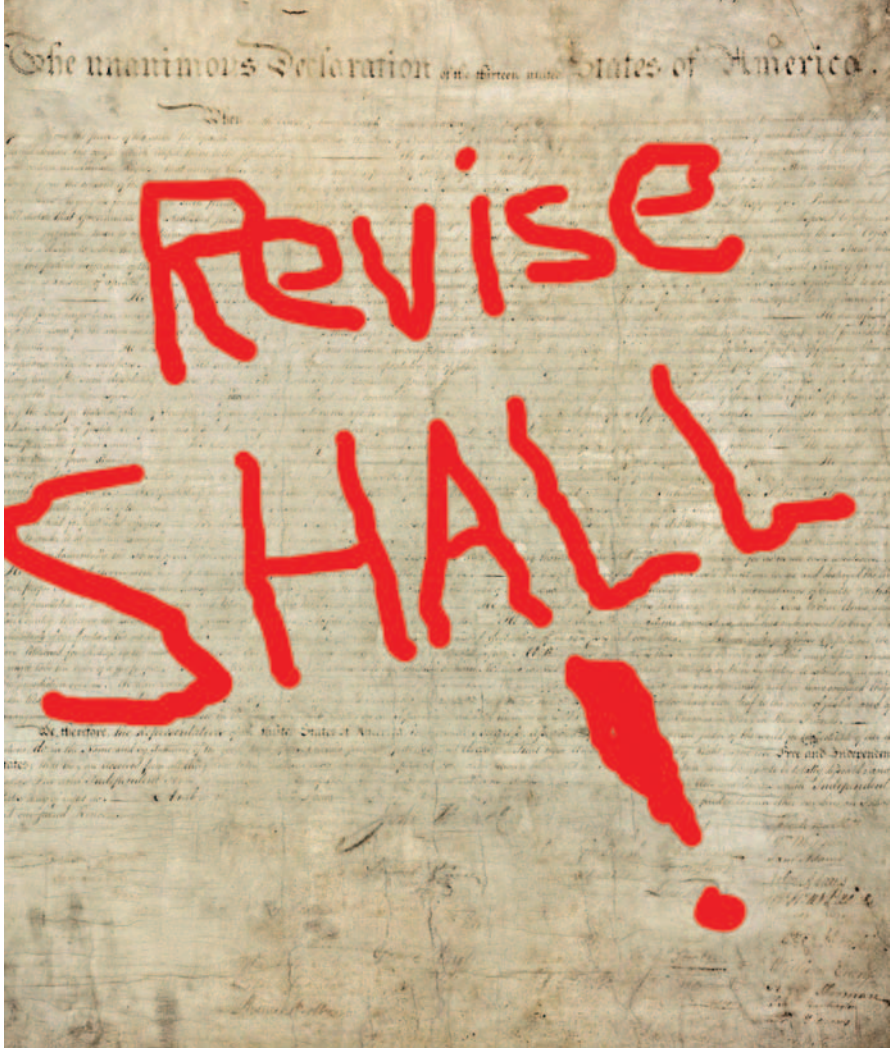
BY KARL G. RULING

# Defining "Shall"

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*HI. QUICK (MAYBE) QUESTION: Do we define Should and Shall in any of our standards?*

The answer is, "Yes." I won't say they are defined in all ESTA standards, but they are in *ANSI E1.42 – 2018 Entertainment Technology—Design, Installation, and Use of Orchestra Pit Lifts*. At a minimum, "shall" should be defined in any standard where we use "shall" to indicate precisely what we mean. We usually don't want someone to decide that "shall" gives them a do-it-or-not option, expresses a vague hope for a future condition, or something else—although, lacking a clear definition, any of these are possibilities.

**"The writer of the command has to make it clear that "shall" means a requirement, if that's what they mean—or use other words and state the requirement as obligatory."**

Many people think "shall" means a commandment you must follow, as in "Thou shalt not kill," that a peremptory command is built into the word. However, the actual meaning is much fuzzier, allowing a person to read a "shall" statement and reasonably decide it really doesn't mean they have to do it. The writer of the command has to make it clear that "shall" means a requirement, if that's what they mean—or use other words and state the requirement as obligatory.

The online *Oxford English Dictionary* entry for the verb "shall" goes on for 35 screens on my desktop computer. Much of the text is examples of how "shall" has been used over the centuries, but there are 29 primary definitions with subsidiary definitions—shadings of meaning—under each one. Only one definition, 5 a. (a), has the meaning of the imperative in a command, such as "Thou shalt not kill." Other meanings include the statement of a necessary condition, as in *The Merchant of Venice* when Bassanio says, "You shall seek all day ere you find them, and when you have them they are not worth the search." "Shall" also can express the speaker's determination to bring something about, as when Sir Peter says in *The School For Scandal*, ". . . though your ill-conduct may disturb my Peace it shall never break my Heart . . .." It can express an aspiration, as it does in "We Shall Overcome." It also can be part of a question to which the answer may be yes or no, or multiple-choice. "Shall I draw the curtain?" asks Paulina in the final scene of *The Winter's Tale*. One of my favorite childhood books was *What Shall I Do?*, which answered its title with 59 projects a child could do with things found around the home. A child could do one, or two, or none—or simply look at the pictures, as I often did.

The Supreme Court decided that "shall" in Colorado law did not lay a mandatory requirement on police officers to enforce restraining orders. Heidi Schreck in her play, *What the Constitution Means to Me*, covers Town of Castle Rock, Colorado v. Gonzales, case No. 04–278, and plays clips for the audience of Justices Scalia and Breyer discussing what "shall" means. It sounds silly, but the case it bears on is horrific. Jessica Gonzales had a restraining order against her estranged husband. A month into that order, her husband took

their three daughters, who were playing outside their home. Gonzales called the Castle Rock Police Department when she realized the children were gone. When the officers arrived, she showed them the restraining order, which had a notice to law enforcement, saying, "You shall use every reasonable means to enforce this restraining order. You shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of the restrained person . . .." The officers said there was nothing they could do; she should call the Police Department if the children were not returned by 10:00 p.m. Then her husband phoned and said he had the girls at a Denver amusement park. She called the police, telling them where her husband said he and the children were, and was again told to wait until 10:00. At 10:10, she called the police, who told her to wait until midnight. At 12:10 a.m. she went to her husband's apartment, found it empty, and called the police. She was told an officer would come.

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None came. She went to the police station and submitted an incident report. An officer took the report, and then went to dinner. At about 3:20 a.m., the husband arrived at the police station and opened fire with a handgun. Police killed him and found the bodies of the three daughters in the husband's truck. Jessica Gonzalez filed suit against the Town of Castle Rock saying the Town violated the Constitution's Fourteenth Amendment's Due Process Clause, since a Colorado statute established the state legislature's clear intent to require police to enforce retraining orders, and thus its intent that the order's recipient have an entitlement to its enforcement.

The Supreme Court decided seven to two against Gonzales, ultimately deciding, as Shreck says in *What the Constitution Means to Me*, that "shall" does not mean "must." The legal argument in the majority opinion, available at http://estalink.us/usscopinion, is more complicated than that, but the gist is that the Due Process Clause's procedural component does not protect everything that might be described as a government "benefit." "To have a property interest in a benefit, a person . . . must . . . have a legitimate claim of entitlement to it." A benefit is not a protected entitlement if officials have discretion to grant or deny it. The Supreme Court majority found, "It does not appear that state law truly made such enforcement mandatory." "A true mandate of police action would require some stronger indication than the Colorado statute's direction to 'use every reasonable means to enforce a restraining order' or even to 'arrest . . . or . . . seek a warrant.'"

Heidi Shreck says, "Feminist scholars have called this the death of the 14th Amendment for women." Linda Greenhouse, writing in the *New York Times*, 28 June 2005, is less dramatic, saying that organizations concerned with domestic violence "expressed disappointment at the outcome." However, the ruling affects more than state attempts to control domestic violence. Joel Teitelbaum, V. Nelligan Coogan, and Sara Rosenbaum, on the National Center for Biotechnology Information website (http://estalink.us/ncbiarticle) wrote about the ruling's implications for public health policy, including the expansion of Medicaid. "The policy and practice lesson to be drawn from all of this is that if a legislature expects unconditional government protections—be it law enforcement or medical care rights—it must write laws that express this unambiguously and it must also unambiguously imbue protected persons with the legal right to seek redress when these protections are not accorded."

ESTA's Technical Standards Program writes standards, not laws. Laying out legal rights to seek redress is outside our scope, but expressing unambiguously what a person must do to comply with a standard—if they **must** do something—is important. "Shall" by itself, with nothing saying "shall" means "You must do this," doesn't quite work. A person could say, "Oh, I shall do that," and go to dinner.

"Shall" is an archaic word. The OED examples I cited are hundreds of years old; *What Shall I Do?* is 72-years old. There is a movement in legal and government circles to use plain language in modern communication. (See www.plainlanguage.gov/, http://estalink.us/govclearwriting, and http://estalink.us/abajournalshall.) Proponents of plain language advise replacing "shall" with words or expressions commonly used in American English, such as "must," "will," "is," "may," or "is entitled to." ("Must" rather than "shall" is specifically advised in www.clear-writing.com.) They also would urge using an active rather than passive voice and being specific as to who is to do whatever must be done. The www.plainlanguage.gov/ website has links to legislation and Executive Orders emphasizing the need for plain language.

**"Words have to be chosen, not simply for what the speaker or writer means to say, but also for how those words will be heard or read."**

Why do we use "shall?" Partially, it's tradition and partially it's because some readers expect "code enforcement language." This is language that a requirement "shall" be done, or, if there is something that may or may not be done and either is okay, the options "shall be permitted." *NFPA 101*, *The Life Safety Code*, uses "shall." For example, article 7.8.1.3 (1) says, "During conditions of stair use, the minimum illumination for new stairs shall be at least 10 foot-candles (108 lux) measured at the walking surface." *NFPA 101* is a model code and article 1.2 says its purpose is "to provide minimum requirements, with due respect to function,

for the design, operation, and maintenance of buildings and structures for safety to life from fire." It's highly unlikely that a reader of *NFPA 101* would take "shall" in 7.8.1.3 (1) as aspirational: "When this stairway is in use, the illumination shall be at least 10 foot-candles!"

ESTA standards are not codes. Some are guidance documents, meant to help people figure out what is the best thing for them to do in a given situation. Some are indeed written in code enforcement language, even though ESTA has no code enforcement power, because we would like the standard to be adopted into local regulations or be referenced by organizations that use code enforcement language. If we write it in that language, it saves translation, and also lessens the probability our document will be dismissed because, "That's not the way you write something like that." If a congregation expects to hear the *King James* version of Deuteronomy 5, 17, "Thou shalt not kill," but hears *The Message*'s "No murder," they may miss the point.

Words have to be chosen, not simply for what the speaker or writer means to say, but also for how those words will be heard or read. Plain language is preferred, but when recondite terms are needed, definitions can help clarity. ■

**Karl G. Ruling** is ESTA's Senior Technical Standards Manager. He also serves as *Protocol*'s Technical Editor. Karl can be reached at karl.ruling@esta.org.

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