ESSAY

THE FEDERAL RULES OF CLIMATE CHANGE

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INTRODUCTION

A new Federal Rule of Civil Procedure, Rule 87, quietly took effect in December 2023.[1] The wholesale adoption of a new rule is rare; most changes to the Federal Rules of Civil Procedure involve tweaks or minor revisions to existing rules, and many existing rules are quite old.[2] Yet, despite the novelty of a new rule, the debut of Rule 87 was subdued. There were no speeches, no symposia, no spontaneous expressions of joy from a grateful populace, and minimal judicial fanfare. Even civil procedural scholars have remained largely uninterested.

Why did the addition of Rule 87 garner so little attention? The Rule is, on the surface at least, a straightforward device of emergency management. It establishes a series of procedural accommodations in the event of a "Civil Rules Emergency," such as a pandemic or a severe storm that makes it impossible for a courthouse to operate under normal conditions. One can understand why this kind of pragmatic addition to the nitty-gritty of court administration failed to inspire much response.

However, Rule 87 is notable beyond the emergency procedures it puts forth. Indeed, the most remarkable thing about the text and comments of Rule 87 is not what is included, but what is omitted: climate change. Despite referencing extreme weather events as one of the key motivations for the promulgation of the Rule, any reference to climate change is notably absent from the rule and comments. This choice to

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1 U.S. Supreme Court, Order Approving Amendments and Additions to Federal Rules of Civil Procedure (April 24, 2023). https://www.supremecourt.gov/orders/courtorders/frcv23_3eah.pdf ("The Federal Rules of Civil Procedure are amended to include amendments to Rules 6, 15, and 72, and to add new Rule 87.").

2 More than a few can trace their origins back to the Federal Rules of Equity, predating the modern shift to a unified system, *compare* FED. R. CIV. P. 3 (". . .leaving a copy of each at the individual's dwelling or usual place of abode") *with* RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES 13 (1842) (". . .or by leaving a copy, thereof at the dwelling house or usual place of abode of each defendant").

omit offers three useful opportunities for reflection and assessment.

First, it provides a chance to consider what is gained or lost by submerging climate-related procedural action. Is it subterfuge to not confront head-on such a huge source of future emergencies? Does the omission not deny an opportunity for informed discussion and participation of all stakeholders? Is it dodgy not to mention and discuss it? Or is it prudent? By not highlighting climate change, the Rule flew under the radar screen. Because it did not become politicizing, the rule-makers were able to promulgate Rule 87 without inviting endless political showmanship and delays. The existence and shape of Rule 87 allows us to weigh the tradeoffs between open confrontation and quiet accomplishment in partisan times.

Second, the rule illustrates the competing tensions inherent in developing climate-change-aware civil procedures. How much should we upset existing practice and established expectations; when is the right time to destabilize working systems; how do you fix a plane mid-flight? The timing of Rule 87's promulgation is an opportunity to compare early piece-meal tweaks to delayed comprehensive action.

Third, the existence of Rule 87 asks us in a fresh context who is best equipped to be a rule-maker and what the rule-making process should look like. An emerging and important literature has challenged the composition and biases of the rule-makers that promulgate the Federal Rules of Civil Procedure. Perhaps even the very architecture of the rule-making process (independent of who might staff it) is biased against addressing inequality and the concerns of the marginalized. And yet it was that very group of current rule-makers that quietly incorporated climate change considerations into the Federal Rules long before the supposed vanguard of academics and commenters conceived of the idea. Rule 87 is a confirmation *and* a rebuke of existing narratives about the pathologies of the rule-making process.

Overlooking Rule 87 is a mistake. It is information rich. It teaches us about the possibilities, compromises, and limitations of adapting law to climate change in contentious times. Perhaps the heroic and deeply compromised work of steering courts, the rule of law, and the nation through the choppy seas of climate change looks a lot like unassuming Rule 87.

I
CONTENT

Rule 87 authorizes the Judicial Conference of the United States to declare a "Civil Rules Emergency" upon a determination "that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions."[3] During such an emergency, federal judges in courts subject to the declaration may extend service of process and filing deadlines.[4] The rule was prompted, in part, by instructions from Congress in the Coronavirus Aid, Relief, and Economic Security Act of 2020 to consider rule amendments "that address emergency measures that may be taken by the Federal courts when the President declares a national emergency."[5] The Committee Notes accompanying Rule 87 cite the COVID-19 pandemic as the "immediate occasion" for adopting the rule,[6] but acknowledge the potential for other events to give rise to such emergencies, including "hurricanes" and "flooding."[7] Notably absent from the Rule and the Committee comments is any mention of climate change, despite it being responsible for the increasingly destructive nature of these extreme weather events[8] and many other challenges to existing civil litigation processes.[9]

The rule-makers, of course, are aware of climate change. It is difficult to imagine that the omission of climate change from the comments on the rule is happenstance. Thus, the relevance of climate change is submerged in this context.

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3 FED. R. CIV. P. 87(a).

4 *Id.* at 87(b). Rules of appellate (FED. R. APP. P. 2), bankruptcy (FED. R. BANKR. 9038), and criminal (FED. R. CRIM. P. 62) procedure were similarly amended to address Civil Rules Emergencies.

5 Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116- 136, 134 Stat. 281 § 15002(b)(6) (2020). ("The Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the "Rules Enabling Act"), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act").

6 FED. R. CIV. P. 87(a) advisory committee's notes to 2023 amendment.

7 *Id.*

8 *See, e.g.*, Angela Colbert, *A Force of Nature: Hurricanes in a Changing Climate*, NASA (June 1, 2022), https://climate.nasa.gov/news/3184/a-force-of-nature-hurricanes-in-a-changing-climate/) [https://perma.cc/LCB2-2ZBW]; Elena Shao, *How is Climate Change Affecting Floods?*, N.Y. TIMES (July 10, 2023), https://www.nytimes.com/article/flooding-climate-change.html [https://perma.cc/A5E6-QUY9].

9 *See generally* Roger Michalski & Emily S. Taylor Poppe, *Civil Procedure for the Anthropocene*, 104 B.U. L. REV. 1729 (2024).

What should we make of that? What is gained and lost by not being explicit?

Climate change activists and others who believe that all branches of government should be responding to climate change with greater urgency could argue that this is irresponsible.[10] They might argue that by failing to acknowledge that climate change is contributing to the threats that Rule 87 is designed to address, rule-makers are downplaying its impact. They might further argue that the omission of climate change from the Rule's discussion is problematic because it results in a Rule that is too small in scope. By failing to acknowledge climate change head-on, by not acknowledging the threat, the Rule's scope is inherently limited, and the remedy consequently too timid. Much of Rule 87 is concerned with emergency procedures for service of process, extensions of time to file motions, and time limitations for appeals. While clearly implicated in emergencies, filing deadlines of various sorts are not the only way the judiciary could acknowledge and respond to climate change. But a limited diagnosis calls for a limited response. And that is exactly what Rule 87 is.

Another argument in favor of acknowledging the role of climate change is transparency. This line of reasoning suggests that failing to openly acknowledge climate change smacks of disingenuity.[11] Democratic governance calls for the demos to be informed of what the government is doing, why it is doing it, and why it is not doing more. By failing to openly discuss climate change, the people are denied notice that they should pay attention, participate, and influence the outcome to more closely align with democratic sentiment.

In addition, by submerging the influence of climate change in Rule 87, rule-makers squander the opportunity to use the symbolic and expressive power of law to address climate change. Laws matter not just for the outcomes that they encourage and produce but also for what they express about

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10 *See generally* Caroline G. Cox, *Adapting Civil Procedure*, 54 LEWIS & CLARK L. REV. 79 (2024) ("Federal Rules, like many areas of the law, rest on assumptions of societal and climatic stability. Climate change threatens this fundamental 'stationarity.'").

11 *See generally* Brooke Coleman, *Janus-Faced Rulemaking*, 41 CARDOZO L. REV. 921 (2020) ("[I]t seems that the Committee often says one thing whilst it does another. Stated differently, the Committee is, at times, quite janus-faced . . . I am not arguing that the Committee is purposefully deceitful. Rather, I argue that in their effort to manage what the Committee views as the hyper-politicized, ideological context in which it does its work, its overt attempt to appear 'neutral' at all costs results in a janus-faced approach to rulemaking.").

what is important, who is worthy of care, and increasingly simply what is real or fake.[12] By not expressly discussing climate change, the rule-makers missed an opportunity to emphasize the dangers of climate change and the need for governmental responses. This could have been a moment to reorient civil procedure toward a new role as a tool to address and respond to climate harm.

Rejoinders abound and the interplay allows us to examine the tradeoffs between open confrontation and quiet accomplishment in partisan times.

While some might wish for the rule-makers to directly address climate change, that was not their singular charge. There are many types of emergencies beyond climate change. The rule-makers were tasked with thinking about the full gamut of emergencies, ranging from hurricanes to bombings of judicial buildings.[13] It is easy to image that if Rule 87 had been explicitly linked to climate change, it would have generated notoriety and negative repercussions. One can imagine that Rule 87 might suddenly have seemed not like a pragmatic, workaday bit of emergency management but one-sided political extremism. Perhaps the Rule would never have been adopted at all. Or, even if adopted, might have invited a political backlash.[14]

This might even be true if the content of the Rule would have been unchanged but climate change had been acknowledged as a motivation. If the substance of the rule would not have changed, does it matter if climate change is not explicitly mentioned? Especially in an era of extreme political polarization in which the topic of climate change has become politicized, downplaying its role may be a savvy approach to getting work done.[15] Perhaps, even if Rule 87 is unsatisfying

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12 *See generally* Melissa Mortazavi, *Tort as Democracy: Lessons from the Food Wars*, 57 ARIZ. L. REV. 929 (2015) ("argu[ing] that assessing the function and value of tort law primarily on the basis of compensation, risk management, and loss allocation may miss a crucial function of tort").

13 *See, e.g.*, Minutes of the Civ. Rules Advisory Comm. (Apr. 23, 2021), https://www.uscourts.gov/sites/default/files/minutes_from_advisory_committee_on_civil_rules_meeting_april_23_2021_0.pdf [https://perma.cc/5ZVR-RWZH] ("It is easy to imagine a local emergency – or to remember a courthouse bombing").

14 *See generally* Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1600–01 (2014) ("The rulemakers are not courts, and rulemaking under the Enabling Act is not an exercise of judicial power under Article III. It is essentially a legislative activity, not a judicial activity, and federal judges are understandably reluctant to be seen as active participants in a political process.").

15 *See generally* Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 801 (1991) (noting

in failing to be forthright or to serve as a groundbreaking example of openly climate-aware procedure, it is good enough to start to address the civil procedural implications of climate change without beating your chest about it.

Similarly, the alleged lack of transparency has a flip side. After all, the Advisory Committee on Civil Rules is a sunshine committee. Its meetings are open to the public; its minutes and reports readily available for anybody who is interested.[16] The Committee, laudably and incredibly, will patiently listen to just about anybody who has thoughts on the Federal Rules of Civil Procedure. It is difficult to imagine a more transparent, participatory, and democratic process in a country of 335 million people.[17] Highlighting climate change as an animating concern might have provided additional notice to interested parties, sure, but with what effect? Would it have invited more stakeholders into the process to make novel arguments and raise unconsidered concerns; or would it simply have invited a horde of trolls. Sometimes deliberation benefits from increased participation, often it does not.[18]

Finally, symbolic and expressive action is important, but so is getting things done. Because the rule-making process did not become politicizing, the rule-makers were able to promulgate Rule 87 without inviting endless political

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the danger that "opening the rulemaking process at the earliest stages of rule promulgation will politicize the rulemaking process as never before, with perhaps worrisome consequences. Either the Advisory Committee will create vacuous, ineffective rules that are the result of political compromise, or the Committee will fail to effectuate any rule reform, becoming bogged down in endless stalemate, delay, and legislative paralysis."); Danya Shocair Reda, *What Does It Mean To Say that Procedure Is Political?*, 85 FORDHAM L. REV. 2203, 2207 (2017) ("The Committee is saddled with the burden of holding itself out as a body whose decisions are apolitical. Indeed, the Committee's existence relies on the premise that it can engage in a largely expert and technical task best left to the judiciary rather than the political branches. To the extent that its decisions are understood to be political rather than 'procedural,' the legitimacy of its actions is called into question.").

16 28 U.S.C. § 2073 (c)(1) ("Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public"). *See generally* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 Geo. L.J. 887, 902-–08 (1999) (describing developments in the 1980s that increased the transparency of the rule-making process).

17 *See generally* A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING A REPORT FROM THE SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMMITTEE ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 168 F.R.D. 679, 688-91 (1995) (discussing transparency and access and pointing out that "[e]very effort is made to publish the proposed rules widely").

18 *See generally* Lynn M. Sanders, *Against Deliberation*, 25 POLITICAL THEORY 347 (1997).

showmanship and delays.

II
TIMING

What is the right timing for procedural reform? How early and how forcefully should the rule-makers respond to societal changes? Rule 87 illustrates the competing tensions inherent in developing Rules that respond to societal developments.

People frustrated with decades of unheeded warnings about climate change might argue that Rule 87 missed the boat. Meaningful responses to climate change should have happened a generation ago. Rule 87 is too little, too late.

The rule-makers might agree with this sentiment or not. But whatever their views, Congress hemmed in their ability to quickly respond to societal change through the Rules Enabling Act. The Act controls the process for creating and modifying the Federal Rules of Civil Procedure. Most relevant here, the Act makes clear that "[s]uch rules shall not abridge, enlarge or modify any substantive right."[19] Though the substance/procedure distinction is slippery, the Act clearly contemplates a distinction that the judiciary must attempt to police. It also arguably sets the tone that substantive change must precede procedural change.[20] Only after *Brown* and the Voting Rights Act of 1965 did the rule-makers custom tailor Federal Rules of Civil Procedure 23(b)(2) for civil rights cases. Perhaps reversing this sequence and leading with procedural change would have channeled more energy toward litigation rather than legislation. Whether that is true is difficult to prove. But the mere possibility counsels caution and delayed procedural reform. Perhaps the right timing for large-scale procedural reform is only after a political settlement on contentious issues. Congress must act first.

Insofar as the rule-makers can act, they must also remain mindful that they are not designing a new procedural regime from the ground up. The rules are modified one at a time, at best a handful at a time. There is little appetite for a whole-sale rewrite. Even if that were to happen, reformers must be

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19 28 U.S.C. 2072(b). *See generally* A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654 (2019).

20 *See generally* Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1032 (2013) (discussing the "subordinate status of practice and procedure"); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1169 (1996) (noting that the Rules Enabling Act "envisioned procedural rulemaking as an essentially technical undertaking best left in the expert hands of judges.").

mindful that the rules are used every day in thousands of cases. It is easier to build a new plane than to fix one in midair.

How can you fix a plane in flight? Carefully, and one small part at a time. Rule 87 does something like that. It does not fundamentally alter the workings of the Rules. Instead, it supplements and modifies a few of them, temporarily, and only in extreme circumstances. That is an intervention, but it is one that is cabined and cautious. In formalizing the federal court system's ability to respond to emergencies, Rule 87 is intended as a "pragmatic and functional" approach that limits divergence from standard procedures only in response to "problems that cannot be resolved . . . [through] the flexibility deliberately incorporated in the structure of the Civil Rules."[21] In this way, the Rule strikes a balance between the competing goals of proactively addressing disruptive events and maintaining consistent and predictable procedures as much as possible. The exception generated by formal rule-making trumps existing process only in circumstances where alternative solutions are deemed insufficient.

Rule 87 thus takes pains to not destabilize a working system.[22] It accomplishes frustratingly little because it is frustratingly cautious; but it is also palatable and practical because it is sensibly cautious.

Climate change will have lots of procedural effects. A more comprehensible approach would have linked and reformed all of these aspects of procedure in one go. The appeal of such an approach would be the promise of coherency, efficiency, and proactive problem-solving. The danger of a comprehensive approach is to destabilize a working system with unintended consequences that are difficult to isolate, difficult to study, and without feedback loop for iterative reforms.

Rule 87 is not the final word about climate change and the Rules, but it does not have to be. It is not necessary, not possible, and perhaps not desirable to holistically address climate change once and for all in the Federal Rules. As our understanding of the risks and costs of climate change continues to evolve and deepen, it will call for continual adjustments. Seen in this light, Rule 87 is an incremental first step and should be judged on those terms, both good and bad.

IV

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21 *Id.*

22 *See generally* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010).

AUTHORSHIP

Who is best equipped to be a rule-maker and what should the rule-making process look like in unstable times? Much has been written about the general dysfunction, limitations, and biases of the rule making process.[23] Some of it is on display here. Perhaps the lack of meaningful climate-related action is a (further) example of the limitations and biases of the rule-makers. But Rule 87 also undercuts this narrative as the rule-makers, for all their alleged rearguard nature, cautiously lead the way.

Rule 87 appoints the Judicial Conference to declare when an emergency requires deviation from ordinary procedures.[24] The rule itself is the result of the rules amendment process that is, by statute, staffed by elites.[25] The rule-makers and members of the Judicial Conference are anything but representative of the population. Nothing in their composition assures that the views of common people are represented. Even less guarantees that movement lawyers have a say.[26]

As a vibrant literature points out, the key actors in rule-making at the federal[27] and state[28] level represent a skewed sample of the population. The literature suggests that the very composition of the Advisory Committee on Civil Rules and the

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23 *See generally* Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 448 (2013) ("Though the Rules themselves have earned their encomia, the process by which they are promulgated under the Rules Enabling Act (REA) has been a source of gloom for more than a generation.").

24 FED. R. CIV. P. 87(a) ("The Judicial Conference of the United States may declare a Civil Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.").

25 *See* 28 U.S.C. 2073(a)(2) ("Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.").

26 *See generally* Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645 (2017); Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, Movement *Law*, 73 STAN. L. REV. 821 (2021); Carmen G. Gonzalez, Climate Lawyers as Movement Lawyers *(and Vice Versa)*, 115 AM. SOC'Y OF INT'L L. ANN. MEETING PROC. 207 (2021).

27 *See, e.g.*, STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1017 (2016) (noting the outsized influence of attorneys on the Committee whose practice focuses on complex litigation); Elizabeth Thornburg, *Cognitive Bias, the "Band of Experts," and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 767 (2016) (similar); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 613-17, 636-37 (2001) (noting the need for a more diverse "sociopolitical makeup").

28 *See* Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1, 26 (2018).

Judicial Conference might bake systematic biases into the process.[29] The federal judiciary has long been aware of this critique.[30]

Does climate change represent an opportunity to address these longstanding failures? Is the lack of meaningful responses to climate change not a wake-up call to bring in new sources of expertise into the rule-making process? Some might argue that this is a call to finally bring in a more diverse range of participants beyond the narrow world of established lawyers, judges, and academics.[31] After all, federal civil procedural rulemaking is fundamentally undemocratic: rules are made by a group of unelected judges and out-of-touch academics who are far from representative of the general public. They are selected through an opaque process. Most people have never even heard of the Advisory Committee on Civil Rules, have no idea who serves on it, what work they do, or why it might matter in their lives. There is little pretense of public accountability.

Perhaps even if other types of people staffed the Advisory Committee, the rule-making process would still be biased against addressing climate change, inequality, and the concerns of marginalized groups. Some argue that rule-making is simply too staid, too cumbersome, too statist.[32] It must become nimble. And, somehow at the same time, it should also become more evidence-based.

It is easy to criticize the rule-makers and, as public

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29 *See, e.g.*, Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 NW. U.L. REV. 52, 52 (2018). ("[T]he homogeneous composition of the Civil Rules Committee, not only historically, but also today, limits the quality of the rules produced and perpetuates inequality.").

30 *See, e.g.*, A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING A REPORT FROM THE SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMMITTEE ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 168 F.R.D. 679, 695 (1995) ("Criticisms have been leveled at the composition of the various rules committees. First, there have been allegations of an under-representation of the bar, particularly active practitioners, and of other identifiable interest groups within the bar, such as public interest lawyers. The often implied but sometimes explicit objection is that the Advisory Committees are dominated by federal judges. Second, there have been allegations of a lack of diversity of members. The argument is that the Advisory Committees ought to mirror the diversity of the federal bar, which includes more women and minorities than are currently found on the federal bench.").

31 *See generally* Benjamin A. Spencer, *Rule 4(K), Nationwide Personal Jurisdiction, and the Civil Rules Advisory Committee: Lessons from Attempted Reform*, 73 ALA. L. REV. 607, 619 (2022) (arguing that the Civil Rules Committee "might benefit from having fewer judges as members" and that "it would not hurt to make the Committee more inclusive in the perspectives and backgrounds that it represents").

32 *Ibid.*

servants who perform vital work for the country, their every action, of course, should be closely scrutinized.

But for all these critiques, it was this very group of rule-makers that quietly incorporated climate change considerations for the first time into the Federal Rules. They did so long before the supposed vanguard of academics and forward-leaning commentators conceived of the idea. The supposed rearguard led the way. Maybe only Nixon could go to China.[33]

Abandoning the apolitical patina of the process and opening up the process to more participation might not protect the marginalized. Perhaps more likely, repeat players and well-resourced lobbyists would be empowered to influence the process at the expense of the marginalized.[34] In a more transparent and participatory political process, carbon extractors might yield more influence than carbon sequesters.

CONCLUSION

Rule 87 illustrates and exemplifies the current state of noodling through crisis responses in partisan times. The politicians, judges, academics, and the public at large are all torn about, well, just about everything related to climate change. Every facet of the debate is hyper-politicized, antagonistic, and often plain ugly. Rule 87 shows what can be accomplished in this environment, how it can be accomplished, and the limitations of what can be said and done. It is a notable rule in its own right but perhaps an even bigger monument to the opportunities and folly of clandestine compromise.

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33 *See* Tyler Cowen & Daniel Sutter, *Why Only Nixon Could Go to China*, 97 PUB. CHOICE 605 (1998) ("Right-wing politicians sometimes can implement policies that left-wing politicians cannot, and *vice versa*."); *See also* Star Trek 6 (Spock declares that "there is an old Vulcan proverb: only Nixon could go to China").

34 *See generally* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 301-02 (as a former committee reporter, Carrington lauded the Committee's work because it allowed for an "apolitical approach to matters of procedure," as it did not allow "groups . . . such as 'repeat players' and the organized bar [to] exercise disproportionate influence on the process" and protects the interests of the "disorganized (and hence powerless)"); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 842 (1991) ("Traditionalists hold paramount the principles of trans-substantive rules, a belief that compels an apolitical process conducted by expert elites operating with relative immunity from partisan pressures.").