

PART VII

The Judicial Branch

27. Structure of the Federal Judiciary



Photo by Abbie Rowe. Courtesy National Park Service

A COURT is a governmental institution for the peaceful solution of disputes over matters of law. Laws, as has been seen in previous chapters, either are enactments of a legislature (statutory law), or stem from a vast body of tradition and custom belonging to the people (common law). When these laws are being executed, certain disputes may arise that must be resolved in, if possible, a peaceful manner. Legal disputes fall in the main into any one of three great classes, depending chiefly upon who or what are the parties to the dispute: (1) two or more private individuals or groups; (2) one or more private individuals on the one side and the government, functioning as the embodiment of society, on the other; and (3)

one or more individuals on the one side, and one or more government officials or agencies on the other. These three classes involve, respectively, civil law, criminal law, and administrative law. In the American national government, cases pertaining to civil law and to criminal law, and some cases pertaining to administrative law, fall into the sphere of the main American judicial system, the *constitutional* courts. Certain types of cases related to administrative law are dealt with by one or another of the special judicial bodies called *legislative* or *administrative* courts.

THE PLACE OF THE COURTS IN THE AMERICAN GOVERNMENT

With regard to the place that they occupy in the government, American courts have two important traits that make the American judicial system unique by comparison with the systems of other great powers. In the first place, the American court system is dual: there is a system of national courts under the authority of the national government, and there is a parallel and independent system of State courts for every State government. In the second place, at both levels the courts are independent of, and constitutionally equal to, both the executive and the legislative branches of the government.

A dual court system

In the United States there is a dual court system composed of a national judiciary and forty-eight State judiciaries. This dual court system is but another reflection of the American federal form of government. Under the Articles of Confederation there were only State courts. Conceivably under a federal system there might be only State courts or only national courts. Canada and Australia, both of which have federal governments, have single court systems. However, the authors of the Constitution had to respect State fears of annihilation by a powerful central authority. Therefore they made no effort to prevent the States from continuing their own judicial organizations. On the hand, the Constitution requires only a Supreme Court at the national level, leaving the establishment of inferior courts to the discretion of Congress. However, the early federal leaders feared to rely solely upon the State courts for interpretations of federal law, short of cases that came before the Supreme Court; the State courts might have blocked the growing nationalism to the utmost of their ability. Hence a complete set of federal courts was established.

The national and State systems of courts are independent and co-equal, each in its own sphere. Federal courts do not possess powers superior to those of the State courts. Cases that originate in a State court and that conclude with decisions intolerable to one of the parties to the dispute may not simply for that reason be transferred to a federal court. A case may come into a federal court only when it clearly falls within the jurisdiction of the federal court system. The broadest limits of this jurisdiction

are set forth in Article III, section 2 of the Constitution (see below). Congress may by statute clarify these limits and may further constrict them; however, it cannot expand them since, as the Court itself once ruled, such a law would consist of an amendment to the Constitution by unauthorized means. The jurisdiction of State courts occupies the vast unconfined region outside federal court jurisdiction. For this reason, the great majority of cases arising in an American court never leave the State courts; a case enters a federal court only when it can be shown that the case concerns a national issue of the sort described by the Constitution or by an act of Congress. The apparently superior powers of the federal court system repose in the supreme law—the Constitution, federal laws, and treaties—that the federal courts judge.

Equality of the judicial branch

The judicial branch of the national government (and of each State government as well) is constitutionally equal to the executive and the legislative branches. Ideally, under the principles of either Roman or Anglo-American law, a court must reach its decision independently of the status of the litigants, or parties to the dispute; thus the goddess of justice is portrayed as being blindfolded, so that she cannot see who are the litigants. But the ideal of an independent judiciary is difficult to achieve within a practical framework of government. A comparison of two other great and widely imitated juridical systems, the French and the British, with that of the United States will show how the American courts, both national and State, come closer to independence than those of European countries do.

It is important to stress that in each of these countries the judges are presumed to be unprejudiced, as contrasted with the Soviet courts, which must adapt their rulings to the needs of the state as set forth by the Soviet leaders. The real distinctions among the French, British, and American court systems lie in their relationships with the other branches of the government. In France the courts are in fact a part of the executive branch of the government. The court system is under the Ministry of Justice, whose administrative chief is a member of the cabinet. The process of recruiting French judges illustrates the position of the courts in the French government. Judges in France are chosen in a manner similar to that for naming any highly skilled civil servants. A person seeking to become a judge in France follows a special law school curriculum to prepare himself for the bench; he must then pass a typical civil service examination; and, if successful, he is assigned to a minor judicial post, whence he rises in the court system through promotions.

In Great Britain the courts are subordinate to Parliament. Indeed, the supreme tribunal in the British court system is the House of Lords, or more properly those members called the "Law Lords"; historically, the judicial functions of Parliament antedate the legislative. Judges in England are recruited much as they are in the United States, with one outstanding exception: the Lord Chancellor, who is the judicial and administrative head of the British court system, occupying a position roughly analogous

to that of the American Chief Justice, is replaced every time the party control of Parliament changes hands; he is a cabinet member and normally is chosen because he is a trained lawyer who supports the policies of the majority party in the Commons.

American courts at both the national and the State levels enjoy an independence surpassing that of either French or British courts. All American court systems (aside from certain administrative courts, which are a comparatively minor fraction of the whole) are established by the supreme laws, or constitutions, of their respective governments, as organizations independent of and equal to either the executive or legislative branch. The Department of Justice, supervised by the Attorney General, who is a member of the cabinet, is in charge only of prosecutions; hence in the American national government a case is preferred by one branch of the government—the executive—and decided by another—the judicial. In France, by contrast, the prosecuting and the judging of a case are both handled by the Ministry of Justice.

JURISDICTION OF THE AMERICAN FEDERAL COURTS

The jurisdiction of the federal courts of the United States, which comprises the cases that these courts will decide, is succinctly outlined in Article III, section 2, of the Constitution. It was the intention of the Founding Fathers to assign to the federal courts only those types of cases which the State courts would be incompetent to handle; the Tenth Amendment, assuring the States their reserved powers, clearly turns over to the State courts all other types of cases. The Constitution empowered the federal courts to deal with cases on the grounds of two criteria: (1) the nature of the dispute; and (2) the parties to the dispute. Congress may at any time enact legislation to define the constitutional grant of jurisdiction, and has on occasion limited it; nevertheless, the federal courts may deal with no other classes of disputes than those named in the Constitution.

The nature of the dispute

The federal courts have jurisdiction over all cases arising under the "Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." They also hear "all cases of admiralty and maritime jurisdiction." All such cases plainly are matters of national concern. Indeed, cases revolving about treaties or admiralty law would seem to fall within the province of the national courts even without a constitutional grant, since the national government has admittedly inherent powers to administer relations with other countries; however, that these powers are inherent had not been stated at the time the Constitution was adopted.

The parties to the dispute

The federal courts have jurisdiction over "all cases affecting ambassadors, other public ministers and consuls"; cases in which the United States is a

party; and the so-called "diversity of citizenship" cases, that is, cases between two or more States, between one State and a citizen of another State, between citizens of different States, between a State and a foreign country, and between an American citizen and a foreign country. These constitutional grants have subsequently been diminished by constitutional amendment and by legislation. For example, owing to the Eleventh Amendment, federal courts no longer hear cases in which a citizen of one State sues the government of another State; to the adherents of States' rights in the eighteenth century this power seemed an invasion of State sovereignty. Also, it is provided by congressional statute that unless a controversy between citizens of different States involves a sum greater than \$3,000, the case cannot come into a federal court; the federal courts are overwhelmed with business as it is. Congress may in the future delegate more of these judicial areas to the State courts.

THE HIERARCHY OF COURTS

The federal courts of the United States are ranged in a hierarchy from the district courts at the base to the Supreme Court at the apex. With respect to the authority underlying their establishment, and with respect also to their function, these courts may also be divided into two classes, *constitutional* and *legislative*; it is in terms of this classification that the courts will be discussed.

Constitutional courts

The constitutional courts of the United States are those that have been created by the constitutional warrant expressed in Article III, section 1: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

District Courts: The district courts stand at the base of the constitutional court system. The United States is divided into eighty-five districts, each with one court. In a legal sense, Hawaii and Puerto Rico each comprise districts also, although the courts on those islands have been created by legislative rather than by constitutional warrant; yet their jurisdiction is the same as that of district courts on the mainland. Each State contains at least one district; that is, no district crosses a State line. However, some States have two or three districts; New York and Texas each have four. Presumably States are divided into more than one district to cope with a large volume of litigation. However, it is noteworthy that Oklahoma, with 2,233,351 people according to 1956 estimates, has three districts; but Ohio, with 7,946,627, or more than three times as many people as Oklahoma, includes only two districts. Indeed, the southern States have proportionately far more districts than the northern and western States, as can be seen from the map in Figure 51. A reasonable explanation may be that judicial districting, which is executed by Congress, may be a source of patronage; for every district has appointive officers such as district attorneys.

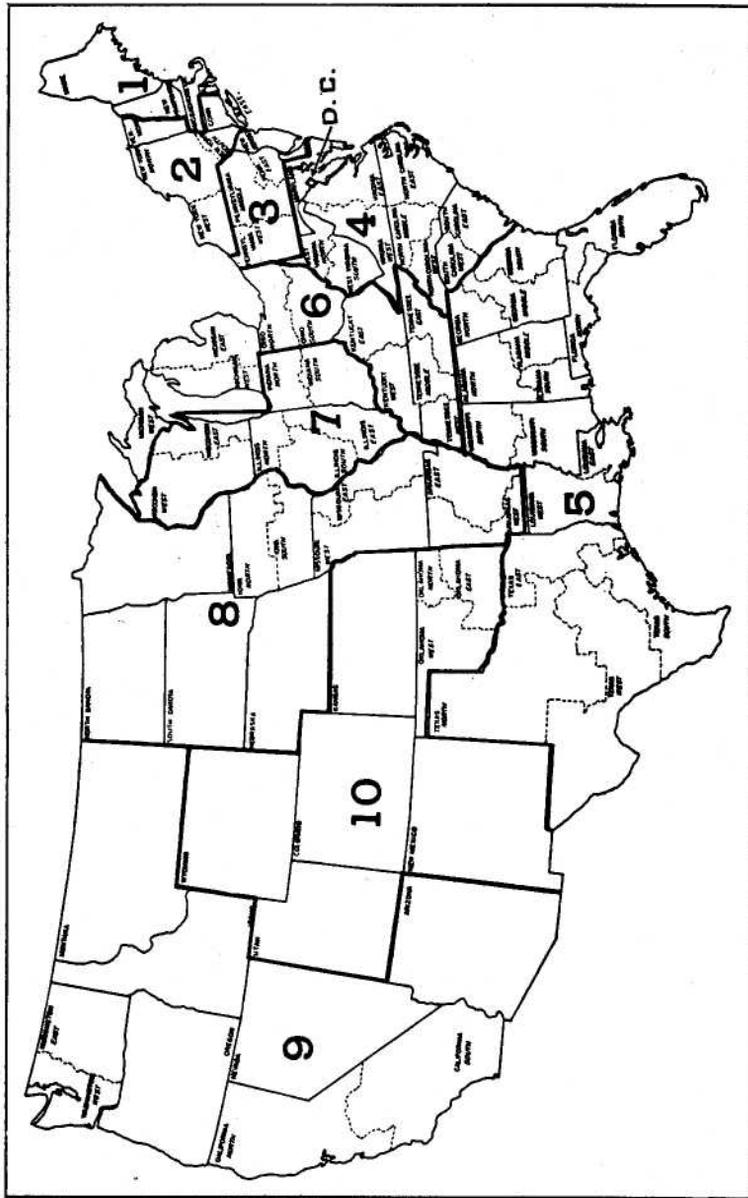


Figure 51. United States Federal Court Districts and Circuits. (1) The large numerals indicate the various Courts of Appeals and the heavy lines represent the jurisdictional boundaries of each circuit; (2) The broken lines represent jurisdictional boundaries of District Courts in States having more than one District.

The amount of business determines not so much the number of districts as it does the number of justices in a district, which may range from one, as in Maine, to sixteen, in the New York Southern District, which includes Manhattan Island. There are about two hundred federal district judges. Congress determines how many judges shall be permanently installed in a district, but judges may be temporarily assigned out of their districts when they are needed elsewhere. A case is heard by only one judge.

District courts handle most of the business that comes before the federal judiciary. A district court is a so-called *court of first instance*, or of *original jurisdiction*; as a trial court, it is the location for the first hearing of almost all federal cases, and also for the last hearing of a large majority of these cases. Its function is to determine the facts in a controversy, to decide what law shall be applied, and to render a judgment.

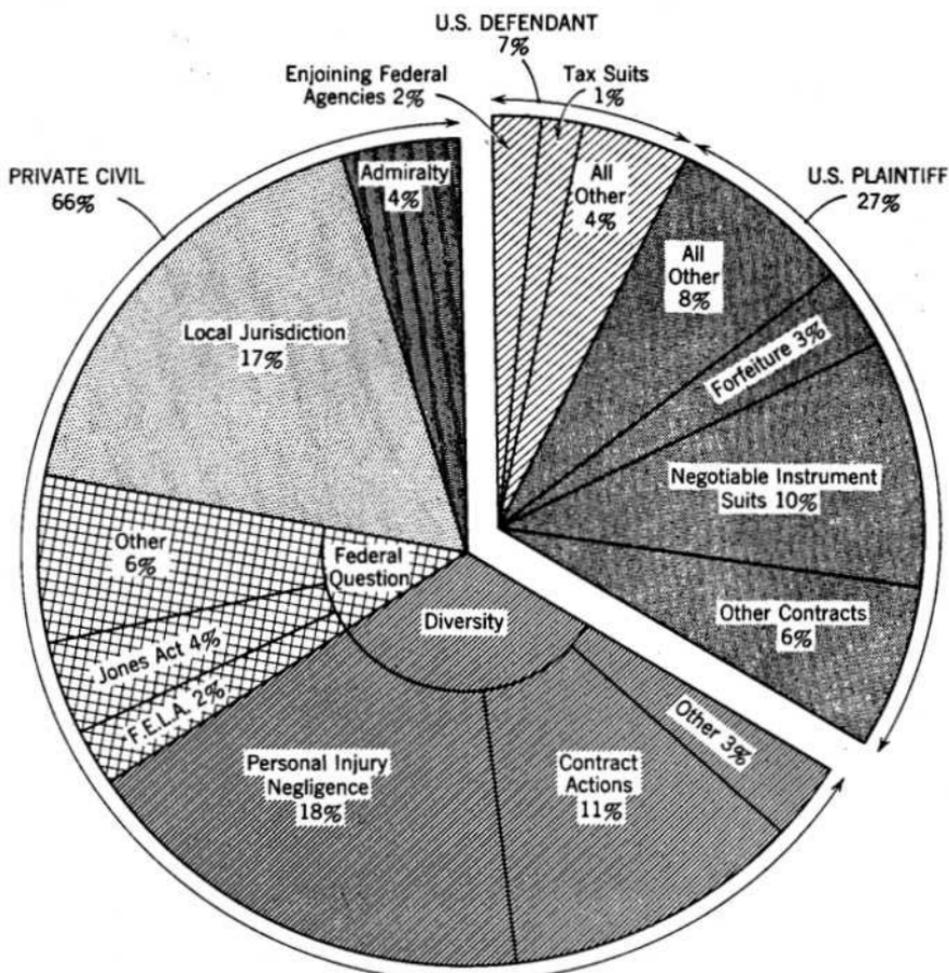
In the year ending on June 30, 1955, 59,375 civil cases were commenced before all district courts (see Figure 52); in thirty-four per cent of the cases, the United States was a party. Of the balance that were private cases, thirty-two per cent involved diversity of citizenship; only twelve per cent concerned a federal question, that is, some dispute revolving about a federal law, the federal Constitution, or a treaty. In the same year, 41,149 persons were accused of crimes in cases commenced before the district courts (see Figure 53). Of these cases, twenty-four per cent were charged with violating immigration laws; thirty-five per cent were accused of larceny, fraud, or other theft; and fourteen per cent of liquor and internal revenue law violations. During the year before, 1954, the federal district courts disposed of 42,989 adult criminal defendants, finding only 1,277 not guilty and dismissing 3,571 for various reasons. Of the balance, nearly half were given suspended sentences and put on probation, or fined; the average sentence of imprisonment for the other half was 18.3 months.

Courts of Appeals: The courts of appeals rank second in the federal court hierarchy, being intermediate to the district courts and the Supreme Court. The United States is divided into ten circuits, each of which has a court of appeals; the District of Columbia constitutes an eleventh circuit. The practice of terming these judicial areas "circuits" descends in a direct line from the medieval English institution whereby royal justices were sent out "on eyre" (derived from the Latin verb *ire*, "to go"), "riding a circuit," to hear cases in different parts of the realm under the principles of royal law. Courts of appeals today may or may not move about their circuits, depending upon circumstances. The composition and procedure of circuit courts differ from those of district courts; each circuit has at least three, and possibly as many as nine, justices. There are sixty-five federal appellate judges. Furthermore, at least two judges must hear a case in a court of appeals; three is the usual number. Each Supreme Court justice is assigned to one or two circuits, but he no longer "rides the circuit."

Courts of appeals have solely appellate jurisdiction; that is, they hear only the cases that have already been tried in a lower court, and that the losing party has appealed. It was stated above that district courts de-

termine facts and apply law. Conceivably an appeal might be raised on the basis of either facts or law. However, the presumption is that the trial court has discovered the pertinent facts; hence appeals are brought almost entirely on the ground of improper law. Thus a court of appeals does not need to retry the case; it needs only to review the court records to decide whether or not the judge in the lower court has applied the relevant law. If the court of appeals rules that the lower court has applied the proper law, the lower court decision stands unless the aggrieved

Total Number = 59,375

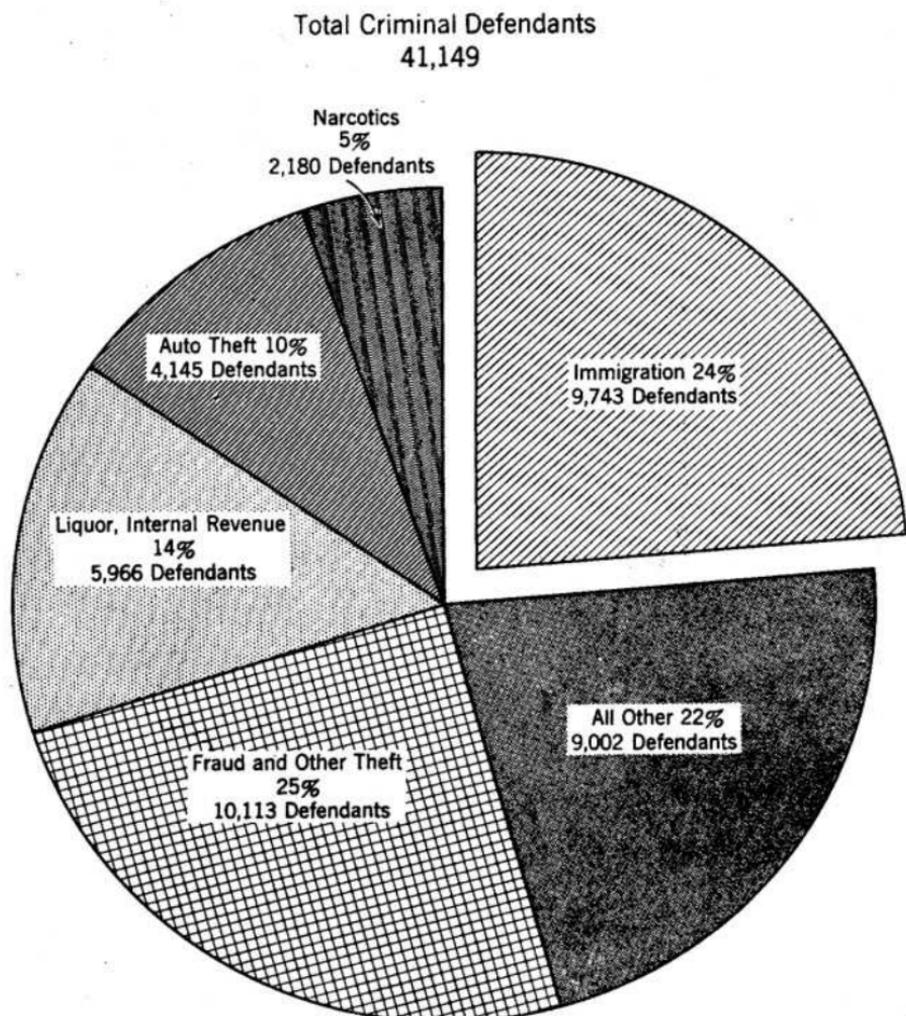


Annual Report of the Director of the Administrative Office of the United States Courts, 1955

Figure 52. District Courts. Civil Cases Commenced during Fiscal Year 1955. Several terms used in the chart require brief explanation: Negotiable instruments are promises to pay things or money which are not legal tender (money) themselves; they are contracts. By "diversity" is meant cases mainly where citizens of two states are involved. A federal question concerns an act of Congress; the Jones Act concerns injuries to seamen; the F.E.L.A. is the Federal Employers' Liability Act. Cases of local jurisdiction are ones that arise directly in places under the jurisdiction of the Federal government, such as reservations, the high seas, or the District of Columbia.

party manages to bring the case to the Supreme Court—a rare achievement. On the other hand, if the court of appeals rules against the lower court, the case must be retried in the lower court; the lower court judge will thereupon bring his interpretation of the law into conformity with the decision of the appellate court.

Courts of appeals were first established in 1891 to relieve the Supreme Court of some of its burdens; and from time to time Congress has expanded the work of these appellate courts, so that they are the last courts for most cases that are appealed. Their principal function is to review cases appealed from the federal district courts in their circuits and rulings of administra-



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Figure 53. District Courts. Defendants in Criminal Proceedings Commenced during Fiscal Year 1955. "All other" includes anti-trust law violations (190), food and drug act violations (589), impersonation of federal officer (180), juvenile delinquency (1235), migratory bird act (839), selective service acts (477), illegal use of uniform (109), offenses on high seas or U.S. reservations (2080), and others. "Fraud and theft" includes 529 income tax defendants.

tive courts and agencies (see below). For example, in the year ending on June 30, 1955, 3,695 cases were filed in all the courts of appeals; of these, 3,004 or eighty-one per cent came from the various district courts and 691 from administrative agencies and courts, chiefly the United States Tax Court and the National Labor Relations Board. Federal courts of appeals hear no cases brought up from State courts. However, in cases such as those involving diversity of citizenship where there is no federal question, and in criminal cases where less than \$1,000 is at stake, the court of appeals is the last resort unless the federal Supreme Court deliberately brings the case within its purview.

The Supreme Court: The Supreme Court is the pinnacle of the federal court system. It is the only federal court that is specifically named in the Constitution and that it was mandatory for Congress to establish. However, Congress has numerous controls over the Supreme Court that will be subsequently indicated. Congress, for instance, fixes the number of justices on the Court. Today there are nine justices. Supposedly the entire membership of the Court hears a case; however, six members make a quorum.

The role of the Chief Justice is worthy of note. He is not necessarily the predominant member of the Court; rather, he is simply its presiding member. Today he is as well the administrative head of the whole federal judiciary. Since 1789, fourteen men have been appointed to this post; only thirteen have served, for in 1795 the Senate refused to confirm the appointment of John Rutledge, evidently because the Federalist majority in the Senate could not tolerate Rutledge's extremely anti-Federalist views. Of the men appointed Chief Justice, only four—Rutledge, Edward D. White, Charles Evans Hughes, and Harlan F. Stone—had previously been associate justices on the Court; and only White and Stone were on the Court at the time they were named Chief Justice.

The Supreme Court has both original and appellate jurisdiction. It is the court of first instance in all cases concerning the diplomatic representatives of foreign powers, and all controversies in which a State is a party. However, there is little possibility that the Court will ever hear a case in which a representative of another country is a party, since ambassadors, ministers, consuls, and other diplomatic agents possess diplomatic immunity, guaranteeing that they will be tried only in courts of their native land. On occasion States do bring suit, as in the case of the perennial litigation over the diversion of water from Lake Michigan by the city of Chicago, where the State of Illinois is the party since Chicago is a legal dependency of the State government. But the original jurisdiction of the Supreme Court is very small. In the three sessions of 1952, 1953, and 1954, none of the 3,950 cases disposed of by the Court was an original case. Only 11 of the 4,466 cases on the Court's docket were original cases.

Cases brought up on appeal, therefore, make up the bulk of the controversies before the Supreme Court. Whereas at one time a large number of types of cases could be brought before the Court on appeal, today

there are only two classes that the Court will deal with: (1) those in which it is held that a right or privilege guaranteed by the federal Constitution or by a federal law has been violated; and (2) those in which it is held that a State law or a clause in a State constitution violates some federal law or a clause in the federal Constitution. Cases, then, come to the Supreme Court from any one of three main sources: (1) a federal district court; (2) a federal court of appeals; or (3) a State supreme court. Hence the real function of the Court today, apart from the few cases it handles in original jurisdiction, is to hear cases that involve an interpretation and application of some part of the federal Constitution. It is important to bear in mind also that the Constitution determines the original jurisdiction of the Court, but that Congress fixes the appellate jurisdiction of the Court.

A further limitation on the amount of business that the Supreme Court will handle arises from the means by which a case may be brought before the Court, that is, by the so-called writ of *certiorari* (from the Latin, "to be certified"). Many disputants seek to plead their cause before the Supreme Court; however, the Court itself chooses most of the litigation that is to come before it by issuing a writ of *certiorari*, which is an order to a lower court to send up the certified record of a case so that a superior court—in this instance, the Supreme Court—may deal with it. Those who wish to obtain a Supreme Court hearing, then, must normally submit a petition for a writ of *certiorari*; and the crucial point is the decision of the Court as to whether or not it will honor this petition by issuing the writ. Most such petitions are rejected; in the session ending in June 1955, the Court dismissed or denied 494 and granted only twelve of them.

These petitions make up the largest proportion of the work of the Court. In a normal year the Court hands down no more than 200 decisions apart from acting on petitions for writs of *certiorari*; fewer than 100 written opinions are handed down. Yet it is still somewhat behind its docket, or schedule of cases, although not so much as in the past when more cases could be brought before it. The subject of judicial review, a prime function of the Court that involves the probing of State and federal laws to see if they conflict with the Constitution, will be discussed in a later chapter.

Legislative courts

A legislative court is a court that has been created by Congress for the purpose of carrying out any one of the powers of Congress authorized by the Constitution; the warrant for the creation of most of these courts lies in Article I, section 8, which enumerates the various congressional powers. A number of these courts may be called *administrative* courts, since they deal with administrative law. However, as will be shown, not all legislative courts are administrative courts; nor are all federal administrative courts included under the heading of legislative courts. Some of the most important administrative judicial bodies in the national government are known as *administrative agencies*, such as the Interstate Commerce Commission and the Federal Trade Commission, which have executive and

quasi-legislative powers as well as judicial functions; these will be described in the chapter entitled "The Departments and Independent Agencies."

The group of administrative courts in the United States is markedly different from the administrative court structure in France. In the United States these courts are all inferior courts that have been established in quite haphazard fashion. In France, by contrast, the administrative courts make up a judicial hierarchy both equal and parallel to the French civil and criminal courts. The implication seems to be that the power of the French executive branch demands this sort of juridical edifice to protect French citizens from governmental excesses.

Territorial Courts: Territorial courts are the courts that Congress has established in Alaska, Guam, the Virgin Islands, and the Canal Zone, under its constitutional power to govern the territories (Art. IV, sec. 3, cl. 2) and in the District of Columbia, under its authority to rule the seat of the national power in the United States (Art. I, sec. 8, cl. 17). In most respects these courts are similar to those of Hawaii and of Puerto Rico. However, by law the courts of Hawaii and of Puerto Rico are classed as federal district courts; furthermore, the courts of Alaska, Guam, the Virgin Islands, the Canal Zone, and the District of Columbia hear many cases that are normally in the province of the State courts, such as suits for divorce. There are four judges of the territorial court of Alaska, one in each of the other outlying territories, and fifteen in the court of the District of Columbia. It has already been noted that the District of Columbia also has a court of appeals, similar in every respect to other federal courts of appeals.

Court of Claims: The Court of Claims hears suits for damages filed against the government of the United States. These suits are typical of those found in civil law; they involve chiefly breaches of contract and torts, the latter being such civil wrongs as trespassing. A building contractor who holds that the federal government has damaged him by breaking a contract providing for some construction work, or a person who has felt that government employees while at work have been improperly entering his land, brings his case to the Court of Claims. The establishment of this court has largely abolished the former procedure whereby a citizen might sue the federal government only when authorized to do so by a special act of Congress. The findings of this Court are transmitted for enforcement either to Congress or to the appropriate agency. The Court contains a chief justice and four associate justices, who hear cases as a unit. Authority to create this court lies in the congressional power to pay the debts of the United States.

Customs Court: The Customs Court hears complaints from importers of goods from foreign countries who maintain that they have been obliged to pay an unduly high tariff on some commodity. For example, a merchant may import a beverage which he contends is for medicinal purposes and on which the tariff rate should be low; the customs inspectors, however, may declare that the beverage is nothing more than an exotic intoxicating liquor on which a high tariff rate should be imposed. This sort of con-

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troverſy is brought to the Customs Court. This Court includes a chief juſtice and eight associates, who hear caſes in teams of three judges each. No more than five of theſe judges may be of the ſame political party. The power to eſtabliſh this Court lies in the warrant of Congress to regulate foreign trade.

Court of Customs and Patent Appeals: The Court of Customs and Patent Appeals hears two types of caſes: (1) diſputes that are appealed from the Customs Court deſcribed above; and (2) controverſies ariſing with reſpect to deciſions of the Patent Office in the Department of Commerce over new mechanical devices and trade marks. The Court is made up of a chief juſtice and four associates, who hear caſes as a unit. Authority to create this Court is derived from the congressional powers to regulate foreign trade and to grant patents.

Court of Military Appeals: The Court of Military Appeals reviews all caſes of courts-martial in which a general or admiral has been found guilty, or in which any member of the armed forces has been ſentenced to death. It alſo reviews caſes that have been turned over to it by the Judge Advocate General—the highest judicial officer—of the Army, the Navy, or the Air Force. This Court is located in the Department of Deſe. It contains three judges, all civilian lawyers, no more than two of whom may belong to the ſame political party. Congress is empowered to erect this Court through its authority to regulate the armed forces.

Tax Court of the United States: The Tax Court of the United States handles diſputes ariſing over the exceſſive payment, or deficient payment, of federal income, exceſs profits, eſtate, and gift taxes. Deciſions of this Court in ſome types of controverſy are final; in others, they may be appealed to a federal court of appeals and even to the Supreme Court on a writ of *certiorari*. It alſo hears caſes concerning the refund of certain federal taxes. The Court includes ſixteen divisions, each headed by one juſtice; one of theſe juſtices is biennially choſen to be Chief Judge for a two-year term. The Court has been eſtabliſhed on the congressional warrant to levy taxes.

FEDERAL JUDGES

Appointment, tenure, ſalary, and retirement

Appointment: All of the approximately three hundred federal judges, regardless of the court in which they ſerve, are ſimilar or even identical with reſpect to appointment, tenure, ſalary, and retirement. All federal judges are appointed by the Preſident with the advice and conſent of the Senate. Appointments to the inferior courts are uſually made upon the recommendation of a Senator, Representative, or party chief, from the area concerned; however, the Preſident normally names appointees who will be ſatisfactory to the Attorney General. Appointments to the federal Supreme Court uſually reflect among other influences the wiſhes, or at leaſt ſuggeſtions, of the Department of Juſtice. Theſe appointments are alſo modified by the practice of having moſt if not all of the ſections

of the country represented on the Court, and the custom of choosing experts in different fields of law. Other considerations in the appointment of Supreme Court justices can be seen from the analysis of their backgrounds given below. The Senate rarely rejects a judicial appointment; the unusual case of John Rutledge has already received comment in this text.

Tenure: Judges in all the constitutional federal courts and most of the legislative courts are appointed for life, or for "good behavior." Judges in the territorial courts, by contrast (save those in the District of Columbia) have specified terms; for instance, those in Alaska and the Virgin Islands serve for four years. The aim of life tenure was undoubtedly to raise judges above partisan activities, since it protects them from removal for partisan causes. Justices hold their seats for long terms; the seventy-nine Supreme Court judges who between 1789 and 1954 were appointed to, and subsequently departed from, the bench averaged almost sixteen years in office. This average far exceeds the average tenure of any federal elective post. However, the longest period served by any Supreme Court justice, the thirty-four year terms of John Marshall, Stephen J. Field, and John Harlan, does not equal the forty-four consecutive years that Adolph J. Sabath represented the Illinois Seventh District in the House.

Federal judges may be removed only by impeachment. Nine judges have been impeached; one was an associate justice of the Supreme Court, seven were district judges, and one was a member of the now-defunct Commerce Court. Four, including the Supreme Court justice, were acquitted; four were convicted and removed from office; and the ninth resigned after the House had voted his impeachment. The articles of impeachment for these justices included such counts as misconduct in office, drunkenness, improper financial transactions of various types, and tyrannous treatment of counsel (meaning abuse of an attorney in court). The specified terms for territorial justices were probably designed to make these benches subjects of patronage. Actually, since most American territories are administered by the Interior Department, it is certainly a contradiction of the principle of an independent judiciary to have their justices of the same party as that of the Secretary of the Interior.

Salary and Retirement: All federal judges receive an annual salary that may not be reduced during their tenure of office; in this way a hostile Congress may not threaten to diminish their income for an unfavorable ruling. Judges in the district courts, the Customs Court, the Tax Court, and the territorial courts, are paid \$22,500 yearly; those in the courts of appeals, the Court of Customs and Patent Appeals, and the Court of Claims, \$25,500; and the justices of the Supreme Court, \$35,000. These salaries hardly match what many justices can earn, and what some have earned prior to their appointment, in private law practice. However, especially in recent years, public respect for the courts has conferred exceptional prestige upon a federal judgeship; and life tenure gives the position great security. Because in the past some judges have abused this security so as to remain on the bench after they had become senile and mentally in-

competent, Congress has provided that any federal judge who has served at least ten years and who had reached the age of seventy years may retire on full salary.

The backgrounds of federal judges

Federal judges, especially those on the Supreme Court, from 1789 to the present show considerable similarity in their backgrounds; however, in recent years a growing number of justices have possessed types of experience and training seldom encountered in earlier days. This evolution reflects the changed attitude toward the Supreme Court assumed both by the public at large and by the officers in the other two branches of the federal government. This attitude can be summed up as a greater respect for the Court united with the belief that the justices should be legal technicians who have a broad education in the social studies, rather than politicians who have studied law. The following data refer to all Supreme Court members from 1789 through the appointment of John Marshall Harlan as associate justice in 1955, eighty-nine men in all.

All Supreme Court justices have been lawyers. Those in the first half of the Court's history had prepared for the bar by independent study in an older lawyer's office, for there were no law schools at that time. However, all justices have been admitted to the bar. Some have had little legal practice; they were occupied with other concerns, such as political office. Others prior to their appointment have held no governmental posts; men such as George Shiras, who sat on the Court from 1892 until 1903, have been known exclusively as wealthy and influential lawyers.

Most Supreme Court justices have been deeply immersed in politics; however, this trait was more nearly universal among early justices than of those today. Thirty-nine justices have been members of State legislatures; however, only Wiley Rutledge among jurists of the past three decades was once a State legislator. Thirty-two justices have been members of Congress, more often the Senate than the House; Justices Harold Burton, Hugo Black, and Sherman Minton on the 1955 Court were all former Senators. Twelve justices have held some cabinet post apart from the attorney generalship, none of them on the 1955 Court. Chief Justice William H. Taft had been President of the United States; and Chief Justice Charles Evans Hughes had been almost victorious as Republican candidate in 1916. Eight justices, mainly in the nineteenth century but including Earl Warren, have been State governors.

Many justices have been very active in party affairs; Associate Justice David Davis took a leading role at the 1860 Republican national convention in procuring the nomination of Abraham Lincoln, and later worked for his election. It is probable that Lincoln appointed Davis to the Court as a reward for his actions, and that he named Salmon P. Chase as Chief Justice to thwart Chase's inordinate political ambitions. Almost without exception, justices have been of the President's party; during the twenty years from 1933 until 1953 when the Democrats held the White House, Roosevelt and Truman between them named thirteen Supreme Court

justices but only one Republican, Burton, who had been a close friend of Truman in the Senate.

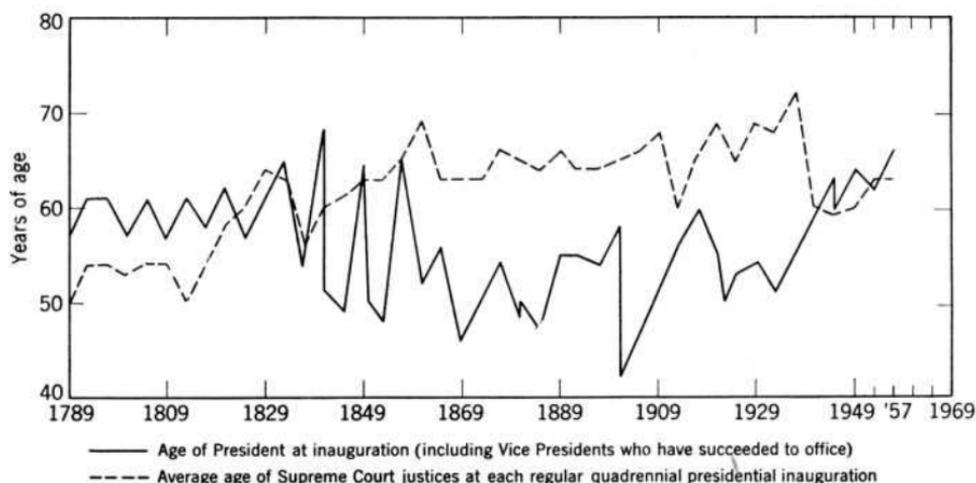
Supreme Court justices have had varying degrees of experience in the public practice of law before their elevation to the Supreme Court. Only nineteen, or about one-fifth, had held a position in the inferior courts, and all but three of these have been men appointed since 1880. However, more than forty justices, most of them in the nineteenth century, had occupied a State bench; about a dozen had been chief justice in their State, but only Associate Justice Benjamin Cardozo in recent years. By contrast, more than a dozen, chiefly since 1880, have been prosecuting attorneys at the State level. Nine justices, seven of them since 1890, have been Attorney General of the United States; three members of the Roosevelt-Truman Court, Associate Justices Frank Murphy, Robert Jackson, and Tom Clark, had previously been Attorney General, and Stanley Reed had been Solicitor General, a position equivalent to that of assistant to the Attorney General.

The desire to secure justices who have special competences can be seen in the appointment of men who have served as lawyers in important administrative agencies; for instance, Reed had been with the Reconstruction Finance Corporation, and Douglas and Jackson with the Securities and Exchange Commission. Perhaps the most significant index for the conviction that justices must be above partisan affiliation is in the growing number of professors of law who have been named to the Supreme Court. Many justices have occasionally taught a few courses in law schools to increase their incomes; however, only about a dozen justices could be described as career professors of law. Ten of these have been appointed since 1880; on the 1955 Court, Justice Felix Frankfurter had been a professor at the Harvard Law School, and Justice Douglas had long been a professor of law. One might be wise in suspecting, however, that this trend indicates an increasing participation by professors of law in political affairs; Justice Frankfurter never held any other public office before entering the Court, but he was a powerful factor in Massachusetts, and then in national politics while he was a notable professor at Harvard Law School.

Supreme Court justices are men of mature years. As can be seen from Figure 54, which gives the average age of the justices at the inauguration of each regularly-elected President, only twice has the average been as low as fifty years. Since about 1840, or for more than a century, it has almost always exceeded sixty years; meanwhile, the age of Presidents has dropped greatly, with Eisenhower being the oldest President inaugurated for his first term since James Buchanan. President F. D. Roosevelt, exasperated by several contrary rulings of the Court, gave great publicity to the age of the justices in 1937. True, at that time the average was seventy-two years, higher than at any other time in American history. However, the age of the justices at this time gave Roosevelt a convenient talking-point for his aim of selecting justices who would not rule against laws he had sponsored; actually, one of the oldest justices in 1937, Louis Brandeis, was a staunch supporter of New Deal legislation.

Doubtless another significant point was that during his first term Roosevelt had not had the opportunity to name a single justice, so that he may have felt cheated. The fact is that in the 144 years from 1789 until 1933, when Roosevelt was first inaugurated, there had been seventy-eight appointments to the Court, an average of one every twenty-two months; hence in a four-year term a President might expect to appoint two or three members of the Court. As matters worked out, Roosevelt was able to make five appointments in his second term, double the average rate; at the end of this time, the average age of the justices had dropped to sixty years. After a further decline in 1945, the average once more began to rise. The youngest man ever named to the Court was Joseph Story, who was appointed in 1811 at the age of thirty-two; the youngest member in recent years was William O. Douglas, named in 1939 at the age of forty-one.

Although some appointments have been made with an eye to representing different sections of the country, a few States have contributed a large proportion of the Supreme Court justices. Eleven justices have come from New York, eight from Massachusetts, and eight from Ohio. Only eleven justices—fewer than fifteen per cent of the total—have come from States west of the Mississippi. In proportion to population the South has been very heavily represented, with Virginia, Maryland, Kentucky, and Tennessee all sending five justices apiece. One explanation may be that lawyers from these States, particularly from New York, are in a position to make themselves better known in Washington than lawyers from States far from the District of Columbia. Unquestionably the need for paying political debts has played a role also. Of course, too, these are among the oldest States in the country, and New York is the most populous.



Analysis of data in World Almanac (1955), adapted

Figure 54. Comparative Age of Presidents at Inauguration and Average Age of Supreme Court Justices at Each Regular Presidential Inauguration, 1789-1957.

This summary of Supreme Court justices' backgrounds shows, then, that justices are not, and never have been, persons isolated from the main stream of public concerns. Rather, they have been, in one fashion or another, political leaders; in fact it has been only in recent years that influential circles of opinion have expected and demanded that the justices have achieved a high level of scholarship and civic reputation. Supreme Court justices have not had feet of clay; on the other hand, their backgrounds have not been such as to cushion them from partisan considerations. It seems very improbable that a politically neutral individual, regardless of the excellence of his training, could secure an appointment to the Supreme Court, or, for that matter, to any federal court. On the other hand, appointment to the Supreme Court or inferior courts brings a great change to the lives of the judges and to the rules of conduct which they observe. The following interview of Chief Justice Warren by a newspaper reporter brings out these changes clearly:

Excerpt from the San Francisco Chronicle, Sunday, July 11, 1954, pages 1, 10.

Earl Warren was back in San Francisco last week. He was working at his new job as Chief Justice of the United States and Chairman of the Judicial Conference of the United States by attending the annual meeting of Federal Judges of the Ninth Circuit. Between sessions, he talked to a Chronicle reporter about how things were going with him in Washington.

By Kevin Wallace

After 31 years in the hurly burly of ever-temporary (that is, elective) employment, as deputy and district attorney and Governor, Earl Warren has wound up his first season in a new job that is seasonal but serene and, in the long range, steady.

"It was a great change and, initially, something of a shock," he told friends who reunited with him here this week.

Being fourteenth Chief Justice of the United States and head of the Nation's judicial system, keeps him away from home—which, in point of legal residence, is and always will be Oakland—during the long October-to-June Supreme Court season.

And all of Mrs. Warren's house-hunting hasn't pried anything more than a rented apartment out of Washington's tight real estate situation, to make a home-away-from-home.

And the peculiarly discreet nature of the new job forbids Earl Warren from so much as hinting as to which California gubernatorial candidate he'll check on the absentee ballot he mails in next November.

But just the same:

"While I enjoyed my experience in public service very greatly, I have no longing to be back in it—I'm happy in this new work," he said.

"As you can imagine, it's been a big change—initially, something of a shock—and I've spent this year becoming oriented to new conditions.

"A Justice who joined the Supreme Court when Chief Justice Hughes was there told me Hughes warned him it would take three years to learn the limitations of the job, and it did. That's always encouraging—to know it's not unique with you, when you take time getting used to a complete change in your way of living.

"There were a number of things I'd wondered about.

Special help

"For ten years before in an executive position (as California's first three-term governor), I had a very large and highly specialized and organized administrative organization, supplying basic material essential to make my decisions.

"When I went to Washington, I found that my total entourage consisted of two secretaries and three law clerks and a messenger. My decisions—not just formal opinions, but my own decisions—were, from that day on, largely the result of my own personal research.

"But I've found the quiet of my chambers and of the (Supreme Court Building's) library a very soothing thing, after the hectic years I put in as an executive.

Speech-making

"Then there's the matter of making speeches. A governor has to make speeches, day and night, all kinds, all over the State—it's part of his job to let people know his views. I did a lot of it.

"But now it's just the opposite. A Justice who started expounding informal opinions would never know when their subject matter might come before him in court.

"Any other judge who disqualified himself that way could simply step aside for another judge to sit in his place. But there aren't any substitutes available to replace a Supreme Court Justice on a case."

And is this limitation frustrating?

"No—I never made a speech I really wanted to. I don't mind telling my views, but making speeches was never an experience I really enjoyed."

Aloof nature

The somewhat aloof nature of the new job also provides the Warrens with a perfect out from the deluge of invitations to political luncheons and receptions that naturally descend on the top man in one of the government's three branches.

"When I was governor, I'd finish my day's work and then fly down from Sacramento to Los Angeles for a meeting and then back again that night, perhaps 60 times a year—or, just as often, I'd drive down here to San Francisco and back.

"And the luncheons.

"But now I have a few ground rules I can go by. Since I've been in the new work, I've left the office at noon only three times—and only to go to the White House.

"I pass up almost all the receptions except the formal ones that require the attendance of the Chief Justice.

"And I get to go home nights. . . ."

Other court personnel

Attached to each federal court are certain non-judicial employees who are appointed by, and responsible to, the justice or justices of the court. Each district court has a commissioner, who occupies a position somewhat akin to that of a justice of the peace in State courts; he conducts preliminary hearings and binds over criminal suspects for trials. Each federal court has a clerk, who must keep the records of court proceedings. The Supreme Court has a marshal to make arrests, a librarian, a reporter, and three deputy clerks.

THE ADMINISTRATIVE ORGANIZATION OF THE COURTS

The administrative organization of the federal court system coordinates the work of the individual courts, strives to establish uniform standards of justice throughout the system, and manages most of the non-judicial business of the courts. It performs tasks that in France or some other country with a judicial structure analogous to the French would be carried out by the Ministry of Justice. In the United States, however, this administrative organization is part of the judicial branch rather than of the executive.

Federal Judicial Conference

The Federal Judicial Conference includes the Chief Justice, who is its presiding officer; the senior judge from each of the eleven federal courts of appeals; and representatives from the judiciary committees of both houses of Congress and from the Department of Justice. Through the Conference the Chief Justice functions as the administrative chief of all federal courts. It meets annually to report on the amount of judicial business in the various circuits and districts; to recommend the transfer of a judge from one district to another, or even from one circuit to another, to equalize the burden of cases; to urge Congress to create new judicial positions; and to seek the uniform interpretation of federal laws throughout the federal court system.

In each circuit there is a judicial council similar to the Federal Judicial Conference, made up of all the federal judges in the circuit. The presiding officer of each circuit council is the senior judge from the court of appeals in the circuit. Often the leading members of the bar in the circuit are invited to attend. At the annual gathering of these circuit councils the senior judge transmits the recommendations of the Federal Conference and in turn receives suggestions for the Conference to examine.

Administrative Office of the United States Courts

The Administrative Office of the United States Courts manages the routine housekeeping details of the federal court system. It handles clerical and accounting matters; disburses the moneys provided for the maintenance of the courts; purchases the supplies needed by the courts; and furnishes janitorial services for federal court buildings. The Office also prepares statistics on the weight of court business for the Federal Judicial Conference. The principal officers of the Office are the Director and the Assistant Director, who are appointed by the Supreme Court and supervised by the Federal Judicial Conference.

THE DEPARTMENT OF JUSTICE

The Department of Justice is entrusted with the general enforcement of federal laws, detecting and prosecuting crimes against the federal govern-

ment, representing the government in civil cases, and advising all other agencies of the government regarding legal questions. Whereas the Department of Justice is functionally related to the federal judiciary, it is structurally and administratively distinct; it is a part of the executive branch of the government and is responsible to the President. Hence it has no formal power over any of the federal courts.

The administrative head of the Department is the United States Attorney General, who is a member of the Cabinet. He is the chief legal officer of the federal government; he represents the government before the Supreme Court in extremely important cases. Yet most of his work revolves about managing the affairs of the Department and giving legal counsel to the President. His principal aide, the Deputy Attorney General, maintains relations with Congress and supervises the employees of the Department. The Solicitor General actually pleads most Supreme Court cases for the government, under the guidance of the Attorney General.

The Department of Justice has a number of important offices and divisions. Several of them may be briefly described. The Office of Alien Property administers assets in the United States that were owned by enemy aliens and confiscated by the government. The Antitrust Division enforces laws prohibiting the formation of trusts and monopolies. The Tax Division handles cases involving federal taxes. A Civil Division deals with civil suits against the government, and a Criminal Division prosecutes individuals charged with violating federal criminal laws. Undoubtedly the best-known office of the Department is the Federal Bureau of Investigation (FBI), whose function is to investigate, but not to prosecute, alleged infractions of all federal laws except those that have been assigned by Congress to some other agency. The FBI also collaborates with State and local police agencies in matters such as providing information about suspected persons and distributing educational materials on innovations in police methods. Another major section of the Justice Department is the Immigration and Naturalization Service, which administers all aspects of the immigration and naturalization laws. Finally, the Department contains a Bureau of Prisons to manage the various penitentiaries, such as that at Atlanta, reformatories (Chillicothe, Ohio), correctional institutions (Milan, Michigan), and camps (McNeil Island, Washington), where the federal government detains its prisoners.

The Department also maintains a considerable personnel in each of the court districts and territories. In each there is a district attorney who, with his several assistants, files suits on behalf of the government and prosecutes those charged with breaking federal laws. The other chief agent of the Department in each court district is the United States Marshal, whose chief functions are the arresting of suspected persons and the serving of federal warrants; the marshal, then, fills about the role that the sheriff has in the county. These officers, like federal judges, are appointed by the President; unlike federal judges, they do not hold office for life, so that their positions are an important source of federal patronage.

QUESTIONS AND PROBLEMS

1. What are the sources in law of constitutional courts and of legislative courts?
2. Define briefly the following terms: a dual court system; jurisdiction; a case on appeal; writ of *certiorari*; administrative courts.
3. List the classes of cases over which the Supreme Court has original jurisdiction.
4. Which of the legislative courts would you regard as being closest to the constitutional court system? Explain your reasons.
5. Describe some of the social characteristics of justices of the Supreme Court. What changes have occurred since the inception of the Court?
6. What are the duties of the Chief Justice of the Supreme Court as administrative chief of the federal judicial system?
7. What are the various ways in which the Department of Justice performs services necessary to the federal court system?