Headnotes

to the Judgment of the Second Senate of 10 June 2014

- 2 BvE 2/09, 2 BvE 2/10 -

1. **Pursuant to Article 54 sec. 1 of the Basic Law, it is the exclusive task of the Federal Convention to elect the Federal President; its procedures are meant to emphasise the particular dignity of this office.**

2. **Pursuant to Article 54 of the Basic Law, the members of the Federal Convention are granted only limited rights apart from participating in the election. Their legal position does not correspond to the position of the members of the Parliament (*Bundestag)*.**

FEDERAL CONSTITUTIONAL COURT

- 2 BvE 2/09 -

- 2 BvE 2/10 -

Pronounced
on 10 June 2014
Kunert
Amtsinspektor
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

**In the proceedings
on the applications**

I. 1. to declare

a) that respondent no. 1 violated the applicant's rights under an analogous application of Article 38 section 1 sentence 2 of the Basic Law (*Grundgesetz* - GG) by not giving the applicant the opportunity to state reasons for or to speak on the subject of his motion concerning the introduction of own draft rules of procedure for the Federal Convention, which he had introduced together with the members of the Federal Convention Apfel, Dr. Müller, and Hesselbarth during the 13th Federal Convention,

b) that respondent no. 1 violated the applicant's rights under an analogous application of Article 38 section 1 sentence 2 of the Basic Law by not putting to a vote in the plenary the motion to place the item "Presentation of the Candidates" on the agenda of the 13th Federal Convention, which had been introduced by the applicant and the members of the Federal Convention Apfel, Dr. Müller, and Hesselbarth,

c) that respondent no. 2 violated the applicant's rights under an analogous application of Article 38 section 1 sentence 2 of the Basic Law by adopting the resolution that there must be no oral explanations for or debate on motions on the rules of procedure and other motions,

d) that respondent no. 2 violated the applicant's rights under an analogous application of Article 38 section 1 sentence 2 of the Basic Law by carrying out the election of the Federal President even though its composition was improper,

e) that the election of the Federal President by the 13th Federal Convention is invalid and that a repeat election should have been held

and applications for preliminary injunctions

Applicant: Udo Pastörs, Member of the *Landtag*,
Dorfstraße 7, 19249 Lübtheen

- authorised representative: Rechtsanwalt Peter Richter, LL.M.,
Birkenstraße 5, 66121 Saarbrücken -

Respondent: 1. The President of the German *Bundestag* as Chair of the 14th Federal Convention,
Platz der Republik 1, 11011 Berlin,

2. 14th Federal Convention,
represented by the President of the German *Bundestag*,
Platz der Republik 1, 11011 Berlin

- authorised representative: Prof. Dr. Wolfgang Zeh,
Marktstraße 10, 72359 Dotternhausen -

Joined Parties: 1. Holger Apfel, Member of the *Landtag*,
Bernhard-von-Lindenau-Platz 1, 01067 Dresden,

2. Dr. Johannes Müller, Member of the *Landtag*,
Bernhard-von-Lindenau-Platz 1, 01067 Dresden

- authorised representative: Rechtsanwalt Peter Richter, LL.M.,
Birkenstraße 5, 66121 Saarbrücken -

- 2 BvE 2/09 -,

II. 2. to declare

a) that respondent no. 1 violated the applicant's rights under an analogous application of Article 38 section 1 sentence 2 of the Basic Law by not giving the applicant the opportunity to orally state reasons for his motion –introduced by the applicant and the members of the Federal Convention Apfel and Dr. Müller during the 14th Federal Convention on 30 June 2010 – to bar the delegates from the *Laender* (federal states) Bavaria, Baden-Württemberg, Brandenburg, Berlin, Lower Saxony, North Rhine-Westfalia, Rhineland-Palatinate, Saarland, Saxony-Anhalt, and Thuringia from participating in debates and votes in the 14th Federal Convention on the grounds that they had been incorrectly elected by the respective *Landtage* (state parliaments),

b) that respondent no. 1 violated the applicant's rights under an analogous application of Article 38 section 1 sentence 2 of the Basic Law by not putting to a vote in the plenary the motion – introduced by the applicant and members of the Federal Convention Apfel and Dr. Müller – to bar the delegates from the *Laender* Bavaria, Baden-Württemberg, Brandenburg, Berlin, Lower Saxony, North Rhine-Westfalia, Rhineland-Palatinate, Saarland, Saxony-Anhalt, and Thuringia from participating in deliberations and votes in the 14th Federal Convention on the grounds that they had been incorrectly elected by the respective *Landtage*,

c) that respondent no. 1 violated the applicant's rights under an analogous application of Article 38 section 1 sentence 2 of the Basic Law by not giving the applicant the opportunity to orally state reasons for his motion concerning the introduction of own draft rules of procedure for the Federal Convention, which he had introduced together with the members of the Federal Convention Apfel and Dr. Müller during the 14th Federal Convention,

d) that respondent no. 1 violated the applicant's rights under an analogous application of Article 38 section 1 sentence 2 of the Basic Law by not putting to a vote in the plenary the motion concerning the introduction of own draft rules of procedure for the Federal Convention, which the applicant had introduced with the members of the Federal Convention Apfel and Dr. Müller,

e) that respondent no. 1 violated the applicant's rights under an analogous application of Article 38 section 1 sentence 2 of the Basic Law by not giving the applicant the opportunity to orally state reasons for the motion to allow each entity entitled to nominate candidates to name one election observer to be present during the counting of the votes, which the applicant had introduced together with the members of the Federal Convention Apfel and Dr. Müller during the session of the 14th Federal Convention on 30 June 2010,

f) that respondent no. 2 violated the applicant's rights under an analogous application of Article 38 section 1 sentence 2 of the Basic Law in conjunction with Article 20 section 2 of the Basic Law by denying the motion to allow each entity entitled to nominate candidates to name one election observer to be present during the counting of the votes, which the applicant had introduced together with the members of the Federal Convention Apfel and Dr. Müller,

g) that respondent no. 2 violated the applicant's rights under an analogous application of Article 38 section 1 sentence 2 of the Basic Law by adopting the resolution that there must be no oral s for or debate on motions on rules of procedure and other motions,

h) that respondent no. 2 violated the applicant's rights under an analogous application of Article 38 section 1 sentence 2 of the Basic Law by carrying out the election of the Federal President even though its composition was false,

a n d

i) to declare the election of Christian Wulff as Federal President by the 14th Federal Convention to be invalid and to order a repeat election, or, in the alternative, to declare that the election of Christian Wulff as Federal President by the 14th Federal Convention is invalid

and application for a preliminary injunction

Applicant: Udo Pastörs, Member of the *Landtag*,
Dorfstraße 7, 19249 Lübtheen

- authorised representative: Rechtsanwalt Peter Richter, LL.M.,
Birkenstraße 5, 66121 Saarbrücken -

Respondent: 1. The President of the German *Bundestag* as Chair of the 14th Federal Convention,
Platz der Republik 1, 11011 Berlin,

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2. Dr. Johannes Müller, Member of the *Landtag*,
Bernhard-von-Lindenau-Platz 1, 01067 Dresden

- authorised representative: Rechtsanwalt Peter Richter, LL.M.,
Birkenstraße 5, 66121 Saarbrücken -

- 2 BvE 2/10 -

the Federal Constitutional Court - Second Senate -

with the participation of Justices

President Voßkuhle,

Lübbe-Wolff,

Gerhardt,

Landau,

Huber,

Hermanns,

Kessal-Wulf

held on the basis of the oral hearing of 11 February 2014:

Judgment:

1. **The proceedings are joined for a joint decision.**
2. **Applications 1. d) and e) as well as 2. h) and i) are dismissed as inadmissible.**
3. **As for the rest, the applications are rejected.**
4. **This renders moot the applications for preliminary injunctions.**

R e a s o n s :

The *Organstreit* proceedings (dispute between constitutional organs) concern the rights of a member of the 13th Federal Convention (*Bundesversammlung*) on the occasion of the re-election of Horst Köhler as Federal President, as well as of the 14th Federal Convention, which elected Christian Wulff as Federal President. 1

A.

I.

1. The election of the Federal President is governed by Art. 54 of the Basic Law (*Grundgesetz* – GG): 2

> (1) The Federal President shall be elected by the Federal Convention without debate. Any German who is entitled to vote in *Bundestag* elections and has attained the age of forty may be elected.
>
> (2) […]
>
> (3) The Federal Convention shall consist of the Members of the *Bundestag* and an equal number of members elected by the parliaments of the *Laender* on the basis of proportional representation.
>
> (4) The Federal Convention shall meet not later than thirty days before the term of office of the Federal President expires or, in the case of premature termination, not later than thirty days after that date. It shall be convened by the President of the *Bundestag*.
>
> (5) […]

(6) The person receiving the votes of a majority of the members of the Federal Convention shall be elected. If after two ballots no candidate has obtained such a majority, the person who receives the largest number of votes on the next ballot shall be elected.

(7) Details shall be regulated by a federal law.

2. In implementing Art. 54 sec. 7 GG, the Act on the Election of the Federal President by the Federal Convention (*Gesetz über die Wahl des Bundespräsidenten durch die Bundesversammlung* – BPräsWahlG) of 25 April 1959 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 1326), last amended by the act of 12 July 2007 (BGBl I p. 1326), states, *inter alia*: 3

§ 1

The President of the *Bundestag* shall determine when and where the Federal Convention meets.

§ 2

(1) The Federal Government shall determine in due time how many members of the Federal Convention the individual *Landtage* (state parliaments) shall elect. […]

(2) […]

(…)

§ 4

(1) The *Landtag* shall elect members from the respective *Land* according to lists of candidates. The *Landtag*'s rules of procedure shall apply accordingly to the election.

(2) Each member of the *Landtag* has one vote.

(3) In case of more than one list of candidates, the seats are allocated to the lists according to the number of votes they have received using the *d'Hondt* method. In case of equal highest averages, the President of the state parliament shall draw lots to determine the allocation of the last seat. The seats are allocated to the candidates according to the order of their names on the lists of candidates. Should a list be allocated more seats than it contains candidates, the remaining seats shall be allocated to the other lists in the order of the next highest averages.

(4) The President of the *Landtag* shall require the elected members to declare in writing within two days whether they accept their office. […]

(5) In case an elected member does not accept the office or if a

member leaves office, the next candidate on the same list of candidates who has not been elected shall replace that member. Should the list of candidates be depleted, the seat shall be allocated to the list of candidates that has the next highest average. The President of the *Landtag* shall determine who the replacement is. Section 4 applies accordingly.

(6) The President of the *Landtag* shall inform the President of the *Bundestag* of the outcome of the election.

§ 5

Every member of the *Landtag* and every candidate who has been admitted to a list of candidates may, within two days after the outcome of the election has been announced, lodge an objection against the validity of the election with the President of the *Landtag*. The *Landtag* shall decide upon the objection without delay, at the latest, however, one week before the Federal Convention meets. Should no decision be adopted by then, the Federal Convention shall make the decision. The President of the *Bundestag* shall prepare the decision of the Federal Convention.

(…)

§ 7

Articles 46, 47, 48 sec. 2 GG shall apply accordingly to members of the Federal Convention. The *Bundestag* shall be competent for issues of parliamentary immunity; provisions concerning parliamentary immunity that have been passed by the *Bundestag* or its competent committee shall apply accordingly. The members shall not be bound by orders or instructions.

§ 8

The President of the *Bundestag* shall chair the sessions and manage the procedures of the Federal Convention. The rules of procedure of the *Bundestag* shall apply accordingly to the procedures of the Federal Convention, if and to the extent that the Federal Convention does not adopt its own rules of procedure.

§ 9

(1) Every member of the Federal Convention may, in writing, propose candidates for the office of Federal President to the President of the *Bundestag*. New proposals may be made for the second and the third ballot. Proposals may only contain such information as is necessary to identify the proposed candidate; a written declaration of consent from the proposed candidate is to be enclosed.

(2) The presidency of the Federal Convention shall examine whether the proposals satisfy the legal requirements. The Federal Convention decides upon the denial of a proposal.

(3) The election shall be held by secret official ballot; ballots cast in favour of persons other than the approved candidates are invalid.

(4) The President of the *Bundestag* shall inform the elected candidate of the election and call upon the candidate to declare within two days whether he or she accepts the office. Should the elected candidate not make a declaration within this time period, this is deemed a rejection of the office.

(5) The President of the *Bundestag* shall declare the Federal Convention to be closed once the elected candidate has accepted the office.

(…)

II.

The applicant was elected by the *Landtag* of Mecklenburg-Western Pomerania and the joined parties were elected by the *Landtag* of Saxony to be members of the 13th and 14th Federal Conventions. 4

1. […] 5-12

2. […] 13-21

[*Excerpt from press release no. 50/2014 of 10 June 2014*:]

The 13th Federal Convention convened on 23 May 2009. It had 1,224 members, namely the 612 members of the *Bundestag* and 612 members elected by the parliaments of the *Laender* (federal states). In the parliaments of 10 *Laender*, only one list of candidates, which had been jointly drawn up by all groups represented in the respective parliament, was put to the vote. The lists contained substitute candidates, which were listed separately for each parliamentary group. The day before the Federal Convention, the applicant, the parties who joined the proceedings, and another member of the Federal Convention submitted written motions to adopt rules of procedure for the Federal Convention and to include the item "Presentation of the Candidates" on the agenda. Later, a motion to adopt rules of procedure was made by the majority of the members of the Federal Convention, requesting that the German *Bundestag*'s Rules of Procedure be applied correspondingly, with the stipulation that procedural and other motions could only be made in writing, and that there were no oral explanations or debate.

In the Federal Convention, the President of the *Bundestag*, as chair of the Federal Convention, first ascertained the presence of a quorum; he then declared that in the absence of rules of procedure, there was no basis for requests for leave to speak and

for debates. Subsequently, he put the majority's motion to the vote; it was adopted by the Federal Convention. The President of the *Bundestag* did not admit the motion to give each candidate the opportunity to present him- or herself for up to 30 minutes.

The 14th Federal Convention, which convened on 30 June 2010, had 1,244 members, namely the 622 members of the *Bundestag* and 622 members elected by the parliaments of the federal states. Again, in 10 state parliaments, a single list of candidates was put to the vote, with substitute candidates listed separately according to parliamentary groups. The applicant and the parties who joined the proceedings submitted three written motions, announcing that they would state their reasons orally. The majority of the Federal Convention's members submitted a joint written motion for rules of procedure which corresponded to those adopted by the 13th Federal Convention.

The President of the *Bundestag* did not permit the applicant's first motion, which challenged the legal validity of the election of the Federal Convention's members in 10 *Laender*, and did not allow that reasons for the motion be stated orally. Subsequently, the President of the *Bundestag* put the majority's motion to the vote; it was adopted. Neither did the President of the Bundestag permit the applicant's second motion, which called for every candidate to be given the opportunity to present him- or herself for up to 30 minutes. The applicant's third motion, which called for permitting the nomination of "election observers", was put to the vote by the President of the *Bundestag* without a prior opportunity to state reasons. The Federal Convention denied the motion.

[*End of excerpt*.]

III.

1. With his application for *Organstreit* proceedings, which was received by the Court on 26 August 2009, the applicant claims that his rights as a member of the 13th Federal Convention were violated by the respondents. 22

a) […] 23-24

b) According to the applicant, the applications are well-founded […]. 25

aa) He claims to have a right to speak under an analogous application of Art. 38 sec. 1 sentence 2 GG, or, in any event, under customary constitutional law. This right to speak was allegedly violated by respondent no. 1 when he refused to give the applicant the opportunity to orally state reasons for his procedural motion and was also allegedly violated by respondent no. 2 when it adopted rules of procedure that did not permit the oral statement of reasons for or debate on motions on the rules of procedure and other motions. 26

(1) […] 27

(2) […] 28

(3) […] 29-30

bb) Furthermore, the applicant considers it a violation of his constitutional rights that respondent no. 1 did not put to a vote the motion to place the item “Presentation of the Candidates” on the agenda, which had been supported by the applicant. According to him, since personal presentation does not encompass discussion of the candidate in question, it does not constitute debate and is thus not covered by the prohibition on debate set out in Art. 54 sec. 1 sentence 1 GG. He contends that the first half of § 9 sec. 1 sentence 3 BPräsWahlG does not preclude such a view either. […] 31

cc) The applicant further alleges that the composition of respondent no. 2 was improper, arguing that the deficient composition resulted from the election of delegates of several *Laender* by way of single lists. […] 32

The applicant claims that since some of the persons who participated in electing the Federal President had not been properly elected and should have been barred from participating in the election, the effective value of his vote was distorted and that therefore his organ-derived right to vote, which he believes to derive under an analogous application of Art. 38 sec. 1 sentence 2 GG, was violated. […] 33

According to him, this error results in the invalidity of the election of the Federal President since it cannot be excluded that an election involving only the 753 members of the Federal Convention who had been properly elected would have led to a different outcome of the election. […] 34

c) In light of Federal President Köhler’s resignation, the applicant has declared moot his original application to declare the election of the Federal President by the 13th Federal Convention invalid and to order a repeat election. He now requests a declaration that the election of the Federal President by the 13th Federal Convention on 23 May 2009 was invalid and that a repeat election should have been held. […] 35

The applicant claims that the principle that *Organstreit* proceedings may only yield declaratory judgments does not apply in the present case because there is no other way to subject the election of the Federal President to electoral scrutiny. […] 36

[…] 37

2. With the application received on 1 September 2010, the applicant claims a violation of his rights during the 14th Federal Convention. The applicant refers to his submissions in proceedings 2 BvE 2/09 and additionally states: 38

a) […] Respondent no. 1 should have given the applicant the floor, as the applicant had a right to speak under an analogous application of Art. 38 sec. 1 sentence 2 GG or, in any event, from customary constitutional law […]. The fact that respondent no. 1 considered the motions to be inadmissible does not justify not giving the applicant the floor for the purpose of stating the reasons in support of the motions. In fact, it was not feasible to take a decision on the admissibility of the motions - a decision only respondent no. 2 but not respondent no. 1 was entitled to take, before the (oral) statement of 39

reasons had been provided.

b) Like every other collegial organ, respondent no. 2 must establish before beginning with the agenda that it has a quorum. Should there be any objections, e.g. because the composition of the Federal Convention is improper, the organ must attend to them. […] 40

The improper composition of the Federal Convention might have influenced the outcome of the election. […] 41

c) He further states that was incorrect to treat the procedural motion as inadmissible. Similar motions were put to a vote in the 10th and 13th Federal Conventions; in the 10th Federal Convention, it had even been possible to orally state reasons for the motion. 42

d) Under an analogous application of Art. 38 sec. 1 sentence 2 GG in conjunction with Art. 20 secs. 1 and 2 GG (the rule of law principle), the applicant should have a right to be present during the counting of the votes or to at least name a person to be present as an observer during the counting of the votes. […] 43

3. In proceedings 2 BvE 2/09, the applicant seeks a preliminary injunction declaring a criminal judgment of the Saarbrücken Local Court (*Amtsgericht*) against him to be void, or, in the alternative, preventing the Saarland law enforcement agencies from taking enforcement measures against him until a final decision in the matter has been reached, or, in the alternative, declaring that as a member of the 13th Federal Convention, he is entitled to immunity pursuant to § 7 sentence 2 BPräsWahlG in conjunction with Art. 46 sec. 2 GG and cannot be prosecuted without the consent of the *Bundestag*. To support his reasoning, he asserts that since the election of the Federal President was invalid and therefore the Federal Convention could not be properly closed, his immunity under § 7 sentence 2 BPräsWahlG in conjunction with Art. 46 sec. 2 GG remains in force. 44

In addition, in proceedings 2 BvE 2/09 and 2 BvE 2/10, the applicant requests, with a view to further criminal proceedings carried out against him on grounds of an alleged violation of the memory of the dead and defamation, a preliminary injunction preventing the law enforcement agencies of Mecklenburg-Western Pomerania from taking any enforcement measures against him until a final decision in the *Organstreit* proceedings has been reached. 45

IV.

The joined parties adopt the applicant's applications and their reasoning as their own and additionally seek a declaration that their rights as members of the Federal Convention under an analogous application of Art. 38 sec. 1 sentence 2 GG were also violated by the challenged acts of the respondents. 46

1. The respondents consider the applications concerning the 13th Federal Convention, which challenge its allegedly improper composition, to be inadmissible. […] 47

[…] 48

In any case, they deem the other applications to be unfounded. […] 49

[…] 50-51

2. Concerning the 14th Federal Convention, the respondents additionally state that respondent no. 1 was entitled not to put to a vote the applicant's motion to exclude the delegates from the *Laender* in question as well as his motion for rules of procedure. […] 52

[…] 53

According to the respondents, the applicant failed to demonstrate that respondent no. 2 was obligated to grant his motion for admission of an "election observer". […] 54

V.

The Federal President, the *Bundestag*, the *Bundesrat*, as well as the Federal Government were given the opportunity to submit statements. In both proceedings, the *Bundesrat* and the Federal Government announced that they would not submit statements; the *Bundestag* and the Federal President did not submit statements in either proceedings. 55

B.

Applications 1. a) to c) and 2. a) to g) are admissible; applications 1. d) and e) as well as 2. h) and i) are inadmissible. 56

I.

The applicant as well as the respondents may be parties to *Organstreit* proceedings. 57

1. The Federal Convention may be a party to *Organstreit* proceedings (a)); in that respect it is of no relevance for the ability of respondent no. 2 to be a party to *Organstreit* proceedings that respondent no. 1 has declared the 13th and 14th Federal Convention to be closed pursuant to § 9 sec. 5 BPräsWahlG (b)). 58

a) The Federal Convention is a supreme federal organ within the meaning of Art. 93 sec. 1 no. 1 GG ([…]). It is insignificant that the Federal Convention is not listed in § 63 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), because that provision does not exhaustively implement the constitutional requirements set out in Art. 93 sec. 1 no. 1 GG (cf. Decisions of the Federal Constitutional Court – *Entscheidungen des Bundesverfassungsgerichts*, BVerfGE 13, 54 <81>). 59

b) The closure of the 13th and 14th Federal Convention does not hinder it from being party to *Organstreit* proceedings. If the ability to be party to *Organstreit* proceedings were to be determined solely on the basis of the status at the time the application 60

was lodged (cf. BVerfGE 4, 144 <152>; 102, 224 <231>; 108, 251 <270 and 271>), legal recourse against measures taken throughout the course of the Federal Convention would be *de facto* impossible due to the particularities of that organ's functioning. This has also been pointed out by the respondents. Although the applicant cannot invoke Art. 19 sec. 4 GG in that respect since that provision does not relate to legal recourse in matters of state organisation (cf. BVerfGE 129, 108 <118>; cf. also BVerfGE 21, 362 <369 and 370>; 45, 63 <78>; 61, 82 <101 et seq.>), a Federal Convention may give rise to constitutional issues that require a decision in *Organstreit* proceedings. For instance, one could conceive of violations of organ-derived rights such as manipulations of the outcome of the vote that interfere with the right to vote of the members of the Federal Convention. In such cases, it would contradict the concept of legal recourse before the Federal Constitutional Court, which is enshrined in Art. 93 sec. 1 no. 1 GG, if such recourse were precluded with regard to the Federal Convention. For that reason, it is appropriate to assume that the Federal Convention continues to exist for the purposes of *Organstreit* proceedings (cf. on such a possibility BVerfGE 4, 250 <267 and 268> […]). […]

2. As a member of both Federal Conventions, the applicant can also be party to *Organstreit* proceedings pursuant to Art. 93 sec. 1 no. 1 GG. In any case, Art. 54 secs. 3 and 6 GG vest in him the right to participate in the Federal Convention and in the election of the Federal President by that organ. Both the Act on the Election of the Federal President by the Federal Convention, which governs the Federal Convention's rules of procedure to a large extent (e.g. § 7 sentence 1, § 9 sec. 1 sentence 1 BPräsWahlG), as well as the rules of procedure that were adopted by respondents no. 2 provide the members of the Federal Convention with additional rights. 61

3. Respondent no. 1 is vested with own rights by the Basic Law (Art. 54 sec. 4 sentence 2 GG) as well as by the Act on the Election of the Federal President by the Federal Convention. […] 62

II.

While the applications for declarations nos. 1. a) to d) and 2. a) to h) are admissible in *Organstreit* proceedings, the relief sought by applications 1. e) and 2. i) cannot be the subject matter of such proceedings. 63

1. § 67 sentence 1 BVerfGG provides that in proceedings under Art. 93 sec. 1 no. 1 GG, the Federal Constitutional Court merely declares whether the contested act or omission violates a provision of the Basic Law. Therefore, a decision in *Organstreit* proceedings cannot have the effect of shaping legal circumstances (cf. Stern, in: Bonner Kommentar, vol. 12, Art. 93 para. 183 <March 1982>), which is why in *Organstreit* proceedings the Federal Constitutional Court cannot revoke an individual measure, nor declare a measure to be void (cf. BVerfGE 119 <129>) cannot require a certain conduct of the respondent (cf. BVerfGE 1, 351 <371>; 20, 119 <129>; 124, 161 <188>; for a particular scenario see BVerfGE 112, 118 <147 and 148>). 64

2. According to these standards, applications 1. e) and 2. i) are not admissible.

a) The main application in 2. i) seeks a declaration determining that Christian Wulff's election as Federal President by the 14th Federal Convention was invalid and also ordering a repeat election. The application is therefore directly seeks an impermissible shaping of the law and the formulation of a duty. […] 66

b) Application 1. e) and alternate application 2. i) also seek an impermissible legal protection. They seek a declaration that the election was invalid, i.e. a declaration that shapes legal circumstances. However, the outcome of the *Organstreit* proceedings can only be a declaration to the effect that there has been a violation of the applicant's organ-derived rights. […] 67

c) Lastly, a declaration that a repeat election must be held, as sought by the applicant in application 1. e), is not permissible in *Organstreit* proceedings. Such an application, which corresponds to an application for a finding of continuing unlawfulness (*Fortsetzungsfeststellungsantrag*), seeks the determination of certain legal consequences which, pursuant to the standards set out above, the Federal Constitutional Court, however, cannot formulate. 68

III.

According to § 64 sec. 1 BVerfGG, the applicant must assert that an act of the respondent violated the rights afforded him or her by the Basic Law (1.). These requirements are not met with regard to applications 1. d) and 2. h), yet they are fulfilled with regard to the other applications (2.). 69

1. The right affected by the respondent's conduct must derive directly from the Basic Law and must be based on a relationship shaped by constitutional law (cf. BVerfGE 118, 277 <318 and 319>; 131, 152 <191>). The applicant must assert that one of his or her own rights afforded him or her by the Constitution has been violated or is directly threatened (cf. BVerfGE 4, 144 <148>; 10, 4 <10 and 11>; 70, 324 <350>; 90, 286 <342>; 112, 363 <365>; 114, 121 <146 and 147>; 117, 359 <367>). Such an assertion is plausible if, pursuant to the facts provided by the applicant, a violation of the right appears possible (cf. BVerfGE 93, 195 <203 and 204>; 102, 224 <231 and 232>; 129, 356 <365>). 70

2. According to these standards, the applicant has no standing regarding applications 1. d) and 2. h), since he has not asserted a violation of organ-derived rights (a)). The remaining applications, however, meet the requirements set out in § 64 secs. 1 and 2 BVerfGG (b)). 71

a) Insofar as the applicant asserts that the Federal Convention was improperly composed (applications 1. d) and 2. h)), he bases his legal standing to lodge the application on an alleged distortion of the effective value of his vote and on a violation of his organ-derived election rights and right to vote, which he claims under an analogous application of Art. 38 sec. 1 sentence 2 GG. In doing so, however, he has not demon- 72

strated that the Constitution might afford him an organ-derived right to challenge the election of the delegates sent to the Federal Convention by other *Laender* and to use this as a basis to demand a review as to whether the Federal Convention was properly composed. […]

When it comes to errors during the election of delegates by the *Landtage*, legal recourse may only be had under the conditions set out in § 5 BPräsWahlG, which are, however, not met in the case at hand (aa)). There are no farther-reaching organ-derived rights which the applicant could invoke. In terms of its substance, the application seeks to have Art. 54 sec. 3 GG and § 4 sec. 3 BPräsWahlG applied in accordance with the applicant's interpretation thereof, and therefore seeks (merely) to uphold the objective law. This, however, is not admissible in *Organstreit* proceedings under § 64 BVerfGG (cf. *supra* para. 66 (bb)). 73

aa) Art. 54 sec. 3 GG provides that the Federal Convention shall consist of the members of the *Bundestag* as well as of the same number of delegates, who are to be elected by the *Landtage*. 74

Art. 41 GG and the Electoral Scrutiny Act (*Wahlprüfungsgesetz* – WahlPrG) contain exhaustive provisions on electoral scrutiny with regard to the members of the *Bundestag*. […] The Basic Law does not provide for a separate review examining the status of members of the *Bundestag* in their specific function as members of the Federal Convention. 75

§ 5 BPräsWahlG governs the electoral scrutiny with regard to the election of delegates by the *Landtage*. […] [This provision's] requirements are not fulfilled in the case at hand since none of the persons entitled under § 5 sentence 1 BPräsWahlG to raise an objection against the elections in the *Landtage* has done so. 76

bb) This system of review does not provide for organ-derived rights of the members of the Federal Convention. 77

(1) Insofar as the applicant relies on an analogous application of Art. 38 sec. 1 sentence 2 GG for the purpose of substantiating his view that his own rights have been violated, he already fails to demonstrate that the provision's direct scope of application encompasses the right of an individual member of the *Bundestag* to demand review of whether the composition of the *Bundestag* is correct. Electoral scrutiny under Art. 41 GG serves to ensure that the will of the people is– as measured by electoral law standards – properly reflected through representatives at the beginning of the chain of legitimacy, which stretches onwards from the *Bundestag* to the other organs of state (cf. Morlok, in: Dreier, GG, 2. ed. 2006, Art. 41 para. 7). This scrutiny does not constitute an organ-derived right conferred upon the members of the *Bundestag* by virtue of their status under Art. 38 sec. 1 sentence 2 GG. Individual members of the *Bundestag* cannot lodge complaints in electoral scrutiny proceedings under Art. 41 GG (cf. § 2 sec. 2 WahlPrG), and have standing before the Federal Constitutional Court only insofar as their own membership in the *Bundestag* is challenged (§ 48 sec. 78

1 BVerfGG). Thus, the analogy sought by the applicant in favour of members of the Federal Convention has no basis.

(2) Furthermore, the possibility that the applicant's organ-derived rights have been violated can be already ruled out given the fact that in cases other than those named in § 5 sentence 3 BPräsWahlG, the Federal Convention is neither obliged nor does it even have the right to examine whether its members have been validly elected. The applicant assumes that constitutional organs automatically have such a right of self-evaluation. This is, however, not the case. The *Bundesrat*, for instance, does not have the right to examine whether the *Laender* have delegated their representatives in a formally correct manner. And also the Federal Constitutional Court has not derived its power to review whether it is correctly composed from its status as a constitutional organ but rather deduced an obligation to that end from Art. 101 sec. 1 sentence 2 GG (cf. BVerfGE 65, 152 <154>; 131, 230 <233>). Electoral scrutiny is not withheld from parliaments in every case. For instance, Bremen and Hesse – in keeping with the situation during the Weimar Republic (cf. Art. 31 of the Weimar Constitution, *Weimarer Reichsverfassung*, have specific courts for electoral scrutiny, cf. § 37 sec. 1 sentence 2 of the Bremen Electoral Scrutiny Act – *Bremisches Wahlgesetz* – BremWahlG, as well as § 1 of the Hesse Electoral Scrutiny Act, *Hessisches Wahlprüfungsgesetz* – HessWahlPrG). 79

Since it can thus not be concluded that constitutional organs are vested with a general right of self-evaluation, clear indications that the Federal Convention has the power to examine whether its members have been correctly delegated would be required. However, there are no such indications. In fact, the fact that § 5 sentence 3 BPräsWahlG limits the Federal Convention's power of review to "emergencies" (cf. *Bundestag* Document, BTDrucks 3/358, p. 4) argues against a farther-reaching right of self-evaluation. Since, as explained (*supra* para. 75), there is no review of membership in the *Bundestag* anyway, a general right of self-evaluation concerning the delegates elected by the *Landtage* would also contradict the principle of equality among the members of the Federal Convention (further elaborations *infra* para. 107). 80

(3) Furthermore, a right of the applicant to have the Federal President elected by the Federal Convention with fewer members than prescribed in Art. 54 sec. 3 GG cannot, unlike claimed by the applicant, be granted on the grounds that otherwise the effective value of his vote would be distorted. Even if the applicant's allegation that election at the level of the state parliaments was improper were true, this would not result in a right granted precisely to the applicant to have the Federal President elected by the Federal Convention with fewer members than prescribed in Art. 54 sec. 3 GG. The composition of the Federal Convention prescribed by that provision serves the purpose of ensuring that the election of the Federal President represents the unity of the citizens also in terms of its federal structure (cf. Herzog, in: Maunz/Dürig, GG, Art. 54 para. 28 <January 2009>). For that reason, the *Laender* have the same number of representatives in the Federal Convention as the Federation. Excluding all delegates elected by a state parliament would be incompatible with this approach (cf. on the 81

continuing existence of a parliament despite errors in the election process affecting the mandate of the delegates BVerfGE 129, 300 <344> with further references).

(4) The applicant's claim with regard to the Federal Convention's power to determine whether it has a quorum is not applicable in the case at hand since the issue of whether a quorum is reached must be decided according to the number of the members present and does not extend to the issue of whether those members have been properly elected and are thus legitimate members of the Federal Convention (cf. *infra* para. 111). 82

b) As far as the remaining applications are concerned, it appears at least possible, based on the facts presented, that the challenged measures of the respective respondents violated the applicant's constitutional rights as a member of the Federal Convention; they are therefore admissible. 83

The applicant has specified the rights he considers violated in a manner satisfying the requirements set out in § 64 sec. 2 BVerfGG. Even though he has not named constitutional provisions that apply to him directly, he has made it clear that he is challenging a violation of rights conferred to him by virtue of his status as a member of the Federal Convention. It is irrelevant for the applicant's standing whether and to what extent these rights derive – as the applicant claims – from an analogous application of Art. 38 sec. 1 sentence 2 GG, which applies to members of the *Bundestag*, or whether they can be directly derived from Art. 54 GG. 84

IV.

The applicant has a sufficient recognised legal interest in bringing an action. […] 85

V.

Lastly, the applicant has observed the time limit of § 64 sec. 3 BVerfGG. […] 86

VI.

The joinder is permissible. Being members of the 13th and 14th Federal Conventions, the parties entitled to join have the same organ-derived status as the applicant. 87

C.

The applications are – insofar as they are admissible – unfounded. The respondents have neither violated a constitutional right of the applicant to speak or file motions (I.), nor does the applicant have the right to name "election observers" (II.). 88

I.

Applications 1. a) to c) and 2. a) to e), as well as g) claiming a right of the applicant to speak and file motions in the Federal Convention, are unfounded. Respondent no. 1 was neither required by the Constitution to provide the applicant the opportunity to state reasons for the filed motions during the Federal Conventions nor to place the 89

item “Presentation of the Candidates” on the agenda of the 13th Federal Convention, nor to put to a vote the draft rules of procedure for the 14th Federal Convention or the motion to bar delegates from debating and voting in the 14th Federal Convention on the grounds that they had not been properly elected by the respective *Landtage*. Furthermore, members of the Federal Convention are not vested with a general right to speak that could have been violated by the rules of procedure adopted by the respective respondents no. 2.

1. According to Art. 54 sec. 1 GG, the Federal Convention has the sole task of electing the Federal President. As a purely creative organ (*Kreationsorgan*), the sole function of the body is to bring into being the Federal President. Thus, the constitutional status of the Federal Convention cannot be determined independently from the position afforded to the Federal President under the Basic Law (a)). Due to the inherent differences between the two organs, Art. 38 sec. 1 sentence 2 GG, which applies to members of the *Bundestag*, cannot be analogously applied to members of the Federal Convention (b)). In fact, apart from the right to vote granted immediately through Art. 54 GG, members of the Federal Convention have limited rights at most (c)). This is accompanied by extensive powers on the part of the President of the *Bundestag* as Chair of the Federal Convention (d)). 90

a) When defining the office of the Federal President in the Basic Law, the constitutional legislature bore in mind the experience with the Weimar Constitution (aa)). According to the constitutional legislature’s concept, the Federal President is to be an integrative authority representing the unity of the state and the people (bb)). This affects the way in which the election of the Federal President by the Federal Convention is to be understood (cc)). 91

aa) According to the Weimar Constitution, the President of the Weimar Republic (*Reichspräsident*), as a head of state directly elected by the people, was to serve as a counterbalance to parliament (cf. H. Preuß, in: Verfassungsausschuss, Protokolle, vol. 1, 25th session, p. 25; Ablaß, *ibid* ., p. 27, as well as 22nd session, p. 16). This approach was adopted in order to alleviate scepticism with regard to the parliamentary system, which was wide-spread at the time (cf. e.g. Eschenburg, Die improvisierte Demokratie der Weimarer Republik, 1954, pp. 17 et seq., 27 et seq.). In order to become a “participant …, but maybe also … a dynamic opponent in state matters” (Th. Heuss, in: M. Weber, Gesammelte politische Schriften, 2nd ed. 1958, Preface p. XXVI), the head of state had to be vested with significant powers. 92

bb) The constitutional legislature of the years 1948/49, however, considered this presidential system with its extensive powers to have been a decisive factor when it came to paving the way for dictatorship (cf. Süsterhenn, in: Parlamentarischer Rat, 2nd session, shorthand report, p. 25). Therefore, when the Basic Law was created, there was wide-spread consent that while the Federal President should not be elected directly by the people (cf. Bericht über den Verfassungskonvent auf Herrenchiemsee, p. 41; Süsterhenn, in: Parlamentarischer Rat, 2nd session, shorthand report, 93

p. 25; Walter, in: Parlamentarischer Rat, Hauptausschuss, protocol, p. 103) and should not be vested with powers as extensive as those granted to the President of the Weimar Republic ([…]), the office of a Federal President should not be given up altogether either. The Federal President should rather continue to function as a "representative of the unity of the people" (cf. Süsterhenn, in: Parlamentarischer Rat, 2nd session, shorthand report, p. 25 […]) at the head of the state.

According to this concept, the Federal President should be as independent as possible *vis-à-vis* other organs – in particular, he should not be accountable in a parliamentary sense – (cf. Carlo Schmid, in: Parlamentarischer Rat, Hauptausschuss, protocol, p. 116) and should have a conciliatory status (cf. Bericht über den Verfassungskonvent auf Herrenchiemsee, pp. 41 and 42). In accordance with the understanding of his office, the Federal President cannot be classified as belonging to any of the three traditional powers ([…]). He embodies the unity of the state. In this sense, he is the head of state (cf. already Bericht über den Verfassungskonvent auf Herrenchiemsee, pp. 41 and 42; Walter, in: Parlamentarischer Rat, Hauptausschuss, protocol, p. 103; Seebohm, *ibidem*, p. 120 […]). Beyond the powers which the Constitution provides him with immediately (cf. in particular Art. 59 sec. 1 GG – representation of the Federation for the purposes of international law –; Art. 60 sec. 1 GG –appointment of federal civil servants and soldiers –; Arts. 63 sec. 1, 64 GG – proposal for election and appointment of the Federal Chancellor, appointment and dismissal of Federal Ministers; Art. 82 sec. 1 sentence 1 GG – certification of laws) he is primarily tasked with general representational and integrational functions. In case of crisis, the Federal President is also tasked with making leading political decisions (cf. Arts. 63 sec. 4, 68 – dissolution of the *Bundestag*; Art. 81 GG – declaring a state of legislative emergency, BVerfGE 114, 121 <151, 159>). The authority and the dignity of the office are particularly evidenced by the fact that it is designed to primarily have an intellectual and moral impact. 94

Against this background, it is in keeping with the constitutional requirements for the office of Federal President and with the firm constitutional tradition established since the founding of the Federal Republic of Germany that the Federal President maintain a certain distance to the goals and work of the political parties and of social groups (cf. BVerfGE 89, 359 <362 and 363>; cf. also BVerfGE 114, 121 <159> […]; cf. also on the notion of the Federal President as "pouvoir neutre": Süsterhenn, in: Parlamentarischer Rat, 2nd session, shorthand report, p. 25; *idem*, in: Parlamentarischer Rat, Hauptausschuss, protocol, p. 120; Bericht über den Verfassungskonvent auf Herrenchiemsee, p. 41). 95

cc) The election procedure corresponds to the status of the Federal President (cf. BVerfGE 89, 359 <363> […]). 96

The Federal Convention was created as a special, large and "deliberately not … homogenously" composed (cf. von Brentano, *ibidem*, p. 116) election organ in order to distinguish the Federal President from the legislative organs, on the one hand (cf. 97

Heuss, in: Parlamentarischer Rat, Hauptausschuss, protocol, p. 114 […]), as well as to "root his election … as deeply as possible in the people" (cf. von Brentano, in: Parlamentarischer Rat, Hauptausschuss, protocol, p. 117) and to have as broad a base as possible for the election, on the other hand (cf. Walter, *ibidem*, p. 114; Katz, *ibidem*, p. 113; Heuss, *ibidem*, p. 117; Dehler, *ibidem*, p. 103).

98 The design of the election procedure was accorded particular importance (cf. Greve, in: Parlamentarischer Rat, Hauptausschuss, protocol, p. 115; Becker, in: Der Parlamentarische Rat 1948-1949, Akten und Protokolle, vol. 13/2, 2002, p. 812; on the election's character as a selection (*Kür*) cf. Carlo Schmid, in: Parlamentarischer Rat, Hauptausschuss, protocol, p. 116). The Federal Convention is tasked not only with electing the Federal President but its procedure should also underline the particular dignity of the office.

99 b) For that reason, the rights of members of the *Bundestag* cannot be relied on to determine the rights of the members of the Federal Convention. The Federal Convention "is a constitutional organ of a different nature than *Bundestag* and *Bundesrat*, and one whose task is different from those commonly assigned to legislative bodies" (Gerstenmaier, in: Deutscher Bundestag, Die Bundesversammlungen 1949 bis 2010, pp. 160 and 161). Members of the *Bundestag* sitting in the Federal Convention do not act in their function as members of the *Bundestag* but rather as "electors" (cf. Mücke, in: Der Parlamentarische Rat 1948 bis 1949, Akten und Protokolle, vol. 13/2, 2002, p. 815).

100 aa) The *Bundestag* represents the people, and is tasked with matters of state governance, in particular legislation, which it develops by means of argument and reply of its individual members. The term "verhandeln" [*translator's note: German term meaning both "to hold a sitting" and "to negotiate"*] used in Art. 42 GG to describe the work of the *Bundestag* conveys that meaning (BVerfGE 10, 4 <12>). In that respect, the *Bundestag*'s members' right to speak is closely linked to Parliament's function of operating publicly (cf. BVerfGE 119, 96 <128>). Public negotiation of argument and reply, public debate and discussion are essential elements of parliamentary democracy. The degree of publicity of the debate and decision-making guaranteed by the parliamentary procedure provides a means of balancing conflicting interests (cf. BVerfGE 70, 324 <355>) and combines the technical legislative procedure with a substantial formation of opinion, which is based on the force of argument and permits the members of the *Bundestag* to take responsibility for their decisions (cf. BVerfGE 112, 363 <366>). Thus, the *Bundestag*'s members' liberty to speak is an indispensable prerequisite for performing parliamentary tasks, and essentially defines the status as member of the *Bundestag* (cf. BVerfGE 60, 374 <380>; cf. also BVerfGE 2, 143 <171>; 10, 4 <12>; 80, 188 <218>; 96, 264 <284>).

101 The ability to adopt its own rules of procedure is part of the *Bundestag*'s autonomy regarding its rules of procedure, which is guaranteed by Art. 40 sec. 1 sentence 2 GG (cf. BVerfGE 102, 224 <234 and 235>; 104, 310 <332>; 130, 318 <348>). Self-

organisation of the *Bundestag* is necessary also for reasons of organisational efficiency in order to cope with the complexity of the *Bundestag*'s tasks ([…]). The rules of procedure govern the conditions for the exercise of the rights of the members of the *Bundestag*. These rights must be put into relation and balanced against each other in order to permit Parliament to efficiently perform its tasks – also with regard to its representative abilities and functioning (cf. BVerfGE 80, 188 <219>).

bb) None of this can be applied to the Federal Convention. Its procedure is largely pre-determined and thus cannot be altered by the Federal Convention. This is in line with the fact that the Basic Law does not contain a provision establishing the Federal Convention's autonomy to adopt its own rules of procedure. Furthermore, and unlike the *Bundestag* (Art. 39 sec. 3 sentence 1 GG), the Federal Convention does not have a right of self-assembly but is convened by the President of the *Bundestag* (Art. 54 sec. 4 sentence 2 GG), who is vested with further organisational tasks by the Act on the Election of the Federal President by the Federal Convention. 102

The publicity has a different function for the Federal Convention than for the *Bundestag*. When it comes to the election of the Federal President, all that matters is that the electoral process is visible in its factual and symbolic dimensions; a public debate to that end, however, is expressly excluded (Art. 54 sec. 1 sentence 1 GG). 103

cc) Unlike what the applicant asserts, the Federal Convention's status as a constitutional organ does not give rise to farther-reaching rights on the part of its members. The same applies with regard to the applicant's assertions that the members of the Federal Convention have a right to speak and file motions under customary constitutional law. There is not even state practice that could support an interpretation of Art. 54 GG in line with what the applicant proposes. 104

c) The right to elect the Federal President, which Art. 54 sec. 1 sentence 1 GG assigns to the members of the Federal Convention (alone), encompasses the power to participate in the electoral process by voting (aa) as well as the entitlement to have each vote counted in accordance with Art. 54 sec. 6 GG (bb). However, it does not encompass a right to debate (cc). Other rights of participation beyond the actual right to vote are conceivable in limited form at most, i.e. insofar as they are necessary for the exercise of the right to vote (dd). 105

aa) The right to participate in the election presupposes that the members are not hindered from attending the Federal Convention by law enforcement measures or by other circumstances. For instance, the Federal Court of Justice (*Bundesgerichtshof*) ordered that two members of the 2nd Federal Convention be released from pre-trial custody (*Untersuchungshaft*) so that they could participate in the election ([…]). The immunities accorded to members of the Federal Convention also serve to secure this right to an unhindered participation in the election. Therefore, the Constitution itself requires that Arts. 46, 47, and 48 sec. 2 GG (§ 7 sentence 1 BPräsWahlG) be applied accordingly in order to enforce the right of participation stemming from Art. 54 GG ([…]). 106

bb) Furthermore, the right to vote of the members of the Federal Convention also encompasses a right to an electoral procedure worthy of that name, in that it substantively permits a real election (cf. BVerfGE 41, 1 <11>). In particular, the members have a constitutionally guaranteed right to a free and equal election. Art. 54 sec. 3 GG presupposes that the members of the Federal Convention who are members of the *Bundestag* and those who are delegates of the *Landtage* have the same status in the Federal Convention. The composition of the Federal Convention is intended to ensure that the Federation and the *Laender* participate equally in electing the Federal President. The representatives of the *Laender* must thus be accorded the same status in the Federal Convention as the members from the *Bundestag*. This rule is in fact reflected in § 7 sentence 3 BPräsWahlG, which provides that members of the Federal Convention shall not be bound by orders or instructions. 107

cc) However, Art. 54 sec. 1 GG provides that the election shall take place “without debate”. Therefore, the members of the Federal Convention may not engage in substantive or person-related debate with or on the subject of the candidates. 108

The prohibition of having a debate serves to protect the dignity of the electoral procedure, which shall be above political dispute (cf. *supra* para. 98). Therefore, it applies not only to the members of the Federal Convention but also to the candidates – irrespective of whether they are members of the Federal Convention; thus, it also precludes a presentation by the candidates personally ([…]). Otherwise, there might be a risk that the Federal Convention could distort the intention of the prohibition of having a debate by providing a forum for political competition among the candidates or at least for political (self-)portrayal. In order for the Federal Convention to be able to adequately perform its functions, it is incumbent upon its members to obtain the information relevant to their decision outside of the Federal Convention. 109

dd) Other rights of participation reaching farther than the actual right to vote are conceivable in a limited form at most, i.e. insofar as they are necessary for the exercise of the right to vote. 110

Whether the Federal Convention has reached a quorum must merely be determined; this is a duty incumbent upon its Chair. To that end, it is necessary to ascertain whether a sufficient number of members of the Federal Convention appeared for the election. This does not entail a review as to whether its members were properly elected. Notwithstanding § 5 sentence 3 BPräsWahlG, the determination does not require any particular action on the part of the members of the Federal Convention. 111

The members may influence the proceedings in the Federal Convention by adopting rules of procedure for the Federal Convention and by electing an electoral board. However, these powers do not derive from a right conferred upon the Federal Convention and its members by the Constitution but solely from § 8 sentence 2 BPräsWahlG, which was enacted on the basis of Art. 54 sec. 7 GG. Thus, the members of the Federal Convention merely have a constitutional right to equal treatment that is derived from their status as members of the Federal Convention. 112

In principle, neither the casting nor the counting of the votes requires a right to speak or file motions. This might be different should there be reasonable doubts in the Federal Convention that the election was properly carried out. However, the Court need not elaborate on this, as the applicant has claimed neither such errors nor a right to speak in that respect. 113

Generally speaking, the Constitution does not prohibit debate but does not require it either. Instead, Art. 54 sec. 7 GG provides that the further details shall be regulated by a federal law. 114

d) The President of the *Bundestag*, being Chair of the Federal Convention, is tasked with ensuring that the election is properly carried out. Since – as explained – the Federal Convention, unlike the *Bundestag*, shall not serve as a forum for political competition but shall rather put the Federal President into office in a manner that reflects the dignity of the office, the Federal Convention's Chair possesses powers that reach farther than those with which the President of the *Bundestag* is vested when chairing sessions of the *Bundestag* (aa)); however, the members of the Federal Convention have a right to equal treatment (bb)). 115

aa) The *Bundestag* is competent to attend to a large variety of issues (*Befassungskompetenz*) and has the right of self-organisation. It can fulfil its tasks only if its members, in exercising their free mandate by filing motions, can participate in the decision-making process. To that end, the members of the *Bundestag* must be capable of shaping parliamentary procedure autonomously and freely; in that respect, motions constitute the "master key" for this procedure as well as an essential prerequisite for participation in parliamentary work by the members of the *Bundestag* (cf. Kabel, in: Schneider/Zeh, Parlamentsrecht und Parlamentspraxis, 1989, § 31 para. 1). A far-reaching power of review on the part of the President of the *Bundestag* would be incompatible with this principle ([…]). 116

By comparison, the Constitution specifies the sole object of the Federal Convention's work. Its sole task is to "select" (cf. Carlo Schmid, in: Parlamentarischer Rat, Hauptausschuss, protocol, p. 116) the Federal President. It is in keeping with this limited task that the Chair of the Convention uphold the ceremonial and symbolic importance of the election by refraining from putting to a vote motions that do not concern the way the election itself is carried out or motions that are evidently incompatible with the Constitution. In the same vein, when adopting the provisions of the Act on the Election of the Federal President by the Federal Convention, the law was intentionally designed in a manner that is not overly detailed, "in particular so that the President of the *Bundestag* should have the leeway that the situation may require" (BTDrucks 3/358, p. 5). Thus, the Chair of the Federal Convention has the right to measure the admissibility of motions against these standards without first having given the person who filed the motion leave to speak. 117

bb) However, the Chair of the Federal Convention must observe that the members of the Federal Convention generally have equal status (cf. above para. 107). Mem- 118

bers not only have the right to have their votes count equally but also have a right to equal participation in designing the electoral procedure. With regard to the President of the *Bundestag*'s powers as Chair of the Federal Convention this means in particular that he must decide upon the treatment of motions in a non-arbitrary way; i.e. adopt a decision that is not influenced by irrelevant considerations (cf. BVerfGE 104, 310 <331>; 108, 251 <276>).

2. Measured by these standards, applications 1 a) to c) and 2 a) to e), as well as g) are unfounded. 119

a) His powers as Chair of the Federal Convention (cf. above paras. 116 and 117) encompassed respondent no. 1's right to examine the admissibility of the motion to add the item "Presentation of the Candidates" to the agenda of the 13th Federal Convention (application 1 b)). Such a presentation would have violated the prohibition on debate enshrined in Art. 54 sec. 1 sentence 1 GG (cf. above para. 109). Thus, in order to ensure that the Federal Convention could properly perform its tasks, it was necessary to refrain from putting this motion to a vote. 120

b) Application 2 d) is unfounded for corresponding reasons. The rules of procedure envisaged by the motion, according to which the candidates for the office of Federal President would have been given the opportunity to present themselves in a free speech of up to 30 minutes, would have violated the prohibition on debate of Art. 54 sec. 1 sentence 1 GG in the same way as would have the motion to add the item "Presentation of the Candidates" to the agenda. 121

c) Lastly, respondent no. 1 did not violate any rights of the applicant by not putting to a vote the motion to bar members of the Federal Convention who were improperly elected by the *Landtage* from voting (application 2 b)). 122

The applicant had no right to demand that individual members be barred from participating in the Federal Convention (cf. above para. 80). As has been set out, the elections by the *Landtage* can only be reviewed in accordance with the standards set out in § 5 BPräsWahlG. However, the requirements for having the Federal Convention perform electoral scrutiny (in a subsidiary manner) under § 5 sentence 3 BPräsWahlG were obviously not fulfilled (cf. paras. 79 and 80). Thus, had it heard the motion, the Federal Convention would have claimed for itself a competence it does not actually possess under the Basic Law. Moreover, electing the Federal President without the members named in the motion would have violated Art. 54 sec. 3 GG (cf. above para. 81). Therefore, proceedings carried out in compliance with the motion would have resulted in the finding that the election of the Federal President was unconstitutional. 123

d) Applications 1 c) and 2 g), in which the applicant claims a violation of his right to speak through the decisions adopting the rules of procedure of the respective Federal Conventions, are unfounded. 124

The Basic Law does not accord the members of the Federal Convention a general 125

right to speak (cf. above paras. 108 et seq.). By enacting § 9 sec. 1 sentence 1 BPräsWahlG, which provides that proposals of candidates must be presented in writing, the legislature used its leeway to design under Art. 54 sec. 7 GG to further define the procedure outlined by Art. 54 sec. 1 sentence 1 GG. It did so in reaction to the fact that during the 2nd Federal Convention a member had misused the possibility to orally propose candidates for the purpose of criticising the incumbent Federal President, who was standing for re-election. By enacting § 8 sentence 2 BPräsWahlG, the legislature left the further design of the procedure to the Federal Convention and merely stipulated that the rules of procedure of the *Bundestag* apply in a subsidiary manner should the Federal Convention not adopt its own rules of procedure.

The applicant unsuccessfully claims – particularly for the 13th Federal Convention – that respondent no. 2 misused its power to design, as the rules of procedure it adopted merely served the aim of preventing him – the applicant – and the members of his party from speaking. In that respect he has submitted that he would have wished to address the events that took place prior to the election. In doing so, he made it clear that he would have used the opportunity of free speech to address circumstances outside the purview of the Federal Convention. In particular, the Federal Convention has no supervisory powers over the President of the *Bundestag*. Moreover, there are no indications that the Federal Convention pursued the aim alleged by the applicant when it adopted its rules of procedure. 126

e) Respondent no. 1 did not violate the applicant's rights by refusing to give him leave to orally state the reasons for his motions. 127

aa) The 14th Federal Convention had no authority to decide upon the barring of its members; therefore, respondent no. 1 was entitled to refrain from putting the motion to a vote (cf. above paras. 123 and 124). Since the Federal Convention had no authority to hear the motion anyway, respondent no. 1 was not required to give the applicant leave to orally state reasons for it; for that reason, application 2 a) is unfounded. 128

bb) Applications 1 a) and 2 c) are unfounded as well. Respondent no. 1 was not required to give members the floor before the adoption of the rules of procedure. 129

§ 8 sentence 2 BPräsWahlG, which was passed on the basis of Art. 54 sec. 7 GG, provides that the rules of procedure of the *Bundestag* – along with the rights to speak enshrined in § 29 – apply only "if and to the extent that" the Federal Convention does not adopt own rules of procedure. If it is already clear that the Federal Convention will make use of its power to organise its procedure itself, the *Bundestag*'s rules of procedure do not apply. For § 8 sentence 2 BPräsWahlG specifically does not provide that the *Bundestag*'s rules of procedure apply "as long as" the Federal Convention has not adopted own rules of procedure. 130

The Court need not decide which fundamental rules of procedure the Chair of the Federal Convention must always observe. In any event, the specific conduct of re- 131

spondent no. 1 does not meet with objections, since the procedural motion supported by the majority in the Federal Convention evidently aimed at banning all speeches from the Federal Convention (cf. para. 126). Respondent no. 1 would have undermined this aim had he given the applicant leave to speak before putting the motion to a vote. Respondent no. 1 did not breach the law when he accorded the vote on the majority motion priority or at least put it to a vote before he had given any member of the Federal Convention leave to speak.

cc) Nor was respondent no. 1 required to give the applicant leave to orally state reasons for the motion requesting to give the entities entitled to nominate candidates the permission to name “election observers” (application 2 e)). Insofar, he merely executed the previously adopted rules of procedure, whose rule that all motions must be filed in writing does not meet with constitutional objections (cf. above para. 108) and which gave respondent no. 1 no leeway to decide differently. 132

II.

Application 2 f), challenging the fact that respondent no. 2 denied the applicant’s motion to give all entities entitled to nominate candidates in the 14th Federal Convention the permission to name an “election observer” to be present during the counting of the votes, is unfounded. 133

In 2012 proceedings for a preliminary injunction concerning the 15th Federal Convention, the Federal Constitutional Court decided that members of the Federal Convention clearly do not possess such a right, since the Basic Law does not afford them the right to be present as “election observers” during the counting of the votes and the determination of the outcome of the vote after each ballot in the election of the Federal President; moreover, the Federal Constitutional Court held that the principle that the election be public does not require that “election observers” named by the entities entitled to nominate candidates be permitted to attend the counting of the votes and the determination of the outcome of the individual ballots in the Federal Convention (BVerfGE 130, 367 <369 and 370>). Nor can a right to be present as “election observer” during the counting of the votes and the determination of the outcome of the vote be derived from Art. 54 sec. 7 GG in conjunction with § 8 sentence 2 BPräsWahlG, since the rules of procedure of the *Bundestag* contain no corresponding right on the part of the *Bundestag*’s members (cf. BVerfGE 130, 367 <370>). A right to attend or to name an “election observer” to be present during the counting of the votes cannot be derived from the principle that the election be public either; in any event, the Court need not decide here to what extent that principle applies to the election by the Federal Convention. For the Federal Convention’s practice to elect officials from among its members belonging to different parliamentary groups and who count the votes and determine the outcome of the individual ballots – all the while exercising mutual review during the counting of the votes – complies with the criteria of comprehensibility and verifiability, which the principle of publicity demands for the election (cf. BVerfGE 130, 367 <371>). There are no apparent reasons justifying a different appraisal. 134

D.

For the same reasons, the applications of the joined parties entitled to join are unsuccessful. 135

E.

The decision in the main proceedings renders moot the applications for preliminary injunctions. 136

Voßkuhle	Lübbe-Wolff	Gerhardt
Landau	Huber	Hermanns
	Kessal-Wulf	

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