

**ON THE SENATE’S PURPORTED CONSTITUTIONAL DUTY TO  
MEANINGFULLY CONSIDER PRESIDENTIAL NOMINEES TO THE  
SUPREME COURT OF THE UNITED STATES: A RESPONSE TO CHIEF  
JUDGE PETER J. ECKERSTROM**

*Seth Barrett Tillman\**

In a recent issue of the *University of Pennsylvania Journal of Constitutional Law*,<sup>1</sup> Chief Judge Peter J. Eckerstrom<sup>2</sup> defended the view that the United States Senate has a constitutional duty, arising under the Appointments Clause,<sup>3</sup> to meaningfully consider presidential nominees to the Supreme Court of the United States. He characterizes such Senate consideration as “obligatory,”<sup>4</sup> “mandatory,”<sup>5</sup> and an “affirmative constitutional duty”<sup>6</sup> as opposed to

---

\* Lecturer, Maynooth University Department of Law. Roinn Dlí Ollscoil Mhá Nuad. This response was originally published in Volume 21 of the *University of Pennsylvania Journal of Constitutional Law Online* (2019). Much of the material put forward in this response first appeared on *New Reform Club*, where I am a co-blogger. See Seth Barrett Tillman, *Letter to The Boston Globe’s Letters Editor: Responding to Dean Martha Minow (Harvard) and Dean Deanell Tacha (Pepperdine)*, NEW REFORM CLUB (Mar. 25, 2016, 6:26 AM), <http://tinyurl.com/hks6vdq>; Seth Barrett Tillman, *Part I, Does the President Have a Duty to Nominate Supreme Court Candidates? Does the Senate Have a Duty to Consider Nominees?*, NEW REFORM CLUB (Mar. 18, 2016, 1:33 PM), <http://tinyurl.com/zrh4zbe>; Seth Barrett Tillman, *Part II, The Appointments Clause Imposes no Duty on the President to Nominate Supreme Court Justices, Other Article III Judges, and/or Executive Branch Officers. The Appointments Clause Imposes no Duty on the Senate to Confirm Candidates*, NEW REFORM CLUB (Mar. 24, 2016, 12:17 PM), <https://tinyurl.com/jycbrat>; Seth Barrett Tillman, *Part III: More on Why the Senate Has not Defaulted on its Purported Constitutional Duty*, NEW REFORM CLUB (Apr. 1, 2016, 8:37 AM), <https://tinyurl.com/ybttdh7n>; Seth Barrett Tillman, *Part IV: Why Senate Inaction as a Response to a Presidential Nomination is Constitutional*, NEW REFORM CLUB (Apr. 1, 2016, 12:50 PM), <https://tinyurl.com/ydhqnv9a>; see also Jonathan H. Adler, *The Senate Has No Constitutional Obligation to Consider Nominees*, 24 GEO. MASON L. REV. 15, 19 nn.22–23, 32 n.85 (2016) (citing two Tillman-authored *New Reform Club* posts); Richard Samuelson, *From Marbury to Garland*, WEEKLY STANDARD (Mar. 28, 2016, 2:17 PM), <http://www.weeklystandard.com/from-marbury-to-garland/article/2001730> (citing a Tillman-authored *New Reform Club* post); Ed Whelan, *Another Feeble Argument About Senate Confirmation Role*, NAT’L REV. ONLINE: BENCH MEMOS (Nov. 3, 2016, 2:07 PM), <http://tinyurl.com/h4u2e3l> (citing a Tillman-authored *New Reform Club* post). I thank Professors Franck, Lawson, and Ramsey for their comments; all errors remain mine.

1 Peter J. Eckerstrom, *The Garland Nomination, the Senate’s Duty, and the Surprising Lessons of Constitutional Text*, 21 U. PA. J. CONST. L. 33 (2018).

2 Chief Judge, Arizona Court of Appeals, Division II. See Eckerstrom, *supra* note 1, at 33 n.\*.

3 See U.S. CONST. art. II, § 2, cl. 2.

4 Eckerstrom, *supra* note 1, at 43, 46–47, 53–54, 65, 67–68 (using “obligatory” language).

5 *Id.* at 37, 43–44, 46–48, 53, 58 (using “mandatory” language).

6 *Id.* at 54 (using “affirmative constitutional duty” language) (emphasis omitted). By utilizing “mandatory” and other similar language, Eckerstrom is making the expansive claim that when a Supreme Court vacancy appears, the President and the Senate are obliged to fill the vacancy. “Shall” in the Appointments Clause means “must.”

merely aspirational or directory. Broadly speaking, he puts forward three primary types of arguments or evidence in support of his position: [1] textual; [2] purposive analysis; and [3] historical materials from ratification. Rather than critique Eckerstrom's three modalities for understanding the Appointments Clause, I point out what Eckerstrom's analysis lacks—a developed discussion of extant case law addressing this issue.

The text of the Appointments Clause states:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>7</sup>

Chief Judge Eckerstrom describes the process laid out in the Appointments Clause as:

[A]n obligatory three-step process [including presidential nomination, senate consideration, and presidential appointment] for appointing important governmental officials. The [114th] Senate claimed that it owed no duty to discharge its advice and consent role as to an individual nominee, the necessary second step in that process. . . . In short, the 114th Senate's claim of authority, to the extent based on fidelity to the United States

---

In a more limited sense, however, the process outlined in the Appointments Clause could be considered "mandatory" because it is exclusive. In other words, Congress cannot create another process (outside the Appointments Clause) to fill Supreme Court vacancies and other vacant positions which, like Supreme Court seats, are officers of the United States subject to the Appointments Clause. In the public debate between senators and the President over the Garland nomination, almost no one argued that the vacant Supreme Court seat should or could be filled by any mechanism other than through presidential nomination, Senate advice and consent, and presidential appointment—as per the Appointments Clause. *But see* Gregory L. Diskant, Op-Ed, *Obama Can Appoint Merrick Garland to the Supreme Court if the Senate Does Nothing*, WASH. POST (Apr. 8, 2016), [https://www.washingtonpost.com/opinions/obama-can-appoint-merrick-garland-to-the-supreme-court-if-the-senate-does-nothing/2016/04/08/4a696700-fcf1-11e5-886f-a037dba38301\\_story.html?utm\\_term=.d7b2d4d43a24](https://www.washingtonpost.com/opinions/obama-can-appoint-merrick-garland-to-the-supreme-court-if-the-senate-does-nothing/2016/04/08/4a696700-fcf1-11e5-886f-a037dba38301_story.html?utm_term=.d7b2d4d43a24) (arguing that Senate-inaction in regard to a presidential nominee permits the President to act unilaterally). Diskant excepted, the Garland debate had nothing to do with the issue of whether the Appointments Clause is mandatory in the sense of being exclusive. Historically, the dominant view has been that the Appointments Clause is the exclusive mechanism for permanently filling vacant Supreme Court seats and other positions properly characterized as officers of the United States. *See* *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976) (per curiam) (holding that the process outlined in the Appointments Clause is exclusive). *But see* *Myers v. United States*, 272 U.S. 52, 276 (1926) (Holmes, J., dissenting) (asserting that Congress has plenary (or near plenary) power over positions which it has created by statute); EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957: HISTORY AND ANALYSIS OF PRACTICE AND OPINION* 69–71 (4th rev. ed. 1957); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801*, at 44–45 (1997); Peter Nicolas, *Nine, of Course: A Dialogue on Congressional Power to Set by Statute the Number of Justices on the Supreme Court*, 2 N.Y.U. J.L. & LIBERTY 86 (2006); E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 196–99 (2018).

<sup>7</sup> See *supra* note 3.

Constitution, is not a correct one.<sup>8</sup>

Now that's Eckerstrom's view. On the other hand, some many years ago, a judge on some multi-member appellate court—albeit, not a particularly well-known judge—albeit, not a particularly well-known court—once addressed this precise issue in a case that is no longer quite rightly remembered. This is what that judge wrote long ago:

The [second] section of the [second] article of the [C]onstitution, declares, that, “the President shall nominate, and, by and with the advice and consent of the [S]enate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for.”

The third section declares, that “he shall commission all the officers of the United States.”

An act of Congress directs the [S]ecretary of [S]tate to keep the seal of the United States, “to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the President, by and with the consent of the Senate, or by the President alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States.”

These are the clauses of the [C]onstitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

[1.] The nomination. This is the sole act of the President, and is *completely voluntary*.

[2.] The appointment. This is also the act of the President, and is also a *voluntary act*, though it can only be performed by and with the advice and consent of the [S]enate.

[3.] The commission. To grant a commission to a person appointed, *might perhaps* be deemed a duty enjoined by the [C]onstitution. “He shall,” says that instrument, “commission all the officers of the United States.”<sup>9</sup>

As you might have already guessed: the judge was Chief Justice John Marshall—Marshall was writing for a unanimous bench—the Court was the Supreme Court of the United States—and the case: that was *Marbury v. Madison*.<sup>10</sup> Eckerstrom fails to discuss this aspect of *Marbury*, which is a bit odd given that he cites *Marbury* for the proposition—and *only* for the proposition—that: “the Court[] [enjoys] constitutional primacy as the final arbiter of such [constitutional] disputes . . . .”<sup>11</sup> *What good is constitutional primacy if no one can remember what you have written?*

<sup>8</sup> Eckerstrom, *supra* note 1, at 67–68.

<sup>9</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155–56 (1803) (emphases added). It is interesting to speculate as to just how many academics reviewed Eckerstrom's article prior to publication—yet *Marbury* remains undiscussed.

<sup>10</sup> *Id.*

<sup>11</sup> Eckerstrom, *supra* note 1, at 38 n.14 (citing *Marbury*, 5 U.S. at 177).

If Eckerstrom's analysis were correct (i.e., that the three steps of presidential nomination, senate consideration, and presidential appointment are mandatory), and if Marshall's analysis is and always has been wrong (i.e., that these steps are "voluntary" or "completely voluntary"), then one might suspect that *someone, somewhere, at some time* might have challenged Marshall's analysis on this particular point. I am not aware of any such challenge or challenges, contemporaneous or even roughly contemporaneous (e.g., from the antebellum era) to Marshall's decision in *Marbury* on this particular point. There are modern commentators who, like Eckerstrom, suggest that the various steps in the Appointments Clause process are mandatory.<sup>12</sup> Some voice that position in a conclusory fashion. Some assume that "shall," appearing twice in the clause's text, is used in a mandatory fashion. But if any have directly challenged Marshall and *Marbury* on this particular point—I must have missed that. So Eckerstrom is not alone—but that hardly explains why he is right and Marshall is wrong.

Again: this is what we have. We have a constitutional provision—it is part of the original Constitution of 1789—its language is well over 200 years

---

<sup>12</sup> This is not to say that there have not been commentators, who, like Eckerstrom, assert that the Appointments Clause's processes are mandatory, and that the President and Senate have a duty to fill vacant positions. I am only making the more limited claim that when prior commentators assert that the process is mandatory, they do not challenge Marshall's *Marbury* analysis. See, e.g., HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II, at 19 (5th ed. 2008) ("[The Appointments Clause] means exactly what it says: it is the president's duty and responsibility to find and nominate candidates for the Supreme Court of the United States (as well as, of course, all lower federal judges) . . ."); Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 98 (2016) (suggesting existence of a "limited duty"—absent any discussion of *Marbury v. Madison*); Douglas W. Kmiec & Elliot Mincberg, *The Role of the Senate in Judicial Confirmations*, 7 TEX. REV. L. & POL. 235, 235 (2003) (examining whether "the Constitution [r]equire[s] the [f]ull Senate to [a]ct [on a presidential nomination]?," but absent any discussion of *Marbury*); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 63 n.7 (1990) ("Article II of the Constitution helps ensure such accountability by granting the President the duty to appoint and remove subordinates."); David F. Tavella & Anne Marie Tavella, *Advice and Consent for Federal Judges: A New Alternative Based on Contract Law*, 3 DREXEL L. REV. 521, 531 (2011) ("[T]he [Appointments] [C]ause places an affirmative obligation on the President and the Senate to fill the described appointments. Without the implication that this will be done in a reasonable time, this clause loses all effectiveness. Similarly, the Constitution must be upheld and followed in good faith. Quite simply, the Appointments Clause cannot be effective if either the President or the Senate violate the duty to cooperate."); Martha Minow & Deanell Tacha, Opinion, *US Needs a Government of Laws, Not People*, BOS. GLOBE (Mar. 22, 2016), <https://www.bostonglobe.com/opinion/2016/03/21/needs-government-laws-not-people/34oNmHmUH3TYEltXCQyIM/story.html#comments> ("Obama [has a] clear constitutional duty to nominate a successor [to fill the Scalia vacancy] . . ."); Steven J. Harper, "Let the People Speak?," LAWYER BUBBLE: BELLY BEAST (Mar. 9, 2016), <http://thelawyerbubble.com/2016/03/09/let-the-people-speak/> ("The President has a duty to nominate and the Senate has a responsibility to act on that nomination.").

old.<sup>13</sup> The text of the Appointments Clause is ambiguous;<sup>14</sup> the meaning of “shall” is ambiguous. *Marbury v. Madison* is a unanimous Marshall-authored<sup>15</sup> precedent of the Supreme Court of the United States. It has been followed by subsequent courts and other high legal authorities.<sup>16</sup> I see no indication that any court of record (much less the Supreme Court of the United States) has ever suggested that this issue is not settled or that *Marbury*'s holding on this point should be revisited.<sup>17</sup> I see no opinion, no concurrence, and no dissent so holding—or even suggesting. I see no academic authorities—Eckerstrom including—disputing *Marbury* and explaining in what way Marshall and his Court erred. On these facts, it seems to me that the standard view is that ambiguous constitutional meaning has been “liquidated”<sup>18</sup> by judicial decision and long acquiescence by the country and by the three branches of the government. Given all this, I do not see it as my

<sup>13</sup> The Philadelphia Convention met in 1787. Nine states were needed for ratification. See U.S. CONST. art. VII (mandating nine of thirteen states were necessary for ratification). Eleven states ratified prior to the meeting of the First Congress. The First Congress met in 1789. Two states—Rhode Island and North Carolina—ratified after the First Congress convened. See Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601, 604 nn.12–14 (2003).

<sup>14</sup> See *United States v. Maurice*, 26 F. Cas. 1211, 1213 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice) (“I feel no diminution of reverence for the framers of this sacred instrument, when I say that some ambiguity of expression has found its way into this clause.”). *Maurice* is another important case that Eckerstrom’s article fails to discuss—yet it deals with the issue under discussion.

<sup>15</sup> In actuality, the original manuscript which entered the reporters no longer appears extant. It is considered common knowledge that Marshall authored *Marbury*, and so the official reporter seems to indicate. See *Marbury*, 5 U.S. at 153 (“Afterwards, on the 24th of February the following opinion of the [C]ourt was delivered by the [C]hief [J]ustice.”). But today, we lack the ability to authenticate this information.

<sup>16</sup> See, e.g., *Harris v. United States*, 102 Fed. Cl. 390, 405 (Fed. Cl. 2011) (Horn, J.) (citing the same passage from *Marbury*); *In re De Puy*, 7 F. Cas. 506, 509–10 (S.D.N.Y. 1869) (No. 3814) (Blatchford, J.) (same); *Appointment of a Senate-Confirmed Nominee*, 23 Op. O.L.C. 232, 232 (1999) (Daniel Kofsky, Acting Dep’y Asst. Att’y Gen.), <http://tinyurl.com/gljnmv8> (“The Constitution thus calls for three steps before a presidential appointment is complete: first, the President’s submission of a nomination to the Senate; second, the Senate’s advice and consent; third, the President’s appointment of the officer, evidenced by the signing of the commission. All three of these steps are discretionary.”).

<sup>17</sup> The value of precedent and settled law was understood early on in the history of the America republic. See also Abraham Lincoln, *Speech on the Dred Scott Decision at Springfield, Illinois* (1857), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858, at 393 (Don E. Fehrenbacher ed., 1989) (suggesting that a judicial precedent should be accepted by the public if it were an “important decision” and if it “had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part based on assumed historical facts, which are not really true; or if wanting in some of these, it had been before the court more than once, and had there been affirmed and reaffirmed through a course of years,—it then might be, perhaps would be factious, nay, even revolutionary, not to acquiesce in it as a precedent.”).

<sup>18</sup> See, e.g., THE FEDERALIST NO. 37, at 197 (James Madison) (Clinton Rossiter ed., 1999) (“All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”).

role to explain why Marshall was *right*, and Eckerstrom is *wrong*. Rather, it is (or was) Eckerstrom's job to show the reverse: that Eckerstrom is *right*, and Marshall was *wrong*. Maybe Eckerstrom will turn to that task in a reply. But if he comes out entirely the same way as he did in his original article, he will not look entirely convincing—it will look more like motivated reasoning.

Should Eckerstrom turn to that task, I would ask him to consider two other lines of argument—which neither he nor Marshall have and had considered.

First, the position that a President has a duty to put forward a Supreme Court nominee is narrowly elitist and overtly judicial-centric. Nothing distinguishes the President in his role here in regard to nominating Supreme Court nominees from: [1] his role in regard to nominating other judicial nominees on the inferior courts; and [2] his coordinate role in regard to nominating persons for any and every Executive Branch office (however humble) within the President's orbit. If the President fails to nominate a person to one of these less prominent offices, who would say that the President failed in his constitutional duty? Yet for all of these positions, the controlling text is precisely the same—the Appointments Clause. All these positions stand or fall together—they should all be treated the same way—they are bound by a common text. It would seem to follow that if it is mandatory for the President to nominate a candidate, and for the Senate to meaningfully consider that nomination, and for the President to appoint the nominee to fill the vacancy for any one such office as a constitutional matter, then it is equally mandatory for the President to nominate and appoint persons, with the advice and consent of the Senate, to fill all vacancies within the President's nomination power. I think few, and perhaps no, responsible commentators would make such an argument.<sup>19</sup> And if you will not make that argument for each and every one of the less prominent positions subject to presidential nomination, then I think there is no good reasoned basis for

---

<sup>19</sup> If in creating an office, Congress were to expressly impose on the President a mandatory duty, setting a time limit for its fulfilment, and adverse consequences or a punishment in regard to presidential inactivity, then that would be a very different situation. (Of course, some supporters of the unitary theory of the executive might argue that such a statute is not constitutional.) But where the only thing Congress has done is to create an office, and to mandate that the "President shall nominate a candidate subject to Senate consent," then the default view ought to be that the President is permitted not to act. If Congress wants to create a duty and impose it on the President, it must clearly express its command. "Shall" standing alone cannot do that because "shall" is an ambiguous term. It is ambiguous today; it was certainly ambiguous at the timing of the Constitution's framing. See *infra* note 25. Compare Eckerstrom, *supra* note 1, at 46 n.39 (rejecting Tillman's position on the indeterminacy of "shall"), with Nora Rotter Tillman & Seth Barrett Tillman, *A Fragment on Shall and May*, 50 AM. J. LEGAL HIST. 453 (2010) (peer reviewed), and Letter from Justice Antonin Scalia to Seth Barrett Tillman (Sept. 13, 2010) ("I assume you are correct that the meaning of 'shall' at the time of the Constitution was quite indeterminate."), reproduced on Seth Barrett Tillman, *A Letter from the Grave*, NEW REFORM CLUB (Apr. 13, 2016, 5:24 AM), <https://tinyurl.com/y9n9sx7l>.

adopting Eckerstrom's position exclusively for Supreme Court vacancies—except that our great and good all think the Supreme Court was, is, and must be the center of attention of our common political and legal life. This view has consequences—few of them good.

Second, Eckerstrom takes the position that “shall” is used in Article II to mean “must.” For example, he wrote:

Nor can it be correctly argued that, in the context of Article II, “shall” denotes a discretionary act. Article II, Section 1, devoted to the procedures by which a President takes and leaves office, uses the word “shall” 25 times. In each case, it denotes an obligatory procedural step or event. For example, that section uses the word “shall” to describe the indispensable duty of the President to take the oath of office: “Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation . . . .”<sup>20</sup>

Is that all correct and true? I count “shall” as being used 32 times in Article II, Section 1. More importantly, it seems to me that “shall” in the presidential oath does not command the President to take the oath, in the sense that the President must take it; rather, it only tells the President that until the oath is taken (in the future), s/he may not execute the office of President. The Oath Clause and its “shall” language do not make the President do anything; rather, it simply enjoins the President from taking any official actions until such time as the President chooses to take the oath. If that analysis is correct, then it is not—as Eckerstrom suggests it is—a “duty of the President to take the oath.”

Consider, Article II's Presidential Succession Clause. The clause provides:

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same *shall* devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer *shall* then act as President, and such officer *shall* act accordingly, until the disability be removed, or a President *shall* be elected.<sup>21</sup>

This clause uses “shall” four times. What does that fourth “shall” do? It permits Congress—acting by statute—to provide an interim presidential election in circumstances where both the President and Vice President have been removed, died, resigned, or are unable to discharge their duties.<sup>22</sup> The

---

<sup>20</sup> Eckerstrom, *supra* note 1, at 46 (footnotes omitted) (citing Tillman & Tillman, *supra* note 19).

<sup>21</sup> U.S. CONST. art. II, § 1, cl. 6 (emphases added).

<sup>22</sup> See, e.g., Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 133 (1995) (“This special election procedure squares perfectly with the Constitution’s Succession Clause, which empowers Congress to specify an Acting President to serve ‘until . . . a President shall be elected,’ without explicitly insisting that the country wait for a regular quadrennial election. And at the Virginia ratifying convention, [James Madison] made public assurances that in the event of double death, ‘the election of another President will immediately take place.’”).

modern statutory scheme for presidential succession<sup>23</sup> does not provide for such interim elections, but the original presidential succession statute, the 1792 Act, did provide for such elections.<sup>24</sup> *In other words, Congress may provide for an interim election, but such elections are not mandatory.* Congress need not—and in modern times, has not—provided for such interim presidential elections. If a President is elected in an interim election, it is mandatory that he then succeeds to the presidency. But that result is mandatory in consequence of the third “shall” in the Succession Clause, not because of the fourth “shall.” In short, the fourth “shall” does not make anything mandatory; it merely anticipates that something “may” happen in the future should Congress provide for such elections. “Shall” here is not used in any mandatory sense. What this shows is what one and all know or at least should know: “shall” is an ambiguous term.<sup>25</sup>

Finally, consider Article II’s Reception of Ambassadors Clause. That clause states: “[The President] shall receive ambassadors and other public ministers . . . .”<sup>26</sup> Now this could mean (and, according to the Supreme Court, does mean) that the President is the “sole organ”<sup>27</sup> of foreign policy and for dealing with foreign nations, and that the Congress cannot take this role from the President and vest it in another entity.<sup>28</sup> Under this interpretation “shall” simply expresses that something will happen in the future at the discretion of the President, and that his discretion cannot be limited or transferred to another by Congress. In other words, “*he shall receive*” means “*he shall do it, and no one else.*” But whatever conduct the President engages in is still discretionary—it is still voluntary—something entirely under the control of the President. Under this view, the President can choose not to receive an ambassador or any ambassador or even all ambassadors,

<sup>23</sup> See Presidential Succession Act, 3 U.S.C. § 19 (1947) (repealing Act of Jan. 19, 1886, ch. 4, § 1, 24 Stat. 1); *infra* note 24.

<sup>24</sup> An Act relative to the Election of a President and Vice President of the United States, and declaring the Officer who shall act as President in case of vacancies in the offices both of President and Vice President, ch. 8, § 10, 1 Stat. 239, 240–41 (1792) (providing for interim elections) (repealed 1886).

<sup>25</sup> See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 113 (2012) (“*Shall*, in short, is a semantic mess. *Black’s Law Dictionary* records five meanings for the word . . . .” (citing Tillman & Tillman, *supra* note 19)); *supra* note 19 (collecting other authorities).

<sup>26</sup> U.S. CONST. art. II, § 3.

<sup>27</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) (Rehnquist, J.); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–320 (1936) (Sutherland, J.).

<sup>28</sup> By “vest . . . in another entity,” I mean Congress cannot vest the reception power in: itself, its agents, the states, state agents, officers of international organizations, officers of foreign governments, private parties, federal officials or officers outside the Executive Branch, or Executive Branch officers not subject to presidential removal or supervision. Whether Congress can vest (or, more properly, re-vest) the reception power in subordinate Executive Branch officers subject to presidential removal or supervision is a difficult and resolved constitutional issue. Fortunately, it is not one I have to address here. I only need note that if Congress has such a power, then it would seem to follow that “shall” in the Reception Clause cannot be understood in any meaningfully “mandatory” sense. *Cf. Buckley v. Valeo*, 424 U.S. 1, 125–27 (1976) (*per curiam*).



without regard to whether the United States has recognized<sup>29</sup> and continues to recognize the government or governments involved.

The alternative view, apparently Eckerstrom's view, is that "shall" in this clause imposes a mandatory duty on the President: i.e., the President has an affirmative duty to receive each and every ambassador from every foreign nation whose government we have and continue to recognize.<sup>30</sup>

Consider a hypothetical. Let's suppose the United States has recognized a foreign country—e.g., Xanadu. Perhaps Xanadu is a country the United States is and has been on good terms with for long standing. Then it comes to pass that Xanadu's executive government falls into the hands of criminals. Xanadu's executive chooses to send to the United States an individual known to the President and his security establishment as a dangerous criminal—a person who is a threat to persons and property in the United States. "Must"

---

<sup>29</sup> One could argue that given that the President has the greater (judicially) recognized power to terminate relations and treaties with foreign nations, he need not receive that nation's ambassador. See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979). That is, the greater power (to terminate relations with a foreign nation), includes the less power (not to receive its ambassador). In this sense, the reception power is, arguably, illusory. It is for that reason that in my hypothetical in the main text of this Article that I deal with the situation in which the foreign nation has been recognized by the United States, and the United States continues to recognize it; yet, notwithstanding recognition, the President refuses to receive, meet, and accredit its ambassador. Likewise, the fact that recognition might involve a nonjusticiable political question does not mean the relevant constitutional text does not have a reasonably determinate meaning. Eckerstrom's position or my own—either may be correct, even if the courts cannot get involved.

<sup>30</sup> Eckerstrom or others might turn to Madison's third *Helvidius* letter (in the *Pacificus-Helvidius* debates) to defend the mandatory vision of the Reception Clause. In that letter, Madison's primary point was that the President had no unilateral power to derecognize a foreign nation (which had undergone a revolutionary change in government) and then to reject that nation's ambassador based on the exercise of a non-existent or void presidential derecognition power. See JAMES MADISON, *HELVIDIUS NO. 3* (Sept. 7, 1793), <https://founders.archives.gov/documents/Madison/01-15-02-0066>. Madison was not speaking to the issue at hand: *Could the President reject an ambassador for policy reasons when our policy is to recognize that ambassador's nation?* Moreover, the courts have rejected Madison's vision—it is the *Pacificus* or Hamiltonian position which has largely prevailed. Indeed, Hamilton embraced the discretionary view as early as *The Federalist*. See THE FEDERALIST NO. 69, *supra* note 18, at 388 (Alexander Hamilton) ("The President is also to be authorized [by the Constitution] to receive ambassadors, and other public ministers."). To be the party authorized to do something is not coextensive with being required to do it. Early post-ratification commentaries are ambiguous on this point. See, e.g., WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES* 171 (2d ed. 1829) ("Under the expression, *he is to receive ambassadors*, the president is charged with all transactions between the United States and foreign nations . . ." (emphasis in original)), [http://press-pubs.uchicago.edu/founders/documents/a2\\_3s9.html](http://press-pubs.uchicago.edu/founders/documents/a2_3s9.html). On a closely related legal issue, Jefferson, while Secretary of State, embraced the broadest view of the President's power to revoke a foreign diplomat's credentials. See, e.g., Letter from Thomas Jefferson to Edmond Charles Genet, The French Minister (Nov. 22, 1793), in 8 THE WORKS OF THOMAS JEFFERSON 73, 74 (Paul Leicester Ford ed., 1904); Letter from Thomas Jefferson to Edmond Charles Genet, The French Minister (Dec. 9, 1793), in 8 THE WORKS OF THOMAS JEFFERSON, *supra*, at 89, 90. See generally Matthew Franck, *Ambassadors—Article II, Section 3*, in THE HERITAGE GUIDE TO THE CONSTITUTION 286, 286–88 (David F. Forte & Matthew Spalding eds., 2d ed. 2014), <https://www.heritage.org/constitution/#!/articles/2/essays/97/ambassadors>.

the President “receive” that ambassador? In the capital? In the White House? Could not the President simply say—“The United States continues to recognize Xanadu, but this particular ambassador, we will not receive; indeed, the President will not receive any ambassador until there is a change in the executive government of Xanadu.”<sup>31</sup> In other words, given the realities on the ground, the President might publicly state that he will not meaningfully consider the individual merits or qualifications of any particular ambassador that Xanadu chooses to send. Rather, the United States will wait for a change in administration in Xanadu before considering to receive any ambassador from Xanadu. Unless the President should be bound by a (constitutional) statute to do otherwise, does not the President have an unbridled “discretion” to do precisely what is outlined here?

And if the President does have that unbridled discretion not to consider the merits or qualifications of a foreign ambassador—which would seem to establish that “shall” in Article II is not on each and every occasion used in the “mandatory” sense—then does not the Senate (equally) have a coordinate discretion to refuse to meaningfully consider each, any, or, indeed, every Supreme Court nominee (or any other nominee for any other position) the President might send to the Senate for confirmation?

---

<sup>31</sup> See generally Vienna Convention on Diplomatic Relations art. 4(1) (“The sending State must make certain that the agrément of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.”); *id.* art. 4(2) (“The receiving State is not obliged to give reasons to the sending State for a refusal of agrément.”); Otto von Bismarck, *The Canossa Speech* (1872), in 7 THE WORLD’S FAMOUS ORATIONS 243, 245–246 (Francis W. Halsey & William Jennings Bryan eds., 1906) (“For reasons which the [P]ope has failed to explain, he has declined to give to our choice [of ambassador] that sanction which courtesy requires us to ask for. A refusal of this kind has not often been recorded in the annals of diplomacy. I have been nearly ten years at the head of the foreign office and twenty-one years in domestic employment, but I do not remember a single analogous case. . . . [H]owever much I may regret this extraordinary step on the part of the Holy See, I do think we should not be justified in resenting it by a suspension of diplomatic intercourse.”).