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**HOW THE SUPREME COURT DERAILED  
FORMAL RULEMAKING**

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# How the Supreme Court Derailed Formal Rulemaking

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## ABSTRACT

*Based on archival research, this Essay explores the untold story of how the Supreme Court in the 1970s largely ended “formal” trial-like rulemaking by federal agencies in two railway cases. In the first, nearly forgotten decision, United States v. Allegheny-Ludlum Steel Corp., the Court held sua sponte that an agency was not required to use formal rulemaking, despite its significant historical provenance. That unpersuasive decision all but decided the second, better-known decision, United States v. Florida East Coast Railway, the following term. In response to both decisions, agencies abandoned formal rulemaking—one of only four broad categories of agency action—and policymakers and scholars largely ceased debating its virtues. Findings from the Justices’ personal papers—including that the Court identified the issue only after oral argument and appeared deeply uninterested in Allegheny-Ludlum—should revive the long-muted debate among scholars and Congress over formal rulemaking’s utility and the continued vitality of the Court’s railway decisions.*

## INTRODUCTION

Formal “on the record” rulemaking is as curious to contemporary minds as it was commonplace to the modern administrative state’s founders. It refers to federal agencies’ promulgation of regulations under the Administrative Procedure Act (“APA”)<sup>1</sup> based on a closed record from a trial-like hearing with witnesses, cross-examination, an administrative law judge (“ALJ”) or other hearing officer, and findings of fact and law.<sup>2</sup> It contrasts with more familiar, informal notice-and-comment rulemaking, which has neither trial-like procedure, closed record, nor specific findings of fact or law.<sup>3</sup> In two railroad cases decided in the early 1970s, the Supreme Court allowed formal rulemaking to fall largely into desuetude with little fanfare.<sup>4</sup> Given formal rulemaking’s then-growing reputation for furthering administrative lethargy and interest-group capture, few lamented

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\* Associate Professor, University of Georgia School of Law. I very much appreciate helpful comments and materials from Gary Lawson, Ron Levin, Aaron Nielson, and Miriam Seifter. I am also very grateful to the editors of *The George Washington Law Review* for their careful attention to my Essay.

<sup>1</sup> Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C. (2012)).

<sup>2</sup> See generally 5 U.S.C. §§ 553, 556–57 (2012) (outlining the administrative rulemaking process).

<sup>3</sup> See *id.* § 553.

<sup>4</sup> See *infra* notes 10, 17 and accompanying text.

its demise.<sup>5</sup>

Notwithstanding its often maligned status, formal rulemaking had an established provenance and significant prominence within early-modern administrative law.<sup>6</sup> This was especially true of the Interstate Commerce Commission (“ICC”), the agency at issue in both railroad cases.<sup>7</sup> Indeed, the parties in both cases proceeded throughout the administrative proceedings with the understanding that the ICC was required to use formal rulemaking, and no one challenged its use in the consolidated litigation that reached the Supreme Court.<sup>8</sup> Why, then, did formal rulemaking meet such an unceremonious end? Responding to thoughtful speculation,<sup>9</sup> this Essay turns to the Justices’ files to address this question.

The answer lies primarily in the Court’s *sua sponte* treatment of the issue in the first and significantly lesser known of the two decisions, *United States v. Allegheny-Ludlum Steel Corp.*<sup>10</sup> That case concerned regulations that governed how shared railway freight cars should be returned to their owners.<sup>11</sup> The Court held that the underlying statute’s requirement that rules be made only “after hearing” did not trigger formal rulemaking under the APA because it did not specifically call for the rules’ promulgation “*on the record* after opportunity for an agency hearing.”<sup>12</sup> Whatever the policy merits of formal rulemaking, the Court’s *sua sponte* rejection of formal rulemaking was perfunctory, relied upon unpersuasive authorities, and failed to account for formal rulemaking’s consistent historical understandings and use.<sup>13</sup> Remarkable primary documents from the

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<sup>5</sup> See Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 240 (2014) (quoting AM. BAR ASS’N, SECTION OF ADMIN. LAW & REGULATORY PRACTICE, COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011, at 21 (Oct. 24, 2011), [http://www.americanbar.org/content/dam/aba/administrative/administrative\\_law/commentso\\_n3010\\_final\\_nocover.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/administrative_law/commentso_n3010_final_nocover.authcheckdam.pdf)) (reevaluating formal rulemaking’s benefits but noting that the ABA’s Section on Administrative Law and Regulatory Practice stated it had “not identified a single scholarly article written in the past thirty years that expresses regret about the retreat from formal rulemaking”). *But cf.* David P. Currie, *Rulemaking Under the Illinois Pollution Law*, 42 U. CHI. L. REV. 457, 471 (1975) (“I found that rulemaking on the record of hearings in which full cross-examination was permitted worked extremely well for the [Illinois] Pollution Control Board.”).

<sup>6</sup> See Nielson, *supra* note 3, at 243–47.

<sup>7</sup> See *id.* at 244.

<sup>8</sup> See GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 220–22 (3d ed. 2004).

<sup>9</sup> See GARY LAWSON, TEACHER’S MANUAL TO ACCOMPANY FEDERAL ADMINISTRATIVE LAW 142–44 (3d ed. 2004).

<sup>10</sup> 406 U.S. 742 (1972).

<sup>11</sup> See *id.* at 742–43.

<sup>12</sup> See *id.* at 757 (emphasis added).

<sup>13</sup> See *infra* notes 62–67, 73–80 and accompanying text.

Justices' personal files, including a mock opinion, strongly suggest that the Justices hurriedly dispatched the formal rulemaking issue because they had little interest in these admittedly dry and inaccessible rulemaking cases, which arose under the Court's mandatory jurisdiction (as opposed to its discretionary certiorari docket).<sup>14</sup> Moreover, the issue of formal rulemaking's applicability arose only during the drafting process as an alternative avenue for two tentative dissenting Justices to join the majority opinion.<sup>15</sup>

Whether due to his well-documented distraction or dementia,<sup>16</sup> Justice Douglas, the only Justice with a background in administrative law, did not initially object to the majority's unpersuasive reasoning. He came to formal rulemaking's defense only later in his dissent to the second and much better-known decision, *United States v. Florida East Coast Railway Co.*<sup>17</sup> The case concerned certain per diem rates promulgated under the same underlying rulemaking provision at issue in *Allegheny-Ludlum*.<sup>18</sup> Immediately before the Court issued its opinion in *Allegheny-Ludlum*, it called for additional briefing on the applicability of formal rulemaking in *Florida East Coast Railway*.<sup>19</sup> Relying significantly upon its decision in *Allegheny-Ludlum*, the Court once again held that "after hearing" did not require formal rulemaking under the APA or the ICC's enabling act even for ratemaking,<sup>20</sup> the paradigmatic agency action to which formal rulemaking had previously applied.<sup>21</sup>

The Justices' papers suggest that *Allegheny-Ludlum* rendered *Florida East Coast Railway* a *fait accompli*, stifling the limited persuasive force of the parties' briefing and Justice Douglas's notoriously hard-to-follow dissent.<sup>22</sup> *Allegheny-Ludlum*'s outsized role in *Florida East Coast Railway* is all the more troubling because it perhaps led the Court to proffer specious arguments that ended any lingering hopes that formal rulemaking

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<sup>14</sup> See *infra* notes 106, 108–109 and accompanying text.

<sup>15</sup> See *infra* notes 103–104 and accompanying text.

<sup>16</sup> See *infra* notes 138–142 and accompanying text.

<sup>17</sup> 410 U.S. 224 (1973).

<sup>18</sup> See *id.* at 225–28.

<sup>19</sup> See LAWSON, *supra* note 8, at 220.

<sup>20</sup> See *Fla. E. Coast Ry. Co.*, 410 U.S. at 235.

<sup>21</sup> See Nielson, *supra* note 5, at 244.

<sup>22</sup> See, e.g., 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 565 (5th ed. 2010) (describing why "[i]t is difficult to tell whether the dissent, as well as the response from the majority, was based on different interpretations of the statutory term 'hearing' or on different ways of interpreting and applying the Due Process Clause of the Constitution"); see also *infra* notes 131–132.

could retain a portion of its former place in the administrative state.<sup>23</sup> The influence of *Allegheny-Ludlum*'s sua sponte treatment is clear when one considers that, months before the Court decided *Allegheny-Ludlum* and prior to Justice Rehnquist joining the Court, a majority of the Justices had already "joined" a circulated draft opinion in *Florida East Coast Railway* that would have applied formal rulemaking.<sup>24</sup> In short, *Allegheny-Ludlum*'s impact is much larger than its fame.

Together, *Allegheny-Ludlum* and *Florida East Coast Railway* (collectively the "Railway Cases") all but ended formal rulemaking in the federal administrative state. Many at the time, including the Administrative Conference of the United States ("ACUS") led by Antonin Scalia, were already skeptical of formal rulemaking's benefits after what was perceived as a well-publicized formal rulemaking debacle.<sup>25</sup> Because of these decisions and the zeitgeist of the late 1960s and early 1970s, formal rulemaking fell from a prominent rulemaking device to a perplexing wrinkle in administrative law.

Recently, however, scholars and Congress have expressed renewed interest in formal rulemaking. For instance, Congress most likely required the procedure in the 2010 Dodd-Frank Act<sup>26</sup> for the Office of the Comptroller of the Currency's ("OCC") preemption of state consumer-protection law.<sup>27</sup> Congress likely did so as an antidote for longstanding concerns that regulatory capture and the lack of transparency that surrounded the OCC's preemption decisions contributed to the 2008 economic downturn.<sup>28</sup> The House has also introduced legislation that would require formal rulemaking under the Patient Protection and Affordable

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<sup>23</sup> See *infra* Part I.

<sup>24</sup> See *infra* notes 119–123 and accompanying text.

<sup>25</sup> See *infra* Part I.

<sup>26</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>27</sup> See 12 U.S.C. § 25b(c) (2012). The language in Dodd-Frank ("made on the record of the proceeding") does not perfectly track the APA's triggering language in § 553(c) ("on the record after opportunity for an agency hearing"). But the statute's use of "on the record," which was the key missing language in *Allegheny-Ludlum*, and the statute's requirement that the decision be supported by "substantial evidence" (the standard that applies to formal rulemaking and adjudication under the APA), see *id.*; 5 U.S.C. § 706(2)(E) (2012), are likely sufficient for courts to find that Congress clearly required formal proceedings under the APA. See *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972) (noting that "precise words 'on the record'" are not required to render formal proceedings applicable); *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 251–52 (1973) (noting that no terms of art are required to invoke formal proceedings).

<sup>28</sup> See Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 22–33 (2015).

Care Act,<sup>29</sup> and scholars have recently begun to reconsider formal rulemaking's place in the administrative law firmament.<sup>30</sup> But these efforts face significant resistance from inertia rooted in formal rulemaking's mythology, the Railway Cases, and decades of disuse. The historical inquiry into the Railway Cases informs this renewed debate: *Allegheny-Ludlum* is more significant than its obscurity suggests. The sua sponte treatment of formal rulemaking limits the holding's persuasive force, providing a reason to push against inertia and for policymakers and scholars to consider the merits or demerits of formal rulemaking on its own terms, removed from the shadows of the Railway Cases.

### I. FORMAL RULEMAKING AND THE RAILWAY CASES

Formal rulemaking is the platypus of administrative law—the awkward beast that combines rulemaking and adjudication. Governed by sections 556 and 557 of the APA, formal rulemaking is a process by which agencies promulgate rules of general application, usually with prospective effect, based on closed records that ALJs develop in evidentiary hearings.<sup>31</sup> More specifically, “[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing,”<sup>32</sup> the APA requires a hearing (whether oral or by written submissions), cross-examination if necessary, and a transcript of evidence and testimony upon which the agency must base its rule.<sup>33</sup> Generally, the ALJ, who is prohibited from having certain ex parte communications, may prepare a tentative decision.<sup>34</sup> When issuing the final rule, the agency must prepare findings of fact from the record and conclusions of law.<sup>35</sup> The formal rulemaking process prioritizes participation by affected parties, reasoned decisionmaking, and transparency over efficiency.<sup>36</sup>

On-the-record formal rulemaking significantly differs from the much more common informal notice-and-comment rulemaking. Informal rulemaking generally requires only that the agency provide notice of its

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<sup>29</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

<sup>30</sup> See Gary S. Lawson, *Reviving Formal Rulemaking: Openness and Accountability for Obamacare*, BACKGROUNDER, July 25, 2011, at 1 (considering H.R. 1432, 112th Cong. (2011)); Nielson, *supra* note 5, at 253–92.

<sup>31</sup> See 5 U.S.C. §§ 556–57 (2012).

<sup>32</sup> *Id.* § 553(c).

<sup>33</sup> *Id.* § 556(a), (d)–(e).

<sup>34</sup> *Id.* § 557(b)–(d). Alternately, an agency may require that the record be certified to it for initial decision, either in specific instances or as a general rule. *Id.* § 557(b).

<sup>35</sup> *Id.* § 557(c)(3).

<sup>36</sup> See Nielson, *supra* note 5, at 244–47.

proposed rule, solicit comments, and provide an explanation for its rule in which it responds to key comments.<sup>37</sup> The key differences between formal and informal rulemaking, accordingly, are that the latter does not require any hearing, closed record to support the decision, specific findings of fact or legal conclusions, or prohibitions on *ex parte* contact.<sup>38</sup> With fewer procedural hurdles than formal rulemaking, informal rulemaking acknowledges public participation, transparency, and reasoned decisionmaking without giving these values the same prominence as formal rulemaking.<sup>39</sup> Rather, it emphasizes efficiency and ensures that agencies can move nimbly as facts on the ground change.<sup>40</sup>

Although many agencies used formal rulemaking before and after the enactment of the APA in 1946, it was perhaps most commonly found in ratemaking proceedings—that is, the procedure through which agencies set rates for certain industries, including railroads.<sup>41</sup> Ratemakings are “rulemakings” under the APA.<sup>42</sup> Indeed, before the APA, ratemakings proceeded through evidentiary hearings that were the precursors of APA formal rulemaking.<sup>43</sup> And when the General Counsel of the ICC testified before a Senate subcommittee whose members castigated the agency for taking so long to promulgate certain rules, he responded that the ICC was required to engage in formal rulemaking under the Esch Car Service Act of 1917.<sup>44</sup> Indeed, the ICC never asserted in lower-court litigation (or in the Railway Cases) that formal rulemaking did not apply to the rules at issue.<sup>45</sup>

But around the time of the Railway Cases, skepticism of formal rulemaking’s benefits abounded. The Federal Drug Administration’s (“FDA”) notorious Peanut-Butter Rule led to much of the handwringing.<sup>46</sup> The FDA took more than a decade of protracted proceedings to decide whether peanuts must comprise 87% or 90% of peanut butter.<sup>47</sup> The received wisdom is that it was but one example of regulated parties purposefully impeding regulatory action by taking advantage of formal

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<sup>37</sup> 5 U.S.C. § 553.

<sup>38</sup> Compare *id.*, with *id.* § 556(a), (d)–(e).

<sup>39</sup> Nielson, *supra* note 5, at 242.

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* at 244–46, 263.

<sup>42</sup> 5 U.S.C. § 551(4) (defining “rule” to include “the approval or prescription for the future of rates”).

<sup>43</sup> See Nielson, *supra* note 5, at 244.

<sup>44</sup> Esch Car Service Act of 1917, Pub. L. No. 65-19, 40 Stat. 101 (repealed 1978). See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 232–33 (1973).

<sup>45</sup> LAWSON, *supra* note 8, at 220–22.

<sup>46</sup> See Nielson, *supra* note 5, at 247–48.

<sup>47</sup> *Id.*

rulemaking's required procedures.<sup>48</sup> The debacle largely led to ACUS's stated view in 1971 and 1972 that Congress should never require formal rulemaking, instead leaving it up to agencies' discretion.<sup>49</sup>

But, as Aaron Nielson has chronicled, the Peanut-Butter Rule was a poor exemplar. First, the FDA failed to implement procedures that were common in other agencies to facilitate multiparty hearings.<sup>50</sup> Second, even without procedural safeguards, the hearing itself only took thirty days; the lengthy delays before and after the hearing arose from the agency's failure to prioritize what it viewed as an insignificant matter.<sup>51</sup> Third, the infamous 8000-page transcript, while long, is on par with most judicial hearings.<sup>52</sup> And finally, other agencies, such as the Department of Agriculture, used formal rulemaking much more efficiently and without complaint from regulated parties, including for complex matters.<sup>53</sup> Nevertheless, the two Railway Cases arose amidst a zeitgeist that opposed formal rulemaking, and the Court took the opportunity to turn the mismatched platypus into an exceedingly rare unicorn.

The first, lesser-known decision was *Allegheny-Ludlum*. There, the Court approved ICC rules that required rented railcars to be returned in the direction of the borrowing railroad, which were adopted to ease a longstanding, national railcar shortage.<sup>54</sup> In accord with longstanding practice and the Esch Act's requirement that the ICC establish rules "after hearing,"<sup>55</sup> the ICC had promulgated the rule through formal rulemaking proceedings under the APA.<sup>56</sup> Responding to the railroads' argument that the ICC had departed from the requirements of sections 556 and 557 (which, recall, apply only to formal proceedings), the Court held *sua sponte*<sup>57</sup> that the agency was not bound to follow formal rulemaking procedures. The phrase "after hearing" in the Esch Act was not sufficiently similar to the triggering language for formal rulemaking under the

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<sup>48</sup> See *id.* (citing Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132, 1142 (1972)).

<sup>49</sup> See *id.* at 250 (citing Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 504 (1986)). Later, in 1976, ACUS explained that formal rulemaking may be appropriate for scientifically complex or significantly costly issues. See *id.* at 250–51.

<sup>50</sup> *Id.* at 248.

<sup>51</sup> *Id.* at 248–49.

<sup>52</sup> See *id.* at 249.

<sup>53</sup> See *id.* at 273.

<sup>54</sup> *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 742–45 (1972).

<sup>55</sup> *Id.* at 757 (quoting 49 U.S.C. § 1(14)(a) (repealed 1978)).

<sup>56</sup> *Id.*

<sup>57</sup> See LAWSON, *supra* note 8, at 220–21.



APA: “on the record after opportunity for an agency hearing.”<sup>58</sup> Instead, the Court held that only informal rulemaking was necessary, and the ICC had satisfied its requirements.<sup>59</sup> The procedural issue that led the Court to address formal rulemaking’s applicability was a minor point in the railroads’ briefing and was not even mentioned in the United States’s reply brief or at oral argument.<sup>60</sup>

As Gary Lawson has detailed, the Court’s brief analysis is hardly compelling.<sup>61</sup> Based on longstanding historical practice, the context of the 1917 Esch Act drafting, and continued agency views, “after hearing” was almost certainly intended to invoke formal rulemaking.<sup>62</sup> The Court relied on three authorities for its contrary position.<sup>63</sup> But one—a famous treatise by Professor Kenneth Culp Davis, along with a *cf.* citation to a D.C. Circuit decision that the treatise cited—referred to formal adjudication, not rulemaking.<sup>64</sup> One concerned a statute that did not require any hearing at all.<sup>65</sup> And while the third required “on the record” language for formal rulemaking, it relied only on *The Attorney General’s Manual on the Administrative Procedure Act*, which Lawson argues stated the opposite.<sup>66</sup> Indeed, the authoritative *Manual*, promulgated as a guide to the APA when

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<sup>58</sup> *Allegheny-Ludlum*, 406 U.S. at 757.

<sup>59</sup> *Id.* at 757–58.

<sup>60</sup> See LAWSON, *supra* note 8, at 220–21.

<sup>61</sup> See LAWSON, *supra* note 9, at 141.

<sup>62</sup> *Id.* at 141, 145.

<sup>63</sup> See *Allegheny-Ludlum*, 406 U.S. at 757 (citing KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 13.08 (1958); *Joseph E. Seagram & Sons, Inc. v. Dillon*, 344 F.2d 497, 499 (D.C. Cir. 1965); and *Siegel v. Atomic Energy Comm’n*, 400 F.2d 778, 785 (D.C. Cir. 1968)).

<sup>64</sup> See DAVIS, *supra* note 63, § 13.08 n.30 (citing *First Nat’l Bank of McKeesport v. First Fed. Sav. & Loan Ass’n*, 225 F.2d 33 (D.C. Cir. 1955)).

<sup>65</sup> See *Seagram & Sons*, 344 F.2d at 499 (“The statute does not provide for a hearing on label applications, and no hearing was held.”).

<sup>66</sup> See LAWSON, *supra* note 8, at 221 (considering *Siegel*, 400 F.2d at 785). Lawson’s argument may overstate the case, but his broader point is sound. THE ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, which the Court has frequently referred to as persuasive authority, has a relatively extended discussion of whether “on the record” language is necessary to trigger APA formality on pages 32–35. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 32–35 (1947). To be sure, the Manual indicates that one can infer that agencies are required to use formal rulemaking when agencies have the authority to promulgate rates after a hearing. But it also noted that “[t]here is persuasive legislative history to the effect that the Congress did not intend [formal rulemaking] to apply . . . where the substantive statute merely required a hearing.” *Id.* at 34. Although I think that Lawson’s reading is reasonable, I do not think that the Manual is as clearly contrary to the Court’s holding as he suggests. Nevertheless, I am persuaded that, as a matter of historical context for the Esch Act and ratemaking generally, the Court’s decision was wrong.

it was enacted, has an extended discussion in which it contends—notably contrary to agencies’ and the executive branch’s disfavor of formal rulemaking—that formal rulemaking can apply even in the absence of “on the record” statutory language because of legislative intent, history, and the prescribed standards for judicial review.<sup>67</sup>

The second decision, decided the following term, was *Florida East Coast Railway*. The Court approved of certain per diem rates to address the same national boxcar shortage at issue in *Allegheny-Ludlum*.<sup>68</sup> The ICC promulgated these rates and the rules in *Allegheny-Ludlum* under the same statutory grant of rulemaking authority.<sup>69</sup> After issuing its opinion in *Allegheny-Ludlum*, the Court requested additional briefing in *Florida East Coast Railway* on whether formal rulemaking was required.<sup>70</sup> Reaffirming *Allegheny-Ludlum*, the Court held that neither the APA nor the Esch Act itself, based on its amendment history and text, required formal rulemaking for the ICC’s ratemaking.<sup>71</sup> Justice Douglas, joined by Justice Stewart, argued in an often difficult-to-follow dissent that due process of some kind required formal proceedings in *Florida East Coast Railway*, but not *Allegheny-Ludlum*, because the former concerned rates that created “new financial liability.”<sup>72</sup>

As with *Allegheny-Ludlum*, Lawson has argued that the majority decision was not persuasive. First, even assuming that the APA did not require an oral rulemaking hearing, the 1917 Esch Act certainly did. Lawson argues that it was uncontroverted that everyone in 1917 understood that “after hearing” required an oral hearing because of due process concerns over setting rates.<sup>73</sup> The Court, however, held to the contrary.<sup>74</sup> Determining that no legislative or textual history informed the meaning of “after hearing,” the Court held that it could incorporate the APA’s broad understanding of “hearing” (which includes both oral and written hearings).<sup>75</sup> “After hearing” simply required some kind of hearing, the Court held, and not necessarily an oral one.<sup>76</sup> The problem with this

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<sup>67</sup> THE ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, *supra* note 66, at 32–35.

<sup>68</sup> *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 224, 230 (1973).

<sup>69</sup> *Id.* at 230.

<sup>70</sup> *See* LAWSON, *supra* note 8, at 220.

<sup>71</sup> *Fla. E. Coast Ry.*, 410 U.S. at 238.

<sup>72</sup> *Id.* at 252 (Douglas, J., dissenting).

<sup>73</sup> *See* LAWSON, *supra* note 9, at 144–45.

<sup>74</sup> *Fla. E. Coast Ry.*, 410 U.S. at 241.

<sup>75</sup> *Id.* at 239.

<sup>76</sup> *Id.* at 240–41.

argument is that the APA was enacted nearly three decades after the Esch Act.<sup>77</sup> The majority attempted to circumvent this temporal problem by noting that the Esch Act had been amended in 1966 after the 1946 APA.<sup>78</sup> But the amendments had nothing to do with the “after hearing” language.<sup>79</sup> Finally, the fact that “hearing” might be open-ended in the APA itself does not tell us what the Esch Act meant by “hearing” in this context—a context that history unquestionably indicated had required an oral hearing.<sup>80</sup>

The upshot from both of these decisions is that “unless a statute uses ‘text quite close to the magic words, on the record after opportunity for an agency hearing,’ an agency can opt to use the more truncated informal rulemaking instead.”<sup>81</sup> Which words would be sufficiently close to “on the record” is far from clear. If the significant contextual and historical support for formal rulemaking that even *The Attorney General’s Manual* deems central to the inquiry were insufficient in the Railway Cases, it is hard to fathom what words would suffice.<sup>82</sup> And because agencies almost never voluntarily choose formal rulemaking, formal rulemaking has become “a null set.”<sup>83</sup>

## II. BEHIND THE SCENES IN THE RAILWAY CASES

If formal rulemaking’s applicability was not at issue in the underlying Railway Cases before they reached the Supreme Court, why then did the Court reach the issue, and why did it produce such unpersuasive opinions? I turned to Justices Rehnquist’s, Stewart’s, and Powell’s papers on the Railway Cases to find out, as well as a limited collection of materials assembled from the Justices’ files for the Burger Court Opinion Writing Database (“Burger Court Files”).<sup>84</sup>

I selected Justice Rehnquist’s papers, available at the Hoover Institute at Stanford University, because he authored both opinions and would thus

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<sup>77</sup> *See id.* at 237.

<sup>78</sup> *See id.* at 240.

<sup>79</sup> *Id.* at 234–35.

<sup>80</sup> LAWSON, *supra* note 9, at 145–46.

<sup>81</sup> Nielson, *supra* note 5, at 240 (quoting Michael P. Healy, *Florida East Coast Railway and the Structure of Administrative Law*, 58 ADMIN L. REV. 1039, 1039 (2006)).

<sup>82</sup> *See* LAWSON, *supra* note 9, at 141 (“[T]he Esch Car Service Act of 1917 presented as strong a case for formal rulemaking under the APA as any statute that does not use the magic ‘on the record’ language will ever present. That is why the case is so powerful . . .”).

<sup>83</sup> Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 106 (2003).

<sup>84</sup> THE BURGER COURT OPINION WRITING DATABASE, [http://home.gwu.edu/~wahlbeck/Personal\\_Homepage/The\\_Burger\\_Court\\_Opinion\\_Writing\\_Database.html](http://home.gwu.edu/~wahlbeck/Personal_Homepage/The_Burger_Court_Opinion_Writing_Database.html) (last visited Jan. 17, 2017) (hereinafter “Burger Court Files”).

be the most likely of the Justices to have kept relevant materials. In light of the narrow nature of this project, I limited myself to collecting only those of the other Justices' papers that were easily accessible at low cost. Justice Stewart's papers were housed at Yale Law School and provided at no cost. Likewise, Justice Powell's papers at Washington and Lee University School of Law were provided at no cost.<sup>85</sup> The remaining Justices' papers are housed at the Library of Congress and researching those files would have required more time and expense than the relatively limited scope of this project warranted.<sup>86</sup> Fortunately, the selected papers proved relatively helpful and consistent with one another, and I was able to supplement them with the Burger Court Files. Those latter files provided key additional materials that appeared to come primarily from the files of Justices Marshall and Blackmun.

#### A. *United States v. Allegheny-Ludlum Steel Corp.*

Justice Rehnquist's papers for *Allegheny-Ludlum* contained several unique documents but they were rarely identified or organized systematically and were often missing several pages. Nonetheless, I have attempted to reconstruct the opinion-drafting process by considering document formats, argument development, and dates provided on a few documents. The following documents were the most relevant and are discussed in more detail below:

An opinion-circulation table ("Opinion-Circulation Table"), which includes dates of when the other Justices joined the opinion and the assignment history;

An undated draft opinion that appears to be a preliminary draft ("Preliminary Draft");<sup>87</sup>

An undated addendum that appears to be related to the Preliminary Draft concerning whether the Esch Act requires formal rulemaking ("Preliminary Draft Addendum");

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<sup>85</sup> Justice Powell did not participate in *Florida East Coast Railway*. See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 246 (1973). He recused himself because of his interest in one of the parties in the case, Seaboard Coast Line Railroad Co. See Justice Powell's Papers, *United States v. Fla. E. Coast Ry. Co.*, No. 70-279, Ltr. from C. Parnell (June 7, 1972), <http://law2.wlu.edu/powellarchives/page.asp?pageid=1279>.

<sup>86</sup> Chief Justice Burger's papers are currently housed at the College of William and Mary but are closed to researchers until 2026.

<sup>87</sup> This document is missing pages five through ten, and hard-to-decipher, handwritten notes that seem to concern an unrelated speech appear on the back of the pages.

portions of a May 17, 1972 draft opinion (“May 17 Draft”), a May 18, 1972 “redraft” (“May 18 Redraft”), and a “redraft” from May 19, 1972 that included the formal rulemaking issue (“May 19 Redraft”);

An official first draft opinion from May 1972 (“First Draft Opinion”) with a notation reading “NOT CIRCULATED”;

A marked-up version of the official second draft opinion from May 1972 with a notation indicating that it was circulated (“Marked-Up Second Draft Opinion”);

A May 31, 1972 “join” letter from Justice Powell (“Powell Join Letter”); and

An undated letter from David Kendall, law clerk for Justice White (“Kendall Letter”).

To my great disappointment, Justice Rehnquist’s files do not contain any bench memoranda for the Railway Cases. Michael Meehan, the clerk assigned to *Allegheny-Ludlum*, said in a phone interview that he did not think that he prepared a bench memo for the case because he could not find one in his personal files.<sup>88</sup> But because there is also no memo for *Florida East Coast Railway*, it is possible that Rehnquist had them removed from the files. After all, an informal memorandum in Justice Jackson’s files for *Brown v. Board of Education of Topeka*<sup>89</sup>—which Rehnquist asserted that he drafted as Justice Jackson’s law clerk only as a summary of Jackson’s pro-segregation views—caused great controversy in his confirmation proceedings.<sup>90</sup> Regardless, Rehnquist’s files lack the best evidence of how the opinions in the Railway Cases developed.

Nevertheless, developments during the drafting of *Allegheny-Ludlum* suggest that no one identified the formal rulemaking issue before oral argument. The Preliminary Draft did not refer to the formal-rulemaking issue.<sup>91</sup> Indeed, the Preliminary Draft did not refer to the APA at all.<sup>92</sup> Relatedly, a bench memo from Justice Powell’s papers does not refer to any procedural concerns or the applicability of formal rulemaking, aside

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<sup>88</sup> Telephone Interview with Michael Meehan, Former Clerk, Justice William Rehnquist (July 13, 2016). Michael Meehan, a graduate of the John P. Rogers College of Law at the University of Arizona, confirmed in a phone interview that he was the clerk assigned to the case. I appreciate his willingness to speak with me about his recollection of his time in chambers (with the understanding that he would not share matters related to the merits of the decisionmaking process).

<sup>89</sup> 347 U.S. 483 (1954).

<sup>90</sup> See Brad Snyder & John Q. Barrett, *Rehnquist’s Missing Letter: A Former Law Clerk’s 1955 Thoughts on Justice Jackson and Brown*, 53 B.C. L. REV. 631, 632–34 (2012).

<sup>91</sup> See Preliminary Draft.

<sup>92</sup> See *id.*

from arguing that the ICC's findings were sufficiently specific.<sup>93</sup> The Preliminary Draft instead appeared to assume that formal proceedings applied. It twice referred to *Universal Camera v. NLRB*,<sup>94</sup> a leading formal-adjudication decision, and discussed the proper weight to give the difference in opinion between the commissioners and the ALJ who received the relevant evidence.<sup>95</sup> Likewise, the opinion applied the "substantial evidence" standard of review, which under the APA applies only to formal (as opposed to informal) rulemakings.<sup>96</sup> At the same time, the draft referred to pre-APA decisions to argue that because a rule, as opposed to an adjudication, was at issue, "[n]o broad specific findings of fact are necessary."<sup>97</sup> Because the APA requires factual findings for only formal rulemaking,<sup>98</sup> this reference could suggest that the seeds of Justice Rehnquist's belief that formal rulemaking did not apply existed even then. Taken altogether, however, the draft suggests that the author was generally not thinking about the APA's applicability.

In the Preliminary Draft Addendum, the author first addressed the formal-rulemaking issue.<sup>99</sup> That discussion refers to no authorities other than the APA itself.<sup>100</sup> But by the May 19 Redraft, which incorporated and added revisions from the preliminary draft, the draft opinion cited the Kenneth Culp Davis treatise and the D.C. Circuit decision to which it referred.<sup>101</sup> The additional authorities in the final opinion were added to the circulated Second Draft Opinion in handwritten revisions (possibly from another chambers).<sup>102</sup> In other words, the drafting history provides evidence

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<sup>93</sup> Justice Powell's Papers, Covert E. Parnell, III (law clerk), Bench Memo, No. 71-227, *United States v. Allegheny-Ludlum Steep Corp.* at 9-10.

<sup>94</sup> 340 U.S. 474 (1951).

<sup>95</sup> See Preliminary Draft at 13, 22. The fact that the ICC overruled the ALJ's report led Justice Powell, as a tentative matter, to vote to affirm the lower court's ruling that vacated the rule. See Justice Powell's Papers, Tentative Impressions, No. 71-227, *U.S. v. Allegheny-Ludlum Steel Corp.*, at 3 (Mar. 27, 1972). He noted that he would wait to read Justice Rehnquist's circulated opinion before writing a short dissent. See *id.* at 4.

<sup>96</sup> See Preliminary Draft at 16-17; 5 U.S.C. § 706(2)(E) (2012). The final opinion also includes two references to "substantial evidence." See *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 746, 753 (1972).

<sup>97</sup> See Preliminary Draft at 13.

<sup>98</sup> 5 U.S.C. § 557(c)(3)(A).

<sup>99</sup> See Preliminary Draft Addendum at 2.

<sup>100</sup> See *id.* at 3.

<sup>101</sup> See May 19 Redraft at 23-25; see also First Draft Op. at 15 (incorporating revisions from May 19 Redraft).

<sup>102</sup> Compare Marked-Up Second Draft Op. at 15 (with handwritten additional authorities), with Justice Powell's Papers, Second Draft Op. (circulated May 30, 1972) (including earlier handwritten additions on marked-up draft).

that the Court did not identify the formal-rulemaking issue until well after the drafting process began.

Based on revisions to the drafts and Justice Powell's conference notes, it appears that addressing formal rulemaking's applicability did more than simply get rid of a stray procedural challenge in the parties' briefing. Justice Powell indicated in his post-oral argument notes that he was tentatively voting to dissent from the majority opinion because the ICC's overruling of the trial examiner's recommendation undermined the rule's presumption of validity.<sup>103</sup> Indeed, the citation to *Universal Camera v. NLRB* in Rehnquist's Preliminary Draft discussed above appears to have been added to respond to Justice Powell's concern because the case centered on the relationship between an ALJ's findings and the agency's acceptance of those findings in formal adjudication.<sup>104</sup> Yet by revising the draft to hold that formal rulemaking was not required, the concerns over the relationship between the ALJ's findings, the ICC's final decision, and the necessity of a closed evidentiary record silently fell away.

The files demonstrate, too, that the Rehnquist Chambers did not particularly enjoy the case, which, recall, arrived under the Court's mandatory appellate jurisdiction.<sup>105</sup> A very amusing mock conclusion to the Preliminary Draft makes this abundantly clear:

Finally, we must confess that we [couldn't] care less where the box cars of the world go. Box cars have come and box cars have gone, and still there are box cars. Since the Commission is the boxcar expert of the great United States, and because we yearn to ease our docket, we [remand] with directions never to send us another box car case.<sup>106</sup>

Unfortunately for the Rehnquist Chambers, another boxcar case from the mandatory-jurisdiction docket—*Florida East Coast Railway*—was waiting in the wings because the Court had placed it on hold until after deciding *Allegheny-Ludlum*.<sup>107</sup>

The Rehnquist Chambers' lack of enthusiasm was contagious. The Kendall Letter is another remarkable document in the Rehnquist files that suggests to humorous effect how little the other chambers thought of the

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<sup>103</sup> See Justice Powell's Papers, Tentative Impressions, No. 71–227, *Allegheny-Ludlum v. U.S. Steel Corp.*, at 3 (Mar. 27, 1972).

<sup>104</sup> See Preliminary Draft at 22–23; *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).

<sup>105</sup> See *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 743 (1972) (“We noted probable jurisdiction . . .”).

<sup>106</sup> See Preliminary Draft at 23.

<sup>107</sup> See List of “Cases Heretofore Held for Opinions” at 10.

case. The letter, “[o]n behalf of the ‘End the Term in OT 71’ Committee of 31,” informs Justice Rehnquist that his opinion in *Allegheny-Ludlum* was “nominated for the Parnelli Jones [a former American racecar driver] Memorial Award for the most *supersonic opinion* of the year.”<sup>108</sup> Why supersonic? The opinion “picked up three ‘joins’ on its first day in circulation, four on its second, and . . . the final ‘join’ on its third day out.”<sup>109</sup> In other words, the decision was the most quickly circulated opinion among the chambers and the fastest to obtain signoff. The fact that the other chambers joined the first draft within three days suggests that the Justices did not find the decision meaningful, difficult, or interesting. After all, the final opinion almost entirely tracks the Second Draft Opinion with its limited revisions, suggesting that the other chambers were not meaningfully troubled by the *sua sponte* discussion of formal rulemaking’s inapplicability.<sup>110</sup>

The quick turnaround is all the more surprising because the Justices at their conference were not clearly unanimous in seeking to reverse. Justice Powell’s conference notes list four votes as “tentative,”<sup>111</sup> with Chief Justice Burger and Justice Powell tentatively voting to dissent.<sup>112</sup> Justice Stewart’s notes indicate that Justice Blackmun’s vote to join the majority was also only tentative.<sup>113</sup> Yet, despite perhaps a majority of the Court expressing early reservations, the Court produced a unanimous opinion in

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<sup>108</sup> Kendall Ltr. (emphasis added). An attached picture of Justice Rehnquist to the letter obscures some of the text. The obscured text does not appear relevant to *Allegheny-Ludlum*.

<sup>109</sup> *Id.* Kendall’s circulation history is consistent with the Opinion-Circulation Table. See Opinion-Circulation Table. That table indicates that on May 30, 1972, Justice Rehnquist circulated only one draft (which, it indicates, was actually the Second Draft Opinion). Justices Douglas and Brennan joined that day. Chief Justice Burger and Justices Stewart, White, and Powell joined on May 31, and Justice Blackmun joined on June 1. A join letter from Justice Marshall to Justice Rehnquist in Justice Powell’s files reveals that he joined on May 30, 1972. See Justice Powell’s Papers, Ltr. to Justice Rehnquist from Justice Marshall (May 30, 1972).

<sup>110</sup> Compare *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, with Justice Powell’s Papers, Second Draft Op. (circulated May 30, 1972).

<sup>111</sup> See Justice Powell’s Papers, Conf. Notes, No. 71–227, *United States v. Allegheny-Ludlum Steep Corp.* (undated).

<sup>112</sup> See *id.* Justice Powell wrote to the Chief Justice expressing his inclination to join Justice Rehnquist’s majority after reading the draft on the first day of its circulation. See Justice Powell’s Papers, Ltr. to The Chief Justice from Justice Powell (May 30, 1972).

<sup>113</sup> See Justice Stewart’s Papers, Conf. Notes, No. 71–227, *U.S. v. Allegheny-Ludlum Steel Corp.* Justice Rehnquist’s notes are consistent. His Opinion-Circulation Table states that the Chief Justice joined on May 31, “despite early vote to affirm.” Opinion-Circulation Table. In the Powell Join Letter, Justice Powell included a handwritten note saying, “Your excellent opinion won me over.” Justice Powell’s Papers, Ltr. to The Chief Justice from Justice Powell (May 30, 1972).



three days after only one draft's circulation.<sup>114</sup> Notably, Justice Powell provided no suggested revisions to Justice Rehnquist's circulated draft,<sup>115</sup> despite having tentatively voted to dissent based on the difference of opinion between the ICC and the examiner.<sup>116</sup> Given the Justices' conference, the rapid unanimity suggests that the formal rulemaking issue was of little interest to the entire Court, perhaps especially at the end of the term in June in a case the Court was forced to hear. Nonetheless, it served as a pragmatic way to calm doubts over other issues.

*B. United States v. Florida East Coast Railway Co.*

The Rehnquist files for *Florida East Coast Railway* were not nearly as enlightening or entertaining as those for *Allegheny-Ludlum*.<sup>117</sup> But the Burger Court Files and the files of Justice Stewart, who joined Justice Douglas's dissent in *Florida East Coast Railway*, provide some limited insight as to the development of the majority and dissenting opinions. They further suggest why the latter did not cause the other Justices more concern over the formal rulemaking issue.

Perhaps most surprisingly, months *before Allegheny-Ludlum* was decided, an early per curiam draft opinion for *Florida East Coast Railway* noted that formal rulemaking applied and commanded the support of a majority of the then-eight-member Court.<sup>118</sup> Before Justice Rehnquist joined the Court in January 1972, Justice Douglas circulated a per curiam opinion that expressly indicated in a footnote that formal rulemaking applied and that the controversy concerned whether written submissions were permissible in the formal rulemaking at issue.<sup>119</sup> Justices Brennan,<sup>120</sup> Stewart,<sup>121</sup> and Marshall<sup>122</sup> all joined that opinion, and Justice Blackmun agreed that formal rulemaking applied in a concurring opinion.<sup>123</sup> This meant that there were at least five out of eight possible votes for applying formal rulemaking's requirements in *Florida East Coast Railway*. Why

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<sup>114</sup> See *supra* note 109 and accompanying text.

<sup>115</sup> See Justice Powell's Papers, Second Draft Op. (circulated on May, 30, 1972).

<sup>116</sup> See *supra* note 103 and accompanying text.

<sup>117</sup> They generally contain only majority- and dissenting-opinion drafts (usually without many marked revisions) and "join" letters.

<sup>118</sup> See Burger Court Files, No. 70-279, *United States v. Fla. E. Coast Ry.*, Second Per Curiam Draft (Oct. 5, 1971).

<sup>119</sup> *Id.*

<sup>120</sup> Burger Court Files, Ltr. from J. Brennan to J. Douglas (Oct. 6, 1971).

<sup>121</sup> Burger Court Files, Ltr. from J. Stewart to J. Douglas (Oct. 7, 1971).

<sup>122</sup> Burger Court Files, Ltr. from J. Marshall to J. Douglas (Oct. 21, 1971).

<sup>123</sup> Burger Court Files No. 70-279, *United States v. Fla. E. Coast Ry.*, J. Blackmun, Concurring Op., First Draft (Oct. 8, 1971).

exactly the opinion was set aside and not issued before Justice Rehnquist joined the Court (or without his participation after he joined) is not clear from the limited files.

Instead, as the initial *Florida East Coast Railway* decision lingered in circulation, Justice Rehnquist circulated *Allegheny-Ludlum*.<sup>124</sup> On June 5, 1972, after Justice Rehnquist had circulated his *Allegheny-Ludlum* opinion, Justice Douglas circulated his fifth draft per curiam opinion in *Florida East Coast Railway*.<sup>125</sup> It had a longer first footnote that briefly—and without any analysis—distinguished *Allegheny-Ludlum* as concerning general rulemaking provisions that did not concern per diem rates for which Congress required factual inquiries.<sup>126</sup> By at least that same day (two days before the Court issued *Allegheny-Ludlum*), Justice Rehnquist had expressed his discomfort with deciding *Florida East Coast Railway* and Justice Douglas had suggested that the Justices consider how to proceed at a future conference.<sup>127</sup> After the Court decided *Allegheny-Ludlum*, Justice Rehnquist suggested that the parties brief the issue of whether formal rulemaking applied in *Florida East Coast Railway*,<sup>128</sup> and a majority of the Justices agreed without explaining why.<sup>129</sup> After briefing, as history knows, the Court held that formal rulemaking did not apply in *Florida East Coast Railway*.<sup>130</sup>

But one striking takeaway from Justice Stewart's conference notes was that *Allegheny-Ludlum*, and not the supplemental briefing, seemed to all but decide the case for at least four of the eight participating Justices. In his conference notes, Justice Stewart noted that the Chief Justice and Justices White and Marshall voted to reverse based on *Allegheny-Ludlum*.<sup>131</sup> Similarly, he indicates that Justice Rehnquist voted to reverse “because of

<sup>124</sup> See *supra* note 109 and accompanying text.

<sup>125</sup> See Burger Court Files, No. 70–279, *United States v. Fla. E. Coast Ry.*, Fifth Per Curiam Draft (June 5, 1971).

<sup>126</sup> *Id.* at 1 n.1.

<sup>127</sup> Burger Court Files, Ltr. from J. Douglas to C.J. (June 5, 1972). Justice Douglas ended the letter by saying, “The new sentence that Bill Rehnquist put into his *Allegheny* opinion (71–227) eliminates any possibility of a conflict with *Florida East Coast*.” *Id.* It is not clear to me to which sentence Justice Douglas referred. But his optimism was, it turns out, misplaced.

<sup>128</sup> Burger Court Files, Ltr. from J. Rehnquist to C.J. (June 14, 1972).

<sup>129</sup> See Burger Court Files, Ltr. from J. Douglas to Conf. (June 15, 1972); Burger Court Files, Ltr. from J. Blackmun to J. Rehnquist (June 16, 1972); Burger Court Files, Ltr. from J. Brennan to J. Rehnquist (June 16, 1972); Burger Court Files, Ltr. from J. Stewart to J. Rehnquist (June 20, 1972).

<sup>130</sup> See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 227–28 (1973).

<sup>131</sup> See Justice Stewart's Papers, Conf. Notes, No. 70–279, *United States v. Fla. E. Coast Ry.*

§ 553,” which applied (as the *Florida East Coast Railway* opinion that he wrote for the Court stated) because of *Allegheny-Ludlum*.<sup>132</sup> Justice Stewart does not indicate why the other Justices joined the majority.<sup>133</sup>

Justice Stewart’s papers also inform the dissenting opinion. Recall that Justice Douglas’s often hard-to-follow dissent generally relied upon unclear notions of due process to argue that the regulated parties were entitled to the protections of sections 556 and 557 of the APA.<sup>134</sup> Similar to his fifth draft per curiam opinion that he circulated around the time the Court issued *Allegheny-Ludlum*, Justice Douglas’s dissent argued that the Court should distinguish the rates in *Florida East Coast Railway*, which created financial liability, from rules like those at issue in *Allegheny-Ludlum*, which did not.<sup>135</sup> With historical practice in mind, the dissent contended that the Court should have read “hearing” under the Esch Act to require formal rulemaking under the APA for rates but not other rules.<sup>136</sup> This distinction could have found some basis in historical practice and the *Attorney General’s Manual*,<sup>137</sup> but the dissent did not meaningfully refer to either argument.

During the early 1970s, Justice Douglas was not at his best. Although a well-known stroke in 1974 severely diminished his faculties,<sup>138</sup> he was distracted before then by political, financial, health, and interpersonal problems. His financial dealings had led, in part, to an unsuccessful impeachment attempt.<sup>139</sup> He had suffered heart problems,<sup>140</sup> and he had notoriously bad relations with his staff and law clerks.<sup>141</sup> Later, Justice Brennan said that Justice Douglas’s “last ten years on the Court were marked by the slovenliness of his writing and the mistakes that he constantly made.”<sup>142</sup>

The dissenting drafts provide some evidence of Justice Douglas’s distraction in *Florida East Coast Railway*. The first draft of his dissenting

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<sup>132</sup> *Id.*

<sup>133</sup> *See id.*

<sup>134</sup> *See supra* note 22 and accompanying text.

<sup>135</sup> *See Fla. E. Coast Ry. Co.*, 410 U.S. at 247 (1973) (Douglas, J., dissenting).

<sup>136</sup> *See id.* at 252–53.

<sup>137</sup> *See supra* note 66.

<sup>138</sup> Justice Douglas’s decline after a stroke in 1974 is well documented. *See* Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1539 n.161 (2012).

<sup>139</sup> *See* BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 396, 400–01, 433, 441 (2003).

<sup>140</sup> *See, e.g., id.* at 447–48.

<sup>141</sup> *See, e.g., id.* at 407–13, 431, 457.

<sup>142</sup> *Id.* at 386.

opinion read like a majority opinion, stating “We affirm”<sup>143</sup>—a remnant from his per curiam drafts.<sup>144</sup> In his fifth draft dissent (after earlier drafts with few revisions), he reformulated his introductory paragraphs in a way that nearly cost him Justice Stewart’s vote. After using strong rhetoric concerning the majority’s “sharp break with traditional concepts of procedural due process,” he prominently relied upon due process of some kind to require “a full hearing that includes the right to present oral testimony, cross examine witness [sic], and to present oral argument.”<sup>145</sup> He argued that the APA required these procedures anyway under section 554—which concerns only adjudications, not rulemakings—because the ratemaking at issue “is certainly adjudicatory, not legislative in the customary sense.”<sup>146</sup> Recall that, contrary to Justice Douglas’s pronouncement, the APA expressly defines ratemaking as rulemaking, not adjudication.<sup>147</sup> This was too much for Justice Stewart. He asked Justice Douglas to delete his name from joining and instead add that “Mr. Justice Stewart joins in this dissent except insofar as it relies on 5 U.S.C. § 554.”<sup>148</sup> In response, Justice Douglas revised his sixth and final draft to refer to the APA’s rulemaking provisions.<sup>149</sup>

### III. LESSONS FROM THE WRONG SIDE OF THE TRACKS

The Justices’ papers strongly suggest that they did not meaningfully engage with formal rulemaking’s applicability in the Railway Cases, whether because of the issue’s *sua sponte* treatment, the misplaced reliance on *Allegheny-Ludlum* to decide *Florida East Coast Railway*, or the failure of Justice Douglas’s dissenting opinion to alert his colleagues to the problems in the majority opinion. But why should anyone care?

*First.* The railway decisions were more significant than they may appear. With formal rulemaking’s quick banishment, administrative law lost, for all practical purposes, one of only four key categories of agency

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<sup>143</sup> See Burger Court Files, *United States v. Fla. E. Coast Ry.*, No. 70–279, Second Draft (Oct. 5, 1971).

<sup>144</sup> See Justice Stewart’s Papers, First Draft Dissenting Op. at 1 (circulated Jan. 6, 1973).

<sup>145</sup> Justice Stewart’s Papers, Fifth Draft Dissenting Op. at 1 (circulated Jan. 17, 1973).

<sup>146</sup> *Id.* at 2.

<sup>147</sup> See *supra* note 42 and accompanying text.

<sup>148</sup> Justice Stewart’s Papers, Ltr. to Justice Douglas from Justice Stewart (Jan. 18, 1973).

<sup>149</sup> See Justice Stewart’s Papers, Sixth Draft Dissenting Op. at 1–2 (circulated Jan. 19, 1973); see also *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 247 (1973) (Douglas, J., dissenting).

action under the APA.<sup>150</sup> All that remained were informal rulemaking, formal adjudication, and informal adjudication.<sup>151</sup> Moreover, administrative law lost a form of rulemaking that is formal for a reason: the procedure was intended to protect regulated parties from administrative overreach.<sup>152</sup> As Nielson has recounted, formal rulemaking under the APA was a compromise to ensure reasoned decisionmaking and transparency.<sup>153</sup> Indeed, formal rulemaking's antecedent itself arose as an important compromise in the development of the early modern administrative state.<sup>154</sup> It was the ICC that in 1887, after significant debate in Congress, established the judicial-agency model now ubiquitous in federal agencies.<sup>155</sup> And Congress continued to paint the ICC with a judicial hue even when it engaged in rulemaking by granting the agency the power to make rates only after it provided a "full [trial-like] hearing."<sup>156</sup>

In formal rulemaking's nearly complete absence, informal rulemaking took over in mutated form. Courts rendered informal rulemaking more formal. Very shortly after the Railway Cases, courts began to impose more stringent procedural protections on informal rulemaking,<sup>157</sup> including by requiring more notice<sup>158</sup> and more detailed agency explanations.<sup>159</sup> In fact, one scholar has gone so far as to say that "[t]oday, the informal rulemaking process is almost as time consuming and expensive as the formal rulemaking process."<sup>160</sup> The more-or-less extinction of formal rulemaking created a new ecosystem within which other organisms changed (or

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<sup>150</sup> See Rubin, *supra* note 83, at 106.

<sup>151</sup> *Id.*

<sup>152</sup> See Nielson, *supra* note 5, at 244.

<sup>153</sup> See *id.* at 245–47.

<sup>154</sup> *Id.* at 244.

<sup>155</sup> See generally Hiroshi Okayama, *The Interstate Commerce Commission and the Genesis of America's Judicialized Administrative State*, J. GILDED AGE & PROGRESSIVE ERA (forthcoming).

<sup>156</sup> See Nielson, *supra* note 5, at 244–45.

<sup>157</sup> See JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 512 (2009) (noting debate over rulemaking's requirements led courts to "extract[] from the language—or assumed purpose—of section 553" many procedural requirements).

<sup>158</sup> See LAWSON, *supra* note 8, at 263 (describing the judiciary's changed understanding of notice's purpose as checking agency action as opposed to facilitating agency action).

<sup>159</sup> See, e.g., PIERCE, *supra* note 22, 592–93 (discussing how courts have required more from agencies as to their explanation over the decades).

<sup>160</sup> Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 282 (1998).

continued their mutation) to fill the void left by its absence.<sup>161</sup> Although the holdings in the Railway Cases nominally affected only formal rulemaking itself, they had a much more significant impact on administrative law writ large.

To be sure, formal rulemaking was never required of all agencies or for all matters.<sup>162</sup> It was, however, an important and robust form of agency action prior to the Railway Cases—even “dominat[ing] the administrative law landscape.”<sup>163</sup> And the increasingly shared consensus that formal rulemaking was too inefficient for a modern regulatory state may have led to its decline without the Court’s intervention.<sup>164</sup> But the Railway Cases did not permit the resolution of those debates before largely shunning one of only four categories of agency action.

*Second. Allegheny-Ludlum* provides a striking example of the dangers of deciding matters sua sponte. The Court hamstrung formal rulemaking without so much as briefing in *Allegheny-Ludlum*, and conference notes indicate that decision rendered later briefing in *Florida East Coast Railway* practically nugatory.<sup>165</sup> The Court appeared to consider the issue in *Allegheny-Ludlum* for only three days and without input from the parties or argument concerning the historical nature of formal rulemaking and its provenance within ICC matters.<sup>166</sup> The absence of briefing appears meaningful because the Court ruled that formal rulemaking did not apply without citing on-point, persuasive authorities.<sup>167</sup> With the parties’ input, the Court could have given the issue sustained attention and perhaps recognized the deficiency in its poorly reasoned arguments in *Florida East Coast Railway*. Indeed, Justice Rehnquist’s hesitation to decide *Florida East Coast Railway* without briefing on the subject of formal rulemaking’s applicability should have alerted him to the need for briefing in *Allegheny-*

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<sup>161</sup> Moreover, circuit courts immediately after the Railway Cases continued to require agencies to provide hearings and formalities in excess of those required by the APA, but the Supreme Court unanimously stopped that practice in 1978. See Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 194 (1996) (discussing impact of *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519 (1978)).

<sup>162</sup> See Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1278 (1972).

<sup>163</sup> Nielson, *supra* note 5, at 246 (quoting ADMIN. CONFERENCE OF THE U.S., A GUIDE TO FEDERAL AGENCY RULEMAKING, at ix (2d ed. 1991)).

<sup>164</sup> See *id.* at 250–51.

<sup>165</sup> See *supra* notes 131–133 and accompanying text.

<sup>166</sup> See *supra* notes 108–110 and accompanying text.

<sup>167</sup> See *supra* notes 63–67 and accompanying text.

*Ludlum*.<sup>168</sup> Had they called for such briefing in *Allegheny-Ludlum*, perhaps Justice Douglas's dissent in *Florida East Coast Railway* would have been spared the difficult task of alerting his colleagues to the historical significance of formal rulemaking.

I do not go so far as to assert that the Railway Cases, based on their troubling provenance and problematic reasoning, should be overturned or ignored. They are precedents, albeit underwhelming ones. And they do perhaps provide a useful, limited holding: a clear statement rule that requires Congress to speak unambiguously when it seeks to use formal rulemaking by saying "on the record" or something extremely similar.<sup>169</sup> Such a rule can save judicial and agency resources in seeking to ascertain congressional intent. But the utility of that holding comes at a cost. The Court, as *The Attorney General's Manual* perhaps most poignantly reveals, ignored what had been a clearly understood legislative preference for a contextual inquiry into whether formal rulemaking was required—not magic words or something akin to them.<sup>170</sup>

Regardless of formal rulemaking's virtues (or lack thereof), formal rulemaking was a hard-fought, well-understood compromise between those that favored robust protections for regulated entities and those that preferred a nimble and robust administrative state.<sup>171</sup> The choice to renegotiate the deal struck in the APA was not the Court's to make. The Court should have instead carefully considered formal rulemaking's applicability under the Esch Act only after significant briefing, historical inquiry, and contextualization. That inquiry would have been faithful to the APA.

*Third.* The Court's decisionmaking process makes it clear that, contrary to myth, the Court did not set out to resolve the underlying debate over formal rulemaking's virtues or faults or establish that Congress had already done so. I do not join the debate over formal rulemaking's virtues or faults. That debate should accordingly address the merits of formal rulemaking without placing undue weight on the ahistorical approach of the Railway Cases. The recently revived debate had lain dormant for questionable reasons. Although Nielson thoughtfully demonstrated that the FDA's infamous Peanut-Butter Rule was not the *bête noir* it was once thought to be,<sup>172</sup> scholars have largely dismissed formal rulemaking as a

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<sup>168</sup> See *supra* notes 128–130 and accompanying text.

<sup>169</sup> See *supra* Part I.

<sup>170</sup> See *supra* note 67 and accompanying text.

<sup>171</sup> See Nielson, *supra* note 5, at 243–47.

<sup>172</sup> See *supra* notes 52–53 and accompanying text.

useless device based on the FDA's ineffective use of the process.<sup>173</sup>

Likewise, the myth of formal rulemaking's shortcomings can lead scholars to quickly praise *Florida East Coast Railway* as simply following precedent (*Allegheny-Ludlum*) and historical practice, and thereby justifiably disengage from the underlying merits of formal rulemaking. For instance, one leading treatise argues that *Florida East Coast Railway* was properly decided because, aside from being consistent with *Allegheny-Ludlum*, its "refusal to presume congressional intent to impose trial-type rulemaking is consistent with the law at the time the APA was passed."<sup>174</sup> But the decision that the authors cite to support their assertion, *Norwegian Nitrogen Products Co. v. United States*,<sup>175</sup> merely confirms that a contextual inquiry is necessary. The Court in that case refused to require a trial-like hearing because, among other contextual factors, the agency merely provided recommendations on tariffs to the President and not rules with the force of law like those at issue in the Railway Cases.<sup>176</sup>

Congress, agencies, and scholars of different ideological stripes should continue to consider the merits of formal rulemaking by engaging with Nielson's thoughtful defense of formal rulemaking in certain contexts.<sup>177</sup> Formal rulemaking, after all, does not have a clear political valence. To be sure, Republicans in the House have supported formal rulemaking in an apparent effort to hobble "Obamacare."<sup>178</sup> But Dodd-Frank required formal rulemaking to further a longstanding progressive policy goal—to limit federal preemption of state banking and consumer-protection laws.<sup>179</sup> Indeed, despite its reputation for permitting regulated parties to stall agency action by forcing agencies to comply or reach settlement on industry goals, formal rulemaking appears to be a useful tool to mitigate concerns that regulated parties (such as financial institutions) have captured their regulating agencies (such as the OCC).<sup>180</sup> The key point is that as the

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<sup>173</sup> See, e.g., CHARLES H. KOCH, JR. & RICHARD MURPHY, 1 ADMIN. L. & PRAC. § 4:34[1] (3d ed. 2016) (arguing that formal rulemaking is "not very useful" based on FDA use and experience).

<sup>174</sup> See *id.* § 4:34[2] (citing *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 305 (1933)).

<sup>175</sup> 288 U.S. 294 (1933).

<sup>176</sup> See *id.* at 317–18.

<sup>177</sup> See Nielson, *supra* note 5, at 253–92; see also *supra* notes 27–28 and accompanying text (referring to the Dodd-Frank Act).

<sup>178</sup> See *supra* note 29 and accompanying text.

<sup>179</sup> See Barnett, *supra* note 28, at 22–33.

<sup>180</sup> Congress's silence during the decades following the Railway Cases and its recent invocation of formal rulemaking may suggest that Congress agrees with the Railway Cases and requires formal rulemaking only in the limited instances in which it is beneficial. But



debate continues, it should take formal rulemaking on its own terms and not regard the Railway Cases as resolving the debate over its merits.

#### CONCLUSION

*Allegheny-Ludlum*, despite its great significance and troubling provenance, has largely been forgotten. Scholars often relegate it to the indignity of the *see also* citation,<sup>181</sup> and casebook authors frequently discuss formal rulemaking's demise without mentioning it.<sup>182</sup> But *Allegheny-Ludlum* is more significant than its treatment suggests, even if it should live in infamy as opposed to celebration. By recognizing the problems with the Railway Cases, policymakers can better consider the merits or demerits of formal rulemaking on its own terms—without the undue influence of the Court's two leading formal rulemaking decisions.

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this is very likely reading too much into Congress's extremely limited action. Congress was likely silent because the Railway Cases, at least in the short term, were consistent with congressional calls for the ICC to act with alacrity. *See supra* note 44 and accompanying text. That their broader holdings did not encourage a congressional response is hardly surprising in this context. And one use of formal rulemaking does not demonstrate that Congress generally recognizes formal rulemaking as a useful (or problematic) administrative device. Indeed, when investigating Congress's use of formal rulemaking in Dodd-Frank, I found no legislative history explaining why the provision was added or what Congress or the drafting committees thought about formal rulemaking.

<sup>181</sup> *See, e.g.*, PIERCE, *supra* note 22, at 564.

<sup>182</sup> *See, e.g.*, CHARLES H. KOCH, JR. ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 177–88 (6th ed. 2010); MASHAW ET AL., *supra* note 157, at 507–12 (omitting reference to *Allegheny-Ludlum*); JOHN M. ROGERS ET AL., ADMINISTRATIVE LAW 245–56 (3d ed. 2012). *But see* WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 91 (4th ed. 2006) (excerpting *Allegheny-Ludlum*).