

## An American's View of The Federal Constitutional Court: Karlsruhe's Justices

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[1] Few Americans have heard of either Karlsruhe or its courts, the Bundesverfassungsgericht (Federal Constitutional Court) and the Bundesgerichtshof (Federal Court of Justice). Moreover, American lawyers who walk through the unique, Enlightenment-era city center of Germany's seat of justice may be surprised. Karlsruhe's streets are neither the twisting, medieval alleyways of travel brochures that extol Europe's charms nor the grand, straight avenues of Berlin. They are evenly spaced spokes of a rational planner's superimposed wheel. When American lawyers approach the Federal Constitutional Court (FCC), they find a further surprise: The court inhabits a modest, modern building. This unimposing structure is stunningly different from the U.S. Supreme Court's massive marble temple on Washington's unmistakably imperial Capitol Hill. The German court sits quietly, unobtrusively between gardens and lawns around a palace that long ago ceased to be a center of political power. Except for the handful of armed guards, one could easily mistake the court for an ordinary office building or part of the local university. [2] These geographic and aesthetic differences between the settings for the most powerful courts in Germany and the U.S. are deceiving. The FCC, despite its unassuming home, is a political powerhouse with considerable influence over German society and politics. Its justices instruct and reprimand Germany's parliament and government with remarkable confidence and detail. Consider, as just one example, its case law regarding university admissions: Professor Donald Kommers has written that the court, through a series of very specific, exacting judgments, "transformed itself into a veritable ministry of education." (1) [3] The FCC also enjoys a global reputation. Jurists from around the world study its organization, methods, and decisions, and they import to their own countries some of the courts most successful attributes. They also eagerly visit and exchange ideas with the FCC's justices. I experienced this first-hand by serving as the courts translator when South Africa's Constitutional Court justices visited Karlsruhe in 1994, shortly before that newly formed court would, in its first case, strike down the death penalty as unconstitutional. (2) Despite the substantial role of British law and culture in South Africa, and despite the reforming country's desire to control political power effectively through courts, the South African court's creators did not look primarily to the U.S., with its long, proud history of judicial review and its British colonial past. Instead, they sought inspiration and very detailed guidance from Germany's FCC. Other countries have done the same, so much so that the FCC has felt compelled to translate many of its key decisions into English to satisfy a steady stream of requests from around the world. [4] More surprises await American lawyers who study the FCC's decisions. The opinions begin with an admirable, lawyer-friendly feature: the *Leitsätze*, or literally "leading sentences." These court-written statements give readers a boldly stated, extremely concise, and accurate account of the binding rules that the court has articulated in the opinion. They are thus far more satisfying and useful than the rambling reporters syllabus that, alongside an explicit warning that it "constitutes no part of the opinion," typically precedes and simply summarizes a Supreme Court opinion. American lawyers can appreciate the FCC's *Leitsätze* best if they recall the hours of work they must spend tracking down and searching through lengthy cases, only to see their German colleagues progress more quickly through a comparable research task simply by pulling the (*Grundgesetz*), a few commentaries, and a *Leitsatz* or two off the shelf. [5] The FCC also speaks with a remarkably coherent, authoritative voice. An opinion's author is not announced. Moreover, the opinions have an organizational and rhetorical similarity that suggest a firm unanimity of purpose among the justices. Such unanimity seems stunning in light of both the unabashedly political process by which the Republic selects the justices and the court's crucial, unavoidably political function. The court's capacity for consensus is likewise striking. Unlike in the U.S. Supreme Court, decisions are not rendered with five different opinions, in which Justice X joins Justice Y only in Parts I.B. and III.C. of her opinion and then, with a feisty rhetorical scalpel, unapologetically slices to bits the ideas of Justice Z. Nor will a German judge singlehandedly and openly put forth an official opinion that -- despite a nearly complete refusal of fellow justices to join that opinion -- nonetheless becomes widely accepted as constitutional law. That of course is what Justice Powell did when his solo opinion in the *Bakke* case (3) set parameters for racial preferences in state university admissions that only now, more than two decades later, courts are gradually supplanting. (4) [6] None of these observations should surprise an American who knows intimately Germany's history and culture, including its legal culture. Like the so-called Bonn Republic, which took Germany from ruins and regret to prosperity and European leadership, the FCC has succeeded by generally avoiding the limelight, rationally and consistently pursuing the Basic Law's fundamental values, and going to great lengths to achieve consensus. It has, in short, adopted a style that fits well its nearly anonymous Karlsruhe home. That style could be described well by the old adage that U.S. President Teddy Roosevelt used to explain the foreign policy tactic he most favored: "Speak softly but carry a big stick." The FCC's "stick" is of course not military might. It is instead the subtler, ultimately inestimable power of words, indeed of constitutional words. Such words form a foundation of democracy and human rights that no polity can thrive without. Germany has learned that lesson painfully and now teaches it well. The FCC, moreover, is one of its most influential teachers. As the self-proclaimed and vigorous "protector of the constitution," the court has contributed greatly to the global health of the rule of law. Americans, surprised or not, would do well to examine the court's work closely

- (1) Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 289 (1997).
- (2) *State v. Makwanyane and Another*, 1995 (6) BCLR 665 (SA).
- (3) *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
- (4) See *Hopwood v. Texas*, 78 F.3d 932, 942 (5th Cir. Tex. 1996), reversing *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994) (Concluding that the defendant "may not use race as a factor in law school admissions" and noting that "Justice Powells opinion has appeared to represent the 'swing vote,' and though, in significant part ... it was joined by no other Justice, it has played a prominent role in subsequent debates concerning the impact of Bakke.")