PLAIN LANGUAGE

"May" for granting discretion

BY MARK COONEY

"May" does not just suggest discretion, it clearly connotes it.
— U.S. Supreme Court Chief Justice John G. Roberts[1]

While debate continues over some finer points of legal drafting, one little word has risen above the fray: *may*. Experts spar over the merits of *shall*, *must*, *will*, and more. But those same experts find common ground with *may*: it unmistakably grants discretion.[2]

Chief Justice Roberts said so just last June. The case, *Biden v. Texas*,[3] concerned the Immigration and Nationality Act. The act says that the government "may return" border crossers to their country of origin while their immigration cases are pending.[4] When the Biden administration balked at enforcing the Trump administration's return policy, two border states sued. They alleged that because mandatory detention language appears elsewhere in the act, the Biden administration's inaction under the "may return" section was unlawful.

Chief Justice Roberts, writing for the Court's majority, rejected this argument because the statute "plainly confers a discretionary authority."[5] His elaboration was emphatic:

> The statute says "may." And "may" does not just suggest discretion, it "clearly connotes" it.[6]

In fact, wrote Roberts, *may* is an "expressly discretionary" term.[7] This is especially clear when *may* "is used in contraposition to the word 'shall.'"[8] Had Congress intended the act's nearby detention provision "to operate as a mandatory cure" of government inaction under the "may return" provision, Congress "would not have conveyed that intention through an unspoken inference in conflict with the unambiguous, express term 'may.'"[9] In short, the statute's "use of the word 'may' … makes clear that contiguous-territory return is a tool that the Secretary 'has the authority, but not the duty,' to use."[10]

This reading of *may*, though spirited, was hardly new — and Roberts took pains to show it. He cited four modern Supreme Court cases in support, noting that the Court "has 'repeatedly observed' that 'the word "may" *clearly* connotes discretion.'"[11]

History buffs might note that the point wasn't always so settled. One pre–Civil War opinion observed that "[t]he sense in which this word [may] is to be taken, whether permissive or compulsory in various statutes, has been a fruitful source of difficulty and discussion in the courts and at the bar, both in England and America."[12] That court, writing in 1859, fell on the side of a permissive meaning, holding that "the word 'may' is used in the section under consideration to confer … discretionary powers."[13]

In the ensuing decades, the case law was uneven, but courts became more confident in announcing, as one did in 1933, that "[t]he primary or ordinary meaning of the word 'may' is undoubtedly permissive and discretionary."[14]

Modern case law reflects this view. In the past decade alone, California's appellate courts have confirmed *may*'s permissive meaning at least a dozen times.[15] Here in Michigan, the court of appeals recently rejected an argument for a mandatory *may* because the argument was "inconsistent with the [statute's] plain language."[16] The court explained that *may* "typically reflects a permissive condition, entrusting a particular choice to a party's discretion."[17]

Courts have, unsurprisingly, rejected arguments straining *may*'s permissive meaning past its breaking point. An isolated or inapt *may* won't, for example, allow litigants to flout an entire mandatory administrative-remedy scheme[18] or ignore a statute's list of official designees for service of process.[19] And cautious courts, while acknowledging *may*'s "customary meaning of being permissive

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or providing for discretion," accept the possibility of exceptions when "indications of legislative intent … or obvious inferences from the structure and purpose of the statute" show otherwise.[20] These would-be anomalies, besides being logical upon close inspection, are overwhelmed by the cases, too numerous to cite, applying *may*'s discretionary meaning without hesitation.

Leading commentators have likewise tabbed *may* as the choice for expressing "has discretion to; is permitted to; has a right to; is authorized to."[21] In Justice Antonin Scalia and Bryan Garner's *Reading Law*, this idea takes on canonical status. For the mandatory/permissive canon, they state that "[m]andatory words impose a duty; permissive words grant discretion."[22] In the supporting illustrations, *may* is their lone choice for correct permissive language.[23]

Given *may*'s precedential and canonical standing as a permissive term, it's puzzling how timid — and elaborately roundabout — some drafters are when granting discretion. I've barely scratched the surface in this short article, yet even here I've offered five post-2000 U.S. Supreme Court cases confirming that *may* "clearly" connotes discretion. *May*, with active-voice phrasing — *the court may award costs* — should be a mainstay in our documents.

Yet it isn't.

I recently checked a form contract for style. What I found was typical:

- "If …, then the Publisher **shall have the right to** terminate this Agreement …."

Edit: then the Publisher **may** terminate this Agreement

- "If …, then the Publisher **shall have the unqualified right to** terminate this Agreement …."

Edit: then the Publisher **may** terminate this Agreement

- "[T]he Publisher **shall have the right, but not the obligation, to** acquire or prepare …."

Edit: the Publisher **may** acquire or prepare

The problem with the original versions goes beyond wordiness. True, the original versions used five, six, even nine words to express what *may* expresses in one word. But let's look past that.

Consider the rampant misuse of *shall*. Drafting experts who view *shall* as a legitimate term of art wouldn't defend *shall*'s use in terms granting discretion (as seen above). In fact, those experts are unwavering in their advice: use *shall* to impose a duty and only to impose a duty.[24] Documents send mixed, contradicting messages when the mandatory *shall* appears in terms that confer discretion. To grant discretion, the experts say, use *may*.[25]

Yet in the form contract I studied, 28% of the *shall*s (22 of 78) appeared in clauses granting discretion. That's worth repeating: more than a quarter of the contract's *shall*s appeared in passages that did not impose a duty but instead granted discretion. Under any definition, that's loose drafting.

Infusing *shall*s into discretionary terms risks clouding the duty *shall*s. After all (a court might ask), if 22 *shall*s appear in permissive passages, why should *shall* have an ironclad mandatory meaning elsewhere?

Far-fetched? No. Consider one court's refusal to find a mandatory duty in this seemingly clear language: "'[T]he code official shall employ the necessary labor and materials to perform the required work.'"[26] The court concluded that this *shall* was "intended simply to signify the future tense," was meant "to invest the code official with authority to act," and was used "in its directory, not mandatory, sense."[27] Why no duty? The court explained that "because the word 'shall' is overused, it is not examined critically before placed in a statute and, thus, can convey a diversity of meanings."[28] Given cases like this, drafters' quick trigger with *shall* is puzzling.

But we're not done with potential ambiguity. Take another peek at the examples above; note how inconsistent the language is from one to the next. These examples show three language scenarios for granting discretionary authority. Whenever a drafter uses different words to express the same idea within a document or related documents, the drafter risks contextual ambiguity.[29]

Here, for instance, only one of the three examples includes the adjective *unqualified* before the noun *right*. ("[T]he Publisher shall have the **unqualified** right to ….") Does this mean that the discretion granted in the other examples is in some way qualified? Inserting *unqualified* in one place but not in others needlessly opens the door to that argument.[30]

In contrast, the consistent use of *may*, with active-voice phrasing, removes the risk of ambiguity.

The examples above only hint at how frequently *shall* alternatives appeared in the form contract I studied. All should meet the delete key:

- "The Publisher **shall have the right to** edit and revise the Work …." [**may** edit and revise, etc.]

- "[T]he Author **shall have the right to** review and approve … the title …." [**may** review and approve, etc.]

- "The Publisher **shall have the right to** manufacture…." [**may** manufacture]

- "The Publisher **shall have the right to** use ...." [**may** use]
- "The Publisher **shall have the right to** debit the account ...." [**may** debit, etc.]

In several provisions scattered here and there, the form contract used the active-voice construction that experts recommend:

- "If the Author fails to [timely] return the corrected page proofs ..., **the Publisher may publish** the Work without the Author's approval ...."
- "If ... a claim ~~shall arise~~ [arises] ..., **the parties may [sue]** jointly or separately."

Ironically, this correct — but only occasional — use of *may* only adds to the contract's overall inconsistency. *May*'s correct, consistent use would have, as Scalia and Garner put it, worked "beautifully."[31] We see its seamlessness in these last two examples. But *may*'s use in only occasional places suggests, again, some possible difference in meaning from the elaborate *shall have the right to* phrases found elsewhere. Do these *may* terms mean something slightly different from the wordy *shall* alternatives? No. But alas, the door to interpretive mischief is by now wide open.

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ENDNOTES

1. *Biden v Texas*, ___ US ___; 142 S Ct 2528, 2541; 213 L Ed 2nd 956 (2022) (Cleaned up).
2. Adams, *A Manual of Style for Contract Drafting (4th Ed)* (Chicago: ABA Publishing, 2018); Garner, *Garner's Guidelines for Drafting & Editing Contracts* (St. Paul: West Academic Publishing, 2019), pp 161-62; Neumann, Jr. & Entrikin, *Legal Drafting by Design: A Unified Approach* (Frederick: Aspen Publishing, 2018), p 144; Stark, *Drafting Contracts: How and Why Lawyers Do What They Do (2nd Ed)* (Frederick: Aspen Publishing, 2014), p 174; and Schiess, *'may' vs. 'reserves the right to,'* Legalwriting.net (May 13, 2005) <https://law.utexas.edu/faculty/wschiess/legalwriting/2005/05/may-vs-reserves-right-to.html> [https://perma.cc/9ZTS-BVF5]. All websites cited in this article were accessed April 4, 2023.
3. *Biden v Texas*, ___ US ___; 142 S Ct 2528; 213 L Ed 2nd 956 (2022).
4. *Id.* at 2535 (quoting 8 USC 1225(b)(2)(C)).
5. *Id.* at 2541.
6. *Id.* (quoting *Opati* v *Republic of Sudan*, 590 US ___; 140 S Ct 1601, 1609; 206 L Ed 2d 904 (2020)).
7. *Id.* at 2542.
8. *Id.* at 2541 (quoting *Jama v Immig & Cust Enforcement*, 543 US 335, 346; 125 S Ct 694; 160 L Ed 2d 708 (2005))(Cleaned up).
9. *Id.*
10. *Id.* (quoting *Lopez v Davis*, 531 US 230, 241; 121 S Ct 714; 148 L Ed 2d 635 (2001)).
11. *Id.* at 2541–42 (quoting *Opati*, 140 S Ct at 1609, emphasis in *Opati*).
12. *Cutler v Howard*, 9 Wis 309, 311 (1859).
13. *Id.* at 315–316 (stray comma removed).
14. *Bechtel v Bd of Supervisors of Winnebago Cty*, 217 Iowa 251; 251 NW 633, 635 (1933) ("As a general rule, the word 'may' when used in a statute is permissive only and operates to confer discretion. ... The primary or ordinary meaning of the word 'may' is undoubtedly permissive and discretionary.").
15. See, e.g., *People v Moine*, 62 Cal App 5th 440, 448; 276 Cal Rptr 3d 668 (2021) ("[I]n delineating the trial court's authority by use of the word 'may,' the statutory language itself indicates the trial court has broad discretion ....").
16. *Ass'n of Home Help Care Agencies v Dep't of Health & Human Servs*, 334 Mich App 674, 687; 965 NW2d 707 (2020).
17. *Id.* (quoting *In re Complaint of Mich Cable Telecom Ass'n*, 241 Mich App 344, 361; 615 NW2d 255 (2000)).
18. See, e.g., *Mullenaux v Graham Co*, 207 Ariz 1, 3; 82 P3d 362 (App, 2004).
19. *City of Mesquite v Bellingar*, 701 SW2d 335, 336 (Texas App, 1985).
20. *Yoo v United States*, 43 F4th 64, 73, 74, 80 (CA 2, 2022).
21. *Garner's Guidelines for Drafting & Editing Contracts.* p162.
22. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan: West Group, 2012), p 112.
23. *Id.*
24. *A Manual of Style for Contract Drafting*, pp 57 ("This manual recommends not using shall in contract drafting to express any other meaning" than to impose a duty). and 62 ("Using shall to mean only 'has a duty to' ... is a big step toward curing the ailment" of "chaotic verb structures" in contracts.) and *Drafting Contracts: How and Why Lawyers Do What They Do*, p 183 ("[Y]ou should use shall only to signal an obligation. But drafters incorrectly use shall so frequently that they think they are using it correctly, even when they are not.").
25. *A Manual of Style for Contract Drafting*, p 76 n 2; *Legal Drafting by Design: A Unified Approach*m, p 144 n 2; and *Drafting Contracts: How and Why Lawyers Do What They Do*, p 174 n 2.
26. *South End Enterprises, Inc v City of York*, 913 A2d 354, 358–59, 360 (Pa Commw, 2006) (Quoting ordinance).
27. *Id.* at 359.
28. *Id.* at 358–59 (Cleaned up).
29. Sepinuck & Hilson, *Transactional Skills: How to Structure and Document a Deal* (St. Paul: West Academic Publishing, 2015), pp 150-51.
30. See *Garner's Guidelines for Drafting & Editing Contracts*, pp 20–21.
31. *Reading Law: The Interpretation of Legal Texts*, p 112 ("When drafters use shall and may correctly, the traditional rule holds — beautifully.").