Is today's Justice Department unconstitutional?

by Edward Spannaus and Mary Jane Freeman

With over 77,000 employees—including almost 10,000 FBI agents—the U.S. Department of Justice today constitutes a gigantic national police force, feared less by criminals than by anyone involved in politics, industry and finance, or unions. Its power is such that it is almost impossible to overcome once it trains its sights on a targeted individual or group.

The statistics themselves tell a lot. The rate of convictions obtained by federal prosecutors is well over 90%. Eighty-five percent of federal indictments are disposed of by guilty pleas, without a trial. Of those who go to trial, 75% are convicted.

An impressive record? Good law enforcement? The drug plague which is destroying this nation proves otherwise. If the national law enforcement machinery had been doing its job for the past three decades,
and no need for the President to announce an intensified war on drugs at this late date.

As the federal law enforcement apparatus has expanded, so has crime. Its priorities are clearly elsewhere. "Political corruption," "white-collar crime," defense procurement fraud, Abscam, Brilab: This has been the emphasis since the days of the Carter administration. Not only the priorities but the targets are politically determined.

This is not a new phenomenon. The dangers of a national police force were well understood by the Founding Fathers. The Constitution dealt with this two ways. First, it limited federal law enforcement functions, leaving them largely to the states. Secondly, the Constitution and the Bill of Rights built in specific protections against overarching federal police powers, which protections have been severely eroded during the twentieth century.

Indeed, until 1870, the nation got along without a Department of Justice at all. In 1850, for example, the Attorney General—who functioned as an adviser to the President—had a staff of only four people.

Stuart Lewis

A demonstration by the National Democratic Policy Committee in front of the U.S. Justice Department. The date is Dec. 19, 1988, three days after the conviction in a railroad trial of Lyndon LaRouche and six associates. The LaRouche case is at the center of the Justice Department's unconstitutional rampage.

Under the plan of the Constitution, the enforcement of criminal laws was a state function, with a few exceptions. Congress was expressly authorized to punish treason against the United States, piracy and felonies on the high seas, offenses against the law of nations, and counterfeiting the coins and securities of the United States. Additionally, under the Necessary and Proper Clause, it was recognized that Congress could provide for the punishment of acts interfering with the exercise of federal authority, such as the postal system or the administration of justice.

Only one crime—treason—was actually defined in the Constitution. The reasons for this—the arbitrary use of indictments for treason by the English crown—are too well known to need elaboration here. Even before the adoption of the Bill of Rights, the Constitution itself provided guarantees against the exercise of tyrannical power by means of the criminal law: It guaranteed the right of *habeas corpus*, and forbade its suspension except in times of invasion or rebellion; it prohibited bills of attainder and *ex post facto* laws; and it required that criminal cases be tried by jury, and in the state where the alleged offense was committed.

This delimited federal authority was restricted even further by the Bill of Rights—particularly the Fourth Amendment's prohibition of "general searches" and restrictions on the power of search and seizure; the Fifth Amendment's guarantees of due process of law, indictment by a grand jury, and its prohibition against double jeopardy and being a witness against one's self; the Sixth Amendment's fair trial guarantees; and the Eighth Amendment's prohibition of cruel and unusual punishments, and of excessive bail and fines. And, of course, the First Amendment carved out areas of political activity and religious belief that were to be free from interference by the federal government.

(It should be recalled that the Bill of Rights' prohibitions and guarantees were understood as applying only to the *federal* government; their application to the states is a relatively recent development.)

After the ratification of the Constitution, a limited enforcement machinery was created by Congress with the Judiciary Act of 1789. A three-tier court system was established, with both district courts and circuit courts having criminal jurisdiction. Also created were the offices of clerk of court, U.S. marshal, and district attorney. Marshals were the sole federal law enforcement officers; the district attorneys (today's U.S. Attorneys) prosecuted accused offenders and represented the United States in civil actions.

This remained the structure of federal law enforcement for many decades. The Attorney General was a counsellor and adviser to the President; he did not even supervise the district attorneys, whose budgets were under the Interior Department.

Defining federal crimes

Congress still had to define what constituted crimes against the United States and their punishments. The Crimes Act of 1790 defined 17 crimes, six of which were capital offenses, including treason, piracy, and murder on U.S. property. Other defined offenses, carrying lesser penalties, included perjury, obstruction of justice, and bribery of a judge. From time to time Congress defined additional crimes: stealing mail or robbing a mail carrier was made a federal crime in 1792; certain violations of neutrality were made

crimes in 1794; forgery or counterfeiting of instruments of the Bank of the United States were made crimes in 1798; the Logan Act, which forbade private individuals from carrying out international diplomacy on behalf of the United States, was passed in 1799; and criminal penalties for the slave trade were imposed in 1800.

There were also some early efforts to bring common-law crimes under the federal courts. That is, any act traditionally considered a crime under the common law could be prosecuted in federal courts if the offense was committed within federal jurisdiction—i.e., on federal property, the high seas, etc. Alexander Hamilton, for one, believed that the federal courts should have common-law jurisdiction. But even so, this did not mean *general* criminal jurisdiction, merely jurisdiction over all offenses committed against the federal government.

Chief Justice Oliver Ellsworth said in 1795 that a federal grand jury could indict for "acts manifestly subversive of the National Government, or of some of the powers specified in the Constitution." Thomas Jefferson, predictably, sounded the alarums at this "wholesale doctrine," warning that the Bank Law, the Alien and Sedition Acts, etc. were "inconsequential, timid things, in comparison to the audacious, barefaced and sweeping pretention to a system of law for the United States . . . so infinitely beyond their power to adopt." "If this assumption be yielded to," Jefferson declared, "the State Courts may be shut up." (Old Tom must be spinning in his grave today, with the sweeping jurisdiction given to the federal courts today to prosecute all kinds of garden-variety crimes that have no relationship whatsoever to federal constitutional authority or power.) In 1812, the U.S. Supreme Court ruled definitively that the federal courts could only punish those crimes defined by statute, and not those defined by common law.

The federal law enforcement system nevertheless became politicized very early on, particularly with the Alien and Sedition Acts, which were passed in part because of the difficulties in obtaining common-law prosecutions for political offenses. The Sedition Act of 1798 defined as criminal any conspiracy to oppose any measure of the government; it also defined criminal libel, while allowing truth to be entered as a defense against a charge of libel.

Budget cutters of 1860s created Justice Dept.

In 1870, almost a century of opposition to establishing federal jurisdiction over crimes and law enforcement was finally broken with the passage of H.R. 1328—a bill to establish a federal Department of Justice. The opposition had been rooted in the abhorrence first articulated by our Founding Fathers to the establishment of national police powers. When the yoke of British rule had been thrown off in America, one critical consideration in creating the U.S. Constitution was to eliminate the heavy hand of regal power as reflected in the British system of criminal law. Our forefathers rightly saw that such a system of criminal law was in fact a "tool of politics."

The first proposal to create a department of law came from President Andrew Jackson in 1828. But it was not until the 1850s that a concerted push was made to get the necessary legislation passed. From 1854 to 1870, when the bill was finally passed, a series of joint committees audited and investigated the legal expenditures made by different governmental departments. In 1870, Rhode Island Congressman Thomas Allen Jenckes pressed the passage of the legislation, with the rationale that it cost too much for each branch of government to have its own law division. His argument scrupulously circumvented the central argument against such a department being created—the danger of a federal police apparatus—by playing on the budgeting concerns of Congress financing the operations of government.

The creation of the Department of Justice was followed by a series of initiatives which gradually federalized the enforcement of criminal law—exactly what the opponents had feared. These initiatives culminated in the establishment of a Criminal Division of the DoJ in 1928.

A brief chronology follows:

1871 A central fund of $50,000 is authorized for nationally supervised investigative functions out of the DoJ.

1872 The Mail Fraud statute is enacted. It is the first federal criminal statute of broad scope used to prosecute criminal activity (e.g., fraudulent schemes) which was normally dealt with under state law.

1875 Attorney General Williams begins appointing "special agents" to conduct investigations throughout the country.

1883 Attorney General Brewster calls for the revision of federal statutes, with a special emphasis on procedure and substance of the criminal law.

1887 The post of "General Agent" is created. The General Agent's responsibility is to supervise all "special agents."

The Federalists used the Alien and Sedition Acts against the Jeffersonian Republicans. The latter denounced the former for their politically motivated use of these statutes—especially prosecutions for criminal libel—but they were just as quick to wield these laws against their Federalist adversaries as soon as they had the opportunity.

Under Jefferson's presidency, some additional crimes were defined as federal offenses, such as offenses involving the national bank, the postal system, Indian lands, and the slave trade. The second comprehensive federal criminal code was not passed until 1825; it added little to the limited list of federal crimes, but even so, there were still complaints in Congress that it interfered with state criminal laws.

This was, by and large, the system that existed up until the Civil War. From time to time, new federal crimes were defined, but they were always offenses that involved actual federal jurisdiction or property; there was no need to duplicate state criminal laws. For example, the problem of interstate flight to avoid prosecution did not emerge with the invention of the automobile; a criminal could outrun a local sheriff by horse or boat. But the Constitution considered that problem and solved it with Article IV's provision for extradition; there never has been any need to "federalize" state crimes because a suspect crosses a state line, whether by foot or by air.

1890 Sherman Anti-Trust Act is passed.

1897 Congress authorizes a commission to revise and codify the criminal penal laws of the U.S.

1905 An *ad hoc* reorganization of the appointment of "special agents" occurs—the first step to establishing a national investigative force.

1909 The Bureau of Investigation is created within the DoJ. In the same year, a comprehensive federal criminal code is adopted.

1910 The Mann Act is passed, prohibiting interstate transportation for immoral purposes.

1914 The Harrison Act is passed, beginning federal criminal involvement in dealing with narcotic drugs.

1919 The Dyer Act is passed, prohibiting interstate transportation of stolen motor vehicles.

1928 A Criminal Division is created within the DoJ with Attorney General Cummings designating 31 functions to the division. The federal criminal code of 1909 is made part of the general statutes of the U.S.

1932 The Lindbergh Law, making kidnaping a federal offense, is adopted.

1934 Nine new federal criminal statutes are adopted, including the Fugitive Felon Act, wire fraud, bank robbery, extortion, firearms, and interstate transportation of stolen property.

Creation of the Justice Department

From time to time there were also proposals to broaden the powers of the Attorney General and to create a Department of Law. These were succ
ments on the powers left to the states by the Constitution.

However, under the needs of the Civil War, in 1861 the Attorney General was given formal, administrative control over the district attorneys and U.S. marshals. The Attorney General thus assumed control over prosecutorial functions that had been dispersed in various departments of the government, i.e., the Treasury, State, Navy Departments, etc. In 1870, the Department of Justice was created by Congress, and in 1871 the first federal funds were allocated for "the detection and prosecution of crimes against the United States."

The first significant expansion of federal law enforcement came with the Sherman Anti-Trust Act of 1890—exactly 100 years after the passage of the first federal criminal statute. Also, over the years, the practice of hiring private detectives (Pinkertons, etc.) had grown, and in 1909, under the pretext of "professionalizing" such investigative functions, the Bureau of Investigation (today's FBI) was created.

(It is interesting to recall that the principal investigative agency in the early years of the republic was the grand jury—an independent body of citizens that conducted its own investigations, called witnesses, etc. Unlike today's rubber-stamp grand juries, these bodies in the 19th century frequently acted independently of prosecutors, charting out their own investigations, and indicting or refusing to indict as they saw fit.)

The FBI's "charters"—so to speak—were the Mann Act of 1910 (crossing state lines for immoral purposes) and the Dyer Act of 1919 (making auto thefts across state lines a federal crimes). Charter or no, the FBI jumped into the investigation and harassment of radicals and union organizers. During World War I, the FBI increased its strength from 300 to 400 agents for alleged enforcement of the Neutrality Act and the Espionage Act. The most massive political attacks occurred with the 1919 Palmer Raids, when as many as 10,000 aliens and perceived radicals were arrested without warrants.

But it was in the 1930s that the creation of a national police force was seriously undertaken. The stage was set by a multiplication of "crime commissions" in the 1920s, generally funded by the Eastern financial establishment and using Prohibition-spawned gangsterism and racketeering as the excuse to call for new federal criminal laws.

The years 1933-34 saw a massive expansion of federal criminal laws, which were denounced in Congress as "substituting a federal criminal code for the criminal codes of the

states." In 1934, new laws were passed making federal crimes of wire fraud, extortion, bank robbery, fleeing across state lines, transporting stolen property across state lines, and so forth.

At this point, full police powers were also given to FBI agents. In 1934, agents of the FBI were given the power to serve warrants and subpoenas, make seizures and arrests, and carry firearms. The rationale for the early 1930s' consolidation of federal police power was that this was necessary to respond to the "crime wave" and to deal with gangsters and "racketeers."

It is not accidental that this acceleration of the creation of a national police-state apparatus (1933-34) coincided with Franklin Roosevelt's "first New Deal"—many features of which (NIRA, etc.) were modelled on Mussolini's corporatist fascism. This was a period when both the economy and the financial structure were in utter collapse, and waves of mass strikes were rolling across the country, and being broken by police and troops.

During the 1930s the FBI also expanded its "internal security" functions against fascists and Communists; with the outbreak of World War II the FBI was reorganized with the creation of the notorious Division V, handling internal securtiy and counterintelligence. The FBI hardly missed a beat in the transition from wartime to the McCarthyism of the late 1940s and 1950s, continuing with its "Cointelpro" dirty political operations into the 1960s and 1970s, and indeed, up to the present day.

The 1950s saw another wholesale expansion of federal criminal jurisdiction—particularly in areas of gambling, union operations, and interstate travel for just about anything. In 1958 the Organized Crime and Racketeering section was created within the Department of Justice. This unit was supposed to concentrate on the prosecution of narcotics, tax, and gambling offenses. However, it used its powers to aggressively target labor unions and officials—especially the nation's largest independent union, the Teamsters.

This trend has continued apace to the present day. This expansion of federal jurisdiction has absorbed all sorts of local crimes into the federal system. This includes numerous areas in which there is no direct federal interest—such as theft, robbery, fraud, burglary, threats and extortion, bribery, loan sharking, murder, assault, gambling, prostitution, pornography, etc. The Travel Act and the Racketeering Influenced and Corrupt Organizations (RICO) statute directly incorporate state laws into federal laws.

How to encourage crime

With all these weapons in the federal law enforcement arsenal, one might expect crime to have been reduced. But in fact, reality works in the opposite way: deteriorating economic and cultural conditions bring more crimes and more police-state measures.

Two of the most powerful weapons in the federal police-state arsenal are the 1970 Racketeering Influenced and Corrupt Organizations Act (RICO) and the 1984 Sentencing Reform Act.

The RICO statute is treated at length elsewhere in this issue. The continuation of RICO civil procedures and remedies (private suits, injunctions, treble damages) and criminal prosecutions gives the government enormous—but totally unnecessary—powers.

The mandatory sentencing provisions of the Sentencing Reform Act (which took effect in late 1987) have greatly increased the powers of federal prosecutors to coerce pleas and cooperation, while decreasing the discretionary powers of federal judges. Sentencing is now basically "computerized," with no allowance for individual differences with respect to criminal propensity, potential for rehabilitation, etc. The *only* way a defendant can get a reduced sentence is by "cooperation," i.e., by informing on other defendants or suspects. The information provided by a "cooperating" defendant need not be truthful—and frequently isn't. The important criterion is whether it helps the prosecutors get further convictions—e.g., with more plea bargains.

The increasingly powerful weapons available to federal law enforcement agencies are not used where they are most needed. Since the late 1970s, the Justice Department's priorities have been so-called "white collar crime" and "political corruption"; any political or economic grouping which could represent a potential for independent political action or resistance to depression conditions can and will be targeted.

The only conclusion which can be reached is that most of the powers which Congress and the courts have given to the Justice Department and FBI are not only unnecessary, but are in fact a danger to the republic. But, the reader protests, "What about the War on Drugs? What about terrorism?" These, in fact, conclusively prove our point, for under the original powers given to the federal government under the Constitution, international drug trafficking and terrorism (i.e., piracy) could be fully dealt with. Congress explicitly has the power to control imports and exports, to punish piracy, felonies on the high seas, and offenses against the law of nations. Congress can also declare war if necessary.

All of the powers necessary to wage war on drug trafficking and terrorism are implied in the original plan of the Constitution. There is no necessity for the federal government to have such "garden variety" criminal jurisdiction as it has today, to adequately perform those law enforcement functions that are properly its own.

In short, all those law enforcement functions which are necessary and proper for the federal government to exercise can be carried out within the bounds of the Constitution. There is no justification for the existence of the massive police-state apparatus called the U.S. Justice Department; it has become that sort of engine of politically motivated legal tyranny which the Founding Fathers tried to prevent. Indeed, the Constitution itself is becoming its victim.