Preserving Faithful Execution: An Examination into the Original Meaning of the Take Care Clause and the Measures to Preserve It

SOPHIA SHAMS*

ABSTRACT

The Constitution states that the President shall take care that the laws be faithfully executed. While its precise meaning is unclear, the Take Care Clause has been used to justify broad exercises of executive power. This paper examines the original meaning of the Take Care Clause and whether the Framers intended the clause to provide such broad executive discretion. In determining the original meaning of the Take Care Clause, this paper analyzes founding documents such as notes and records from the Constitutional Convention, the Federalist Papers*, and state constitutions and court opinions. After determining the original meaning of the Take Care Clause, this paper explores whether our current system of government provides any meaningful checks to ensure fidelity to this clause and what measures may be necessary to preserve such fidelity.*

TABLE OF CONTENTS

I. INTRODUCTION

"[W]ith great power . . . come[s] great responsibility."[1] This is a cautionary principle that is not only applicable to comic book characters, but also the President of the United States. The Constitution bestows upon the President an immense amount of discretion when it comes to his executive power. And while energy in the executive was certainly a goal of the Framers, there still must be some sort of accountability to avoid the type of tyranny the Framers had formerly experienced. Referred to at the North Carolina Ratification Convention as "one of the best provisions" of the Constitution,[2] the Take Care Clause has[3] may provide that security.

The Take Care Clause has been interpreted in a number of ways. Found in Article II, the clause states that the President "shall take Care that the Laws be faithfully executed."[4] Since the founding, Presidents have relied upon the Take Care Clause as support for their broad discretion in executing laws, or even their refusal to execute laws deemed unconstitutional.[5] Our understanding of how much deference the executive branch should have is still developing. But while scholars continue to debate the meaning of the Take Care Clause and its implications for executive power, the clause itself was not of much controversy when the Constitution was debated and ratified.[6] Consequently, very little documentation

1. *See* STAN LEE & STEVE DITKO, AMAZING FANTASY NO. 15: "SPIDER- MAN" 11 (1962) ("[I]n this world, with great power there must also come—great responsibility.").

2. North Carolina Ratification Convention Debates (July 28, 1788) (statement of Rep. Maclaine), https://consource.org/document/north-carolina-ratification-convention-debates-1788-7-28/20130122080337/ [https://perma.cc/FJ3G-D38G].

3. U.S. CONST. art. II, § 3.

4. *Id.*

5. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Myers v. United States, 272 U.S. 52 (1926).

6. *See* Records of the Federal Convention of 1787, *in* 4 THE FOUNDER'S CONSTITUTION, art. 2, § 3, document 5 (Max Farrand ed., Yale Univ. Press 1937), https://press-pubs.uchicago.edu/founders/documents/a2_3s5.html [https://perma.cc/P683-UY3L].

exists from the time of the founding about what exactly the clause means. And yet, the original understanding of the Take Care Clause has important implications of what precisely the executive power entails and whether the form it takes today provides too much discretion to the President without effective safeguards.

This article will explore the meaning of the Take Care Clause, the duty it imposes upon the executive office, and what, if any, meaningful checks may exist to ensure that Presidents do not violate the clause. To discern the meaning of the clause in its entirety, this paper will examine three crucial parts of the clause: "the Laws," "shall take care," and "faithfully executed." Given that the meaning of the first two parts, "the Laws" and "shall take care," are relatively straightforward, the bulk of the discussion will focus on the meaning of the more complex phrase, "faithfully executed." It will then discuss the potential checks on the President's duty under the Take Care Clause, and the potential need for a stronger check to preserve the meaning of the clause.

II. THE MEANING OF THE TAKE CARE CLAUSE

The Take Care Clause, found in Article II, Section 3 of the Constitution, states that "[the President] shall take Care that the Laws be faithfully executed."[7] Although only ten words in length, the clause holds an immense amount of weight. The clause has three important phrases: "shall take Care," "the Laws," and "faithfully executed." Examining each of these phrases individually shows that the clause imposes a duty on the President to execute those laws passed by Congress, but also defines how much discretion the President has in interpreting those laws.

A. The Meaning of "the Laws"

The first question is what the phrase "the Laws" entails. Some scholars have argued that the laws merely include those passed by Congress,[8] while others have stated that it includes the Constitution.[9] The difference in these interpretations is quite meaningful for the Take Care Clause; it determines whether the President can interpret only the laws passed by Congress when executing them or whether he may interpret the constitutionality of those laws when executing them. Although there is evidence to suggest that the phrase "the Laws" includes the Constitution, the more compelling conclusion is that "the Laws" includes only those passed by Congress.

1. The Take Care Clause Includes Laws Passed by Congress

The text of the Constitution itself suggests that "the Laws" include only those passed by Congress. The Supremacy Clause in Article VI provides: "This

7. U.S. CONST. art. II, § 3.
8. *See* John Harrison, *The Constitution and the Law of Nations*, 106 GEO. L.J. 1659, 1671–84 (2018).
9. *See* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RSRV. L. REV. 905, 919–24 (1989).

Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land . . . ."[10]

In this section, the "Constitution" and the "Laws" are stated as though they are separate. If "the Laws" included the Constitution itself, one would expect that the Framers would not explicitly state the Constitution separately, as this would be unnecessarily redundant. Even in Article II, the distinction between the Constitution and "the Laws" is made clear. The President has a duty to "take Care that the Laws be faithfully executed"[11] and separately must take an oath swearing that he will "to the best of [his] Ability, preserve, protect and defend the Constitution of the United States."[12] The separate promise to "preserve, protect and defend the Constitution," supports the idea that when the Framers intended to refer to the Constitution, they did so explicitly rather than by using the phrase "the Laws."

The surrounding language in Article II, Section 3, in which the Take Care Clause lies, further supports that "the Laws" encompass only those passed by Congress. Article II, Section 3 addresses the President's obligations to Congress. It states:

> He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers.[13]

This Section lists the President's duties with respect to Congress. The position of the Take Care Clause immediately following this list indicates that the clause also refers to the President's duty with respect to Congress. Thus, based on the text of the Constitution, "the Laws" in the Take Care Clause refers to the laws passed by Congress.

2. The Constitution Is Not Part of "the Laws" in the Take Care Clause

Although the text of the Constitution itself supports a narrower interpretation of "the Laws," scholars have argued that this phrase either includes the

10. U.S. CONST. art. VI.
11. U.S. CONST. art. II, § 3.
12. U.S. CONST. art. II, § 1.
13. U.S. CONST. art. II, § 3.

Constitution[14] or excludes unconstitutional laws, as they are considered "void."[15] While these are two distinct interpretations, they both lead to the same result: an ability of the President to interpret the constitutionality of laws in order to execute them.

There is some support that "the Laws" itself refers to the Constitution. After all, Article VI refers to the Constitution as the "supreme Law of the Land."[16] The Supreme Court in *Marbury v. Madison* also seems to refer to the Constitution itself as a law.[17] And Alexander Hamilton in *Federalist No. 78* refers to the Constitution as a "fundamental law" when discussing judicial review and the supremacy of the Constitution.[18] It is important to note that these statements were made in reference to the supremacy of the Constitution over laws passed by Congress which may come in conflict with it. Thus, the idea of the Constitution as a law may simply serve to elucidate the power of the judiciary, whose duty it is to interpret laws and the constitutionality of those laws. So, while there may be some evidence suggesting that the Constitution is itself a law, it is limited to the understanding of the judiciary and does not necessarily mean that the phrase "the Laws" as used in the Take Care Clause includes the Constitution itself.

As to the second interpretation that "the Laws" includes only constitutional laws because unconstitutional laws are void, this argument improperly conflates all laws passed by Congress and laws which are considered supreme. [19] Whether a law is supreme is a different question from whether it is a law. Article VI states that only laws made in pursuance of the Constitution "shall be the supreme Law of the Land."[20] But that does not necessarily mean that laws passed by Congress and contrary to the Constitution are not laws; they are just not supreme. And so, whether something is a law does not depend on whether it is made in pursuance of the Constitution; rather it just depends on whether it was properly passed by Congress, the legislative body.

Furthermore, any determination of whether a law is constitutional belongs to the judiciary, not the President. The Framers "deliberately created a scheme in which the federal judiciary was to play a . . . superior role in the process of constitutional review" compared to the President.[21] Justice John Marshall stated that

---

14. *See* Easterbrook, *supra* note 9.

15. *See* Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 522 (2012).

16. U.S. CONST. art. VI, § 6.

17. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

18. THE FEDERALIST NO. 78, at 404 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("A constitution is in fact, and must be, regarded by the judges as a fundamental law.").

19. A similar argument has been made regarding judicial review. Known as the writ of erasure fallacy, it refers to an improper conflation of judicial review and the ability to strike down, or veto, laws. It is based on the understanding that a law is still a law even if a court refuses to enforce it based on its unconstitutionality. For more on this, see Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018).

20. U.S. CONST. art. VI, § 2.

21. Christopher N. May, *Presidential Defiance of Unconstitutional Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 893 (1994).

the judiciary and "no other body" can provide "protection from an infringement on the Constitution."[22] And Alexander Hamilton in *Federalist No. 78* called judges the "faithful guardians of the constitution" and stated that "whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former."[23] Hamilton therefore specifically defines the power to interpret the constitutionality of a statute as belonging to the judiciary, not the President. Given that the Framers did not consider the executive as the body that could interpret the constitutionality of laws passed by Congress, "the Laws" in the Take Care Clause does not include the Constitution.

B. The Meaning of "Shall Take Care"

There is strong support for the conclusion that "shall take Care" imposes a duty upon the President to provide for the faithful execution of the laws, whether that be through him or through his cabinet. First, the phrase imposes a duty on the President. According to William Rawle, the Take Care Clause "declares what is [the President's] duty."[24] The duty it imposes is best understood in the context in which the phrase appeared at the founding. For example, in a General Order to his officers, George Washington states they must "take care that Necessarys be provided in the Camps and frequently filled up" and they must "take particular care that not more than two Men of a Company be absent on furlough at the same time."[25] Additionally, the phrase appeared in English law in a manner that imposed a duty on others.[26] The phrase "take care" also often appeared with the word "directed" or "order," indicating that it was a directive or command issued upon others.[27] And in an 1836 decision, the Supreme Court interpreted "shall take care" in the Take Care Clause as imposing an obligation upon the President.[28]

---

22. John Marshall, Speech at the Virginia Ratifying Convention, *reprinted in* 1 THE PAPERS OF JOHN MARSHALL 275, 277 (Charles Hobson ed., Univ. of Virginia Press digital ed. 2014).

23. Hamilton, *supra* note 18.

24. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 149 (2d ed., Carolina Academic Press 2009) (1829).

25. George Washington, General Orders, 4 July 1775, *in* 1 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 54, 55 (Univ. of Virginia Press digital ed. 2008).

26. *See, e.g.*, DANIEL DEFOE, THE POOR MAN'S PLEA IN RELATION TO ALL THE PROCLAMATIONS, DECLARATIONS, ACTS OF PARLIAMENT, &C. WHICH HAVE BEEN OR SHALL BE MADE OR PUBLISH'D FOR A REFORMATION OF MANNERS AND SUPPRESSING IMMORALITY IN THE NATION 23 (2d. ed. 1698) ("[T]he Vigour of the Laws consists in their Executive Power . . . in whose hands the Execution of those Laws is placed, take care to see them duly made use of . . . ."); OBADIAH HULME, AN HISTORICAL ESSAY ON THE ENGLISH CONSTITUTION 29 (London, Edward & Charles Dilly 1771) ("[The] chief magistrate, who was vested with the executive authority to administer the constitution to the people; and whose duty it was to take care that every man, within his jurisdiction, paid a due obedience to the law."); Chickering v. Fowler, 21 Mass. (4 Pick.) 371, 373 (1826) ("[I]t was Haven's duty to receive and take care of them.").

27. 10 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 141 (Worthington Chauncey Ford ed., 1908) ("*Resolved*, That the Board of War be directed . . . to take care that the public receive no damage by such persons."); SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674–1784, at 70 (Richard B. Morris ed., 1935) [hereinafter SELECT CASES] (ordering the Constable to "take Care [that a man] be Transported out of this City").

28. Kendall v. United States *ex rel.* Stokes, 37 U.S. 524, 612–13 (1838).

Beyond just imposing any duty, the phrase "shall take care" requires the President to provide for or ensure that the laws be faithfully executed. According to Noah Webster's Dictionary of 1828, "to take care of" means "to superintend or oversee; to have the charge of keeping or securing."[29] A 1755 English Dictionary defined the word "care" as synonymous with words like "caution," "regard," and "attention."[30] The manner in which the phrase "take care" was used at the time of the founding seems to align with these definitions. "Take care" was often used in reference to a superior's obligation to provide for those underneath them, such as a parent would for a child.[31] George Washington used the phrase in his General Order to his officers to instruct that they provide for the men they supervised.[32] The phrase "take care" was also used in a manner synonymous to the word "ensure," especially in cases where a court directed that a person complete a specific task.[33] Thus, the phrase "shall take care" imposes a duty upon the executive to provide for and ensure that the laws passed by Congress are faithfully executed.

C. The Meaning of "Faithfully Executed"

The final part of the Take Care Clause is the phrase "faithfully executed." This phrase informs what exactly the Take Care Clause requires the President to do in reference to those laws passed by Congress, and it sets the standard that the clause imposes upon the President.

First, faithful execution requires the President to act within, and not exceed, the bounds of the laws passed by Congress. But within those bounds, the President may exercise discretion with respect to how he chooses to execute the laws. Thus, while the duty to faithfully execute requires the President to operate within the laws passed by Congress, it does not direct the President to execute the laws in any specific manner.

Second, faithful execution imposes a good faith, and perhaps even a slightly stronger, standard on the President. The uncertainty regarding the clause is due to conflicting evidence. While some evidence suggests that the phrase requires merely a good faith effort by the President to act within the bounds of the laws, other evidence implies a stronger, more objective standard.

---

29. *To take care of*, NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

30. *Care*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 328 (1755).

31. *See, e.g.*, Trs. of Jefferson Twp. v. Trs. of Letart Twp., 3 Ohio 99, 102 (1827) ("The parent is bound both by the laws of nature and the laws of the land, to provide for and take care of his infant child . . . ."); SELECT CASES, *supra* note 27, at 70 (giving an order that the "Church Wardens do take Care for [a pregnant servant's] Relief until She Shall be delivered and able to Labour for her livelyhood . . . .").

32. Washington, *supra* note 25, at 55.

33. *See, e.g.*, SELECT CASES, *supra* note 27, at 70 (instructing the Constable to "take Care" that a man "be Transported out of this City"); Bagley v. White, 21 Mass. (4 Pick.) 395, 412 (1826) (concerning a situation where a man was asked to "take care that his goods were not mixed with" another's).

1. The President Has Discretion, But Only to the Extent Congress Prescribes

Faithful execution requires the President to stay within the bounds of the laws passed by Congress. As Alexander Hamilton wrote in *Federalist No. 33*, the term "law" includes a level of supremacy and is therefore "a rule which those to whom it is prescribed are bound to observe."[34] Because a law implies that the person is bound to observe it, the President's duty to "take care that the Laws be faithfully executed" requires him to act within its bounds. The duty of the executive is further explained by Hamilton in *Federalist No. 75*, which states that the legislative branch "prescribe[s] rules for the regulation of the society" by enacting laws while the executive branch executes those laws.[35] This language indicates a separation between the executive and legislative powers. It is well documented that the founders were concerned about the potential "accumulation of all powers . . . in the same hand" which they described as "the very definition of tyranny."[36] Faithful execution therefore cannot allow the President the power to exceed the bounds of laws passed by Congress as this essentially would be a form of legislative authority and could create the potential for tyranny that the Framers themselves tried to avoid.

Although the President must stay within the bounds of the laws, he still has discretion in how he chooses to execute those laws. The power of the legislature to enact laws still depends on the executive, as laws without such faithful execution would be a "dead letter."[37] The President, therefore, must have some discretion when working within the confines of those laws to ensure that they have a meaningful effect within society. As such, faithful execution necessarily means that the President has discretion to execute the laws as he sees fit, so long as he does so within the bounds prescribed by Congress.

Such discretion bestows upon the President the ability to interpret the laws passed by Congress. This is because, in order to faithfully execute the laws, the President must have some "power which is necessary to accomplish that end."[38] According to Alexander Hamilton, "The President is the constitutional Executor of the laws. . . . He who is to execute the laws must first judge for himself of their

---

34. THE FEDERALIST NO. 33, at 160 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

35. THE FEDERALIST NO. 75, at 388 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

36. THE FEDERALIST NO. 47, at 249 (James Madison) (George W. Carey & James McClellan eds., 2001).

37. Statement of James Wilson at the Pennsylvania Ratifying Convention (Dec. 1, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 448, 450 (John P. Kaminski et al. eds., Univ. of Virginia Press digital ed. 2009) ("It is not meant here that the laws shall be a dead letter; it is meant, that they shall be carefully and duly considered before they are enacted; and that then they shall be honestly and faithfully executed.").

38. Statement of James Madison (1789), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 378, 379 (Jonathan Elliot ed., 1854) ("If the duty to see the laws faithfully executed be required at the hands of the executive magistrate, it would seem that it was generally intended he should have that species of power which is necessary to accomplish that end.").

meaning."[39] At first glance, this may seem concerning. After all, the founders, fearing tyranny, separated the powers among the three branches to avoid the accumulation of all the powers in one branch. And yet, the Framers recognized that the separation of powers did not necessarily mean that one branch could never exercise the powers of another. James Madison wrote that there may be a "*concurrent* right to expound the constitution."[40] And in particular, a right vested in one department may also be "assumed and exercised by the executive *in the course of its functions*."[41] In fact, to require the President to defer to the judiciary on every matter involving statutory interpretation would severely diminish the energy in the executive which the Framers praised as "essential to the administration of laws" and as the "leading character in the definition of good government."[42] Thus, it would not be contrary to the Constitution and the role of the President that in executing the laws he must also interpret them, at least to a certain extent.

2. Faithful Execution Does Not Include a Refusal to Execute the Laws

It is important to note that the Take Care Clause only imposes a duty on the President to act within the bounds of the laws passed by Congress; it does not act as a source of power for the President to refuse to execute the laws. As discussed in Part II.A.2, the phrase "the Laws" does not include the Constitution;[43] thus, the Take Care Clause does not allow the President to refuse to execute a law based on his constitutional interpretation. But beyond that, "faithful execution" was not understood at the time of the founding as granting the President the power to refuse to execute the laws passed by Congress. In discussing the meaning of faithful execution, William Rawle stated that the Take Care Clause "gives [the President] no power beyond" enforcing the law.[44] He condemned any delay or non-performance because "the execution of laws should be speedy."[45] In 1837, the Supreme Court stated that the President cannot refuse to enforce a law: "To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution, and entirely inadmissible."[46]

---

39. ALEXANDER HAMILTON, LETTERS OF PACIFICUS NO. 1 (June 29, 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33 (Harold C. Syrett & Jacob E. Cooke eds., 1969).

40. JAMES MADISON, LETTERS OF HELVIDIUS NO. 2 (Aug. 31, 1793), *reprinted in* 6 THE WRITINGS OF JAMES MADISON 151, 155 (Gaillard Hunt ed., 1900).

41. *Id*. at 156.

42. THE FEDERALIST NO. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

43. *See supra* Part II.A.2.

44. RAWLE, *supra* note 24, at 35.

45. *Id*. at 35.

46. Kendall v. U.S. ex rel. Stokes, 37 U.S. 524, 613 (1838); *see also* Madison, *supra* note 36, at 323 ("The accumulation of all powers, legislative, executive and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

Additionally, allowing the President's refusal to execute the laws would threaten the separation of powers by essentially giving him a power that was specifically never granted to him. The Constitution gives the President "authority, not to make, or alter, or dispense with the laws, but to execute and act the laws."[47] Any legislative powers[48] that the President may have must be granted expressly and cannot be implied from his general grant of executive power.[49] For example, the President is explicitly given the power to veto prospective laws, [50] but not the power to veto or suspend existing laws. In fact, the Framers specifically rejected to grant any such power to the President.[51] The fact that many state constitutions and declarations of independence contain language condemning the executive power to suspend laws further demonstrates that the Framers never intended to grant such a power to the executive branch.[52] Allowing the President to refuse to execute a law would grant him the power to veto or suspend the laws.[53] After all, laws without enforcement are essentially a "dead letter."[54] Consequently, "faithfully execute" should not be interpreted as allowing the President to refuse to enforce congressionally-passed laws.

While some at the founding argued the President can choose not to execute laws he deems "unconstitutional," this argument does not rely on the Take Care Clause for support. George Washington, for example, once stated that his duty to the Constitution prevented him from complying with a request from Congress.[55] When Thomas Jefferson was President, he refused to enforce the Sedition Act because of his "oath to protect the [C]onstitution," which he felt the Act

---

47. 2 JAMES WILSON, *Of the Constitutions of the United States and of Pennsylvania—Of the Legislative Department*, *reprinted in* 2 COLLECTED WORKS OF JAMES WILSON 829, 878 (Kermit L. Hall & Mark David Hall eds., 2007); *see also* United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) ("The president of the United States cannot control the statute, nor dispense with its execution . . . .").

48. Article I, Section 1 of the Constitution vests "[a]ll legislative Powers" in Congress. U.S. CONST. art. I, § 1.

49. HAMILTON, *supra* note 39, at 33–43 ("The general doctrine then of our constitution is, that the Executive Power of the Nation is vested in the President; subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument.").

50. U.S. CONST. art. I, § 7, cl. 2.

51. The proposal for an absolute veto power for the President was rejected. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97(Max Farrand ed., 1937).

52. *See, e.g.*, VT. CONST. of 1786, ch. 1, art. 17 ("The power of suspending laws, or the execution of laws, ought never to be exercised, but by the Legislature . . . ."); DE. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES, § 7 ("That no Power of suspending Laws, or the Execution of Laws, ought to be exercised unless by the Legislature.").

53. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97 (Max Farrand ed., 1937) ("[A] power of suspending might do all the mischief dreaded from the negative [veto] of useful laws; without answering the salutary purpose of checking unjust or unwise ones.").

54. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 160 (2d ed., William S. Hein & Co. 2003) (1829).

55. George Washington, Message to the House Regarding Documents Relative to the Jay Treaty (Mar. 30, 1796), *in* COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 194, 196 (James D. Richardson, ed., 1897) ("[A] just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with [the House of Representative's] request.").

violated.[56] And James Wilson argued that, like judges, a President could "refuse to carry into effect an act that violates the [C]onstitution."[57] Rather than relying on the Take Care Clause, these statements rely on the Oath of Office.[58] Consequently, the Take Care Clause by itself likely does not allow or support a presidential power to refuse to execute a law based on its presumed unconstitutionality.[59]

3. Faithful Execution May Impose a Good Faith Standard or a More Objective Standard

Given that "faithfully execute" requires that the President execute the laws without exceeding the bounds of the laws defined by Congress, the next question is what standard this phrase imposes on the President.

The phrase "faithfully execute" appeared in the constitutions and laws of many states at the time of their founding. For instance, the New York Constitution of 1777, after which the Take Care Clause of the Constitution was modeled, stated "[t]hat it shall be the duty of the governor . . . to take care that the laws are faithfully executed to the best of his ability."[60] Similar language appeared in other state constitutions.[61] The influence of this language on the Take Care Clause is demonstrated by Alexander Hamilton's comments in *Federalist No. 69* that the Take Care Clause is one that will "resemble . . . the Governor of New-York."[62]

---

56. Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), *in* 44 THE PAPERS OF THOMAS JEFFERSON 129, 129–31 (James P. McClure ed., 2019); *see also* Letter from Thomas Jefferson, President, to Wilson Cary Nicholas (June 13, 1809), *in* 11 THE WORKS OF THOMAS JEFFERSON 108, 111 (Paul Leicester Ford ed., 1905) (stating "that the sedition law was unconstitutional and null, and that [his] obligation to execute what was law, involved that of not suffering rights secured by valid laws, to be prostrated by what was no law").

57. James Wilson, Pennsylvania Ratifying Convention (Dec. 1, 1787), *in* THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 443, 446 (Jonathan Elliot ed., 1854) ("[F]or it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before the judges . . . it is their duty to pronounce it *void*. . . . In the same manner the President of the United States could shield himself, and refuse to carry into effect an act that *violates* the constitution.").

58. *See* U.S. CONST. art. II, § 1.

59. Given that this paper focuses on the meaning of the Take Care Clause, I will not go into detail about whether the Oath of Office provides a separate power for the President to refuse to execute the laws. However, it is still unlikely that the Oath of Office provides any source of power for the President to refuse to execute unconstitutional laws. *See* David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 122 (1993) (stating that the oath does not provide a power for the President to refuse to execute a law based on his perception of its unconstitutionality). This is because such a power would essentially be the same as a power of an absolute veto or to suspend the laws, which was never intended to be granted to the executive. *See supra* notes 47–51 and accompanying text.

60. N.Y. CONST. of 1777, art. XIX.

61. *See, e.g.*, PA. CONST. of 1777, § 10 (containing a promise to conduct one's self as a "faithful honest representative and guardian of the people, according to the best of only judgment and abilities").

62. THE FEDERALIST NO. 69, at 357 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

James Sullivan stated that the power granted via the Take Care Clause is not much more than what is vested by the states in their own constitutions.[63]

Before appearing in state constitutions, the phrase "faithfully execute" was also seen in state laws. For example, a 1785 Pennsylvania law stated that an officer must "faithfully execute the office . . . according to the best of his knowledge and ability, and the directions contained in this act."[64] A Virginia law required a surveyor of land to "truly and faithfully to the best of His Knowledge and Power, discharge and execute his Trust, Office, and Employment" and enter into bond with sureties "for the true and faithful Execution and Performance of his Office."[65]

State court decisions suggest that "faithful execution" merely requires an honest, good faith effort. Although many of these decisions reference the duty of a principal in a surety bond to "faithfully execute the duties of his office," they illuminate what those in the founding era understood "faithfully execute" to mean. In one case, a state court held that an honest error in judgment does not violate a duty to "faithfully execute," but gross negligence does.[66] In another, a state court determined that a requirement to "faithfully perform" requires only fidelity to one's required tasks, not skill.[67] These decisions indicate that a duty to faithfully execute merely requires a good faith effort on the holder of that office.[68]

There is also evidence to suggest that faithful execution may require a more objective standard rather than the subjective good faith standard. Many of the state laws and constitutions after which the Take Care Clause was modeled also included the phrase "to the best of my ability."[69] Such a phrase, when paired with "faithfully execute," provides strong support for the idea that faithful execution only requires a good faith effort. But the phrase "to the best of my ability" is absent from the Take Care Clause. And records from the Constitutional Convention indicate that while the phrase "to the best of my ability" was initially

---

63. James Sullivan, *Cassius, X: To the Inhabitants of this State*, MASS. GAZETTE, Dec. 21, 1787, *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 38, 41 (Paul Leicester Ford ed., 1892) ("Very little more power is granted to the President of the United States, by the [Take Care Clause], than what is vested in the governours of the different states.").

64. A DIGEST OF THE LAWS OF THE PENNSYLVANIA FROM 1700 TO JUNE 16, 1836, at 482 (John Purdon ed., 5th ed. 1837) [hereinafter PENNSYLVANIA LAWS].

65. An Act Directing the Duty of Surveyors of Land, ch. XIV (1748), *in* THE ACTS OF ASSEMBLY, NOW IN FORCE, IN THE COLONY OF VIRGINIA 305 (Williamsburg, W. Rind, A. Purdie & J. Dixon eds., 1769).

66. Common Council of Alexandria v. Corse, 1 F. Cas. 393, 393 (C.C.D.D.C. 1822).

67. Bank of the U.S. v. Brent, 2 F. Cas 688, 689 (C.C.D.D.C. 1826).

68. Webster's first dictionary similarly defined "faithfully" as "with good faith." *Faithfully*, NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

69. MASS. CONST. ch. VI, art. I (promising to faithfully discharge the duties "according to the best of my abilities"); N.Y. CONST. of 1777, art. XIX (stating that the governor must "take care that the laws are faithfully executed to the best of his ability"); PA. CONST. of 1776, § 10 (containing a promise to conduct one's self as a "faithful honest representative and guardian of the people, according to the best of only judgment and abilities"); PENNSYLVANIA LAWS, *supra* note 64, at 482 (stating that an officer must "faithfully execute the office . . . according to the best of his knowledge and ability, and the directions contained in this act").

considered, it was later removed.[70] There is little record to explain why this phrase was taken out of the Take Care Clause, but it may suggest that the Framers intended a stricter standard to apply.

Further support comes from looking at the Oath of Office, in which the phrase "to the best of my ability" actually appears. It states:

> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:–"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."[71]

Here, the phrase "faithfully execute" appears but it is a separated from the phrase "to the best of my Ability." The first promise, a promise to "faithfully execute the Office of the President," seems to refer to the duty imposed by the Take Care Clause. And this promise exists separately from the second promise to "preserve, protect, and defend" the Constitution "to the best of my Ability." The fact that the Framers intentionally used the phrase "to the best of my Ability" in reference to the oath to protect the Constitution but not in reference to the duty to faithfully execute the laws reinforces that the Framers may have not intended a good faith standard to apply to the Take Care Clause.

Additionally, it is worth noting that although the phrase "good faith" appears in other founding documents, the Framers did not use it in the Take Care Clause. The term "good faith" first appears in the Magna Carta in its Latin form "*bona fide*."[72] It also appears in the Northwest Ordinance.[73] Since "good faith" was clearly a known phrase at the time of the founding and was used in other legal documents, one must wonder why the Framers chose the phrase "faithfully execute" instead of "good faith" if they intended a good faith standard to apply.

If the Framers did not intend the Take Care Clause to have a good faith standard, what standard does it impose? One possibility is that while "good faith" indicates a subjective standard, the Framers envisioned a more objective standard on the President's duty to take care that the laws be faithfully executed. Thus, whether a President faithfully executes the laws would not depend on whether he made a good faith effort or tried to the best of his ability; rather, it would depend on whether he, based on an objective standard, acted within the confines of the law. This may be determined in several ways. The first that comes to mind is one

---

70. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 145, 158, 171 (Max Farrand ed., 1937).

71. U.S. CONST. art. II, § 1.

72. *See* MAGNA CARTA (David Carpenter trans., 2015).

73. *See* An Ordinance for the government of the territory of the United States northwest of the river Ohio, *in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 52 (Charles C. Tansil ed., 1927).

found in many early common law cases: the reasonable man standard.[74] This standard would still provide the President the discretion envisioned by the Framers to execute the laws while also imposing a stricter requirement and stronger check to ensure that the President acted within the confines of those laws.[75]

Ultimately, the Take Care Clause places a duty upon the President to ensure that the laws passed by Congress are enforced. It grants the executive office discretion in how it executes these laws, so long as it stays within the bounds of the laws defined by Congress. This necessarily includes some ability to interpret the laws passed by Congress.

"Faithful execution" also imposes a standard on the President in executing the laws passed by Congress, although it is unclear what the standard exactly is. State interpretations of the phrase indicate that the clause requires that the President make merely a good faith effort to act within the bounds prescribed by Congress. But there is also evidence to suggest that an alternative, more objective standard may apply.[76] The uncertainty regarding which standard faithful execution requires has implications for determining when the President has violated the Take Care Clause.

III. THE POTENTIAL CHECKS ON EXECUTIVE POWER WITH RESPECT TO THE TAKE CARE CLAUSE

The founders' language indicates that there should be a check on the broad discretion granted to the President via the Take Care Clause. The Framers feared the accumulation of powers in one branch and even referred to the potential of a tyrannical executive power.[77] Thus, they infused into the Constitution a system of checks and balances.[78] With respect to the President's duty under the Take Care Clause, there are three potential checks. The first check comes from the people. The second check is in the form of impeachment from the legislature. The judiciary is the final check. An examination of the first two checks from the legislature and the public shows that such checks are not as meaningful as the Framers perhaps once intended.

The strength of the judiciary as a check is unclear, especially given the uncertainty of what standard the Take Care Clause imposes: a good faith standard or a more objective standard (like the reasonable man standard). A good faith standard leads to the judiciary acting as a weaker check on the President's duty under the Take Care Clause, while the reasonable man standard leads to the judiciary acting

---

74. *See, e.g.*, Vaughan v. Menlove (1837) 132 Eng. Rep. 490, 492; R. v. Jones (1703) 87 Eng. Rep. 863, 864 (looking to whether a "person of ordinary capacity" would act similarly to determine whether an individual should be civilly or criminally liable in a fraud case).

75. *See infra* note Part III.C.2 for a discussion on how a reasonable man standard, if applied, would create a stronger check on the executive by the judiciary but still provide the executive with discretion.

76. This objective standard would include the potential reasonable man standard mentioned before.

77. *See* THE FEDERALIST NO. 48, at 257 (James Madison) (George W. Carey & James McClellan eds., 2001) ("[A]ssembling all power in the same hands . . . lead[s] to the same tyranny as is threatened by executive usurpations.").

78. *See* THE FEDERALIST NO. 51 (James Madison) (Jacob E. Cooke ed., 1961).

as a stronger check. Given that the legislature and the people may not actually serve as meaningful checks, it may be necessary for the judiciary to serve as a stronger check.

A. The People As a Check

A meaningful check on the President comes in the form of the people. Seemingly referring to the President's duty imposed by the Take Care Clause, James Madison described elections as a "principal motive" for the President to "faithful[ly] discharge [his] duties."[79] Alexander Hamilton also stated that "due dependence on the people [and] a due responsibility" serve as ingredients of "safety in the republican sense."[80] According to Hamilton, this is especially true when there is a unitary executive because the people at large know who to hold responsible.[81] Thus, the people through the process of elections may serve as a meaningful check to ensure the "faithful exercise of any delegated power."[82] However, the meaningfulness of this check may be diminished by the fact that presidential elections only occur every four years. And given that the President can no longer exceed two terms in office, such a check may not be as effective for a President in his second term who no longer has to answer to the people in the following election.[83]

B. The Legislature As a Check

The legislative branch can also serve as a check on the power of the President through impeachment.[84] In reference to impeachment, the Framers noted that while energy in the executive was necessary for an efficient government, it also made the executive branch ripe for corruption and tyranny.[85] In *Federalist No. 77*, Alexander Hamilton referenced impeachment as a precaution to counter and prevent "abuse of the executive authority."[86]

It is not clear, however, that an alleged violation of the Take Care Clause would be sufficient grounds for impeachment. Impeachment is limited only to cases involving "Treason, Bribery, or other high Crimes and Misdemeanors."[87] The Articles of Impeachment for Andrew Johnson and Bill Clinton suggest that a violation of the Take Care Clause could potentially qualify as a high crime or

---

79. James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES (J.C.A. Stagg ed., Univ. of Virginia Press digital ed. 2010).

80. *See* Hamilton, *supra* note 42, at 363.

81. *See id*. at 362–63.

82. *Id*. at 367.

83. The Twenty-Second Amendment states that "[n]o person shall be elected to the office of the President more than twice." U.S. CONST. amend. XXII, § 1. Given that this restriction on the President's duration in office was added via amendment, it was unforeseen by the Framers and thus not considered when discussing the effectiveness of elections as a check on executive power.

84. Article I gives the House of Representatives the power to impeach, U.S. CONST. art. I, § 2, cl. 5, and the Senate the power to try all impeachments, U.S. CONST. art. I, § 3, cls. 6–7.

85. *See* Madison, *supra* note 77, at 259–60.

86. THE FEDERALIST NO. 77, at 400 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

87. U.S. CONST. art. II, § 4.

misdemeanor.[88] But how severe the violation must be or whether a violation of the clause by itself may be considered a "high crime or misdemeanor" and therefore addressed by impeachment is still unclear. Additionally, the impeachment charges against Andrew Johnson and Bill Clinton listed the violations of the Take Care Clause as subsidiary charges and not the primary reason for impeachment.[89] Consequently, impeachment may not be as meaningful of a check on the President's duty to "take care that the laws be faithfully executed."

C. The Judiciary As a Check

A final check to the President's duty to ensure the faithful execution of the laws may come in the form of the judiciary. The Framers supported a checks and balances framework, as demonstrated by James Madison's comments in *Federalist No. 51*:

> [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. . . . [T]he constant aim is, to divide and arrange the several offices in such a manner as that each may be a check on the other . . . .[90]

Under a checks and balances framework, each branch of government may act as an effective check in some form on the others to prevent the accumulation of power in one branch. As noted previously, the legislature may check executive power under the Take Care Clause through impeachment. But the check by the judicial branch is less obvious.

Such a check by the judicial branch, however, may be necessary. Through the Take Care Clause, the executive branch has broad discretion and some ability to interpret the laws. But the Framers envisioned the judiciary, through the power of judicial review, as the body that discerns the meaning of any legislative act to ensure that it does not stand in "opposition to that of the people, declared in the constitution."[91] So while the President may have the ability to interpret the laws when executing them, the ultimate determination of what those laws mean must belong to the courts in their role as an "intermediate body" between the people and the legislature.[92] Consequently, the courts must act as some sort of check on

88. *See* STAFF OF H. COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 47–48 (Comm. Print 1974) (stating that Andrew Johnson violated his oath to "take care that the laws be faithfully executed"); Articles of Impeachment Against William Jefferson Clinton, H.R. Res. 611, 105th Cong. 2d Sess. (1998) (stating that Clinton's conduct violated "his constitutional duty to take care that the laws be faithfully executed").

89. *Id.*

90. Madison, *supra* note 78, at 269.

91. Hamilton, *supra* note 18, at 404.

92. *See id.*

the President's interpretation of the laws when that interpretation may violate the Constitution.

If the judiciary must act as a check on the executive's ability to operate within the laws prescribed by Congress, and the judiciary and the President have somewhat concurrent powers to interpret the laws, how much discretion should the judiciary afford the President in that interpretation? As discussed in Part II(c)(iii), the Take Care Clause may impose one of two standards on the President: a good faith standard or an objective standard (like the reasonable man standard).[93] Whether a good faith or reasonable man standard applies will affect how much discretion the judiciary affords the executive branch when acting as a check on its power.

1. Good Faith (Subjective) Standard

A good faith standard is a softer standard which would allow the President a large amount of discretion when interpreting the laws. Contract law, which has often employed a good faith standard, refers to good faith in conjunction with honesty.[94] The Magna Carta suggests that "good faith" is determined by the absence of an "evil intent."[95] Thus, the key to determining whether a party acted in good faith, is by looking to their motivation.[96] Therefore, when applying a good faith standard to determine whether a law has been faithfully executed, a court must look to the motivation of the executive in its interpretation of the laws.

Such a standard based on one's motivations would provide the executive with a greater amount of discretion. Under a good faith standard, a court could only find that the President failed to ensure that the laws be faithfully executed if his interpretation of those laws demonstrates an intent to evade or exceed the boundaries of them. A court may consider, among other things, the reasonableness of the interpretation when making this determination.[97] But ultimately, it must try to determine whether the interpretation was an honest one or a bad faith attempt to bypass and usurp Congress' power.[98] In this way, similar to how it applies to a board of directors in corporate law, a good faith standard would provide the executive office with a "halo of discretion."[99]

---

93. While I do not conclude that the Take Care Clause—if it imposes an objective standard—must impose a reasonable man standard, I will use the reasonable man standard in my discussion here as it was a commonly used objective standard in early common law and still provides a reasonable amount of discretion for the executive branch.

94. Andrew McCanse Wright, *Constitutional Good Faith*, 93 N.Y.U. L. REV. ONLINE 41, 46 (2018).

95. MAGNA CARTA (David Carpenter trans., 2015) ("An oath, moreover, has been taken, as well on our part as on the part of the barons, that all these conditions aforesaid shall be kept in good faith and without evil intent.").

96. Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 385 (1980).

97. Wright, *supra* note 94, at 47.

98. *See id*. at 47–48.

99. *Id*. at 47.

2. Reasonable Man (Objective) Standard

The reasonable man standard existed at early common law[100] and would act as a stronger standard than the good faith standard, thereby limiting the executive's discretion in interpreting the laws. In applying this standard, which is typically applied in negligence cases, courts must ask one question: "What would the reasonable person have done in the defendant's situation?"[101] In this sense, the reasonable man standard is more objective than the good faith standard because it does not necessarily require an inquiry into the person's motives or intentions.

In the context of the Take Care Clause, a reasonable man standard would require a court to determine whether the executive's interpretation of a law is objectively reasonable and not whether the interpretation demonstrates an intention to bypass those laws. This objective standard would ultimately provide the executive branch with less discretion in its interpretation of the laws than a good faith standard. Consequently, the court would play a stronger role in serving as a check on the President's ability to "take care that the laws be faithfully executed." The good faith standard and objective standard (like the reasonable man standard) thus have different effects on how strong of a check the judiciary may serve on executive power.

3. The Case for an Objective Standard

It is unclear exactly which standard (objective or subjective) the Take Care Clause requires. However, the current state of executive power and diminished effectiveness of checks by the other branches suggest that perhaps a stronger check by the judiciary (in the form of an objective standard) is necessary. Since the founding, executive power has grown tremendously, especially with the rise of the administrative state.[102] This growth is paired with the lack of effective checks by the legislative branch and the public at large. As such, agencies have attempted to employ what are, at times, questionable statutory interpretations to best serve their policy goals.[103] Whether such a growth in executive power or diminished effectiveness of the other checks are constitutional or appropriate falls outside the scope of this paper. My goal in pointing out these modern developments is to show that, whether we like it or not, this is the reality of our government today. Given these realities, a stronger check may be necessary to ensure fidelity to the

---

100. *See* Vaughan v. Menlove (1837) 132 Eng. Rep. 490, 492; R. v. Jones, (1703) 87 Eng. Rep. 863, 864 (looking to whether a "person of ordinary capacity" would act similarly to determine whether an individual should be civilly or criminally liable in a fraud case).

101. JOHN GARDNER, REASONABLE PERSON STANDARD 2 (2019).

102. Recently, there have been more questions about whether a President has truly acted faithfully or exceeded the bounds of the laws passed by Congress. *See, e.g.*, Adi Diyar, *HHS Wants to Return to Shadow Lawmaking—It Should Not*, HILL (Dec. 6, 2021), https://thehill.com/opinion/judiciary/584159-hhs-wants-to-return-to-shadow-lawmaking-it-should-not [https://perma.cc/P59T-ZLQH]; David Bernstein, *Supreme Court Bombshell: Does Obama's Immigration Guidance Violate the Take Care Clause?*, WASH. POST (Jan. 19, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/19/supreme-court-bombshell-does-obamas-immigration-guidance-violate-the-take-care-clause/ [https://perma.cc/52J5-NX7M].

103. *See supra* note 102.

Take Care Clause. An objective standard by the judiciary would best preserve the original meaning of the Take Care Clause as it would provide that stronger check on the executive branch while also allowing it a fair amount of discretion.

An example of the judiciary applying an objective standard is *Chevron* deference.[104] The crux of this doctrine is that, where a statute is ambiguous, the judiciary should defer to the agency's interpretation of that statute, so long as that interpretation is reasonable.[105] In other words, *Chevron* deference requires courts to impose a reasonable man standard when determining whether the executive branch has violated the Take Care Clause. By employing an objective standard, *Chevron* deference ensures that agencies do not violate the Take Care Clause through unreasonable interpretations of the laws while also ensuring that agencies have discretion to execute the laws. Thus, *Chevron* deference is a prime example of how an objective standard serves as the most effective check to the Take Care Clause while preserving its original meaning.

IV. CONCLUSION

Although brief and uncontroversial at the time of ratification, the Take Care Clause imposes an important duty upon the President to provide for and ensure that the laws passed by Congress are executed. It requires the executive branch to act within the bounds of the laws prescribed by Congress while also providing discretion as to how those laws are executed. The clause creates an obligation to enforce the law; it does not act as a source of power for the President to refuse to execute laws based on their perceived unconstitutionality or operate outside of the bounds of the laws.

What remains unclear about the clause is the standard it imposes. Although legal scholars have concluded that the Take Care Clause imposes a subjective, good faith standard on the President,[106] further examination into the language chosen by the Framers indicates that the clause may impose a more objective standard. Perhaps this objective standard comes in the form of the reasonable man standard, which was used in early common law cases. The difference between the subjective and objective standards has important implications for the level of discretion given to the executive in its interpretation of the laws as well as the role of the judiciary in acting as a check on the President's duty to ensure the faithful execution of the laws.

The potential checks on the President's duty under the Take Care Clause suggest that an objective standard is necessary. There are several potential checks on the President with respect to the Take Care Clause: the people (through elections), the legislature (through impeachment), and the judiciary (through judicial review).

---

104. *See* Chevron U.S.A, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (establishing a test for deference granted to a government agency's interpretation of a statute).

105. Cory R. Liu, *Chevron's Domain and the Rule of Law*, 20 TEX. REV. L. & POL. 391, 392 (2016).

106. *See, e.g.*, Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2178 (2019); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1858 (2016).

But since the people and the legislature may not be as effective of checks as once envisioned by the Framers, a stronger check by the judiciary is necessary to effectively contain the executive power within its constitutional bounds. This means that an objective standard, like the reasonable man standard, should be applied by courts over a good faith standard when determining whether the President has violated his duty under the Take Care Clause.

A stronger check by the judiciary is especially favorable considering the modern state of executive power. Executive power has grown substantially in recent years.[107] The growing executive power, paired with the lack of effective checks by the legislature and the public, make the Take Care Clause more susceptible than ever to violations by the President and should be of serious concern.[108] So while the exact standard imposed by the Take Care Clause is unclear, an objective standard may be the only effective way to prevent the President from violating his duty to execute the laws within the bounds prescribed by Congress and preserve the original meaning of the Take Care Clause.

107. Glenn Sulmasy, *Executive Power: The Last Thirty Years*, 30 U. PA. J. INT'L L. 1355, 1355 (2009).

108. *See supra* note 102.