

THE COURT IS NOW IN SESSION

# “现在开庭！”

乔钢良

我为美国联邦法官做助理



THE COURT IS NOW IN SESSION

# “现在开庭！”

乔 钢 良

我 为 美 国 联 邦 法 官 做 助 理

生活·读书·新知三联书店

**图书在版编目(CIP)数据**

“现在开庭”!——我为美国联邦法官做助理/乔钢良著.  
北京:生活·读书·新知三联书店,1999.11  
ISBN 7-108-01354-1

I. 现… II. 乔… III. 法院-工作-美国 IV. D971.262

中国版本图书馆 CIP 数据核字(1999)第 39129 号

**责任编辑** 吴 彬  
**封面设计** 张 红  
**版式设计** 姜仕依

---

**出版发行** 生活·读书·新知 三联书店  
(北京市东城区美术馆东街 22 号 邮编 100010)

**经 销** 新华书店  
**排 版** 北京新知电脑印制事务所  
**印 刷** 北京市宏文印刷厂

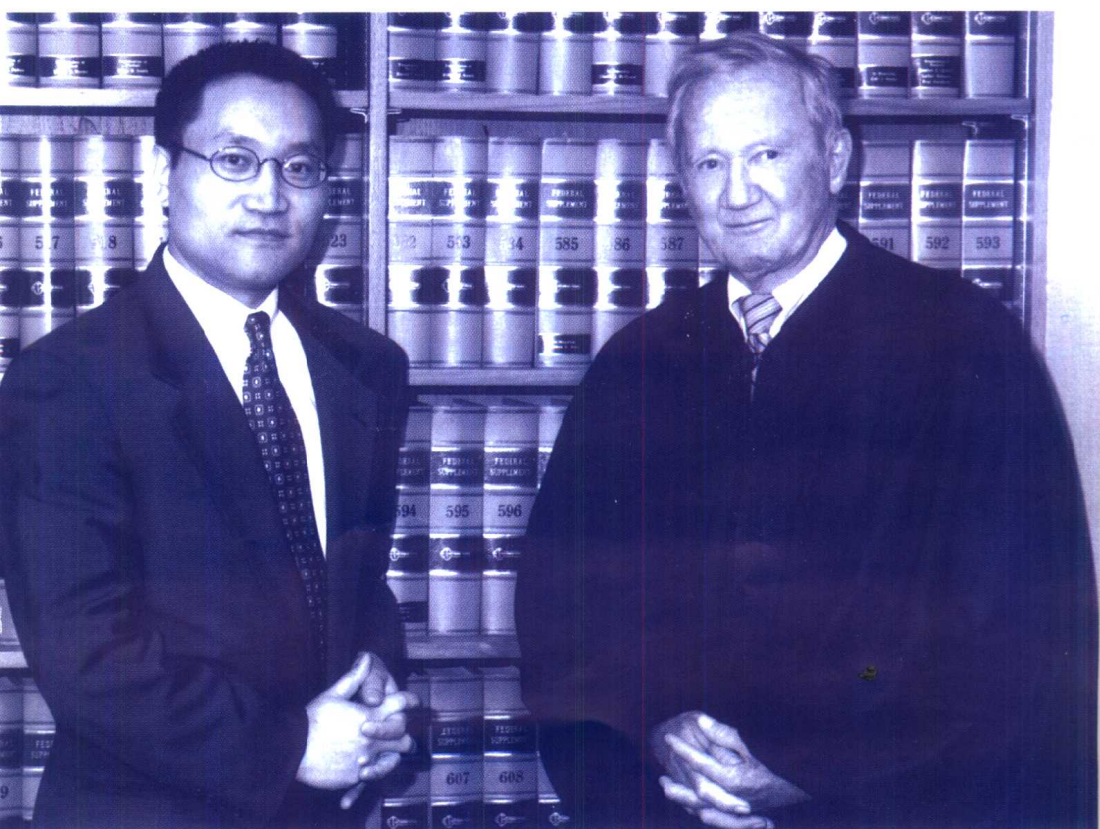
---

850×1168 毫米 32 开 印张 12.375 字数 300 千字  
1999 年 11 月北京第 1 版 1999 年 11 月北京第 1 次印刷  
印数 00,001 - 14,000 册

---

ISBN 7-108-01354-1/D·33

定价 23.50 元



1999年初与海尔曼法官在其图书馆合影。



大急流市考尔德广场。图右为美国密西根西区联邦法院大楼；图左桔红色的雕塑为美国现代雕塑家 Alexander Calder [亚历山大·考尔德] 的雕塑作品 La Grande Vitesse (急流)。



图为海尔曼法官法庭。每次开庭时，法官从右侧国旗旁的后门入庭，助理从图右侧门入庭，同时宣布“请全体起立！”然后在法官席右前方落座。有陪审团参审案件时，陪审团从左侧门入庭，然后在陪审团席入座。图右黑板前桌子上的木轮为挑选陪审员的手摇抽样机。

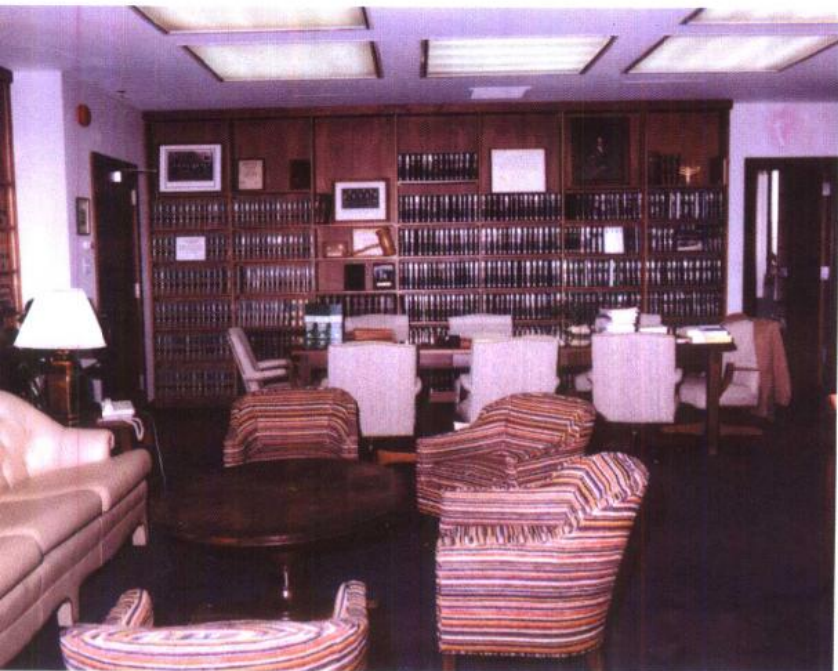




海尔曼法官办公室。右边第一扇和第二扇门为法官助理办公室，第三扇门通向法律图书馆，第四扇门为法官秘书办公室兼接待室，并与法官私人办公室连通。右边的各个办公室都连接在一起。左边中央的一扇门通向法庭。走廊正对的那扇门后面是一个过道，然后便是法官私人办公室的一扇门。陪审团审议室在过道的左边。



海尔曼法官私人办公室东侧。图中为法官办公桌。



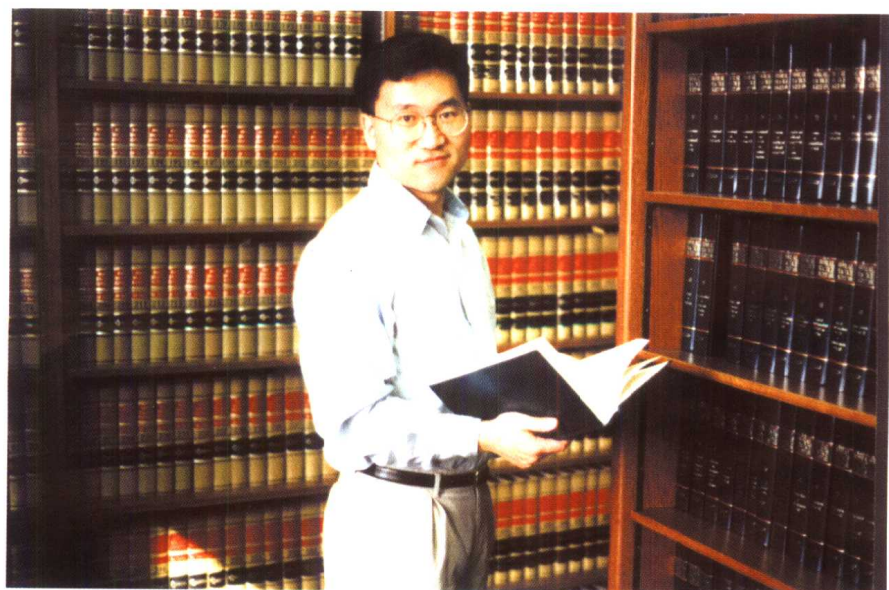
海尔曼法官私人办公室南侧。图左的门通向法庭，图右的门通向海尔曼法官私人休息室，法官的办公桌在右角东侧。



海尔曼法官私人办公室西侧。图左的门通向法官秘书办公室。书架上的部分照片为海尔曼法官宣誓就职时与全体西区法官合影的照片，另有卡特总统致海尔曼法官的信件。



周末在我的办公室。



周末在法官办公室图书馆查阅案例。





海尔曼法官秘书凯瑟的办公室。左墙上的照片为法官1991年与各位助理在法庭内的合影。法官的得意风景照挂在右墙上。



密西根西区联邦法官助理在市内一家公园的合影。



与海尔曼法官(左一)、海尔曼法官夫人(右三)、辛莎亚(左二)、丽莎(右二)和法官前助理汤姆·费德尔(左三)在波士顿一家饭店的合影。



与海尔曼法官和辛莎亚在福特总统图书馆的柏林墙前合影。





与海尔曼法官在法官位于佛罗里达州的别墅合影。



海尔曼法官与助理在他位于密西根湖畔的别墅烧烤。

谨以此书献给我的父母亲



# 代 序

置身于新兴市场和过渡经济体系的经济学家很快便会敏锐地领悟到法律制度对经济发展的重要作用。缺乏健全有效的法律制度,社会财富将被掌握权力的人轻而易举地掠夺;合同的执行会陷入困境;人们对政府的信任将丧失殆尽,改革进程也将举步维艰。

通过乔钢良先生,我接触到了一个由于法治匮乏而导致运行不可预测的实例:钢良是宝维斯律师事务所(总部设在纽约)的律师。当时他为一家在上海与当地公司从事衍生工具业务的跨国银行作代理。设在上海的某中外合资企业与该银行作为对家进行各种外汇现汇掉期业务(例如用荷兰盾兑换美元)。该合资企业在一段时间内由于判断准确,从市场投机活动中赚取了丰厚的利润,但最终由于判断失误,亏欠了该银行一大笔债务。背负着巨大的经济损失,有关人员和该合资企业的中方投资者对此事件感到十分难堪。面对经济和人事方面的双重压力,合资企业舍难求易,干脆拒绝偿付欠款。用金融界的术语来说,这是一起典型的赖账案例。

应原告的邀请,我以专家证人的身份陈述有关金融交易的国际惯例。在上海市高级人民法院出庭作证时,法院的翻译很快便被诸如“逐日盯市”、“履约价格”、“展期”、“选择权”等数十个现代金融服务常用术语难倒了。如果当时没有钢良在场,法庭根本无法继续审案。虽然当时钢良出任原告的律师,但在法庭的同意下,

他亦游刃有余地担当起了法律翻译的角色。他不仅将那些金融术语翻译得贴切妥当,而且还帮助我解释我的论述,促进了我和法官之间的交流。

坐在上海法院时,我还丝毫没意识到,为了让中国同行分享他宝贵的经验,钢良已准备将他在美国联邦法院做法官助理的经历撰写成书。我想没有人能比他更胜任这项工作了!钢良在中国土生土长,精通中国语言和文化,同时,他又曾在美国乔治城大学法学院学习,在美国生活工作了十数年。他的英文就像中文一样流利,而且谙熟英美文化和法律制度。

除了多年从事律师业务之外,钢良曾担任美国联邦法院密西根州西区道格拉斯·海尔曼联邦法官的助理,从而获得了洞悉美国法律制度内部运作的宝贵机会。全美仅有 800 多名联邦法官。本书中,钢良以其亲身经历描述了法官助理工作,深入分析了海尔曼法官曾审理过的一些极富争议的案件,将他担任法官助理的经历栩栩如生地展现在读者面前。他对案件的叙述引人入胜且富有启迪。每一个案件都生动地展现了美国司法和法律教育制度的独特之处。本书将不仅成为律师、法官和法律系学生们喜爱的读物,亦将引起其他阶层人士的兴趣。

西方社会以法治国来解决争议(和防止争端)经历了漫长而艰难的历程。我期望这本书以及与此类似的一系列读物将能加速中国迈向法治大道的进程。

默顿·米勒

1999 年夏于芝加哥

## PREFACE

Economists working in emerging markets and transitional economies soon become acutely aware of the critical importance of legal institutions to economic development. Without sound and effective legal institutions, the wealth of such societies is all too vulnerable to plunder by the politically-connected, the enforcement of contracts is imperiled, and trust in government and the reform process dissipates.

A very practical instance of the uncertainties regarding the rule of law was introduced to me by Qiao Gangliang. Gangliang, then and now an attorney with the New York-based law firm of Paul, Weiss, Rifkind, Wharton & Garrison, represented an international bank doing derivative deals with a variety of local firms in Shanghai. A Shanghai-based Chinese-foreign joint venture entered into various foreign exchange currency swaps (Dutch guilders for U. S. dollars, for example) with the bank as counterparty. For some time, the joint venture firm made substantial profits by making successful bets on market movements. But the firm eventually guessed wrong and found itself owing the bank substantial sums. This loss was not only financially painful, but was embarrassing to the individuals concerned and to the Chinese government-owned investor in the joint venture. Faced with both financial and personal pain, the joint venture took the easy way out: it simply refused to pay up and became a typical “walkaway” in the jargon of the financial services industry.

I was retained as an expert witness by Gangliang’s firm to

discuss international practices in connection with financial transactions. In the course of the trial before the Shanghai High People's Court, the official translator was quickly floored by phrases like mark-to-market, strike price, rollovers, options and dozens of other terms common to the modern financial services industry. The court could not have proceeded had Gangliang not been at my side. Gangliang, though technically an attorney for the plaintiff, stepped out of that role and assumed that of active legal interpreter. He not only translated the technical terms into their closest Chinese equivalents, but was able to explain and facilitate my communications with the judges.

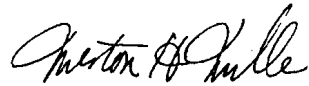
Little did I realize then, as I sat in that Shanghai courtroom, that Gangliang had plans for a book sharing his valuable experience of U. S. law with the Chinese people. I can think of no one better equipped for such a task. Born and raised in China, he is at home in Chinese language and culture. But, as a graduate of Georgetown University Law Center who has lived and worked in the United States for an extended period, he is equally fluent in the English language, and Anglo-American culture and legal institutions.

In addition to his many years of active legal practice, Gangliang has had the priceless opportunity to see the U. S. legal systems, from the inside as it were, by serving as clerk to the federal judge for the Western District of Michigan, the Hon. Douglas W. Hillman, one of only 800 such federal judges throughout the United States and its territories. In this book Gangliang captures his clerkship experiences, ranging from a very personal view of what a law clerk does, to analysis of some of the highly controversial cases tried before Judge Hillman. His account of these cases is both entertaining and



instructive, each case illustrating a particular feature of the U. S. judicial and legal education systems that will be of interest not just to lawyers, judges and law students throughout China, but to the general public as well.

The road to the development in the West of the rule of law as an efficient system of dispute resolution (and conflict prevention) has been long and arduous. Books like this can, I hope, speed China's progress along its own road to the rule of law.

A handwritten signature in black ink, reading "Merton H. Miller". The signature is written in a cursive, flowing style.

Merton H. Miller

Chicago

Summer 1999