

Procedure Matters

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Tagged as : [Immigration](#)

Date : November 30, 2017

Ming Hsu Chen, *The Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 **Admin. L. Rev.** 347 (2017), available at [SSRN](#).

Professor Ming Chen's *Administrator-In-Chief: The President and Executive Action in Immigration Law* is an ambitious effort to peer inside the relationship between a president and administrative agencies. It is the executive branch equivalent to the legislative sausage. Professor Chen concludes that a president is on strongest footing when he "promot[es] practices of good government in agencies rather than trying to substitute his policymaking judgments for those of the agency." (P. 359.) The article emphasizes that the president should focus on his control over three things: (1) coherent federal policy; (2) centralized agency discretion, ensuring consistency, and (3) coordinating actions across all agencies. The article concludes that procedural choices matter; the president should work hard to set a procedural example and to use his influence to encourage procedural choices that will strengthen the legitimacy of policies. Professor Chen argues that the normative justifiability of presidential policymaking rests on whether the president is promoting coherency, consistency and coordination.

While three case studies from the Obama Administration's approach to immigration law guide the article's analysis, the analysis includes lessons for any president. In developing these case studies, Professor Chen conducted interviews with government officials and immigration advocates. The subject of the first case study is President Obama's use of agency guidance documents to announce the Deferred Action for Childhood Arrivals ("DACA") and Deferred Action for Parents of Americans ("DAPA") policies. The second case study focuses on President Obama's attempts to set removal and detention priorities. Professor Chen walks us through several incarnations of enforcement policies that attempted to express President Obama's priorities for detention and removal. These policies called on local law enforcement to share information about individuals with federal immigration agents and to detain individuals while waiting for federal immigration officials to travel to a jail to take custody of an individual. The third case study examines the Obama Administration's efforts to respond to a surge of asylum seekers at the Mexican border.

These case studies reveal the extremely complicated nature of the immigration bureaucracy. Not only is the organizational chart complex, but the dispersion of immigration functions makes achieving coherency, consistency and coordination an awesome challenge. The immigration bureaucracy not only consists of three separate entities within the Department of Homeland Security (Customs and Border Protection, Immigration and Customs Enforcement, and United States Citizenship and Immigration Services), but the Department of Justice, the Department of State, and the Department of Labor each play roles as well. Each agency has its own mission and culture. The reality is even more complex, though, as Professor Chen's research reveals competing cultures within agencies. Professor Chen describes different cultural forces at work within Homeland Security and also the challenges President Obama faced in fighting ingrained agency culture. The amount of inter- and intra-agency coordination and massaging necessary to change course is mind-boggling. Professor Chen's article reminds us that no matter how difficult, this type of management can be crucial, and the president is in the best position to do it.

For DACA and DAPA, Professor Chen concludes that President Obama “somewhat succeeded in promoting a coherent system of enforcement practices.” (P. 411.) Both DACA and DAPA aimed to create a coherent policy of how the executive branch would exercise its prosecutorial discretion. Two things stood in the way and rendered the effort only somewhat successful, according to Professor Chen. First, the President faced strong headwinds in the form of agency cultural resistance to the policies. Second, in the case of DAPA, the procedural choice to use a guidance document instead of notice and comment rulemaking factored into the policy’s legal downfall. For both the detainer policies and the response to the surge in asylum applicants at the border, Professor Chen relays failures of coherency, consistency and coordination. According to Professor Chen, procedural missteps greatly contributed to those failures.

Professor Chen deserves a lot of credit for taking on this project. Her valuable insights allow us to peer into the relationship between President Obama and immigration agencies. Her article also serves as an important bridge between immigration law and administrative law generally. She ties specific immigration law case studies to larger administrative law issues, including the president’s proper relationship with agencies. Her detailed explanation of the immigration bureaucracy and the cultural challenges within it on their own are significant contributions. The article’s ambition, however, is also its soft spot. This is a very dense article that attempts to accomplish much and sometimes gets in its own way by attempting to touch on too many related topics. This left me, at times, unsure of the article’s main focus. On some points I was unsatisfied. For example, the article mentions the ongoing debate about the legitimacy of the administrative state, but left me without a clear explanation of how the call for greater attention to the president’s procedural power fits into that debate. Also, I believe that Professor Chen intends for her focus on procedure to be solely normative, but I am not sure and I would like to know where she sees the existing legal boundaries.

What is clear, however, is Professor Chen’s call for the president to be a staunch defender of procedure who encourages coherency, consistency and coordination across the executive branch. She makes suggestions for how a president can better achieve those goals and her case studies provide important lessons.

Cite as: Jill Family, *Procedure Matters*, JOTWELL (November 30, 2017) (reviewing Ming Hsu Chen, *The Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 **Admin. L. Rev.** 347 (2017), available at SSRN), <https://lex.jotwell.com/procedure-matters/>.