法律英语
案例探究

法学专业英语系列教程

杨俊峰 主编
屈文生 夏元军 副主编

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内 容 简 介

本书精选英美法律史上产生过深刻历史影响的经典案例，划分为三章：宪法、刑法（刑事诉讼法）和民商法（国际货物买卖法）。每个案例主要包括四个部分：第一部分为“案例引言”，用中文向读者介绍有关案例的背景知识，引导读者熟悉案例的相关内容；第二部分为“案例及思考问题”，是主体部分，为英文，为方便读者理解，我们从语言和法律两个方面加注大量的注释，这也是本书区别于其他同类书籍的特色；第三部分为“判例影响及意义综述”，使读者从历史影响的角度去理解英美法律传统上的“遵循先例”原则；第四部分为“背景知识补充”，补充与案例相关的材料，或为英文，或为中文，特别注重材料的可读性。

本书适用于已有一定英语水平的在校（英语、法律）本科生、研究生和法律工作者，以及对法律和英语感兴趣的读者。

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PREFACE

前言

法学专业英语系列教程

近些年来全国各大院校都在加快人才培养模式调整的步伐，在深入探讨和实践双语、三语人才培养模式的基础上，又开设了法律、经贸、新闻等专业。而这些专业的最大特点是用英语学习专门知识，也许他们的法律（新闻、经贸）专业知识不及法律（新闻、经贸）专业的学生，但他们的外语水平，尤其是口语和笔头水平普遍受到用人单位的一致好评。对人才市场的调查也给了我们同样的启示，复合型外语人才不仅比单一的语言人才受欢迎，甚至比单一的专业人才更受欢迎（例如，同样是经贸专业，外语类院校的毕业生就比财经类院校的毕业生更具竞争力）。所以，利用英语来教授和学习法律知识也许会在未来的若干年中逐渐成熟，这种新的法律英语教学模式势必会提高学生将来从事涉外法律事务相关工作的能力。也正是因为这个缘由，我们精心组织了一批“复合型老师”编写了这套“法学专业英语系教程”，包括：《法律英语综合教程》、《法律英语案例探究》和《法律英语阅读教程》，以满足广大法律英语爱好者的需求。

案例教学法（Case Method）又被称为“苏格拉底式教学法”（Socratic Method），是英美法系国家如美国和加拿大等国法学院最主要的教学法。这种教学方法是由哈佛法学院前院长克里斯托弗·哥伦布·朗得尔（Christopher Columbus Langdell）于1870年前后提出的，并最早应用于哈佛大学的法学教育之中。这种教学法的特点是主要采用对话式、讨论式、启发式的教育方法，通过向学生提问，不断揭露对方回答问题中的矛盾，引导学生总结出一般性的结论。案例教学法对于培养学生独立思考、怀疑和批判精神起着十分重要的作用。

在我国，案例教学法已在法律教育界实践多年，收到了较好的效果。目前市场上出现的多本法律英语教材中，也多有英文案例的部分。因此，在法律英语教学中运用案例教学法既有必要，也有可能。但是，目前所出版的各种法律英语及相关的专门案例教材中所收录的国外案例或者已被翻译成中文——中国学生容易接受，但起不到英语教育的效果；或者为编辑删选过的全英文案例——可以起到英语教育的

效果，但一般的中国学生阅读英美大法官那逻辑严谨、长难拗口的英文判词还是有困难的。目前亟需一本能弥补这两方面缺陷的法律英语案例方面的教材，《法律英语案例探究》的编写即为此目的。

本书精选英美法律史上有深刻历史影响的经典案例。英美法本无划分部门法的传统，但为符合中国学生的学习和阅读习惯，全部案例划分为三章：宪法、刑法（刑事诉讼法）、民商法（国际货物买卖法）。本书中所编辑的每个案例主要包括四个部分：第一部分为“案例引言”，用中文向读者介绍有关案例的背景知识，引导读者熟悉案例的相关内容；第二部分为“案例及思考问题”，是主体部分，为英文（个别案例有删节），为方便读者理解，我们从语言和法律两个方面加注大量的注释，这也是本书区别于其他书籍的特色；第三部分为“判例影响及意义综述”，让读者从历史影响的角度去理解英美法传统上的“遵循先例”原则；第四部分为“背景知识补充”，补充与案例相关的材料，或为英文，或为中文，或为中英文对照，特别注重材料的可读性。

鉴于各学校的学期长短不一，周课时和学生的英语水平不一，在使用本教材时可根据本校的情况自行确定进度。一般情况下，如果只注重知识的获得，在提前预习较充分的情况下，每课可用2学时完成；如果知识和语言并重，建议每课4学时。两者相比，我们更主张后者，这样，教师既可以将知识的获得交给学生完成，又可以腾出时间讲解语言难点和用法。教师在教学的过程中可以运用如多媒体、播放美国法律电影等多种教学手段，引导学生进行思考和讨论，锻炼学生分析和解决问题的多种能力，全面提高学生的法律素养。

参加本书编写的人员有石伟、李威、李群、杨俊峰、屈文生、荆雷、夏元军、钱泳宏。在此表示衷心的感谢。

我国法律英语的教学和研究方兴未艾，很多学者和专家投入了很大的精力，希望本书的出版能为我国法律英语教学和研究的发展添砖加瓦。由于编者水平有限，加之时间仓促，错误和不当之处在所难免，恳请使用者指正，以便再版时更正。

主编

2007年4月于大连

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第一章

法学专业英语系列教程

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宪法

第一部分 案例引言

1800年的美国大选中，第二任总统约翰·亚当斯（John Adams）竞选败给了托马斯·杰弗逊（Thomas Jefferson）。亚当斯代表的是联邦党，杰弗逊代表的是民主共和党。当时，两党政见相左，派系斗争相当激烈。联邦党虽然在总统大选中败北，但为了日后能够卷土重来，便利用宪法赋予总统的任命联邦法官的权力，极力争取控制不受选举直接影响的联邦司法部门，借以维持联邦党人在美国政治生活中的地位和影响。亚当斯在卸任之前，行使了自己的司法提名权，让尽可能多的联邦党人坐上法官的位子。就在新总统上任的三星期前，联邦党控制的参议院通过法案，新增42个法官职位。威廉·马伯里（William Marbury）是其中之一。亚当斯命令时任国务卿的约翰·马歇尔（John Marshall）来完成这些任命，但是马歇尔尚未完成任命，托马斯·杰弗逊就入主了白宫（White House）。杰弗逊对这些尚未发出去的任命状毫不理会，并命令新上任的国务卿詹姆斯·麦迪逊（James Madison）不要发那些没有发出去的任命状。于是就有了“马伯里诉麦迪逊”这一著名案例。

该案奠定了美国联邦法院的司法审查权的基础，使最高法院成为宪法的最终解释者。可以说，这是美国政治制度史和人类政治制度史上的一个伟大的里程碑。

托马斯·杰弗逊在大选中胜出，担任美国第三任总统（1801—1809），他曾是美国《独立宣言》的起草者。詹姆斯·麦迪逊，人称"美国宪法之父"，后任国务卿、美国第四任总统（1809—1817）。约翰·马歇尔后任美国最高法院首席大法官。

第二部分
案例及思考问题

U. S. Supreme Court

MARBURY v. MADISON, 5 U. S. 137 (1803)[①]

5 U. S. 137 (Cranch)

WILLIAM MARBURY

v.

JAMES MADISON, Secretary of State of the United States

February Term, 1803

Chief Justice John Marshall delivered the opinion[②] of the Court...

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1. Has the applicant[③] a right to the commission he demands?

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3. If they do afford him a remedy, is it a mandamus issuing from this court?

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① 5 U. S. 137 (1803):《美国案例汇编》第5卷，137页开始，1803年判决。U. S. is short for *United States Reports*.

② opinion：法院（或法官）判决意见书。依照《元照英美法词典》的解释，一般指由作出判决的法庭或法官就其审理的案件所作的书面意见，阐释其是如何达成该判决的，内容包括案件事实、本案所适用的法律及判决基于的理由、附带意见（dicta）等。

③ the applicant：申请人，在此指原告。

The first object of inquiry is:

1. Has the applicant a right to the commission he demands?

His right originates in an act① of congress passed in February 1801, concerning the district of Columbia...

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office...

It is therefore decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the secretary of state...

Mr. Marbury, then, since his commission was signed by the president, and sealed by the secretary of state, was appointed; and as the law creating the office gave the officer a right to hold for five years independent of the executive, the appointment was not revocable②; but vested in the officer legal rights which are protected by the laws of his country.

To withhold③ the commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry, which is:

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection...

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence④ of our country, it must arise from the peculiar character of the case.

It behoves us then to inquire whether there be in its composition any ingredient which shall

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① 1801 年 2 月 27 日国会通过《哥伦比亚特区组织法》(*The District of Columbia Organic Act*),授权总统可以任命特区内共 42 名任期 5 年的治安法官(Justices of Peace)。

② revocable: *adj.* 可撤销的,可撤回的,可取消的。

③ withhold: *v.* 扣留(属于他人或他人继承的财产)。

④ jurisprudence: *n.* 法学;法理学;法律哲学;法律体系。按照《牛津英语词典》的解释,此处应翻译为"法律或法律制度"较为合适。

exempt from legal investigation, or exclude the injured party from legal redress...

But when the legislature① proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion②, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy...

It is then the opinion of the Court:

1. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether:

3. He is entitled to the remedy for which he applies. This depends on

(A) the nature of the writ applied for

(B) the power of this court

4. The nature of the writ...

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be..."to do a particular thing therein specified, which appertains to his office and duty,

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① legislature: *n.* 立法机关，立法机构。如：parliament, congress, chamber(s), legislative department, city council.

② discretion: *n.* 裁量权。指公务人员根据授权法的规定，在特定的环境下根据自己的判断和良心执行公务，不受任何他人干涉或控制的权利或权力。

and which the court has previously determined or at least supposes to be consonant to right and justice. . . "

These circumstances certainly concur in this case. . .

This, then, is a plain case of a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired, whether it can issue from this court.

The act① to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States. "

The secretary of state, being a person, holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power② of the United States in one supreme court, and such inferior courts③ as congress shall, from time to time, ordain④ and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction⑤ in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction. "

It has been insisted at the bar, that as the original grant of jurisdiction to the supreme and inferior courts is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature to assign original

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① act: *n.* 法律;制定法。尤指由立法机关所制定的法律,与"statute"词义相同。此处指《1789 年司法法》。

② judicial power: 司法权利。

③ inferior courts: 初级法院,低级法院。指某一特定的司法系统内级别较低,并要接受高级法院令状管理的法院。对于低级法院作出的裁决,当事人有权向高级法院提出上诉。

④ ordain: *v.* 制定;决定。指制定法律和法令。在美国宪法序言中,该词曾与"establish"成对使用,用以表明该宪法的制定。

⑤ original jurisdiction: 初审管辖权。Jurisdiction: *n.* 司法管辖权。

jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals① in which it should be vested... If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance...

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar② that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true; yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause③ already instituted, and does not create that cause...

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution, and it becomes necessary to inquire whether a jurisdiction, so conferred, can be exercised...

The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

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① tribunals: *n.* 法院；法庭；裁判庭。还可以表示“法官席；(某一司法区内的)全体法官；管辖(裁判)权等”。

② bar: *n.* 指法庭。

③ cause: *n.* 诉因，诉讼理由；诉讼，案件。

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty...

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions①, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

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① written constitution:成文宪法。成文宪法形成统一的书面法律文件,又称刚性宪法(rigid constitution),如美国宪法。它与不成文宪法(unwritten constitution),又称柔性宪法(flexible constitution)相对应。

Questions to Consider

1. *If the Supreme Court of the United States had issued the writ of mandamus, how could it have forced Madison to comply with the order? What would have happened if he had ignored it? (In other words, does the Court have enforcement power?)*

2. *In the Court's opinion, is Marbury entitled to his appointment?*

3. *According to the decision, does the Supreme Court of the United States have the authority to issue a writ of mandamus to force Madison to deliver the commission? Explain. Is there any way to reverse the Court's decision?*

4. *In this case, Chief Justice John Marshall and the Court "gave up some power in order to get more." Explain. What power did they give up? What power did they gain? Why did the Court do this?*

5. *Why does the judicial branch, as opposed to the executive or legislative branch, have the power of judicial review?*

6. *What do you think the doctrine of constitutional supremacy?*

7. *Imagine that if Jefferson, rather than Adams, had appointed the Chief Justice of the Supreme Court, would the outcome of this case, and the future of the country, have been different? Why?*

第三部分
判例影响及意义综述

名垂青史的首席大法官约翰·马歇尔在上任之初就面临一个巨大的挑战，不难想象他当时处境的微妙和困难：如果他支持马伯里的诉求，下令麦迪逊发出委任状，麦迪逊必定不会执行，而法院并没有任何手段来执行这一判决。这将大大削弱法院的权威，并创下法院无权过问行政的先例。如果他驳回马伯里的诉求，这无疑是向世人表明联邦党人已向民主共和党人屈服。本案堪称绝妙的判决就产生于这两难境界之中。

经过一番思索，马歇尔和联邦最高法院的法官们终于想出了一个两全其美的办法——运用了司法审查的方式来处理这一案件。1803 年 2 月 24 日，马歇尔宣布了由他起草的联邦最高法院的判决书，对此案做了阐述：

首先，必须弄清楚的第一个问题是，马伯里是否有权得到他所要求的委任状？马歇尔对这个问题做了肯定的回答。他认为，"当一份委任状一经总统签署，任命即为做出；一经国务卿