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## Essay

# Introduction to The Bremer-Kovacs Collection: Historic Documents Related to the Administrative Procedure Act of 1946 (HeinOnline 2021)

Emily S. Bremer<sup>†</sup> and Kathryn E. Kovacs<sup>††</sup>, Editors

### INTRODUCTION

This Essay offers a narrative introduction to *The Bremer-Kovacs Collection: Historic Documents Related to the Administrative Procedure Act of 1946* (HeinOnline 2021) and is designed to assist users of the Collection by placing the included documents in their historical context. The Collection begins in 1929 with the APA's first predecessors: bills to regulate administrative procedure that were introduced in Congress but never enacted. The Collection's coverage expands in 1933, tracking heightened interest in administrative reform following President Roosevelt's first inauguration and spurred on by the New Deal expansion of the federal administrative apparatus. The Collection includes a comprehensive legislative history of the Walter-Logan Bill of 1940, which Congress approved but President Roosevelt vetoed, as well as later bills that culminated in the Administrative Procedure Act of 1946 (APA).

A unique feature of *The Bremer-Kovacs Collection* is its recognition that the APA was not exclusively Congress's product: Private citizens and executive officials contributed significantly to the statute's development and enactment. The Collection thus includes, first, reports, draft legislation, and other documents produced by the American Bar Association's (ABA) Special Committee on Administrative Law. The ABA Committee took a critical, conservative view of the

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administrative state and was a consistent source of political pressure in favor of reform. Second, the Collection includes the work of the Attorney General's (AG's) Committee on Administrative Procedure. Commissioned by President Roosevelt, the AG's Committee produced an immense, detailed, scientific study of the procedures used in actual administrative agencies and programs. Its research provided the "intellectual foundation" for administrative reform, and its legislative proposals ultimately became the APA.

*The Bremer-Kovacs Collection* is rounded out with various tools to help researchers navigate the Collection, understand the documents in their rich historical context, and quickly identify the material most relevant to the user's precise interests. This Essay provides a concise narrative of the long road to the APA's adoption, putting the Collection's core documents in their proper historical context along the way. A Visual Timeline offers further contextualization. In addition, Research Editor Charlotte Schneider created a detailed Spreadsheet Timeline that makes the Collection more usable, as well as a bibliography of additional materials related to the APA of 1946.

#### I. WHY THIS COLLECTION?

The common law reigned supreme in administrative law until 1946, when the APA was enacted and became central to the field's further development.<sup>1</sup> As soon as President Truman signed the statute into law, both sides of the administrative-reform debate sought to convince the courts that its interpretation of the new law was the correct interpretation. Conservatives tried to sell the APA as imposing strict new controls on federal agencies.<sup>2</sup> Liberals, in contrast, billed the APA as merely restating the common law.<sup>3</sup> The Attorney General's Manual on the APA, published in 1947, reflects the liberal view.<sup>4</sup> Even though it reflects only one side of the debate, the Supreme Court has found the AG's Manual "persuasive" and given it deference.<sup>5</sup>

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1. See Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1348-49 (2012).

2. See Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1208 (2015).

3. See *id.*

4. TOM C. CLARK, U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947); see also John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 119, 133 (1998).

5. See *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004); *Darby v. Cisneros*, 509 U.S. 137, 148 n.10 (1993) (citing *Steadman v. SEC*, 450 U.S. 91, 102 n.22 (1981)); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979); *Vt. Yankee Nuclear*

Although the APA was enacted after an epic seventeen-year political battle, the courts have given its text and history scant attention. Instead, they have continued to enforce and create administrative common law. Examples are legion.<sup>6</sup> Courts continue to impose rules on agency rulemaking that exceed the APA's requirements.<sup>7</sup> They presume that courts may review agency action, even though the APA establishes the opposite default rule.<sup>8</sup> They apply common law ripeness doctrine, notwithstanding that the APA replaced that doctrine with a final agency action requirement.<sup>9</sup> They defer to agencies on questions of law, including the interpretation of relevant statutes and regulations, even though the APA commands that courts should "decide all relevant questions of law."<sup>10</sup> They give some agencies super-deference, despite the history showing that Congress intentionally imposed the same standard of review on all agencies.<sup>11</sup> There are many other doctrines that are central to administrative law that are difficult or impossible to ground in any provision of the APA.<sup>12</sup>

In recent years, these tensions have led courts and scholars to focus renewed attention on the text and origins of the APA.<sup>13</sup> The Roberts Court has followed suit, demonstrating an "increased historicism

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Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 546 (1978); see also *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring).

6. Some of the propositions that follow are disputed, even by the authors of this Introduction. Further research using the Collection can inform—and hopefully resolve—some of these disputes.

7. See Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 532–45 (2018).

8. Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1291, 1304–05 (2014).

9. Duffy, *supra* note 4, at 162–81.

10. Compare 5 U.S.C. § 706 ("[T]he reviewing court shall decide all relevant questions of law . . ."), with *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (deference to agency statutory interpretation), and *Kisor v. Wilkie*, 139 S. Ct. 2400, 2400 (2019) (deference to agency regulatory interpretation); but see Kristin E. Hickman & R. David Hahn, *Categorizing Chevron*, 81 OHIO ST. L.J. 611, 656 (2020) (arguing that *Chevron* deference can be understood as a construction of § 706).

11. Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583, 587, 593–99 (2011).

12. See generally CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* (2020).

13. See, e.g., Evan Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807 (2018); Kathryn E. Kovacs, *Progressive Textualism in Administrative Law*, 118 MICH. L. REV. ONLINE 134 (2019); Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613 (2019); Note, *Beyond "No Law to Apply": Uniting the Current Court in the Context of APA Reviewability*, 134 HARV. L. REV. 1206 (2021).

... in revived debates over the meaning” of the original enactment.<sup>14</sup> In the Supreme Court, the traditional, “evolving, common law approach to the statute and administrative law writ large” is now “squaring off” against an “originalist and textualist interpretation of the APA.”<sup>15</sup> More broadly, history continues to play a key role in statutory interpretation, even as the debate about whether that is appropriate rages on.<sup>16</sup>

Interpreting the APA requires close attention to the statute’s text, supported by an understanding of the historical context in which it was enacted. The APA is not merely a statute: it is a superstatute.<sup>17</sup> It emerged after a long period of deliberation and addresses foundational questions of modern governance. It has proven remarkably durable, such that many of its core precepts have become entrenched in U.S. administrative law. As the Supreme Court said shortly after its enactment, the APA “represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.”<sup>18</sup> It marked a constitutional moment when a unanimous Congress and the President accepted the existence of the administrative state and delegations of authority to executive branch agencies conditioned on procedural constraints and judicial review.<sup>19</sup> Seventy-five years after its enactment, the APA remains the central statutory component of the administrative state’s constitution.<sup>20</sup> As the Supreme Court observed, however, the APA “contains many compromises and generalities and, no doubt, some ambiguities.”<sup>21</sup> Thus, interpreting it requires understanding the history of the political battle that forged its text.

Those who attempt to unearth the APA’s historical foundations

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14. Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 6 (2019).

15. *Id.*

16. See, e.g., Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia’s Campaign Against Legislative History*, 105 CORNELL L. REV. 1023, 1025–28 (2020); Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. (forthcoming 2022); Mark Seidenfeld, *Textualism’s Theoretical Bankruptcy and Its Implication for Statutory Interpretation*, 100 B.U. L. REV. 1817, 1822–33 (2020).

17. Kovacs, *supra* note 2.

18. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950); see also *Vt. Yankee v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 523 (1978).

19. Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 90 (2020).

20. See Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1236 (2014).

21. *Wong Yang Sung*, 339 U.S. at 40.

quickly discover, however, that the documents are voluminous, scattered, and difficult to navigate without substantial pre-existing knowledge of the events that lead to the statute's enactment. Others have sought to address these difficulties by producing collections of the key documents. Unfortunately, those prior efforts have shortcomings. In 1946, Congress published an official legislative history on the order of Senator Pat McCarran, then-Chair of the Judiciary Committee.<sup>22</sup> But that publication includes only the bills that ultimately became the APA, along with the hearings and debates on those bills.<sup>23</sup> The official legislative history does not include material related to earlier legislative efforts that laid the groundwork for the APA, nor does it include any material from outside the official congressional record. In 1946, Elizabeth Finley, the librarian at Covington, Burling, Rublee, Acheson, and Shorb, created a more complete collection reaching back to 1933,<sup>24</sup> but she too overlooked some bills, reports, hearings, and debates. Even a full record of Congress's consideration of administrative reform during the 1930s and 1940s fails to convey the APA's full history, for two principal reasons. First, private organizations—most notably the ABA—played key roles in drafting, generating legislative momentum, and brokering the ultimate compromise. Second, the 1947 Attorney General's Manual on the APA significantly influenced the way agencies and courts interpreted and applied the statute.

*The Bremer-Kovacs Collection* is designed to provide a complete, contextualized library of the historic documents related to the APA spanning the years 1929 to 1947. While the first bill in our Collection was submitted in 1929, the long and winding journey to the APA's enactment began in earnest in 1933 in the midst of the intense political fight for the soul of the New Deal. The journey concluded in the decidedly different political atmosphere of the immediate postwar period. Along the way, many people and institutions contributed to developing the framework for administrative action ultimately reflected in the APA of 1946. Therefore, this Collection includes not just all of the bills members of Congress proposed to control administrative agencies, and the hearings and debates on those bills, but also the various other communications, studies, reports, and debates that informed the APA.

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22. ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at III (1946).

23. *See id.*

24. *See* Stephen G. Margeton, *Of Legislative Histories and Librarians*, 85 LAW LIBR. J. 81, 85–86 (1993); Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 295 (2013).

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Collectively, the editors have spent several decades researching and writing about the APA's historical foundations. We hope our knowledge and experience as reflected in this Collection will make it easier for courts, practitioners, and scholars to access and use the APA's history to improve and develop administrative law, theory, and practice.

## II. THE BREMER-KOVACS COLLECTION'S DOCUMENTS IN HISTORICAL CONTEXT

The documents in this Collection are best understood in their historical context. This Part first tells the story of the materials users will find in *The Bremer-Kovacs Collection*. It then discusses historical materials that are adjacent to the APA and have therefore been excluded from the present Collection.

### A. THE STORY OF THE MATERIALS INCLUDED IN THE COLLECTION

The Administrative Procedure Act of 1946 marked the culmination of more than a decade of debate about administrative reform. *The Bremer-Kovacs Collection* begins in 1929, several years before Franklin Delano Roosevelt's first inauguration, when Senator George Norris introduced the first administrative reform bill.<sup>25</sup> That bill focused on creating a court to hear claims against federal agencies.<sup>26</sup> When FDR became President in 1933, he promptly kicked off the New Deal in an effort to rescue the nation from the Great Depression. Two months later, the ABA formed a Special Committee on Administrative Law, which also focused its initial reports on the administrative court idea. The ensuing years saw a massive expansion of federal administrative authority, which necessarily intensified concerns about controlling administrative agencies.

Administrative reform began to pick up steam in Congress after 1937 when the Supreme Court began approving New Deal programs, recession set in, and President Roosevelt was politically weaker than he had been. Proponents of administrative reform shifted their efforts towards controlling agency procedure in adjudications and rulemaking and providing for judicial oversight. The ABA Committee's 1937 proposed bill was far stricter than its previous administrative courts proposals. Its reports, and indeed the entire administrative reform

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25. S. 5154, 70th Cong. (1929). The Supreme Court has identified this as the starting point for understanding the APA's history and importance. See *Wong Yang Sung*, 339 U.S. at 37–38.

26. See S. 5154, 70th Cong. (1929).

debate through the 1930s, were infused with anti-authoritarian rhetoric reflecting the increasingly common fear that FDR would become a dictator.<sup>27</sup>

The ABA Committee's proposal was introduced in Congress in 1939 as S. 915 and H.R. 6324.<sup>28</sup> The reports and debates on that bill, which came to be known as the Walter-Logan Bill, are included in the Collection and are critical to understanding the APA. President Roosevelt opposed the restrictive Walter-Logan Bill and worked to prevent its enactment, including by commissioning the Attorney General to conduct the first "scientific" study of administrative procedure. A small staff of "attorney-investigators" working under the direction of Walter Gellhorn supported the AG's Committee on Administrative Procedure, which was composed of seven liberal and four conservative judges, professors, and practitioners. In December 1940, a coalition of Republicans and conservative Democrats passed the Walter-Logan Bill. FDR vetoed the Bill on December 18, 1940, in part because he preferred to await the final report of the AG's Committee.<sup>29</sup>

In 1940 and 1941, the AG's Committee produced an impressive body of work that provided an "intellectual foundation" for Congress's further administrative reform efforts.<sup>30</sup> The Committee produced twenty-seven individual monographs examining the procedures used by then-existing administrative agencies. The monographs were widely heralded as the greatest and most scientific study of administrative process that had been completed to date.<sup>31</sup> These monographs, published as individual Senate Documents, informed a 474-page Final Report that was delivered to Congress on January 24, 1941. The Final Report included the separate views of the Committee's conservative minority and legislative proposals from both the majority and minority. The minority report, however, was not in the nature of a dissent. The entire Committee agreed on the descriptive aspects of the study and parted ways with respect to the question of how far Congress

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27. See generally Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 GEO. MASON L. REV. 573 (2021).

28. S. 915, 76th Cong. (1939); H.R. 6324, 76th Cong. (1939).

29. Kovacs, *supra* note 27, at 586-94.

30. Kenneth Culp Davis, Walter Gellhorn, & Paul Verkuil, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 513-14 (1986).

31. See Walter F. Dodd, Book Review, *Attorney General's Committee on Administrative Procedure Monographs Nos. 1-11*, 88 U. PA. L. REV. 764, 765 (1940); Edward G. Jennings, Book Review, *Monographs of the Attorney General's Committee on Administrative Procedure*, 25 MINN. L. REV. 123, 124 (1940); see also Joanna Grisinger, *Law in Action: The Attorney General's Committee on Administrative Procedure*, 20 J. POL'Y HIST. 379, 380 (2009).



should go in regulating administrative procedure. Reluctant to make generalizations about the administrative process, the majority urged relatively modest provisions. Looking across agencies, the members in the minority saw more similarity—and more need for reform—than did the majority. The minority was correspondingly bolder in its legislative proposals.<sup>32</sup> Senator Hatch introduced the two draft bills from the AG's Committee final report included as S. 674 and S. 675.<sup>33</sup> The AG's Committee report shifted the tone of the debate away from its prior anti-authoritarian rhetoric. The Senate Judiciary Committee hearings in April and May of 1941 lacked the vituperative language of the earlier debate.<sup>34</sup>

The United States' entry into World War II later that year relegated administrative reform to a back burner in Congress, but the ABA's Special Committee on Administrative Law continued its work. It drafted a bill, designed as a compromise between the majority and minority proposals from the AG's Committee. Shortly after D-Day in 1944, Senator McCarran and Representative Sumners introduced that bill as S. 2030 and H.R. 5081. They revised and reintroduced the bills in 1945 as S. 7 and H.R. 1203. The House Judiciary Committee held hearings in 1945, but the real action on the bill took place behind the scenes in private negotiations with the Truman administration. The bill passed both houses of Congress unanimously, and President Truman signed it into law on June 11, 1946.<sup>35</sup>

In 1947, the Department of Justice published the Attorney General's Manual on the APA to offer federal administrative agencies guidance on complying with the new law. That monograph reflected the liberal Truman administration's interpretation of the new law. This is where *The Bremer-Kovacs Collection* ends.

#### B. ADJACENT MATERIALS PRESENTLY EXCLUDED FROM THE COLLECTION

By focusing tightly on the materials that directly influenced the APA, this Collection necessarily omits materials that touch on similar issues and may be of interest to those who study federal government agencies and the history of administrative law. At a later date, we may expand the Collection or encourage others to develop distinct but

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32. See Davis et al., *supra* note 30, at 518, 522; Grisinger, *supra* note 31, at 398–404; Louis L. Jaffe, *The Report of the Attorney General's Committee on Administrative Procedure*, 8 U. CHI. L. REV. 401, 402 n.4. (1941).

33. S. 674, 77th Cong. (1941); S. 675, 77th Cong. (1941).

34. Kovacs, *supra* note 27, at 593–94.

35. See generally George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

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related collections. For now, however, we have concluded that the best course is to retain a narrow focus on a core canon of APA historical documents. To explain this choice and assist users of this Collection, we briefly identify some of the materials that we have omitted.

The most notable exclusion from *The Bremer-Kovacs Collection* is the materials produced by the President's Committee on Administrative Management, which President Roosevelt commissioned in 1936 to study reorganization of the more than one hundred agencies in the executive branch.<sup>36</sup> Its report is essential reading for anyone interested in presidential control of executive and independent agencies, the civil service system, or the federal budget.<sup>37</sup> We opted not to include the report and related materials because they are themselves voluminous and probably warrant a separate digital collection. Though a full understanding of administrative law's development in the 1930s requires examining the executive branch reform debate, and that debate certainly influenced the administrative reform debate, we decided that those materials are not sufficiently related to agency procedure and judicial review to warrant inclusion in this Collection.

### III. TOOLS AVAILABLE TO USERS OF *THE BREMER-KOVACS COLLECTION*

In addition to this Introduction, the Collection includes several tools designed to assist researchers. The Collection includes two timelines: a Visual Timeline and a Spreadsheet Timeline. The Visual Timeline was prepared by Hein's Editorial Specialist, Stephanie Ruesch, and offers users a concise historical orientation. The Document Timeline, which was prepared by Research Editor Charlotte Schneider, enhances the usability of the Collection significantly by presenting the Collection's documents in chronological order and in the context of the surrounding history. The Spreadsheet Timeline includes all the documents in the Collection: congressional bills, hearings, reports, debates, extensions of remarks, and public laws; the Attorney General's Committee report and monographs; the Attorney General's Manual; ABA journals and reports; presidential documents; and the official legislative history of the APA. The Spreadsheet Timeline is formatted to provide the researcher the ability to filter, sort, and see progressions in the history. The chronological order and color-coding of document

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36. See Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 13 (2022).

37. REORGANIZATION OF THE EXECUTIVE DEPARTMENTS, S. DOC. NO. 75-8 (1937).

types contextualizes the evolution of the APA. At a glance, researchers can see when ideas or language were introduced in the process, by whom, and their relation to other bills.

The Spreadsheet Timeline is color coded to enhance usability. The greens follow the progression of the legislative process: bills are the lightest green; hearings are a slightly darker green; reports are an even darker green; debates and extensions of remarks are darker still; and Public Laws are the darkest green. The official Legislative History is a very light green. Certain actions are meant to stand out. Hence, presidential documents are blue. Attorney General documents are a lighter blue. Significant historical events influenced Congress's legislative priorities. Some of these events are included in orange to add further context. Finally, the ABA Journals are a light gray, and ABA reports are gray.

The Collection includes key books from HeinOnline's digital collection. One of those books, *Administrative Procedure: A Handbook of Law and Procedure Before Federal Agencies* (1944), includes a helpful bibliography of law review articles. Professor Schneider enhances the Collection with an expanded bibliography of books and articles. The Collection also offers researchers the ability to search documents by subject matter.

Inevitably there will be material that we overlooked and material that need not be included. Your feedback is very much appreciated to inform future iterations of the Collection.