

HOW TO STEER AN OCEAN LINER

by
Richard Marcus*

Steering an ocean liner or supertanker is reportedly very difficult; the vessel itself is unwieldy, and there are many fast-changing problems to navigate through or around, including inclement weather, ocean currents, and shoals of various sorts. Steering the rulemaking process sounds easier, but it has recently been anything but. Mark Kravitz proved himself a master of that difficult task during a time of considerable stress on the rulemaking process and set an agenda that has guided us, and will probably continue to guide us, for years to come.

It is worth emphasizing that rulemaking has been under stress before, while also avoiding the temptation to overstate the challenges it faces now. More than twenty years ago, Professor Mullenix foresaw that the Advisory Committee might “go the way of the French aristocracy”¹ and suggested that the rulemaking process might become “a quaint, third-branch vestigial organ.”² Meanwhile, some predicted that what the rulemakers were doing would wreak havoc unless they were reined in. For example, in 1992 Nan Aron of the Alliance for Justice announced that the pending proposal to add initial disclosure in a new Rule 26(a)(1) “would end public-interest litigation as we know it.”³ Well, Rule 26(a)(1) went through, and so far as I know public interest litigation did not end. But similar forebodings are being trumpeted today.

Forebodings of this sort can prompt efforts to curtail rulemaking authority, or shift it to other hands. Such things have happened in the past. For example, the English judges responded to consternation about the complexities of English common law procedure in the 1830s by adopting the Rules of Hilary Term, the first English rules of court to have the force

* Horace Coil Chair in Litigation, University of California, Hastings College of the Law. Since 1996, I have served as Associate Reporter of the U.S. Judicial Conference’s Advisory Committee on Civil Rules. In this Essay, I draw in part on that experience. But I speak only for myself and not for anyone else, particularly the Advisory Committee.

¹ Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 802 (1991).

² Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 379 (1992).

³ Ann Pelham, *Judges Make Quite a Discovery: Litigators Erupt, Kill Plan to Reform Federal Civil Rules*, LEGAL TIMES, Mar. 16, 1992, at 1, 14 (internal quotation marks omitted).

of law.⁴ But that effort was a failure, leading Parliament to step in and bring procedure “under public, not professional, regulation.”⁵ Twenty years ago (in the wake of comments like the one from the Head of Alliance for Justice quoted above), I reacted to the tumult, then about various American procedural issues, by observing that “the pervasiveness and tenor of current crisis rhetoric seem to outstrip that of recent memory.”⁶

It may be that the rulemaking process is again approaching similar shoals, or at least tricky currents. It is certain that it has engendered something like stormy weather. For the last 20 years or so, even controversial rule-amendment packages have attracted no more than about 300 comments during the statutorily directed public comment period. The package published in August 2013, on the other hand, attracted about 2,300 public comments and also produced three oversubscribed public hearings.⁷ Moreover, the Senate Judiciary Committee held a hearing on the amendment package on November 5, 2013 (two days before the Committee’s first public hearing on the package),⁸ and the House Judiciary Committee communicated its concerns about matters addressed in that package to the Advisory Committee in March 2012, more than a year before the package was published for comment.⁹ One could characterize

⁴ See *Roffey v. Smith*, (1834) 172 Eng. Rep. 1409, 1409–10.

⁵ Edson R. Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725, 737–39 (1926).

⁶ Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 762 (1993).

⁷ See *Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS.GOV, <http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002>.

⁸ See, e.g., *Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice?: Hearing Before the Subcomm. on Bankr. & the Courts*, 113th Cong. 1 (2013) (statement of Chris Coons, Chairman, Subcomm. on Bankr. & the Courts). Senator Coons explained that the proposed rule changes “have sparked no small amount of controversy in the civil rights, consumer rights, antitrust and employment rights communities. These advocates worry that limitations on civil discovery will unduly hamper the ability of those who have been subject to discrimination and other violations to obtain the evidence they need to prove their cases in court.” *Id.* Later, Senator Coons and four other Democratic Senators on the Judiciary Committee (Senators Leahy, Durbin, Franken, and Whitehouse) wrote to the rules committees expressing concern that the proposed rule changes “risk shutting the courthouse door to many meritorious plaintiffs, while we fear that they are by no means certain to curb discovery excesses and abuses that plague some high stakes, complex, or contentious litigation.” Letter from Christopher A. Coons, Patrick J. Leahy, Richard J. Durbin, Al Franken & Sheldon Whitehouse, Senators, to Jeffrey S. Sutton, Chair, Standing Comm. on Rules of Practice & Procedure & David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure (Jan. 8, 2014), available at <http://www.lfcj.com/documents/FRCP%20US%20Senate.%20Christopher%20Coons%201.8.14.pdf>.

⁹ See Letter from Trent Franks, Chairman, H. Judiciary Comm. Const. Subcomm., to Mark R. Kravitz, Chairman, U.S. Judicial Conference Comm. on Rules of Practice & Procedure & David G. Campbell, Chairman, Civil Rules Advisory Comm. (Mar. 21, 2012) (on file with Lewis & Clark L. Rev.). In the letter,

these congressional communications as representing cross currents, for the expression from the House was that discovery was not sufficiently constrained,¹⁰ and the concern from the Senate was that the proposed constraints were too constraining.

Dealing with these sorts of cross currents requires a creative and reliable skipper. For me, these developments prompt some reflection on the sometimes-tumultuous evolution of American procedural rulemaking. As one who has been studying the rulemaking experience for thirty years and working inside it for more than fifteen, that reflection seems to me to focus on several somewhat distinct periods that I can sketch:

First, for the federal courts, it began with a very long dry period so far as procedure was concerned. From 1789 until 1934, they were required to follow the procedure of the states in which they sat,¹¹ even though federal judges felt themselves justified, in those pre-*Erie* days, to rely on the “general common law” to provide substantive principles for deciding diversity cases while adhering to state procedural law.

Second came a tumultuous extended period of debate about whether to authorize the federal courts to develop their own procedure rules without regard to state law. This effort was kicked off by Dean Roscoe Pound’s famous speech to the American Bar Association (ABA) in 1906,¹²

Representative Franks said this was “the first time that a formal Congressional hearing has been conducted to better understand how the costs and burdens of civil discovery impact litigants, the consumers of our civil justice system, and, consequently, our country’s economic health.” Representative Franks’ views therefore supported constraints on discovery. Representative Franks wrote as Chair of the House Judiciary Committee’s Constitution Subcommittee. His letter reported on a December 11, 2011 hearing his committee had conducted about discovery. See *Costs and Burdens of Civil Discovery: Hearing Before the Subcomm. on the Constitution*, 112th Cong. 1 (2011) (statement of Trent Franks, Chairman, Subcomm. on the Constitution).

¹⁰ It is worth noting that after Representative Franks sent his letter to the rules committees, see *supra* note 9, Democratic minority members of the House Judiciary Committee wrote to the rules committees expressing different concerns.

¹¹ Under the Process Acts and later the Conformity Act, federal judges were until 1938 required to adhere to the procedure of the state courts in the state in which they sat. For a very thorough and careful dissection of these developments, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982). As Professor Crowe has recently reminded us, this embrace of state-court procedure was the outcome of political contests in the first Congress between those who favored centralized national power (often associated with Hamilton) and the localists (often associated with Jefferson): “[T]he Judiciary Act of 1789 [creating the lower federal court system] is more appropriately viewed as a remarkable victory for those with prejudicial and pronational sympathies. As the outcome of the Process Act of 1789, a significant defeat for nationalists . . . at the hands of those who preferred reliance on state forms of procedure, suggests, the Judiciary Act could easily have been a setback.” JUSTIN CROWE, *BUILDING THE JUDICIARY* 43 (2012) (footnote omitted).

¹² Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, in REPORT OF THE TWENTY-NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 395, 395–417 (1906). Dean Wigmore said 30 years later that Pound’s speech “struck the spark that kindled the white flame of high endeavor, now

but was stymied by opposition led by Senator Thomas Walsh of Montana. Eventually the ABA gave up on getting the bill through Congress when in 1933 President-elect Roosevelt nominated Walsh—the vehement opponent of this project—to be his Attorney General. But Walsh died on the way to the 1933 inauguration ceremony for President Roosevelt, and Homer Cummings became Attorney General in his place. Cummings embraced and pushed the Rules Enabling Act, and it was passed by Congress in 1934. As a result, what began as a conservative movement supported by Chief Justice Taft ended up a piece of New Deal legislation.¹³

The third period, running from 1938 to sometime around 1970, is now recalled as the Golden Age for federal procedural rulemaking. Congress had not given much attention to the content of federal procedural rules during the debates on whether to confer rulemaking authority on the Supreme Court to promulgate rules of procedure. Without congressional tethers, the framers of the Federal Rules had a relatively free hand in designing their rules package, and they built into it what some may in retrospect regard as a “wish list” of innovative provisions, most significantly by relaxing pleading requirements and greatly expanding discovery opportunities and methods. Moreover, they created the whole set of rules in about three years of work—a striking contrast to the four or five it now takes to make modest changes. Somewhat in keeping with Dean Pound’s preference for judicial discretion in place of rigid tethers on judicial activity, the new rules gave federal judges considerable latitude to tailor the procedures to the needs of the case, a tendency fortified by further amendments during the Golden Age. As Judge Weinstein put it, the rules enabled transsubstantive procedure because “one stretch sock fits all.”¹⁴

These new rules won wide favor in the bar and (after some vigorous resistance to the pleading relaxation in some lower courts) carried the day for more than a generation. But we must not forget that there were almost immediately some misgivings. For example, in 1951 there was a session on “The Practical Operation of Federal Discovery” convened under the presiding hand of Judge Charles Clark, who had been Reporter of the Advisory Committee when it drafted the original rules (and still was Reporter in 1951). Interestingly, a representative of the Administrative Office of the U.S. Courts, who had made what we would call an empirical study of discovery practices, reported that “[o]ne of the criticisms is that the expense and time consumed by discovery is out of proportion to the value.”¹⁵ For those who have attended to the concerns recently ex-

spreading through the entire legal profession.” John H. Wigmore, *Roscoe Pound’s St. Paul Address of 1906*, 20 J. AM. JUDICATURE SOC’Y 176, 176 (1937).

¹³ For a chronicle of these events, see CROWE, *supra* note 11, at 212–23.

¹⁴ Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1902 (1989).

¹⁵ *The Practical Operation of Federal Discovery*, 12 F.R.D. 131, 137 (1951) (statement of William H. Speck). Mr. Speck continued: “If 100 to 150 pages of

pressed about the Rule 26(b)(1) invocation of proportionality, this idea rings a bell. An experienced lawyer cited a massive case involving large companies, noting that “it happened that the parties were financially able to bear that tremendous burden, but there are obviously many cases in which the litigant would find that the cost of conducting, or being subjected to, any such proceeding would be prohibitive.”¹⁶ Another complained that “[w]e now have about the worst and most destructive procedure devised by man to hamper the administration of justice. On top of trial by deposition, we have piled the injustices of unlimited discovery.”¹⁷

So the storm clouds have been there almost from the beginning. But these potential storm clouds were met with great enthusiasm for the new regime in the academy, enthusiasm that remains bright to this day. A few examples can capture the prevailing sentiments. Professor Hazard recognized the Rules as “a major triumph of law reform,”¹⁸ and Professor Yeazell said that they “transformed civil litigation” and “reshaped civil procedure.”¹⁹ Professor Shapiro found that “they have influenced procedural thinking in every court in this land . . . and . . . have become part of the consciousness of lawyers, judges, and scholars who worry about and live with issues of judicial procedure.”²⁰ Professor Resnik concluded that they even “became a means of transforming the modes of judging.”²¹ Many states abandoned their procedural rules and adopted copies of the federal ones.²² Through 1970, this process produced further relaxations or expansions of procedure (most famously the 1966 amendments to Rule 23, the class action rule), and by 1970 American procedure had reached its apogee of liberality.

A fourth and less exultant period followed, beginning in the 1970s. The Pound Conference of 1976, an event commemorating the 70th anniversary of Dean Pound’s 1906 speech to the ABA, prompted proponents of narrowing the Federal Rules’ approach to coalesce around a set

depositions are reasonable in a tort case worth \$20,000, then 100,000 to 150,000 pages would be in proportion in a case worth \$20,000,000.” *Id.* at 138.

¹⁶ *Id.* at 143 (statement of Albert R. Connelly).

¹⁷ *Id.* at 150 (statement of George P. Dike).

¹⁸ Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237 (1989).

¹⁹ Stephen C. Yeazell, *Judging Rules, Ruling Judges*, LAW & CONTEMP. PROBS., Summer 1998, at 229, 233.

²⁰ David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1969 (1989).

²¹ Judith Resnik, *Trial As Error, Jurisdiction As Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 934 (2000).

²² See, e.g., Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2029 (1989) (reporting that 26 states plus the District of Columbia had adopted versions of the Federal Rules either statutorily or through judicially promulgated rules).

of rule-amendment proposals.²³ This period featured discussion of the “litigation explosion” and repeated assertions that the liberality of the Federal Rules regime (particularly with respect to interrogatories and other discovery provisions) was fostering groundless claims and unduly burdening at least some litigants, especially businesses. After the Pound Conference, there was much effort to trim discovery in various ways and, starting in 1983, rule changes emphasizing judicial management and proportionality appeared on the scene.²⁴ 1983 also produced amendments to Rule 11, which converted the rule from being an unused provision to being a major force,²⁵ and introduced proportionality into Rule 26. Rule 68’s provisions for possible cost-bearing came in for sustained study as well.²⁶

These developments also prompted congressional concern, and Congress considered possible changes to the Rules Enabling Act during the 1980s. Among the ideas considered was removing the “Supersession Clause,” the provision that says the rules supersede all contrary law, even statutes, and requiring more openness in the overall rulemaking process.²⁷ Eventually, in 1988 Congress did amend the Enabling Act and provided that the rulemaking process be much more open than it had been in the past (particularly during the Golden Age).²⁸

It might be said that this activity led to a fifth period beginning in the early- to mid-1990s, during which much more attention was focused on the rulemakers than had previously been the case, and controversy about the rules’ contents drew attention in Congress on occasion. It was kicked off by the huge tumult over initial disclosure in 1991 to 1993, a tumult that the legal press said took the rulemakers by surprise.²⁹ One could also say that they temporized, first retreating from an initial disclosure requirement and then including one but permitting districts to opt

²³ Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 79, 79–246 (1976). It is worth noting that these themes had emerged long before this 1976 event. By 1951, some were expressing dissatisfaction with broad discovery. See *supra* notes 15–17 and accompanying text. In addition, resistance to relaxed pleading requirements generated what has been described as a “guerilla attack” in the 1950s that was eventually scotched by the Supreme Court in *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957). See generally Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 445–46 (1986).

²⁴ For a review of these developments, see Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 753–68 (1998).

²⁵ See generally Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989).

²⁶ For a critical chronicle of these developments, see Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REFORM 425 (1986).

²⁷ 28 U.S.C. § 2072(b) commentary (1988 & 1990).

²⁸ See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, §§ 401–03, 407, 102 Stat. 4642, 4648–52 (1988).

²⁹ For a description of this episode, see Marcus, *supra* note 6, at 805–12.

out of it. Despite that concession, the rules package faced a sustained challenge in Congress over initial disclosure, numerical limits on some discovery events, and the new authorization for video recording of depositions (strongly opposed by the court reporters' lobby). That challenge came within a whisker of succeeding—the Clinton Administration supported the bill removing those features from the package, the House unanimously passed a bill doing so and the Senate came within one vote of doing so also. But Senator Howard Metzenbaum of Ohio refused to consent to suspending the rules to permit a vote in time, and the rule went into effect.³⁰

Since 1993, the question has been whether we have entered a sixth period. Certainly there have been important changes, including the amendments to Rule 23 in 1998 and 2003, the discovery amendments in 2000 (making initial disclosure nationally applicable in a less aggressive form and revising the scope of discovery under Rule 26(b)(1)), the E-Discovery amendments of 2006, and the expert discovery and summary judgment amendments in 2010.³¹ These have *not* been particularly aggressive changes, but they have sometimes produced aggressive reactions that seem to rely on overstatement. In part, that may simply come with the territory; as Professor Robel observed nearly a generation ago: “Crisis rhetoric is enduringly popular in discussions of the court system.”³² As the recent period of public comment on proposed amendments to the discovery and related rules attests, that rhetoric is at least as popular now as it was in the past.

During this period, some have opposed even modest rule changes on the ground that Congress has relied on the “open courts” attitude of the Golden Age in creating various statutory rights to sue, and that procedural retrenchment would therefore undercut congressional objectives. Opponents of change have also argued fairly frequently that any change from the laxity of 1970 could be supported only with FDA-caliber empirical support (the sort required to approve a new drug), disregarding the obvious reality that the rule provisions they embrace had no such support when adopted (or since). Proponents of change have somewhat similarly resorted to overstatement on occasion, emphasizing their view that the

³⁰ See Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 485 (1997).

³¹ See Proposed Amendments to the Federal Rules of Civil Procedure, 177 F.R.D. 530–31 (1998); Amendments to the Federal Rules of Civil Procedure, 215 F.R.D. 158, 162–69 (2003); Amendments to the Federal Rules of Civil Procedure, 192 F.R.D. 340, 344–49 (2000); Amendments to the Federal Rules of Civil Procedure, 234 F.R.D. 219, 227–49, 251 (2006); Amendments to the Federal Rules of Civil Procedure, 266 F.R.D. 502, 507–22 (2010).

³² Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, OHIO ST. J. ON DISP. RESOL., no. 1, 1991, at 115, 115.

costs and risks of American litigation are hurting the competitive position of American business and even costing American jobs.³³

This is surely a heady atmosphere, and it seems to have prompted at least some of the very considerable interest we have received regarding our current rule package. Already the rules' current provisions that generally require responding parties to bear the cost of their responses to discovery have been assailed as "un-American"³⁴ and the amendment package proposing some modest reduction of discovery have also been attacked as "un-American."³⁵ Some comments come close to "May you burn in Hell."

These are the tumultuous times and treacherous waters in which Mark Kravitz found himself when he agreed to become Chair of the Advisory Committee, and later to become Chair of the Standing Committee even though he had already been struck by the illness that took his life. He surely entered the fray with open eyes and heroic confidence.

He also built on the foundation already put in place by his predecessors, particularly Judges Patrick Higginbotham, Paul Niemeyer, David Levi, and Lee Rosenthal. Before their time, rulemaking had been quite a secretive activity. Paul Carrington, Reporter of the Advisory Committee in the 1980s, related that a former Reporter told him his Committee Chair instructed him to keep everything the Committee was doing a deep secret until the Committee was ready to publish a proposed change.³⁶ That

³³ In making these generalizations, I draw on a decade and a half of being on the "receiving end" of some such arguments, and also having read the submissions when these arguments are made to other bodies, including Congress. I think that anyone who has been involved in the rules process during this period would recognize the strain of argument that I describe, and also appreciate the strains that these arguments can impose on rulemakers. For the rulemakers also endorse the goals of the Golden Age, but recognize that there sometimes seems to be at least some dark clouds among the silver linings of American procedure. Criticism that verges on the ad hominem mode can be taxing for those who volunteer their (considerable) time and (more considerable) energy to reform projects.

³⁴ *E.g.*, Comment from Lawyers for Civil Justice to the Civil Rules Advisory Comm. & Discovery Subcomm. 1 (Apr. 1, 2013) (stating that the American requirement that the responding party usually pays for the cost of responding to discovery is "the Un-American Rule"); Jessica D. Miller, John Beisner & Jordan Schwartz, *Can E-Discovery Violate Due Process?* (pt. 2), LAW TECHNOLOGY NEWS (ONLINE), June 10, 2013 (arguing that "forcing a defendant to pay significant discovery expenses (without any contribution from the plaintiff) absent any finding of liability arguably infringes the defendant's right to due process").

³⁵ *E.g.*, Letter from John R. Cady & Christopher Aulepp, attorneys, Cady Law Firm to Jonathan Rose, Admin. Office of the U.S. Courts (Aug. 14, 2013), available at <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0263> (asserting that "The Proposed Change to Rule 26(b) Is Un-American").

³⁶ Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 164 (1991) ("I have been told by one of my predecessors, the late Al Sacks, that he was instructed to keep his work entirely under wraps until the committee was prepared to

veil of secrecy was one of the things that prompted the 1988 revision of the Rules Enabling Act by Congress. Now the rulemaking process must be conducted in a public manner; unlike other Judicial Conference committees, the rules committees are “sunshine committees.”³⁷

But the rules committees did not stop with the minimum transparency Congress decreed. Instead, they went farther. The Civil Rules Committee, in particular, has developed a pattern of outreach.³⁸ Beginning when Judge Patrick Higginbotham was Chair, the rulemakers gave much more attention to outreach to the bar and bench as they pondered and developed ideas about possible rule amendments. This outreach has led to the convening of many “mini-conferences” about rules-related issues; several of the rules committees now routinely use such events as methods for education and outreach.³⁹ At the same time, the rulemakers have increasingly sought out empirical information about the current operation of the rules for which they are responsible and (sometimes) the possible consequences of rule changes that are under consideration. Two decades ago some thought that the rulemaking effort was hobbled by its lack of such information.⁴⁰ This effort has included social science research by the Federal Justice Center (FJC) and similar submissions by interested groups.

But that openness could be criticized as somewhat haphazard; groups were assembled to address specific issues already identified by the Committee as seeming to warrant close attention, rather than (like the 1976 Pound Conference) taking a more open-ended approach. Often (and valuably) those mini-conference events focused on mock-ups of possible rule changes that tended to focus discussions that otherwise could remain too general to be helpful to the Committee. As I noted twenty years ago (before I began working for the rulemakers), rulemakers need

make a recommendation. This practice reflected, of course, the traditions of judicial institutions accustomed to keeping their adjudicative deliberations to themselves.”)

³⁷ See 28 U.S.C. § 2073(c) (2012) (directing that rules committee’s meetings must be open to the public and that minutes of meetings be publicly available).

³⁸ For discussion, see Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 917–19 (2002).

³⁹ Just one week before the symposium in honor of Judge Kravitz, for example, the Advisory Committee on Evidence Rules held a symposium during its meeting in Portland, Maine on the many issues raised by the increasing use of electronically stored information as evidence in court. Some of these issues directly connect to matters the Civil Rules Committee has addressed in relation to discovery of such material. As a result, this outreach also permits constructive sharing of experience and insights among the various rulemaking committees.

⁴⁰ For a notable expression of this view, see Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 841–42 (1993). Professor Burbank later acknowledged that the judiciary “has come to recognize the value of seeking empirical data before formulating new or amended Federal Rules.” Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 242 (1997) [hereinafter Burbank, *Implementing Procedural Change*].

to be attentive but cautious about their ability to find definitive answers to all the questions they confront in empirical efforts:

[I]f procedural reform could only be adopted after being proved effective and safe in a manner similar to the way that the FDA determines whether a new drug can be sold, it seems unlikely that there would be any formal procedural reform. The challenge, then, is to appreciate and evaluate the pertinent policy concerns and make reasonable use of empirical information. This can prove surprisingly difficult, but also yield answers.⁴¹

Mark Kravitz saw the need for a more comprehensive look at the situation, and that seems to have been the spark for the Duke Conference, which took a broad look at a multitude of litigation issues without any particular focus or any mock-up of a rule change. And Judge Kravitz had the foresight to persuade Judge John Koeltl to act as organizer of that conference. Judge Koeltl's remarkable leadership produced an astonishingly rich array of materials and data for further study.⁴²

The Duke Conference led directly to the current amendment package. The package was screened over a considerable time to identify the issues seemingly most helpful to include in amendments to the rules, a process more like the mini-conference activity described above. That process of revising continues; the results of the reconsideration in light of the public comments was before the Advisory Committee during its meeting at Lewis & Clark College. I think most would have to admit that the process has been a success; even the toughest problems (perhaps preservation of electronically stored information qualifies there) have received very thorough scrutiny, and the rule response to them has been carefully calibrated and re-calibrated.

So I think we are in a sixth period now—the Kravitz Era. Where that leads is certainly not clear right now, but the fact this is the new era is an important tribute to Mark Kravitz. I remember the efforts he made to explain to some skeptical members of Congress the importance of the Rules Enabling Act process and the care with which it does its job. On at least some issues, it seems that even those who sometimes criticize some of the Committee's efforts also recognize that it is the ideal forum for

⁴¹ Marcus, *supra* note 6, at 770. For a study of empirical research gone awry, see John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 *BUFF. L. REV.* 195 (1980). Schlegel chronicles how Professor Underhill Moore spent huge amounts of time and money trying to demonstrate the effect of parking laws on parking behavior in New Haven, Connecticut. The effort did not produce anything of significant value. There are limits to the help that empirical work can give to those who make legal policy.

⁴² Somehow Judge Koeltl managed to persuade the various eminent speakers at the conference not only to get their papers in before the conference, but to get them in *long* before the conference. I have been an academic for a third of a century now, and have been to a lot of conferences, but I have never seen anything like this before or since.

thorough and thoughtful examination of changes to our procedural rules.

Maybe steering the rules through these waters is not as difficult as steering an ocean liner, but I suspect it is actually harder. Perhaps Professor Walker is right in attributing the tumult to the end of the New Deal.⁴³ In any event, caution and care are important on all sides. As Professor Burbank has said, one can regard the Rules Enabling Act as a “treaty” between Congress and the rulemakers.⁴⁴ As Judge Weinstein observed in his epic study of rulemaking, published not long after Watergate: “It is the good sense to avoid intolerable conflicts by refusing to push the notion of independent branches of government to its logical conclusion that has made it possible for our government to survive.”⁴⁵ Fortunately, we are far from such dangerous waters today.

In connection with the vigorous debate about the Civil Justice Reform Act of 1990, a prized initiative of then-Senator Joseph Biden (Chair of the Senate Judiciary Committee at the time), one of his aides derided what he called the “near-mystical reverence of the rulemaking authority exercised by the Judicial Conference.”⁴⁶ “Reverence” may be too strong a word, and mysticism is not a part of rulemaking, but it still seems that our process receives high marks. Around the same time Senator Biden’s aide made this comment, then-Professor Karen Nelson Moore observed that “[t]he events of the last decade suggest that Congress is moving to reclaim some degree of involvement in the rulemaking process, notwithstanding the continued broad delegation of rulemaking power to the Court.”⁴⁷ Certainly the 1995 enactment of the Private Securities Litigation Reform Act and the 2005 adoption of the Class Action Fairness Act⁴⁸ bolster this point, and the current discussion of possible legislation about “patent trolls” again raises such issues.⁴⁹

So even though we who labor in the vineyards of rulemaking may no longer claim reverence, I think we still claim, and surely deserve, respect. I think that is because our rulemaking project has been led by judges like Mark Kravitz. And the Civil Rules more particularly depend for much of

⁴³ See Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1270, 1285–86 (1997).

⁴⁴ Burbank, *Implementing Procedural Change*, *supra* note 40, at 231.

⁴⁵ JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 78 (1977).

⁴⁶ Jeffrey J. Peck, “Users United”: *The Civil Justice Reform Act of 1990*, LAW & CONTEMP. PROBS., Summer 1991, at 105, 117.

⁴⁷ Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1059 (1993).

⁴⁸ It is worth noting that the rules committees actually endorsed the concept of expanded federal-court jurisdiction—the main feature of the Class Action Fairness Act—and eventually promoted a revision of the Judicial Conference’s position on that subject.

⁴⁹ The “patent troll” issue has received much attention in Congress. The House of Representatives passed H.R. 3309 to address these issues. The Senate Judiciary Committee has not acted on this bill. See Innovation Act, H.R. 3309, 113th Cong. (2013).

their current agenda on the path-breaking leadership he afforded, particularly in connection with the Duke Conference. All of us therefore owe a great debt to Mark for what he did as our skipper, and I am honored to be able to put that debt in context and try to repay some of it today.