesrat* only the repetition of the entire ballot is bound by the precondition that no *Land* should contradict it, the repetition of the vote casting of an individual *Land* – where it can be sensibly separated from the repetition of the ballot as a whole, as is the case with voting by calling on the *Länder* – is permissible independently of this precondition. Accordingly, the vote cast by an individual *Land* “may be corrected in the practice of the *Bundesrat* until the end of the respective ballot – be it because of an error or because of a change in intention” (Reuter, *Praxishandbuch Bundesrat*, 1991, marginal no. 15 re § 32 of the Rules of Procedure of the *Bundesrat*).

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This practice is not a product of chance or of arbitrariness. Analogous principles apply to ballots in the German *Bundestag* and in the conciliation committee. Here too, in principle as long as the ballot as a whole is not closed, the individual Members may correct their vote (Achterberg, *Parlamentsrecht*, 1984, p. 647; Dästner, *Die Geschäft-*

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sordnung des Vermittlungsausschusses, 1995, pp. 151-152). Both in the *Bundesrat* and in the *Bundestag*, and in the conciliation committee, this practice of generous permission of correction takes account of the constitutionally protected interest of the parties to the ballot in voting effectively and as they intend.

2. In consequence, if one presumes that in the first round a vote casting of the *Land* took place at all, the *Land* Brandenburg was by recognised and constitutionally founded rules of procedure principles at least entitled to correct this vote casting. If following on from the first round the President of the *Bundesrat* had forgone an enquiry, but a representative of the *Land* Brandenburg had requested for the *Land* a new opportunity to cast a vote, the President of the *Bundesrat* would have had to respect the *Land's* right to make a correction and meet this request. In fact, however, the *Land* Brandenburg did not express such a request. It had no opportunity to do so since directly after his determination that the *Land* had not voted uniformly, the President of the *Bundesrat* on his own judgment afforded the *Land* the opportunity for a new vote casting by his enquiry. This however changes nothing about the fact that the *Land* Brandenburg was entitled to correct its vote casting which had been unsuccessful in the first round, and indeed availed itself of this opportunity.

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Even if one were to concur with the Senate majority in the presumption that the President of the *Bundesrat* was not entitled to make his enquiry, it is unfathomable why this should have the consequence that the *Land* Brandenburg was no longer able to exercise its right of correction effectively. The consequence of the view of the Senate majority is that the President of the *Bundesrat* removes a *Land's* right to correct its vote casting for the concrete case if he offers the *Land* the opportunity to do so unasked. This is a unique case under public law. Usually and sensibly, rights, both rights of a body and rights of the individual, can be violated by unlawful conduct by third parties, but in fact not destroyed. Even if it were true that the President of the *Bundesrat* with his enquiry had violated his duty to be unbiased: The Basic Law does not recognise a shifting of responsibilities between those participating in the procedure permitting it to punish the *Land* Brandenburg with the loss of the possibility to correct its vote casting because of unlawful conduct of the President of the *Bundesrat*.

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3. Moreover, the view that the President of the *Bundesrat* was not entitled to enquire in the instant case is also not convincing. The Senate majority presumes that the President of the *Bundesrat* is only entitled to enquire where "ambiguities occur in the course of the ballot", and hence also can only effectively open a new round of voting in this case. Here, it is factually presumed that an enquiry in any other case can only be understood to be an expression of bias. This presumption is incorrect. Efficient chairing of the session includes the chairperson recognising justified procedural concerns of the participants in the session and, if one may presume an interest in carrying them out, the participants in the session concerned per se being afforded the opportunity to exercise their procedural rights. Thus it is avoided that the persons concerned must interrupt the continuation of the session to assert their rights by

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speaking or shouting. The President of the *Bundesrat* does not violate his duty to be unbiased by anticipating justified procedural interests in this manner, but only if he does not act equally favourably in comparable cases towards different participants. Hence, in his discretion that is to be evenly exercised, the President of the *Bundesrat* may not only afford to a *Land* the possibility to cast a fresh vote by making an enquiry if he is uncertain how the *Land* has voted, or if there are indications that the vote casting which has taken place is based on an error, but also if another justified interest of the *Land* in repetition is recognisable. This is not unauthorised influence by the President of the *Bundesrat* since the *Land* asked is quite free to forgo the offered opportunity to cast a fresh vote. A violation of the duty of neutrality would only be considered to lie in the excessive encouragement to correct a decision which the *Land* in question recognisably does not desire, or which it has no recognisable reason to desire. This cannot apply to the instant case, however. Brandenburg availed itself of the opportunity created with the first enquiry by the President of the *Bundesrat* to correct (see on this also at 5.). The President of the *Bundesrat* could anticipate the interest in correction of the *Land* thereby confirmed in view of the invalidity of the preceding vote cast.

With the criterion developed by the Senate majority to distinguish between authorised and unauthorised enquiries, the Senate majority contradicts recognised constitutional principles for voting in the *Bundesrat*. In the view of the Senate majority, there is no right to enquire “if a uniform *Land* will recognisably does not exist and it cannot be expected in view of the overall circumstances for such a will to yet come into being during the ballot”. Hence, the right to enquire is made dependent on case-related perceptions and prognoses which relate to the political positions of individual *Bundesrat* Members and the formation of a uniform intention within a *Land* against the background of the *Bundesrat* ballot. Such case-specific internal *Land* backgrounds are however irrelevant under federal constitutional law, as the applicants have rightly stated in their written application in agreement with the very prevalent view in the teaching on public law. Hence, it is not a matter of whether the vote cast in the *Bundesrat* has at all been preceded by the formation of an intention within the government at *Land* level, whether *Bundesrat* Members have kept in their vote casting to internally issued instructions within the *Land*, and whether their voting conduct emerges from their stance on the subject of the ballot or from other political considerations (see instead of many Herzog, in: *Handbuch des Staatsrechts*, vol. II, 1987, § 46, marginal no. 33; Koriath, in: v. Mangoldt/Klein/Starck, *GG*, vol. II, 4th ed. 2000, *Art. 51*, marginal nos. 21, 23; Krebs, in: v. Münch/Kunig, *GG*, vol. II, 4th/5th ed. 2001, *Art. 51* marginal no. 14, with further references). Also for the question of whether the President of the *Bundesrat* in the event of non-uniform voting is entitled to enquire, it can hence not be a matter of case-related interpretations and expectations which relate to the intention-forming processes against the background of the respective voting conduct.

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If the “uniform *Land* will”, on the foreseeability of which the Senate majority bases its

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further considerations, does not mean the uniformity of any background convictions, but the uniformity of votes cast by the *Land*, it remains unclear why in the case at hand it is not to have been foreseeable that this uniformity would yet come about in the further course of the ballot. In fact, in response to an enquiry by the President of the *Bundesrat* a uniform vote of the *Land* Brandenburg came about (more on this at 5.). Why the Senate majority nevertheless believes that it was able to rule out that this could at least be expected as a possibility is not stated in the grounds to the ruling. In fact, any attempt to answer this question would have made it clear that the distinction between clear and unclear cases on which the Senate majority bases its arguments is in turn anything but clear, and hence is unsuited as a constitutional standard for the conduct of the President of the *Bundesrat*.

In summary: That the President of the *Bundesrat* by his enquiry opened to the *Land* Brandenburg the possibility for a renewed vote casting is constitutionally unobjectionable. 173

4. It may at best be doubtful whether the enquiry took place in the correct form. The President of the *Bundesrat* asked “Minister-President Stolpe how the *Land* Brandenburg votes”. This clearly asked on the one hand as to how the *Land* Brandenburg voted, and hence re-opened for the *Land* Brandenburg the opportunity for vote casting. At the same time, this question was however specifically directed at the Minister-President. § 29 of the Rules of Procedure of the *Bundesrat* provides in addition to voting by raising of hands voting by calling on the *Länder*. Accordingly, it is also customary in practice that the President of the *Bundesrat* calls on *Länder* to vote without in doing so turning to individual representatives of the *Land*. The Minister-President is – in this we concur with the Senate majority – also for instance not the obvious addressee of any enquiries because, by his status under *Land* constitutional law, he had a casting vote in the *Bundesrat*. All this speaks for enquiries in principle being directed to the *Land* in question, and not to individual representatives of the *Land*. 174

Having said that, the legal situation in this question at the time of the ballot was not fully clarified. The President of the *Bundesrat* was able for his approach to call on reputable representatives of the teaching on public law (Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, vol. II, 1980, p. 137; Blumenwitz, in: *Bonner Kommentar*, Art. 51, marginal no. 29). The permissibility of an enquiry to the Minister-President was also favoured by the uncontested approach in the only prior case of a non-uniform vote casting by *Bundesrat* Members of a *Land*. After in the tenth session of the *Bundesrat* on 19 December 1949 two North-Rhine/Westphalian Ministers had voted non-uniformly, evidently because of a disagreement on the decision situation in the cabinet, the then State President of Württemberg-Hohenzollern and later President of the Federal Constitutional Court Gebhard Müller proposed “that the Minister-President of North-Rhine/Westphalia casts the vote.” This is indeed what happened (see *Bundesrat* minutes no. 10 of 23 December 1949, p. 116). The instant case showed in contrast to this historical precedent the particularity that in the first round two Ministers had voted non-uniformly recognisably because of a decisive political 175

disagreement. Particularly because of this difference in the cases, however, it does not follow that the enquiry should have taken place in another manner. For a chairperson who is entitled in cases in which votes are cast invalidly to take account by making an enquiry of the *Land's* interest in casting an effective vote (see above at 2.), on the contrary it particularly suggested itself in this situation to address his enquiry solely to the Minister-President, from whom one may anticipate in such a situation that he is able through his political authority to further the *Land's* interest in casting an effective vote. The President of the *Bundesrat* hence at least did not commit an evident procedural error (see above at 1.a) by addressing his enquiry to the Minister-President of the *Land* Brandenburg.

The form of the enquiry also evidently has no “steering” influence on the further course of the proceedings. In particular, it was unable to and did not prevent Minister Schönbohm from defending his rights as a *Bundesrat* Member. The latter thereupon made a statement, although the enquiry of the President of the *Bundesrat* was not addressed to him. That he did not express himself in a manner that would have been necessary to lawfully prevent the Immigration Act coming to being (on this also at 5.) was not a factor related to the form of the enquiry. 176

5. Accordingly, with his enquiry the President of the *Bundesrat* effectively afforded the *Land* Brandenburg the possibility to cast a fresh vote. In this second round, the *Land* voted uniformly. The Brandenburg Minister-President voted “Yes”. No further No vote was cast. 177

Since a new, second round was taking place, the previous No vote was also no longer valid. The only opposition put forward by Minister Schönbohm to the Yes vote of the Minister-President in the second round was by saying “You know my view, President”. The view of the *Bundesrat* Member Schönbohm was indeed known. However, it was not the point. Article 51.3 sentence 2 of the Basic Law does not require the representatives of a *Land* to express a uniform view in the *Bundesrat*. What is exclusively decisive for the Basic Law is the uniformity of votes cast. As stated above (at 4.), the uniformity of the underlying political views, as all the *Land* policy and *Land* constitutional backgrounds to vote casting, are irrelevant from the point of view of the federal constitution. For this very reason, it is necessary to distinguish clearly between casting a vote and expressing an opinion. The calls “Yes”, “No” or “Abstention” could have been considered as votes cast in a ballot taken by calling on the *Länder* (§ 29.1 sentences 2 and 3 of the Rules of Procedure of the *Bundesrat*) (see Reuter, *Praxishandbuch Bundesrat*, 1991, marginal no. 7 re § 29 of the Rules of Procedure of the *Bundesrat*). The statement “You know my view, President”, by contrast, clearly did not fall into this category. 178

That making the casting of a vote conditional on clear, clearly identifiable forms is not unnecessary formalism is shown by the instant case in particular. If one were to diverge from this condition, and also interpret unconventional statements as vote casting, there would be no end of interpretation. If it were possible and necessary to 179

interpret the statement “You know my view, President” as vote casting, the President of the *Bundesrat* would have had to determine how the vote had hence been cast. It would have then been necessary to ask whether it was a “No” or indeed its deliberate avoidance, whether perhaps it was indeed intended to keep this question undecidable, and so on. Given such a need for interpretation, voting procedures would become inoperable. In ballots, it is hence only possible to count a vote that is clearly cast as such.

No clear vote was however cast by *Bundesrat* Member Schönbohm in the decisive second round which could have prevented the acceptance of the Immigration Act. 180

Osterloh

Lübbe-Wolff

**Bundesverfassungsgericht, Beschluss des Zweiten Senats vom 18. Dezember 2002
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