

If Not Congress, Then Whom? Making the Case for Greater Legislative Oversight of Executive Immigration Policy

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INTRODUCTION

Few issues grab more headlines or heighten more political passions than questions of who among non-U.S. persons may enter, and stay, in this country.¹ Under the Trump administration, these issues came to the fore from the administration's first week in power, when the President's first "travel ban" was implemented. The ban, which came on the heels of a campaign filled with Islamophobic statements and was written by individuals known for their hostility towards immigration, raised several questions of legality, among which was the role of the executive in determining who may enter the country.² While much media coverage of the ban focused on litigation brought by affected individuals, non-profits, and state governments against the Trump administration, this Note will argue that when the topic in question is related to immigration, Congress can—and should—take a comprehensive and probing oversight role over the executive branch through legislative investigative functions.

Congressional investigations, whether conducted through letters requesting information, subpoenas, hearings, or a mix of the three, are fundamental to our system of government. The power to investigate, while not explicitly bestowed on Congress by the Constitution, is inherent in its lawmaking responsibilities.³ Not only do investigations allow lawmakers to assess pending legislation, gather information for future legislation, and oversee federal agencies,⁴ these investigations maintain our system of checks and balances, allowing the legislative branch to oversee the executive branch in a way that the judicial branch cannot.⁵ While

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1. See Derek Thompson, *How Immigration Became So Controversial*, ATLANTIC (Feb. 2, 2018), <https://www.theatlantic.com/politics/archive/2018/02/why-immigration-divides/552125/> [<https://perma.cc/89QQ-CKLD>].

2. See *infra* notes 29–48.

3. U.S. CONST. art. 1, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

4. *Investigations & Oversight*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/Institution/Origins-Development/Investigations-Oversight/> [<https://perma.cc/2855-6Z5G>] (last visited Jan. 5, 2022).

5. *Id.*

private citizens have repeatedly sued the executive branch, such cases require the plaintiff to show actual injury from the challenged executive actions (or inactions).⁶ Failure to demonstrate standing has thrown many plaintiffs out of court and left many questionable executive branch policies and programs intact.⁷ Unlike the judicial branch, the legislative branch does not have to show injury (or causation and redressability, for that matter): it has the inherent power to investigate the executive branch either to inform current and future legislation or to oversee operations on executive policies and programs.⁸ Furthermore, due to the jurisprudence of the Supreme Court, only the executive and legislative branches can make decisions on immigration matters for the most part.⁹

Of all the issues the executive oversees, there are few that merit aggressive congressional oversight more than immigration policy. Reasons for this importance include constitutional, institutional, and ethical considerations. First, due to the development of constitutional jurisprudence, the judiciary is largely unable to oversee the executive branch on immigration matters. Second, immigration is an issue on which Congress can—and must—make law, and it should exercise its investigative functions to both gather information and oversee the executive branch. Finally, Congress has a duty, from the perspectives of legal and normative ethics, to check the executive branch when it is engaging in practices that run counter to the spirit and substance of this country's laws and values.

There are undoubtedly drawbacks to this argument. Aggressive congressional oversight of executive action on immigration will not always unfold in a way that brings about the most humanitarian outcome in the short term. Congressional oversight of executive actions on pro-humanitarian immigration policies, such as the Deferred Action for Childhood Arrivals policy promulgated under the Obama administration, may result in short-term political pressure to rescind such policies. Yet, investigations conducted in good faith to investigate and oversee questionable executive branch policies can bring about desirable long-term institutional effects. Congressional investigations into executive immigration actions force the executive branch to publicly disclose its motivations for taking these actions; such a process cannot be replicated in a case before a traditional Article III court.

6. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–63 (1992).

7. Bradford C. Mank, *Clapper v. Amnesty International: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211, 239–40 (2014) (criticizing the Supreme Court's failure to find plaintiffs showed standing in case arguing that the U.S. government was spying on foreign clients); Mary Kathryn Nagle, *Tracing the Origins of the Fairly Traceable: The Black Hole of Private Climate Change Litigation*, 85 TUL. L. REV. 477, 478–82 (2010) (arguing that the development of standing doctrine "limit[ed] the ability of regulatory beneficiaries to bring public interest lawsuits against federal agencies in the Executive Branch").

8. *McGrain v. Daugherty*, 273 U.S. 135, 173–75 (1927) (holding that Congress has "auxiliary powers" subordinate to its lawmaking functions which are "necessary and appropriate" to carrying out its legislative responsibilities).

9. See discussion *infra* Section I.A.

In recent history, the executive branch has been active on immigration matters, with both the Obama and Trump administrations—the latter especially—issuing a flurry of executive orders on the issue.¹⁰ Executive resort to executive actions is due in part to gridlock in the legislature and in part to the ease of issuing such an action;¹¹ executive orders, while they may be challenged by the legislature or in court, only require presidential sign-off and have been referred to as “instant law.”¹² Congressional oversight of executive actions on immigration, motivated by concerns that the executive has encroached into lawmaking, could emphasize the lack of Congressional action on immigration, and perhaps bring about calls for greater accountability for Congress to fulfill its legislative responsibilities.

This Note will argue that congressional investigations into executive actions on immigration are crucial, for constitutional, institutional, and ethical reasons. Part I will explain why the constitutional limitations on judicial oversight of executive actions on immigration necessitates stronger congressional investigations. Part II will discuss Congress’ duty to investigate and oversee the executive branch. This discussion will be conducted through a case study of the congressional investigation into the travel ban. Part III will then make the case that representatives hold an ethical duty to investigate executive misconduct on immigration. This ethical duty has both normative and legal elements; the former rooted in the duty to correct a wrong when one is in the position to do so, and the latter rooted in comment 7 to Model Rule 8.4, which posits that “[l]awyers holding public office assume legal responsibilities going beyond those of other citizens.”¹³ The Note will conclude by re-emphasizing the significance of congressional investigations to the integrity of our government, especially when those investigations inquire into a topic as consequential as immigration.

10. See generally Susan Parnas Frederick, *Summary of Executive Orders on Immigration*, NCSL (Jan. 26, 2017), <https://www.ncsl.org/research/immigration/summary-of-executive-orders-on-immigration.aspx#1> [<https://perma.cc/UNH2-TLR4>] (summarizing two of the Trump administration’s earliest executive orders relating to border control at the southern border and undocumented persons within the country); *DACA*, NAT’L IMMIGRANT L. CTR., <https://www.nilc.org/issues/daca/> [<https://perma.cc/DCQ3-SRJ8>] (last visited Jan. 16, 2022); WHITE HOUSE, FACT SHEET: IMMIGRATION ACCOUNTABILITY EXECUTIVE ACTION (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action> [<https://perma.cc/H3BR-T6Q6>] (executive order issued by the Obama administration which, among other actions, prioritized undocumented persons with criminal records for deportation over families).

11. See generally Edward G. Carmines & Matthew Fowler, *The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power*, 24 IND. J. GLOB. STUD. 369 (2017).

12. *What Is an Executive Order?*, ABA (Jan. 25, 2021), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order/ [<https://perma.cc/42R8-44FN>].

13. MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. 7 (2018) [hereinafter MODEL RULES].

I. THE JUDICIAL BRANCH IS INCAPABLE OF OVERSEEING EXECUTIVE ACTIONS ON IMMIGRATION

The following section will trace the development of the plenary power doctrine, from its origins in litigation surrounding the Chinese Exclusion Act of 1882 to its latest iteration in *Trump v. Hawaii*. This doctrine, the evolution of which is rooted in concerns that the judicial branch is not suited to make judgments on issues of foreign affairs and national security, largely prevents the judicial branch from overseeing the executive branch's actions on immigration.¹⁴ As the judicial branch is unable to oversee the executive branch's actions on immigration, the legislative branch must step into an oversight role to maintain the system of checks and balances.

A. THE DEVELOPMENT OF THE PLENARY POWER DOCTRINE

The plenary power doctrine, which boxes the judicial branch out of any meaningful oversight of immigration law and policy, and its corollary political question doctrine, necessitates stronger congressional oversight of executive actions on immigration. The Constitution is largely silent on issues of immigration, save questions of citizenship and naturalization.¹⁵ The Supreme Court first spoke to this silence in 1889 in the case of *Chae Chan Ping*, a Chinese laborer whose return to the United States was blocked by the passage of the Scott Act.¹⁶ The Scott Act, which was motivated by the same anti-Asian animus as its predecessor, the Chinese Exclusion Act of 1882, voided the registration certificates of Chinese laborers in the United States and ensured that most of the Chinese population in the United States could not lawfully stay.¹⁷ The Court upheld the Act and for the first time held that the political branches have the inherent plenary power—no subject to judicial review—over exclusion of immigrants from the country.¹⁸ The Court rooted this plenary power in a number of different sources: international law, under which a state has sovereign power to control who enters its borders; separation of powers between the federal government and state governments; and the need for Congress to be unrestrained in its powers to legislate on matters of national interest.¹⁹

A few years later, the Court extended this plenary power of the legislative and executive branches to deportation, allowing these branches the “absolute and unqualified” right to deport people who were not naturalized and had not “taken

14. David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 69 OKLA. L. REV. 29, 41–42 (2015).

15. U.S. CONST. amend. XIV, § 1.

16. *Chae Chan Ping v. United States*, 130 U.S. 581, 581–82 (1889).

17. *Id.* at 582; see also *Timeline of Systemic Racism Against AAPI*, STAN. LIBRS., <https://exhibits.stanford.edu/riseup/feature/timeline-of-systemic-racism-against-aapi> [<https://perma.cc/35BB-MGGB>] (last visited Apr. 13, 2022).

18. *Chae Chan Ping*, 130 U.S. at 606–07.

19. *Id.* at 600–05.

any steps towards becoming citizens.”²⁰ While the political branches’ power over immigration today is not as “unqualified” as it appeared in the late 1880s, this power has been relatively untouched.²¹

Many immigration issues challenged in court are also considered “political questions”: issues that are too entangled with foreign affairs and national security concerns for the judicial branch to appropriately consider.²² The problem with this classification, however, is that it allows the court to punt responsibility for adjudicating critical questions of legality of programs and policies to the executive and legislative, the very branches responsible for creating the policies in the first place.

B. “FACIALLY LEGITIMATE AND BONA FIDE” STANDARD OF DEFERENCE

Through the doctrines previously discussed, the judicial branch excused itself from oversight of legislative and executive actions on immigration. This reality is made even more troubling by the immense deference the courts have carved out for the executive branch to interpret the Immigration and Nationality Act (INA) and refuse entry to non-citizens.²³ Such deference was explicitly referred to in *Kleindienst v. Mandel*, a landmark case from 1972.²⁴ In *Mandel*, American academics brought an action against the Attorney General to compel him to reverse his refusal to grant a temporary nonimmigrant visa to their Belgian colleague, whom the U.S. government had found inadmissible under INA § 212(a)(28) for his teachings on Marxism.²⁵ In its decision, the Court reiterated that the power to exclude and deport fell solely to the political branches, and that the legislative branch had explicitly delegated power to the executive branch to admit noncitizens under the INA subsection in question.²⁶ The Court then articulated the judicial “standard” that still controls today when determining whether the executive branch has overextended the conditional power it was delegated: has the executive provided a “facially legitimate and bona fide” reason for its action?²⁷ If the Court is satisfied with the executive branch’s explanation—which will usually cite sensitive matters of national security and foreign affairs—then the inquiry has reached its end.²⁸

20. *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893).

21. See *infra* Section I.B.

22. Martin, *supra* note 14, at 41–42.

23. See *Fong Yue Ting*, 149 U.S. at 707; *Chae Chan Ping*, 130 U.S. at 581–82.

24. 408 U.S. 753 (1972).

25. *Id.* at 756–60. This provision of the INA has since been struck. See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

26. *Kleindienst*, 408 U.S. at 769–70.

27. *Id.*

28. *Id.*

C. THE EFFECT OF DEFERENCE TO THE EXECUTIVE ON *TRUMP V. HAWAII*

The troubling nature of extreme deference to the executive was on full display when the Court failed to strike down the Trump administration's Presidential Proclamation 9645,²⁹ commonly referred to as the Muslim ban or the travel ban.³⁰ This proclamation was the Trump administration's third attempt to realize its long-held goal of restricting immigration from particular groups.³¹ After campaigning on a "total and complete shutdown" of Muslim immigration to the United States,³² appointing top-level advisors and cabinet officers with a history of Islamophobic statements,³³ and consistently spreading misinformation about links between Muslim communities and terrorist organizations,³⁴ President Trump issued Executive Order 13769 (Protecting the Nation from Foreign Terrorist Entry Into the United States) within one week of taking office.³⁵ In keeping with the fear-mongering rhetoric of the campaign, the Executive Order (the Order) claimed its purpose was to increase vetting of foreign nationals entering the United States, citing the "[n]umerous foreign-born individuals" who entered the United States under pretext as visitors, students, workers, or refugees and then were "convicted or implicated in terrorism-related crimes since September 11, 2001."³⁶ The Order required that the Secretaries of Homeland Security and State and the Director of National Intelligence review the visa adjudication process. After reviewing this process, they must submit to the President a list of countries which provide insufficient security information for the U.S. to determine that the individual does not pose a threat to national security or public safety.³⁷ Most significantly, the Order banned entry of immigrants and nonimmigrants (with limited exceptions) from Iran, Iraq, Libya, Somalia, Sudan, Syria,

29. Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 27, 2017); see also *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

30. *Timeline of the Muslim Ban*, ACLU WASHINGTON, <https://www.aclu-wa.org/pages/timeline-muslim-ban> [<https://perma.cc/H7Y9-UHCX>] (last visited Jan. 15, 2022); Harsha Panduranga, *Trump's Travel Ban is Still Unconstitutional*, BRENNAN CTR. (Oct. 22, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/trumps-travel-ban-still-unconstitutional> [<https://perma.cc/HD4K-S838>].

31. Proclamation No. 9645, *supra* note 29.

32. Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States.'* WASH. POST (Dec. 7, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/> [<https://perma.cc/W2YC-2DSV>].

33. Patrick G. Eddington, *In the Trump Administration, Islamophobia is a Truly Family Affair*, JUST SEC. (Feb. 1, 2017), <https://www.justsecurity.org/37132/trump-administration-islamophobia-family-affair/> [<https://perma.cc/85T5-K8U9>]; Andrew Kaczynski, *Steve Bannon in 2010: 'Islam is not a religion of peace. Islam is a religion of submission.'* CNN (Jan. 31, 2017), <https://www.cnn.com/2017/01/31/politics/kfile-bannon-on-islam/index.html> [<https://perma.cc/YUQ3-GBPX>].

34. Faiza Patel, *The Islamophobic Administration*, BRENNAN CTR. (Apr. 19, 2017), <https://www.brennancenter.org/our-work/research-reports/islamophobic-administration> [<https://perma.cc/VN8X-VXBA>].

35. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (This Executive Order is known as the first travel ban.).

36. *Id.*

37. *Id.*

and Yemen for ninety days, claiming that their entry “would be detrimental to the United States” and “suspend[ed] the U.S. Refugee Admissions Program (USRAP) for 120 days.”³⁸ Moreover, the Order put an indefinite ban on entry of Syrian refugees.³⁹ While most of the Order contained technical language about new screening standards and procedures consular officers were to adopt when adjudicating visa applications, the intention of the Order was to chill all immigration, tying the entry of any non-U.S. national to threats to security and safety.⁴⁰

Implementation of the Order was chaotic. People traveling from countries on the ban list found themselves stuck in limbo at airports when they tried to enter the U.S., families were separated without warning, and large protests broke out in cities across the country.⁴¹ After various legal challenges, resulting in a nationwide temporary injunction⁴² and two reformulations of the Order,⁴³ the administration issued Presidential Proclamation 9645.⁴⁴ This Proclamation, unlike its former iterations, was a *permanent* ban on travel to the United States by certain categories of individuals from Syria, Iran, Chad, Libya, Yemen, North Korea, and Venezuela.⁴⁵ The Proclamation also included implementation of a waiver process overseen by the Departments of State and Homeland Security.⁴⁶ The waiver would require a foreign national to prove that “(A) denying entry would cause the foreign national undue hardship; (B) entry would not pose a threat to the national security or public safety of the United States; and (C) entry would be

38. *Id.*

39. *Id.*

40. Byron Dorgan, *Just the Threat of Trump's Travel Ban is Having This Chilling Effect*, CNBC (May 26, 2017), <https://www.cnn.com/2017/05/26/threat-of-trumps-travel-ban-has-chilling-effect-commentary.html> [<https://perma.cc/57S6-PT7T>]; David Cole, *Trump's Travel Bans—Look Beyond the Text*, N.Y. REV. (May 11, 2017), <https://www.nybooks.com/articles/2017/05/11/trumps-travel-bans-look-beyond-the-text/> [<https://perma.cc/EE3F-DBA7>]; Kirk Carapezza, *Travel Ban's 'Chilling Effect' Could Cost Universities Hundreds of Millions*, NPR (Apr. 7, 2017), <https://www.npr.org/sections/ed/2017/04/07/522773429/travel-bans-chilling-effect-could-cost-universities-hundreds-of-millions> [<https://perma.cc/MBW7-D7MC>]; Mary von Aue, *Muslim Musicians, Execs Fear the 'Chilling Effect' of Trump Travel Ban*, BILLBOARD (Feb. 2, 2017), <https://www.billboard.com/music/features/trump-immigration-travel-ban-music-industry-7677732/> [<https://perma.cc/KK5F-29ZK>]; Faiza Patel, *Deference to Discrimination: Immigration and National Security in the Trump Era*, ABA (Apr. 27, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/immigration/deference-to-discrimination/ [<https://perma.cc/78YP-X4NK>].

41. Peter Baker, *Travelers Stranded and Protests Swell Over Trump Order*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/politics/white-house-official-in-reversal-says-green-card-holders-wont-be-barred.html> [<https://perma.cc/557P-LC2X>].

42. *Timeline of the Muslim Ban*, *supra* note 30.

43. Jeff Mason & Phil Stewart, *Trump slaps travel restrictions on N. Korea, Venezuela in sweeping new ban*, REUTERS (Sept. 25, 2017), <https://www.reuters.com/article/legal-us-usa-immigration-trump-idUSKCN1C01FZ> [<https://perma.cc/G8SZ-F296>]; Alexander Burns, *2 Federal Judges Rule Against Trump's Latest Travel Ban*, N.Y. TIMES (Mar. 15, 2017), <https://www.nytimes.com/2017/03/15/us/politics/trump-travel-ban.html> [<https://perma.cc/HQG8-5EC9>]; Glenn Thrush, *Trump's New Travel Ban Blocks Migrants From Six Nations, Sparing Iraq*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/travel-ban-muslim-trump.html> [<https://perma.cc/TFV6-MT4R>].

44. Proclamation No. 9645, *supra* note 29.

45. *Id.*

46. *Id.*

in the national interest.⁴⁷ The State of Hawaii immediately challenged the order on several grounds, including that it violated the First Amendment's Establishment Clause, the Fifth Amendment's Equal Protection and Due Process Clauses, and the Administrative Procedure Act.⁴⁸

It was this Proclamation that was at issue in *Trump v. Hawaii*, where the majority relied on the "facially legitimate and bona fide" test to uphold the travel ban.⁴⁹ By the time the case reached the Supreme Court, the central issue was an Establishment Clause question: does the ban on travel from the listed countries constitute an unconstitutional targeting of Muslims trying to enter the country?⁵⁰ Using the deferential test to determine whether the executive had abused its discretion, the majority determined that Congress had given the President wide latitude to determine whose entry "would be detrimental to the interests of the United States"⁵¹ and that Presidential Proclamation 9645 had not abused this authority.⁵² The Court rejected the plaintiff's arguments that the ban was motivated by animus against Muslims and that the stated purpose of increasing vetting to improve national security was pretextual.⁵³ Taking an arm's length approach to the Islamophobic statements the President made on the campaign trail, the Court reasoned that those statements were irrelevant to "reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility."⁵⁴ Echoing language from the cases arising under the Chinese Exclusion Act, the Court removed itself from a role of judicial oversight of the executive, stating that the "admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'"⁵⁵ Given this evolution of Supreme Court jurisprudence, it is unlikely that the judiciary will provide necessary oversight of executive branch immigration actions.

II. CONGRESS HAS A DUTY TO LEGISLATE AND INVESTIGATE

Aside from the need to step into the gap that the judicial branch has left, Congress also has the inherent duty to legislate and investigate immigration policies. Congressional investigations are "auxiliary powers" of Congress; they are "subordinate" to its lawmaking functions and "necessary and appropriate" to carrying out its legislative responsibilities.⁵⁶

47. *Id.*

48. Third Amended Complaint at 33–40, *Trump v. Hawaii*, 138 S.Ct. 2392 (2018) (No. 1:17-cv-0050-DKW-KSC) [hereinafter *Travel Ban Case*].

49. *Travel Ban Case*, 138 S. Ct. at 2419–21.

50. *Id.* at 2415–16.

51. 8 U.S.C. § 1182(f) (1990).

52. *Travel Ban Case*, 138 S. Ct. at 2400–10.

53. *Id.* at 2401–02.

54. *Id.*

55. *Id.* at 2402 (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

56. *McGrain v. Daugherty*, 273 U.S. 135, 169, 173–74 (1927).

A. CONGRESS HAS BEEN UNABLE TO LEGISLATE IMMIGRATION REFORM

That a travel ban on nationals from certain Muslim countries could stand after review by the judicial branch, given the ideologies of those behind the policy and the context in which it was passed, is troubling—but the court’s determination should not, and cannot, be the end of the road for challenging the ban’s legitimacy. While the United States characterizes itself as a country of immigrants, at many points in its history, this country has been hostile to, or rejected, immigrants due to their race, nationality, religion, and ideologies, real or perceived.⁵⁷ This xenophobia, while not always sanctioned by the judicial branch, has rarely been challenged by it.⁵⁸

While the executive branch’s immigration policies have been the source of such xenophobia in recent years, it is not the only political branch to blame for discriminatory actions. Congress has been the source of a slew of xenophobic laws, including the Chinese Exclusion Act and the Immigration Act of 1924, which placed quotas on the number of immigrants who could come from certain countries.⁵⁹ Since the passage of the INA in 1965, however, Congress can pass no law instating national origins quotas.⁶⁰ Moreover, Congress has not passed new immigration legislation since the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁶¹ Immigration reform has been a rallying cry for many candidates—from representatives to senators to presidential contenders—but the two major attempts at comprehensive immigration reform, one in 2007⁶² and one in 2013,⁶³ have failed to pass both houses of Congress. The latest attempt came from President Biden, who sent the U.S. Citizenship Act of 2021 to Congress on the first day of his presidency.⁶⁴ This bill, incorporated into the

57. See generally ERIKA LEE, *AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES* (2019).

58. See *infra* Section I.

59. An Act to Execute Certain Treaty Stipulations Relating to Chinese (Chinese Exclusion Act), ch. 126, 22 Stat. 58 (repealed 1943); An Act to Limit the Immigration of Aliens into the United States (Immigration Act of 1924), ch. 190, 43 Stat. 153 (replaced by the Immigration and Nationality Act of 1965).

60. Muzaffar Chishti, Faye Hipsman & Isabel Ball, *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States*, MIGRATION POL’Y INST. (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states> [<https://perma.cc/62YR-58HW>].

61. Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, 6 J. ON MIGRATION & HUM. SEC. 192 (2018).

62. Comprehensive Immigration Reform Act of 2007, S.1348, 110th Cong. (2007).

63. Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. (2013).

64. WHITE HOUSE, *FACT SHEET: PRESIDENT BIDEN SENDS IMMIGRATION BILL TO CONGRESS AS PART OF HIS COMMITMENT TO MODERNIZE OUR IMMIGRATION SYSTEM* (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/> [<https://perma.cc/4HVM-BPBE>].

Build Back Better Act, passed the House in November 2021 but became stymied in the Senate.⁶⁵

The failure of the legislative branch to move forward immigration legislation has opened the door for the executive branch's actions on immigration. Debates over immigration incorporate questions of who is qualified to be a citizen of this country, who deserves protection in this country, and how much immigration will help—or hurt—our economy. These debates make immigration one of the most highly contested issues in Congress, and recent history provides no support for the hope that the legislative branch will soon reform the country's immigration system.

Due to the decades-long gridlock in the legislative branch over immigration reform, most actions taken on immigration during the past two administrations have originated from the *executive* branch. Both Presidents Obama and Trump used executive orders to bypass Congress to implement policies which, in vastly different ways, fundamentally altered aspects of the U.S. immigration framework. Under President Obama, Deferred Action for Childhood Arrivals (DACA) went into effect,⁶⁶ and under President Trump, the travel ban, family separation policy,⁶⁷ and Migrant Protection Protocols⁶⁸ (otherwise known as the “Remain in Mexico” policy) were implemented. None of these had legislative approval—and all of them were met with severe criticism, often partisan but sometimes bipartisan, in Congress.⁶⁹

65. Andrew Duehren, *Democrats Put Build Back Better in Joe Manchin's Court*, WALL ST. J. (Jan. 30, 2022), <https://www.wsj.com/articles/democrats-put-build-back-better-in-joe-manchins-court-11643554801> [<https://perma.cc/526L-ZU6Q>].

66. *DACA*, *supra* note 10.

67. WHITE HOUSE, PRESIDENT DONALD J. TRUMP IS ACTING TO ENFORCE THE LAW, WHILE KEEPING FAMILIES TOGETHER (June 20, 2018), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-acting-enforce-law-keeping-families-together/> [<https://perma.cc/2MCZ-B6AF>]; *Judiciary Committee Releases Report on Trump Administration Family Separation Policy*, HOUSE COMM. ON JUDICIARY: CHAIRMAN JERROLD NADLER (Oct. 29, 2020), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3442> [<https://perma.cc/YR9U-3AEU>].

68. *Migrant Protection Protocols*, DEP'T HOMELAND SEC. (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/4UUL-P2RQ>].

69. *See Congressional Democrats Call on Administration to Reverse Policies Targeting Asylum-Seekers*, DIANNE FEINSTEIN (Jun. 19, 2020), <https://www.feinstein.senate.gov/public/index.cfm/2020/6/congressional-democrats-call-on-administration-to-reverse-policies-targeting-asylum-seekers> [<https://perma.cc/7DGK-DYRY>]; Rebecca Morin, *Poll: 66 percent of U.S. voters oppose family separations*, POLITICO (June 18, 2018), <https://www.politico.com/story/2018/06/18/poll-66-percent-of-us-voters-oppose-family-separations-650948> [<https://perma.cc/5GS2-CHXA>]; Danielle Kurtzleben, *Republicans Are Happy Trump Ended DACA. They're Less Sure About Deporting DREAMers*, NPR (Sept. 17, 2017), <https://www.npr.org/2017/09/17/551392700/republicans-are-happy-trump-ended-daca-they-re-less-sure-about-deporting-dreamer> [<https://perma.cc/C7R4-WREH>]; Tom LoBianco, *Muslims in Congress, Democrats blast new Trump travel ban: 'Muslim Ban 2.0.'* CNN (Mar. 7, 2017), <https://www.cnn.com/2017/03/06/politics/congress-reaction-travel-ban-muslim/index.html> [<https://perma.cc/BPP8-LZS9>].

B. CONGRESS MUST TAKE AN ACTIVE ROLE IN OVERSIGHT OF THE EXECUTIVE BRANCH

Because Congress has been unable to pass any immigration act in recent years, portending that immigration policy will continue to be made by the executive branch, Congress *must* take an active role in oversight of the executive branch. The Constitution vests Congress with lawmaking powers, which grant Congress the right, and bestow upon it the responsibility, to oversee implementation of the laws.⁷⁰ This oversight responsibility extends to ensuring that the executive branch has not abused the discretion that Congress has delegated to it.

Congressional oversight is also valuable because investigations can publicize information. Through public hearings or letters requesting information, Congress can both gather the information it needs to determine whether the executive branch has overreached or violated its constitutional or statutory duties and disseminate information to the public.⁷¹ Unlike a case brought to an Article III court, Congressional hearings do not seek to answer one question.⁷² Their purpose is to probe information from a wide swathe of stakeholders, not only through testimony, but through statements submitted for the record from relevant experts, nonprofits, and other organizations.⁷³ This information-finding and publicizing function was on full display during the Congressional hearing on the last iteration of the travel ban.⁷⁴

C. CONGRESSIONAL HEARING ON PRESIDENTIAL PROCLAMATION 9645

When the Trump administration enacted its series of travel bans, backlash from Congressional Democrats was swift. Keith Ellison, then representing Minnesota's 5th District, condemned the Trump administration for its thinly veiled attempt to bar Muslims from entering the country and drew the connection between Trump's Islamophobic statements on the campaign trail and the policy.⁷⁵ The House Democratic Caucus and Senate Democrats protested the travel ban outside the Supreme Court, with Senate Minority Leader Chuck Schumer characterizing the ban as un-American and vowing to "fight it with everything we have."⁷⁶ NPR surveyed Congressional members' websites, public statements, and interviews with news outlets to determine the level of support for the travel ban

70. *McGrain v. Daugherty*, 273 U.S. 135, 173–75 (1927) (holding that Congress has "auxiliary powers" subordinate to its lawmaking functions which are "necessary and appropriate" to carrying out its legislative responsibilities).

71. *Investigations & Oversight*, *supra* note 4.

72. *Id.*

73. *Id.*

74. *See infra* Section II.C.

75. LoBianco, *supra* note 69.

76. Daniella Diaz, *Democrats protest Trump's travel ban outside Supreme Court*, CNN (Jan. 30, 2017), <https://www.cnn.com/2017/01/30/politics/democrats-travel-ban-protest-nancy-pelosi-chuck-schumer/index.html> [<https://perma.cc/8GJU-2HJH>].

in the House and the Senate.⁷⁷ As expected, the only members openly in favor of the ban were Republicans, and the *vast* majority of those actively opposed to the ban were Democrats.⁷⁸ In addition to public statements against the travel ban, Democrats—led by Senator Dianne Feinstein—introduced two bills: the first to rescind the Presidential Proclamation and the second to amend the INA to reduce the executive’s discretion to bar entire classes of people from entry to the U.S.⁷⁹ Feinstein’s bill was premised on the argument that the travel ban was unnecessary given the country’s already extensive vetting procedures *and* that the ban stood in stark contrast to American values of nondiscrimination and freedom of religion.⁸⁰ Senator Tom Cotton, a noted anti-immigrant advocate, prevented the bill from moving to a vote the same day it was introduced.⁸¹

The makeup of Congress in early 2017 prevented any movement on Senator Feinstein’s bills, or similar bills introduced by other Democratic members. Republicans held majorities in both the House and the Senate, denying the Democrats a chance to pass their bill and essentially blocking any Democrat’s attempt in a House or Senate Judiciary Committee or the Senate Committee on Homeland Security and Governmental Affairs from initiating an investigation into the travel ban.⁸² Besides being the subject of ongoing litigation in 2017 and 2018, and thus presenting a moving target issue, Congressional members were inundated with several other policy priorities in 2017 and 2018, including responding to the “zero-tolerance” policy and the ongoing Mueller investigation.⁸³

Following the Democrats’ victory in the House in November 2018, they were finally in a strategic position to launch an investigation into the travel ban, which—after the Supreme Court’s blessing in *Trump v. Hawaii*—was still in full

77. Lauren Wamsley & Brett Neely, *Where Does Your Member of Congress Stand on Trump’s Immigration Order*, NPR (Feb. 1, 2017), <https://www.npr.org/2017/02/01/512860167/congress-tracker-trumps-refugee-and-immigration-executive-order> [https://perma.cc/54JG-N5JK].

78. *Id.* As of February 1, 2017, 154 Republicans and 0 Democrats were openly in favor of the travel ban while 237 Democrats and 26 Republicans were openly against it. *Id.*

79. *Senator Dianne Feinstein Introduces Bill to Rescind U.S. Travel Ban*, C-SPAN (Jan. 30, 2017), <https://www.c-span.org/video/?c4653328/senator-dianne-feinstein-introduces-bill-rescind-us-travel-ban> [https://perma.cc/4TSS-CS9U]; Mallory Shelbourne, *Feinstein to introduce two bills in response to Trump ban*, HILL (Jan. 29, 2017), <https://thehill.com/business-a-lobbying/bill-to-repeal-president-donald-trump-immigration-order-ban> [https://perma.cc/DNK5-S9JU].

80. *Feinstein, Colleagues Introduce Bill to Rescind Discriminatory Order on Immigration, Refugees*, U.S. SENATOR FOR CAL.: DIANNE FEINSTEIN (Jan. 30, 2017), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=E1291FF4-DBFC-40AF-8C4D-5FF9BE92AF9F> [https://perma.cc/JLC5-6GVK].

81. *Id.*

82. *115th Congress*, BALLOTPEdia, https://ballotpedia.org/115th_United_States_Congress (last visited Jan. 15, 2022); see also Sabrina Siddiqui, *Democrats Take Control of House but Republicans Tighten Grip on Senate*, GUARDIAN (Nov. 7, 2018), <https://www.theguardian.com/us-news/2018/nov/06/midterm-elections-2018-exit-polls-voters> [https://perma.cc/2G4U-WJ77].

83. Julie Hirschfield Davis & Mark Mazetti, *Highlights of Robert Mueller’s Testimony to Congress*, N.Y. TIMES (July 24, 2019), <https://www.nytimes.com/2019/07/24/us/politics/mueller-testimony.html> [https://perma.cc/KN2Q-FUZC]; Camila DeChalus, *Family separation blasted by both parties at oversight hearing*, ROLL CALL (Feb. 7, 2019), <https://rollcall.com/2019/02/07/family-separation-blasted-by-both-parties-at-oversight-hearing/> [https://perma.cc/QS9K-Z965].

force.⁸⁴ Given how the travel ban (and most of the Trump administration's policies) had starkly divided Democrats from Republicans, there was no possibility that Democrats could have initiated any kind of investigation until they took control of one of the chambers and thus took control of leadership positions in the relevant committees.⁸⁵ In 2019, Congressional Democrats took two major steps towards holding the Trump administration accountable for the travel ban. First, Representative Judy Chu and Senator Chris Coons introduced the National Origin-Based Antidiscrimination for Nonimmigrants (NO BAN) Act in the House and the Senate. This act built on Senator Feinstein's 2017 bill, and rejecting the deferential rational basis-like test the majority used to assess the travel ban in *Trump v. Hawaii*, the bill introduced a test akin to that of strict scrutiny to limit the President's authority to ban entry of certain individuals or groups.⁸⁶ Second, on September 24, 2019, the House Subcommittee on Immigration and Citizenship and Subcommittee on Oversight and Investigations conducted a joint hearing on the Trump administration's travel ban.⁸⁷

The hearing, known as "Oversight of the Trump Administration's Muslim Ban," took place on September 24, 2019, and proceeded in three parts—opening statements, testimony and questioning of two panels, and closing statements.⁸⁸ This hearing began with opening statements from those chairing the committees and the ranking members.⁸⁹ The hostility between Democratic leadership and ranking Republicans was on full display from the start, with Representative Andy Biggs (R-AZ), a ranking member of the House Judiciary Committee, sharply criticizing the title of the hearing as "disingenuous" and claiming that House Democrats were trying to sow discord among the American people.⁹⁰ The parties

84. See WHITE HOUSE, PROCLAMATION ON ENDING DISCRIMINATORY BANS ON ENTRY TO THE UNITED STATES (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/> [<https://perma.cc/8CDR-4LCP>] (repealing, among other proclamations and executive orders from the Trump administration, Proclamation 9645); Jonathan Martin & Alexander Burns, *Democrats Capture Control of House; G.O.P. Holds Senate*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/us/politics/midterm-elections-results.html> [<https://perma.cc/3ZRX-WK9T>].

85. Lindsay McPherson, *House Democrats' New Elected Leadership Team is More Progressive and Diverse*, ROLL CALL (Dec. 4, 2018), <https://rollcall.com/2018/12/04/house-democrats-new-elected-leadership-team-is-more-progressive-and-diverse/> [<https://perma.cc/JS6F-9BGK>].

86. *Rep. Chu, Sen. Coons Lead Bicameral Push to Repeal Muslim Ban, Prevent Future Discriminatory Bans*, U.S. CONGRESSWOMAN JUDY CHU (Apr. 10, 2019), <https://chu.house.gov/media-center/press-releases/rep-chu-sen-coons-lead-bicameral-push-repeal-muslim-ban-prevent-future> [<https://perma.cc/K7ZP-QP8T>] (noting that the Act would "limit the President's overly broad authority to issue future bans by requiring suspensions and restrictions to be temporary, based on credible facts, narrowly tailored to a compelling interest, and circumscribed to the least restrictive means possible").

87. *Oversight of the Trump Administration's Muslim Ban: Hearing Before the H. Comm. On the Judiciary*, 116th Cong. (2019) [hereinafter *Muslim Ban Hearing Transcript*]; House Committee on the Judiciary, *Oversight of the Trump Administration's Muslim Ban*, YOUTUBE (Sept. 24, 2019), <https://www.youtube.com/watch?v=rqa29oTLkgA> [<https://perma.cc/C8EQ-8ED9>] [hereinafter *Muslim Ban Hearing Recording*].

88. See *Muslim Ban Hearing Recording*, *supra* note 87.

89. *Id.* at 19:24–47:08.

90. *Id.* at 24:47–31:28.

generally divided in what they perceived as the purpose for the travel ban: Democratic representatives Zoe Lofgren, Ami Bera, and Jerry Nadler framed the ban in terms of its human impact and its fundamental incompatibility with freedom of religion, while Republican representatives Andy Biggs and Lee Zeldin framed the ban as a tool to close loopholes non-U.S. citizens were allegedly using to enter the country and damage national security.⁹¹ While hearings will inevitably have moments—or longer periods—of political soapboxing, where members seeking the national spotlight try to make names for themselves, these hearings also offer a meaningful opportunity to cut through the noise and hear from those behind the policy in question and those affected by it.

The two panels—the first consisting of officials from the State Department, the Department of Homeland Security, and the U.S. Customs and Border Protection; and the second consisting of two individuals affected by the travel ban and two immigration experts—offered members of Congress and the public opportunity to hear about how the travel ban was implemented, assess its compliance with U.S. laws and regulations, and grapple with the effects of the policy.⁹² Testimony from Edward Ramotowski, Deputy Assistant Secretary for Visa Services for the State Department, focused on the multi-step process consular officers use to adjudicate visa applications from the countries affected by the Presidential Proclamation and emphasized that this new process would improve national security.⁹³ His testimony pushed back on criticisms that the waiver program under the proclamation was a sham; he stated that the month to month change in visas issued pursuant to a waiver grew from around ten percent to greater than fifty percent.⁹⁴

Elizabeth Neumann, Assistant Secretary for Threat Prevention and Security Policy for the Department of Homeland Security, and Todd Hoffman, Executive Director of Admissions and Passenger Programs under U.S. Customs and Border Protection, gave similar testimony. Their written testimony stated that the proclamation allows the government to “assess and improve information sharing by all countries to support enhanced vetting, and to encourage specific foreign governments to participate in more advanced information sharing partnerships.”⁹⁵ Ms. Neumann explained that the seven countries were on the ban list because the U.S.

91. *Id.* at 19:24–47:08.

92. *Muslim Ban Hearing Transcript*, *supra* note 87.

93. *Muslim Ban Hearing Transcript*, *supra* note 87 (statement from Mr. Edward Ramotowski, Deputy Assistant Secretary for Visa Services, Bureau of Consular Affairs, U.S. Department of State); *Muslim Ban Hearing Recording*, *supra* note 86, at 50:23–55:30, 1:14:24–1:19:55.

94. *Muslim Ban Hearing Transcript*, *supra* note 87 (statement from Mr. Edward Ramotowski, Deputy Assistant Secretary for Visa Services, Bureau of Consular Affairs, U.S. Department of State).

95. *Id.* (statement from Ms. Elizabeth Neumann, Assistant Secretary for Threat Prevention and Security Policy, Office of Strategy, Policy, and Plans, U.S. Department of Homeland Security, and Mr. Todd Hoffman, Executive Director, Admissions and Passenger Programs, Office of Field Operations, U.S. Customs and Border Protection); *Muslim Ban Hearing Recording*, *supra* note 87, at 55:30–1:00:37, 1:10:51–1:12:26, 1:23:51–1:26:00.

government could not trust the information coming from them.⁹⁶ This statement was homed in on by Representative Nadler, who questioned why—if this was the true motivation for the proclamation—countries like Russia and China, which had proven themselves to be hostile to U.S. interests, were not on this list.⁹⁷ Republicans generally questioned the panelists about how the proclamation improved national security.⁹⁸ Based on their answers, the proclamation did make certain improvements to the vetting process, creating a national vetting center with real-time access to classified data that consular officers could access to help in their adjudication of visa applications.⁹⁹

Congress then heard from the second panel, which raised personal stories of the effect of the Presidential Proclamation.¹⁰⁰ Dr. Abdollah Dehzangi, an Iranian national who is a professor at Morgan State University (MSU), presented written testimony of the effect of the travel ban on his wife, an Iranian postdoctoral researcher whose visa application and request for waiver due to undue hardship were denied under the proclamation, despite offering proof of their eight-year marriage and her job offer in the U.S.¹⁰¹ His testimony allowed Congress and the public to understand the human impact of the text, which the judicial branch took at face value. He put a human face on the words on the page, and put an image to what “undue hardship” looks like: a couple indefinitely separated and a country robbed of the talent of a researcher on bioinformatics.¹⁰² The second panelist was Ismaili Alghazali, a Yemeni-American bodega owner from New York City, who was separated from his wife and one-year-old son living in Yemen due to the travel ban.¹⁰³ By the end of the two panels, those listening would hear two stories. The first is of how the Presidential Proclamation improved bureaucratic efficiency, increased vetting measures for countries that fail to share adequate data, and shored up national security measures. The second is of the human impact of and the unstated rationale for this Presidential Proclamation, of the families torn apart, of the logic of including certain Muslim-majority countries on the ban list while excluding countries more hostile to U.S. interests, and of the ties between the anti-Muslim rhetoric of the administration and the text of the Presidential Proclamation.

One of the most valuable characteristics of the hearing on this issue is that it allowed both stories to exist at once. Presidential Proclamation 9645 could improve vetting procedures in visa adjudication, but it could also have a devastating, overb

96. *Muslim Ban Hearing Recording*, *supra* note 87, at 1:23:00–1:26:00.

97. *Id.* at 1:27:47–1:33:00.

98. *Id.* at 1:02:12–2:45:00.

99. *Id.*

100. *Id.* at 2:56:45–4:11:33.

101. *Muslim Ban Hearing Transcript*, *supra* note 86 (Statement from Mr. Abdollah Dehzangi).

102. *Id.*

103. *Id.* (Statement from Mr. Ismail Ahmed Hezam Alghazali).

road human impact.¹⁰⁴ The purpose of a congressional hearing is not to reach an explicit verdict. Its purpose is to gather information and to hold the executive branch accountable.¹⁰⁵ The information provided through testimony and questioning provide a basis not only for future legislation,¹⁰⁶ but for the public to judge the actions of the executive branch, and perhaps based on this judgment, vote accordingly in the next election.

III. CONGRESS HAS AN ETHICAL DUTY TO OVERSEE EXECUTIVE ACTIONS ON IMMIGRATION

Even if the investigation does not result in a proposed bill or action taken against the executive branch, the act itself of the legislative branch holding the executive branch to account is significant. Our system of checks and balances cannot exist only in the words of the Constitution; this system works only when those checks and balances are exercised. While some could perceive a congressional investigation of the executive branch as a political attack when the branches are from different parties, investigations—if conducted with the motivation to information-gather and answer questions rather than attack—can be immensely valuable. When a global leader like the United States takes positions that—to many—run counter to the national narrative of nondiscrimination, it is important that the government respond.

The courts can only determine whether a policy or law is constitutional or otherwise violative of a statutory directive; the courts cannot determine whether a policy or law is against the country's values or politically unwise.¹⁰⁷ Congress, however, as a political branch, can and must step in when there is doubt about whether the executive branch is faithfully executing the laws, especially when the laws in question relate to issues from which the judiciary tends to recoil. Congress has a moral duty to act when the executive branch is taking actions that run counter to its mandate to uphold the constitution.

Moreover, from a legal ethics perspective, many Congressional members are lawyers themselves,¹⁰⁸ and according to comment 7 to Model Rule 8.4, have a special responsibility to “assume legal responsibilities going beyond those of other citizens.”¹⁰⁹ Members of Congress who are lawyer-legislators, a term which Eliot T. Tracz defines as “an elected member of a state or federal legislative body

104. *Id.* (Statement from Ms. Elizabeth Neumann, Assistant Secretary for Threat Prevention and Security Policy, Office of Strategy, Policy, and Plans, U.S. Department of Homeland Security, and Mr. Todd Hoffman, Executive Director, Admissions and Passenger Programs, Office of Field Operations, U.S. Customs and Border Protection; Statement from Mr. Ismail Ahmed Hezam Alghazali; Statement from Mr. Abdollah Dehzangi).

105. *Investigations & Oversight*, *supra* note 4.

106. *Id.*

107. Martin, *supra* note 14, at 41-42.

108. *Attorneys in the 117th Congress*, ABA (Jan. 26, 2021), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/january-2021-wl/attorneys-117thcongress/ [<https://perma.cc/QQ6C-4PQQ>] (Of the 535 members of Congress, 175 have law degrees).

109. MODEL RULES R. 8.4 cmt. 7.

who holds a law license, though the license is not necessarily being used in the capacity as a legislator,” must “assume this special responsibility,” though this responsibility has not been greatly elaborated upon in scholarship.¹¹⁰ Model Rule 8.4 gives some guidance as to how this comment should be interpreted. Rule 8.4 is titled “maintaining the integrity of the profession,” and it lays out numerous breaches of professional misconduct, including “engag[ing] in conduct that is prejudicial to the administration of justice” and “engag[ing] in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”¹¹¹ Thus, lawyer-legislators have a responsibility going further than that of lawyers not in elected office to refrain from such conduct. Federal lawyer-legislators, because of their representative capacity and their public personas, have a significant responsibility to speak out when the executive is engaging in actions that could be characterized as discriminatory or violative of constitutional rights because of their duty not only to the Constitution, but to the legal profession.

The antidiscrimination language in Model Rule 8.4 imposes upon federal lawyer-legislators a duty to oversee executive actions on immigration; this duty is stronger than that of their non-lawyer legislator peers. There are few areas of policymaking where race, religion, national origin, and even socioeconomic status,¹¹² can be weaponized more than in immigration. As the decision in *Trump v. Hawaii* makes clear, an executive branch that demonstrates immense anti-Muslim animus *can* enact a policy barring admission of nationals of certain Muslim-majority countries if it can show a “facially legitimate and bona fide reason” for doing so.¹¹³

Congress, however, is not bound by the “facially legitimate and bona fide reason” test. Legality is not the only standard by which Congress can judge such a policy. Congressional members may consult the wisdom and morality of enacting such a policy. Federal lawyer-legislators, who have not only a responsibility to their constituents and to the Constitution of the United States, but also a moral responsibility to not engage in and to prevent others from engaging in discriminatory conduct, must act when immigration policies dangerously toe the line between legal and discriminatory conduct. These individuals, knowing that the judicial branch can rarely judge the merits of an executive’s decision on

110. Eliot T. Tracz, *Lies, Liars, and Lawyers as Legislators: An Argument Toward Holding Attorneys Accountable for Violating the Model Rule of Professional Conduct 8.4(c) Whilst Acting in a Legislative Role*, 42 S. ILL. U. L.J. 451, 452 (2018).

111. MODEL RULES R. 8.4(d), (g).

112. See 8 U.S.C. § 1182(a)(4) (1990) (allowing the executive discretion to deny admission to foreign nationals likely to become a “public charge”).

113. See *supra* Sections I.B–C.

immigration,¹¹⁴ would not fulfill their professional responsibilities if they allowed an allegedly discriminatory immigration policy to stand without question.¹¹⁵

In failing to oversee executive actions, these federal lawyer-legislators would essentially enable that executive action on immigration to exist in perpetuity, unless another executive overturns or reneges the policy. Federal lawyer-legislators have a responsibility to not directly engage in discriminatory conduct, and they have a responsibility to not “knowingly assist” another in engaging in such conduct.¹¹⁶ While federal lawyer-legislators may not have actual knowledge of discriminatory intent in enacting a questionable immigration policy, they have a special responsibility to investigate such a policy to ensure that they are not “knowingly assisting” persistence of such discrimination.¹¹⁷

Furthermore, a country’s immigration law and policy are not only a reflection of its constitution, but of its values. When a country’s immigration policy discriminates against foreign nationals on the basis of nationality and is accused of discrimination on the basis of race or religion, these realities *and* accusations lessen all peoples’ faith in American institutions. Federal lawyer-legislators take an oath to the Constitution to uphold the laws¹¹⁸ and take an oath to the bar of their states to maintain the integrity of their profession and uphold the “quality of justice.”¹¹⁹ There can be no justice in a system where discrimination is legalized in immigration policy. Federal lawyer-legislators must recognize this critical responsibility to uphold justice and actively participate in elucidating the truth behind allegedly discriminatory immigration policies.

CONCLUSION

As discussed in the introduction, aggressive Congressional oversight of executive actions on immigration will not always result in the most-humanitarian outcome in the short term. For example, under the Obama administration, the Republican-majority Congress used its powers to largely derail Deferred Action for Childhood Arrivals (DACA), a policy which was supported by wide swathes of the population—including immigration scholars—on both sides of the aisle.¹²⁰ In order to maintain the legitimacy of checks and balances, however, the appropriate institutional outcome could trump the desirable humanitarian outcome in

114. Martin, *supra* note 14, at 41-42.

115. MODEL RULES R. 8.4(a).

116. MODEL RULES R. 8.4(a).

117. MODEL RULES R. 8.4(a).

118. U.S. CONST. art. VI, cl. 3.

119. MODEL RULES pmbll., R. 8.3.

120. See Harmeet Kamboj & Robert P. Jones, *Majorities of Republicans and Democrats Support Basic Policies of DACA Program*, PRRI (Aug. 29, 2017), <https://www.prii.org/spotlight/trump-dream-act-immigration/> [<https://perma.cc/X2YY-ZQGW>]; Audrey Singer, Nicole Prchal Svajlenka & Jill H. Wilson, *Local Insights from DACA for Implementing Future Programs for Unauthorized Immigrants*, BROOKINGS (June 2015), https://www.brookings.edu/wp-content/uploads/2016/06/BMPP_Srvy_DACAImmigration_June3b.pdf [<https://perma.cc/JF4H-XBG9>].

the short-term. But in the long-term, a congressional investigation into DACA could find itself grappling with the reality that the only reason DACA had to be passed by the executive is the legislative branch's failure to reach consensus on comprehensive immigration reform.¹²¹

Congress has a duty to investigate the executive branch's immigration actions for numerous reasons: the judicial branch's lack of jurisdiction over the issue; the legislative branch's responsibility to legislate; and the ethical duty of Congress to uphold our laws and investigate when the executive branch has appeared to violate those laws. As the case study of the travel ban shows, there is merit in a congressional investigation even if there is no tangible outcome. There is a great and immeasurable value in one branch holding another branch accountable for its actions, especially when that accountability addresses an issue like immigration that affects so many and strikes at the heart of this country's national values.

121. *Civil Rights in the United States, A Brief History*, GEO. L. LIBR., <https://guides.ll.georgetown.edu/c.php?g=592919&p=4170929> [<https://perma.cc/XJ37-9VLZ>] (last visited Apr. 17, 2022) (“In response to the failure of the DREAM Act legislation to pass both houses of Congress, President Obama initiated the immigration policy known as the Deferred Action for Childhood Arrivals in 2012.”).