

**The Attorney Generals' Role in a Polarized Society: How the Office has Evolved and What
it Needs to Survive**

Senior Seminar

Politics and Government

Nicole Zeman

March 10th, 2017

Abstract

The Judiciary Act of 1879 established the role of the United States Attorney General (AG). The AG is the head attorney for the country, appointed by the President. The role of the Attorney General is to be the head administrator for the DOJ, and represent the United States in legal matters, which may include representing the United States Government in the Supreme Court of the United States and all other courts. As the Attorney General role has progressed, the opinions written by AG's have been given authority equivalent to that of law. From the first Attorney General the office has lacked political neutrality and the waves of political polarization throughout American history have forced the AG to play the political game. Because the President appoints the AG, the Attorney General's loyalty, which is supposed to be to the public, has steadily prevailed to be directed at the president. From the beginning roots, the role has been politicized; President Washington appointed Edmund Jennings Randolph not simply because of skill but also because of personal connections. The office has progressed gaining the power of precedent and the Department of Justice, which has heightened the power of the AG within society. Attorneys General such as William Wirt, Amos T Akerman, Homer Stille Cummings, John Ashcroft and Loretta Lynch among many other have highlighted the political problem within the position through party and presidential loyalty. Although the shift has occurred, there is hope for the position. To fix the AG's involvement with party politics, the Supreme Court of the United States must be granted appointment power of the AG with review every four years. The Supreme Court appointment will result in a more stable justice system, a less politicized Attorney General, and loyalty to the people to be restored. The AG role has shifted far from the intended political neutrality, but it is not impossible to restore the neutrality and justice for the American people to be restored.

Introduction

The United States Attorney General (often abbreviated AG) is known as the head attorney for the entire country, appointed by the president himself, and subsequently the state attorney generals have a similar role for each state. The Judiciary Act of 1789 established the position of the Attorney General and, in 1870, congress passed an act to place the Attorney General at the head of the department of justice and give the position control over all other U.S. attorneys and counsel employed by the United States.¹ As it was created, the role of the Attorney General is to “supervise and direct the administration and operation of the Department of Justice, including the Federal Bureau of Investigation, Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms and Explosives, Bureau of Prisons, Office of Justice Programs, and the U.S. attorneys and U.S. Marshals Service.”² As the United States progressed, the role of many governmental positions adapted to unpredictable circumstances –wars, regional conflicts, and the ever-present political divide that has been entrenched in American politics. Politics has become more about political parties and actions that are classified as “left” or “right,” which makes it challenging for political actors, who are supposed to be politically neutral in theory, to make neutral decisions. Therefore, regardless of the constitutional role, it has always been nearly impossible for the Attorney General to be a neutral officer of the law through his or her political alignment with the President. The Office of the Attorney General has never experienced complete neutrality and will not because of the presidential connection; in attempt to fix the polarized position, the current system must be altered to create more accountability and attempt to increase political neutrality. An appointment through the United States Supreme Court will

¹ "Organization, Mission & Functions Manual: Attorney General, Deputy and Associate." The United States Department of Justice. Accessed November 17, 2016. <https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general>.

² Ibid.

remove the partisan approval process and cut the loyalty to the president helping to create a more politically neutral and accountable role.

Table of Contents

Abstract.	2
Introduction.	3
Table of Contents	5
Literature Review	6
The Attorney General: The Federal Government Chief Lawyer and Chief Litigator, or One Among Many?	6
Rethinking the Identity and Role of the United States Attorneys.	7
Break Up the Presidency?: Governors, State Attorneys General, and Lessons from the Divided Executive.	9
Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters	10
Methodology	12
Discussion	14
Foundations of the Attorney General.. . . .	14
The Role of the Attorney General	15
Shifting Roles of the Attorney General	16
Political Neutrality as the Goal	18
Is The United States Really Polarized?.	20
The Supreme Court.	23
Case Studies	24
Edmund Jennings Randolph	25
William Wirt	26
Amos T Akerman	27
Homer Stille Cummings	29
John Ashcroft	31
Loretta Lynch	33
Jeff Session.	36
Conclusion	37
Tables and Charts	42
Bibliography	45

Literature Review

Most existing research in regards to the Attorney General role does not revolve around the concept of abolishing or changing the office. Research on the position focuses on the changes experienced throughout periods of turbulence, scandals and political unrest; however, because the Office of the Attorney General is viewed as fundamental and a part of the Constitutional make up of the government in the United States, there is a lack of scholars discussing changing the office. Many scholars examine the problems and unrest that has occurred throughout various periods of history, but many do not venture farther than that. The literature review contains three prominent sources with scholars who have supported the need for change with evidence and suggested possible solutions.

The Attorney General: The Federal Government Chief Lawyer and Chief Litigator, or One Among Many?

Griffin B. Bell wrote an article in the Fordham Law Review titled “The Attorney General: The Federal Government Chief Lawyer and Chief Litigator, or One Among Many?” discussing the role of the Attorney General on a Federal level. Griffin Bell analyzed the Attorney General in relation to the Department of Justice by acknowledging that the “Department of Justice is strong. But it is a strength born solely of the outstanding individuals who comprise it.”³ As Attorney General, Bell experienced the investigation of Korean influence buying in Congress, investigations of past abuse of the FBI and the national effort to respond to the influx of undocumented aliens.⁴ Bell examined the history of the Attorney General’s office and the DOJ. He examined the first Attorney General Edmund Randolph in his role and his

³ Bell, Giffin B. "The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?" *Fodham Law Review* 46, no. 6 (1978): 1049-070. Accessed 2017. <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2318&context=flr.1049>

⁴ Ibid.

attempt to participate in litigation of inferior courts in attempt to make the records in cases that would eventually reach the Supreme Court. Bell acknowledged the growth of the AG role with the formation of the DOJ and the trust by Congress to place the Attorney General in charge.

Bell then changes focus to the present AG and DOJ. He acknowledged that some regulatory agencies attempt to leave the control to the DOJ and Attorney General; however he is not in favor because “it is unseemly for two government agencies to sue each other. It requires the judicial branch to decide questions of government policy.”⁵ Looking to the future of the position after Bell’s time, he made a few suggestions for the office: ensure the Attorney General is the sole office who is charged by law with duties of advising the others and representing the interests of the United States in General litigation in which questions of law arise; and remove the AG from policymaking and policy implementation processes of government. To accomplish the neutrality, Bell suggested an executive order to remove the Attorney General from Senate confirmation ensure the AG could be free to exercise independent judgment in his litigating function.

Bell’s article discussed the necessity for a change within the position of the Attorney General. Similar to this research, Bell acknowledged the political sway and power that has affected the position; however, he simply suggested an executive order to amend the problem. This research extends beyond an executive order because the problem has become much more entrenched since Bell’s time. An executive order would be a start to amending the problem, but the political affiliations often affect the AG in determining legal outcomes.

Rethinking the Identity and Role of the United States Attorneys

Sara Sun Beale’s article “Rethinking the Identity and Role of the United States Attorneys” discussed the increasing partisan politics that has affected attorneys in the United

⁵ Ibid. 1058

States. Beale discussed that during the Bush administration, improper decisions were made because of partisan political considerations in regards to immigration judges, summer interns, and line attorneys.⁶ Beale described the role of the U.S Attorney as “plainly political” but then described the irony of the position; although appointed by a political figure, once in office the U.S Attorney is expected to “leave behind party politics, adhering to the norm of prosecutorial neutrality.”⁷ Beale examined the fundamental problem in the setup of the office, the Attorney General is supposed to be neutral but he or she is not insulated from politics. By changing the dynamic it would get rid of the approval process through Senate and lessen the strain on the confirmation process. She examines the benefits of the current system. The current system creates a “political counterweight ... a counterweight to excessive centralization and uniformity within the federal system,” additionally it gives the U.S Attorney prestige to carry out federal law enforcement.⁸ Beale believed the current system’s benefits outweigh the benefits of changing the appointment system, but that does not mean nothing should be done.

Beale believes that changing the system can help reduce but not eliminate the partisan politics within the AG role, which is similar to the research presented here. She presents the idea of removing Senate’s approval or creating the position to be a career appointment.⁹ This would insulate them from the partisan politics but she worried it “would affect their ability to withstand partisan political pressures from officials in the White House or Main Justice.”¹⁰ As acknowledged by Beale the career appointment causes problems such as the recognition and prestige. The current system with changing attorneys ensures their political and legal

⁶ Beale, Sara Sun . "Rethinking the Identity and Role of United States Attorneys." *Duke Law* : 369-439. Accessed 2017. http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2726&context=faculty_scholarship.369

⁷ Ibid.

⁸ Ibid. 373

⁹ Ibid. 419

¹⁰Ibid.

involvement are current and prevalent. By taking away the continuous check on the Attorney General the motivation diminishes and the respect by the public and government does as well. Beale's research is consistent with this paper's findings that something must be done to the office, but her two approaches fall on both ends of the spectrum—too little and too much.

Break Up the Presidency?: Governors, State Attorneys General, and Lessons from the Divided Executive

William P. Marshall discussed the role of an independent Attorney General on both the Federal and State level in his article "Break Up the Presidency?: Governors, State Attorneys General, and Lessons from the Divided Executive." In relation to the present research, Marshall focused heavily on the State Attorney General, but ended his discussion with the power of the Presidency and the discussion of an independent federal Attorney General. Marshall acknowledged that in the wake of the Watergate scandal there was Congressional hearings on the idea of an independent AG.¹¹ The necessity for the President to have a concentrated power stems from their national security and foreign affairs duties, but Marshall dares to question if the President really needs the power to appoint the Attorney General. Marshall describes the key arguments to having the current system: energy and efficiency, accountability, separation of powers, and the freedom to not utilize the AG by the President.

Marshall did not develop a solution to the problem or a 'preferred model' of selection; instead he focused on whether a different model would benefit the system on the State and Federal level. Through his research, there are different answers to the State and Federal level because of the present research the Federal level is only being analyzed. An independent

¹¹ Marshall, William P. . "Break Up the Presidency?: Governors, State Attorneys General, and Lessons from the Divided Executive." *The Yale Law Journal* 115 (2006): 2442-474.
http://web.law.columbia.edu/sites/default/files/microsites/career-services/Governors,%20State%20Attorneys%20General,%20and%20Lessons%20from%20the%20Divided%20Executive_0.pdf.2467

Attorney General is “freer to offer objective advice and better able to act in accordance with the rule of law rather than in the pursuit of a political agenda” and the “ability to do so without imposing substantial burdens on the efficacy of government makes the model an attractive candidate for adoption at the federal level.”¹² The current system has essentially made the President “the only arbiter of the legality of his actions,” and an independent AG may “reconstruct a workable system of intra-branch checks and balances.”¹³ Although Marshall did not suggest any new models to adjust the system of the AG, his research coincides with the necessity to change the current model. By taking the AG out of the political games and political loyalty to the President, the executive branch will have another check on its legal powers.

Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters

William Marshall discusses presidential power in his article Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters. The beginning of his literature discusses the simple expansion of power from the legislative branch being the most powerful with the bicameral legislature, but the “presidency has become the far more powerful branch.”¹⁴ Marshall uses examples such as the incident in 2006 when the president was able to maneuver a new congress to pursue a war even when the American public elected a congress that would get them out of the war. The cause of this expansion that has occurred is broken down into eleven reasons, as classified by Marshall. Those reasons include: constitutional indeterminacy of the president; precedential effects of executive branch action; the role of the executive branch lawyering; growth of the executive branch; presidential control of the administrative state;

¹² Ibid. 2472

¹³ Ibid.

¹⁴ Marshall, William P. "Eleven Reasons Why the Presidential Power Inevitably Expands and Why It Matters." *Boston University Law Review* 88 (2008): 505-22. Accessed March 8, 2017. <https://www.bu.edu/law/journals-archive/bulr/documents/marshall.pdf>.

presidential access to control of information; the media and the presidency; the presidency in popular culture; military intelligence capabilities; the need for the government to act quickly; and increasingly polarized two-party system.¹⁵ Although all of these are important to this research because they highlight the increase of power that has occurred, a few in particular discuss the power in relations to the judicial tasks and attorney general.

The role of the executive branch lawyering, as Marshall describes, stems from the justiciability limitations of many of the questions surrounding the scope of presidential power—like war power—that never reach the courts.¹⁶ Additionally, as Marshall recognizes, “the President, simply by his power of appointment, can assure that his Attorney General views the primary duty of the office is to empower the administration and not to some abstract, dispassionate view of the law.”¹⁷ Marshall utilizes examples of the presidential loyalty – as this research does—and acknowledges that the ability of the Department of Justice to check the executive branch power may be more illusory than real. The power of this relationship, as Marshall describes it, has grown to the point where “the President expects his Attorney General . . . to be his advocate rather than an impartial arbiter, a judge of the legality of his action,”¹⁸ and this power has been improperly placed.

Marshall’s research and discussion on the growth of lawyering within the Executive Branch coincides with this research and both come to the same conclusion: something must be done. Marshall directs the solution as increasing the independence of the whole Department of Justice while this research simply looks at the AG. However, because the AG controls the DOJ both suggest a similar solution. Marshall argues that “those assuming key legal positions in the

¹⁵ Ibid.

¹⁶ Ibid. 511

¹⁷ Ibid.512

¹⁸ Ibid. 514

next administration should strive, as much as possible, to be independent by maintaining distance between their legal conclusions and a President's political agenda."¹⁹ The removal of the Attorney General from the president—as this research suggests—will help accomplish what Marshall is advocating for, and as a result it will help accomplish the removal of power from the ever-growing executive branch.

Methodology

This research stemmed from the current debate in today's society about the politicization of society and the distrust that has grown in government. Especially in light of the recent election, much of the American public does not trust the government—not only the president but also his appointees, cabinet members, and congress. A lot of debate circulated the Supreme Court justice appointment between Obama and the new president. The Supreme Court and judicial branch are often left out of this general debate, but that does not leave them 'off the hook'—the judicial branch must be affected somehow. The Attorney General faces the most aversion because of his connection with the President and his role as the attorney; therefore, this research will seek to understand how much of an influence really exists and whether a change is needed.

To start, the research analyzed current literature on the topic of the Attorney General and Presidential relationship. Other scholars have found a similar problem with the power vested in the president through the AG and three prominent sources support the necessity for a change in the Justice System and the position of the Attorney General.

To conduct original research, the foundations of the AG, the role of the AG, the shifting role of the AG, the Political Neutrality, and the Supreme Court were all analyzed to reach a deeper

¹⁹ Ibid.521-522

understanding of the foundations and shift the AG has experienced. The questions researched include:

1. What is the foundation of the Attorney General?
2. Where does the Attorney General obtain its power?
3. What power does the Attorney General have?
4. How has the role of the Attorney General shifted?
 - a. What past Attorneys General help depict this shift?
5. Is the office supposed to Politically neutral?
 - a. Has it achieved that goal?
6. Is Society more polarized today?
7. How does the Supreme Court act as a role of Government?
8. What change to the system may help reach the political neutrality?

These questions are important to understanding the rational behind the problem that is being claimed today. Questions 1-5 help to grasp a deeper understanding of the AG as a position. Question 1 analyzes the foundation and the roots of the position, which will be important when understanding whether the role was designed to be politically neutral and whether a shift has occurred. Question 2 and 3 help lay the foundation for what the AG is allowed to do legally, which allows the research to find overreach and improper uses of power. Question 4 and 5 are vital because without understanding what shift has occurred—politically or not—the solution cannot be decided on. The polarization of society—question 6—helps to lay context for the reason the shift in power and corruption of the position has occurred. Question 7 is important to include because the thesis of this research give the Supreme Court more power, so it is vital to

understand their current role in government. Finally, question 8 helps to create the thesis of the research by synthesizing all the information.

After solidifying the research questions, the research was conducted to answer these questions. It analyzes the foundations of the Attorney General role within the context of America's changing political and legal systems. Additionally, case studies of past AG's are analyzed to add contextual support to the discussion of the problem. Case studies of past AG's help to exemplify what the research found. All of the information was synthesized to conclude that the AG position has been corrupted by the presidential connection and the thesis was created to suggest a solution that has research to support it.

Discussion

Foundations of the Attorney General Role

The United States Department of Justice originated from the English office of the Attorney General and is currently the governing body for the United States in regards to legal procedures, statutes and laws.²⁰ Britain's equivalent to the department of justice has law officers that were legal advisers to the King and his ministers, but there was not a formalized system for adjudicating criminal cases.²¹ Colonies within the British Empire had Attorneys General and state governments continued the practice as the state system progressed.²² In the United States, the AG stemmed from the British heritage and endured after independence. In the beginning stages, the office did not demand a full work load and the attorney was expected to continue private practice until 1814, when he was required to reside in Washington.²³ The AG's

²⁰ Fairlie, John A. "The United States Department of Justice." *Michigan Law Review* 3, no. 5 (March 1905): 352-59. Accessed September 23, 2016. <http://www.jstor.org/stable/1273036>.

²¹ *Ibid.* 352

²² *Ibid.* 352

²³ *Ibid.*

administrative powers are relatively low; he has no power of appointing judges, and his advice does not mandate merit by the president in regards to judicial appointments.²⁴

In the United States, the role of the AG – created by the Judiciary act of 1789 – provided minimal guidance regarding the role of the Attorney General beyond the qualification that “the person appointed be learned in the law” and the president would appoint a person with the consent of congress.²⁵ From the vague beginnings, the office has evolved to codify roles and adaptability to address the ever-changing legal field.

The Role of the Attorney General

The judicial system of the United States is the branch of government designed as a politically neutral check and balance on the other branches of government. The judicial system, the Department of Justice, and the Attorney General of the United States are designed to uphold the law of the nation without being directly concerned for the political system that exists. Constitutionally, the AG has specific legal roles. The principle duty of the Attorney General is to represent the United States in legal matters, which may include representing or supervising the United States Government in the Supreme Court of the United States and all other courts, but it also supervises the operations of various offices, divisions, and bureaus that make up the Justice Department.²⁶ He or she also composes opinions on legal matters for the President or cabinet heads as provided by law, while also recommending appointments to positions within the Department of Justice.²⁷ The Michigan law review encompasses all of the duties of the AG into four divisions: “(1) as legal advisor to the President and the executive departments; (2) as attorney for the United States before the courts, either as prosecutor or defendant; (3)

²⁴ Ibid. 355

²⁵ Hall, Timothy L. *The U.S. Legal System*. Pasadena, Calif: Salem Press, 2004. *eBook Academic Collection (EBSCOhost)*, EBSCOhost (accessed November 17, 2016).51

²⁶ "Organization, Mission & Functions Manual: Attorney General, Deputy and Associate."

²⁷ Ibid.

administrative supervision over officers of United States courts and over United States penal and reformatory institutions; and (4) as adviser to the President in the exercise of his pardoning power.”²⁸

Because of these wide-ranging roles, there is a gray area in classifying issues that may or may not be in the hands of the Attorney General. Constitutional questions are a direct duty of the Attorney General, but “questions not involving the construction of the Constitution of the United States may be referred to subordinates; and their subordinates when approved by the Attorney-General have the same force and effect as the opinion of the Attorney-General himself.”²⁹ The hierarchical system with checks by the AG allow a large scope of issues to be covered by the department of justice, but because he has all the power within case decisions, it gives him a “quasi-judicial” role.³⁰ The Michigan law review describes it as “his opinions officially define the law in a multitude of cases.”³¹

Shifting Roles of the Attorney General

One necessary acknowledgement with the shift of the Attorney General is the role of precedent in any judicial system. As the United States judicial system has progressed, AGs have made opinions that “officially define the law in a multitude of cases, where his decision is in practice final and conclusive,”³² which can change the legal standpoint for future Attorneys General. The Supreme Court does not take appeals from the decision of the Attorney General where he was authorized by law to utilize his discretion or judgment.³³ Past decisions—known as precedent—have become a body of legal expositions with authority equivalent to that

²⁸ Fairlie 352

²⁹ Ibid. 353

³⁰ Ibid.

³¹ Ibid. 353

³² Fairlie 353

³³ Ibid.

of statutes.³⁴ From a constitutional stand point, if an AG simply interprets laws within its jurisdiction, controversy is minimized; as the role becomes politicized, decisions and precedents become more radical resulting in future AGs being bound by different legal restrictions from those who came before.

The 20th century brought politically active AG Robert F. Kennedy, who lacked legal experience but was President John F Kennedy's brother.³⁵ Kennedy was not picked because of legal experience—he had none; instead, he was chosen for the close relationship he had with the president and the entrenched loyalty that existed. Kennedy's appointment was not a legally correct decision because the Attorney General should hypothetically be the 'best attorney in the nation' but Kennedy could not fit that bill because he had no experience. However, for the President, appointing Kennedy was an advantageous pick. By choosing an attorney that had personal loyalty, President Kennedy ensured the political loyalty that the AG position has taken on. Experience is attainable through practice, but loyalty is not. On the opposite spectrum, President Carter appointed AG Griffin Bell who had been a federal appeals court judge with an unimpeachable reputation.³⁶ Throughout U.S. history the AG position has varied in experience level and political connections. Another evolution for the office occurred during President Bill Clinton's presidency when he appointed the first woman Attorney General: Janet Reno.

The Attorney General position has had to endure shifts because of the changing world. A highly contended issue in regards to the attorney general is "how [he] will act to defend our civil liberties."³⁷ It is important as the public to ask questions and be skeptical of the AG's actions and governmental power because in times of need or crisis—such as 9/11—the public has the right to

³⁴ Ibid.

³⁵ Hall. 52

³⁶ Ibid.

³⁷ Sisneros, Henir. "Issues for a New U.S. Attorney General." Utah Bar Journal 28, no. 2, 40-43.40

know their best interests will still be acknowledged. Civil liberties, privacy and domestic issues such as the War on Crime are a few topics out of many that the attorney general must analyze in a larger national and international playing field. In the world of growing interconnectedness, the Sisneros argues that the public has a right to question whether the attorney general will “be the guardian of constitutionally protected privacy interests.”³⁸

Donald C. Shields analyzes the political profiling of elected officials within current context – i.e. the War on Crime. Attorney General Ashcroft addressed criminal acts and public corruption with a preemptive approach to ensure law enforcement was pursuing and protecting.³⁹ AG Ashcroft shifted the justice department away from the historical emphasis on investigation and prosecution of crimes because the department could no longer wait for a crime or threat to occur—it would seek to prevent them as analyzed within the Case Studies section.⁴⁰

Political Neutrality as the Goal

As with any other attorney, the Attorney General has guidelines set out by the American Bar Association. Seventy-five lawyers from twenty states and the District of Columbia founded the ABA on August 21, 1878.⁴¹ From the beginning the group played an influential role in developing the legal profession through rules and guidelines. The ABA does not have any political affiliation, which helps to keep political neutrality from a formative standpoint, and their goals are 1. Serve their members, 2. Improve the profession, 3. eliminate bias and enhance diversity, and 4. Advance the rule of law.⁴² Currently the ABA has almost 400,000 members and is a voluntary professional organization, committed to fulfilling its goals and “supporting the

³⁸ Ibid.

³⁹ Etienne, M. (2005). The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers. *Journal of Criminal Law & Criminology*, 95(4), 1195-1260. Retrieved from <http://search.proquest.com.ripon.idm.oclc.org/docview/218444091?accountid=9525>

⁴⁰ Ibid.

⁴¹ “History of the American Bar Association.” American Bar Association. Accessed January 22, 2017. http://www.americanbar.org/about_the_aba/history.html

⁴² Ibid.

legal profession with practical resources for legal professionals... [and] establishing model ethical codes.”⁴³ By having a politically neutral governing body over the profession, the Attorney General, and all attorneys, do have politically neutral guidelines.

The goal of any lawyer and the desire for the Attorney General is to “bring greater professional independence to the office, and hopefully thereby, more strict observance of relevant legal restraints.”⁴⁴ The question of what ‘professional independence’ means is toyed with throughout this study; the legal profession can often leave gray areas with respect to the role of a lawyer, especially one appointed by a political figure. The ABA Model Rule of Professional Conduct 2.1 provides guidelines stating, “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”⁴⁵ This rule is intended to remind lawyers that they must say what they think, even if it is uncommon among a majority—or in the case of the AG, unpopular with the president and the majority political party.

The office of the Attorney General is expected to have the highest level of “public sentinel” by upholding the strictest fidelity to “not just the law, but to those basic rule-of-law values upon which the impartial enforcement of law depends.”⁴⁶ Because the president is allowed to pick whatever Attorney General he would like, a political-legal dynamic arises within the AG role. The dynamic appears within the actions of the AG such as enforcing existing law, advising and offering opinions and leading the Department of Justice.⁴⁷ The political dynamic and the political polarization within American politics combined have caused the public to heavily scrutinize the independent role the AG claims. It is argued that “the A.G. serves the

⁴³ Ibid.

⁴⁴ Spaulding, Norman W. "Professional Independence in the Office of the Attorney General." *Stanford Law Review* 60, no. 6 (2008): 1931-979. <http://www.jstor.org/stable/40040428>.1932

⁴⁵ Ibid.1933

⁴⁶ Ibid.1934

⁴⁷ Ibid

President who appointed him or her, much as a lawyer represents a client,” but that is not what the public wants.⁴⁸ The Attorney General, although appointed by the president, has a duty to defend and protect the general population. People heightened the debate of independence in reaction to events like Watergate, which created an “erosion of public confidence in our federal justice system.”⁴⁹ The political dynamic the AG experience is not new, and poses the question of whether society is really more polarized today.

Is The United States Really Polarized?

The United States has experienced waves of strong polarization throughout its history, and present day is no different. According to Pew Research Center, “the American public has grown more ideologically polarized along partisan lines.”⁵⁰ Chart 1 depicts the shifting of both parties; the right has shifted to the right and the left has shifted to the left. Political parties in America have always been divided but the fluidity between the parties has decreased steadily, especially for the Democrats as the past two decades have progressed. Pew describes this trend in coming from “partisan antipathy [being] deeper and more extensive ... than at any point in the last two decades.”⁵¹ Another way to depict this polarization is Chart 2, which depicts the similar trend to polarization by highlighting the expanding middle ground and overlap between the two political parties.

Additionally, the partisan effect has not just affected the hill and government—the American people are more divided at home than ever before too. Chart 3 and Chart 4 depict the growing antipathy as Pew Research describes it between the political parties. Chart 3 depicts the attitudes that Democrats have about the Republican Party and the Republicans have about the

⁴⁸ Sisneros.42

⁴⁹ Etienne.7

⁵⁰ Gramlich, John. “America’s Political Divisions in 5 Charts.” Pew Research Center. November 07, 2016. Accessed January 22, 2017. <http://www.pewresearch.org/fact-tank/2016/11/07/americas-political-divisions-in-5-charts/>.

⁵¹ Ibid.

Democratic Party, respectively. Pew discusses that in 1994 “hardly a time of amicable partisan relations” a majority of Republicans had unfavorable opinion of Democrats, but only 17% had “very unfavorable opinions,” whereas in 2014 82% had unfavorable opinions and 43% had very unfavorable opinions.⁵² The Democrats are not much better with views on the Republican party according to the same data; however, the problem goes deeper than that data. The general public is getting trapped in its echo chamber, which is increasing the divide. Chart 4 helps depict the ideological echo chambers that exist. Political people in general are more likely to discuss and view politics on a regular basis, but as Pew’s data shows, they are also the same people whom are more likely to receive news according to their party lines. As the data shows, “nearly two-thirds (63%) of consistent conservatives and about half (49%) of consistent liberals say most of their close friends share their political views” and people on the left and right of the political spectrum find it important to live in neighborhoods with similar views.⁵³ This indoctrination of political thought and closed-mindedness is what contributes to the political divide that is being experienced today. Now more than ever people are closing their minds to opposing political views, and clinging to those that make them feel safe – not questioning their views—and for that reason the polarization has affected the Attorney General role recently more than ever.

The increase of polarization in the political system resulting in a decrease in trust of the system has resulted in a call for independence of the AG position; the call for independence can often be traced back to distrust and dissatisfaction of political goals.⁵⁴ Critics of the majority party or administrative changes will avoid challenging the changes directly, instead the “lawyers

⁵² Suh, Michael. "Political Polarization in the American Public." Pew Research Center for the People and the Press. June 11, 2014. Accessed March 06, 2017. <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>.

⁵³ Ibid.

⁵⁴ Spaulding. 1934

charged with implementing or offering legal foundation for them” get the backlash.⁵⁵ However, scapegoat tendencies aside, the role of any attorney and specifically the Attorney General should be professional independence. This independence is in reference to freedom from party politics and loyalty to the AG’s client—the American public. To achieve this independence to some extent the “detachment from self and cause . . . [is required] to avoid or at least mitigate the distortions of (self) interest and ideology—to serve rather than dominate or blindly obey others.”⁵⁶ Being detached must be in moderation and does not mean that an attorney general should live “off” politics; they should live “for” politics.⁵⁷

As the Attorney General role has grown, it has experienced the shift between ‘live off politics’ and ‘live for politics’, and the independence associated accordingly. William Wirt, the AG under Monroe, established the concept of precedent—the concept that opinions by the Attorney General should be followed in future cases.⁵⁸ The practice, now widely accepted, was landmark at the time; it pushed the AG’s role into a greater spotlight of importance because the single person now had the power to affect future litigation. This practice also helped to minimize impartiality and political whims of administration.⁵⁹ If precedent, regardless of the Attorney General’s party loyalty, binds the attorney, then the independence of the office can be upheld. Wirt’s goal with precedent would have been beneficial to the reputation and consistency of the office; however it did not act as such. The role of presidential involvement and senate input has resulted in a diminished political independence status; if the Supreme Court—the intended neutral governmental body—had the appointment power, then Wirt’s method may have worked.

⁵⁵ Ibid. 1935

⁵⁶ Ibid. 1947

⁵⁷ Ibid.

⁵⁸ Ibid. 1956

⁵⁹ Ibid.

The Supreme Court

The Supreme Court as a body has been gaining political party—regardless of appointments—within the legal system. The shift in more power to the judicial branch has been labeled “judicialization” and it involves bringing power away from the legislatures and toward the courts.⁶⁰ The increasing ability to limit and regulate the exercise of parliamentary authority, the increase in substantive policy being made and the increasing political conduct being made by judges themselves shows the increase in power.⁶¹ As noted by scholars such as Ferejohn, the increase in power has an affect in the politicizing of courts and of reducing the “legitimate abilities of the people or their representatives to legislate, and, less often, of provoking crude and heavy-handed electoral responses.”⁶² The courts shift in history has increased the power of the Supreme Court as the Attorney General role has also increased. Both are meant to check the power of the legislative branch and by putting the power together between the AG and the Supreme Court, the check power would be better concentrated in one area. However, the politicization of the courts also can be demonstrated through appointments.

Because the solution to the problem involves giving the Supreme Court more power, it is necessary to look at the court within the political context as well. Although the court was meant to be the apolitical branch that has not been the case. As the political system has been polarized, the courts appointments have been similar. Cases of this can be exhibited by the Supreme Court of 2005 known as Robert’s Court under Chief Justice John G. Roberts. The Roberts Court covered cases on core civil procedure jurisdiction, class actions, and the Erie/Hanna Doctrine. Another example includes the Warren Court, which is associated with the expansion of

⁶⁰ Ferejohn, John . "Judicializing Politics, Politicizing Law." *Law and Contemporary Problems* 65, no. 3 (2002): 41-68. Accessed March 6, 2017. <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1258&context=lcp.41>

⁶¹ Ibid.

⁶² Ibid.

individual liberties in the areas of racial equality, freedom of speech and criminal procedure. The most recent example of a political association and the Supreme Court comes from Justice Ginsberg. Justice Ruth Bader Ginsburg has publicly called President Donald Trump a “faker” during his time of campaigning. Ginsburg’s public distaste for the then president-elect and now President of the United States proves the political motives and associations the justices have. Additionally, the ‘Kennedy’ justices—middle, swing votes—are not in existence anymore. Justice Kennedy was often known as the swing vote on the court and his decisions often swayed the courts final decision, but he was the last of his kind. Many justices also now fall within party lines like other political appointments in today’s society and therefore there will not be any more swing votes. Courts will now often be politically aligned to one party and that political party will essentially control another branch of government capable of making the equivalent of laws through their legal decisions.

Because of this political alignment, the suggestion for an AG appointment will acquire a $\frac{3}{4}$ vote to pass a candidate. This vote will require a more moderate AG, and hopefully one with the necessary skills not just party alignment, to pass between members of both parties on the court. Past AG’s that will be examined highlight the importance of the change necessary.

Case Studies

The intended role of the Attorney General—a political neutral adversary for the American people – has been distorted in the overly politicized governmental system that exists in America today. The role no longer remains neutral to politics. The next section of the study examines specific Attorneys General who have either attempted to uphold the neutral position or experienced the shift to political game. These individual cases will be a tool to answer the question posed by Spaulding, “What are we to make of the face that the nation’s highest legal

officers... have been drawn so willingly, it would appear, into a position of complicity with, if not outright endorsement of extralegal conduct at odds with our most fundamental constitutional democratic commitments.”⁶³ Are there any cases of neutral, professional AGs, or has history proved what most of the public assumes? Table 1 summarizes the past Attorney’s General appointers, political ideology and attribution to the system as discussed in the following case studies.

Edmund Jennings Randolph

Edmund Jennings Randolph was born and raised in Virginia; he studied law with his father and during the American Revolution, Randolph served as an aide-de-camp to General George Washington.⁶⁴ When he returned to Virginia he was elected to the Virginia Convention of 1776 and elected as the Commonwealth’s first Attorney General.⁶⁵ Randolph was also a delegate to the Constitutional Convention of 1787, where “he introduced the Virginia Plan, and was a member of the Committee on Detail charged with framing the first draft of the Constitution.”⁶⁶ Because of Randolph’s involvement and personal connection to George Washington, he was appointed the first national Attorney General in 1789, which he served until 1794 when we has appointed the Secretary of State.⁶⁷

Randolph’s role as AG is significant in the sheer subsistence of the first role for the United States Government. His involvement through the Revolution and help drafting the Constitution allowed for him to be placed in this role. However, at such beginning stages, the role of the attorney general did not carry the same connotation it does today as it did no have the

⁶³ Spaulding..932

⁶⁴ "Edmund Jennings Randolph - People - Department History - Office of the Historian." U.S. Department of State. Accessed November 17, 2016. <https://history.state.gov/departmenthistory/people/randolph-edmund-jennings>.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

same level of power and responsibility. The Attorney's General control was not equivalent or as emphasized as it is today. Although the role of the first AG was not landmark it can show the politicized nature from the beginning. Even with the new Judiciary Act creating this role. AG Randolph was appointed because of personal connections. The neutral role of the AG was not in question or threatened at this point, but even from the early beginnings of the office it was about personal connections.

William Wirt

William Wirt, from Maryland, was appointed Attorney General by President Monroe in 1817 and again in 1829 by President Jackson.⁶⁸ Before his appointment, Wirt practiced law privately, was the clerk of the Virginia House of Delegates in 1800, and was appointed prosecuting attorney by President Jefferson on the trial against Aaron Burr.⁶⁹ Wirt was the longest-serving Attorney General.⁷⁰ When Wirt was appointed in 1817, he was very unsure if he would be able to provide for his family;⁷¹ still in this early stage the position was not prestigious enough to make a livable wage. Along with the low wage, Wirt's position was seen as "an officer without an office, an administrator without a clerk, a legal adviser without control of the district attorneys, and a private lawyer with the Federal government with as one of his clients."⁷² However, by the time Wirt left office, he had implemented change and he had come to be known as "the first great Attorney General."⁷³

⁶⁸ "Attorney General: William Wirt." Attorney General: William Wirt | AG | Department of Justice. Accessed November 17, 2016. <https://www.justice.gov/ag/bio/wirt-william>.

⁶⁹ Ibid.

⁷⁰ Thorp, Galen N. 2008. "William Wirt." *Journal Of Supreme Court History* 33, no. 3: 223-303. *Academic Search Complete*, EBSCOhost (accessed November 17, 2016). 230

⁷¹ Ibid. 231

⁷² Ibid. 232

⁷³ Ibid.

Wirt's first act was to create an office with one staffer while also creating a record system for documenting formal opinions.⁷⁴ As presented earlier in the study, the record keeping system turned into something greater for the court system. Wirt allowed for heads of departments or the President to request official opinions made by the Attorney General.⁷⁵ This transformation completely shifted the position by creating stability. Instead of an AG coming in with no knowledge of past AG decisions and each AG acting fundamentally different, there was now a backbone of the position what would allow for some consistency.

Although Wirt's terms appeared early in the office of the Attorney General, his actions had an influential role in preserving the political neutrality that is debated today. Before him there was no record on past cases and action of the previous AGs. By not having guideposts from the past, each AG had essentially complete autonomy in cases. In the current system, thanks to Wirt, precedent exists and is given the same authority as law. The precedent allows for the stability discussed, and also it acts as a tool to keep the AG neutral. Past AGs have been from both political parties, so precedent does fall on both ends of the spectrum hypothetically ending in a straight line of guideposts for the current Attorney General. Back in Wirt's time period the concept of precedent was not deemed as necessary, but his actions created a solid foundation for attempting to keep political neutrality today.

Amos Tappan Akerman

Akerman, a lawyer from New Hampshire, was the Attorney General during the Reconstruction era.⁷⁶ The Reconstruction era after the civil war (1865-1877) focused on

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Parker, David B. "Amos T. Akerman (1821-1880)." *New Georgia Encyclopedia*. September 12, 2002. Accessed November 17, 2016. <http://www.georgiaencyclopedia.org/articles/history-archaeology/amos-t-akerman-1821-1880>.

rebuilding the South and trying to put the nation back together.⁷⁷ Akerman supported the Confederacy during the Civil War and joined the Republican Party. He also served on the state convention to create the 1868 Constitution.⁷⁸ President Ulysses Grant appointed Akerman to the AG role in 1870; thus, Akerman was the first AG to be over the newly developed Justice Department.⁷⁹

The Justice Department was started under the Act to Establish the Department of Justice, which created “an executive department of the government of the United States’ with the Attorney General as its head.”⁸⁰ The department became seemingly necessary through the evolution of the AG post. The workload for the AG increased, especially during the Civil War and the nation size increased, making it necessary for many assistants and private attorney’s to assist the AG.⁸¹ In attempts to address the problem, the Department of Justice had power to “handle all criminal prosecutions and civil suits in which the United States had an interest.”⁸²

As Akerman formed the role of the Justice Department under him, he started an investigative unit within the department, which evolved to the Federal Bureau of Investigation.⁸³ During his term as AG, Akerman often utilized this new unit to investigate and prosecute KKK activities. Akerman “prized stability of the law above almost everything else, and he resented the fact that some southerners so easily disobeyed the U.S. Constitution.”⁸⁴ Because of his passion with the KKK violations it has been noted “perhaps no attorney general since... has been more

⁷⁷ "Reconstruction Era: 1865 - 1877." Library System. Accessed November 17, 2016.
<http://www.howard.edu/library/reference/guides/reconstructionera/>.

⁷⁸ Parker

⁷⁹ Ibid.

⁸⁰ "About DOJ." About DOJ | DOJ | Department of Justice. Accessed November 17, 2016.
<https://www.justice.gov/about>.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Parker

⁸⁴ Ibid.

vigorous in the prosecution of cases designed to protect the lives and rights of black Americans.”⁸⁵

The intense focus on the lives and rights of black Americans was not hyper popular during that time; however, it shows the evolution of the position during Akerman’s term. The specific rights he supported and investigated are not as important in analyzing the AG role as is the methods and capability to do so. As the first AG heading the Department of Justice and eventually the FBI, he had more time and capabilities to target injustices he believed were important. The creation of the DOJ gave the Attorney General more freedom to independently investigate causes he believes are important. Instead of being completely short staffed and only getting the bare minimum done, Akerman had more capabilities to investigate and prosecute at will. The development of office during Akerman’s term formed the foundation for the political neutrality debate. As the governmental system developed and become politicized, the Attorney General picking cases became more hotly debated.

Homer Stille Cummings

Homer Stille Cummings was the AG for FDR from 1933 to 1939. Before his term he practiced law in Connecticut and was the mayor on three occasions.⁸⁶ Cummings was the chairman of the Democratic National Committee from 1919 to 1920. As AG Cummings was very active. He “transformed the Department of Justice by establishing uniform rules of practice and procedure in federal courts.”⁸⁷ Additionally he “made bank robbery a federal crime, cracked down on interstate transportation of stolen property and extended federal regulations over

⁸⁵ Ibid.

⁸⁶ 2016. "Homer Stillé Cummings." *Columbia Electronic Encyclopedia, 6Th Edition 1. Academic Search Complete, EBSCOhost* (accessed November 17, 2016).

⁸⁷ "Archive of FDR's Vice President, Secretaries of War, State and Attorneys General." RJM Autographs and Antiques. Accessed November 17, 2016. <http://rjmautographsandantiques.com/products/archive-of-fdrs-vice-president-secretaries-of-war-state-and-attorneys-general>.

firearms.”⁸⁸ During his time in power he also gave the FBI more power, sponsored national crime conference, established Alcatraz as a model prison for hardened offenders, and reorganized the internal administration the Justice Department.⁸⁹

The AG’s role and governmental power during Roosevelt’s term have experienced much criticism. Cummings was very active in Democratic Party politics and believed the party was “an instrument for social justice.”⁹⁰ During Roosevelt’s election Cummings worked hard in assisting with his nomination as president. Once in the office, Cummings worked to protect the controversial New Deal legislation. In March 1933, he advised Roosevelt on the Trading with Enemy Act of 1917, which allowed the president to close banes and regulate gold hoarding and export.⁹¹ During his time as AG the Supreme Court would often overthrow New Deal legislation, because of the Republican Supreme Court majority. In response, Cummings drafted a proposal to give the president the power to appoint a new justice to the Supreme Court to supplement any incumbent older than 70.⁹² This plan – known as court packing – would have allowed Roosevelt to appoint 6 Supreme Court justices and over 50 other judges. This was ultimately killed in the Senate after much outrage.⁹³

If the court-packing plan had passed, it would have significantly altered the power of the president. The judicial branch is designed to be a politically neutral branch of government. Although justices are appointed, it is not common for every president to pick a justice and therefore there tends to be political equality to help encourage the political neutrality. Cummings’ plan exemplifies the loyalty that AGs experience toward their appointers.

⁸⁸ Ibid.

⁸⁹ “Biography for Homer S. Cummings." American Voices. Accessed November 17, 2016.
[http://www.historicalvoices.org/amvoices/view.php?name=Cummings, Homer S.&type=bio.](http://www.historicalvoices.org/amvoices/view.php?name=Cummings,%20Homer%20S.&type=bio)

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

Cummings, before taking the AG role, was very involved in democratic politics, ultimately showing a political bias going into office. While in office, his actions to support Roosevelt and to pack the courts epitomized the political alignment of party politics. Other actions taken by Cummings – creating uniform rules of practice and procedure in federal courts – fell into the politically neutral job description, but most policies created for the president were the opposite of neutral. Ultimately, Cummings did a lot to expand the position from a foundational standpoint—expansion of the DOJ for example, but he also exemplified the problem of the position. Cummings was one of the first AGs to be harshly criticized in the political spotlight for not being a public adversary of the American people, but instead being a political pawn for the president.

John Ashcroft

President George W. Bush had three Attorneys General, Michael Mukasey, Alberto Gonzalez, and John Ashcroft, and although each would offer different evidence toward the political natural claim, John Ashcroft will be analyzed because he was “arguably the most controversial and conservative of all Bush appointees.”⁹⁴ Ashcroft was a lawyer from Illinois who also had experience as Missouri’s AG and the chairman of the non-partisan National Association of Attorneys General.⁹⁵ In 2000, President-elect selected Ashcroft to be the Attorney General; although he was appointed, the opposition against him was the largest number ever against an AG’s confirmation.⁹⁶ The opposition stemmed from his conservative and religious background extending to his political beliefs in regards to topics such as abortion.⁹⁷

⁹⁴ Rowan, Beth. "Cabinet Members of George W. Bush." Infoplease. Accessed November 17, 2016. <http://www.infoplease.com/spot/bushcabinet.html>.

⁹⁵ "John David Ashcroft Facts." John David Ashcroft Facts. Accessed November 18, 2016. <http://biography.yourdictionary.com/john-david-ashcroft>.

⁹⁶ Ibid.

⁹⁷ Ibid.

After Ashcroft was appointed he vowed to renew an emphasis on the war on drugs, reduce violence due to firearms, and combat discrimination; however, 9/11 drew the AG's attention elsewhere.⁹⁸ Instead of focusing on the war on drugs, the war on terrorism had taken over. During the 9/11 attacks, Ashcroft was the nation's top law enforcement officer, and his new task "would have to turn more than a century's worth of jurisprudence on its head and begin enforcing the nation's laws in a fundamentally new way."⁹⁹ The terrorist attack on our own soil completely affected all of President Bush's cabinet and administrative policy because of the mentality taken by Bush in regards to terrorism. In the days after the attack President Bush told Ashcroft "don't let this happen again," and the Justice Department was to expand the role past punishing offenders after the fact to taking preventative stance.¹⁰⁰

As a result of this push by President Bush, many of Ashcroft's policies were targeted toward anti-terrorism. Some argue that Ashcroft took the Department of Justice to a proactive, preventative agency while also keeping commitments to reducing violent crimes, reducing drug use amongst teens, and increasing the prosecutions for trafficking of illegal persons and victims.¹⁰¹ The opposing side argues that Ashcroft launched the "largest campaign of ethnic profiling we've seen in this country since World War II" and claim his policies are detrimental to the civil liberties of the American people.¹⁰² The policies enacted by Ashcroft increased the power of the executive branch by reducing the power of judicial review. Ashcroft also is responsible for the USA Patriot act and policies related to Guantanamo Bay and interrogation

⁹⁸ Ibid.

⁹⁹ Ragavan, Chitra, Brian Duffy, and Christopher H. Schmitt. 2004. "ASHCROFT'S WAY. (Cover story)." *U.S. News & World Report* 136, no. 3: 30-38. *Academic Search Complete*, EBSCOhost (accessed November 17, 2016).

¹⁰⁰ Ibid.

¹⁰¹ "John Ashcroft Leaves Behind Controversial Legacy as Attorney General." PBS Newshour. November 11, 2004. Accessed November 18, 2016. http://www.pbs.org/newshour/bb/law-july-dec04-ashcroft_11-11/.

¹⁰² Ibid.

methods.¹⁰³

These actions taken in a time of desperation have had a few affects on Ashcroft himself, but also on the office of the AG. Today Ashcroft is “easily the most polarizing member of the Bush cabinet and his policies are sure to emerge as in important area of contention between” the conservative and democratic parties,¹⁰⁴ and he is arguably the most powerful attorney general in history.¹⁰⁵ His policies and legal initiatives have been very controversial among many lawyers and politicians. This being said, Ashcroft took office during a trying time for the United States. 9/11 was the catalyst for many policies progressing the War on Terrorism; however, the vulnerable situation for the United States during this time helps to exemplify the lack of political neutrality within the AG position. In the time of national instability, Ashcroft defended and pushed for policies not necessarily for the good of the people. Instead, it can be argued that he “failed his country by placing his loyalty to the president and personal ambition above his duty to uphold the U.S. Constitution and the U.S. system of Justice.”¹⁰⁶ He was so loyal to the president of the United States he even argued for policies he personally opposed. These actions do not represent a politically neutral office. With the event of 9/11, Ashcroft’s time in office was the most powerful time of the Attorney General, which exemplified the political alignment and loyalty the position has taken on, not just to party politics but also to the appointer himself.

Loretta Lynch

Loretta Lynch, the most recent attorney general, was also the first African-American woman to hold the post.¹⁰⁷ Lynch was a New York lawyer, and she worked in “various capacities

¹⁰³ Talanian, Nancy. "Human Rights: Ashcroft's Legacy." *Alternet*. February 16, 2005. Accessed November 18, 2016. http://www.alternet.org/story/21280/ashcroft's_legacy.

¹⁰⁴ Ragavan.

¹⁰⁵ "John Ashcroft Leaves Behind Controversial Legacy as Attorney General."

¹⁰⁶ Talanian

¹⁰⁷ Rhodan, Maya. "Obama's New Attorney General Hits the Ground Running." *Time*. June 1, 2015. Accessed November 18, 2016. <http://time.com/3904409/loretta-lynch-first-month/>.

for the U.S Attorney's Office for the Eastern District of New York" starting in 1990.¹⁰⁸ In 1999, President Clinton appointed Lynch as the US Attorney for the Eastern District of New York and in 2000 she was a member of the trial team in *United States v. Volpe*, a civil-rights case.¹⁰⁹

Within the political world, Lynch is an influential donor to the Democratic Party and supported president Obama in his campaign by donating \$9,200 to the Obama for American and Obama Victory Fund.¹¹⁰

As Attorney General, Lynch hit the ground running. One of her first acts was announcing the review of the Baltimore police department after the death of a black man in police custody, which contributed to her larger effort of restoring trust with the black community.¹¹¹ Throughout her time as Attorney General she has addressed problems within the police community, spearheaded the arrests of international soccer executives for corruption, and was in charge of investigating the Patriot Act.¹¹² Lynch also launched a national Community Policing Tour which focuses on the "six pillars discussed in the Presidents Task Force on 21st Century Policing final report: (1) Building Trust and Legitimacy; (2) Policy and Oversight; (3) Technology and Social Media; (4) Community Policing and Crime Reduction; (5) Officer Training and Education; and (6) Officer Safety and Wellness."¹¹³ Her intent for public outreach was to bridge the gap that had widened between police and the public; she has stressed that "through active engagement and meaningful dialogue, members of law enforcement work hard to build trust with the

¹⁰⁸ "Loretta Lynch - Discover the Networks." Discover the Networks. Accessed November 18, 2016. <http://www.discoverthenetworks.org/individualProfile.asp?indid=2632>.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Rhodan.

¹¹² Ibid.

¹¹³ Department of Justice. "Attorney General Lynch Expands National Community Policing Tour with Trip to Miami-Dade County, Florida." United States Department of Justice. February 8, 2016. Accessed November 20, 2016. <https://www.justice.gov/opa/pr/attorney-general-lynch-expands-national-community-policing-tour-trip-miami-dade-county>.

communities they serve.”¹¹⁴ Examples of this include the “Blue Courage initiative, a training and leadership development course which focuses on how to enhance their officers’ effectiveness and relationships with the citizens they serve.”¹¹⁵

In relation to the political neutrality of Lynch’s position, the situation is equally as politically divided, if not more, today. Throughout Lynch’s term, an investigation into Obama’s interactions with Iran was attempted, though she did not comply. Congress wanted to investigate the possibility of the “Obama administration’s secret efforts to send Iran \$1.7 billion in cash earlier this year,” but Loretta “pleaded the Fifth Amendment to avoid incriminating herself over these payments, according to lawmakers” as claimed by the Washington Free Beacon.¹¹⁶ No matter the reason for her plea, she refused to cooperate with an investigation of her appointer. Lynch had the Assistant Attorney General respond by refusing to answer questions because they are barred from publicly disclosing any details about the cash payment, “which was bound up in a ransom deal aimed at freeing several American hostages from Iran.”¹¹⁷ Her refusal to answer the questions by relying on statutes that ‘prohibit’ her from disclosing information has been seen as unacceptable and an example of corruption in the system; furthermore, Lynch’s possible involvement with the cash exchanges and her defense of the president depict loyalty to the office of the president instead of loyalty to the public. Her legal role would be to cooperate and give the people justice, but instead she chose to defend her own political motives and keep loyalty to her appointer.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Kredo, Adam. "Congress: Attorney General Lynch ‘Pleads Fifth’ on Secret Iran ‘Ransom’ Payments." Washington Free Beacon. October 28, 2016. Accessed November 20, 2016. <http://freebeacon.com/national-security/attorney-general-lynch-pleads-fifth-secret-iran-ransom-payments/>.

¹¹⁷ Ibid.

Additionally, the recent election has exemplified the corruption within the position. Within the election cycle, President Obama officially endorsed Democratic nominee Hilary Clinton where he claimed that he wanted “Clinton to win the White House in order to preserve his legacy,” and after the declaration was made, President Obama and AG Lynch had a meeting closed to the public.¹¹⁸ Because of the timing of the meeting, many have presumed it was in regards to the email investigation. If President Obama wanted Hilary Clinton to be president, he needed to ensure she was not going to be put in jail, and AG Lynch was the tool to do that. In addition, Bill Clinton and Loretta Lynch had a private meeting on her private airplane at the Phoenix Sky Harbor International Airport in regards to the email scandal and within a week the Justice Department agreed no charges should be brought against Hillary Clinton. Although Clinton did not win the election, the undisclosed meeting between President Obama and Lynch exemplifies the corruption within the position. Presidents know that the AG can be a tool to help ensure their political agendas are achieved, which epitomizes the fact that the AG is not a politically neutral actor instead a pawn in a political game of party politics.

Jeff Sessions

Looking forward with the newest President—President Trump—Jeff Sessions is the next Attorney General. Jeff Sessions is a Republican Junior Senator for Alabama. Jeff Sessions served as the U.S Attorney for the Southern District of Alabama from 1981 to 1993 and he was elected the Attorney General of Alabama in 1994.¹¹⁹ Sessions is known as one of the most conservative senators currently serving which leads into his appointment. President Trump, a republican president will select an Attorney General who will have the same political agenda as himself.

¹¹⁸ Pavlich, Katie. "Obama Endorses Hillary, Immediately Meets With Attorney General Loretta Lynch." Townhall. June 09, 2016. Accessed November 20, 2016. <http://townhall.com/tipsheet/katiepavlich/2016/06/09/obama-endorses-hillary-immediately-meets-with-loretta-lynch-n2176214>.

¹¹⁹ "Biography of U.S. Senator Jeff Sessions of Alabama." Biography - Senator Jeff Sessions. Accessed January 22, 2017. <http://www.sessions.senate.gov/public/index.cfm/biography>.

Additionally, during Trump's campaign Sessions was one of the first members of Congress to endorse him and Sessions became an adviser on almost every major decision and policy proposal Trump made; Sessions aided in Trump's immigration policy, selection for Vice President, and was a member on the his Security Advisory Committee.¹²⁰ In addition to the political alignment the connection made through the campaign is another strong reasons for Session's appointment. Although Sessions has not had any formal act as AG yet, it can be predicted that he will not break the chain of maintaining political ties in office.

Conclusion

With the highly debated duty to defend and the polarized influence politics has had on the office, it can be argued that the Attorney General's office should be abolished; however, that is not the case. Although it is hard to prove that AG can distinguish between its role to the public and the government, the office is necessary for the United States justice system.¹²¹ The argument as described by Harry Woolf is as follows,

“Some influential lawyers and politicians see a fundamental conflict between the role of guardian of the public interest and that of legal counsel to politicians: in performing the first role, the political advantage of the party and government of which the Attorney General is a member should not enter as a consideration. In the second role, party political considerations are bound to be a factor. The critics argue that the conflict between those roles can only be resolved by abolishing the office altogether.”¹²²

¹²⁰ "10 things to know about Sen. Jeff Sessions, Donald Trump's pick for attorney general." The Washington Post. Accessed January 22, 2017. https://www.washingtonpost.com/news/the-fix/wp/2016/11/18/10-things-to-know-about-sen-jeff-sessions-donald-trumps-pick-for-attorney-general/?utm_term=.613445b17b1b.

¹²¹ Woolf, Harry. "Don't Abolish the Attorney General." The Telegraph. February 4, 2007. Accessed November 17, 2016. <http://www.telegraph.co.uk/comment/personal-view/3637083/Dont-abolish-the-Attorney-General.html>.

¹²² Ibid.

The necessity of the attorney general role is rooted in the expertise the AG has regarding the legal world: having someone with political experience and legal knowledge can give insight to inner governmental workings and it gives advice a higher level of influence.¹²³ Saying the role should not be abolished is not the equivalent to declaring the office is perfect. The AG role has evolved into a politicized office that should revert back to its historical roots, but without a change to the governmental system, it will not. The office needs to be strengthened and taken out of the political game in order to succeed.

As analyzed, the appointer—the president—has always influenced the Attorney General role. AGs have endorsed policies against their personal beliefs, expanded the power of their role and the executive branch, and chosen loyalty to the president over the people throughout history. The neutrality of the position created in the Judicial Act of 1879 existed only on paper. All past AGs have fulfilled the business aspect of the position, which includes the administrative tasks of controlling the Department of Justice and all organizations that fall within that jurisdiction; however, they have not been objective in doing so. The very first AG was appointed to the role because of his legal skill, but also because of his personal connection with President Washington. As the country progressed, the cabinet positions and the position of the Attorney General had become a part of the political game of ‘who knows who’ and therefore the loyalty to the president has increased while loyalty to the public has decreased. As the party lines have become increasingly significant within politics, the importance to follow those lines once in office has followed.

To escape the political game and revert our AG to a position of political neutrality, the Attorney General must not be appointed by the president, which essentially morphs it into a cabinet member; instead, it must be appointed by the Supreme Court and be reevaluated every

¹²³ Ibid.

four years. The Supreme Court was intended by the founding fathers to be an apolitical branch of government. The court justices are supposed to be more politically neutral than elected officials and they are appointed for life. A justice may be appointed for political reasons, but once in office their actions are less restrained to party lines (than the president) because they are not looking for re-appointment. Additionally, the justices are not bound to party lines as much as ideologies. Supreme Court Justices are not identified as Democrats or Republicans; instead they stick to the liberal or conservative labels, and more specifically the interpretation of the Constitution is where the justices differ the most.

The politicized nature of the Supreme Court has been acknowledged, so it may be argued that a Supreme Court appointment would result in the similar problem of that with the president. To counter the potential problem a three-fourths approval will be utilized. The three-fourths requirement will require a candidate for the AG position to be more politically moderate because justices that fall on either party line or either ideology must approve it. The appointment would not fall onto one single person with political motives; instead, seven justices would have to agree on an AG. This would result in a more moderate/politically neutral position because justices from both sides would have to compromise on an AG. After the appointment has been made, the AG will still report to the president and continue on with the same duties. This appointment does not fundamentally shift the position; it just eliminates the loyalty to the president.

The suggested change would not go without speed bumps—for example, nine people with differing views will not make an appointment as quickly as one person with political motives. However, this process will help ensure a more politically neutral AG within the executive branch and ultimately over the Department of Justice. By not having loyalty to a single person and thus a party, the attorney general will have neutrality when it comes to enforcing

polices and aiding in investigations. In acknowledgement that there must be a check on the AG, there will be reviews every four years, similar to the current system. With today's system the president-elect chooses the AG, so every four years there may be a change. The Supreme Court must keep this check on the AG by doing the same. Because the Supreme Court justices are more permanent, the shift in the AG may decrease in frequency, which will also allow for more stability within the justice system.

The change of appointment power does not violate the Constitution because the Judicial Act of 1879 created the AG position, and it does not completely remove the president's power. This change also increases the governmental check on the executive branch, which the constitution was designed to do. Political actors within the legislative and judicial branches would support the shift because of this increased check on the executive branch. The President would not be as hasty in impulsive or secret legal action anymore, which is beneficial for all parties but the president. This leads the question to be asked—why would the president give up this power? The president may still gain approval rights to the AG. Also, it can be noted that when justices retire, the current president picks the replacement, so the president role still has power to the AG appointment through the justices they chose. The president would not want to willingly give up this power. Since the founding of the position the AG has been a disposable tool to utilize and manipulate for the president; however, as times have changed and states now appoint/elect their AG's differently than the United State AG, it is time the change comes upon the national office. The president will not willingly give away this power, but the other branches of government and the people will be the cause of this change. The increased checks on the government that will result will be the floodgate that moves this change forward, and the

president will let this happen or face severe criticism and negative press over the resistance he is causing.

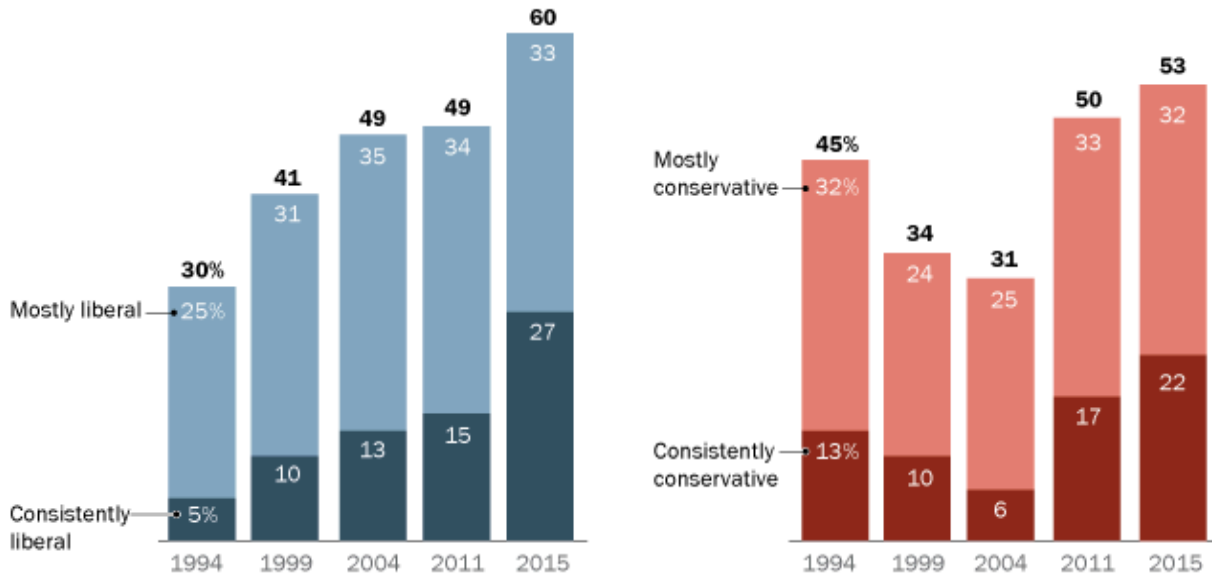
The shift in power would allow for a greater stability within the judicial system and justice system of America. It would also bring the AG role out of the political game. When the AG does not have to look to the president for reappointment, the actions taken will be more objective and the loyalty can lie with the American Public over a policeman party or political figure. The current political situation has left the AG as a pawn in the political game, but there is hope to strengthen and fix the position. Justice for the American people can still be served.

More Democrats take liberal positions, more Republicans take conservative ones

Chart 1

Percent of Democrats with political values that are...

Percent of Republicans with political values that are...



Notes: Ideological consistency based on a scale of 10 political values questions. Republicans include Republican-leaning independents, Democrats include Democratic-leaning independents.

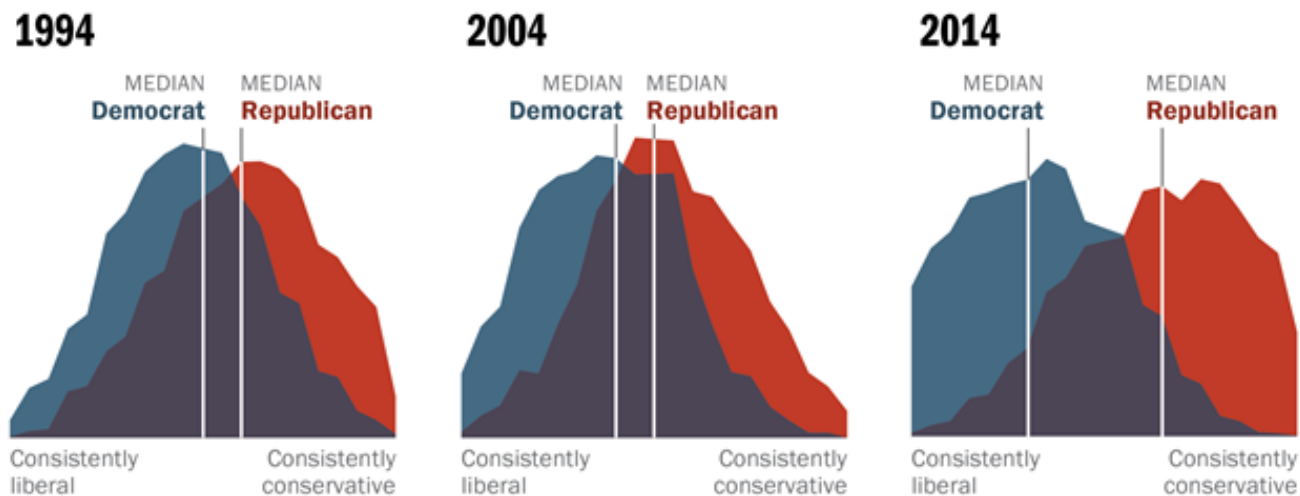
Source: Survey conducted Aug. 27-Oct. 4, 2015 (N=6,004).

PEW RESEARCH CENTER

Democrats and Republicans More Ideologically Divided than in the Past

Chart 2

Distribution of Democrats and Republicans on a 10-item scale of political values



Source: 2014 Political Polarization in the American Public

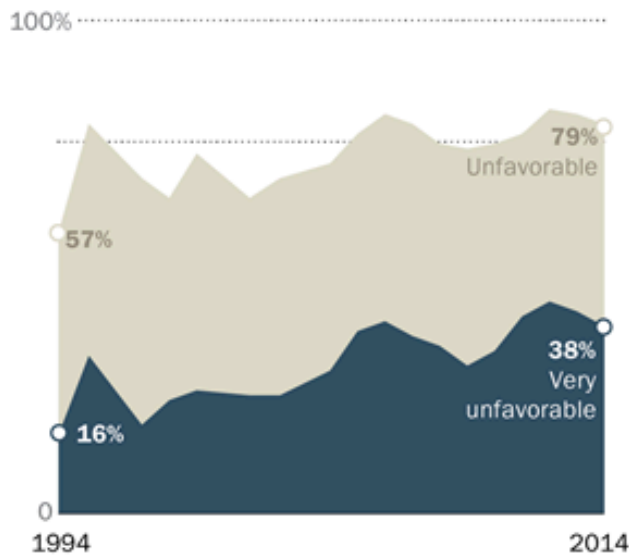
Notes: Ideological consistency based on a scale of 10 political values questions (see Appendix A). The blue area in this chart represents the ideological distribution of Democrats; the red area of Republicans. The overlap of these two distributions is shaded purple. Republicans include Republican-leaning independents; Democrats include Democratic-leaning independents (see Appendix B).

PEW RESEARCH CENTER

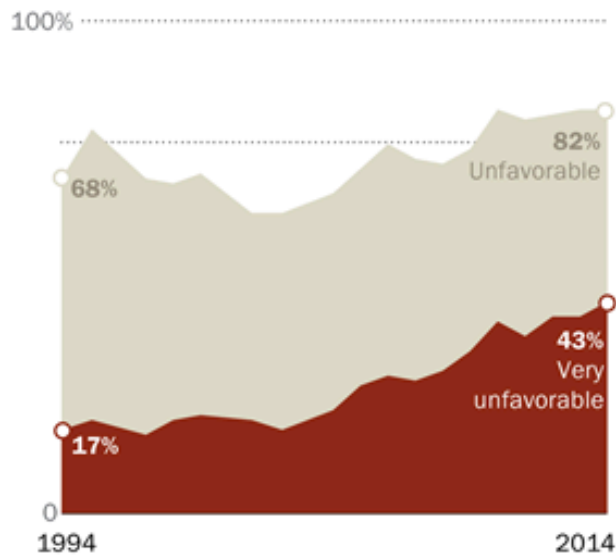
Chart 3

A Rising Tide of Mutual Antipathy

Democratic attitudes about the Republican Party



Republican attitudes about the Democratic Party



Source: 2014 Political Polarization in the American Public

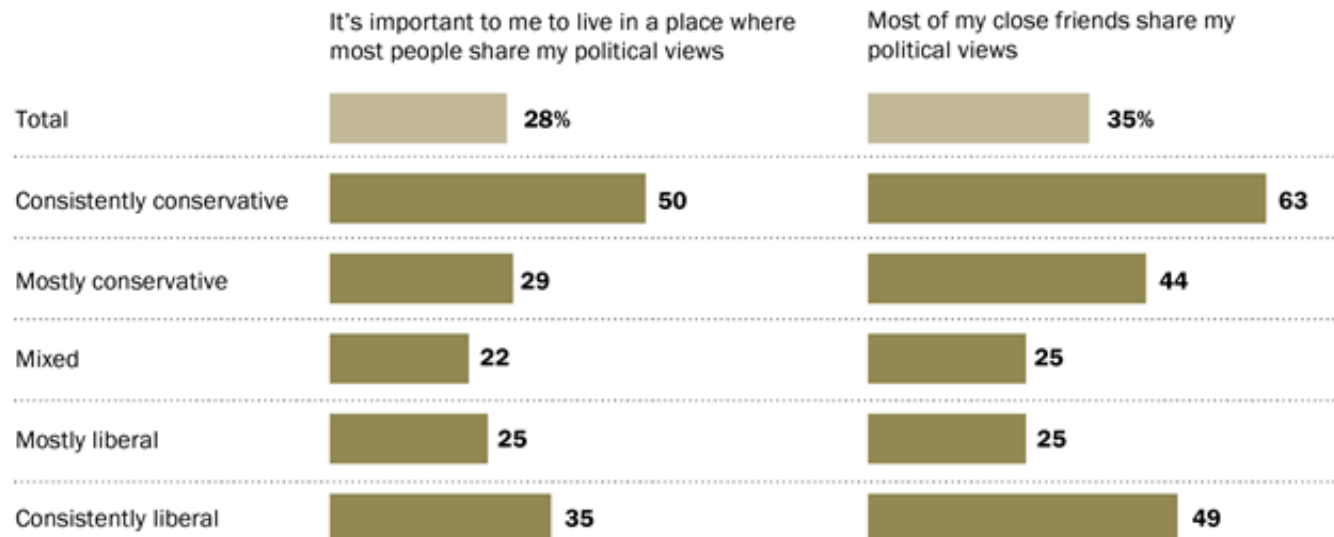
Note: Republicans include Republican-leaning independents; Democrats include Democratic-leaning independents.

PEW RESEARCH CENTER

Chart 4

Ideological Echo Chambers

% who say ...



Source: 2014 Political Polarization in the American Public

Note: Ideological consistency based on a scale of 10 political values questions (see Appendix A).

PEW RESEARCH CENTER

Table 1

Attorney General	President	Political Ideology	Contribution
Edmund Jennings Randolph	Washington	Federalist	<ul style="list-style-type: none"> • First Attorney General
William Wirt	Monroe	Democratic-Republican	<ul style="list-style-type: none"> • Longest Serving AG • Created office staff and record System • Start of precedent
Amos Tappan Akerman	Grant	Republican	<ul style="list-style-type: none"> • First AG over new Department of Justice • New ability to investigate and prosecute at will
Homer Stille Cummings	Roosevelt	Democrat	<ul style="list-style-type: none"> • Establish uniform rules of practice and procedure in federal courts • Court-Packing attempt • First AG to be publicly criticized for not being a public advocate
John Ashcroft	W. Bush	Republican	<ul style="list-style-type: none"> • 9/11 aftermath • Change the DOJ to provocative, preventative agency
Loretta Lynch	Obama	Democrat	<ul style="list-style-type: none"> • Addressed problems of police community, soccer executives corruption and investigated the Patriot Act • Launch a national Community Policing Tour • Refused to investigate Obama's secret efforts with Iran • Secret meetings with Obama and B. Clinton in regards to Hilary Clinton's email scandal
Jeff Sessions	Trump	Republican	

Bibliography

"About DOJ." About DOJ | DOJ | Department of Justice. Accessed November 17, 2016.

<https://www.justice.gov/about>.

"Attorney General: William Wirt." Attorney General: William Wirt | AG | Department of Justice.

Accessed November 17, 2016. <https://www.justice.gov/ag/bio/wirt-william>.

"Archive of FDR's Vice President, Secretaries of War, State and Attorneys General." RJM

Autographs and Antiques. Accessed November 17, 2016.

<http://rjmautographsandantiques.com/products/archive-of-fdrs-vice-president-secretaries-of-war-state-and-attorneys-general>.

Bell, Giffin B. "The Attorney General: The Federal Government's Chief Lawyer and Chief

Litigator, or One Among Many?" *Fordham Law Review* 46, no. 6 (1978): 1049-070.

Accessed 2017.

<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2318&context=flr.1049>

"Biography for Homer S. Cummings." American Voices. Accessed November 17, 2016.

<http://www.historicalvoices.org/amvoices/view.php?name=Cummings,HomerS.&type=bio>.

"Biography of U.S. Senator Jeff Sessions of Alabama." Biography - Senator Jeff Sessions.

Accessed January 22, 2017. <http://www.sessions.senate.gov/public/index.cfm/biography>.

Department of Justice. "Attorney General Lynch Expands National Community Policing Tour

with Trip to Miami-Dade County, Florida." United States Department of Justice.

February 8, 2016. Accessed November 20, 2016.

<https://www.justice.gov/opa/pr/attorney-general-lynch-expands-national-community-policing-tour-trip-miami-dade-county>.

"Edmund Jennings Randolph - People - Department History - Office of the Historian." U.S. Department of State. Accessed November 17, 2016.

<https://history.state.gov/departmenthistory/people/randolph-edmund-jennings>.

Etienne, M. (2005). The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers. *Journal of Criminal Law & Criminology*, 95(4), 1195-1260. Retrieved from

<http://search.proquest.com.ripon.idm.oclc.org/docview/218444091?accountid=9525>

Fairlie, John A. "The United States Department of Justice." *Michigan Law Review* 3, no. 5 (March 1905): 352-59. Accessed September 23, 2016.

<http://www.jstor.org/stable/1273036>.

Ferejohn, John . "Judicializing Politics, Politicizing Law." *Law and Contemporary Problems* 65, no. 3 (2002): 41-68. Accessed March 6, 2017.

<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1258&context=lcp>.

Gramlich, John. "America's Political Divisions in 5 Charts." Pew Research Center. November 07, 2016. Accessed January 22, 2017. <http://www.pewresearch.org/fact-tank/2016/11/07/americas-political-divisions-in-5-charts/>

Hall, Timothy L. *The U.S. Legal System*. Pasadena, Calif: Salem Press, 2004. *eBook Academic Collection (EBSCOhost)*, EBSCOhost (accessed November 17, 2016).

"History of the American Bar Association." American Bar Association. Accessed January 22, 2017. http://www.americanbar.org/about_the_aba/history.html

"John Ashcroft Leaves Behind Controversial Legacy as Attorney General." PBS Newshour. November 11, 2004. Accessed November 18, 2016.

http://www.pbs.org/newshour/bb/law-july-dec04-ashcroft_11-11

"John David Ashcroft Facts." John David Ashcroft Facts. Accessed November 18, 2016.

<http://biography.yourdictionary.com/john-david-ashcroft>.

Kredo, Adam. "Congress: Attorney General Lynch 'Pleads Fifth' on Secret Iran 'Ransom' Payments." Washington Free Beacon. October 28, 2016. Accessed November 20, 2016.

<http://freebeacon.com/national-security/attorney-general-lynch-pleads-fifth-secret-iran-ransom-payments/>.

"Loretta Lynch - Discover the Networks." Discover the Networks. Accessed November 18, 2016. <http://www.discoverthenetworks.org/individualProfile.asp?indid=2632>.

Marshall, William P. "Eleven Reasons Why the Presidential Power Inevitably Expands and Why It Matters." *Boston University Law Review* 88 (2008): 505-22. Accessed March 8, 2017.

<https://www.bu.edu/law/journals-archive/bulr/documents/marshall.pdf>.

"Organization, Mission & Functions Manual: Attorney General, Deputy and Associate." The United States Department of Justice. Accessed November 17, 2016.

<https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general>.

Parker, David B. "Amos T. Akerman (1821-1880)." New Georgia Encyclopedia. September 12, 2002. Accessed November 17, 2016.

<http://www.georgiaencyclopedia.org/articles/history-archaeology/amos-t-akerman-1821-1880>.

Pavlich, Katie. "Obama Endorses Hillary, Immediately Meets With Attorney General Loretta Lynch." Townhall. June 09, 2016. Accessed November 20, 2016.

<http://townhall.com/tipsheet/katiepavlich/2016/06/09/obama-endorses-hillary-immediately-meets-with-loretta-lynch-n2176214>.

- Ragavan, Chitra, Brian Duffy, and Christopher H. Schmitt. 2004. "ASHCROFT'S WAY. (Cover story)." *U.S. News & World Report* 136, no. 3: 30-38. *Academic Search Complete*, EBSCOhost (accessed November 17, 2016).
- "Reconstruction Era: 1865 - 1877." Library System. Accessed November 17, 2016. <http://www.howard.edu/library/reference/guides/reconstructionera/>.
- Rhodan, Maya. "Obama's New Attorney General Hits the Ground Running." *Time*. June 1, 2015. Accessed November 18, 2016. <http://time.com/3904409/loretta-lynch-first-month/>.
- Rowan, Beth. "Cabinet Members of George W. Bush." Infoplease. Accessed November 17, 2016. <http://www.infoplease.com/spot/bushcabinet.html>.
- Sisneros, Henir. "Issues for a New U.S. Attorney General." *Utah Bar Journal* 28, no. 2, 40-43.
- Spaulding, Norman W. "Professional Independence in the Office of the Attorney General." *Stanford Law Review* 60, no. 6 (2008): 1931-979. <http://www.jstor.org/stable/40040428>.
- Suh, Michael. "Political Polarization in the American Public." Pew Research Center for the People and the Press. June 11, 2014. Accessed March 06, 2017. <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>.
- Talanian, Nancy. "Human Rights: Ashcroft's Legacy." *Alternet*. February 16, 2005. Accessed November 18, 2016. http://www.alternet.org/story/21280/ashcroft's_legacy.
- Thorp, Galen N. 2008. "William Wirt." *Journal Of Supreme Court History* 33, no. 3: 223-303. *Academic Search Complete*, EBSCOhost (accessed November 17, 2016).
- Woolf, Harry. "Don't Abolish the Attorney General." *The Telegraph*. February 4, 2007. Accessed November 17, 2016. <http://www.telegraph.co.uk/comment/personal-view/3637083/Dont-abolish-the-Attorney-General.html>.
- "10 things to know about Sen. Jeff Sessions, Donald Trump's pick for attorney general." *The*

Washington Post. Accessed January 22, 2017.

https://www.washingtonpost.com/news/the-fix/wp/2016/11/18/10-things-to-know-about-sen-jeff-sessions-donald-trumps-pick-for-attorney-general/?utm_term=.613445b17b1b.

2016. "Homer Stillé Cummings." *Columbia Electronic Encyclopedia, 6Th Edition* 1. *Academic Search Complete*, EBSCOhost (accessed November 17, 2016).