

Germany: dispute over the election of Federal Constitutional Court justices

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During the Bundestag's final session before the summer recess, MPs failed to elect three justices to the Federal Constitutional Court (BVerfG). The vote was postponed until autumn after the SPD's candidate, Frauke Brosius-Gersdorf, did not obtain the required majority. The Social Democrats accused the CDU/CSU of breaching the agreement, particularly given that all the nominations had been approved by the relevant Bundestag committee. The CDU/CSU parliamentary leader, Jens Spahn, and Chancellor Friedrich Merz tried to persuade their own faction to support the candidate, but faced strong internal resistance – mainly due to Brosius-Gersdorf's stance on liberalising abortion law. In numerous media appearances, the candidate has defended herself against the criticism, including from conservative commentators and the Catholic Church. She has also hinted at the possibility of withdrawing her candidacy.

Justices of the Federal Constitutional Court (BVerfG) are elected for a 12-year term, alternately by the Bundestag and the Bundesrat, and their appointment requires a two-thirds majority vote. Candidates are nominated – also by a two-thirds majority – by the parliamentary judicial selection committee (*Richterwahlausschuss des Parlaments*), which is composed of 12 members of the Bundestag.

The Bundestag's failure to elect the justices (a procedure that is usually considered a formality) marks the most serious crisis within the coalition to date. The prolonged dispute is weakening government cooperation and threatens Jens Spahn's position as head of the parliamentary group. At the same time, the ongoing debate over the politicisation of the BVerfG's appointment process is gaining momentum.

Commentary

- **The dispute over the election of BVerfG justices constitutes the most significant crisis within the CDU/CSU–SPD coalition to date.** The failure to proceed with the vote on the previously agreed date – despite both parties initially approving the nominations – has dealt the greatest blow to the leader of the Christian Democrats' parliamentary group. Discontented colleagues have accused him of mishandling efforts to secure the necessary support for the BVerfG candidates and of misreading the mood within the party. This is yet another challenge for Spahn in this legislative term: he had previously failed to secure a majority for electing Chancellor Merz in the first round of voting, and was unable to defuse internal tensions during the dispute over energy subsidies. In

addition, the opposition – The Greens, Die Linke, and the AfD – are demanding the establishment of a parliamentary inquiry into alleged irregularities in Spahn's procurement of face masks during his tenure as health minister in the COVID-19 pandemic.

- **The crisis highlights the politicisation of the process for electing BVerfG justices**, where ideological stance – rather than solely academic and professional qualifications – plays a decisive role. Until now, judicial appointments have typically taken place away from the public eye, through behind-the-scenes negotiations on the distribution of positions – mainly between the CDU/CSU and the SPD (with the Greens and the FDP each allowed to nominate one justice, ensuring the necessary two-thirds majority in both chambers). This time, under an agreement between the parliamentary groups, one seat was to go to the CDU and two to the SPD. The nomination of Professor Frauke Brosius-Gersdorf from the University of Potsdam proved controversial, particularly due to her past statements supporting the liberalisation of abortion law, the possibility of mandatory vaccinations during the pandemic, opposition to banning headscarves for public officials, and her support for a possible prohibition of AfD activities.
- **In the past, active politicians were frequently appointed to the BVerfG.** In 2018, the nomination of Stephan Harbarth – currently the Court's President – sparked controversy. He had served as a CDU/CSU parliamentary group member for ten years and, from 2016, sat on the party's executive committee. Similarly, in 2011, Peter Müller, former CDU Minister-President of Saarland, was appointed as a BVerfG justice. In the early 1990s, Roman Herzog (CDU) was succeeded as Court President by Jutta Limbach (SPD), who had previously served as a minister in Berlin's state government. Of the ten BVerfG presidents to date, half had prior political experience.
- **Despite the current opposition from the CDU/CSU to the candidacy of Brosius-Gersdorf and the continued support she enjoys from the SPD, a compromise still appears possible.** One of the options under consideration is the replacement of all three candidates. However, if no compromise is reached and the justices are not elected smoothly in autumn, Jens Spahn's position as leader of the CDU/CSU parliamentary group will be seriously at risk. Should the Bundestag fail to resolve the matter by October, the so-called substitute mechanism, introduced in 2023, would be triggered, transferring responsibility for the appointment process to the Bundesrat.