To: 'Rules_Support@ao.uscourts.gov' <Rules_Support@ao.uscourts.gov>
Cc: '[redacted]' <gmaggs[redacted]>; '[redacted]' <abarrett[redacted]>
Subject: Federal Rules of Appellate Procedure -- Orders Regarding Motions for En Banc Hearing

Dear Members of the Advisory Committee on the Federal Rules of Appellate Procedure, Including Professors Barrett and Maggs:

Thank you very much for your time. I write to propose amending Federal Rules of Appellate Procedure 32.1 and 35 to provide that an Court of Appeals' Order 1) granting a motion for initial hearing en banc or rehearing en banc, or 2) denying such a motion and which includes a concurring or dissenting opinion, be designated as a "published" decision.

I write because of my realization that such orders, although vacating an earlier panel decision (in the case of en banc rehearing grant), or at least of academic interest (in the case of a denial featuring a concurring or dissenting opinion), are -- at least in the Sixth and Seventh Circuits -- almost completely hidden from view. In being designated "Orders," they are not only absent from the courts' websites' list of new decisions, but do not even appear in Lexis.

If I may address two examples. On May 17, 2016, the Seventh Circuit issued a 2-1 published decision in *United States v. Johnson* , 823 F.3d 408, an interesting and publicized Fourth Amendment traffic stop case. I first noted the decision while checking the court's website that day for newly-issued decisions. I was surprised, though, to just read in an ABA Journal article that on August 8 the court granted a motion for rehearing en banc in the case. That order, being designated merely as an "Order," does not appear on the court's website as an issued "decision" – published or unpublished -- and thus would not be discovered by those reviewing the website to see the list of that day's issued decisions. Neither is it found on Lexis. As far as I can tell, only the PACER docket has it. (I don't know if Westlaw has it or not.)

Also of interest is *Michigan State A. Philip Randolph Institute v. Johnson* , a Sixth Circuit case of national interest. On August 17, 2016, in a published decision, the court denied appellant's motion for stay of the district court's judgment pending appeal. (Appellant then sought a stay in the Supreme Court, which was denied by a 7-2 vote.) On August 18, appellant moved the Sixth Circuit for an en banc initial hearing on the merits. The divided whole court denied that motion by a September 1, 2016 "Order" featuring concurring and dissenting opinions. And that Order, too, being designated merely as an "Order," does not appear on the court's website as an issued "decision" and thus would not be found by those reviewing the website to see the list of that day's issued

decisions. It is also not on Lexis.

There is no dispute that the grant of a motion for en banc hearing is a rare and significant occurrence (and is an occurrence which, as known at anyone hearing a Circuit judge speak on the topic, the courts prefer to keep rare.) As such, the grant should be prominently set forth in a published decision rather than deeply hidden in a buried "Order." I think the same holds true for a denial of a motion for en banc hearing which at least one judge of the court believes merits a concurring or dissenting opinion. While I realize that such Orders are accessible via PACER (which is how I obtained the two Orders discussed above), it seems wrong that a grant of an en banc hearing -- or denial with a concurring or dissenting opinion -- while certainly of interest to all who have read the original underlying decision, and which in the case of a grant of a motion for en banc rehearing fully vacates the underlying decision, does not even appear as a "decision" on the court's website.

And the concern goes beyond mere academic interest in a case; while the Seventh Circuit's August 8, 2016 grant of the motion for rehearing en banc in *United States v. Johnson* vacated the Fourth Amendment holding in the panel's May 17, 2016 decision, such vacatur is not noted at all through reviewing the May 17 decision on Lexis, as Shepardizing the case fails to reveal the Order granting the en banc hearing. A practitioner performing this exercise might therefore erroneously argue the panel's May 17 holding in support of an argument he or she presents to another court. Further, it certainly can't be the case that this practitioner is bound to go beyond Lexis and review the PACER docket of every case on which he or she will rely, but unless that practitioner is fortunate enough to see the same article I did, such a PACER docket review seems the only way to learn of the original panel's holding being invalid.

The Ninth Circuit Court of Appeals lists their en banc grants, and en banc denials featuring a concurring or dissenting opinion, as published decisions. I think this is the proper practice and should be required through amendments to Federal Rules of Appellate Procedure 32.1 and 35.

Thank you very much for your time.

Sincerely,

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Subject: FW: Federal Rules of Appellate Procedure -- Orders Regarding Motions for En Banc Hearing
From: Eric Bravo <ebravo@lanealton.com> - Friday 09/30/2016 03:12 PM

Dear Committee Members:

I'm sorry to take your time to have to correct a mistake I made below. Sixth Circuit grants of motions for rehearing en banc, though titled "Orders" rather than "Decisions," are indeed included on the court's website's daily list of decided cases, under the group of unpublished decisions. While I believe these Orders should be designated as published rather than unpublished decisions, I apologize for wrongly stating below that these Orders did not appear at all on the court's website's daily list of decisions.

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From: Eric Bravo
Sent: Friday, September 30, 2016 11:31 AM

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