

# 大学法律英语



# 高级教程

ADVANCED COLLEGE LEGAL ENGLISH

主编 张法连



外语教学与研究出版社  
FOREIGN LANGUAGE TEACHING AND RESEARCH PRESS

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# 前言

法律英语是法律科学与英语语言学有机结合形成的一门实践性很强的交叉学科，是ESP（English for Specific Purpose）最重要的分支之一。法律英语是以普通英语为基础，在立法和司法等活动中形成和使用的具有法律专业特点的语言，是指表述法律科学概念以及诉讼或非诉讼法律事务时所使用的英语。当今世界的发展日新月异，经济全球化进程突飞猛进，国际交流合作日益加强，涉外法务活动空前频繁。经济全球化过程中我们所面临的很多问题其实都是法律问题，而这些法律问题中的绝大多数又都属于涉外法律的工作范畴。由于法律文化、法律条款的差异，中外双方在合作过程中不可避免会出现许多矛盾和分歧，减少、化解这些矛盾和分歧需要沟通谈判，甚至需要通过法律手段来解决问题。所有这些工作都需要法律工作者通过专业外语完成。因此，法律英语的重要性日益彰显，掌握专业外语已经成为法律人必备的职业素质。十八届四中全会提出要加强涉外法律工作，运用法律手段来维护我国的发展利益。法律英语证书（LEC）全国统一考试的成功推出，中央政法委、教育部“卓越法律人才计划”的顺利启动，都无疑把法律英语的学习和研究推向一个新的高潮。

众所周知，美国法是英美法系的典型代表，其法律体系完整、内容丰富，既有传统的普通法，又有新兴的成文法；既有统一的联邦法，又有各州的法律。同时，美国法在世界范围内影响深远，学习研究美国法意义重大，这不仅表现为许多国家都在研究美国的法律规则，借鉴其成熟做法，还表现为许多国际公约也参照美国法的理念、原则、规则制定。因此，本书主要介绍美国法，希望读者通过学习权威、实用的美国法律知识，掌握地道、纯正的法律英语。一般的语言教材都会系统地讲授语法知识，但本书的编写设想学生已经完成了从中学英语到大学低年级的基础英语学习，系统掌握了英语语法等基础知识并领会式认知约6000个英语单词。

本书共分为基础阶段和提高阶段两册，具有以下特点：

首先，编者参考了大量的美国原版法学书籍，包括美国法学院教材及大量判例，力求实现教材内容的权威性和丰富性。本书引用了许多极具代表性的英文案例。英美法系是判例法系，无论是法官还是律师都特别注重对判例的研究，因此学习美国法不能绕过案例，通过研究案例更有利于掌握标准的法律英语，也更容易掌握美国法的精

髓。本书选取了几十个经典案例，以期最大程度地展现美国法原貌。

其次，本书力求内容丰富，几乎涉及到了法律英语的听说读写译的各个方面。教材在编写上遵循由总述到具体、由浅入深的原则，基本上达到《大学法律英语教学大纲》提出的基础阶段和提高阶段的目标要求。

再次，本书在各章后都附有相关练习题目，以帮助学生熟练掌握美国法基础知识和英美法律文化知识，提高法律英语读、写、译等基本能力。

本册书是大学法律英语的提高阶段部分，共有三部分。第一部分对美国六个主干部门法（美国宪法、合同法、侵权法、财产法、证据法、刑法/刑事诉讼法）基本内容进行概括介绍并选取典型案例诠释有关知识点。第二部分是自选学习内容，这是为了贯彻《大学法律英语教学大纲》“6+1”学习内容的指导思想而编写的，包括美国的民事诉讼法、知识产权法和美国商法的基本知识，学生可根据自己的实际需要自主选择使用。第三部分介绍了美国法律文书写作的基本知识，包括法律备忘录和案件辩论书的具体写法，这是涉外法务工作人员需熟练掌握的不可或缺的知识内容。这三部分内容浑然一体，又相互独立。学习本教材不一定要严格按前后编写顺序进行，教师完全可以根据学生的具体情况挑选合适的内容安排教学。本册教材内容可供学生一学期使用（比如只选学美国主干部门法内容），也可供学生一学年使用。

编写本书过程中，我们参考了大量国内外有关资料，在此谨对原作者表示谢忱。参加本书编写工作的还有北京外国语大学郑小军教授、中国教育科学研究院陈春勇副研究员、中国石油大学徐文彬副教授、中国海洋大学高国栋副教授、广西民族大学鲁学武副教授、河南工业大学杜巧阁副教授、对外经济贸易大学周玲玲副教授、西北政法大学邢楠讲师、河南财经政法大学朱洁讲师等。感谢法律英语证书（LEC）全国统一考试指导委员会将该套教材指定为复习应考LEC的参考用书。

各位教师或同学在使用本书的过程中有什么问题，欢迎及时与编者联系：[zhangbook16@yahoo.com](mailto:zhangbook16@yahoo.com)。

编者

2015年6月于中国政法大学



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**Part**

**1**

**Introduction to American Law**



# 1

## Chapter

# Constitutional Law

## 导读

美国宪法规划了法律的整体框架，是美国法律的灵魂 (soul)。宪法课上研讨的是美国历史上联邦最高法院所审案件中最富争议的内容。宪法问题还是法院判决书、学术著述和庭审中频繁触及的话题。

宪法的一个核心理念是立法、司法、行政三权分立、相互制衡，这也是宪法的重点内容。

### 一、司法权 (Judicial Power)

美国政府是一个权力有限政府，只有经过宪法授权的行为才是合法行为。宪法第三条设定了联邦法院的体系，规定了联邦法院的管辖范围。

联邦法院有两种：一种称作“第三条法院” (Article III Courts)，也就是国会根据联邦宪法第三条第一款的规定设立的法院；一种称作“第一条法院” (Article I Courts)，也就是国会为了行使方方面面的立法权而设立的法院，这类法院不但有司法功能，有时候也具有行政功能。

联邦最高法院的管辖权，可以分为初审管辖权 (original jurisdiction) 和上诉管辖权 (appellate jurisdiction)。初审管辖包括涉及大使、驻外高级外交使节与领事的案件以及美国政府是一方当事人的案件。对于涉及宪法、国会制定的法律的案件，涉及国际条约的案件，除了国会规定的例外情况，最高法院都有管辖权。

### 二、立法权 (Legislative Power)

宪法以列举的方式授予国会特定的权力，规定在第一条第8款；同时也通过“必要且适宜”条款 (Necessary and Proper Clause) 间接授予了国会辅助性的权力。所谓必要且适宜的权力，就是为确保联邦政府任一分支机构权力的实施，国会有权制定必要

且适宜的法律。

宪法所列举的联邦国会的权力包括税收权、财政开支权、商务管理权（管理对外、州际、与印第安部落之间的商务贸易）、宣战权、调查权、财产处分权、破产规范权、邮政权、与公民身份相关的权力、海事海商权（*admiralty power*）、货币制造与度量衡确定权、专利 / 著作权（*copyright*）权等。

国会可以自行决定将立法权委托行政官员或者行政机关行使，但是必须遵守特定的限制。

### 三、对个人权利的保护与对政府行为或私人行为的限制

宪法的前10条修正案（又称作权利法案（*Bill of Rights*））既是对个人权利的保护，又是对联邦政府权利的限制。第14条修正案规定，任何州不经法律规定的正当程序、不提供法律规定的平等保护不得剥夺任何人的生命、自由和财产。

对私人行为的限制主要体现在宪法的商务条款和外州公民权利条款，主要内容是联邦最高法院允许国会通过相关规定限制个人对他人的权力。

宪法中的“合同条款”（*contract clause*）禁止损害合同权利的溯及性立法（*retroactive legislation*）。剥夺公民权法案（*bills of attainder*），即不经司法审判就对个人施以处罚的立法，也是被宪法所禁止的。根据宪法第5条和第14条修正案，具有溯及力的立法和其他政府行为可能会违背宪法的正当程序（*due process*）条款。

正当程序条款中，第5条修正案是适用于联邦政府的，第14条修正案是保护个人不受州政府行为侵害的。正当程序条款规定，不经正当法律程序，政府不得剥夺个人的生命、财产和自由。它强调程序的公正，至少要确保当事人有机会向一个公正、中立的裁判者表达异议。

宪法的正当程序条款和平等保护条款（*Equal Protection Clause*）以保障法律公平为目的。实体性正当程序（*substantive due process*）确保法律的合理性和非任意性，平等保护条款确保情况相似的人受到相似的对待。

法院审查（*review*）有关法律是否违反上述条款时，采取了一定的审查标准（*standard of review*）。标准有三：严格审查标准（*strict scrutiny*）、中度审查标准（*intermediate scrutiny*）和最低审查标准（*minimal scrutiny*）。

平等保护条款针对的对象限于各州行为，但是联邦政府明显不合理的歧视显然也是违反平等保护条款的。立法行为或者政府行为仅仅具有歧视效果也并不足以启动严格审查程序或者中度审查程序；政府还必须有歧视的意图。歧视意图的表现方式有三：面部歧视（*facial discrimination*）、适用歧视（*discriminatory application*）和歧视动机（*discriminatory motive*）。

### 四、基本权利

公民的基本权利包括隐私权（*right of privacy*）、选举权（*right to vote*）、迁徙权（*right to travel*）等。

公民的隐私权多种多样，包括婚姻、堕胎、生子等，都属于基本权利。影响基本权利的法律的审核标准是严格标准；除非为保护极其重要的权益所必需，否则这类法

律很难得到法院支持。

年龄在18岁以上的美国公民都有选举权。选举权也属于基本权利，通过严格审查后法律才能对这些权利予以限制。

迁徙权分为州际迁徙权和国际迁徙权。州际迁徙是基本权利，如果某个州将特定的居住年限规定为州际迁徙的条件，那么这一规定必须按照严格标准进行审查，通过后方为有效。迄今联邦最高法院尚未将国际迁徙宣布为基本权利，但是从正当程序规则中似乎可以推知，联邦政府不得随意干涉个人的国际迁徙权。

## Text

## The Judicial Power

### 1. Article III

The federal government is a government of limited powers, which means that for federal action to be legitimate, it must be authorized. The Constitution is the instrument that authorizes the federal government to act. Thus, whenever a question involves action by an entity of the federal government, the action will be valid only if it is authorized by the Constitution. The Constitution authorizes a federal court system in Article III, which provides that federal courts shall have Judicial Power over all “cases and controversies”:

- 1) Arising under the Constitution, laws, or treaties of the United States;
- 2) Of admiralty and maritime jurisdiction;
- 3) In which the United States is a party;
- 4) Between two or more states;
- 5) Between a state and citizens of another state;
- 6) Between citizens of different states;
- 7) Between citizens of the same state claiming lands under grants of different states; and
- 8) Between a state or citizens thereof and foreign states, citizens, or subject.

### 2. Federal Courts

Only the action of Article III courts are the subject of our outline, but you should know that there are two types of federal courts.

#### 1) Article III Courts

Article III courts are those established by Congress pursuant to the provisions of Article III, Section 1. Although Congress has plenary powers to delineate the

plenary powers 全权

jurisdictional limits, both original and appellate, of these courts, it is bound by the standards of judicial power set forth in Article III as to subject matter, parties, and the requirement of “case or controversy.” Thus, Congress cannot require these courts to render advisory opinions or perform administrative or non-judicial functions.

## 2) Article I Courts

Congress has created certain others, however, by way of implementing its various legislative powers, e.g., United States Tax Court, courts of the District of Columbia. Judges of such Article I courts do not have life tenure or protection from salary decrease as do Article III court judges. Article I courts are sometimes vested with administrative as well as judicial functions, and the congressional power to create such “hybrid” courts has been sustained by the Supreme Court.

## 3. Jurisdiction of the Supreme Court

### 1) Original (Trial) Jurisdiction

Under Article III, Section 2, the Supreme Court has original jurisdiction “in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party.” This provision is self-executing: *Congress may neither restrict nor enlarge the Supreme Court’s original jurisdiction, but Congress may give concurrent jurisdiction to lower federal courts and has done so regarding all cases except those between states.*

### 2) Appellate Jurisdiction

Article III, Section 2 further provides that “in all other cases before mentioned [i. e., arising under the Constitution, Act of Congress, or treaty], the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”

## 4. Constitutional and Self-Imposed Limitations on Exercise of Federal Jurisdiction-police of “Strict Necessity”

### 1) No Advisory Opinions

The Supreme Court’s interpretation of the “case and controversy” requirement in Article III bars rendition of “advisory” opinion. Thus, federal courts will not render decisions in moot cases, collusive suits, or cases involving challenges to governmental legislation or policy whose enforcement is neither actual threatened.

### 2) Ripeness — Immediate Threat of Harm

A plaintiff generally is not entitled to review of a state law before it is enforced (i.e., may not obtain a declaratory judgment). Thus, a federal court will not hear a case unless

render 作出(判决); 执行, 实施

concurrent jurisdiction 共同管辖权

declaratory judgment 宣告式判决, 确认判决

the plaintiff has been harmed or there is an immediate threat of harm.

### 3) Mootness

A federal court will not hear a case that has become moot; a real, live controversy must exist at all stages of review, not merely when the complaint is filed.

### 4) Standing

A plaintiff will be able to show a sufficient stake in the controversy only if he can show an injury in fact — caused by the government — that will be remedied by a decision in his favor (i.e., causation and redressability).

#### (1) Injury

To be standing, a person must be able to assert that she is injured by a government action or that the government has made a clear threat to cause injury to her if she fails to comply with a government law, regulation, or order. Some specific injury must be alleged, and it must be more than the merely theoretical injury that all persons suffer by seeing their government engage in unconstitutional actions.

#### (2) Causation

There must be a causal connection between the injury and the conduct complained of — i.e., the injury must be traceable to the challenged conduct of the defendant and not be attributable to some independent third party not before the court.

#### (3) Redressability

In determining whether a litigant has a sufficient injury to establish standings, courts ask whether a ruling favorable to the litigant would eliminate the harm to him. If a court order declaring a government action to be illegal or unconstitutional (and ending that government action) would not eliminate the harm to the litigant, then that individual does not have the types of specific injury that would grant him standing to challenge the government action.

### 5) Adequate and Independent State Grounds

The Supreme Court will hear a case from a state court only if the state court judgment turned on federal grounds. The Court will refuse jurisdiction if it finds adequate and independent nonfederal grounds to support the state decision.

#### (1) “Adequate”

The nonfederal grounds must be “adequate” in that they are fully dispositive of the case, so that even if the federal grounds are wrongly decided, it would not affect the outcome of the case.

#### (2) “Independent”

The nonfederal grounds must be “independent”: If the state court’s interpretation of its state provision was based on federal case law interpreting an identical federal provision, the state law grounds for the decision are not independent.



## 6) Abstention

### (1) Unsettled State Law

When a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand (“abstain” temporarily), so as to give state courts a chance to settle the underlying state law question and thus potentially avoid the needless resolution of a federal constitutional issue. [*Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941)]

### (2) Pending State Proceedings

Generally, federal courts will not enjoin pending state criminal proceedings.

## 7) Eleventh Amendment Limits on Federal Courts

The Eleventh Amendment is a jurisdictional bar that modifies the judicial power by prohibiting a federal court from hearing a private party’s or foreign government’s claims against a state government. [*See Hans v. Louisiana*, 134 U.S. 1 (1890)]

### (1) What Is Barred?

The Eleventh Amendment’s jurisdictional bar extends to the following:

- a. Actions against state governments for damages;
- b. Actions against state governments for injunctive or declaratory relief where the state is named as a party;
- c. Actions against state government officers where the effect of the suit will be that retroactive damages will be paid from the state treasury or where the action is the functional equivalent of a quiet title action that would divest the state of ownership of land; and
- d. Actions against state government officers for violating state law.

### (2) What Is Not Barred?

#### a. Actions Against Local Governments

The Eleventh Amendment protects only state governments. Local government (e.g., cities or counties) is not protected.

#### b. Actions by the United States Government or Other State Governments

Actions by the United States Government to other state governments are not barred.

*Note: Native American tribes are treated as other private parties, and so they are barred from bringing an action against a state government in federal court. [Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991)]*

### (3) Exceptions to Eleventh Amendment

#### a. Certain Actions Against State Officers

The Supreme Court allows the following actions to be brought against state officials despite the Eleventh Amendment:

- (a) Actions against state officers for injunctions
- (b) Actions against state officers for monetary damages from officer
- (c) Actions against state officers for prospective payment from state

#### b. State Consents

A state may consent to suit in federal court. However, no consent will be found

unless the state clearly waives its Eleventh Amendment immunity.

c. Congressional Removal of Immunity Under the Fourteenth Amendment

Congress can remove the states' Eleventh Amendment immunity under its power to prevent discrimination under the Fourteenth Amendment.

## Legislative Power

### 1. Enumerated and Implied Powers

The Constitution grants Congress a number of specific powers, many of which are enumerated in Article I, Section 8. It also grants Congress auxiliary power under the Necessary and Proper Clause.

1) Necessary and Proper "Power"

The Necessary and Proper Clause grants Congress the power to make all laws necessary and proper (i.e., appropriate) for carrying into execution any power granted to any branch of the federal government.

2) Taxing Power

Congress has the power to lay and collect taxes, imposts, and excises, but they must be uniform throughout the United States. [Art. I, Section 8] Capitation or other direct taxes must be laid in proportion to the census [Art. I, Section 9, cl.4], and direct taxes must be apportioned among the states.

3) Spending Power

Congress may spend to "provide for the common defense and general welfare." [Art. I, Section 8] This spending may be for any public purpose — not merely the accomplishment of other enumerated powers. However, nonspending regulations are not authorized. Remember that the Bill of Rights still applies to this power.

4) Commerce Power

Article I, Section 8, Clause 3 empowers Congress to "regulate commerce with foreign nations and among the several states, and with the Indian tribes."

(1) Definition of Commerce

(a) Includes Basically All Activity Affecting Two or More States

Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. 1 (1824), defined commerce as "every species of commercial intercourse which concerns more states than one" and included within the concept virtually every form of activity involving or affecting two or more states.

(b) Includes Transportation or Traffic

The Court has consistently regarded transportation or traffic as commerce whether or not a commercial activity is involved.

(2) "Substantial Economic Effect"

The Supreme Court has sustained congressional power to regulate any activity, local

capitation 人头税; 按人头计算

or interstate, that either it itself or in combination with other activities has a “substantial economic effect upon,” or “effect on movement in,” interstate commerce.

#### 5) War and Related Powers

Article I, Section 8 gives Congress the power to declare war, raise and support armies, provide for and maintain a navy, make rules for the government and regulation of the armed forces, and organize, arm, discipline, and call up the militia. Of course, several other congressional powers may have direct or indirect application to military purpose: tax and spending power, commerce power, Senate’s treaty consent power, maritime power, investigatory power, etc.

#### 6) Investigatory Power

The power to investigate to secure information as a basis for potential legislation or other official action (such as impeachment or trying impeachments) is a well-established implied power. It is a very broad power, in that an investigation need not be directed toward enactment of particular legislation, but the following limitations on its use do exist.

#### 7) Property Power

Congress has the power to “dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.” [Art.IV, Section 3] Many other congressional powers (war, commerce, postal, fiscal, etc.) obviously would be unworkable if the ancillary power to acquire and dispose of property of all kinds — real, personal, and intangible — were not also implied from the main grants.

#### 8) No Federal Police Power

Congress has no general police power (i.e., power to legislate for the health, welfare, morals, etc., of the citizens.)

#### 9) Bankruptcy Power

Article I, Section 8, Clause 4 empowers Congress “to establish uniform laws on the subject of bankruptcies throughout the United States.” This power has been interpreted by the Supreme Court as nonexclusive; i.e., state legislation in the field is superseded only to the extent that it conflicts with federal legislation therein.

#### 10) Postal Power

Article I, Section 8, Clause 7 empowers Congress “to establish post offices and post roads.”

##### (1) Exclusive

The postal power has been interpreted as granting Congress a postal monopoly. Neither private business nor the states may compete with the Federal Postal Service absent Congress’s consent. [*Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991)]

ancillary power 附属权 (力)

police power 治安权; 警权

## (2) Scope of Power

Congress may validly classify and place reasonable restrictions on use of the mails, but may not deprive any citizen or group of citizens of the general mail “privilege” or regulate the mail in such a way as to abridge freedom of speech or press (except under valid standards, such as “obscenity”) or violate the ban of the Fourth Amendment against unreasonable search and seizure.

## 11) Power over Citizenship

Article I, Section 8, Clause 4 empowers Congress “to establish a uniform rule of naturalization.”

### Exclusion of Aliens

Congress’s power to exclude aliens is broad

#### (a) Nonresident Aliens

Aliens have no right to enter the United States and can be refused entry because of their political beliefs.

#### (b) Resident Aliens

Resident aliens are entitled to notice and hearing before they can be deported.

## 12) Admiralty Power

Although congressional power to legislate in maritime matters is not expressed in the Constitution, the Supreme Court has implied it from exclusive jurisdiction given the federal courts in this field by Article II, Section 2, supported by the Necessary and Proper Clause of Article I, Section 8.

## 13) Power to Coin Money and Fix Weights and Measures

Congress has the power to coin money and fix the standard of weights and measures under Article I, Section 8, Clause 5.

## 14) Patent / Copyright Power

Congress has the power to control the issuance of patents and copyrights under Article I, Section 8, Clause 8.

## 2. Delegation of Legislative Power

### 1) Broad Delegation Allowed

Congress has broad discretion to delegate its legislative power to executive officers and / or administrative agencies [*Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)], and even delegation of rulemaking power to the courts has been upheld.

### 2) Limitations on Delegation

#### (1) Power Cannot Be Uniquely Confined to Congress

To be delegable, the power must not be uniquely confined to Congress. For example, the power to declare war cannot be delegated, nor the power to impeach.