* 涉外法律人才培养系列教材 *
判决原文*中英参照

Anthology of English and American Judicial Cases

英美司法案例选读

焦洪宝 主编

南开大学出版社

英美司法案例选读

主编　焦洪宝

参编　黄影　陈桂华　严飞行

王岩华　白明华　翟文喆

南开大学出版社

天　津

图书在版编目(CIP)数据

英美司法案例选读 / 焦洪宝主编. —天津 ：南开大学出版社，2017.8
ISBN 978-7-310-05428-2

Ⅰ. ①英… Ⅱ. ①焦… Ⅲ. ①司法－案例－英国②司法－案例－美国 Ⅳ. ①D956.1②D971.2

中国版本图书馆 CIP 数据核字(2017)第 169023 号

南开大学出版社出版发行
出版人：刘立松
地址：天津市南开区卫津路 94 号　　邮政编码：300071
营销部电话：(022)23508339　23500755
营销部传真：(022)23508542　　邮购部电话：(022)23502200
*
三河市同力彩印有限公司印刷
全国各地新华书店经销
*
2017 年 8 月第 1 版　　2017 年 8 月第 1 次印刷
260×185 毫米　16 开本　8.25 印张　202 千字
定价：25.00 元

如遇图书印装质量问题，请与本社营销部联系调换，电话：(022)23507125

目录

（Content）

一、宪法案例

纽约时报公司诉沙利文案

The New York Times Co. v. Sullivan（1964）

【选读理由】（Selected Reason）

在美国社会中，新闻媒体被称为“无冕之王”。由于有美国宪法第1条修正案的保驾护航，它不仅不是政府的喉舌，反而是监督政府的重要力量。1964年3月9日美国最高法院做出判决的纽约时报公司诉沙利文（*The New York Times* Co. v. Sullivan）一案，就是因政府官员控告《纽约时报》构成诽谤而引发的一个重大民事诉讼案件。本案的判决意见从宪法的高度为新闻媒体批评政府与公职官员的权利和自由提供了法律保障，使其成为美国宪政史上的一个里程碑式的判决。

【案件事实】（Facts）

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in *The New York Times* on March 29, 1960. Entitled "Heed Their Rising Voices," the advertisement began by stating that "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the *Bill of Rights*." It went on to charge that "in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom..." Succeeding paragraphs purported to illustrate the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right-to-vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

被申请人沙利文起诉称他受到了1960年3月29日刊载在《纽约时报》上整版广告的诽谤。这篇题为《倾听他们高涨的呼声》的广告文章在一开篇写道：“今天，全世界都知道了。美国南方数以千计的黑人学生，正在发起一次和平示威游行，宣布黑人同样受美国宪法和《权利法案》保护，并享有人格尊严和生存权利。”接下来这篇广告控诉称“在维护这份保障的努力过程中，他们遭遇了前所未有的粗暴对待，施暴者蔑视并践踏了这份在全世界看来将确立保护现代化自由模式的宪法文件……”。接下来的段落描述了一些所谓的事件来佐证这一“恐怖浪潮”。文章最后表达了三项诉求：支持学生运动，为选举权而奋斗，为马丁·路德·金博士在蒙哥马利受到的伪证罪指控做法律辩护——他是此次运动的领袖。

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

Third paragraph:"In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."

Sixth paragraph:"Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten years...*"

广告文本共有 10 段，其中第 3 段和第 6 段的一部分是本案被申请人主张诽谤索赔的依据。第三段写道："在亚拉巴马州蒙哥马利的州议会厅前，当学生们唱完《我的国家，也是你的》这首歌后，学生领袖随即被校方开除。成卡车的警察拿着枪和催泪瓦斯，包围了亚拉巴马州立学院的校园。当全体学生反对在州当局办理重新注册后，他们封锁了学校食堂，试图用饥饿迫使他们就范。"

第六段写道："南方违宪者一次又一次地用恐吓和暴力回答了金博士的和平抗议。他们已经炸毁了他的家，差点杀死他的妻子和孩子。他们殴打他，他们以超速、闲逛和类似的违章为由 7 次逮捕他。现在他们又以伪证罪指控他——这是个能将他投入监狱 10 年以上的重罪。"

Although neither of these statements mentions respondent by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission（Respondent did not consider the charge of expelling the students to be applicable to him, since "that responsibility rests with the State Department of Education"）. As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement "They have arrested [Dr. King] seven times" would be read as referring to him; he further contended that the "They" who did the arresting would be equated with the "They" who committed the other described acts and with the "Southern violators." Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with "intimidation and violence," bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

虽然这些陈述并没有提及本案被申请人沙利文的名字，但他认为在第三段中的"警察"指的就是他这个负责监管警察局的蒙哥马利县市政专员，所以他被指责和警察一起包围校园。他还认为这一段读起来是将封锁食堂以逼迫学生就范的事情归咎于警察，也归咎于他（在他看来，逼迫学生的事情应由政府教育部门承担责任）。就第六段，他认为既然逮捕通常是由警察执行的，那么"他们逮捕金博士 7 次"的叙述读起来就是指向他。他还认为从事逮捕的"他们"看起来和那些从事其他被描述的行为的"他们"以及"南方违宪者"所指向的是同一批人。由此，他认为这一段看起来就是在指控蒙哥马利警察，也是指控他，这些以"恐吓和暴力"应对金博士和平抗议、炸毁他家、殴打他、以伪证罪指控他的人。被申请人与另外 6 个

蒙哥马利县居民做证说他们认为广告中的部分或全部陈述指向的就是作为市政专员的他。

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem and not "My Country, 'Tis of Thee." Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

无可置疑，这两段中的有些表述对发生在蒙哥马利的事件描述并不准确。虽然黑人学生确实在州议会厅前的台阶上集会，但他们唱的是国歌而非《我的国家，也是你的》。虽然有 9 个学生被州教育董事会开除，但并非因为学生领导在州议会的集会，而是因为另一天他们要求蒙哥马利县法院的午餐柜台为他们提供服务。不是所有学生，只是大部分学生通过抵制上课一天的方式抗议驱逐，而并非拒绝注册；几乎所有的学生都进行了下一学期的注册。校园食堂在任何时候都没有被封锁，可能被禁止在那里吃饭的学生只是极少数那些没有办理预先注册申请或者没有要求办理临时饭票的学生。虽然警方有 3 次在校园附近部署了大量警力，但他们在任何时候都没有“包围”校园，他们去校园并非像第三段所暗示的那样和在州议会大厦的示威有任何关系。金博士没有被逮捕过 7 次，只有 4 次。虽然他声称在很多年以前因为他在法庭前闲逛被逮捕时遭到殴打，但逮捕他的一个警察否认有殴打行为发生。

Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel. One of his witnesses, a former employer, testified that if he had believed the statements, he doubted whether he "would want to be associated with anybody who would be a party to such things that are stated in that ad," and that he would not re-employ respondent if he believed "that he allowed the Police Department to do the things that the paper say he did." But neither this witness nor any of the others testified that he had actually believed the statements in their supposed reference to respondent.

被申请人没有就他因起诉的诽谤所遭受的实际损失进行努力证实。被申请人的一个证人，前雇主，做证说如果他相信了报纸的陈述，他将怀疑是否还会有人跟做了广告中所陈述的那些事情的人保持联系；如果他相信了报纸上沙利文所做的那些他许可警察局做的事情，他就再也不会雇沙利文。但无论是这个证人还是其他证人都没有真正地认为报纸中的陈述指向的是被申请人。

The cost of the advertisement was approximately $ 4800, and it was published by the Times

upon an order from a New York advertising agency acting for the signatory Committee. The agency submitted the advertisement with a letter from A. Philip Randolph, Chairman of the Committee, certifying that the persons whose names appeared on the advertisement had given their permission. Mr. Randolph was known to *The Times'* Advertising Acceptability Department as a responsible person, and in accepting the letter as sufficient proof of authorization it followed its established practice. There was testimony that the copy of the advertisement which accompanied the letter listed only the 64 names appearing under the text, and that the statement, "We in the south...warmly endorse this appeal," and the list of names thereunder, which included those of the individual petitioners, were subsequently added when the first proof of the advertisement was received. Each of the individual petitioners testified that he had not authorized the use of his name, and that he had been unaware of its use until receipt of respondent's demand for a retraction. The manager of the Advertising Acceptability Department testified that he had approved the advertisement for publication because he knew nothing to cause him to believe that anything in it was false, and because it bore the endorsement of "a number of people who are well known and whose reputation" he "had no reason to question." Neither he nor anyone else at *The Times* made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.

广告的费用大约 4800 美元。这份广告是由《纽约时报》根据纽约的一家广告代理机构受署名的委员会委托而发布的订单来印发的。代理机构随同广告还提交一封来自委员会主席拉尔夫·阿伯内斯的信，证实其名字出现在广告中的人认可，阿伯内斯对于《纽约时报》广告受理部来说是个负责任的人，这封信本身是表明确有此事的充分证据。但与这封信一起送来的广告文本中只有 64 个名字，并且"我们在南方……热烈赞同这一呼吁"以及包括本案申请人在内的人名，是在收到第一份广告文本之后加上的。每个独立申请人都称他们没有授权使用他的名字，直到他们收到了被申请人的诉请才意识到他们的名字被使用了。广告受理部经理做证说他之所以同意印发这一广告，是因为不知道这里面有虚假，因为有一大批知名人士的署名，这些人的名誉他无法质疑。他和《纽约时报》的其他人都没有人做出努力去核查最近《纽约时报》与广告中描述的事件有关的新闻报道，或用其他方式来核实广告的准确性。

【裁决过程与结果】（Procedure and Disposition）

The present action for libel was brought in the Cir-cuit Court of Montgomery County, Alabama, by a city commissioner of public affairs whose duties included the supervision of the police department; the action was brought against *The New York Times* for publication of a paid advertisement describing the maltreatment in the city of Negro students protesting segregation, and against four individuals whose names, among others, appeared in the advertisement. The jury awarded plaintiff damages of $ 500,000 against all defendants, and the judgment on the verdict was affirmed by the Supreme Court of Alabama in August, 1962 on the grounds that the statements in the advertisement were libelous per se, false, and not privileged, and that the evidence showed malice on the part of the newspaper; the defendants' constitutional objections were rejected on the ground that the First Amendment does not protect libelous publications.

The Newspaper as Petitioner sought review of the decision. On writs of certiorari, the Supreme Court of the United States reversed the judgment and remanded the case to the Alabama Supreme Court.

【裁判理由】（Reasons for Judicial Decision）

【原审意见】

In affirming the judgment, the Supreme Court of Alabama sustained the trial judge's rulings and instructions in all respects. It held that "where the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tend to bring the individual into public contempt," they are "libelous per se"; that "the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff "; and that it was actionable without "proof of pecuniary injury ..., such injury being implied."... It rejected petitioners' constitutional contentions with the brief statements that "The First Amendment of the U.S. Constitution does not protect libelous publications" and "The Fourteenth Amendment is directed against State action and not private action."

亚拉巴马州最高法院在维持原判过程中认可了初审法官的全部推论和观点，并给诽谤罪下了一个很宽的定义："任何刊出的文字只要有损被诽谤者的声誉、职业、贸易或生意，或是指责其犯有可被起诉的罪行，或是使其受到公众的蔑视，这些文字便构成了诽谤。"按照这一原则，上述被公开发布并与原告相关的指责已构成了诽谤，并且无须证明直接伤害的存在就可以起诉，因为伤害是当然存在的。这一判决还拒绝了本案申诉人在宪法有关内容方面的争辩，简要地称"美国宪法第一修正案并不保护诽谤性出版物"和"第十四修正案是针对州的行为，不针对个人行为。"

【生效判决意见】（Opinion by Brennan）

Under Alabama law as applied in this case, a publication is "libelous per se" if the words "tend to injure a person...in his reputation" or to "bring [him] into public contempt"; the trial court stated that the standard was met if the words are such as to "injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust..." The jury must find that the words were published "of and concerning" the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once "libel per se" has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. His privilege of "fair comment" for expressions of opinion depends on the truth of the facts upon which the comment is based. Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight.

The question before us is whether this rule of liability, as applied to an action brought by a

public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

按照本案适用的亚拉巴马州法律，一个出版物只要其措辞“意图伤害一个人的名誉或使其受公众蔑视”就将构成“诽谤”。初审法院认为如果有类似“伤害其公职、导致对其公职的误解、丧失官员的正直性或丧失公众信任”的措辞，就构成诽谤的标准。陪审团必须认定印发的措辞与原告有关，但原告在政府部门担任公众官员本身就足可证明其名誉会受到反映他所任职的机构的表述的影响。一旦诽谤成立，被告将无法就事实问题抗辩，除非他能说服陪审团这些表述都是真实的。他通过表达观点而所享有的公正评论的权益，将依赖于这一评论所基于的事实的真实性。除非他能够免除自己的举证责任，普通损害将被推定存在，无须证明就可被认定金钱赔偿。很明显，真实恶意的存在是要求惩罚性赔偿的前提，按照法律要求，被告可以通过撤回报道而防止收到惩罚性赔偿判决。动机善良和相信是真的并不能否定对恶意的认定，但如果陪审团愿意对此加以衡量的话，只会与减少惩罚性赔偿相关。

我们的问题是本案中有关批评一个政府官员的官方行为的责任认定规则，是否剥夺了宪法第一修正案和第十四修正案所保护的言论和表达的自由。

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

我们认为，宪法对于言论和表达自由的保护要求这样一个联邦规则，即当政府公职官员因处理公众事务遭受批评和指责使个人的名誉可能受到损害时，不能动辄以诽谤罪起诉和要求金钱赔偿，除非公职官员能拿出证据，证明这种指责是出于“真正的恶意”，即明知陈述虚假，或贸然不顾其是否虚假。

We hold today that the Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned malice is “presumed.” Such a presumption is inconsistent with the federal rule. “The power to create presumptions is not a means of escape from constitutional restrictions,” Bailey v. Alabama, 219 U.S. 219, 239; “the showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff ...” Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded.

我们现在持此观点：当政府公职官员提起诉讼要求获得针对其公职行为的批评言论的诽谤赔偿时，宪法给州划定了做出这一认定的权力界限。在本案中适用了需证明真实恶意存在的原则。亚拉巴马州对于给予惩罚性赔偿要求需以证明真实恶意存在为前提，但与普通损害赔偿相关的恶意是推定的。这一推定规则是与联邦规则不符的。创设推定的权利应受制于宪法，造成利益丧失的恶意不能推定而应由原告加以证明。原审法官没有告知陪审团有关普通赔偿和惩罚性赔偿的区别，这可能造成判决的赔偿全部是一个方面或另一个方面的。但我们不知道这个判决是指向于哪个方面。由于此不确定性，原审判决应当被推翻并发回重审。

【附合意见】（Concur by Black）

I concur in reversing this half-million-dollar judgment against *The New York Times* Company and the four individual defendants. In reversing the Court holds that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct."I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power. Unlike the Court, therefore, I vote to reverse exclusively on the ground that *The Times* and the individual defendants had an absolute, unconditional constitutional right to publish in *The Times* advertisement their criticisms of the Montgomery agencies and officials.

我对撤销此要求纽约时报公司及其他四个被告赔偿 50 万美元的判决表示赞同。在撤销判决中法庭认为“宪法给州处理政府公职官员提起诉讼要求获得针对其公职行为的批评言论的诽谤赔偿案件划定权力界限”。我投票同意撤销是基于这样一种认识，即第一和第十四修正案并不仅仅是为州“给遭受与其公共职务行为相关的批评的公职人员”判决赔偿时设定了“权力界限”，而是完全禁止州行使这样的权力。与法庭不同，我投票推翻原判的唯一理由是几位被告有绝对和无条件的宪法权利在《纽约时报》的广告中批评蒙哥马利市各级政府机构及其官员。

【案件影响】（Impact of the Case）

纽约时报公司诉沙利文案是一项具有划时代意义的重要判决，为美国新闻媒体“敢把总统拉下马”式的新闻调查和报道自由提供了前所未有的法律保障。本判决公布后几个小时内，《纽约时报》发表声明，称“法庭的意见使得新闻自由比以往任何时候都更有保证”。通过本案，美国最高法院重申了第一修正案的重要性，并且实际上把通常由各州用普通法管辖的诽谤案件也纳入到宪法的保护范围，“真正的恶意”几乎成为以后衡量所有类似诽谤案的一个标准。纽约时报公司诉沙利文案确立的这一原则起初只适用于担任公职的政府官员，但最高法院后来又通过其他几个判决，将“真正的恶意”原则的适用范围从执行公务的政府官员，扩大到为公众所知的人物，即公众人物（public figure），但并不适用于非官员和非公众人物寻求赔偿的诽谤案，即使被指控为诽谤的陈述涉及“公共关注”的事情。

【思考问题】（Questions）

1. 美国宪法所保护的公民权利的内容有哪些？与我国有何不同？
2. 对公共事务进行随心所欲的言说是一项无条件的宪法权利吗？

二、行政法案例

马伯里诉麦迪逊案

Marbury v. Madison（1803）

【选读理由】（Selected Reason）

行政、立法、司法三权分立是美国的立国根基之一，但在美利坚合众国成立之初，司法的权威与行政、立法相比却比较薄弱。1803 年美国最高法院审理的马伯里诉麦迪逊案（William Marbury v. James Madison, Secretary of States of the United States）是一起原本被任命为治安法官的当事人起诉国务卿不履行职责发放委任状的行政诉讼案例，在当时环境下让最高法院下达执行令状，责令总统直接任命的负责掌管国玺的国务卿发放委任状并不现实，极有可能会被置之不理。时任最高法院首席大法官马歇尔巧妙地利用这桩原本很棘手的行政诉讼案件，提出了最高法院解释宪法及司法机关有权对国家立法行为、行政行为是否违宪做最终审查的观点，并使本案成为美国宪法的司法审查制度的开端。他不仅巧妙地解决了最高法院当时面临的重大危机，同时也维护了最高法院作为最高司法机关的权威和地位，巩固了美国三权分立的政治体制。

【案件事实】（Facts）

On his last day in office, President John Adams named forty-two justices of the peace and sixteen new circuit court justices for the District of Columbia under the *Organic Act*. The *Organic Act* was an attempt by the Federalists to take control of the federal judiciary before Thomas Jefferson took office.

约翰·亚当斯总统在其任期的最后一天根据《哥伦比亚特区组织法》任命了 42 位治安法官（或称太平绅士）以及哥伦比亚特区的 16 名新的巡回法庭法官。联邦党人制定《组织法》的目的是在托马斯·杰斐逊总统就职之前控制联邦司法系统。

The commissions were signed by President Adams and sealed by acting Secretary of State John Marshall (who later became Chief Justice of the Supreme Court and author of this opinion), but they were not delivered before the expiration of Adams's term as president. Thomas Jefferson refused to honor the commissions, claiming that they were invalid because they had not been delivered by the end of Adams's term.

委任状由亚当斯总统签署并由当时的国务卿约翰·马歇尔（之后成为最高法院的首席大法官以及本判决意见的作者）加盖国印，但是由于亚当斯总统的任期结束而未能及时送达至相关人员。杰斐逊总统拒绝颁发委任状，认为这些委任状由于在亚当斯总统任期结束之前未能送达而不具有任何法律效果。

William Marbury was an intended recipient of an appointment as justice of the peace. Marbury applied directly to the Supreme Court of the United States for a writ of mandamus to compel Jefferson's Secretary of State, James Madison, to deliver the commissions. The *Judiciary Act of*

1789 had granted the Supreme Court original jurisdiction to issue writs of mandamus "...to any courts appointed, or persons holding office, under the authority of the United States."

威廉•马伯里是委任状所任命的治安法官之一。马伯里直接向美国最高法院申请执行令状，请求最高法院命令杰斐逊政府的国务卿詹姆斯•麦迪逊颁发之前的委任状。《1789 年司法条例》授予了最高法院向美国行政区域内的所有法院或行政首长发布执行令状的初审管辖权。

At the last term, viz. December term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, Charles Lee, esq. late attorney general of the United States, severally moved the court for a rule to James Madison, secretary of state of the United States, to show cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia. This motion was supported by affidavits of the following facts: that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in the due form were signed by the said president appointing them justices, and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given to that enquiry, either by the secretary of state or by any officer of the department of state; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was laid to show cause on the 4th day of this term.

在 1801 年 12 月开庭中，威廉•马伯里、丹尼斯•拉姆齐、罗伯特•汤森•胡以及威廉•哈珀，在他们的律师的帮助下，郑重请求法庭做出一项决定，要求国务卿詹姆斯•麦迪逊做出解释，为什么法庭不能颁发一项执行令，向他们送达神圣的哥伦比亚特区治安法官的委任状。这个请求得到如下事实支持：这个请求的通知已经送达了麦迪逊先生；亚当斯先生，美国前任总统，向参议院提名原告担任哥伦比亚特区的治安法官，以征求参议院的意见和同意；参议院接受和同意了该项任命；前任总统以正确的格式签署了该项任命法官的委任状，前任国务卿也以正确的形式在委任状上加盖了国印；原告曾经请求麦迪逊先生送达他们的上述委任状，但是被他拒绝了；上述委任状确实为他们所拥有；原告曾经在他的官邸，请求现任国务卿麦迪逊先生解释上述委任状是否被签署和封印；无论是国务卿还是国务院的其他官员都没有对上述质询给出清楚且令人满意的回答；原告曾经要求国务卿出示一份证书，证明总统曾经提名原告，以及参议院对此的意见和同意，但是他拒绝给出这样一份证书；因此，法庭做出一项决定要求他在该期限的第四天说明原因。

【裁判过程与结果】（Procedure and Disposition）

At a prior term, the Court granted an applicant a rule directing the Secretary of State of the

United States to show cause why a mandamus should not issue commanding him to deliver to the applicant his commission as a justice of the peace. No cause was shown, so the applicant moved for a mandamus.

The Court held that 13 of the *Act of 1789*, giving the Court authority to issue writs of mandamus to an officer, was contrary to the Constitution as an act of original jurisdiction, and therefore void.

【裁判理由】(Reason for Judicial Decision)

【生效判决意见】(OPINION BY: MARSHALL)

The first object of enquiry is,

Firstly, has the applicant a right to the commission he demands?

His right originates in an act of congress passed in February, 1801, concerning the District of Columbia.

After dividing the district into two counties, the 11th section of this law enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years."

法院考察的第一个问题是:

一、申请人是否有权利得到他所要求的委任状?

他的权利来源于国会于 1801 年 4 月所通过的一项关于哥伦比亚特区的法令。

在把特区分成两个巡回区后,该法的第 11 条规定,将任命数量相等的合格的人来担任上述每一个巡回区的治安法官,总统会随时给出权宜之计,这些官员的任职期限是 5 年。

The Second section of the 2d article of the constitution declares, that "the president shall nominate, and, by and with the advice and consent of the senate, 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 secretary of state 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 constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

1st. The nomination. This is the sole act of the President, and is completely voluntary. 2nd. 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 senate. 3rd. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. "He shall," says that instrument, "commission all the officers of the United States."

宪法第 2 条第 2 款规定，总统将提名，并且在参议院的建议和同意下，任命大使、其他公共部长和顾问，以及所有的其他官员。

第 3 款规定，他有权委任所有的美利坚合众国官员。

国会的一项法令规定，国务卿保存合众国的印章，负责制作和登记，并且把上述封印加盖到所有的由总统任命、由国会同意，或者由总统单独任命的国内官员的委任状上去。如果在美国总统签署之前，上述封印将不能被加盖到任何委任状上。

这些是宪法和美国法律中的条款，它们将对本案产生影响。它们看起来是由三个独立的运作过程构成的：（1）提名。这是总统的独立行为，并且是完全自愿的。（2）任命。这也是总统的行为，它也是自愿的，尽管它需要在参议院的建议和同意下进行。（3）委任。授予一个被任命的人委任状，可能被认为是一项宪法规定的职责。宪法规定，他将任命所有美利坚合众国的官员。

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional, power of accepting or rejecting it.

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 revocable; but vested in the officer legal rights, which are protected by the laws of his country.

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

行政上的考量只能在任命做出的时候进行。但是一旦做出这项任命，他对该官员的权力将在任何情况下被停止，根据法律规定，对这个官员的任命是不能再随他的意志而转移的。是否就职的权利转移到被任命的人，他有绝对、无条件接受或者放弃它的权利。

马伯里已经被任命了，而且他的委任状已由总统签署，并且由国务卿封印。法律赋予他作为地方治安法官五年的任期，该法律独立于行政命令；这项任命是不可废止的；且赋予该法官受国家法律保护的合法权利。

因此，法院认为拒不发布委任状的行为不受法律保护，是对既得的合法权利的侵犯。

This brings us to the second enquiry; which is,

Secondly, 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. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

这将我们带入了第二个问题，那就是：

二、如果他有一项权利，并且这项权利被侵犯，国家的法律会为他提供一项补救措施吗？

公民自由权的本质就在于每个人都受法律的保护，无论他在何时受到了损害。政府的首要责任是去提供这种保护。在英国，国王也会以令人尊敬的形式被起诉，他永远不会不遵守法庭的判决。

But when the legislature 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.

但是，当立法机关赋予该官员其他责任时，当该官员有义务做出任何行为时，当个人的权利依赖于这些特定行为的履行时，他就是一个法律的执行官，他的行为就要服从法律，其裁量权也不能无视他人被授予的既得权利。

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 discretion, 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.

这种论证的结论是：当部门首脑作为行政机构的政治代表或者秘密代表时，他们仅仅是执行总统的意愿，或者更确切地说，是行使行政机构所拥有的宪法或者法律赋予的自由裁量权。再明显不过的是，对这些行为只能进行政治性的审查。但是，只要法律赋予其特定的职责，而且个人权利的实现有赖于这些行为的实施，显然认为自己受到损害的个人有权要求得到国家法律的救助。

It is then the opinion of the court, 1st. 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. 2nd. 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.

这是法庭的意见：首先，通过签署马伯里的委任状，当时的美国总统已经任命其为哥伦比亚特区华盛顿郡的治安法官；由国务卿加盖其上的美国国印是总统已签署该委任状的绝对证据，并就此完成了任命；该任命赋予他法律上合法的五年任期。其次，由于其具有合法的任期，马伯里对委任状享有后续权利；拒绝发布委任状是对该权利的侵犯，对此其所在国家的法律为其提供了救济途径。

It remains to be enquired whether,

Thirdly, he is entitled to the remedy for which he applies. This depends on, 1st. The nature of the writ applied for, and, 2nd. The power of this court.

接下来要解决的问题是：

三、马伯里是否有权利获得他主张的救济。这取决于：（1）他申请的执行令状的性质；（2）本法院的职权。

The act 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