ENDING THE REIGN OF SLOT MACHINE JUSTICE

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Federal appellate courts employ a random assignment system to select the circuit judges who will serve on any particular three-judge panel. The premise of this system is that random assignment is the fairest way of selecting judges, in light of resource constraints that make the use of full-circuit panels for every case impracticable.[1]

This paper contends that the random assignment system, while perhaps efficient, is certainly not fair. Winning a case in the U.S. courts of appeals hinges too much on luck, and not enough on the merits. This system produces slot machine justice, in which the outcome crucially turns on the three judges selected to hear the case. Aside from problems of basic fairness, the random selection of judges creates other serious problems for the judiciary as well. These include the decreased predictability of the law and extreme ideological results. As the circuit courts' caseload has increased, these problems have become even worse. Prominent jurists have noted that "[t]here is an increasing likelihood that aberrant precedents will be influential"[2] and that courts have become "less predictable and more quirky."[3] These problems, to a large extent, can be traced to the random assignment system.

For this reason, the random assignment system should be replaced with a system in which the judges are assigned on the basis of the parties' preferences. Such a system will fundamentally improve the justice of the federal judiciary's decisions, as every federal appellate decision will reflect, as closely as possible, what the "average" three-judge panel on that federal circuit would decide. It will also mean that there is less variation between decisions made by the same circuit, enabling each court of appeals to develop more coher-

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1. *See* United States v. Mavroules, 798 F. Supp. 61, 61 (D. Mass. 1992).

2. Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 Tex. L. Rev. 1485, 1495 (1995) (book review).

3. Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the* Harvard Law Review *and Other Great Books*, 100 Harv. L. Rev. 887, 904 (1987).

ent and consistent, as well as less ideologically driven, bodies of jurisprudence.

This paper is divided into five parts. Part I briefly reviews the history of the federal appellate system. This Part demonstrates that the random assignment system came into being more by happenstance than by design and that the en banc procedure is an inadequate safeguard to remedy the flaws of random assignment. Part II examines the key problems of the random assignment system, namely unpredictable, inconsistent, and ideologically driven decision-making. Part III further details how my proposal will work in practice, and the advantages it will have, in terms of improved economic efficiency, increased understanding of and conformity to the law, and greater overall fairness to the parties. Parts IV and V contend that my proposal is superior to another proposal, suggested by Professors Emerson H. Tiller and Frank B. Cross, that would replace the random assignment system with "a requirement that every three-member circuit court panel be politically split, with each containing judges appointed by both Republican and Democratic Presidents."[4] My proposal will better accomplish the central goals of the Tiller and Cross proposal—increased "adherence to doctrine and milder ideological results"[5]—while more effectively answering the criticisms that have been leveled against it.

I
THE HISTORY AND STRUCTURE OF THE UNITED STATES COURTS OF APPEALS

When the U.S. courts of appeals were established in 1891, there were only three judges on each circuit.[6] As the number of cases the circuits were asked to adjudicate increased, more judges were added.[7] However, the number of judges that would decide an individual case remained constant at three.[8]

There is no law mandating how federal appellate court judges are to be assigned to these three-judge panels.[9] However, random assignment of appellate court judges to three-judge panels became

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4. Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 216 (1999).

5. Emerson H. Tiller & Frank B. Cross, *A Modest Reply to Judge Wald*, 99 COLUM. L. REV. 262, 263 (1999).

6. Evarts Act, ch. 517, § 2, 26 Stat. 826 (1891).

7. *See* Judicial Code of 1911, ch. 231, §§ 117–18, 36 Stat. 1087, 1131.

8. *See* Tiller & Cross, *supra* note 4, at 216.   **R**

9. *Id*. at 216.

the norm.[10] This occurred for two main reasons. First, random assignment "prevents judge shopping by any party, thereby enhancing public confidence in the assignment process."[11] Second, it allows for cases to be distributed equally among the judges.[12]

As could be expected, sometimes panels on the same circuit decided similar cases differently, depending on the judges assigned to the panel. This led to a statutory reform in 1948 that allowed judges to subject certain cases to en banc review, in which the entire circuit court would sit together to hear one case.[13] Justice Potter Stewart stated the reason for this reform:

> The principal utility of determinations by the courts of appeals in banc [sic] is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions, while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court.[14]

Unfortunately, this reform has been rather ineffective in achieving the desired goal.

En banc hearings occur extremely infrequently, constituting less than one percent of the caseload of the federal appellate courts.[15] The number of en banc cases, moreover, represents only

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10. *Id.* at 216 (citing 3rd Cir. Internal Operating Proc. 1.1, which states that "fully briefed cases are randomly assigned . . . to a three-judge panel"; 4th Cir. Operating Proc. 34.1, which establishes the use of a "computer program designed to achieve total random selection"; 9th Cir. Rules, Intro. E(4), which states that the "only exception to the rule of random assignment of cases to panels is that a case heard by the court on a prior appeal may be set before the same panel upon a later appeal"). For an argument that the random assignment systems of the federal appellate courts "are susceptible to at least some degree of manipulation," see J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1041–43 (2000).

11. United States v. Mavroules, 798 F. Supp. 61, 61 (D. Mass. 1992).

12. *Id.*

13. *See* Judicial Code and Judiciary Act, ch. 646, § 46(c), 62 Stat. 869, 871 (1948) (codified as amended at 18 U.S.C. § 46(c) (1993)).

14. United States v. American-Foreign S.S. Corp., 363 U.S. 685, 689–90 (1960) (quoting Albert Branson Maris, *Hearing and Rehearing Cases in Banc*, *in* 14 F.R.D. 91, 96 (1954)) (internal quotation marks omitted).

15. For example, in the twelve-month period ending September 30, 2000, in all of the federal appellate courts combined (except the Court of Appeals for the Federal Circuit), there were 27,516 total cases terminated on the merits and just seventy-three en banc hearings–for an en banc rate of .27%. *See* 2000 DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 42 tbl.S-1, *at* http://www.uscourts.gov/judbus2000/tables/s01sep00.pdf.

a small fraction of the cases in which there is disagreement among the judges about the outcome. As many as ten percent of the cases decided in the federal appeals courts produce a dissenting opinion,[16] and even the number of dissents vastly undercounts the disagreement on the court. First, judges are reluctant to file dissents for reasons that include the disinclination to take on added work,[17] the fear of fostering "incivility" among their colleagues,[18] and the hope that they can better "control the damage by writing or negotiating with the majority view."[19] Second, several empirical studies show that "Democratic judges typically vot[e] the liberal position and Republicans the conservative"[20] in "numerous areas of law, including civil rights and civil liberties, the environment, crime, and economic issues."[21] This, by extension, may indicate that there remains widespread disagreement within the federal judiciary about a substantial portion of its cases, despite the relatively low number of dissents. In short, there is little question that the en banc procedure is used in only a minor fraction of the cases in which there is division on the court.

With the exception of the Eighth Circuit, if a three-judge panel decision is not heard en banc by the circuit, that decision becomes law for the entire circuit—and binding precedent on all the judges on the circuit—unless overruled by the U.S. Supreme Court.[22] The chances of U.S. Supreme Court review are extremely slim. In 1996, for example, the federal appellate courts decided about 27,000

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16. A Westlaw search of the first four months of 2000 yielded a 2.6% dissent rate for decisions of the courts of appeals. Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1616 n.72 (2000). However, this may significantly undercount the rate of dissents, at least for some circuits. *See, e.g.*, Patricia M. Wald, *" . . . Doctor, Lawyer, Merchant, Chief,"* 60 GEO. WASH. L. REV. 1127, 1142 (1992) ("[T]here were dissents in only about 10 percent [of the cases decided by the D.C. Circuit between 1986 and 1991] . . . ."); Frank X. Altimari, *The Practice of Dissenting in the Second Circuit*, 59 BROOK. L. REV. 275, 277 (1993) ("On average, dissents are filed in less than ten percent of all cases decided by written opinion in this circuit . . . .").

17. Robert G. Flanders, Jr., *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401, 403 (1999).

18. *Id.*

19. Wald, *supra* note 16, at 1143 n.36.

20. Tiller & Cross, *supra* note 4, at 221.

21. *Id.* at 220-21.

22. *See* Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029, 1038 (1999). Hellman continues, "Only the Eighth Circuit allows panels to choose between conflicting lines of circuit precedent." *Id.* at 1038 n.42.

cases on the merits.[23] Out of that plethora of cases, in the 1995 Term, which ended in July 1996, the U.S. Supreme Court decided less than eighty plenary cases that were binding nationally.[24]

II
THE PROBLEMS WITH THE RANDOM ASSIGNMENT SYSTEM

The current random assignment system has created serious problems for the judiciary. First, random assignment makes the outcome of cases extremely unpredictable for the parties. For example, in a federal circuit with thirteen judges, there are 286 possible combinations of three-judge panels. Even if a party could predict that eight out of thirteen of the judges on the circuit would decide the case its way, there would still be an almost one-in-three chance that the party would lose the case after the judicial lottery determined the three judges on the panel.[25] The effects of unpredictable decision-making on the legal process can be severe. As one scholar states:

If appellate outcomes become unpredictable and "quirky" on a large scale, the injurious consequences will be felt both within and without the court system. Some of the harms are instrumental. As litigation becomes "more a game of chance and less a process with predictable outcomes," rational calculation loses much of its value, and the efficiency of the process diminishes. Primary activity too is affected. When citizens must "guess as best they can about what conduct might avoid future litigation," they are deprived of essential materials for intelligent planning and the structuring of transactions. Beyond that, the very notion of "quirky" decisions is antithetical to one of the core values of the justice system: the rule of law.[26]

Thus, unpredictable decision-making decreases judicial legitimacy and results in economic inefficiency.

The second major problem with the random assignment system is that it tends to create contradictory decisions within the same

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23. *See* STATISTICS DIV. ADMIN. OFFICE OF THE U.S. COURTS, FED. JUD. CASELOAD STAT., Mar. 31, 1996, at 17 tbl.B-1.

24. *See* Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 403.

25. *See infra* app. D.

26. Hellman, *supra* note 22, at 1038 (citing J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1176 (1994); JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 7 (1995) [hereinafter JUDICIAL CONFERENCE]) (footnotes omitted). **R**

circuit. As previously stated, any three-judge panel decision is generally binding on the entire circuit, unless overruled by an en banc panel or the U.S. Supreme Court.[27] Phrased another way, if a three-judge panel decides a legal question a certain way, every future three-judge panel on that circuit that hears a case presenting the same legal question must decide the case the same way. This rule is designed to maintain "consistent and coherent law."[28]

The random assignment system undermines the precedential value of three-judge panels for the simple reason that, in many instances, entirely different panels, with entirely different judicial philosophies, will be hearing the future cases. Not surprisingly, when these new panels confront a legal precedent that they strongly believe should have been decided the opposite way, they will sometimes try to evade the previous decision. As former Eleventh Circuit Chief Judge Gerald Bard Tjoflat noted, the problem with "different three-judge panels deciding the court's cases," is that "it is inevitable that one panel will overrule another, or gloss the circuit's precedent, and thus render the law unclear."[29] Talented jurists, Judge Tjoflat implies, can usually "distinguish" on-point precedents when it suits their purposes. Backing up Judge Tjoflat's sentiments, two studies of federal appellate judges indicates that three-judge panels will ignore established doctrine when it suits their ideological purposes.[30]

The problem of contradictory decisions within the same circuit has been noted frequently. In 1990, the Federal Courts Study Committee, a congressionally established panel charged with examining the federal courts, warned of "increasingly disparate case law."[31] Judge Patricia M. Wald, formerly of the D.C. Circuit, would agree. As she has observed, "[p]recedent can be found somewhere for almost any proposition; the value of any single precedent is diminished. Courts [have] become less predictable and more quirky."[32]

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27. *See supra* text accompanying notes 22-24.

28. COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 47 (1998) [hereinafter FINAL REPORT].

29. Gerald Bard Tjoflat, *Statement Before the Commission on Structural Alternatives for the Federal Courts of Appeals* (Mar. 23, 1998), *quoted in* Hellman, *supra* note 22, at **R** 1053.

30. *See* Tiller & Cross, *supra* note 4, at 221-23 (citing studies) ("Two recent studies suggest that federal appellate judges, in order to achieve desired policy outcomes, manipulate judicial decision instruments (statutory interpretation and process review, in particular) when reviewing agency policies.").

31. FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 120 (1990).

32. Wald, *supra* note 3, at 904.   **R**

On a similar note, Fifth Circuit Judge Edith M. Jones has remarked that:

> The promiscuous growth of published precedent imposes enormous social costs. Trends in the law are becoming much more difficult to ferret out; the legal researcher may plow through dozens of similar cases looking for facts most "on point" with a particular problem. . . . There is an increasing likelihood that aberrant precedents will be influential; as legal research is swamped, the haphazard extraction and citation of deviant or simply incorrect opinions becomes more probable. . . . As published opinions continue to proliferate, allowing courts to pick and choose among cases, the courts' discretion increases and the predictability of legal decisions decreases. The end result is inimical to the rule of law.[33]

Commentators such as Judge Wald have identified "escalating caseloads," rather than the random assignment system, as the cause of this problem.[34] The escalating caseload, the theory goes, "produce[s] a glut of published precedent which the judge should but cannot always know."[35] This theory suggests that judges would follow circuit precedent, if only they knew it.

This paper argues that this underlying assumption about judicial decision-making is mistaken. Even accepting this "ignorance-based" theory, however, the random assignment system surely exacerbates the problem that the escalating case loads presents. Random assignment inevitably produces three-judge panels with widely varied ideological bents. These panels will decide similar cases differently if left to their own devices. The only constraining force on the panels is previous circuit precedent. However, if the power of this constraining force is for any reason diminished—whether because judges do not know their circuit's precedent, as Judge Wald contends, or willfully disregard it, as Judge Tjoflat suggests—then inconsistent opinions within a circuit will occur more and more frequently. Since one consequence of escalating caseloads is to diminish the constraining power of circuit precedent, the random assignment system loses the only countervailing force the circuit has to prevent inconsistent decision-making. In contrast, if the random assignment system were replaced by a system that produces three-judge panels with similar ideological dispositions, then these panels would be much more likely to decide cases similarly, even if left to

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33. Jones, *supra* note 2, at 1495.   **R**
34. Wald, *supra* note 3, at 904.   **R**
35. *Id.*

their own devices. Thus, the increasing caseloads would have much less of an effect on judicial outcomes.

III
MY PROPOSAL AND ITS ADVANTAGES

My proposal will replace random assignment with a system that will produce panels of judges with similar ideological dispositions. In fact, it will structure panels so that the ideological composition of each panel will be representative of the composition of an "average" panel for the circuit. In other words, the ideology of each three-judge panel will be representative of the ideological composition of the entire circuit. My proposal accomplishes this by assigning circuit judges to panels based on the parties' preferences, rather than by lot. This part explains the basic components of my proposal and their advantages, which are elaborated in more technical detail in the appendices.

First, the petitioner ranks the circuit's judges in order of preference, and the respondent does the same. The computer then sums the point values for each judge by the following method. Let x equal the number of judges on the circuit. Assign a value of 1 to the petitioner's top choice, 2 to the petitioner's second choice, etc. Assign a value of x to the respondent's top choice, $x - 1$ to the respondent's second choice, $x - 2$ to the respondent's third choice, etc.

Next, the computer randomly picks two of the three judges who will serve on the panel. In order to determine the last judge, the computer selects a judge whose point value, when added to the value of the computer–picked judges, will be closest to equaling $3(x + 1)$. Since an average judge under this system receives a rating of $(x + 1) / 2$ from each of the parties, a panel of three average judges will have a *total* rating of six times that number, or $3(x + 1)$. If no judge has a point value high enough to reach $3(x + 1)$ or if no judge has a point value low enough to reach $3(x + 1)$, then the computer re-picks the first two judges.

That is the simplified version. As the appendices document, the actual computer formula needs to be a bit more complicated to ensure that all the judges decide the same number of cases, and that the petitioner and respondent submit the rankings that accurately represent their preferences rather than submit some other ordering for strategic purposes. (See Appendices A, B, C.) Additionally, as elaborated more fully below, the system allows either the petitioner or respondent to choose *not* to submit a preference list without suffering a disadvantage. This is to ensure that a lawyer

with few resources, who feels that opposing counsel is better able to rank the judges accurately, will not be harmed by the system.

This reform of the federal judiciary will increase the law's predictability and produce less ideologically driven results. It will increase predictability by producing three-court panels whose ideology will be roughly known in advance, that of an "average" three-judge panel on the circuit. The benefits of increased predictability in the law are enormous.

First, predictability in the law improves society's economic efficiency as it allows parties to accommodate their behavior to legal rules.[36] Under the random assignment system, parties can only make reasonably accurate predictions after the three judges are assigned to their case. This is far too late, of course, for businesses and individuals who want to adjust their behavior to legal rules *before* they are involved in litigation. Additionally, legal predictability also improves economic efficiency by increasing the settlement rate. Settlement does not just save the litigants resources, but it also decreases the burden on the federal court system. It was for this very reason, for instance, that the D.C. Circuit now releases the names of the judges assigned to a particular panel before the parties have to write their briefs. According to Professor Richard Revesz, the D.C. Circuit decided that this change of procedure "would encourage settlements and reduce the court's adjudicatory burden."[37] And on a related point, the more predictable the law, the easier it is for citizens to understand and abide by its dictates, thus necessarily reducing enforcement costs.

Second, predictability of the law, combined with less ideologically driven results, also makes the legal system more fair. Under my proposal, the federal appellate courts should produce less ideologically driven results. A three-judge panel that is randomly composed is more likely to have an extreme ideological composition than is a panel specifically selected in ways designed to ensure that its ideology is representative of the entire circuit. This is simply a

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36. *See* Tiller & Cross, *supra* note 4, at 230–31 (citing Pietro Trimarchi, *Commercial Impracticability in Contract Law: An Economic Analysis*, 11 INT'L REV. L. & ECON. 63, 81–82 (1991); John Elofson, Note, *The Dilemma of Changed Circumstances in Contract Law: An Economic Analysis of the Foreseeability and Superior Risk Bearer Tests*, 30 COLUM. J.L. & SOC. PROBS. 1, 23–27 (1996)).   **R**

37. Richard L. Revesz, *Litigation and Settlement in the Federal Appellate Courts: Impact of Panel Selection Procedures on Ideologically Divided Courts*, 29 J. LEGAL STUD. 685, 708 (2000). In addition, advocates of the theory that circuit judges do not adhere to precedent because there is too much of it for them to know would argue that a reform that reduces a circuit's caseload will also increase the predictability and consistency of its decisions.

matter of probability. It is likely that the average ideology of three judges chosen at random will deviate more from the average ideology of all the circuits than will the average ideology of an entire circuit, which has anywhere from six to twenty-eight judges.

Under my system, since all parties will be heard by three-judge panels with similar ideological dispositions, all parties should, to a great extent, be "treated alike in like circumstances,"[38] rather than have their claims disposed of in an arbitrary fashion. Moreover, since the three-judge panels will be less ideologically driven in the aggregate, there is less of a chance that the panel will compromise fairness by ignoring circuit precedent and/or established doctrine in order to reach the desired result. This hypothesis is supported by several studies that suggest that highly ideological three-judge panels disregard established doctrine and neutral precedent when making their decisions.[39] Finally, ideological voting is widely viewed as dangerous for the federal judiciary, and unfair to the litigants, because federal judges are not elected by the people to represent their policy views and lack public accountability because they have lifetime tenure.[40] Ideological voting undermines fairness by "threaten[ing] the values of self-determination, accountability, and representationalism that provide core notions of American political theory."[41]

IV

WHY MY PROPOSAL IS SUPERIOR TO THE TILLER
AND CROSS PROPOSAL

In *A Modest Proposal For Improving American Justice*, Professors Tiller and Cross also argue that the federal judiciary can be "markedly improved by eliminating the practice of randomly assigning circuit court judges to panels."[42] However, Tiller and Cross's suggested reform is quite different from mine. They "propose a requirement that every three-member circuit court panel be politically split, with each containing judges appointed by both Re-

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38. Tiller & Cross, *supra* note 4, at 231 (quoting Karl N. Llewellyn, *Case Law, in* 3 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 249 (Edwin R.A. Seligman ed., 1930)).

39. Tiller & Cross, *supra* note 4, at 215 (citing Frank B. Cross & Emerson H. **R** Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2168–72 (1998)).

40. *See id.* at 215.

41. *Id.* at 215–16 (quoting Martin H. Redish, *Taking a Stroll Through Jurassic Park: Neutral Principles and the Originalist–Minimalist Fallacy in Constitutional Interpretation*, 88 NW. U. L. REV. 165, 166 (1993)).

42. *Id.* at 215.

publican and Democratic Presidents."[43] The authors contend that such a system would "produce adherence to doctrine and milder ideological results."[44]

My proposal is superior to the Tiller and Cross proposal for two main reasons. First, my proposal not only better accomplishes the goals of the Tiller and Cross proposal—adherence to doctrine and milder ideological results—but also maintains the ideological integrity and coherence of the regional appellate courts. Second, my proposal can respond more effectively to the criticisms that have been leveled against the Tiller and Cross proposal.

On the first point, Tiller and Cross contend that their proposal would improve judicial adherence to doctrine and achieve milder ideological results because it would prevent the formation of panels in which all three judges were appointed by Presidents of the same party.[45] Therefore, there would be less of an "ideological component" to judging and enhanced "adherence to neutral precedent."[46]

The major flaw in this reasoning is that it takes only two votes for a circuit panel to reach a decision. Thus, if a panel has two ideologically driven Republicans, a liberal Democrat can do nothing to stop the two Republican judges from deciding the case in the way they want. Tiller and Cross attempt to address this problem in two ways. First, they argue that "not all Republicans share the same level of conservatism and not all Democrats share the same level of liberalism. The minority partisan member may be able to forge a more centrist outcome with the weaker ideologue from the majority party coalition, thereby moderating against extreme partisan outcomes."[47] Second, they contend that the mere presence of the minority party judge will have a significant effect on the other two judges, even if the minority party judge cannot stop the majority from ruling as they wish. Specifically, the minority party judge will serve as a "built-in monitor over partisan excess."[48] That is, the minority party member—acting as a "whistleblower"—will "confront the majority members with their disobedience to precedent, persuading or shaming them into compliance."[49]

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43. *Id.* at 216.

44. Tiller & Cross, *supra* note 5, at 263.   **R**

45. *See* Tiller & Cross, *supra* note 4, at 215–16.   **R**

46. *Id.* at 228.

47. *Id.*

48. *Id.*

49. *Id.* at 229.

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This reasoning is flawed. While it is undoubtedly true that "not all Republicans share the same level of conservatism," nothing in the Tiller and Cross proposal actually *prevents* the two most conservative judges on a circuit from sitting on the same panel. Rather, they leave that possibility up to chance. Moreover, there are good reasons to think that Tiller and Cross overstate the importance of the whistleblower effect. As Judge Wald points out, "it is rare that a third judge with a minority point of view is able to 'persuade' the other two to come round. Majorities, unless they are extremely tentative to begin with, do not often change their mind as a result of a third judge's arguments or pleas."[50]

My proposal does not suffer from the flaws that plague that of Tiller and Cross. Under my proposal, the two judges most favorable from the petitioner's perspective (or the judges most favorable from the respondent's perspective) will generally never sit on the same panel. An extremely petitioner-favorable judge will either be paired with a "neutral" judge and an extremely respondent-favorable judge, or with two moderately respondent-favorable judges. The same holds true, in reverse, for pairing an extremely respondent-favorable judge on a panel with two other judges. Consequently, if the two most petitioner-favorable judges are the two most conservative judges on the panel, then it is unlikely that the two most conservative judges will ever sit on the same panel.[51]

An additional flaw in Tiller and Cross's proposal is that it is not structured so that the decisions of the three-judge panels replicate the decisions that would have been reached if the entire circuit had decided the case. Instead, Tiller and Cross are concerned about balance in some abstract, political sense, no matter what the composition of a particular circuit. For instance, if a circuit consists mostly of Republican judges, Tiller and Cross's proposal would require that the circuit utilize senior status judges from the Demo-

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50. Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 253 (1999).

51. For instance, in the example presented in Appendix B, where I assume that the current U.S. Supreme Court is a nine-judge federal appellate circuit, the most petitioner-favorable judge, Thomas, is never paired with either the second-most petitioner-favorable judge, Scalia, or the third-most petitioner-favorable judge, Rehnquist. Thomas is paired with either a neutral judge and an extremely respondent-favorable judge or with two moderately respondent-favorable judges. In converse, the most respondent-favorable judge, Stevens, is never paired with the second-most respondent favorable judge, Ginsburg, the third-most respondent favorable judge, Souter, or the fourth-most respondent favorable judge, Breyer. Stevens is either paired with a neutral judge and an extremely petitioner-favorable judge or two moderately petitioner-favorable judges. *See* Appendix B.

cratic party or import Democratic judges *from outside the circuit* in order to have an equitable case load distribution.[52] Consequently, any decision that is reached would not be representative of the circuit's legal views, especially if the Democratic judge joined a Republican judge in the majority, and the other Republican judge dissented. This is likely to undermine the legitimacy of the decision, so that a panel in the same circuit hearing a similar case would be less likely to follow the decision that the outsider Democrat helped adjudicate. Therefore, the frequency of inconsistent decision-making would be likely to increase, which, as discussed earlier, makes the judicial system less predictable and coherent.

In contrast, my proposal attempts to structure three-judge panels so that they replicate the decisions that would have been reached if the entire circuit were deciding every case. By so doing, my proposal maintains the ideological integrity and coherence of the regional appellate circuits, where the Tiller and Cross proposal does not. For example, under my proposal, three-judge panel decisions are much more likely to match en banc rulings (meaning, of course, that a circuit is less likely to hear cases en banc in the first place). Imagine an eleven-judge circuit that would decide a case six judges for the petitioner to five for the respondent. The chances that a three-judge panel, if randomly assigned, will also decide for the petitioner are just 58%. Under my proposal, the chances improve to 67%. My proposal will produce an even more dramatic improvement if the split is seven to four: 72% under the random assignment system, 90% under my proposal. (See Appendix D.)

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V

WHY MY PROPOSAL DOES NOT SUFFER FROM THE
MAJOR CRITICISMS THAT HAVE BEEN
LEVELED AGAINST TILLER
AND CROSS

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Judge Patricia Wald, in particular, has offered a sharp critique of Tiller and Cross's proposal.[53] In this part, I will explain why my proposal does not suffer from the same faults.

Wald has five main criticisms of Tiller and Cross. First, she argues that their proposal vastly overstates the relationship between a judge's voting record and the party ideology of the President who appointed the judge.[54] Second, she contends that the Tiller and

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52. *See* Tiller & Cross, *supra* note 4, at 233–34.
53. *See* Wald, *supra* note 50.   **R**
54. *Id.* at 239–41.

Cross proposal places severe administrative burdens on the court because judges affiliated with a party that is underrepresented on their circuit will have to increase their workload or have outside judges sit by designation.[55] Third, she predicts that the Tiller and Cross proposal will increase the public perception that judges are politically motivated.[56] Fourth, she argues that their proposal will mute the important judicial "dialogue" that takes place on controversial issues.[57] Fifth, she asserts that the proposal's explicit mixing of political parties with judging may be unconstitutional.[58] I will examine each of these criticisms in turn and explain why my proposal is less susceptible to them than is the proposal of Tiller and Cross.

A. The Relationship Between an Appointing President's Political Party and a Judge's Voting Record Is Overstated

Wald identifies four reasons why the political party of an appointing president is only a crude proxy for how a judge will vote. First, many judges "will not always hew to the party line," especially since they have a lifetime appointment.[59] Second, a political party's ideology changes over time, so that "a Carter appointee may well have a different worldview than a Clinton appointee."[60] Third, it is often difficult to identify the so-called party line in any particular case.[61] Fourth, each judge on the court is, of course, an individual with a "distinctive world view, a strong personal style of judging, and a particular approach to opinion-writing."[62]

Unlike the Tiller and Cross proposal, my proposal has the advantage of taking each judge as an individual. Lawyers are completely free to use the appointing president's political party as a proxy for the judge's beliefs, but they also have the absolute ability to ignore the appointing president's political party when they decide that is the better strategy. My system also gives litigants the flexibility to account for judges who take conservative positions on some issues, and liberal positions on others. Litigants also can adjust their list of preferences to account for judges who change their

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55. *Id.* at 254.

56. *Id.* at 256.

57. *See id.* at 253.

58. *Id.* at 256–60.

59. *Id.* at 239.

60. *Id.*

61. *See id.* at 240–41.

62. *Id.* at 245.

philosophies over time. Such flexibility does not exist under the Tiller and Cross proposal.

B.   *Significant Administrative Burdens Will Be Placed on the Courts*

Under Tiller and Cross's proposal, judges that are affiliated with an underrepresented party on a circuit will have to increase their workload or have outside judges sit by designation.[63] Wald contends that this would "wreak havoc with a busy appellate court's use of its judicial resources."[64] In contrast, my proposal allows for all the circuit judges to hear an equal number of cases. (See Appendices A and B.) It places no additional administrative burdens on the courts. In fact, my proposal may *ease* the existing administrative burdens because courts may decide that they need to hold en banc panels less frequently.

To be sure, my proposal will place some additional administrative burdens on the litigants, who will have to spend some time formulating their rankings. However, my proposal will not further exacerbate the advantages that wealthy clients, with the money to research judges, have over poorer clients. Under my proposal, it would not be necessary for both the petitioner and respondent to submit preference lists. (In fact, it would not be necessary for either the petitioner or respondent to submit a preference list. In such a circumstance, the computer could resort to the current system, and randomly select the judges.)

If only one party submits a list, the computer will automatically complete the other party's preference list so that the judges are ranked in the *exactly opposite order*. (The two sides are not going to be informed, however, whether the other side has submitted a preference list or not.) Therefore, a low-resource lawyer who feels that the other side is better able to rank the judges will not be at a disadvantage. This lawyer can simply choose not to submit a preference list, and the computer will rank the judges in the order that the opposing counsel would least want. (Appendix C explains how my proposal neutralizes problems of strategic behavior.)

In practice, the party that believes that a centrist panel will be advantageous to its case will always want to submit a preference list. Here, it will be valuable to have the resources to research the judges. However, it is fair to say that a lawyer with few resources, who believes that a centrist panel will rule favorably, would rather have my proposal in place than the current random-assignment sys-

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63. Tiller & Cross, *supra* note 4, at 233.   **R**
64. Wald, *supra* note 50, at 254.   **R**

tem, even though the low-resource lawyer will have to invest some time and money in researching the judges. Furthermore, the effort it will take to produce a reasonably good ranking should not be overstated. If my proposal is implemented, legal newspapers and private-sector services will probably offer assistance. The loser under my system is not the lawyer with few resources; it is the lawyer who can only win the case if it is decided by an ideologically skewed panel.

C.   The Perception of Judges as Politically Motivated Will Increase

Wald's most vehement critique of the Tiller and Cross proposal turns on the way in which she thinks that it undermines the judiciary's perceived legitimacy. As Wald writes:

> [T]he idea that the minority judge, whether from the circuit or from outside the circuit, is to become a kind of proxy for the party on the bench, tasked with rooting out the biases of her colleagues and confronting them, changes radically the public's and the judge's own perception of her role.[65]

In short, Wald believes that the Tiller and Cross proposal will harm the perception of the judiciary in two ways. First, it will increase the public perception of the judiciary as politicized "at a time when those attacks are too much in view during political campaigns."[66] Second, it will change the perception that judges have of their own role in a way that is adverse to the integrity of the judicial process. Wald explains that "[t]his formal labeling of judges is the antithesis of collegial decisionmaking, which depends heavily on open and honest dialogue among judges."[67]

In the absence of polling data, it is hard to do more than speculate about how any reform will affect the public's view of the federal judiciary. Still, it is safe to say that any explicit mixing of political parties with the judiciary will, by definition, increase the public's view of the judiciary as politicized. In contrast, my proposal avoids any explicit mixing of politics with the judiciary. What my proposal does make explicit is the fact that it is possible to "handicap" the relative propensities that individual judges have to vote a certain way on a particular issue. This notion should not be too difficult for the public or the judiciary to accept, since my proposal is analogous to a widely accepted judicial practice—peremptory challenges. In the trial context, seven hundred years of Anglo-

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65. *Id.* at 254–55.
66. *Id.* at 256.
67. *Id.* at 255.

Saxon jurisprudence[68] supports the proposition that parties should, in the interest of fairness, have some control over the people who adjudicate their claims. Although peremptory challenges are most often thought of in the jury context, the application of peremptory challenges to judges has been contemplated as well. In 1973, for example, a U.S. Senator "made brief reference to the advisability of amending [28 U.S.C.] § 144 to permit one [peremptory] challenge of a judge, but Congress did not act upon this suggestion."[69] Additionally, California allows peremptory challenges to judges under limited circumstances.[70] A pure peremptory challenge system would not work for the federal appellate judiciary because of the high probability that the caseload for the more moderate judges on a circuit would increase dramatically. My proposal is like a peremptory challenge system for appellate court judges, modified to allow for an equal distribution of cases among the judges. Moreover, my proposal—by not formally labeling judges with a political party—should not affect the nonpartisan view that judges have of themselves. In fact, neither the judges nor the public will know the lawyers' rankings, so the fear that judges will feel that they are assigned a particular role to play in adjudication should be remote.

D.   The Proposal Will Mute Judicial "Dialogue"

Judge Wald also makes the argument that the Tiller and Cross proposal will mute judicial dialogue, adversely affecting the quality of legal development. As Wald states:

> The present random system of panel assignments is . . . desirable precisely *because* it can produce panels with widely different perspectives. Once a range of panels has considered an issue, the right answer may become more apparent to the judiciary. It also may become clearer to the Supreme Court, which often waits until a legal question has percolated extensively in the courts of appeals before stepping in to decide it. Under Tiller and Cross's proposal, the law would un-

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68. Coburn R. Beck, Note, *The Current State of the Peremptory Challenge*, 39 Wm. & Mary L. Rev. 961, 965 (1998).

69. Karen Nelson Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 Hastings L.J. 829, 833 n.33 (1984) (*citing Judicial Disqualification: Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 6-7, 12–13, 76 (1973)).

70. *See* Cal. Civ. Proc. Code § 170.6 (West Supp. 2001) (establishing that a lawyer can disqualify a judge by simply stating, under oath, that the judge is "prejudiced" against either the lawyer or party "so that such party or attorney cannot or believes that he [or she] cannot have a fair and impartial trial or hearing before such judge").

dergo less percolation, and would instead become something like instant coffee: more homogenous, and ultimately less satisfying.[71]

Wald contends that the random assignment system achieves the desirable level of percolation, and that the Tiller and Cross proposal achieves too little percolation. Of course, the ideal level of legal percolation that should occur in the judiciary is a deep question. In this arena, the judicial value of legal predictability and majority decision-making is pitted against the judicial value of enhanced debate.[72] Nevertheless, there is widespread agreement that the only acceptable percolation of the law occurs between the circuits and not within each one.[73]

The Tiller and Cross proposal attempts to reduce legal percolation between the circuits (as well as within each circuit).[74] Whatever the merits of achieving cross-circuit homogeneity, it is certainly a radical idea and not the "modest proposal" that Tiller and Cross purport it to be.[75] It is radical because it changes the entire value system of the federal judiciary.[76] The federal judiciary was deliberately split into regional appellate courts, whose decisions are not binding on each other. Therefore, Tiller and Cross's proposal challenges the very idea that circuits should be separate entities.

In contrast, my proposal is merely trying to give each circuit "coherence and consistency in decisional law."[77] The fact that the federal appellate system already has the en banc procedure strongly indicates that this system does not view decisions that are unrepresentative of the entire circuit as a healthy development that fosters "judicial dialogue." In fact, the en banc procedure is there precisely to correct such aberrant decisions. But since the en banc procedure is so costly, it is rarely employed. Therefore, a substantial

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71. Wald, *supra* note 50, at 253.   **R**

72. For a persuasive argument in favor of majority decision-making, see Abramowicz, *supra* note 16, at 1630–36. It should be noted that even with my **R** proposal, dissents will continue to provide different points of view that other circuits and the Supreme Court can consider.

73. *See* Hellman, *supra* note 22, at 1038. Hellman continues, "If one panel **R** decides a case in a way that is contrary to a prior ruling of the court, most circuits hold that the later decision will not be given precedential effect." *Id.* at 1038 n.42.

74. *See* Tiller & Cross, *supra* note 4.   **R**

75. *Id.*

76. *See* FINAL REPORT, *supra* note 28, at 49 ("[T]he divisional structure re- **R** spects and heightens the regional character deemed a desirable feature of the federal intermediate appellate system . . . .").

77. JUDICIAL CONFERENCE, 26 *supra* note 25, at 19.   **R**

number of aberrant decisions are allowed to stand, subverting justice.

It is important to note that my proposal will not affect, or mute, the ideological differences *between* the circuits. Instead, my proposal will do two things. First, it will mute legal percolation within a circuit, a goal that even Judge Wald indicates that she supports.[78] Second, my proposal will mute legal percolation to the extent that it will decrease the number of unrepresentative three-judge panels. In sum, there will still be extensive percolation under my proposal. It is just that conservative and liberal appellate opinions will reflect the ideology of entire circuits, rather than renegade three-judge panels.

I anticipate that my proposal may be critiqued on the ground that it will prevent certain judges (both very conservative or both very liberal) from ever sitting together, harming the judges' educational process. As an initial matter, I think that this prediction is overstated. Even judges who harbor similar, and extreme, views may be able to sit together on some cases, if there is *any* issue on which either judge breaks from a knee-jerk conservative or liberal mold. On the other hand, if both judges always adhere to strictly ideological and extreme positions, I think it is fair to say that they are unlikely to learn much from each other.

E. The Proposal May Be Unconstitutional

Wald's last major criticism of the Tiller and Cross proposal is that it may be unconstitutional. Wald writes that "[i]mposing a further political constraint on the judiciary" raises, at a minimum, "serious separation of powers and due process concerns."[79] First, Wald contends that the Tiller and Cross proposal—by injecting partisan considerations into the federal judiciary—may breach the separation-of-powers required by the Constitution.[80] Second, Wald contends that the Tiller and Cross proposal may violate the parties' due process right to impartial adjudication.[81] My proposal does not raise either of these concerns. There is no separation-of-powers issue because partisan considerations will play no formal role in selecting the three-judge panels. Likewise, my proposal raises no due process concerns because judges will not be labeled "Democratic" or "Republican" and will not feel a need to play any particular role.

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78. *See* Wald, *supra* note 3, at 904 (noting that escalating caseloads produce   **R**
"inevitable inconsistencies within and among courts").

79. Wald, *supra* note 50, at 256–57.   **R**

80. *Id.* at 257–59.

81. *Id.* at 259–60.

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In fact, a major effect of my proposal will be to increase the impartiality of the federal judiciary.

VI
CONCLUSION

The random assignment system works as a judicial slot machine: dispensing justice only when the three judges line up just right for the party. But society pays a dear price for such casino justice, which produces inconsistent and unpredictable law, ideologically driven results, and unfairness to the parties. Replacing the random assignment system with a system based on the parties' preferences will bring predictability and fairness back to the federal appellate decision-making process. At the same time, my proposal—by utilizing the preferences of the litigants instead of crude proxies—avoids the pitfalls of the Tiller and Cross proposal.

As caseloads continue to increase, exacerbating the faults of the random assignment system, this reform is urgently needed. Judges have already commented on the increasing phenomenon of inconsistent decisions within the same circuit.[82] Under my proposal, each of the regional circuits will be able to produce coherent and consistent decisions that are representative of the views of the entire circuit. Blind justice will replace blind luck.

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82. *See* Wald, *supra* note 3, at 904; *see also* Jones, *supra* note 2, at 1495.   **R**

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APPENDIX A: THE PROPOSAL

Step 1: The petitioner ranks the circuit's judges in order of preference, and the respondent does the same. The computer then sums the point values for each judge, by the following method. Let x equal the number of judges on a circuit. For the petitioner, assign a value of 1 to his top choice, 2 to his second choice, etc. For the respondent, assign a value of x to his top choice, $x - 1$ to his second choice, $x - 2$ to his third choice, etc.

(The system allows for either the petitioner or the respondent to choose *not* to submit a preference list. If only one party submits a list, the computer will automatically complete the other party's preference list so that the judges are ranked in the exactly opposite order. If neither the petitioner nor respondent submits a preference list, the computer resorts to the current system, and randomly selects the judges. Neither party will be informed, however, whether the other party has submitted a preference list.)

Step 2: The computer randomly picks two of the three judges who will serve on the panel. In order to determine the third judge, the computer selects a judge whose point value, when added to the value of the computer-picked judges under this system, will come closest to $3(x + 1)$. (If there are two or more judges that will bring the aggregate points equally as close to $3(x + 1)$, then all of these possible three-judge panels will be acceptable). If no judge has a point value high enough to reach $3(x + 1)$ or if no judge has a point value low enough to reach $3(x + 1)$, then the computer re-picks the first two judges. Phrased another way, in no event will the first two randomly selected judges be part of a panel if (i) the sum of the points of the two randomly selected judges together with the points of the judge with the highest number of points in the circuit is less than $3(x + 1)$, or (ii) the sum of the points of the two randomly selected judges together with the points of the judge with the lowest number of points in the circuit is greater than $3(x + 1)$. The computer repeats the process described in this step until all the acceptable three-judge panels are listed.

Step 3: For each acceptable three-judge panel, the computer determines the average ranking of the judges for both the petitioner and the respondent, by the following method. For the petitioner, the computer sums the point value of the three judges based on the petitioner's preferences of an acceptable panel and divides the total by 3. Let p equal this number.

For the respondent, the computer first changes the point values assigned to each judge to the system employed by the petitioner

(i.e., assign a value of 1 for the respondent's first choice, 2 for his second choice, etc.). Then, the computer sums the point values of the three judges and divides the total by 3. Let r equal this number.

If $[(p + r) / 2] - 1/2$ is greater than $(x + 1) / 2$, the computer eliminates the panel from the list.

Note: The purpose of Step 3 is to ensure that the petitioner and respondent submit the rankings that accurately represent their preferences rather than submit some other ordering for strategic purposes. Ordinarily, none of the panels should be eliminated through this step. See Appendix C.

Step 4: The computer counts the times that a judge appears on all the remaining acceptable three-judge panels and then eliminates the three-judge panels one-by-one until all the judges appear the same number of times on the list of acceptable panels. If all the judges cannot appear on the list of acceptable panels in the same number, the computer will eliminate panels until the distribution is as close to equal as possible.

Step 5: From the remaining acceptable three-judge panels, the computer randomly selects the one panel that will hear the case.

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APPENDIX B: THE PROPOSAL IN PRACTICE

The following is an example of how this system will work in practice. For purposes of understanding, I have assumed that the U.S. Supreme Court is a nine-judge federal appellate circuit.

Example

Step 1: Rank the Preferences and Total the Points

In this step, the petitioner and respondent rank their preferences, and point values are awarded accordingly. Next, the point values are totaled for each judge.

Petitioner's List		Respondent's List		Total Points
1. Scalia	Pts: 1	1. Stevens	Pts: 9	Thomas: 3
2. Thomas	Pts: 2	2. Souter	Pts: 8	Scalia: 4
3. Rehnquist	Pts: 3	3. Ginsburg	Pts: 7	Rehnquist: 5
4. Kennedy	Pts: 4	4. Breyer	Pts: 6	Kennedy: 8
5. O'Connor	Pts: 5	5. O'Connor	Pts: 5	O'Connor: 10
6. Souter	Pts: 6	6. Kennedy	Pts: 4	Breyer: 13
7. Breyer	Pts: 7	7. Scalia	Pts: 3	Souter: 14
8. Ginsburg	Pts: 8	8. Rehnquist	Pts: 2	Ginsburg: 15
9. Stevens	Pts: 9	9. Thomas	Pts: 1	Stevens: 18

Step 2: List the Acceptable Panels (Total Point Value of Panel in Parentheses)

In this step, the computer randomly picks two of the three judges who will serve on the panel. In order to determine the last judge, the computer selects a judge whose point value, when added to the value of the computer-picked judges under this system, will come closest to $3(x + 1)$. If no judge has a point value high or low enough to reach $3(x + 1)$, then the computer re-picks the first two judges. The computer repeats this process until all the acceptable three-judge panels are listed.

Here, there are nine judges on the circuit so $3(x + 1) = 30$. Thus, if the computer randomly selects Thomas (3 pts) and O'Connor (10 pts), the computer will then select Stevens (18 pts) because then the aggregate points of all three judges will come closest to 30 pts. If, however, the computer randomly selects Scalia and Rehnquist, there is no judge whose point value is high enough that, when added to the point values of Scalia and Rehnquist, can reach 30 pts. Therefore, the computer re-picks the first two judges. The following is the list of acceptable panels under my proposal, with aggregate point values in parentheses. It should be noted that

under the random assignment system there would be 84 acceptable panels (see Appendix D).

    1. Thomas, O'Connor, Stevens (31)
    2. Thomas, Breyer, Souter (30)
    3. Thomas, Ginsburg, Breyer (31)
    4. Thomas, Stevens, Kennedy (29)
    5. Scalia, Kennedy, Stevens (30)
    6. Scalia, O'Connor, Ginsburg (29)
    7. Scalia, Breyer, Souter (31)
    8. Rehnquist, Kennedy, Stevens (31)
    9. Rehnquist, O'Connor, Ginsburg (30)
  10. Rehnquist, Breyer, O'Connor (28)
  11. Rehnquist, Breyer, Souter (32)
  12. Rehnquist, Souter, O'Connor (29)
  13. Kennedy, O'Connor, Breyer (31)
  14. Kennedy, Souter, O'Connor (32)
  15. Kennedy, Ginsburg, Rehnquist (28)

Step 3: Determine Average Ranking

In this step, if $[(p + r) / 2] - 1/2$ is greater than $(x + 1) / 2$, the computer eliminates the panel from the list. The average rank of the petitioner for the three judges is represented by p. The average rank of the respondent for the three judges is represented by r. The number of judges in the circuit is represented by x. In the first case, Thomas is the petitioner's second choice, O'Connor is the petitioner's fifth choice, and Stevens is the petitioner's ninth choice. Thus, $p = (2 + 5 + 9) / 3 = 5.33$. Thomas is the respondent's ninth choice, O'Connor is the respondent's fifth choice, and Stevens is the respondent's first choice. Thus, $r = (9 + 5 + 1) / 3 = 5$. There are nine judges in the circuit so $x = 9$. Consequently, $[(p + r) / 2] - 1/2 = 4.67$ and $(x + 1) / 2 = 5$. Since 4.67 is not greater than 5, this panel is acceptable.

    1. Thomas, O'Connor, Stevens
      $p = (2 + 5 + 9) / 3 = 5.33$
      $r = (9 + 5 + 1) / 3 = 5$
      $[(5 + 5.33) / 2] - .5 = 4.67$
      $(9 + 1) / 2 = 5$
      Since 4.67 is less than or equal to 5, this panel is acceptable.

    2. Thomas, Breyer, Souter
      $p = 5$; $r = 5$

Since 4.5 is less than or equal to 5, this panel is acceptable.

3. *Thomas, Ginsburg, Breyer*
   $p = 5.67$; $r = 5.33$
   Since 5 is less than or equal to 5, this panel is acceptable.

4. *Thomas, Stevens, Kennedy*
   $p = 5$; $r = 5.33$
   Since 4.67 is less than or equal to 5, this panel is acceptable.

5. *Scalia, Kennedy, Stevens*
   $p = 4.67$; $r = 4.67$
   Since 4.17 is less than or equal to 5, this panel is acceptable.

6. *Scalia, O'Connor, Ginsburg*
   $p = 4.67$; $r = 5$
   Since 4.33 is less than or equal to 5, this panel is acceptable.

7. *Scalia, Breyer, Souter*
   $p = 4.67$; $r = 4.33$
   Since 4 is less than or equal to 5, this panel is acceptable.

8. *Rehnquist, Kennedy, Stevens*
   $p = 5.33$; $r = 5$
   Since 4.67 is less than or equal to 5, this panel is acceptable.

9. *Rehnquist, O'Connor, Ginsburg*
   $p = 5.33$; $r = 5.33$
   Since 4.83 is less than or equal to 5, this panel is acceptable.

10. *Rehnquist, Breyer, O'Connor*
    $p = 5$; $r = 5.67$
    Since 4.83 is less than or equal to 5, this panel is acceptable.

11. *Rehnquist, Breyer, Souter*
    $p = 5.33$; $r = 4.67$
    Since 4.5 is less than or equal to 5, this panel is acceptable.

12. *Rehnquist, Souter, O'Connor*
    $p = 4.67$; $r = 5$
    Since 4.33 is less than or equal to 5, this panel is acceptable.

13. *Kennedy, O'Connor, Breyer*
    $p = 5.33$; $r = 5$

Since 4.67 is less than or equal to 5, this panel is acceptable.

14. *Kennedy, Souter, O'Connor*

$p = 5$; $r = 4.33$

Since 4.17 is less than or equal to 5, this panel is acceptable.

15. *Kennedy, Ginsburg, Rehnquist*

$p = 5$; $r = 5.67$

Since 4.83 is less than or equal to 5, this panel is acceptable.

No panels are eliminated in Step 3.

Step 4: Determine the Distribution of the Judges on the Remaining Panels

In this step, the computer counts the number of times each judge appears on the list of acceptable panels and eliminates panels to achieve an equal distribution of judges, or to close as equal as possible.

Thomas: 4 times
Scalia: 3 times
Rehnquist: 6 times
Kennedy: 6 times
O'Connor: 7 times
Breyer: 6 times
Souter: 5 times
Ginsburg: 4 times
Stevens: 4 times

Eliminate the Following Panels to Achieve an Equal Distribution of Judges

Rehnquist, Breyer, O'Connor
Rehnquist, Breyer, Souter
Kennedy, O'Connor, Breyer
Thomas, O'Connor, Stevens
Kennedy, Ginsburg, Rehnquist
Kennedy, Souter, O'Connor

Remaining Acceptable Panels (Each Judge Appears Three Times)

1. Thomas, Breyer, Souter
2. Thomas, Ginsburg, Breyer

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3. Thomas, Stevens, Kennedy
4. Scalia, Kennedy, Stevens
5. Scalia, O'Connor, Ginsburg
6. Scalia, Breyer, Souter
7. Rehnquist, Kennedy, Stevens
8. Rehnquist, Souter, O'Connor
9. Rehnquist, O'Connor, Ginsburg

Step 5: The Computer Randomly Selects a Panel Among the Remaining Panels

APPENDIX C: PREVENTING THE SUBMISSION OF FALSE PREFERENCES

The purpose of Step 3 is to ensure that the petitioner and respondent submit the rankings that accurately represent their preferences rather than submit some other ordering for strategic purposes. The following example will demonstrate how this step foils parties from trying to "game" the system. This example portrays the respondent trying to gain a strategic advantage by submitting a preference list that is in the opposite order of what he truly believes.

Step 1: Rank the Preferences and Total the Points

Petitioner's Rankings:		Respondent's Rankings:		Total Points:
1. Thomas	Pts: 1	1. Thomas	Pts: 9	Thomas: 10
2. Scalia	Pts: 2	2. Scalia	Pts: 8	Scalia: 10
3. Rehnquist	Pts: 3	3. Rehnquist	Pts: 7	Rehnquist: 10
4. Kennedy	Pts: 4	4. Kennedy:	Pts: 6	Kennedy: 10
5. O'Connor	Pts: 5	5. O'Connor	Pts: 5	O'Connor: 10
6. Breyer	Pts: 6	6. Breyer	Pts: 4	Breyer: 10
7. Souter	Pts: 7	7. Souter	Pts: 3	Souter: 10
8. Ginsburg	Pts: 8	8. Ginsburg	Pts: 2	Ginsburg: 10
9. Stevens	Pts: 9	9. Stevens	Pts: 1	Stevens: 10

Step 2: All 84 possible three-judge panels will be acceptable.

Step 3: Determining Average Ranking

In this step, if $[(p + r) / 2] - 1/2$ is greater than $(x + 1) / 2$, the computer eliminates the panel from the list.

1. Thomas, Scalia, Rehnquist
$p = (1 + 2 + 3) / 3 = 2$
$r = (1 + 2 + 3) / 3 = 2$
$[(2 + 2) / 2] - .5 = 1.5$
$(9 + 1) / 2 = 5$
Since 1.5 is less than or equal to 5, this panel is acceptable.

84. Souter, Ginsburg, Stevens
$p = (7 + 8 + 9) / 3 = 8$
$r = (7 + 8 + 9) / 3 = 8$
$[(8 + 8) / 2] - .5 = 7.5$
$(9 + 1) / 2 = 5$
Since 7.5 is not less than or equal to 5, this panel is unacceptable.

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Here, the respondent equalizes the point values of all the judges by falsely submitting preferences that are the opposite of his true beliefs. If it were not for Step 3, this strategy would change the system to a de facto random assignment system since every possible three-judge panel would be acceptable. However, Step 3 eliminates all panels from consideration in which the average ranking of the panel is more than marginally above the midpoint of the average of the petitioner and respondent's first and last choice. In other words, if you considered the universe of all 84 possible three-judge panels that can be formed from 9 judges, both petitioner and respondent are guaranteed to receive a panel that would be among their top 42, or top half, choices, or very close to it. Therefore, the effect of the respondent engaging in this reverse-preference strategy would be to give the petitioner a huge advantage. For instance, in the example above, the computer randomly selects a three-judge panel from a universe of acceptable three-judge panels that consists of the petitioner's first choice to the petitioner's forty-second choice. Thus, on average the petitioner will receive his twenty-first choice. In contrast, if the respondent accurately lists his preferences, and they are roughly opposite of what the petitioner lists, the petitioner will receive a three-judge panel that is at about his forty-second choice. In fact, any deviation in listing preferences from what the respondent actually believes will give the petitioner an advantage because it will enable the petitioner to receive a three-judge panel that is more favorable than the "average" three-judge panel for the circuit.

APPENDIX D: PERCENTAGE OF THREE-JUDGE PANEL DECISIONS MATCHING EN BANC RULINGS

The following table shows the probability that a three-judge panel decision would match an en banc ruling under both the random assignment system and my proposal. For example, imagine a thirteen-judge circuit that would decide a case seven judges for the petitioner, to six for the respondent. The chances that a three-judge panel, if randomly assigned, will also decide for the petitioner are just 56%. Under my proposal, the chances improve to 63%. My proposal will produce an even more dramatic improvement if the split is eight to five: 69% under the random assignment system, 83% under my proposed system. The numbers in parentheses are the numbers of possible panels under each system. For example, in a thirteen-judge circuit, there are 286 possible different combinations of three-judge panels under a random assignment system. There are only 30 under my proposal.

For the purposes of this table, I have assumed that the parties could accurately predict the propensities that the judges have in voting on the case, and voted according to their true preferences. In addition, I disregarded the effect that Step 4 of my proposal—which eliminates acceptable panels to ensure an equitable workload among the judges—could have on the percentage rates. I did so because in some cases a different combination of panels could be eliminated to achieve an equitable workload among the judges. However, on the basis of testing with five-judge and nine-judge circuits, it does not appear that disregarding the effect of Step 4 would, on average, have a large effect on the percentage rates.

Five-Judge Circuit

Split:	3-2	4-1	5-0
Random System (10):[83]	70%	100%	100%
My Proposal (6):	83%	100%	100%

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83. To determine the percentage of three-judge panel decisions matching en banc rulings under the random assignment system, the formula for an x-judge circuit that would split y-z in an en banc ruling is: $(A + B) / C$, where $A = y! / [3!(y-3)!]$, $B = z\{y! / [2!(y-2)!]\}$, $C = x! / [3!(x-3)!]$.

To determine the percentage of three-judge panel decisions matching en banc rulings under my proposal (excluding Step 4) the following procedure should be used, based on the following assumptions:

ASSUMPTIONS
1) We have an x-judge circuit, split y-z.
2) The respondent ranks the judges in the exact reverse order of the petitioner.
3) The judges with the y-lowest point values vote for the petitioner, while those judges with the z-highest point values vote for the respondent.

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Seven-Judge Circuit

Split:	4-3	5-2	6-1	7-0			
Random Proposal (35):	63%	86%	100%	100%			
My Proposal (9):	78%	100%	100%	100%			

Nine-Judge Circuit

Split:	5-4	6-3	7-2	8-1	9-0		
Random System (84):	60%	77%	92%	100%	100%		
My Proposal (16):	69%	94%	100%	100%	100%		

Eleven-Judge Circuit

Split:	6-5	7-4	8-3	9-2	10-1	11-0	
Random System (165):	58%	72%	85%	95%	100%	100%	
My Proposal (21):	67%	90%	100%	100%	100%	100%	

Thirteen-Judge Circuit

Split:	7-6	8-5	9-4	10-3	11-2	12-1	13-0	
Random System (286):	56%	69%	80%	89%	96%	100%	100%	
My Proposal (30):	63%	83%	97%	100%	100%	100%	100%	

Fifteen-Judge Circuit

Split:	8-7	9-6	10-5	11-4	12-3	13-2	14-1	15-0
Random System (455):	55%	66%	76%	85%	92%	97%	100%	100%
My Proposal (37):	62%	81%	95%	100%	100%	100%	100%	100%

PROCEDURE

First we assign point values for the x judges, based on the petitioner's and respondent's preferences. Consequently, the value of 1 is assigned to the petitioner's first choice, and for this same judge a point value of 1 is assigned for the respondent (since this judge is assumed to be the respondent's last choice). Thus, this judge has a total point value of 2. Continuing, the petitioner assigns the point value of 2 to his second choice and for this same judge a point value of 2 is assigned for the respondent (since this judge is assumed to be the respondent's second-to-last choice). Thus, this judge has a total point value of 4. We continue this procedure until the *x*th and final judge has a total point value of 2x.

Next we determine all combinations of two randomly selected judges from an x-judge circuit, which is $_xC_2$. These two-judge panels are then subjected to the conditions described in Step 2 in Appendix A to determine all three-judge acceptable panels (Step 3 is not necessary because the parties are submitting their true preferences).

Since we assume that the judges with the y-lowest point values vote for the petitioner and those with the z-highest point values vote for the respondent, we can determine all panels that split 3-0 or 2-1 in favor of the petitioner. Lastly, to calculate the percentage of acceptable panels voting for the petitioner, we divide the number of panels voting for the petitioner by the total number of acceptable panels.