

# Teaching International Law Students: A Collaboration Between a Law Professor and an ESL Specialist

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## ABSTRACT

As law schools in the U.S. pursue new areas of revenue, they are developing and marketing various law degree programs (LLMs, advanced-standing JDs, and SJDs) to international students. These efforts mirror international students' desire to increase their marketability by having American degrees on their resumes. Despite the recent uncertainty and anxiety felt by international students and scholars, these combined desires have increased the number of international students in U.S. law schools in the past decade. This success, however, has presented a problem of how to teach this new group of students, most of whom are non-native speakers of English, and most of whom come from legal traditions (such as civil or religious law) that are distinctly different from U.S. common law. Most teaching materials on the market for these students are styled as "Legal English," and have been written by English language education specialists, not legal scholars. This Article considers this English for Specific Purposes (ESP) material, the best of which notes that Legal English requires an understanding of the specialized language, style of thought, and subjective knowledge of the law – but it does not purport to teach it. One frequent writer in this area suggests the "development of equal partnerships between legal specialists and language educators,"<sup>1</sup> which calls for a "content-based approach" to teaching international law

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1. Jill Northcott, *Teaching Legal English: Contexts and Cases*, in ENGLISH FOR SPECIFIC PURPOSES IN THEORY AND PRACTICE 181 (Diane Belcher ed., 2009) [hereinafter Northcott, *Teaching Legal English*].

students, rather than an ESP approach. There is, however, little literature on using content-based methods in U.S. law courses for international students. This paper describes such a method and demonstrates the product of that effort in the form of a Reading Guide developed jointly between an English language education specialist and a law professor. Although more work on assessment needs to be done, preliminary feedback suggests that the Reading Guides helped international students to understand legal terms and concepts in the context of reading judicial decisions, an essential skill to succeed in U.S. law schools.

## I. INTRODUCTION

As applications to law schools decrease,<sup>2</sup> U.S. law schools are pursuing new areas of revenue by developing and marketing various law degree programs (LLMs, advance-standing JDs, and SJDs) to international students. These efforts mirror international students' desire to increase their marketability by having American degrees on their resume.<sup>3</sup> Despite a presidential administration that has demonstrated hostility to immigrants,<sup>4</sup> these combined wishes have increased the number of international students in U.S. law schools in the past decade.<sup>5</sup> This success, however, has presented a problem of how U.S. law

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2. Even though numbers are up for the past two years, the average number of applicants at the top fourteen schools fell by more than twenty percent from 2008-2016, while the average plunged for lower-ranked schools by more than fifty-two percent. Ilana Kowarski, *Less Competitive Law School Admissions a Boon for Applicants*, U.S. NEWS & WORLD REPORTS (Dec. 7, 2020, 10:01 AM), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2017-08-08/law-school-admissions-less-competitive-than-2008>.

Currently, 139 U.S. law schools offer LLM programs for international students or SJD programs. See *LL.M. and Post-J.D. Degrees by School*, AM. BAR ASS'N, [https://www.americanbar.org/groups/legal\\_education/resources/llm-degrees\\_post\\_j\\_d\\_non\\_j\\_d/programs\\_by\\_school.html](https://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_school.html) (last visited Mar. 2, 2021).

3. V. Wish, *7 Reasons Why Lawyers Do an LL.M.*, LLM GUIDE (July 22, 2011), <https://llm-guide.com/articles/7-reasons-why-lawyers-do-an-llm->.

4. See, e.g., Letter from Lawrence S. Bacow, President, Harvard University, to Michael Pompeo, Secretary of State, and Kevin McAleena, Acting Secretary of Homeland Security (July 16, 2019), <https://www.harvard.edu/president/news/2019/letter-to-secretary-pompeo-and-acting-secretary-mcaleenan>. The letter details difficulties and delays in getting visas, "postponements and disruptions" for "routine immigration processes," and "significant delays" in receiving approvals for post-graduation Optional Practical Training.

5. For example, Drexel University's Kline School of Law had no foreign students in 2008. In 2019, it had 41 international students in various programs (exchange semester/year; LLM in American Legal Practice; 2-Year advance-standing J.D.; traditional J.D. program) out of a total enrollment of 457 or 9%. For the entering class in 2019, it had 19 international students out of a total class of 173, or 11% of the class. Data on file with authors.

professors, most of whom are native English speakers, teach this new group of students, most of whom are non-native speakers of English, and many of whom come from legal traditions (such as civil or religious law) that are distinctly different from the U.S. common law tradition.<sup>6</sup> The literature on English for Specific Purposes (ESP) as it relates to Legal English is well-developed with many texts purporting to teach “Legal English.”<sup>7</sup> However, that work has largely been written by English language education specialists, not law professors.<sup>8</sup> The best of this literature notes that Legal English requires an understanding of the specialized language, style of thought, and subjective knowledge of the law,<sup>9</sup> but these texts do not teach those things. One frequent writer in this area suggests better materials might be created with the “development of equal partnerships between legal specialists and language educators.”<sup>10</sup> The project described in this paper describes such a partnership, which used “content-based methods”<sup>11</sup> to develop content for a survey course for international LLM students called

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6. For example, at the Kline School of Law our students have hailed from Albania, Armenia, Australia, Bangladesh, Belgium, Benin, Brazil, Canada, China, Colombia, France, India, Iran, Ireland, Israel, Italy, Kazakhstan, Kenya, Mexico, Morocco, Nigeria, Saudi Arabia, Serbia, Spain, Ukraine, Uruguay, and Uzbekistan.

7. See, e.g., KEVIN J. FANDL, *LOST IN TRANSLATION: EFFECTIVE LEGAL WRITING FOR THE INTERNATIONAL LEGAL COMMUNITY* (LexisNexis 2013); CRAIG HOFFMAN, *PRACTICAL LEGAL ENGLISH: WRITING AS A U.S. LAWYER* (West Academic 2019); CRAIG HOFFMAN & ANDREA TYLER, *UNITED STATES LEGAL DISCOURSE: LEGAL ENGLISH FOR FOREIGN LLMS* (Thompson West 2008); AMY KROIS-LINDNER ET AL., *INTERNATIONAL LEGAL ENGLISH* (Cambridge 2011); AMY KROIS-LINDNER & MATT FIRTH, *INTRODUCTION TO INTERNATIONAL LEGAL ENGLISH* (2008) (hereinafter Krois-Linder & Firth); DEBRA S. LEE ET AL., *AMERICAN LEGAL ENGLISH: USING LANGUAGE IN LEGAL CONTEXTS* (Univ. of Michigan 2007); KAREN LUNDQUIST, *LEGAL WRITING AND LEGAL SKILLS FOR FOREIGN LL.M. STUDENTS* (West Academic 2017); NADIA E. NEDZEL, *LEGAL REASONING, RESEARCH, AND WRITING FOR INTERNATIONAL GRADUATE STUDENTS* (Wolters Kluwer 2017); ANN M. PICCARD, *U.S. LEGAL WRITING FOR INTERNATIONAL LAWYERS AND LAW STUDENTS* (West Academic 2017).

8. For example, Amy Krois-Lindner teaches “Language Competence” and has developed ESP courses, but her biography lacks any mention of legal training or a degree in law. See *Authors*, CAMBRIDGE UNIVERSITY PRESS, <https://www.cambridge.org/us/cambridgeenglish/authors/amy-krois-lindner> (last visited Mar. 2, 2021).

9. See, e.g., Northcott, *Teaching Legal English*, *supra* note 1, at 166-68.

10. Northcott, *Teaching Legal English*, *supra* note 1, at 181.

11. See *infra* notes 52-80.

Introduction to U.S. Legal Systems, a course necessary for those students who need an LLM to sit for the New York Bar Exam.<sup>12</sup>

The Article proceeds in the following way: In Part II, we describe the current Legal English ESP literature and note that it lacks content of the sort an international student will face in the U.S. law school classroom and thus does a poor job of preparing international students to study law in the U.S. Part III describes how content-based materials may be better suited to teach international law students who are currently in the U.S. in an LLM, advanced-standing JD, or SJD program. Finally, Part IV describes the joint efforts of the two authors – one, a law professor, the other an English-language education specialist – to create content-based materials for a course called Introduction to U.S. Legal Systems, a course also designed to meet the New York bar requirements for “a course on American legal studies, the American legal system or a similar course designed to introduce students to U.S. law.”<sup>13</sup>

## II. ENGLISH FOR SPECIFIC PURPOSES (ESP)

Most of the texts marketed for second-language law students are intended for use in courses designated as English for Specific Purposes (ESP).<sup>14</sup> They are designed to teach vocabulary related to a subject, not the subject itself. In a widely-used introductory ESL methodology text, Johns and Price define English for Specific Purposes as “a pedagogical movement in applied linguistics devoted to creating research-based English language materials and instruction for . . . students with specific language learning goals directly related to their current or future academic, professional, or vocational lives and contexts.”<sup>15</sup> ESP is

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12. For students needing to “cure” a “deficiency” in their foreign legal education, the New York Bar Examiners permit students to take an LLM at an ABA-approved law school. *Foreign Legal Education*, THE N.Y. ST. BD. OF L. EXAMINERS, <https://www.nybarexam.org/Foreign/ForeignLegalEducation.htm> (last visited Mar. 2, 2021). Among the substantive requirements for that degree is “at least two-credits in a course on American legal studies, the American legal system or a similar course designed to introduce students to U.S. law[.]” *Id.*

13. *Id.*

14. See, e.g., AMY KROIS-LINDNER & MATT FIRTH, *INTRODUCTION TO INTERNATIONAL LEGAL ENGLISH* (2008).

15. ANN M. JOHNS & DONNA PRICE, *English for Specific Purposes: International in Scope, Specific in Purpose*, in *TEACHING ENGLISH AS A SECOND OR FOREIGN LANGUAGE* 471, 471 (Marianne Celce-Murcia et. al. eds., Cengage Learning 4th ed. 2014).

“designed to meet the *specified* needs of the learner; related to content. . . to particular disciplines . . . ; [and] centered on the language appropriate to those activities . . . .”<sup>16</sup>

Legal English texts for international law students and lawyers are typically designed based on this philosophy – for use in the ESL classroom rather than the law classroom. Because of this, they do not include cases and other substantive material that one would expect to find in a law school casebook; rather, they are designed to be used by ESL specialists to teach language that law students theoretically need in their law programs or legal careers. While most of the language input in these texts is law-related, the content is intended to be merely a vehicle through which to teach language and a springboard for classroom discussion. It is not meant to teach legal doctrine.

In contrast to law casebooks, ESP Legal English textbooks are often designed around a “notional syllabus.”<sup>17</sup> A notional syllabus seeks to teach language functions in a context in which the learner would likely use that function.<sup>18</sup> A Legal English textbook, *Introduction to International Legal English* by Krois-Linder and Firth,<sup>19</sup> does exactly this. The scope and sequence of the textbook presents the contents in terms of what students will be able to do with the language rather than substantive legal material that students will learn.<sup>20</sup>

For example, Chapter 3 is titled “Tort Law,” but the objective of the chapter is not to teach the substance of tort law.<sup>21</sup> The stated objectives for this chapter include learning key terms for “[r]eporting procedural history” and “[d]efamation,” “[a]sking for information,” and text analysis on an “[i]nitial lawyer-client interview.”<sup>22</sup> Students will meet these objectives through the content of tort law by reading a one-page

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16. *Id.* at 472 (emphasis in the original) (citing PETER STREVEN, *ESP After Twenty Years: A Re-Appraisal*, in *ESP: STATE OF THE ART 1* (Makhan L. Tickoo ed., 1988); TONY DUDLEY-EVANS & MAGGIE JO, ST JOHN, *DEVELOPMENTS IN ESP: A MULTI-DISCIPLINARY APPROACH* (1988)).

17. The concept of a notional syllabus was first proposed in 1976. See generally DAVID ARTHUR WILKINS, *NOTIONAL SYLLABUSES: A TAXONOMY AND ITS RELEVANCE TO FOREIGN LANGUAGE CURRICULUM DEVELOPMENT* (1976).

18. JACK C. RICHARDS, *From Syllabus Design to Curriculum Development*, in *CURRICULUM DEVELOPMENT IN LANGUAGE TEACHING 37* (Jack C. Richards ed., 2001).

19. KROIS-LINDER & FIRTH, *supra* note 14.

20. KROIS-LINDER & FIRTH, *supra* note 14, at 4-5.

21. KROIS-LINDER & FIRTH, *supra* note 14, at 28-38.

22. KROIS-LINDER & FIRTH, *supra* note 14, at 4.

explanation of tort law that introduces legal terms, such as civil wrong, liability, and standard of proof,<sup>23</sup> reading a half-page case note on *Palsgraf v. Long Island R.R.*,<sup>24</sup> listening to a passage about frivolous lawsuits,<sup>25</sup> and listening to an initial lawyer-client interview.<sup>26</sup> The chapter also includes discussion questions for each reading or listening.<sup>27</sup> For example, after reading the case note on *Palsgraf*, students are asked to “[d]iscuss what you think might have happened if this case had been brought to court in your jurisdiction.”<sup>28</sup> This question is a springboard for discussion, and it lends itself well to an “opinion exchange” task,<sup>29</sup> which is designed to promote “interaction” and “communication.”<sup>30</sup> This promotes negotiation for meaning,<sup>31</sup> which “can serve as a means of working through perceived or actual gaps in communication”<sup>32</sup> and “focuses on the comprehensibility of message meaning, and on the message's form only insofar as that can contribute to its comprehensibility.”<sup>33</sup> That is to say, the question is designed around key principles in second language acquisition rather than the teaching of law. The question does not require any substantive knowledge of U.S. law on the part of the students or the instructor, which may make it suitable for ESP courses taught by ESL faculty focusing on the development of Legal English language skills. The text is suitable to get students talking in English, but it is not suitable to teach content or case analysis.

At the core of ESP, however, is the understanding that ESP teachers do not teach subject content; this “should be left to the subject specialists themselves, as language teachers are not the experts in a particular professional domain and they should concentrate on the general

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23. KROIS-LINDER & FIRTH, *supra* note 14, at 29.

24. KROIS-LINDER & FIRTH, *supra* note 14, at 30 (citing 248 N.Y. 339, 162 N.E. 99 (1928)).

25. KROIS-LINDER & FIRTH, *supra* note 14, at 32.

26. KROIS-LINDER & FIRTH, *supra* note 14, at 35.

27. KROIS-LINDER & FIRTH, *supra* note 14, at 28-38 *passim*.

28. KROIS-LINDER & FIRTH, *supra* note 14, at 31.

29. Theresa Pica ET. AL., *Choosing and Using Communication Tasks for Second Language Instruction and Research*, in *TASKS AND LANGUAGE LEARNING: INTEGRATING THEORY AND PRACTICE 9* (Graham Crookes & Susan M. Gass eds., 1993).

30. *Id.* at 13.

31. Theresa Pica, *Research on Negotiation: What Does it Reveal About Second-Language Learning Conditions, Processes, and Outcomes?*, 44 *LANGUAGE LEARNING* 493 (1994).

32. *Id.* at 499.

33. *Id.* at 517-18.

principles of language teaching.”<sup>34</sup> Thus, in the ESP classroom, the teacher is not the “primary knower.” Rather, it is the students themselves who are often the primary knowers of the material – most students in Legal English classes hold law degrees in their home countries as the LLB degree is required for admission to LLM, advance-JD, and SJD.<sup>35</sup> The teacher’s main role is to generate real, authentic communication in the classroom based on the students’ knowledge.<sup>36</sup> In a Legal English class, this creates difficulties when, for example, students start discussions or ask questions about English words or phrases that appear to have non-specialized meanings, but in fact are deeply rooted in legal diction. “English for law is a field long acknowledged as presenting particular difficulties for the ESP teacher because of the close interplay of content and language,”<sup>37</sup> and ESL instructors may not have the experience to differentiate between the layman’s definition of a particular term versus the precise ways that the term is used in law.

Because ESL faculty are not trained in law, it is important for both students and faculty to understand the limitations of ESP courses. It is necessary for “teachers of legal communication skills who lack legal training . . . to be clear about the limits of their subject knowledge.”<sup>38</sup> Bruce cautions that teachers of Legal English “will be seen as overreaching themselves and pretending an expertise that they can only feign or simulate.”<sup>39</sup> And Bhatia notes that law “demands a subject-specific and a narrow-angled approach . . . because the language used in law and its content are exceptionally close.”<sup>40</sup> For this reason, law professors and ESL faculty must work together to establish the boundaries over which ESL faculty should not cross. ESL faculty are

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34. HALINA SIEROCKA, CURRICULUM DEVELOPMENT FOR LEGAL ENGLISH PROGRAMS 6 (2014).

35. See, e.g., *LLM Admission Requirements & Application*, DREXEL UNIV. THOMAS R. KLINE SCH. OF LAW, <https://drexel.edu/law/academics/llm-programs/llm-admission-requirements/> (last visited Mar. 2, 2021).

36. Sierocka, *supra* note 34, at 14.

37. Jill Northcott & Gillian Brown, *Legal Translator Training: Partnership Between Teachers of English for Legal Purposes and Legal Specialists*, 25 ENGLISH FOR SPECIFIC PURPOSES 358, 360 (2006) (citing John Gibbons, *Language and the Law*, 19 ANNUAL REVIEW OF APPLIED LINGUISTICS 156 (1999); PETER M. TIERSMA, *LEGAL LANGUAGE* (Chicago 1999)).

38. Nigel J. Bruce, *Dovetailing Language and Content: Teaching Balanced Argument in Legal Problem Answer Writing*, 21 ENGLISH FOR SPECIFIC PURPOSES 321, 322 (2002).

39. *Id.* at 324.

40. Vijay Kumar Bhatia, *Language and the Law*, 20 LANGUAGE TEACHING 227, 231 (1987).

trained to teach language and can do so in a variety of contexts but should be cautious so as not to present to students any substantive information that goes beyond the pages of what is written in the texts that they read in class.

The perils of ESL faculty drinking into legal content is exemplified by one Legal English class, observed by one author of this paper. In that class, the students asked the instructor, a non-lawyer, to explain the difference between a “question of law” and a “question of fact.” On the surface, distinguishing between what is a factual question (was the light red when the defendant ran it?) and a legal question (was the defendant guilty when he ran the red light?) may seem straightforward. In fact, it is a particularly thorny question that has implications for who decides the question and the weight it is given by an appellate court. Moreover, it is often difficult to distinguish between questions of law and questions of fact. For example, if the question concerns the reasonableness of an implied term in a contract, it is a question of law; if it concerns the unreasonableness of the defendant’s conduct in a negligence suit, it is a question of fact.<sup>41</sup> The non-lawyer ESP teacher in the Legal English class faced this question and answered it, using his knowledge of English; unfortunately for law students, his answer was incorrect and undermined to a great extent the lessons that their Civil Procedure professor had given that week.

The failure to engage international students in complex language learning is not limited to a single instructor. In fact, much of the scholarship in the Legal English field fails to understand the purpose of a U.S. law school class. In U.S. law school classes, students read “casebooks,” which are largely comprised of judges’ opinions, edited to emphasize a point of law. Students read cases to learn the law, to learn the language of the law, and to learn the process of legal analysis. In reading cases, students have the “complex task” to understand the facts, figure out what are the relevant facts – those on which the judge bases his or her decision – and then understand the judge’s reasoning and “relationship to other law.”<sup>42</sup> While legal English textbooks such as “Introduction to International Legal English” by Amy Krois-Lindner and Matt Firth do not include these types of complex texts, they give

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41. Emad H. Atiq, *Legal vs. Factual Normative Questions & the True Scope of Ring*, 32 NOTRE DAME J. L., ETHICS & PUB. POL’Y 47, 48 (2018).

42. P.M. Howe, *The Problem of the Problem Question in English for Academic Legal Purposes*, 9 ENGLISH FOR SPECIFIC PURPOSES 215, 216 (1990).



students a linguistic backdrop in Legal English that they can use to read and interpret these texts in their future law courses. Therefore, these textbooks can prove useful if used in the right context—ESP classes taken before students begin an LLM, advanced-standing JD, SJD, or other program in Law.

However, Legal English texts make loftier promises as they purport to teach Legal English, which Jill Northcott defined as “English language education to enable L2 [second-language] law professionals to operate in academic and professional contexts requiring the use of English.”<sup>43</sup> Legal English ESP textbooks do not meet this standard. Northcott, who writes extensively in the Legal English field, opines, “[a]n English language course for lawyers will inevitably share features of Business English courses. Giving presentations, telephoning, participating in meetings and negotiations, writing letters and reports are all communication skills required by both business and legal professionals. . . . [T]he priorities are legal documents, in particular contracts and legal letters.”<sup>44</sup> This is a fairly reductionist view of law school and legal practice. It ignores the knowledge of substantive law that is required to draft legal documents – substance that is learned in the U.S. by reading and analyzing judges’ decisions. Further, contract drafting is a small part of many lawyers’ practices (litigators, for example, may go their whole careers without drafting a document), and legal letters are hardly homogenous, as they vary significantly by audience (law trained or not) and content (compare, for instance, demand letters and offers to settle). This definition of a Legal English class does not provide the international student with the tools to study at a U.S. law school or practice in a U.S. firm, where a foundational skill is reading judicial opinions to find and understand the law. While learning the pragmatics of the practice of law is essential for all law students, foreign and domestic, it cannot be taught at the expense of legal analysis. On the other hand, international law students may gain language skills from these Legal English classes if they are taken before the start of formal study of law. However, if it is “inevitable” that this

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43. Jill Northcott, *Legal English*, in THE HANDBOOK OF ENGLISH FOR SPECIFIC PURPOSES 235 (Brian Paltridge & Sue Starfield eds., 2012).

44. Northcott, *Teaching Legal English*, *supra* note 1, at 177.

is the content of a Legal English class,<sup>45</sup> then the international law student needs much more to actually study and practice law and must understand that what they are doing in ESP courses is designed only for language development. They must not view these courses as “content-based.”

ESP texts do not include judges’ opinions at all; instead, they provide descriptions about the law with case descriptions or summaries, with brief quotes from the judges’ opinions. For example, a famous tort case is *Palsgraf v. Long Island R.R.*<sup>46</sup> The original judge’s opinion, which is printed in its entirety in a leading Torts casebook, is six-and-one-half pages, two columns per page, of tightly-printed prose.<sup>47</sup> Yet a recent Legal English text gave it a one-half page summary without using any of the judge’s language.<sup>48</sup> Another ESP text, which promises that it is “[u]sing language in Legal Contexts,”<sup>49</sup> quotes a paragraph of facts from *Palsgraf* and three sentences of the judge’s conclusion.<sup>50</sup> ESP texts do not engage the students in the way that U.S. law students are engaged – with the language of the law; thus, ESL classes in which such texts are used should not replace classes in a law school as they only provide language skills and do not teach the substantive knowledge required to read legal texts.

It is fine to caution “teachers of legal communication skills who lack legal training” that they “need to be clear about the limits of their subject knowledge,”<sup>51</sup> but in law a key phrase can often be deceptively mainstream. Thus, there is a danger that current Legal English classrooms do not do their best in preparing students for the LLM, JD, or SJD curriculum because such classrooms do not engage students in the substantive text of judges’ opinions, and they may fail to distinguish during class discussion the legal implications of everyday vocabulary.

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45. Northcott, *Teaching Legal English*, *supra* note 1, at 177.

46. 248 N.Y. 339 (1928).

47. V.E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ’S TORTS CASES AND MATERIALS 329-35 (13th ed. 2015).

48. KROIS-LINDNER & FIRTH, *supra* note 14, at 30.

49. DEBRA S. LEE ET AL., AMERICAN LEGAL ENGLISH: USING LANGUAGE IN LEGAL CONTEXTS (2007).

50. *Id.* at 118, 120.

51. Bruce, *supra* note 38, at 322.

### III. CONTENT-BASED INSTRUCTION (CBI)

While ESP curricula cannot effectively be used in law schools (although they might be an appropriate tool for pre-law school education), Content-Based Instruction (“CBI”) may prove an effective alternative. In content-based instruction, “language proficiency is achieved by shifting the focus of instruction from the learning of language per se to the learning of language through the study of subject matter.”<sup>52</sup> Content-based courses use material drawn from a discipline as the “medium of English language instruction.”<sup>53</sup> That is to say, in a content-based classroom, students are responsible for both the substantive material of the subject being taught and language development. CBI typically considers the subject matter and the language equally. In contrast, materials used in a non-content-based class may cover a wide variety of topics, such as “‘getting a job’ to world problems.”<sup>54</sup> For example, one popular textbook series published by Cengage, *Pathways*, contains themes such as communications, environmental studies, and anthropology.<sup>55</sup> In these chapters, students are expected to read, write, listen, and speak on the subject of the chapter, but once that chapter is complete, the theme of the course will change to something radically different. Students are not expected to demonstrate any mastery of the subject discussed—the theme was simply a vehicle through which language would be taught. Therefore, the students would never be assessed on the substantive material of the chapter. In a content-based course, on the other hand, an appropriate content textbook would be chosen, and students would be responsible for learning the material in it.

CBI is based on two principles: “(1) People learn a second language more successfully when they use the language as a means of acquiring information, rather than as an end in itself. (2) CBI better reflects

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52. Jayesh M. Rathod, *Legal Education en Espanol: A Pedagogical Model*, 21 HARVARD LATINX L. R. 87, 93 n. 22 (2018).

53. L.F. Kasper, *The Impact of Content-Based Instructional Programs on the Academic Progress of ESL Students*, 16 ENGLISH FOR SPECIFIC PURPOSES 309, 310 (1997).

54. *Id.* at 310.

55. LAURIE BLASS & MARI VARGO, *PATHWAYS 4: READING, WRITING, AND CRITICAL THINKING* (2d ed. 2018).

learners' needs for learning a second language."<sup>56</sup> As Yu and Xiao wrote in their English CBI course for Chinese law students, "[a]dvocates of CBI believe that the involvement of relevant subject matter knowledge may motivate the students to be more actively engaged in language activities and thus develop the relevant skills."<sup>57</sup> In sum, "[c]ontent-based courses are designed both to increase language proficiency and to facilitate academic performance."<sup>58</sup>

The law classroom lends itself particularly well to a Content-Based model, as much of the linguistic complexity found in Legal English occurs far less frequently in genres outside of legal writing. In other words, the linguistic structures are tightly tied to the context in which they are found and teaching such structures in the context in which students will be expected to use them will facilitate acquisition. Pavlenko discusses the complexities of Legal English and how these complexities affect understanding by non-native speakers.<sup>59</sup> She cites Shuy's example of the Miranda Warning<sup>60</sup> as discourse with high "syntactic complexity, seen in the high number of embedded clauses."<sup>61</sup> She represents the embedding visually as follows:

1	<i>If</i>	<i>you cannot afford</i>
2	<i>to</i>	<i>hire a lawyer,</i>
3	[then]	<i>one will be appointed</i>
4	<i>to</i>	<i>represent you</i>
5	<i>before</i>	<i>any questioning</i>
6	<i>if</i>	<i>you wish one.</i> <sup>62</sup>

She argues that for non-native speakers, such complex levels of embedding cause difficulty in processing meaning. Pavlenko's article

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56. Olmedo Bula Villalobos, *Content-Based Instruction: A Relevant Approach of Language Teaching*, 20 INNOVACIONES EDUCATIVAS 71, 73 (2013).

57. Xia Yu & Yunshu Xiao, *A Course Design Guideline for Legal English Teaching in Chinese Tertiary Education: From the Perspective of Content-Based Instruction*, 3 THEORY AND PRACTICE IN LANGUAGE STUDIES 1123, 1123-24 (2013) (citing J. DU, CONTENT-BASED INSTRUCTION (Huazhong Univ. Press 2011)).

58. Kasper, *supra* note 53, at 310.

59. Aneta Pavlenko, *"I'm Very Not About the Law Part": Nonnative Speakers of English and the Miranda Warnings*, 42 TESOL QUARTERLY 1 (2008).

60. Roger Shuy, *Ten Unanswered Questions About Miranda*, 4 FORENSIC LINGUISTICS 176 (1997).

61. Pavlenko, *supra* note 59, at 5.

62. Pavlenko, *supra* note 59, at 6.

focuses on the comprehension of legal English by non-native speakers who are not studying law; however, such difficulties can arise even more frequently for students of law. Consider the following excerpt from *Plessy v. Ferguson*<sup>63</sup>: “Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty and property, there shall be no exclusion of his race and no discrimination against them because of color has been asserted in a number of cases.”<sup>64</sup> This excerpt may be represented as follows:

1	Indeed, the right
2	<i>of a colored man</i>
3	<i>that,</i>
4	<i>in the selection of jurors</i>
5	<i>to pass upon his</i>
6	<i>life,</i>
6	<i>liberty</i>
6	<i>and property,</i>
3	there shall be
4	no exclusion of his race
4	and no discrimination against them
5	<i>because of color</i>
1	<i>has been asserted</i>
2	<i>in a number</i>
3	<i>of cases.</i>

This differs from the Miranda Warning in complexity in that the embedding happens within the matrix (or main) clause: “The right has been asserted.” The subject of the sentence (“the right”) and its verb (“has been asserted”) are quite far apart, and there are two dependent clauses embedded within the matrix clause, each of which has additional embedding of prepositional phrases and lists. For students of law, it is necessary to understand the grammatical breakdown of the sentence to comprehend its meaning. Thus, the grammatical breakdown of key sentences can be taught alongside the substantive content of the case. If such a language lesson is not provided, English language learners in the field of law risk misunderstanding the substance of the text.

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63. 163 U.S. 537 (1896).

64. *Id.* at 545.

There are a variety of models through which CBI may be implemented in American law classes, all of which fall on a continuum between “content-driven” and “language driven.” Courses designed solely around content and offer little to no language support fall under “total immersion.”<sup>65</sup> In this model, typically both domestic and international students, whether native English speakers or not, are taught together. Instructors typically teach with no or few modifications based on students’ linguistic needs. “Sheltered courses,” on the other hand, separate second language users of English from their native-speaking counterparts, but both native and second-language users are responsible for the same content knowledge and assignments.<sup>66</sup> Second language users of English often benefit from sheltered courses; they tend to have better gains in language proficiency and confidence in English as they are not competing with native speakers for the floor.<sup>67</sup> The “adjunct model” provides the most language support for second language users of English. In the adjunct model, both a content specialist and language education specialist work in tandem to teach both the content and language alongside each other.<sup>68</sup> If implemented together with a sheltered model, students are taught both language and content in one class with two instructors. If implemented with an immersion model, students attend class with their native speaking counterparts and are provided an additional language course with a language instruction specialist.<sup>69</sup>

Several textbooks aimed at international law students take a content-based approach, teaching language alongside the substantive content of law courses. Perhaps the most prominent title in this space is *Legal Writing and Legal Skills for Foreign LL.M. Students* and *Legal Writing* by Karen Lundquist.<sup>70</sup> The “Main Assignment File Book” introduces a wide range of topics such as damages, contract formation, defamation, and premises liability through targeted exercises and summaries of

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65. Marguerite Ann Snow, *Content-Based and Immersion Models of Second/Foreign Language Teaching*, in *TEACHING ENGLISH AS A SECOND OR FOREIGN LANGUAGE* 439 (Marianne Celce-Murcia, Donna M. Brinton & Marguerite Ann Snow, eds., 2014).

66. *Id.* at 441-42.

67. *Id.*

68. *Id.* at 442.

69. *Id.* at 442.

70. KAREN LUNDQUIST, *LEGAL WRITING AND LEGAL SKILLS FOR FOREIGN LL.M. STUDENTS* (West Academic Publ’g. eds., 2017).

black letter law.<sup>71</sup> The companion “ESL Workbook” provides students with targeted scaffolding for reading cases (available on the publisher’s website) associated with each topic covered in the Main Assignment File Book.<sup>72</sup>

For example, the first unit of each text covers the topic of damages. The Main Assignment File Book provides a list of content objectives, a two-page introduction to the substantive law of damages, an assignment file so the students can work through a simple tort problem, with additional black letter law on respondent superior and two case summaries on employer liability.<sup>73</sup> The Assignment File Book then presents short fact scenarios in which the students can apply their learning. Online links provide “Commented Cases,” which are annotated cases.<sup>74</sup>

The ESL Workbook contains reading guides for four damages cases, which are presumably found online. Each reading guide contains a list of vocabulary from the case, with definitions; pre-reading and comprehension questions; and a language focus. Language foci in the damages unit include using the subjunctive, differentiating between words that seem like synonyms, and idiomatic expressions. While the vocabulary and language foci associated with each case are commonly used in legal discourse, they’re presented in a mostly decontextualized way. Vocabulary items are presented with definitions only, and examples of the language focus are not excerpted from actual legal documents. While the material represents a good attempt at a Content-Based approach, the substantive law chosen will not fulfill a New York bar exam requirement.<sup>75</sup>

Additional texts for international law students have tried to correct the limitations of current Legal English ESP texts by producing heavily

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71. *See generally id.*

72. *See generally id.*

73. *Id.* at 12-29.

74. *Id.* at 60-82; LUNDQUIST, LEGAL WRITING AND LEGAL SKILLS FOR FOREIGN LL.M. STUDENTS Unit 3 (2017), <http://legalwritingforllms.com/forms/SampleCommentedCases.pdf>.

75. The course for which the authors of this paper prepared the content-based materials was Introduction to U.S. Law & Legal Systems, a two-credit course that fulfills the New York bar’s requirement for “at least two-credits in a course on American legal studies, the American legal system or a similar course designed to introduce students to U.S. law.” *Foreign Legal Education, THE N.Y. ST. BD. OF LAW EXAM’RS*, <https://www.nybarexam.org/foreign/foreignlegaleducation.htm> (last visited Feb. 19, 2021).

edited judicial opinions for international law students to read.<sup>76</sup> However, these texts do none of the discourse analysis that second-language law students need to understand even a heavily edited opinion. For example, most U.S. law students in a Constitutional Law class read *United States v. Lopez*<sup>77</sup>, a leading case on Congress's power to regulate interstate commerce. In its original version, the case is forty pages long; in the leading casebook, the case is twelve densely packed pages long.<sup>78</sup> In Klonoff's *Introduction to the Study of U.S. Law*, an introductory text designed to teach the substantive content of American law to international students, the text of *U.S. v. Lopez* is only seven pages of nicely spaced text.<sup>79</sup> Additionally, Klonoff provides no discourse analysis, such as that provided in content-based instruction. Thus, even texts that purport to tailor themselves to the international student lack the English-language support that would be provided using a Content-Based model.

Finally, there are several texts available that serve as a reference for international students, but these texts assume native-like English language proficiency. For example, *U.S. Legal Writing for International Lawyers and Law Students* by Ann M. Picard offers a variety of guides for reading and writing Legal English; however, these guides are general and do not provide the support that international students who are not native-like speakers of English require to understand a judge's opinion or to draft a legal document. The "Reading Cases" chapter walks students through reading two cases, explaining specific elements of legal documents of which students should take note. While this explanation is useful, pointing out features such as idiomatic language and footnotes, it does not provide any instruction that would help students improve their language proficiency. This type of text would be challenging to use in a content-based language teaching classroom because it seeks only to teach the substantive content, leaving the instructor (or the students) to supplement the text with materials to support language development.

Integrating content and language, however, requires an instructor to have a legal background – Northcott reports on several ESP writers

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76. See, e.g., ROBERT KLONOFF, INTRODUCTION TO THE STUDY OF U.S. LAW (2016).

77. 514 U.S. 549 (1995).

78. ERWIN CHEREMINSKY, CONSTITUTIONAL LAW 188 (Walters Kluwer in N.Y. eds., 5th ed. 2017).

79. KLONOFF, *supra* note 76, at 195.



without such training whose materials were not appropriate for law students<sup>80</sup> – or it requires a law professor to have ESL training. This condition is necessary for successful implementation of the Immersion Model. Or, as discussed further here, the Sheltered Model or Adjunct Model could be implemented through close cooperation between a law specialist and a language instruction specialist.

#### IV. DREXEL UNIVERSITY'S "INTRODUCTION TO U.S. LEGAL SYSTEMS"

This section of the paper describes a law course for international law students at Drexel University's Kline School of Law taught by a law professor who had taken courses in teaching English as a second language. The professor used materials created in conjunction with a language education specialist. The materials combined judges' opinions (content) with discourse analysis to help the students bridge their home country education with the U.S. tradition of case reading and analysis. For this course, the law professor used Klonoff's *Introduction to the Study of U.S. Law*,<sup>81</sup> an introductory law text. The professor did not choose commercially published ESL Legal English because she was unable to identify a textbook that addressed both the content of a first-year law course and language. Instead, the law professor and language specialist worked together to create "reading guides."<sup>82</sup>

Lawyers in the U.S. write in a variety of contexts; one is in drafting statutes and contracts, each of which has its own specialized discourse and is beyond the scope of this paper. The other category of legal writing is expository, which covers judges' opinions, lawyers' legal memorandum and advocacy in the form of briefs, and U.S. law students' writing of case briefs and exams. In legal expository writing, lawyers identify the issue, which has its own rhetoric, state and explain the law, and then analyze the facts by analogizing and distinguishing the law. Expository legal writing follows a formula traditionally known as IRAC (Issue-Rule-Application-Conclusion), which is also stated in a variety of other acronyms, all of which have, at their core, a statement and

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80. Northcott & Brown, *supra* note 37, at 360.

81. KLONOFF, *supra* note 76.

82. *See* Appendix A.

explanation of the law, followed by an application of the law to the facts. Teaching international students to write this way can first be taught by teaching them to read judges' opinions closely to discern both form and content, as reading judges' decisions is a necessary skill for all law students and lawyers in the U.S. for that is how they find and learn the principles of law.<sup>83</sup>

For many international students, reading judges' decisions will be a challenge. Legal decisions often contain lengthy sentences out of a "desire to place all information on a particular topic into one self-contained unit."<sup>84</sup> If a legal rule contains several provisions, all of which are placed in separate sentences, a lawyer may argue that separate provisions may not apply.<sup>85</sup> "The result is not just very long sentences, but complex ones, with many conjoined and embedded clauses."<sup>86</sup> Further, much information may be inserted between the subject and verb phrase.<sup>87</sup> Even for students who received their undergraduate degrees in law in common law countries, students may not have parsed judges' opinions to the extent that U.S. law students do, as much legal training outside the U.S. is done in lecture format, rather than the case study method first adopted by Harvard Law School dean Christopher Langdell in 1870. In the U.S., students read cases and come prepared to discuss them during Socratic questions-and-answer sessions in class.

Drexel University Kline School of Law's Introduction to U.S. Legal Systems is a three-credit course open only to international LLM and foreign exchange students. It is designed to fulfill a New York State Bar requirement.<sup>88</sup> It offers an introduction to the legal and ethical principles of U.S. law and it is designed to familiarize the student with the relevant and governing legal principles that are used in American jurisprudence.<sup>89</sup> In its first two years, the introductory class's format was lecture-based, with experts in major areas of U.S. law making guest appearances. In its third year, a new professor (an author of this paper)

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83. Northcott, *Teaching Legal English*, *supra* note 1.

84. PETER M. TIERSMA, *LEGAL LANGUAGE* 56 (Univ. Chi. Press eds., 1999).

85. *Id.* at 56.

86. *Id.*

87. *Id.* at 57.

88. New York is one of only the five states that allow students to sit the bar exam based on the completion of an LLM at a U.S. law school. Emily Cataneo, *Using the LLM to Take the American Bar Exam*, LLM GUIDE (Sep. 19, 2016), <https://llm-guide.com/articles/using-the-llm-to-take-the-american-bar-exam>.

89. *See* syllabus (on file with authors).

took over the course and added a substantial reading requirement of judges' opinions to the course. In its fourth year, recognizing the students' difficulties with reading judges' opinions, the law school authorized hiring a consultant who had an M.S.Ed. in Teaching English to Speakers of Other Languages (TESOL; the other author of this paper).<sup>90</sup> Together the law professor and the English language education specialist created reading guides for the students for cases that were assigned early in the semester.<sup>91</sup>

The process by which the English language education specialist and the law professor created the "Reading Guides" was recursive and synergistic. First, the law professor would choose the case and identify significant passages of a paragraph or two in length and significant legal vocabulary. Then, the English language education specialist would do a discourse analysis and create a draft of the reading guide, which he would then send back to the law professor for review. This recursive process yielded product that went beyond the knowledge base of the individual authors; for example, the law professor did not focus on the difficulty for second-language law students on adverbial clauses of reason, while the English language education specialist did not know that certain legal terms of art (for example, "substantially affect") should not be paraphrased.

The end product included: (1) fill-in the blank sentences for the vocabulary culled from the legal sources on the Corpus of Contemporary American English; (2) determining the main idea of the passage; (3) questions about analogies used by the court, as analogical reasoning "is a pervasive feature of the common law"<sup>92</sup>; (4) describing the functions of phrases that are part of deductive reasoning, such as "not only ... but," "even though," "in turn," "as a result"; (5) selecting phrases key to the court's reasoning and asking students to paraphrase them; and (6) parsing difficult verb tenses, such as the conditional and the structure of phrases designed to show a statement contrary to fact, such as "if we were to accept the Government's arguments."<sup>93</sup>

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90. The law professor was taking courses in TESOL and the English language specialist was her instructor in Introduction to Linguistics.

91. See Appendix A.

92. Grant Lamond, *Analogical Reasoning in the Common Law*, 34 OXFORD J. LEGAL STUD. 567, 567 (2014).

93. See Reading Guide to United States v. Nixon, Appendix A.

The English language education specialist and the law professor prepared two reading guides for cases that were read early in Introduction to U.S. Legal Systems: one for *United States v. Nixon*,<sup>94</sup> a case that limits presidential claims to executive privilege; and for *United States v. Lopez*,<sup>95</sup> a case that limits Congress's use of the Commerce Clause to make legislation. The law professor then used the reading guides in two different ways. For the first class, for which the students read *Nixon*, she grouped the students homogenously, allowing students to talk in their native languages with a peer, while writing the answers to the Guide in English. Then the class came together to discuss the answers. After, the professor collected the written answers to assess the individual pairings' work. The students, from Albania, Belgium, the Dominican Republic, France, India, Israel, and Mexico, showed a proficient grasp of the fundamentals and the nuances of the *Nixon* case.<sup>96</sup>

The *Lopez* reading guide was used in a less structured way – the law professor used it as a springboard for a more Socratic approach to the discussion of the case, as one of the goals of the class is to eventually remove the scaffolding of the Reading Guides such that the students can eventually read the judges' opinions on their own. The students in this class had a lively exchange, using cognates to define words such as “channel” (“Congress may regulate the use of the channels of interstate commerce,”<sup>97</sup>) and laughing at the proper use of the word “intercourse” in legal versus everyday diction (“Commerce, undoubtedly, is traffic, but it is something more: it is intercourse”<sup>98</sup>). They also did a proficient job of paraphrasing the government's arguments and of understanding the Court's conclusions. They did less well in determining the standards the majority and dissenting justices applied in determining the deference a court should pay to Congress's assertion of Commerce power (whether Congress must show that a legislated activity “substantially affects” interstate commerce or whether Congress may legislate as long

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94. See *supra* note 93 and accompanying text; *United States v. Nixon*, 418 U.S. 683 (1974).

95. See *United States v. Lopez*, 514 U.S. 549 (1995).

96. The one student who did not do well on completing the Reading Guide, even though he was paired with another student, was a student from Nepal. This student had been excused from submitting a TOEFL score on his application because he had taken an English-speaking course before attending Drexel. He was later informally assessed as having a mid-intermediate oral proficiency on the ACTFL, likely too low to be able to successfully navigate U.S. law school classes.

97. *Lopez*, 514 U.S. at 558.

98. *Id.* at 553 (citing *Gibbons v. Ogden*, 22 U.S. 1, 189-190 (1824)).

as there is any “rational basis” for finding such a connection). However, articulating the standards or test that a court applies in making its determination is a skill that all first-year law students must be taught.

The law professor and the English language education specialist plan to use a similar discourse analysis scaffold to teach the students how to analyze a typical exam question – the “problem question”<sup>99</sup> and write an IRAC answer. In such an exam question, the student is presented with a description of events, the length of which could be from one-half a page to more than a page. The student must then give “legal advice to one or more of the parties concerned, often forecasting what the decision of the court will be.”<sup>100</sup> The questions left yet to be determined are: How much scaffolding is needed in the form of these Reading Guides? Should a whole course be developed around using them, or should the students be weaned off them; if so when, and when should the more traditional law student reading guide, the case brief, be added?<sup>101</sup>

## V. CONCLUSION

In conclusion, the well-developed body of ESP literature is not especially instructive for students who arrive at U.S. law schools ready to embark on an LLM, an advanced-standing JD, or SJD degree, as much of it is written by scholars who are not trained in law. International students matriculated in U.S. law schools would benefit more from a content-based approach, which would blend substantive instruction in law with discourse analysis. The literature on this approach is scarce, however. This paper has described one course in which a law professor and a English language education specialist teamed up to create reading guides for leading U.S. legal decisions to be used in the early part of the semester by international LLM and foreign exchange students. While more work needs to be done in the areas of assessment and transitioning

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99. See generally Howe, *supra*, note 42 (analyzing how law students and professors answer the “normal” law school exam question).

100. Howe, *supra* note 42, at 219.

101. See, e.g., *How to Write a Case Brief for Law School: Excerpt Reproduced from Introduction to the Study of Law: Cases and Materials*, LEXISNEXIS <https://www.lexisnexis.com/en-us/lawschool/pre-law/how-to-brief-a-case.page> (last visited Feb. 19, 2021).

the students away from this scaffolding, joint language specialist-law professor reading guides may be a promising way to help the influx of L2 students into U.S. law schools.

**APPENDIX A: READING GUIDE OF U.S. V. NIXON;  
MATERIAL IN RED IS IN THE TEACHER'S VERSION ONLY**

*U.S. v. Nixon* Reading Guide

**Directions: Complete the vocabulary activities that follow, then read the 3 excerpts from *United States v. Nixon*. Complete the exercises below each excerpt.**

**I. Vocabulary: Study the definitions of the following legal terms.**

**adjudicate:** To rule on judicially. (Noun: adjudication)

**delegate:** To give part of one's power or work to someone in a lower position. (Noun: delegate or delegation)

**due process:** In criminal law, the constitutional guarantee that a defendant will receive a fair and impartial trial. In civil law, the legal rights of someone who confronts an adverse action threatening liberty or property.

**in camera:** Latin, meaning in a judge's chambers. It refers to a review by a judge outside the presence of a jury and the public. In private.

**jurisdiction:** The legal authority of a court to hear and decide a certain type of case.

**justiciability:** The condition of being appropriate for adjudication by a court.

**prosecute:** To charge someone with a crime. A *prosecutor* tries a criminal case on behalf of the government. (Noun: prosecution)

**subpoena:** A command, issued under a court's authority, to a witness to appear and give testimony. (Can be used as a noun or verb)

**waive:** To abandon a claim, privilege, or right. (Noun: waiver)

**Complete the following sentences with a legal term defined above.**

1. The Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.
2. Judges may harbor due process concerns for defendants who claim they need access to foreign evidence.
3. Victims... were jailed when they failed to comply with a subpoena for their testimony.
4. Courts must refuse to recognize a foreign judgment if the foreign court lacked personal jurisdiction over the defendant.
5. The government may request an in camera hearing to determine the "use, relevance, or admissibility" of classified information before a trial.
6. Federal courts must decline to adjudicate matters deemed more appropriate for political than judicial decisionmaking.
7. A person may waive his or her Fourth Amendment rights, but that waiver must be voluntary as determined by the totality of the circumstances.
8. Some environmental statutes delegate federal authority to tribes and thus permit tribal regulations promulgated under the statute.
9. Very few cases have actually been litigated; federal judges wisely often refuse on justiciability grounds even to consider cases.



**II. Excerpt 1: Read the following excerpt and answer the questions below.**

**Justiciability.** In the District Court, the President's counsel argued that the court lacked **jurisdiction** to issue the **subpoena** because the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch, and hence not subject to judicial resolution. That argument has been renewed in this Court with emphasis on the contention that the dispute does not present a "case" or "controversy" which can be **adjudicated** in the federal courts. The President's counsel argues that the federal courts should not intrude into areas committed to the other branches of Government. He views the present dispute as essentially a "jurisdictional" dispute within the Executive Branch which he analogizes to a dispute between two congressional committees. Since the Executive Branch has exclusive authority and absolute discretion to decide whether to **prosecute** a case, it is contended that a President's decision is final in determining what evidence is to be used in a given criminal case. Although his counsel concedes that the President has delegated certain specific powers to [a] Special Prosecutor [appointed specifically to investigate the Watergate scandal], he has not "**waived** nor **delegated** to the Special Prosecutor the President's duty to claim privilege as to all materials . . . which fall within the President's inherent authority to refuse to disclose to any executive officer." Brief for the President 42. The Special Prosecutor's demand for the items therefore presents, in the view of the President's counsel, a political question under *Baker v. Carr*, 369 U. S. 186 (1962), since it involves a "textually demonstrable" grant of power under Art. II.

**Main Ideas:** *Answer the following main idea questions based on the excerpt above. Use your own words in your responses.*

**1. What is the main argument of the president's attorney on the issue of justiciability?**

The main argument is that this case should not be heard by the Court because it is a dispute within the

Executive branch between the special counsel and the president.

**2. List three reasons why the president's attorney is making such an argument.**

(1) it is not a case or controversy; rather it is an inter-branch dispute; (2) because the executive branch decides whether to prosecute, the head of the executive branch (i.e., the president) has the final authority as to what evidence to use in prosecutions; (3) even though certain powers of the president were delegated to the special prosecutor, the president didn't waive his right to claim privilege.

**Text Analysis: Answer the following questions based on the excerpt above.**

**1. Reread the following sentence:** *In the District Court, the President's counsel argued that the court lacked jurisdiction to issue the subpoena because the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch, and hence not subject to judicial resolution.*

**What does Chief Justice Burger mean by "intra-branch dispute"? Why is that relevant?** An intra-branch dispute refers to a dispute between one branch of government (executive, legislative, or judicial) with another branch. This is relevant because often intra-branch disputes are not "justiciable" – that is, a court will not hear them.

**2. Consider the following sentence:** *He views the present dispute as essentially a "jurisdictional" dispute within the Executive Branch which he analogizes to a dispute between two congressional committees.*

**What analogy is being made here? Why?**

The analogy is that a dispute between a special prosecutor and a president is an intra-executive branch dispute just like a dispute between 2 congressional

committees is an intra-legislative branch dispute. Just like a court would not hear an intra-legislative dispute, so this Court should not hear the intra-Executive branch dispute.

**3. Paraphrase the following sentence so that it could be understood by someone who has never studied law.**

*Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case, it is contended that a President's decision is final in determining what evidence is to be used in a given criminal case*

Because the Executive Branch alone has the power to decide whether to bring a criminal case, the President, as head of the Executive Branch, has the final say in deciding what evidence can be used in a criminal case.

**4. Analyze the structure of the following sentence:**

*Although his counsel concedes that the President has delegated certain specific powers to [a] Special Prosecutor [appointed specifically to investigate the Watergate scandal], he has not "waived nor delegated to the Special Prosecutor the President's duty to claim privilege as to all materials . . . which fall within the President's inherent authority to refuse to disclose to any executive officer."*

**To whom does "his" refer in the first sentence? Underline the adverb clause (beginning with the word "although"). What function does this clause serve in the sentence?**

- "His" refers to the president.
- An adverb clause is a group of words that function as an adverb. The clause can modify verbs, adverbs and adjectives by telling when, where, why, how, how much and under what condition. They begin with a subordinating conjunction (such as "after," "if," "because" and "although") and they contain a subject and a predicate. Here, the adverb clause is: Although his counsel concedes that the President has delegated certain

specific powers to [a] Special Prosecutor [appointed specifically to investigate the Watergate scandal]

- Function: It's a concession.

**5. Re-read the following sentence:** *The Special Prosecutor's demand for the items therefore presents, in the view of the President's counsel, a political question under Baker v. Carr, 369 U. S. 186 (1962), since it involves a "textually demonstrable" grant of power under Art. II.*

**Why does Chief Justice Burger mention *Baker v. Carr* in this sentence?**

The Justice cites to *Baker v. Carr* as support for the president's argument that, under the standards of *Baker v. Carr*, the question of whether to respond to the subpoena is a non-justiciable political question. In the U.S., both parties cite to precedent (previous cases) to lend support for their arguments.

**III. Excerpt 2: Read the following excerpt and answer the questions below.**

In support of his claim of absolute privilege [of confidentiality] the president's counsel urges two grounds. \*\*\* The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties. \*\*\* The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. \*\*\* However, neither the doctrine of separation of powers nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with

other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* [private judicial] inspection with all the protection that a district court will be obliged to provide.

**Main Ideas: Answer the following main idea questions based on the excerpt above. Use your own words in your responses.**

1. What is the president's argument about "absolute privilege"?

The president argues that the president has the complete right to declare his communications private.

2. What are the two grounds on which the president is claiming absolute privilege?

(1) "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties" and (2) the doctrine of separation of powers.

3. Why does Chief Justice Burger "find it difficult to accept the argument"?

Because an *in camera* inspection will sufficiently protect the confidentiality of the president's communications.

**Text Analysis: Answer the following questions based on the excerpt above.**

1. Analyze the structure of the following sentence:  
*However, neither the doctrine of separation of powers nor the need*

*for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.*

**What is the function of "however" at the beginning of this sentence?**

The use of "however" means that what follows contrasts with the previous statement. However can show a contrast or a concession.

**Underline the subject of the sentence. What is the function of "neither... nor..." in the subject? What is the function of the phrase "without more" in this sentence?**

The neither/nor construction connects two or more negative statements. Here, it connects two subjects or "compound subjects": (1) the doctrine of separation of powers and (2) the need for confidentiality of high-level communications.

The subject of the sentence is: neither the doctrine of separation of powers nor the need for confidentiality of high-level communications

**2. Paraphrase the following sentences:** *The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises.*

The court pays deep respect to the president's argument that he needs total frankness and a lack of bias from his advisors deserves. However, this argument here is less persuasive because it is based on a vague assertion that the public has an interest in such confidentiality; therefore, other arguments may be more persuasive.

**3. Consider the following sentence:** Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very

*important interest in confidentiality of Presidential communications is significantly diminished by production of such material for **in camera** [private judicial] inspection with all the protection that a district court will be obliged to provide.*

**The adverb clause underlined above modifies the main clause. What is the purpose of the adverb clause in this sentence? Why might the information be necessary?**

The purpose of the clause is to set out the circumstances under which a claim of presidential confidentiality would be a winning argument, but it says those circumstances are not present here. This information is necessary to set out a complete ruling in the case; it could also serve the purpose of signifying to the president's attorneys how to come back and make a winning argument.

**IV. Excerpt 3: Read the following excerpt and answer the questions below.**

In this case, we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed, and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the court. \*\*\* Without access to specific facts, a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that, when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of **due process** of law in the fair administration of criminal justice. \*\*\*

**Main Ideas: Answer the following main idea questions based on the excerpt above. Use your own words in your responses.**

- 1. Per Excerpt 3, what is the court's responsibility in this case?** To balance the president's argument about privilege against the interests of a fair criminal trial.
- 2. What are the two sides of the argument?** The president's argument is that he has a general right to keep his communications private; the government argued that it had the right to seek evidence from the president that was "demonstrably relevant" in a criminal trial.
- 3. On which side does the court rule? Why?** The court held in favor of the special prosecutor seeking the communications and against the president. The reason was because the president asserted only a "general" privilege; that is, not one based on a "need to protect military, diplomatic, or sensitive national security secrets. This general claim does not trump a defendant's right to due process in a criminal proceeding.

**Text Analysis: Answer the following questions based on the excerpt above.**

- 1. Paraphrase the following sentence.** *We cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility*



*that such conversations will be called for in the context of a criminal prosecution.* The Court does not believe that the president's advisors will be less frank even if they know that their comments might in rare circumstances be made into evidence in a criminal trial.

**2. Analyze the structure of the following sentence:** *On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the court.*

**What is the function of "on the other hand" at the beginning of the sentence?**

"On the other hand" shows a contrast that is the opposite of the previous statement.

**The adjective clause underlined above modifies a noun. What noun does it modify? Why is this information necessary?** The noun it modifies is "evidence." The clause serves to limit the types of evidence that can trump a general claim of presidential privilege.

**The allowance of privilege to withhold evidence would, *inter alia* "gravely impair the basic function of the court." Why?** One of the powers of the court is to issue subpoenas to produce evidence. Without evidence, "a criminal prosecution may be totally frustrated."

**3. Consider the following sentence:** *Without access to specific facts, a criminal prosecution may be totally frustrated.*

**In the context of the passage, explain what may cause a criminal prosecution to be "totally frustrated." What decision by the Court could prevent the defendant in a criminal prosecution from gaining access to these "specific facts?"** A prosecution will be frustrated if the parties do not have access to all relevant facts. Had the Court

held for the president, his assertion of privilege would have kept the documents from being inspected *in camera* by the judge for a determination of relevancy.

**4. Analyze the word choice in the following sentence:**

*The President's broad interest in confidentiality of communications will not be vitiated [impaired] by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.*

**What two antonyms (words with opposite meaning) are used here?**

Broad / limited.

N.b, some students may note confidentiality / disclosure

**Why might Chief Justice Burger have chosen to use these antonyms in his decision?** He is contrasting the wide range of the president's claim of privilege to the small number of documents that would need to be produced.