

# 法學英文

## 攻略 7

林利芝 / 編著

Legal English




新學林出版股份有限公司

# 法學英文 攻略

## Legal English

本書每一篇皆從英文原文的案例出發，到最後的測驗複習，每一環節的精心設計都出自於作者自身教學經驗所得。經由這樣的導引，讀者可以逐步攻略法學英文當中的“閱讀技巧”、“搜尋技巧”、“分析技巧”以及“寫作技巧”。這些技巧可以幫助讀者眼明手快地找出法律爭議，自信滿滿地去適用解決爭議的法律或法則，並且能舉一反三地將法律或法則靈活運用在其他的具體事實情況。經過這樣長期的訓練累積，讀者便能有條理地分析與應用，進而躋身成為具有十足國際競爭力的法律人。

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## 序

許多法律人認為，目前律師考試科目並無法學英文一門，因此對於學校所開設的英美法學習較不熱衷。雖然通過律師考試是目前成為我國律師的主要途徑，但是臺灣的法律系學生與律師必須了解，對身處於國際地球村時代的法律人而言，涉獵多國法律是相當必要的，而英美法更應是學習外國法律的重點。

學習英美法，從案例直攻，對於法律人有很多的好處：

第一，幫助法律人打破平日所自圓的思考模式，以更開闊的視野面對律師考試或其他類型的考試。像是法學英文“閱讀技巧”的訓練，可以幫助讀者迅速找出法律爭議。“搜尋技巧”可以用來確認適用在法律爭議上的法律或法則。“分析技巧”可以將正確的法律或法則適用在具體的事實情況。而“寫作技巧”則能幫助讀者有條理地分析考題。

第二，讀者可以從案例的研讀學習到律師執業技巧，對日後的生涯規劃有相當大的幫助。臺灣的經濟繁榮和政治安定吸引許多外國人士來臺觀光或投資，每分鐘有數以百計的國際商業交易，每天更有數以千計的臺灣旅客在世界各國旅行。面對往來頻繁，像是造成死亡或人身財產傷害的犯罪行為、違約行為、和侵權行為在臺灣境內、外層出不窮，而這些紛爭皆需倚靠律師的協助來解決。尤其臺灣已經加入世界貿易組織，在不久的將來，外國律師將被允許在臺灣執行涉外法律事務。屆時，唯有法學英語流利、精通外國法律（尤其是英美

法）、並且具備解決跨國爭議經驗的本國律師，才能輕鬆面對外國律師（尤其是美國律師）競爭下的強大壓力。

第三，對於想要精通專利法、著作權法、商標法、營業秘密法、及公平交易法等新興法律領域的讀者有非常大的幫助。臺灣許多法律受到英美法，尤其是美國法的影響甚深。眾多法律的制定與修正，亦經常借鏡美國的相關的法律制度。研讀美國法律和案例的英文原文，很自然地會學習到法律條文中專用的法學英文字彙，並且直接地了解這些法律設計的目的，進而去比較我國與美國法律的差異與制度的優劣，最後有能力去重新審視並建構適合我國國情的法律。

第四，對於具有提昇臺灣國際競爭力使命的法律人更需要藉由法學英文的研讀增強自己的實力。以目前臺灣的形勢迫切地需要兼備英語能力的律師，代表臺灣出席世界貿易組織（WTO）或其他國際組織。雖然臺灣已在國際上擔當大任，但是因為中國大陸的阻撓和打壓，使得臺灣不被認同是一個“主權獨立”的國家，而無法成為聯合國的會員。為突破中國大陸所造成的政治孤立，臺灣雖然積極地參與許多國際組織，但是在多國貿易協商中，因缺乏強勢的法律代表捍衛臺灣人民的權益，經常使台灣在國際上屈居下風。英語已然是全世界通用的語言，而法律則是全世界統一的基礎，必須了解只有仰賴全世界都聽得懂的語言，表達立場才能突破臺灣現有的格局，與世界各國建立起此對等的聯繫。

本書的目的是希望法律人在了解到學習法律英文的好處以及重要性之後，能用不同的心情面對這門學

科。也希望藉由本書可以減少法律人在學習英美法時所產生的焦慮與苦惱。本書是根據作者身為美國法學院 J.D. 學生的經驗來撰寫，希望讀者在閱讀本書之後能用更寬闊的視野面對自己的法律專業。

林利芝  
台北，2004.03



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# Morrison v. Olson

## The Appointment of an Independent Counsel



### 獨立檢察官的任命

此篇英文原文是摘錄自美國最高法院判決  
Morrison v. Olson, 487 U.S. 654 (1988).



原文



This case presents us with a challenge to the independent counsel provisions of the Ethics in Government Act of 1978. We hold today that these provisions of the Act do not violate the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, or the limitations of Article III, nor do they impermissibly interfere with the President's authority under Article II in violation of the constitutional principle of separation of powers.

Briefly stated, Title VI of the Ethics in Government Act (Title VI or the Act) allows for the appointment of an "independent counsel" to investigate and, if appropriate, prosecute certain highranking Government officials for violations of federal criminal laws. The Act requires the Attorney General, upon receipt of information that he determines is "sufficient to constitute grounds to investigate whether any person covered by the Act may have violated any Federal criminal law," to conduct a preliminary investigation of the matter. When the Attorney General has completed this investigation, or 90 days has elapsed, he is required to report to a special court (the Special Division) created by the Act "for the purpose of appointing independent counsels." If the Attorney General determines that "there are no reasonable grounds to believe that further investigation is warranted," then he must notify the Special Division of this result. In such a case, "the division of the court shall have no power to appoint an independent counsel." If, however, the Attorney General has determined that there are "reasonable grounds to believe that further investigation or prosecution is warranted," then he "shall apply to the division of the court for the appointment of an independent counsel." The Attorney General's application to the court "shall contain sufficient information to assist the court in selecting an independent counsel and in defining that independent counsel's prosecutorial jurisdiction." Upon receiving this application, the Special Division "shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction."

With respect to all matters within the independent counsel's jurisdiction, the Act grants the counsel "full power and independent authority to exercise all investigative and prosecutorial functions

and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice.” The functions of the independent counsel include conducting grand jury proceedings and other investigations, participating in civil and criminal court proceedings and litigation, and appealing any decision in any case in which the counsel participates in an official capacity. Under § 594(a)(9), the counsel’s powers include “initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States.” The counsel may appoint employees, may request and obtain assistance from the Department of Justice, and may accept referral of matters from the Attorney General if the matter falls within the counsel’s jurisdiction as defined by the Special Division. The Act also states that an independent counsel “shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.” In addition, whenever a matter has been referred to an independent counsel under the Act, the Attorney General and the Justice Department are required to suspend all investigations and proceedings regarding the matter. An independent counsel has “full authority to dismiss matters within his or her prosecutorial jurisdiction without conducting an investigation or at any subsequent time before prosecution, if to do so would be consistent” with Department of Justice policy.

Two statutory provisions govern the length of an independent counsel’s tenure in office. The first defines the procedure for removing an independent counsel. Section 596(a)(1) provides: “An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the

personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."

If an independent counsel is removed pursuant to this section, the Attorney General is required to submit a report to both the Special Division and the Judiciary Committees of the Senate and the House "specifying the facts found and the ultimate grounds for such removal." Under the current version of the Act, an independent counsel can obtain judicial review of the Attorney General's action by filing a civil action in the United States District Court for the District of Columbia. Members of the Special Division "may not hear or determine any such civil action or any appeal of a decision in any such civil action." The reviewing court is authorized to grant reinstatement or "other appropriate relief."

The other provision governing the tenure of the independent counsel defines the procedures for "terminating" the counsel's office. Under § 596(b)(1), the office of an independent counsel terminates when he or she notifies the Attorney General that he or she has completed or substantially completed any investigations or prosecutions undertaken pursuant to the Act. In addition, the Special Division, acting either on its own or on the suggestion of the Attorney General, may terminate the office of an independent counsel at any time if it finds that "the investigation of all matters within the prosecutorial jurisdiction of such independent counsel have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions."

Finally, the Act provides for congressional oversight of the activities of independent counsel. An independent counsel may from time to time send Congress statements or reports on his or her activities. The “appropriate committees of the Congress” are given oversight jurisdiction in regard to the official conduct of an independent counsel, and the counsel is required by the Act to cooperate with Congress in the exercise of this jurisdiction. The counsel is required to inform the House of Representatives of “substantial and credible information which the counsel receives that may constitute grounds for an impeachment.” In addition, the Act gives certain congressional committee members the power to “request in writing that the Attorney General apply for the appointment of an independent counsel.” The Attorney General is required to respond to this request within a specified time but is not required to accede to the request.

The proceedings in this case provide an example of how the Act works in practice. In 1982, two Subcommittees of the House of Representatives issued subpoenas directing the Environmental Protection Agency (EPA) to produce certain documents relating to the efforts of the EPA and the Land and Natural Resources Division of the Justice Department to enforce the “Superfund Law.” At that time, appellee Olson was the Assistant Attorney General for the Office of Legal Counsel (OLC), appellee Schmults was Deputy Attorney General, and appellee Dinkins was the Assistant Attorney General for the Land and Natural Resources Division. Acting on the advice of the Justice Department, the President ordered the Administrator of EPA to invoke executive privilege to withhold certain of the documents on the ground that they contained “enforcement sensitive information.” The Administrator obeyed this order and withheld the documents. In response, the House voted to hold the

Administrator in contempt, after which the Administrator and the United States together filed a lawsuit against the House. The conflict abated in March 1983, when the administration agreed to give the House Subcommittees limited access to the documents.

The following year, the House Judiciary Committee began an investigation into the Justice Department's role in the controversy over the EPA documents. During this investigation, appellee Olson testified before a House Subcommittee on March 10, 1983. Both before and after that testimony, the Department complied with several Committee requests to produce certain documents. Other documents were at first withheld, although these documents were eventually disclosed by the Department after the Committee learned of their existence. In 1985, the majority members of the Judiciary Committee published a lengthy report on the Committee's investigation. The report not only criticized various officials in the Department of Justice for their role in the EPA executive privilege dispute, but it also suggested that appellee Olson had given false and misleading testimony to the Subcommittee on March 10, 1983, and that appellees Schmults and Dinkins had wrongfully withheld certain documents from the Committee, thus obstructing the Committee's investigation. The Chairman of the Judiciary Committee forwarded a copy of the report to the Attorney General with a request, pursuant to 28 U. S. C. § 592(c), that he seek the appointment of an independent counsel to investigate the allegations against Olson, Schmults, and Dinkins.

The Attorney General directed the Public Integrity Section of the Criminal Division to conduct a preliminary investigation. The Section's report concluded that the appointment of an independent counsel was warranted to investigate the Committee's allegations

with respect to all three appellees. After consulting with other Department officials, however, the Attorney General chose to apply to the Special Division for the appointment of an independent counsel solely with respect to appellee Olson. The Attorney General accordingly requested appointment of an independent counsel to investigate whether Olson's March 10, 1983, testimony "regarding the completeness of OLC's response to the Judiciary Committee's request for OLC documents, and regarding his knowledge of EPA's willingness to turn over certain disputed documents to Congress, violated 18 U. S. C. § 1505, § 1001, or any other provision of federal criminal law." The Attorney General also requested that the independent counsel have authority to investigate "any other matter related to that allegation."

On April 23, 1986, the Special Division appointed James C. McKay as independent counsel to investigate "whether the testimony of Olson and his revision of such testimony on March 10, 1983, violated either 18 U. S. C. § 1505 or § 1001, or any other provision of federal law." The court also ordered that the independent counsel "shall have jurisdiction to investigate any other allegation of evidence of violation of any Federal criminal law by Theodore Olson developed during investigations, by the Independent Counsel, referred to above, and connected with or arising out of that investigation, and Independent Counsel shall have jurisdiction to prosecute for any such violation." McKay later resigned as independent counsel, and on May 29, 1986, the Division appointed appellant Morrison as his replacement, with the same jurisdiction.

In January 1987, appellant asked the Attorney General pursuant to § 594(e) to refer to her as "related matters" the Committee's allegations against appellees Schmultz and Dinkins. The Attorney

General refused to refer the matters, concluding that his decision not to request the appointment of an independent counsel in regard to those matters was final under § 592(b)(1). Appellant then asked the Special Division to order that the matters be referred to her under § 594(e). On April 2, 1987, the Division ruled that the Attorney General's decision not to seek appointment of an independent counsel with respect to Schmuts and Dinkins was final and unreviewable under § 592(b)(1), and that therefore the court had no authority to make the requested referral. The court ruled, however, that its original grant of jurisdiction to appellant was broad enough to permit inquiry into whether Olson may have conspired with others, including Schmuts and Dinkins, to obstruct the Committee's investigation.

Following this ruling, in May and June 1987, appellant caused a grand jury to issue and serve subpoenas ad testificandum and duces tecum on appellees. All three appellees moved to quash the subpoenas, claiming, among other things, that the independent counsel provisions of the Act were unconstitutional and that appellant accordingly had no authority to proceed. On July 20, 1987, the District Court upheld the constitutionality of the Act and denied the motions to quash. The court subsequently ordered that appellees be held in contempt pursuant to 28 U. S. C. § 1826(a) for continuing to refuse to comply with the subpoenas. The court stayed the effect of its contempt orders pending expedited appeal.

A divided Court of Appeals reversed. The majority ruled first that an independent counsel is not an "inferior Officer" of the United States for purposes of the Appointments Clause. Accordingly, the court found the Act invalid because it does not provide for the independent counsel to be nominated by the President and confirmed by the