Concurring in Result Without Written Opinion: A Condemnable Practice

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by Ira P. Robbins

A nyone who has picked up a state court reporter lately is likely to have observed a perplexing judicial voting tactic: One or more judges on an appellate panel frequently “concur in the result only” (CIR), without providing reasons. Presumably, the judge agrees with the outcome advanced by the majority but not its rationale, and nevertheless opts not to write a concurrence explaining his or her independent basis for decision. Sometimes the CIR judge even acts as the “swing vote” on a divided panel. In these cases, the CIR grants one party the vote necessary to win on the merits, but deprives the litigants of a clearly stated rationale commanding a majority of the court. The adverse effects of CIR voting do not end there, however. The inherent ambiguity of the CIR vote produces instability in the law as lawyers, courts, and commentators attempt to evaluate the case’s precedential value. As a result, parties are forced to relitigate important issues that should have been resolved earlier, and courts hearing those cases struggle to apply the law that can be deduced from the earlier case.

Perhaps many who observe the CIR trend think it is of no consequence. As appellate docket backlogs increase, one tends to expect less of even the most conscientious jurists. In turn, the American legal community’s diminished expectations are met with various types of streamlined judicial decision-making tactics—from summary affirmances and unpublished dispositions, to drastic reductions in the hearing of oral arguments, and now CIR—as courts struggle to manage burgeoning caseloads.

Judicial backlogs and other preferred justifications notwithstanding, there are some standards for judicial decision making that should not be compromised. One of these is that a concurring judge should either join in the majority’s reasoning or articulate his or her rationale for declining to do so. Reasonable minds often disagree on novel legal issues; for precisely this reason, judges are charged with articulating their reasoning. Judges should not remain silent and utilize CIR voting whenever they find it expedient to do so because CIR undermines the judicial process and can be fundamentally unfair to litigants.

Patterns and trends

Research indicates that judges use CIR votes often. One noteworthy pattern is that state court judges cast CIR votes much more frequently than their federal court counterparts, but there is even disparate use of CIR from one state to another. Alabama, Mississippi, and Pennsylvania demonstrate a remarkably high incidence of CIR. At the other end of the spectrum are states such as Alaska, California, and Kansas, for which research disclosed only sporadic CIR voting in recent years. Furthermore, if CIR use is prevalent in one of a state’s appellate courts, then the other appellate courts of that state usually employ CIR voting as well. Finally, in courts showing a high rate of CIR voting, most if not all of the judges on those courts cast CIR votes at one time or another. However, some judges use CIR votes considerably more frequently than their colleagues. Indeed, with some judges this increased frequency is astonishing.

States that utilize CIR regularly are Alabama, Florida, Georgia, Louisiana, Michigan, Mississippi, Ohio, and Pennsylvania. Of these, Pennsylvania and Mississippi stand out, for the following reasons. First, the use of CIR in Pennsylvania has been so widespread that the practice provides a good illustration of the potential problems resulting from CIR voting. Second, federal courts in Pennsylvania have expressed confusion and frustration when, bound to apply Pennsylvania law, they are charged with interpreting a Pennsylvania Su-

1. I did not conduct a statistical study on the incidence of CIR. Instead, I tried to determine the prevalence of CIR and to identify trends in CIR use—i.e., in particular states, in individual courts within those states, and even by particular judges. My methodology encompassed the following: (1) searching Westlaw and LexisNexis with keywords to find cases in which one or more judges concurred in the result only, without opinion; (2) determining which states demonstrated a particularly high incidence of CIR votes as compared with other states; (3) taking an approximate count of the number of cases in which a judge entered a CIR vote in selected courts for a 5- or 10-year period; (4) ascertaining what patterns of CIR use, if any, existed in selected cases from particular courts; and (5) noting which judges entered CIR votes more frequently than their colleagues.

2. In each of these states, CIR votes were entered more than 400 times in the past five years.
The Pennsylvania Supreme Court ruling in which a CIR vote was the swing vote. Third, Mississippi cases demonstrate the ability of a single judge to overuse, if not abuse, CIR voting.

The rate of CIR voting in Pennsylvania courts is dramatic. In the Pennsylvania Supreme Court, for example, judges cast approximately 30 CIR votes per year. Recently, legal commentators have remarked on the use of CIR in the Pennsylvania state courts, noting that this phenomenon has proved problematic for the development of Pennsylvania law.

In Pennsylvania, CIR voting occurs in both criminal and civil appeals, and in a variety of instances with respect to the decisions of the other justices. CIR occurs most frequently in the following breakdowns of a seven-judge panel: five majority votes, one CIR vote, and one dissenting vote; or six majority votes and one CIR vote. The fact that a judge is most likely to cast a CIR vote when there is strong majority support for a decision and a particular rationale suggests that the CIR judge may feel it is a waste of time to write separately when greatly outnumbered. A judge’s use of CIR in this situation may be peculiar and enigmatic, but it is not as deleterious as the use of CIR as the swing vote in a case.

Because the highest court in each state has the final word on state law, CIR swing votes have caused confusion for federal courts when they attempt to resolve a case dealing with the application of state law. For example, in Vargas v. Pitman Manufacturing Co. (1982), the United States Court of Appeals for the Third Circuit presided over an appeal of a tort case that had been tried in a Pennsylvania federal court because of the parties’ diversity of citizenship.

The appellant claimed that the Pennsylvania Supreme Court had abolished the assumption-of-risk defense in Rutter v. Northeastern Beaver County School District (1981). The Third Circuit rejected that argument, holding that because Rutter was a mere plurality decision—composed of three justices in favor of abolishing assumption of risk, three dissenting, and one CIR vote—it did not have any precedential value. As a result, the Third Circuit ruled that the assumption-of-risk defense still existed in Pennsylvania. Moreover, after acknowledging that a CIR vote could be interpreted in a number of different ways, the Third Circuit struggled with a variety of possible interpretations of Pennsylvania Supreme Court Justice O'Brien’s CIR vote in Rutter. Unable to determine with which aspect of the “result” Justice O’Brien concurred, the Third Circuit held that a plurality opinion supported by a CIR vote was not controlling precedent and could not create authoritative statements of law.

The Pennsylvania Supreme Court has even struggled to interpret some of its own cases in which one or more justices cast a CIR vote. As a result, the court has specifically held that CIR swing-vote cases may not be used as precedent. For example, in 1995, a six-member panel in Commonwealth v. Jones split on the issue of whether police officers may make a valid arrest, absent a warrant, based solely on information obtained from a confidential informant. Three justices found that information from confidential informants gave rise to probable cause sufficient to make such an arrest, two justices dissented, and one justice concurred in the result only. This issue was relitigated in 1998 in In the Interest of O.A. A divided seven-justice panel of the Pennsylvania Supreme Court disregarded the court’s previous decision on the issue and reached the opposite conclusion—i.e., that tips from confidential informants alone could not generate probable cause. The divided panel consisted of three justices finding probable cause lacking, one CIR supporting that result, and three justices finding probable cause sufficient—a CIR swing-vote case attempting to interpret another CIR swing-vote case. These two examples demonstrate how use of the CIR vote can prevent courts from resolving critical legal issues definitively.

The use of CIR in the Mississippi Supreme Court is particularly noteworthy because one of that court’s justices—Charles McRae—uses CIR with incredible frequency. Over the past five years, Mississippi Supreme Court justices cast approximately 350 CIR votes, roughly 10 of which were CIR swing votes. Justice McRae cast about half of those 350 CIR votes, as well as more than half of the CIR swing votes. In 1999 alone, Justice McRae cast 49 CIR votes. In 2000, Justice McRae cast 49 CIR votes. In 2000, Justice McRae cast 49 CIR votes.
tice McRae has continued his use of CIR: On just one day, January 27, 2000, he cast CIR votes in four cases. They involved a range of issues, including: (1) review of a trial court’s finding that a decedent taking mind-altering drugs had not made a valid inter vivos transfer of real property; (2) review of a circuit court’s dismissal of a petitioner’s motion for post-conviction relief because of lack of jurisdiction; (3) review of a chancery court’s refusal to reduce a petitioner’s child support obligations by $1000 per month; and (4) review of a petitioner’s arguments that his motion for a judgment notwithstanding the verdict should have been granted and that the search of his vehicle violated the Fourth Amendment. To the extent that one might seek a pattern to a particular judge’s CIR voting, none was apparent on this day.9

Low rates of CIR

As noted, Alaska, California, and Kansas are three states in which CIR voting rarely, if ever, occurs. Although none of these states has court rules or other laws prohibiting CIR voting, two provisions of the California Constitution seem to affect judges’ ability to use CIR. First, Article VI, Section 3 states that appellate panels in California must consist of one presiding justice and two or more associate justices, and that the concurrence of at least two judges is necessary to render a valid judgment. On its face, the language of that provision appears to require the concurrence of at least two members with respect to the judgment and the rationale supporting the judgment. However, the California Supreme Court interpreted the meaning of Section 3 in 1995, holding in Amwest Surety Ins. Co. v. Wilson that Article VI, Section 3 was satisfied when two justices concurred in the result despite their adherence to differing or unstated rationales. Thus, as interpreted by the California Supreme Court, Article VI, Section 3 does not prohibit, or even constrain, CIR voting.

The Amwest court also interpreted a second provision of the California Constitution that bears on jurors’ ability to use CIR voting. Article VI, Section 14 states that the decision of an appellate court must be in writing “with reasons stated.” The appellants in Amwest argued that the decision, in which one of the justices who comprised the two-justice majority of the court of appeal concurred in the judgment only, violated Section 14. Reviewing this claim, the California Supreme Court noted that, in the majority of cases in which one or more justices of the California Supreme Court or the state’s courts of appeal cast CIR votes, the views of a majority of the court supporting the judgment are reflected in one or more written opinions. The court stated that these cases do not offend Article VI, Section 14 because they provide a decision for a majority of the court with stated reasons. The court conceded, however, that in a few cases such as the one challenged by the petitioners in Amwest, the CIR vote rendered it uncertain whether the “majority opinion” actually reflects the views of a majority of the justices. The court then held that the decision of the court of appeal in the case under review, consisting of a divided panel and one CIR swing vote, violated Article VI, Section 14 of the California Constitution. Thus, the combined effect of the Amwest court’s holdings on Sections 3 and 14 is to proscribe CIR swing votes, but not CIR voting when a majority of justices—not including the CIR judge—joins in the reasoning of the majority opinion.

Factors fueling CIR

One reason that judges might cast CIR votes is that their dockets are large and unmanageable. According to various studies, the numbers of both criminal and civil cases surged in recent years and, therefore, judges are handling unwieldy caseloads.10 As a result, judges have less time to write opinions for each case to which he or she is assigned. In short, overworked judges may be using CIR simply as a technique to avoid spending time articulating disagreement with the majority’s or plurality’s rationale.11

In response to burgeoning dockets, states have hired more judges, law clerks, staff attorneys, and other court personnel. The additional non-judicial personnel help alleviate caseload pressures by screening cases before they reach a judge. Further, sometimes panels reach decisions on a case with little or no discussion among the judges.12 Thus, CIR use might merely reflect an inability of judges to communicate their positions to one another and achieve consensus on complex legal issues.

9. Other states that use the CIR practice with some frequency are Alabama and Georgia. In the last five years, Alabama judges in the two highest courts, the supreme court and the court of appeals, used CIR more than 800 times. In the same period, Georgia’s appellate courts used CIR more than 500 times.

10. Surging caseloads are a fact of judicial life at both the state and federal levels. See Kauder, National Criminal Justice Measures Affecting State Courts, 2 CASELOAD HIGHLIGHTS 1, 1 (Apr. 1999) (discussing the increasing number of criminal cases filed in state courts); Williams, Survey of State Court Opinion Writing and Publication Practices, 83 L. Lins. J. 21, 21 (1991) (stating that the main reason for selective publication by state courts is the increase in appellate cases); accord Capalbo, supra note 9. The statistics demonstrating how extremely overburdened the appellate courts of Pennsylvania are. Moreover, felony filings take longer to process, involve multiple court appearances, longer trials, and more complicated depositions and sentencing hearings. See Kauder, supra, at 1. For information regarding the federal caseload, see Federal Judicial Center, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 5 (1990) (noting that, in order to manage the increased workload, Congress more than doubled district court and appellate court judgeships).

11. To ‘concur in the result’ means what it expresses. This type of a vote simply means the jurist might not fully agree with the opinion’s rationale. It is, of course, preferable that a concurring opinion be filed, but for many reasons, particularly the constraints of time, the vote ‘CIR’ is employed.” Letter from John P. Flaherty, Chief Justice of Pennsylvania, to Ira P. Robbins (Feb. 11, 2000) (on file with author). A judge may use CIR to save time when he or she believes that producing written ten reasons will add nothing to the area of law.

12. Even the United States Supreme Court uses its law clerks to determine which cases they will hear; not every case is given a great deal of attention.
Indeed, perhaps the growth of the judiciary and high turnover rates have caused a lack of collegiality among members of the court, making consensus building even more difficult.\textsuperscript{13} In part because of these problems, some commentators have argued that there should be a moratorium imposed on increasing the number of judgeships in state and federal courts.\textsuperscript{14}

On a more subjective level, a judge may have his or her own reasons for using CIR in a particular case. For example, a judge might use a CIR swing vote to prevent a holding from becoming binding precedent. As explained above, in cases in which a Pennsylvania Supreme Court judge casts a CIR swing vote, the plurality opinion may not be regarded as Pennsylvania law. Thus, CIR could be used as a way to block an opinion with which the judge agrees in result but not in reasoning. Of course, this premeditated use of CIR swing votes arguably is highly disruptive to the orderly development of the common law and indeed ultimately counterproductive, because it spawns future litigation of issues that should have been resolved earlier.\textsuperscript{15}

Denigration of the process CIR has many negative effects on the judicial process. First, CIR hinders judicial efficiency in the long term.\textsuperscript{16} Second, CIR may “waste” an opinion.\textsuperscript{17} Where one judge has taken time to write an opinion expressing a reasoned basis for his or her conclusion, a CIR swing vote nullifies any effect of that opinion. Third, litigating parties are not afforded the benefit of knowing the reason for a given decision. Fourth, by not acknowledging any governing rationale, the law remains unknown to future litigants. Subsequently, case filings involving a particular issue may increase over time.

Generally, courts have the power to control the “creation” of law through such practices as summary disposition. Summary disposition is a practice in which a court rules on an appeal with, at most, a brief per curiam opinion, and often with only a couple of words—such as “affirmed” or “leave to appeal denied.” Some judges defend summary disposition on the ground that the practice leaves unwritten those decisions that do little to aid the development or understanding of the law.\textsuperscript{18} In other words, the practice of summary disposition excludes from reasoned elaboration those decisions that the judge deems inappropriate for such treatment, while permitting written justification for other, more “worthy,” decisions. Critics note, however, that cases in which an appellate court reverses the court below, or in which an appellate court decision is not unanimous, are often disposed of with a terse one-word “opinion.”\textsuperscript{19} Thus, critics argue, judges are left with too much discretion to decide which cases merit written reasons to support the court’s conclusion.\textsuperscript{20} Once rendered, it is unclear to what extent an appeal resolved by summary disposition has precedential value. The importance and reach of a decision can hardly be determined when only the result, and not the rationale, is apparent. In fact, the courts themselves disagree about the persuasive

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13. It is not all that surprising that the Pennsylvania Supreme Court and the Pennsylvania Superior Court, whose judges use CIR frequently, have suffered very high turnover due to vacancies, abstentions, and retirements. See Cappalli, supra n. 4, at 507-08. Some argue, however, that increasing the number of judgeships would create a “faceless bureaucracy.” See Newman, 1,000 Judges—the Limit For an Effective Federal Judiciary, 76 JUDICATURE 187, 187 (1995) (arguing that a larger federal judiciary is a threat to quality, hinders proper functioning of courts, causes unmanageable circuits, and creates incoherent body of law).

14. See Bermant et al., Imposing a Moratorium on the Number of Federal Judges: Analysis of Arguments and Implications 10-11 (1995). Bermant raises four issues pertaining to an increase in the number of judges: (1) the impact on the overall judicial system; (2) the inevitable increase of other judicial staff; (3) the relatively new debate over expansion; and (4) the effectiveness of enlarging the judiciary to resolve increased workload.

15. Justice Antonin Scalia, too, has argued that increasing the number of judges “helps the docket [but] aggravates . . . the problem of image, prestige and (ultimately) quality.” See id. at 11 (quoting Justice Scalia, Remarks Before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents (Feb. 15, 1987) (manuscript)). But see Richardt, Too Few Judges, Too Many Cases, 79 A.B.A.J. 52 (1993) (arguing that more judges are needed in federal courts).

16. Cf. Cappalli, supra n. 4, at 327 (stating that a CIR swing vote can have the disastrous effect of undermining the efforts of those judges who wrote the majority and dissenting opinions). The use of CIR is equivocal and impedes common-law development. See Witkin, Manual on Appellate Court Opinions § 113 (1977) (emphasizing that CIR “produces all the evils of a contrary opinion with none of the values” because it casts doubt on the majority opinion without giving reasons); see also Aldisert, Opinion Writing 167-68 (1990) (citing and agreeing with Witkin).

17. Because CIR is equivocal, a plurality opinion with a CIR swing vote may not be used as precedent; therefore, the efforts of the judges who wrote the lead and dissenting opinions may be wasted. See supra n. 15 and accompanying text.


19. See id. at 790-91.

20. See id. at 790 (“Judges cannot accurately determine at the time of disposition which cases require published opinions.”).
effect of summary dispositions rendered in their own jurisdictions.\textsuperscript{21}

As difficult as it may be to determine the precedential value of a summary disposition with respect to a particular proposition, it is even more difficult to assess the value of a case disposed of with a CIR swing vote. In the case of the former, the court’s rationale remains hidden, but the decision of the court is unequivocal. In the case of a CIR swing vote, however, it is often impossible to determine the extent of the CIR judge’s agreement with the lead opinion and, therefore, with which aspect of the result he or she concurs. Indeed, a case determined with a CIR swing vote is so ambiguous that it is uncertain whether it would be binding on a later case with nearly identical facts. As a result, the questionable value of a decision complemented by a CIR vote undermines stare decisis to a greater extent than does summary disposition, because it forces parties to relitigate issues that have already been reviewed. In short, summary disposition, the question concerns the case’s precedential value for a particular proposition. With CIR, the question is how to decipher the result in the first place.

**Effect on judicial principles**

Three commonly stated purposes of appellate review and judicial opinions are: (1) reviewing for correctness; (2) developing the law; and (3) ensuring uniformity in the administration of justice. In addition, judicial opinions provide certainty, consistency, and fidelity to the law. Specifically, the doctrine of stare decisis is compromised when judges use CIR rather than write a reasoned elaboration of their positions. The very basis of stare decisis is the idea that a given legal rule will apply to other cases with similar facts. Thus, judges’ adherence to stare decisis provides stability and predictability in the law, both of which are beneficial to judges, lawyers, and litigants.

In contrast, CIR hinders stability in the law. In the case of a CIR swing vote, for example, the CIR judge not only fails to provide any reasoning for his or her decision not to join the majority, but the vote also thwarts the justifications of the plurality.\textsuperscript{22} Furthermore, CIR hinders predictability in the law because one cannot predict when the law on an issue will change if the issue has been disposed of by a CIR swing vote. Indeed, CIR voting generates unnecessary litigation because of the non-binding nature of such decisions. When a judge presents his or her decision, even in dissent, others may subsequently build on the foundation. The written opinion is a necessary tool for judges and lawyers in order to fine tune their reasoning. CIR practice, on the other hand, thwarts the judicial process and wastes judicial resources in the long run. It provides little foundation for anything at all.

**CIR and due process**

The Fourteenth Amendment states that the government may not “deprive any person of life, liberty, or property, without due process of law.” But the term “due process of law” does not lend itself to precise definition or uniform and formulaic application.\textsuperscript{23} Instead, due process represents the elastic concept of fundamental fairness, which lies at the heart of our justice system. Due process safeguards the rights of individuals, while restricting the power of the government. At the least, it protects individuals from government action that is patently arbitrary or capricious. At the most, it guarantees that an individual will not be deprived of his or her rights without all of the procedures necessary to ensure just application of just laws.

Courts invoke the Due Process Clause to strike down rules that are arbitrary—i.e., lacking a reasonable basis for their existence and application. Specifically, legislatures violate due process when they pass laws that are not aimed at furthering a reasonable governmental interest.\textsuperscript{24} Due process applies not just to lawmakers, however; it also applies to a whole range of government actors. For example, public officials and law enforcement officers violate due process when they act arbitrarily or capriciously. It follows, then, that the courts—as custodians of the judicial powers of government—are bound by the Due Process Clause to decide cases on the basis of an honest and reasonable interpretation of the law.

Although courts have not interpreted the United States Constitution to guarantee a right of appeal, even to criminal defendants,\textsuperscript{25} this country has legislatively allowed appeals as of right in criminal cases since 1889.\textsuperscript{26} Thus, because Congress and the state legislatures have conferred the right of appeal to criminal defendants through statutory directive,\textsuperscript{27} due process requires that each petitioner receive meaningful appellate review of his or her conviction.\textsuperscript{28} On the basis of this guarantee, defendant-appellants have recently invoked the Due Process Clause to challenge appellate courts’ disposition of appeals with summary affirmances.

The United States Court of Appeals for the Fifth Circuit rejected one such due process claim in United States v. Pajooh (1998). In that case, a criminal defendant who was tried and convicted in a federal district court in Texas appealed his convic-

\textsuperscript{21} Each court decides for itself which cases are appropriate for summary disposition, as well as how to interpret those decisions later. See id. at 793 (stating that the United States courts of appeals have adopted divergent rules for interpreting the precedential value of summary actions).

\textsuperscript{22} This point is relevant to a situation in which the CIR judge is the swing vote. In cases in which the CIR judge is not the swing vote, stability likely is not affected, except that the CIR judge’s reasoning remains unknown.

\textsuperscript{23} See, e.g., Gilbert v. Homer, 520 U.S. 924, 930 (1997) (stating that due process is not a technical rule having a fixed meaning, but rather is flexible and varies with the particular situation at hand).

\textsuperscript{24} See Alexander v. Whitman, 114 F.3d 1392, 1403 (3d Cir. 1997) (stating that a statute satisfies due process if it implements a rational means of achieving a legitimate governmental aim); United States v. Neal, 16 F.3d 1405, 1409 (7th Cir. 1995) (remarking that a statute violates the Due Process Clause when it manifests an arbitrary classification that is devoid of rational justification), aff’d, 516 U.S. 284, 296 (1996).

\textsuperscript{25} See Almey v. United States, 431 U.S. 651, 656 (1977); United States v. Melmon, 972 F.2d 566, 567 (5th Cir. 1999).

\textsuperscript{26} See Almey, 431 U.S. at 656 n. 3.


\textsuperscript{28} See United States v. Pajooh, 143 F.3d 293, 294 (5th Cir. 1998) (“Appellant argues that because Congress has created the statutory mechanism by which to appeal a criminal judgment of conviction, due process entitles him to ‘meaningful appellate review.’ We agree.”) (citation omitted).
The Fifth Circuit affirmed Pajooh's conviction, but provided only a brief per curiam opinion. This summary affirmation was released in a manner consistent with the Fifth Circuit's rule that judgments may be affirmed or enforced without opinion in certain circumstances. Alleging that his due process right to meaningful review had been violated because the court did not state its reasons for affirming, Pajooh petitioned for rehearing. The Fifth Circuit denied the request. Judge Robert Parker, for a unanimous panel, first agreed with the petitioner that due process entitled him to "meaningful appellate review." He continued, however, by stating that appellate review is sufficiently meaningful when a panel of a court of appeals fully reviews and decides all relevant issues. Under the panel's view, due process does not always require judges to provide appellants with a full written opinion explaining their rationale. Judge Parker also explained that the Fifth Circuit makes decisions regarding publication of opinions on the basis of "whether a full opinion will benefit bench, bar, or the litigants."

Like the Fifth Circuit, the Seventh Circuit has also denied petitioners' claims that summary affirmation violates due process. In Guentchev v. INS (1996), an alien petitioned for judicial review of a Board of Immigration Appeals (BIA) decision, arguing that the BIA's summary affirmation of an immigration judge's disallowance of asylum denied him due process of law. Writing for the court, Judge Frank Easterbrook explained that the BIA's summary affirmation constituted an adoption of the immigration judge's reasoning as its own. This adoption of another's reasons, he stated, is commonplace in the judicial system; therefore, the court lacked any principled ground on which to require that the BIA write a decision using its own words rather than simply adopting the opinion of the immigration judge.

The essential question bearing on whether CIR use complies with the Due Process Clause, then, is whether due process demands from each CIR judge a reasoned justification for casting that vote. Conceding ar
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Instead of objecting to the manner in which the court announces its decision, constitutional challenges to CIR voting should question both the process involved in the CIR judge's decision and its effect on the petitioner. In the case of a CIR swing vote, a divided panel of judges, unable to reach a consensus, finds itself unable to resolve a particular legal issue cleanly. Meanwhile, the CIR judge, aware that he or she will be the swing vote, rejects the majority's rationale as well as the outcome desired by the dissenter(s). Nevertheless, the judge chooses to remain silent. This silence indicates that the judge failed either to find common ground with his or her colleagues or to reach an independent basis for decision. The liti-
gant feels the effect of this failure keenly. Indeed, while an appellant whose criminal conviction is affirmed through summary disposition receives a decision—albeit brief—of a unanimous panel, the appellant whose conviction is affirmed by a divided panel plus a CIR swing vote does not even receive the reasoning of a majority. Clearly, the latter litigant has a stronger argument for deprivation of meaningful appellate review.

A due process violation
The process that is due in a particular case varies with the subject matter, the necessities of the situation, the nature of the right affected, the degree of danger caused by the arbitrary state action, and the availability of prompt remedial measures. Mindful of these variables, this article argues that, at least in some cases, a judge's CIR vote can deny a defendant meaningful appellate review, in violation of the Due Process Clause.

The following hypothetical example illustrates one such situation. A criminal defendant, having been convicted of manslaughter by a jury in a local trial court, appeals his conviction and 10-year prison sentence to the state's intermediate appellate court. He argues that the trial judge's jury instructions were erroneous and, therefore, that his case should be remanded for retrial. The appellate court affirms the conviction with a brief per curiam opinion, and the defendant appeals again—this time to the highest court of the state. After reviewing the case, the seven judges are almost evenly divided: Three judges believe the conviction should be affirmed, one judge is undecided but leaning toward affirmance, and three judges believe the trial judge committed reversible error.

Once the respective judges have drafted what will become the majority and dissenting opinions, the formerly undecided judge decides that she will vote to affirm the conviction but nevertheless refuses to join in the majority's rationale. Thus, she concurs in the result only, and does not provide her reasons. The CIR vote tips the balance of power for decision, and the panel votes 4-3 in favor of affirming the conviction. As a result, the opinion “for the court” relies only the rationale of three of the judges who voted to affirm. The dissenting opinion expresses the views of an equal number of judges who believed the appellant was entitled to a new trial. And the CIR judge's reasoning remains a complete mystery.

While there may be cases in which a CIR vote does not impinge on constitutional guarantees, this hypothetical case does raise due process concerns. The degree of danger resulting from arbitrary state action in the hypothetical mandates that a greater amount of process is due in that case than in others. Indeed, the litigant stands to be deprived of his liberty—a right of the highest order—for many years if his allegedly improper conviction stands. Moreover, once the state high court has ruled on the appeal, there are no other state tribunals to which the defendant may appeal. Due process entitles this defendant to have his case decided by a panel of judges employing an honest and reasonable interpretation of the law.

In two respects, the CIR judge has not provided the appellant with the procedural fairness to which he is entitled. First, the CIR swing vote deprives him of the rationale of a majority of the court. As a result, the defendant must serve his prison term pursuant to the decision of a plurality, and without a statement of how the CIR judge's rationale differed from that of the plurality. Second, through his or her silence the CIR judge fails to provide any assurance that he or she reached the result on the basis of an honest and reasonable interpretation of the law. Nobody but the CIR judge knows whether the decision was reached rationally or arbitrarily. By raising the specter of arbitrariness, this unchecked decision making seems repugnant to the deeply rooted notions of justice and ordered liberty that due process undoubtedly protects. Moreover, the CIR judge leaves other interested parties, such as the bench, the bar, and future litigants, unclear about the state of the law with respect to the issues on appeal.

Recommendations
In view of all of CIR's adverse effects, I believe that CIR voting is not justifiable on judicial efficiency or expediency grounds. Indeed, it is hard to imagine any rationale that would support CIR voting, particularly when the CIR serves as the swing vote. This article challenges courts and judges to acknowledge the problems engendered by CIR voting and to take it upon themselves to abandon the practice.

The most direct and effective way to halt the practice would be for courts to promulgate rules prohibiting CIR voting, or at least defining narrow instances in which CIR voting might be allowed. This avenue for judicial reform puts the authority where it belongs—with the judges themselves. Indeed, if there are limited circumstances in which CIR voting is authorized, each court can create and adopt a policy explicitly stating so. At the least, explicit court rules on CIR voting will prevent the overuse and abuse of CIR voting as it exists now in many states. At the most, court rules will prohibit CIR voting altogether, making the practice a mere relic of a less accountable judiciary.

32. Cases in which all judges on a panel agree on a particular outcome and yet one judge concurs in the result only probably do not involve due process concerns. In these cases, the appellant, the bench, and the bar have not been deprived of a majority rationale. See, for example, *Zelnick v. Brunswick Corp.*, 185 F.3d 1311 (Fed. Cir. 1999), in which a three-judge panel of the United States Court of Appeals for the Federal Circuit affirmed a district court's grant of summary judgment for the defendant with respect to the plaintiff's patent infringement claims. Judge Plager, joined by Judge Bryson, wrote for the majority. Judge Rader concurred in the result without opinion. 33. A state prisoner may, of course, have the option of petitioning for state or federal postconviction review. But the decision whether to grant relief often requires knowledge of the reasons for the challenged court decisions, as in the case of procedural defaults. See *generally* Robbins, *Habeas Corpus Checklists* Chs. 12, 13 (2001).
An alternative measure for curbing CIR voting would be for states to follow California's lead in providing litigants with a constitutional guarantee that every judicial decision must be accompanied by stated reasons. But this approach has two drawbacks: first, to amend a state constitution is a great undertaking; second, any constitutional amendment will be subject to the interpretation of the very judges who engage in CIR voting. As California's Amwest case demonstrates, constitutional guarantees that decisions be accompanied by a stated rationale are likely to be construed as prohibiting CIR swing votes, but not all CIR voting. Thus, such an amendment may solve only half the problem. It may eliminate due process concerns, but fail to mitigate CIR's deleterious effects on the judicial process.

A final alternative depends on the will of individual judges. Collectively, the refusal of each and every judge to partake in CIR voting would amount to a total elimination of the practice. However, this result will obtain only if judges decide that CIR voting is no longer an option open to them. Unless or until this happens, each judge can make a big difference simply by refraining from CIR voting, thereby benefitting a host of individuals, including litigants, and furthering the orderly evolution of the law.

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The legal community should be aware of the dangers of CIR voting and demand greater accountability from its judges. CIR voting often raises the specter of arbitrary judicial decision making and gives rise to due process concerns. Even if CIR voting were found to be constitutional in every instance, however, the practice would still be condemnable. First, CIR voting diminishes the precedential value of judicial decisions, thereby leaving critical legal issues unresolved. As such, the important judicial goals of promoting certainty, predictability, and uniformity in the law are being compromised by judges who are simply unwilling to provide the bench, the bar, and the litigants with a statement of their reasoning. Second, CIR voting adversely affects present and future litigants. Criminal defendants are sometimes deprived of liberty without a clear statement of CIR judges' rationales. In addition, ordinary citizens who are left unsure of what duties the law demands of them must unnecessarily expend resources taking precautionary measures to protect against potential liability. Finally, CIR voting exacerbates the problem of burgeoning court dockets by fueling further litigation. Often parties must relitigate issues that should have been laid to rest definitively. Courts and judges must become aware of the problems that CIR voting creates, and take it upon themselves to discontinue CIR voting before more harm is done. 

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