All the briefs are filed, and the next step in the saga of *Rowe v. Gibson*, No. 14-3316 (Aug. 19, 2015), is for the nine judges in regular active service on the Seventh Circuit to cast their votes in favor of or against rehearing the case *en banc*.

We first wrote in August about *Rowe*, a decision written by Judge Richard Posner that created considerable controversy regarding the propriety of internet factual research by appellate courts. In short, Judge Posner relied on publicly available information on the web concerning the effects and use of Zantac to conclude that the district court should not have granted summary judgment in favor of the defendants in an Eighth Amendment claim. The use of that internet research sparked the controversy, beginning with one of the members of the panel in *Rowe*, Judge
David Hamilton, who wrote a strong dissent. The third member of the panel, Judge Ilana Rovner, concurred in the result, but not in Judge Posner’s surfing the web.

Rowe first appeared pro se, but the court appointed counsel to represent Rowe and to file a response after the defendants filed a petition for rehearing en banc in September. Rowe filed that response on Monday.

The essence of Rowe’s argument to deny the petition for rehearing is that the panel’s debate over internet research, while “lively,” was not essential to its decision to overturn the district court’s grant of summary judgment. Judge Posner’s opinion, according to Rowe, did not purport to make the internet research “the basis of its decision.” That information only “underscore[d] the existence of a genuine dispute of material fact created in the district court proceedings by entirely conventional evidence.” Response 1 (quoting Slip Op. 14). Rowe further points out that Judge Posner’s lead opinion is not precedential under Marks v. United States, 430 U.S. 188 (1977), given that Judge Rovner’s concurring opinion contains “the narrowest reasoning supporting the Court’s judgment.” Response 1.

The vote on the petition for rehearing (typically conducted by email) is likely to take place soon, if it isn’t already in the works. The court’s Internal Operating Procedure 5(a) requires a judge to call for a vote within 10 days of the filing of Rowe’s response, and subsection 5(d)(2) provides that “[j]udges are expected to vote within 14 days of the request for a vote.” Alternatively, it’s possible that a judge might have called for a vote before Rowe filed his response—viz., based only on the petition—and that the court then appointed counsel to file an answer for Rowe. If that was the case, the judges still are expected to vote, under subsection 5(d)(2), “within 14 days of the filing of the answer pursuant to the request for a vote.” The court can dispense with its internal operating procedures if it wishes, but a decision is likely only a few weeks away.

As we noted previously, the last time that Judge Posner stirred up this debate in Mitchell v. JCG Industries, Inc., No. 13-2115 (Mar. 18, 2014), Chief Judge Diane Wood and Judges Ann Claire Williams, Rovner, and Hamilton voted to rehear the case en banc. (It seems unlikely that Judge Rovner would vote to rehear Rowe, since she was on the panel.) Judge Posner carried the day in Mitchell with six votes, including that of Judge John Tinder, who has since retired from the court.

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