

INFORMAL NORMS IN JUDICIAL SELECTION

Diego A. Zambrano* & Ludmilla Martins da Silva**

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When countries seek to improve their judicial system, they usually tinker with the formal rules that govern the judiciary—tenure protections, salaries, and appointment arrangements. But there is a significant mismatch between the formal rules and actual judicial performance. For the past decade, then, scholars have explored informal institutions—social conventions and practices—that seem to shape judicial behavior. Informal norms can be as important as the formal institutional set-up in determining judicial independence and competence. Yet, except for particular case studies, there is little comparative scholarship on the role of informal norms in the context of judicial selection. This leads to a straightforward question: How exactly does informality bleed into the selection of judges?

This Article provides a comparative study of the subterranean layer of informal norms that governs the selection of judges. Drawing on informal arrangements in Colombia, Mexico, Eastern Europe, and the United States, we explore how informality grows around judicial appointment processes and influences judicial performance. Our case study on Colombia builds on more than fifty interviews with government officials and judges. This allows us to offer a systematic understanding of how informal appointment mechanisms develop and exactly what role they play in different systems. We specifically identify three sites of informality that seem important in most countries: the process of pre-selection and vetting, the role of judicial guilds or corporatism, and the involvement of non-governmental organizations across the selection process. Normatively, we argue that differences in informal norms partially explain differences in de facto judicial independence and that countries need to plan for informality by seeding the ground for healthy norms to develop.

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* Professor of Law, Stanford Law School. For thoughtful comments or conversations, we thank . . .

** JD '15, University of Sao Paulo, JSM '22 Stanford Law School, JSD '27, Stanford Law School.

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Introduction

Scholars of judicial reform have long focused on appointment processes as a key intervention to strengthen judicial independence.¹ The literature highlights the importance of selection processes that can balance independence, competence, and some limited democratic accountability. Since the 1990s, the priority for most countries has been to guarantee judicial separation from the political process and, sometimes, an authoritarian executive. But countries have embraced a broad range of selection mechanisms, ranging from sole executive appointments to sole legislative appointments, judicial councils, or mixed systems. More recently, the common wisdom is that the executive should not retain “exclusive” power to appoint judges.² And that judicial councils—staffed by a group of designated judges and politicians—are one of the best methods for ensuring judicial independence and competence.³ Overall, the message from decades of studies is straightforward: if you want a more independent and competent judiciary, build a robust appointment process.

The fundamental problem with the common wisdom and the extensive literature on judicial appointments is that formal appointment processes exist alongside informal norms and practices. That is why there is a significant mismatch between formal appointment processes and actual selection procedures. Countries with similar appointment processes have widely divergent judicial outcomes—compare Argentina (notoriously incompetent and corrupt) with the U.S. (relatively high performing)—while countries with different processes sometimes arrive at the same level of competence and judicial independence, like the United States and Germany.⁴ Worse, adopting common-sense reforms seems to have little to no effect on judicial performance. Ukraine, for instance, adopted every best practice in the book between 2014–2018, but by 2021, many informal practices that had long undermined

¹ See Tom Ginsburg on Judicial Councils n.1 (listing sources, including Richard Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice*, *BYU L. REV.*, at 827 (1990); Paul Fenn & Eli Salzberger, *Judicial Independence: Some Evidence from the English Court of Appeal*, 42 *J.L. & ECON.* 831 (1999); F. Andrew Hanssen, *Is There a Politically Optimal Level of Judicial Independence?*, 94 *AM. ECON. REV.* 712 (2004); Irving Kaufman, *The Essence of Judicial Independence*, 80 *COLUM. L. REV.* 671 (1980); Daniel Klerman & Paul Mahoney, *The Value of Judicial Independence: Evidence from 18th Century England*, 7 *AM. L. & ECON. REV.* 1 (2005)).

² Sarkar Ali Akkas, *Appointment of Judges: A Key Issue of Judicial Independence*, 16 *BOND L. REV.* 200 (examining “the basic nature of the principal mechanisms for appointment of judges” and arguing that “the power of appointment of judges should not be vested exclusively in the executive government”).

³ See e.g. *APPOINTING JUDGES IN THE AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES* (Kate Malleson & Peter Russel, eds, 2005); Tom Ginsburg, *Judicial Appointments and Judicial Independence*, U.S. INSTITUTE FOR PEACE (Jan. 2009) (describing and evaluating the four main systems of judicial appointments, the value of judicial councils, and the ways in which mechanisms for removal of judges); Lee Epstein et al., *Comparing Judicial Selection Systems*, 10 *WILLIAM & MARY BILL OF RIGHTS J.* 7 (2001) (exploring the “formal rules that would maximize the achievement of a distinguished and independent bench”); European Commission for the Democracy Through Law (Venice Commission), *Judicial Appointments*, Opinion No. 403/2006 (June 22, 2007) (arguing that “no single non-political ‘model’ of appointment system exists”).

⁴ See e.g., *RULE OF LAW INDEX 2023 REPORT*, (2023), <https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIIndex2023.pdf> (last visited May 31, 2024); Rebecca Bill Chavez, *The Evolution of Judicial Autonomy in Argentina: Establishing the Rule of Law in an Ultrapresidential System*, 36 *J. LAT. AM. STUD.* 451 (2004).

judicial performance and trust in the judiciary remained in place.⁵ Worst still, some of the most authoritarian countries in the world, like Venezuela, have excellent written rules for appointments.⁶ In short, a well-designed formal appointment process does not guarantee a high-performing judiciary. The challenge, then, is identifying what matters for judicial appointments.

For the past decade, then, scholars have focused on informal institutions that seem to shape the performance of judiciaries—social conventions and practices that influence how judges decide cases, whether political interference in the judiciary is appropriate, or even the existence of corruption.⁷ Informal norms can be as important as the formal institutional set-up in determining the degree of judicial independence and, even more crucially, the competence of a country’s judiciary. David Weiden, for instance, argues that “[i]nformal norms . . . are more important than the formal selection mechanism in determining whether the judiciary is highly or less politicized.”⁸ Maria Popova similarly notes that “[o]ften, changes in the informal norms that structure the relationship between the judiciary and other branches are the most transformative to the functioning of the judiciary.”⁹ Yet, with the exception of particular case studies,¹⁰ there is little comparative scholarship on the role of informal norms in the context of judicial selection. Nor have scholars explored specific sites of informality in selections and appointments, focusing instead on judicial decision-making or corruption. The literature, therefore, does not offer a systematic understanding of how norms and informal mechanisms develop or exactly how informality bleeds into judicial selections.¹¹ Our comparative approach allows us to answer a clear question: How exactly do informal norms influence judicial selections?

This Article provides a comparative study of the subterranean layer of informal norms that governs the appointment of judges. Countries around the world have devised different conventions and informal processes to check the integrity, merit, and potential performance of judicial candidates. Drawing on recent examples from

⁵ Maria Popova & Daniel J. Beers, *No Revolution of Dignity for Ukraine’s Judges: Judicial Reform After the Euromaidan*, 28 DEMOKRATIZATSIYA: THE JOURNAL OF POST-SOVIET DEMOCRATIZATION 113 (2020).

⁶ See Rogelio Pérez-Perdomo, *Judicialization and Regime Change: The Venezuelan Supreme Court*, in THE JUDICALIZATION OF POLITICS IN LATIN AMERICA (Palgrave Macmillan, 2005), 133, 131–59.

⁷ See e.g., Ana María Montoya, “*Si no vas al Senado, no te eligen magistrado*”. *Instituciones informales y criterios de selección de los magistrados de la Corte Constitucional colombiana en el Senado (1992-2009)*, COLOMB. INT. 155 (2013); Maria Popova & Daniel J. Beers, *supra* note 5; see also Rebecca Bill Chavez, *supra* note 4.

⁸ David L. Weiden, *Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia*, 64 POLITICAL RESEARCH QUARTERLY 335 (2011) at 335; Paul W. Kahn, *Independence and Responsibility in the Judicial Role*, 1 in TRANSITION TO DEMOCRACY IN LATIN AMERICA 73 (Irwin P. Stotzky ed., 1st Edition ed. 1993) at 84; Hubert Smekal, *Informality as a Virtue: Exploring Positive Informal Judicial Institutions*, 24 GERMAN LAW JOURNAL 1555 (2023).

⁹ Popova & Beers, *supra* note 5 at 116.

¹⁰ Rebecca Bill-Chavez, Maria Popova, Julio Rios-Figueroa, and Ana Maria Montoya, among others, have highlighted informal institutions in Argentina, Ukraine, Mexico, and Colombia. See Montoya, *supra* note 7; Popova & Beers, *supra* note 5; Chavez, *supra* note 4; see also Andrea Pozas-Loyo & Julio Ríos-Figueroa, Anatomy of an informal institution: The ‘Gentlemen’s Pact’ and judicial selection in Mexico, 1917-1994, 39 INTERNATIONAL POLITICAL SCIENCE REVIEW 647 (2018); see also Santiago Basabe-Serrano, Informal Institutions and Judicial Independence in Paraguay, 1954-2011, 37 Law & Policy 350 (2015)

¹¹ *Id.*

informal arrangements in Colombia, Mexico, Eastern Europe, and the United States, we explore how informality grows around judicial appointment processes and heavily influences judicial performance, for good or ill. Our case study on Colombia draws from a set of more than fifty semi-structured interviews with government officials, judges, lawyers, and academics, conducted in two field research trips—Appendix A provides further methodological details—giving us an inside view of the informal norms of judicial appointments in Colombia.¹²

Drawing on these case studies, the Article makes three key contributions. First, it offers a systematic understanding of how informal appointment norms develop, exactly what role they play in different systems, and how they influence the outcomes of formal judicial recruitment processes. Second, the Article shows that three institutional mechanisms are responsible for most norms in this area: the process of pre-selection and vetting, the role of judicial guilds or corporatism, and the involvement of non-governmental organizations across the selection process. Third, we argue that informal norms partially explain cross-country variation in de facto judicial independence and performance. We do not claim that informality is the sole driver of judicial quality—historical legacies, political culture, and economic conditions matter, too. But we argue that once formal rules prove inconclusive, a focus on informal norms is critical to understanding why some judiciaries develop stronger independence and competence than others. We identify specific combinations of informal practices that tend to enhance independence—like norms creating multiple accountability mechanisms (to different branches of government, civil society, and the legal profession) while rewarding merit—and others that reliably undermine it—like practices making advancement dependent on political loyalty. Understanding these relationships is essential because informal rules may shape judicial independence as much as formal institutions do. We, therefore, push for a larger shift in comparative law scholarship from formal institutions to informal ones.

Part I of this Article begins by defining norms in this context as any informal practice that plays an important role in the selection of judges. Unlike formal rules, norms go unmentioned in constitutions and laws and are enforced only via social networks and reputational consequences. Scholars sometimes refer to these norms as social practices, conventions, or informal institutions to distinguish them from formal legal rules.¹³ Consider the following well-known examples:

- While many countries provide for the executive appointment of judges subject to confirmation by the legislature, norms govern whether the legislature serves as a meaningful check or just a rubber stamp. For instance, in the United States, despite the formal process of presidential nomination and confirmation by the Senate, the “blue slip” norm gives one senator the power to veto a presidential nominee from the senator’s home state.¹⁴ This norm gives senators a powerful influence on judicial nominations.

¹² Appendix A describes our interview methodology in detail, including who we interviewed, how we recorded the interviews, and when and where we conducted our interviews.

¹³ See Part I for a full definition and discussion of related literatures.

¹⁴ See Brannon P. Denning, *The “Blue Slip”: Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75 (2001).

- The German Constitution empowers both chambers of the German legislature to vote on judicial nominees for the Constitutional Court. Yet, this formal process has been supplanted by an informal political scheme in which the major parties in the legislature appoint “their respective Justices.”¹⁵
- Many countries maintain conventions on the representation of minorities in their highest court. In Ireland, for example, “it has been a long-standing convention that at least one judge on the Supreme Court is a non-Catholic. More recently, judicial appointments should also consider gender balance in the Court.”¹⁶ In the nineteenth and early twentieth century, U.S. politicians followed a norm of regional balancing of Supreme Court justices.¹⁷

The common thread across these examples is the divergence between formal law and the actual practice of judicial appointments. To fully demonstrate the fragility of formal systems, we gathered data from the Comparative Constitutions Project on every major change to judicial appointments around the world in the past fifty years. We then identified two sets of reforms: (1) those that increased self-governance by empowering the judiciary or a judicial council to select new justices for the highest ordinary court, and (2) those that set political branches at the center of judicial recruitment processes. Applying statistical methods, we tested whether these changes correlated with changes to *de facto* judicial independence. As explored in Part I, we found no correlation. In simple terms, when countries make significant changes to formal appointment processes, it does not correlate with improvements in judicial independence, at least under current measures.

Moving beyond common examples, Parts II and III of the Article widen the lens to explore how norms and informal mechanisms manifest in different regimes across continents. Examining processes in Colombia, Mexico, Ukraine, and the United States—Part III provides more detail on our case selection—we show how informality grows around judicial appointments at all levels of the judiciary, influencing judicial performance. While Colombia is our main case study, the other countries serve as shadow case studies that complement our analysis. Mexico and Ukraine are developing democracies that have made serious efforts to improve their institutions.¹⁸ However, recently, Mexico shifted its judicial appointment process to elections, a reform that goes against every basic principle of good governance.¹⁹ Our discussion of Mexico, then, is mostly historical and focuses on the judiciary as it was before this recent reform. Both Eastern European and Latin American countries have been particularly

¹⁵ Uwe Kischel, Party, Pope, and Politics? The Election of German Constitutional Court Justices in Comparative Perspective, 11 INT. J. CONST. LAW 962 (2013).

¹⁶ Smekal, *supra* note 8, at 1564.

¹⁷ See e.g., William E Hulbary & Thomas G Walker, *The Supreme Court Selection Process: Presidential Motivations and Judicial Performance*, 33 WESTERN POLITICAL QUARTERLY 153 at 186.

¹⁸ To be clear: we are not interested in authoritarian or autocratic nations because norms in those countries follow different dynamics. Our inclusion of Georgia focuses on a time period where that country had a democratic government interested in improving institutions.

¹⁹ Alfonso Cortez-Fernandez et. al., *Mexico: Constitutional Amendment Introduces Popular Elections for Judicial Positions*, Baker McKenzie Insightplus (Sep. 17, 2024), <https://insightplus.bakermckenzie.com/bm/dispute-resolution/mexico-constitutional-amendment-introduces-popular-elections-for-judicial-positions> (last visited Sep 30, 2024).

innovative in the field of judicial reform, engaging in wide-ranging reforms to judicial selection in the 1990s and 2000s. We also include the United States as a useful contrast of a more established democracy that nonetheless relies on informality. While historically the United States maintained a high standard of competence and judicial independence, more recently it has seen increasing political polarization and the influence of ideological groups like the Federalist Society and the American Constitution Society.²⁰ It is unclear how this shift will affect judicial performance. Overall, our cross-country review of judicial norms provides a synthetic account of informal selection processes and allows us to disinter a whole slew of informal institutions.

Consider, then, our main case study of Colombia's judicial selection. The 1991 constitution provides for two main appointment processes—a judicial career for lower court judges and a mechanism for the high courts that involves other high court magistrates in the nomination and selection process.²¹ This system has turned Colombian courts into some of the world's most independent and powerful.²² We interviewed dozens of justices and government officials to understand the nuances and practices of the judicial appointment process and to identify enablers of judicial independence in Colombia. We found that there is indeed a strong norm of judicial independence: judges and lawyers generally believe that executive intervention in the judiciary is highly inappropriate.²³ To the extent that the formal appointment process works, it is because informal norms enable it, including that lawyers and judges view judicial independence as strongly desired and corruption as highly offensive.

But, beyond that, Colombian judges have also embraced informal processes. At the high court level, despite exhortations against political influence, an informal lobbying process has developed in which candidates to the Constitutional Court are expected to actively campaign in the Senate.²⁴ Moreover, while the Superior Council of the Judiciary is supposed to prepare a meritocratic list of candidates for other high courts, the current process is opaque and does not sufficiently prioritize competence. There is a similar story at the lower court level, where the judicial career is supposed to be a meritocratic contest centered around formal examinations. But the system has practically collapsed—the examination process has stalled for years, forcing the system to rely on provisional appointments. Here is where informality comes in: there is no formal process for appointing provisional judges. It is left up to judges with slight supervision by an administrative court. And so it appears that current judges are

²⁰ Adam Bonica & Maya Sen, *The Judicial Tug of War: How Lawyers, Politicians, and Ideological Incentives Shape the American Judiciary* (2021).

²¹ See 1991 Col. CONST, art. 231 (setting the selection process of justices for the Supreme Court and Council of State), art. 239 (providing the appointment process of the Constitutional Court's justices), and art. 254 (specifying the selection process of Judicial Council's justices and lower court's judicial career).

²² See e.g., Miguel Schor, "An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia," *Indiana Journal of Global Legal Studies* 16 (2009).

²³ Interview with attorneys and academics, Bogotá, March 2023.

²⁴ Montoya, *supra* note 7.

comfortable with a stalled process that lets them retain provisional appointment power, turning the entire system over to informal judicial networks.

The story is similar in Mexico and Eastern Europe, where informal judicial networks significantly influence appointments and sometimes go directly against the formal process. While Mexican law provided for lower court appointments by a vote of Supreme Court justices, between 1917 and 1994, a “gentleman’s pact” between the justices gave rise to a system of patronage within the judiciary.²⁵ Instead of taking votes on lower court nominees, justices maintained an informal rotating list that gave each justice full control over the next lower court vacancy.²⁶ Similarly, in Ukraine and Georgia, patronage networks within the judiciary have stalled reforms.²⁷

Drawing from these countries, Part III then offers a typology of sites of informality that seem important in most countries: pre-selection and vetting, the growth of judicial guilds or corporatism, and the involvement of non-governmental organizations across the selection process.

First, almost every country employs an informal pre-selection and vetting process to review the credentials of potential judges. In theory, the process is supposed to focus on competence, integrity, and professional credentials. But often, the process allows political actors to select for specific backgrounds and political connections. Countries from Eastern Europe to Latin America are increasingly focusing on this vetting process, and the European Union has specifically empowered the Venice Commission to focus on vetting in transitional contexts. Yet, surprisingly, formal law rarely regulates the vetting process. In Colombia, the Superior Council vets and prepares a shortlist of nominees for the Supreme Court but does not have an explicit rubric to follow.²⁸ Even in highly formal legal systems like the United States, vetting occurs behind closed doors. Vetting is increasingly important yet understudied, undertheorized, and unrecognized by formal law.

Second, judicial corporatism—or what we term, the new judicial guilds—plays an important role in many countries.²⁹ By guilds, we mean the development of a judicial “esprit de corps and institutional identity”³⁰ that prioritizes the defense of the judiciary and its interests. The forceful promotion of judicial independence has produced

²⁵ Rolando Garcia Miron, *The Construction of a Constitutional Court in an Emerging Democracy: The Mexican Supreme Court (1994-2018)*, Dec., 2023, <https://stacks.stanford.edu/file/dw143sp3420/Garcia%20Miron,%20Rolando%20-%20SD%20Dissertation-augmented.pdf> (last visited May 31, 2024) at 107-108; *see also* Pozas-Loyo & Julio Ríos-Figueroa, *supra* note 10.

²⁶ Miron, *supra* note 25, at 107-108.

²⁷ Popova & Beers, *supra* note 5, at 124; Nino Tsereteli, Constructing the Pyramid of Influence: Informal Institutions as Building Blocks of Judicial Oligarchy in Georgia, 24 *German Law Journal* 8 (2023).

²⁸ Interview with Justice, Higher Court, Bogotá, (2024).

²⁹ *See e.g.*, Denis Preshova, *Informal Constraints and Judicial Councils as Fourth Branch Institutions in the Western Balkans* (2023), <https://ecpr.eu/Events/Event/PaperDetails/70565>; Julio Ríos-Figueroa, *Zaldívar’s Resignation and the Double-Edged Sword of Judicial Corporatism*, WILSON CENTER (Feb. 29, 2024), <https://www.wilsoncenter.org/article/zaldivars-resignation-and-double-edged-sword-judicial-corporatism>; Tim Bunjevac, *The Rise of Judicial Self-Governance in the New Millennium*, 44 MELBOURNE UNIVERSITY LAW REVIEW 812 (2021).

³⁰ Ríos-Figueroa, *supra* note 29.

internal cohesion among judiciaries in many countries, leading to the development of a guild-like identity. This can produce serious benefits at times—developing an institutional identity is often associated with high institutional development. On the other hand, it can also produce corruption. Consider, as discussed above, the notorious example of Ukraine, where 2014 reforms intended to force turnover in judicial leadership instead resulted in “leadership continuity and retention.”³¹ It appears that judges stuck together to avoid personnel changes. In Colombia, judges increasingly close ranks and protect each other from outsider pressure.³² In Mexico, Professor Ríos-Figueroa has highlighted a growing corporatism among judges who are “insiders” to the judiciary—career-long bureaucrats who defend the interests of the judiciary.³³ We consider the strength of judicial networks as a form of corporatism that can foster informality.

Third, civil society organizations and political forces routinely find a way to influence the appointment process. They often do this, however, without any regulation or even recognition in the formal process. For instance, the process for selecting Colombian high court justices has sometimes accommodated specific non-governmental organizations, who are given privileged access to deliberations.³⁴ In Ukraine and Georgia, civil society organizations have become a major institution in both judicial reform and appointments.³⁵ By contrast, while NGOs play an increasing role worldwide, in the United States, the ABA’s role in the appointment process has waned while specific political groups have grown in power.³⁶ Either way, it appears that outside groups have significant power in the selection process.

To close the discussion, Part V tackles a fundamental question emerging from our comparative analysis: whether certain informal practices predictably enhance or undermine judicial independence and institutional quality. Generally, we do not claim that informal norms are either wholly positive or negative. Most of the literature focuses on their negative impact, especially on corruption. But our normative take is more nuanced and depends on the specific country and practice. We argue that informal practices can be evaluated based on whether they reinforce or undermine three core institutional values: separation from political interference, maintenance of high judicial competence, and preservation of public legitimacy. Good norms create overlapping accountability mechanisms and prioritize merit while punishing political subservience, whereas bad norms make advancement dependent on political loyalty or shield corrupt networks from oversight. Differences in informal norms that fall into these categories likely explain differences in de facto judicial independence.

³¹ Popova & Beers, *supra* note 5, at 124; Maria Popova, Can a leopard change its spots? Strategic behavior versus professional role conception during Ukraine's 2014 court chair elections, 42 *Law & Policy* 424 (2020).

³² Interview with Justice, Higher Court, Bogotá, 2023.

³³ Ríos-Figueroa, *supra* note 29.

³⁴ Interview with Justice, Higher Court, Bogotá, March 2023.

³⁵ Serhii Lashyn, Anastasia Leshchynshyn & Maria Popova, *Civil Society as an Informal Institution in Ukraine's Judicial Reform Process*, 24 *GERMAN LAW JOURNAL* 1488 (2023); Tsereteli, *supra* note 27, at 1483-1484.

³⁶ See e.g., Josh Blackman, *The ABA Needs Ideological Diversity to Ensure Its Future*, *ABA JOURNAL*, Apr. 2023, <https://www.abajournal.com/voice/article/the-aba-needs-ideological-diversity-to-ensure-its-future> (last visited May 31, 2023).

Nevertheless, similar informal practices can produce different outcomes depending on contextual factors like the political environment and institutional complementarities, suggesting that informal rules are necessary but not sufficient for judicial excellence. The new judicial guilds, for instance, are paradoxical. Yes, they can allow judges to select other judges based on patronage networks that undermine meritocratic standards, but they also protect the judiciary from external interference. Insofar as we care about separation of powers and authoritarian executives, we might prefer independence from the executive, even at the cost of judicial guilds. Likewise, the participation of civil society organizations can be salutary when they highlight corruption or force politicians to prioritize competence. But, as Popova argues, NGO and civil society participation can be a double-edged sword—some corruption investigations by NGOs have turned out to be baseless and delegitimized reforms instead of improving them. An overly vigilant civil society can sometimes corrode emerging institutions. Finally, informal vetting can improve judiciaries when it truly nudges selections based on competence and judgment. But it can also be easily abused.³⁷ In other words, there is nothing *per se* wrong with informality—norms can be used for positive or negative ends.

We also sketch out a few preliminary conclusions and design principles. First, our findings should contribute to a shift in the focus of comparative law scholarship from formal institutions to a more nuanced understanding of the levers—whether formal or informal—that truly influence behavior. This argument aligns with recent scholarship evaluating the null effects of formal political or constitutional reforms on democracy and rule-of-law outcomes.³⁸ Second, another implication is that incremental reforms to judicial selections must target empirically proven, effective levers, and not just assume that formal rules will have an impact. More practically, we also argue that informality can sometimes provide significant benefits in the appointment process and that scholars should not assume that formality is inherently better.³⁹ But in this Part, we sketch a few design principles that can help judicial reformers. We reject the typical prescription that more transparency and better formal rules can solve existing problems. Instead, we seek to identify and channel informality so that it serves positive ends.

I. Finding Norms in Judicial Appointments

We begin by providing an overview of formal versus informal appointment processes. Formal systems derive from written legal rules and are binding and enforceable. By contrast, informal norms are unwritten, derive from social networks, and are not legally enforceable. Unlike formal rules, violations of the informal norms of appointments can only be policed via reputational consequences. While scholars recognize the critical role played by informal norms in other legal processes, they have not appreciated the significance of informal norms in judicial appointments.

³⁷ Interview with Administrator, Peruvian Supreme Court, Video Call, 2022.

³⁸ See e.g., A. Chilton and M. Versteeg, *HOW CONSTITUTIONAL RIGHTS MATTER* (Oxford Press 2020).

³⁹ We understand that Hubert Smekal recently made a very similar argument. See Smekal, *supra* note 8, at 1555.

A. The Formal System

To staff judicial systems, countries must establish a reliable and institutional way to select judges. Countries generally do this through formal systems that are (a) written, (b) binding, and (c) enforced through official channels. Formal systems are written in constitution or statutes that must be followed to appoint judges. Those rules are public, widely available, and legible. They are binding and enforceable in the sense that new judges cannot receive their formal commissions without going through the process. Litigants can also challenge the appointment of a judge if it violates the process. And, depending on the particular law of standing, in most systems, other public officials can file claims against ultra vires appointments of any judge.

Generally, formal systems seek to balance judicial independence, accountability, competence, and some democratic input. Scholars agree that “judicial independence is a central goal of most legal systems, and systems of appointment are seen as a crucial mechanism to achieve this goal.”⁴⁰ Tom Ginsburg has identified four approaches to judicial appointments: by (1) political institutions, (2) a judicial council, (3) the judiciary itself, or (4) an electoral system.⁴¹ One common approach is to empower the political branches—usually allowing the executive to nominate and the legislature to confirm an appointee. By contrast, a more recent but increasingly common framework is to empower a group of parliamentarians, officers, or judges, to act as a judicial council that selects judges. Judicial councils provide a “happy medium” between “letting judges manage their own affairs and the alternative of complete political control of appointments, promotion, and discipline” and roughly 60% of all countries have adopted them in some form.⁴² However, despite the popularity of judicial councils, “they do not by themselves guarantee the substantive outputs of independence and quality.”⁴³ But many countries don’t fall neatly into these buckets—some involve several branches of government sharing power over the appointment process. Only a small minority of countries allows members of the judiciary to exclusively select their own successors. And, finally, the U.S. states almost uniquely allow judges to be selected through democratic elections.

B. The Formal System Does Not Guarantee Good Judicial Performance

Despite the seeming importance of the formal system, several threads of evidence indicate the formal method of appointment does not determine actual performance of judiciaries.

First, countries with similar appointment processes have widely divergent judicial outcomes.⁴⁴ Second, the obverse is also true: countries with different processes

⁴⁰ See Ginsburg *supra* note 1 at 1; see also Jeffrey Segal & Herbert Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002) (arguing that appointment politics dictate judicial behavior).

⁴¹ See Ginsburg *supra* note 1.

⁴² See Ginsburg *supra* note 1.

⁴³ See Nuno Garoupa & Tom Ginsburg, *Guardian the Guardians: Judicial Councils and Judicial Independence*, John M. Olin Program in Law and Economics Working Paper No. 444 (2008) at 105.

⁴⁴ Consider, for instance, the different performances of the U.S. Supreme Court and the Argentine Supreme Court. Martin Oyhanarte, *Supreme Court Appointments in the U.S. and Argentina*, 20 WASH. U. GLOBAL STUD. L. REV. 697 (2021); Rebecca Bill Chavez, *supra* note 4.

sometimes arrive at the same level of competence and judicial independence. Consider, for instance, that the top-performing countries in the World Justice Project's ranking of judiciaries (e.g., Denmark, Norway, Finland, New Zealand, Netherlands, Canada, Australia, etc.) employ a mix of appointment systems for their high courts.⁴⁵ Third, adopting the standard package of reforms can have little to no effect on judicial performance.⁴⁶ As we explore below, Eastern European countries adopted every best practice in the book in the 2010s yet maintained corruption and weak judicial performance.⁴⁷ As Bobek and Kosař have noted, standard packages of reforms only provide a structure and cannot ensure changes in the legal culture and informal practices.⁴⁸ Fourth, some of the most corrupt countries have excellent written rules for appointments, yet informal practices dominate.⁴⁹

In order to explore the weakness of formal systems, we gathered data from the Comparative Constitutions Project (CCP)⁵⁰ on every major change to judicial appointments around the world between 1960 and 2012.⁵¹ Specifically, we worked with

⁴⁵ See e.g., RULE OF LAW INDEX 2023 REPORT, (2023), <https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIIndex2023.pdf> (last visited May 31, 2024).

⁴⁶ See Erik G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses*, in *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* 336 (2003) at 348-350.

⁴⁷ Popova & Beers, *supra* note 5; Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 GERMAN LAW JOURNAL 1257 (2014).

⁴⁸ *Id.* at 1282.

⁴⁹ Bobek & David Kosař, *supra* note 47, at 866. See Rogelio Pérez-Perdomo, *Judicialization and Regime Change: The Venezuelan Supreme Court*, in *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA* (Palgrave Macmillan, 2005), 133, 131–59 (discussing corruption in the Venezuelan judiciary).

⁵⁰ Zachary Elkins & Tom Ginsburg, *Characteristics of National Constitutions: Data from the Comparative Constitutions Project*, (2022), <https://comparativeconstitutionsproject.org/download-data/> (last visited Oct 1, 2024).

⁵¹ We used two key variables from the CCP dataset—*SUPNOM* and *SUPAP*—which indicated the authorities responsible for nominating (*SUPNOM*) and approving (*SUPAP*) justices to the highest ordinary court. To facilitate the analysis, we recoded these variables into two categorical variables (*supnom_categ* and *supap_categ*), each with 13 subcategories: (1) Executive, (2) Legislative, (3) Judiciary, (4) Judicial Council, (5) Executive and Legislative, (6) Executive and Judiciary, (7) Legislative and Judiciary, (8) Executive and Judicial Council, (9) Legislative and Judicial Council, (10) Judiciary and Judicial Council, (11) Judiciary, Executive, and Universities, (12) Universities, Lawyers, and Judiciary, and (13) Electoral College. For constitutions originally coded as “other” (none of the previous categories), we manually reviewed each case and assigned it to the appropriate category. See the Appendix for more details on this recoding process. To track changes in judicial selection, we sorted the dataset by country and year and compared consecutive observations within each country. More specifically, we created two indicators, *supnom_s_event* and *supap_s_event*, which took the value of 1 when the selection authority changed from the previous year. We used the type of constitutional event variable (*evnttype*) in the CCP dataset to identify amendments and new constitutions and exclude interim, reinstated, and suspended constitutions (or amendments). This approach ensured that the comparison of only stable constitutions. We also created the *mixed_event* variable to capture hybrid shifts in judicial selection -- changes involving interactions between nomination and approval rather than a straightforward shift in either category. Moreover, to avoid misinterpreting superficial adjustments as substantive reforms, we identified and excluded linguistic changes through the *ling.change* variable. These cases involved renaming an authority without modifying the selection process. In Afghanistan (1989–1990), for instance, the Executive's role changed from approving to nominating justices, but the process itself did not change. We captured similar changes through the *ling.change* variable. Finally, we created the *slc.ev* variable to consolidate all substantive reforms. It condensed changes in the nomination and/or approval process,

two sets of judicial reforms. We first considered reforms that enhanced judicial self-governance by (1) adding, (2) increasing, or (3) concentrating the authority to nominate and/or approve justices for the highest ordinary court, on the judiciary or judicial council.⁵² We identified nine constitutions that implemented these changes and stayed in place for at least ten years: Benin (1990), Bolivia (1994), Bulgaria (1991), Colombia (1991), Honduras (2001), Kenya (1992), Malawi (1994), Nepal (1990), and Seychelles (1993). Before the reforms, most countries concentrated the selection process in the Executive—only Benin and Colombia had two branches (i.e., the Executive and the Legislative) sharing the authority to nominate and approve candidates. After the reforms, these countries moved toward more complex power-sharing arrangements. Most reforms divided authority between judicial councils and political bodies, with councils gaining nomination powers while either the executive or legislature retained approval authority.

In a second group, we considered reforms that concentrated the power to nominate and/or approve candidates for the highest ordinary court in the political branches. This group includes four constitutions that changed their selection system between 1960 and 2005 and stayed in place for at least ten years: Finland (1999), Netherlands (2002), Trinidad and Tobago (1976), and Zambia (1991).

We then tested whether these reforms were associated with changes to *de facto* judicial independence levels. To conduct this analysis, we used a modified version of Linzer and Staton's (2015) indicator, an index combining eight other measurements of *de facto* judicial independence into one composite metric.⁵³ More specifically, we excluded Cingraneli and Richard's measurement (CIRI) from this measurement. We

incorporated *mixed_event*, and excluded linguistic changes, ensuring historical consistency across countries and years. See the Appendix for more details on the identification of the relevant reforms.

⁵² The variable *slc.ev* (see *supra* note 51) identified 69 potentially relevant reforms that occurred between 1960 and 2012. After identifying these reforms, we reviewed them to ensure all met five requirements: (1) 10 years before and after stability, (2) complete data on all covariates, (3) no overlapping of reforms, (4) not enacted under provisional or interim constitutions, and (5) a pre-established judicial selection system. First, we required stability for a 10-year event window, which ensured the capture of only enduring changes rather than temporary modifications. Constitutional changes produce gradual effects as they often do not occur alongside an immediate and complete reappointment of all justices. Still, we also conducted a complementary analysis using a 5-year event window, allowing the assessment of immediate and sustained correlations between the reforms and judicial independence. This additional approach addresses eventual concerns about the impossibility of measuring correlation in the long term. Therefore, we only expect an impact on the *de facto* judicial independence arising from a modification in the judicial selection process in the medium to long term. Second, we only selected reforms with complete data for all control variables. Third, we excluded overlapping reforms, where multiple changes occur within the event window, to prevent carryover effects. Fourth, we excluded reforms enacted under provisional or interim constitutions because constitutional transitions in unstable environments can directly influence judicial independence. Finally, we only included countries with a pre-existing high-ordinary court and judicial selection system. In other words, we did not consider constitutional events that established a selection system for the first time or that occurred alongside the creation of a high-ordinary court, as these represent fundamentally different institutional changes from reforms to existing systems. This review process identified 13 reforms meeting all criteria. We then analyzed and hand-coded each to verify whether it enhanced judicial self-governance or, conversely, concentrated the authority to nominate and/or appoint justices within political branches.

⁵³ Drew A. Linzer & Jeffrey K. Staton, *A Global Measure of Judicial Independence, 1948-2012*, 3 JOURNAL OF LAW AND COURTS 223 (2015).

based our analysis on Adam Chilton and Mila Versteeg's work on the effects of constitutional provisions on the enforcement of rights.⁵⁴ Drawing on their work, we used two research designs to investigate whether these reforms are correlated with changes in *de facto* judicial independence. First, we used ordinary least squares (OLS) regressions with fixed effects for country and year and clustered robust standard errors at a country level. Then, we employed a stacked event study design, which allowed us to address bias concerns inherent to the use of the first method in the context of staggered study settings – when countries adopt the reform at different points in time.⁵⁵

For each approach, we generally defined the control group as countries that maintained their existing judicial selection process without any changes during the event window—defined as ten years before and after the event.⁵⁶ The TWFE regressions included as control observations (a) countries that did not change the selection process during the event window (never treated) and (b) the treated countries in the pre-treatment period (not yet treated). The stacked event study also used never-treated and not-yet-treated countries as control observations. However, each treated country gained a specific control group in this design. For instance, for the 1990 Constitution of Benin, the control group consisted of countries that did not modify their judicial selection system from 1980 to 2000 and the pre-treatment observations for Benin. In this sense, we identified, on average, 32 control countries for each treated constitution, including those that enhanced judicial self-governance (treatment group 1) and concentrated the selection process in the political branches (treatment group 2).

The Appendix reports our results in detail. Briefly, Tables 1 and 2 below present the results for both research designs. Table 1 shows that models (1) and (2) of the TWFE regressions identified a statistically significant association at a 10% level between judicial self-governance reforms and *de facto* judicial independence. However, this correlation dissipates once we include a control for political regimes. Considering that model (3) exhibits a higher R-squared value, which indicates a better fit, omitted variable bias may have driven the initial significance of model (2). Table 2 reports the findings of the stacked event study design. This approach also did not identify a statistically significant association between both sets of reforms and the outcome variable. In summary, all models and research designs show no statistically significant correlation between changes in the appointment process of justices for the highest ordinary court and measures of *de facto* judicial independence in the treated countries.

⁵⁴ Chilton & Versteeg, *supra* note 38 and Adam Chilton & Mila Versteeg, *The Effect of Constitutional Gender Equality Clauses*, 51 *The Journal of Legal Studies* 329 (2022).

⁵⁵ See Andrew C. Baker, David F. Larcker & Charles C.Y. Wang, *How Much Should We Trust Staggered Difference-in-Differences Estimates?*, Working Paper 21-112, Harvard Business School, 2021. (“... when research settings combine staggered timing of treatment effects and treatment effect heterogeneity across firms or over time, staggered DiD estimates are likely to be biased. In fact, these estimates can produce the wrong sign altogether compared to the true average treatment effects.”)

⁵⁶ To identify the control group, we also disregarded provisional, interim, reinstated, and suspended constitutions to ensure comparability with the treatment group. We also considered the availability of data for the outcome and control variables.

To assess whether our statistically insignificant results indicated truly negligible effects, we conducted equivalence testing following Rainey’s “two one-sided test” method.⁵⁷ We adopted Cohen’s guidelines for effect sizes⁵⁸ and Chilton and Versteeg’s approach to define a negligible impact threshold between -0.2 and +0.2 standard deviations of the outcome variable.⁵⁹ Specifically, the equivalence tests for TWFE OLS regressions revealed non-negligible associations in our basic models (1) and (2) for both judicial self-governance and political appointment reforms. However, models (3) and (4), which controlled for political and economic factors, showed diminishing associations approaching negligible levels. The stacked event study consistently indicated negligible relationships across all models, leading us to conclude that neither type of judicial reform demonstrated a meaningful correlation with de facto judicial independence.⁶⁰ Taken together, these results suggest that our regressions rule out the possibility of a large association.

While our study did not identify a statistically significant correlation between the considered judicial selection reforms and the outcome variable, we do not interpret these findings as evidence of no causal relationship. This limitation arises from (1) the observational nature of this study, (2) the potential existence of unobserved confounders, and (3) the small number of reforms that met all study requirements, leading to a relatively small sample size. Moreover, we recognize the associated limitations inherent to TWFE regressions and the stacked event study designs in the context of staggered treatment adoption.⁶¹ We encourage further research to establish causality considering the potential for heterogeneous treatment effects across countries and over time.

⁵⁷ We followed Rainey’s “two one-sided tests”. See Carlisle Rainey, *Arguing for a negligible Effect*, 58 *MIDWEST POLITICAL SCIENCE ASSOCIATION* 4 (2014).

⁵⁸ Jacob Cohen, *Statistical Power Analysis for the Behavioral Sciences* (1988), *see also* Adam Chilton & Mila Versteeg, *The Effect of Constitutional Gender Equality Clauses*, 51 *The Journal of Legal Studies* 329 (2022).

⁵⁹ Adam Chilton & Mila Versteeg, *The Effect of Constitutional Gender Equality Clauses*, 51 *The Journal of Legal Studies* 329 (2022).

⁶⁰ See Figures 8 and 9 of the Appendix A.

⁶¹ *See, e.g.*, Andrew C. Baker, David F. Larecker, Charles C. Y. Wang, *How much should we trust staggered difference-in-differences estimates*, 144(2) *Journal of Financial Economics*, (2022). Kirill Borusyak, Xavier Jaravel & Jann Spiess, *Revisiting Event-Study Designs: Robust and Efficient Estimation*, 91(6) *The Review of Economic Studies*, 2024.

Table 1. TWFE OLS Regressions (10 years before and after)

	Judicial Self-Governance Reforms			Political Appointment Reforms		
	(1)	(2)	(3)	(1)	(2)	(3)
Treatment	0.093* (0.050)	0.100* (0.051)	0.019 (0.034)	0.072 (0.066)	0.078 (0.072)	0.044 (0.051)
Log GDP Per Capita		0.026 (0.019)	0.037*** (0.011)		0.049** (0.025)	0.040*** (0.011)
Log Population		0.001 (0.090)	-0.008 (0.067)		-0.006 (0.082)	-0.042 (0.066)
Political Regime			0.564*** (0.057)			0.558*** (0.056)
Observations	1319	1319	1319	1575	1575	1575
R2	0.925	0.926	0.954	0.926	0.929	0.954

* $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$

Note: This table reports the OLS regressions for Linzer and Staton's modified indicator of *de facto* judicial independence. They include fixed effects at country and year levels. This specification ensures that the analyses focus on within-country variations and controls for time-invariant characteristics that vary across countries and features that vary over time but are constant across countries. Standard errors, clustered by country, are reported in parentheses. We estimate the TWFE OLS regressions employing different sets of control variables. Model (1) tests the correlation between these reforms and the outcome variable without controlling for other factors. Model (2) controls for GDP per capita and population size – both variables in their logarithmic forms. Model (3) includes a variable to capture the influence of political contexts in addition to model (2) specification.

Table 2. Stacked Event Study

	Judicial Self-governance Reforms			Political Appointment Reforms		
	(1)	(2)	(3)	(1)	(2)	(3)
Control (Post)	0.001 (0.002)	0.001 (0.001)	0.006 (0.005)	0.000 (0.001)	0.014* (0.007)	0.014* (0.007)
Treatment (Post)	0.022 (0.037)	0.022 (0.035)	0.026 (0.035)	0.039 (0.056)	0.054 (0.050)	0.054 (0.050)
Log GDP Per Capita	0.042*** (0.011)	0.042*** (0.011)	0.042*** (0.011)	0.038** (0.006)	0.037*** (0.009)	0.037*** (0.009)
Log Population	-0.067 (0.090)	-0.067 (0.087)	-0.067 (0.087)	-0.031 (0.064)	-0.029 (0.063)	-0.029 (0.063)
Political Regime	0.536*** (0.074)	0.536*** (0.072)	0.536*** (0.072)	0.542*** (0.040)	0.543*** (0.048)	0.543*** (0.048)
Observations	6111	6111	6111	2625	2625	2625
R2	0.954	0.954	0.954	0.9561	0.961	0.961

* $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$

Note: This table presents the results of the stacked event study with a modified version of Linzer and Staton's de facto judicial independence. Model (1) includes fixed effects and standard errors clustered at three levels: country, year, and treatment. However, the small sample size of political appointment reforms leads to instability in the variance-covariance matrix and an unreliable standard error. Model (2) attempts to address this issue by maintaining fixed effects at the country, year, and treatment levels but clustering standard errors only at the country and year levels. But this approach still does not fully resolve the instability problem in the political reforms panel. Model (3) further simplifies the specification by including only country and year fixed effects while clustering at the country and year level. This adjustment stabilizes the estimates and maintains the results consistent with Model (2). We also observe consistency between models (2) and (3) for judicial self-governance reforms, indicating that removing event-level fixed effects did not significantly affect the estimates.

C. The Informal System: Defining Ingredients

Beyond the formal written rules, there is a subterranean layer of informal practices that also influences judicial appointments. The study of informal institutions and norms has a rich tradition across multiple disciplines. Political scientists often refer to “informal institutions” as “socially shared rules, usually unwritten that are created, communicated, and enforced outside officially sanctioned channels.”⁶² Law and Society scholars have long demonstrated how informal norms operate as governance mechanisms across various contexts. Robert Ellickson’s work, for instance, showed how close-knit communities develop and enforce their social norms that can be more efficient than formal legal rules when it comes to dispute resolution.⁶³ Similarly, Stewart Macaulay revealed how businesses frequently rely on informal norms rather than formal contracts to regulate their relationships.⁶⁴ In a study of how communities manage shared resources, Elinor Ostrom emphasizes the need for theories that explain how groups create their norms, establish oversight systems, and fairly distribute costs and benefits among members. She highlights that “many policy prescriptions are themselves no more than metaphors,” containing “oversimplified, idealized institutions.”⁶⁵ Policy prescriptions can produce unexpected outcomes when applied to different contexts, justifying the need for empirical research into how groups actually behave.⁶⁶ In the context of judicial appointments, informal norms also influence different aspects of the process and can directly impact outcomes.

Below, we build on the political science definition—using the terms “institution” and “norm” interchangeably—to lay out the foundational features of informal norms. We also refer to the German example of rotating political appointments as illustrative. We specifically consider the following features of informal norms in judicial selection: they are sociological, unwritten, legally unenforceable, persistent, and play multiple roles in the selection process.

Sociological. In the judicial appointment context, norms emerge from arrangements among politicians, executive officials, legislators, and other political players.⁶⁷ Political actors sometimes refer to these as “handshake deals” or “unspoken agreements.” Consider, again, the agreement among German political parties to ignore the constitutional method of appointment and, instead, rely on an informal arrangement that each political party gets to pick a justice.⁶⁸ This agreement comes solely from political leaders, not the law.

⁶² Helmke and Levitsky, *supra* note xx at 12.

⁶³ See Robert Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 *Stanford Law Review* 623 (1986).

⁶⁴ See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28(1) *American Sociological Review* (1963).

⁶⁵ Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (2015) at 22.

⁶⁶ *Id.* at 23-25.

⁶⁷ Cf. Helmke, Gretchen y Steven Levitsky (eds.). 2006. *Informal institutions and democracy: Lessons from Latin America*. Baltimore: Johns Hopkins University Press at 18-19

⁶⁸ Uwe Kischel, *Party, Pope, and Politics? The Election of German Constitutional Court Justices in Comparative Perspective*, 11 *INT. J. CONST. LAW* 962 (2013).

Notice, then, that one key goal of norms is to “structure the behavior of a group of people,” mostly judges, lawyers, and political actors.⁶⁹ That is why they are sociological—they emerge from groups and “provid[e] a prescribed guide for conduct or action and ‘a standard for others to evaluate’ a [politician, officer, or judge’s] behavior In this sense, they coordinate behavior by organizing the [political] system around expected patterns of conduct.”⁷⁰ Far from emerging from diffuse social norms, however, these norms result from what Robert Ellickson identifies as “purposive actions of discrete individuals.”⁷¹ The people “supplying” these norms are generally actors with some sort of “special endowments that provides them with unusually high tangible benefits from norm reform, superior technical knowledge of cost-benefit conditions, or superior social knowledge of group dynamics.”⁷² The literature also identifies these actors as “norms entrepreneurs.”⁷³ The German example illustrates this dynamic: politically connected leaders with deep institutional knowledge and clear incentives crafted the informal appointment-sharing arrangement.

Unwritten. While elites bargain in the shadow of the law, political arrangements are not written law. They are not in constitutions, statutes, or any other legally binding document. Take, again, the German agreement to rotate appointments among political parties. You cannot find it in the German Basic Law or the German Civil or Administrative Code. It exists only in the minds of politicians. With that said, sometimes norms are written in scholarly treatises or guides. But they remain “unwritten in the sense that, unlike law, they do not derive their power from the act of being written down. Even when they are recorded in guides or manuals, writing these norms down does not create them; it only memorializes their pre-existence.”⁷⁴

Legally unenforceable. Most importantly, norms are not legally enforceable. Formal procedures or norms are law in the sense that violating them subjects someone to judicial processes and sanctions via the formal legal system. Informal norms, by contrast, do not subject anyone to legal consequences. Instead, norms are enforced endogenously via reputational, social, or political consequences. Gretchen Helmke and Steven Levitsky, for instance, define informal institutions as “socially shared rules, usually unwritten, that are created, communicated, and enforced outside officially sanctioned channels.”⁷⁵ For them, “informal institutions must be enforced in some fashion”⁷⁶; there must be sanctions for non-compliance. Similarly, Eric A. Posner explains that the difference between behavioral regularities and a social norm lies in the existence of sanctions that emerge endogenously because it is within people’s

⁶⁹ Diego A. Zambrano, *The Unwritten Norms of Civil Procedure*, 118 NORTHWESTERN UNIVERSITY LAW REVIEW 853 (2024) at 867.

⁷⁰ *Id.*

⁷¹ Robert Ellickson, *The Market for Social Norms*, 3(1) AMERICAN LAW AND ECONOMICS REVIEW 1 (2001) at 2.

⁷² *Id.*

⁷³ See e.g., Eric A. Posner, *Law and Social Norms*, Second Printing (2002).

⁷⁴ *Id.* at 868; see also COLIN TURPIN & ADAM TOMKINS, *BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT AND MATERIALS* 185 (7th ed. 2012) (quoting Joseph Jaconelli, *Do Constitutional Conventions Bind?*, 64 CAMBRIDGE L.J. 149, 169 (2005)).

⁷⁵ Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 PERSP ON POL 725 (2004) at 5-6.

⁷⁶ *Id.* at 5-6.

rational self-interest to reinforce the norm.⁷⁷ Robert Ellickson contrasts instances where an individual violates and follows a norm. While breaking a norm can trigger punishments (e.g., negative gossip or ostracism), adhering to it may lead to informal rewards like increased respect among peers and better chances of favorable relations.⁷⁸

In the German system, if a political party violated the rotating appointment agreement, there would be no legal consequence. No politician could challenge such a violation in court. Nor could a judge hold a politician in contempt. Instead, there would be a breakdown in cooperation between political parties, leading to an unstable tit-for-tat of political retaliation. Voters could also take such a violation into account in the next elections. But no legal consequence would follow.⁷⁹

Persistent. Scholars sometimes refer to informal norms as “institutions” because they persist over time and become part of the legal system. The key to persistence is that legal actors recognize the informal norms and follow them over time, creating expected patterns of behavior. The system of punishment and rewards intrinsic to these norms helps to ensure their durability. Individuals who internalize an informal norm through socialization become their own regulators, experiencing guilt when violating these norms and satisfaction when adhering to them.⁸⁰ Yet norms can also persist without internalization when informal sanctions create sufficient incentives for compliance.⁸¹

Multiple Roles. As we will explore below, informal norms play multiple roles in judicial appointment processes. Sometimes, norms fill the gaps of underspecified formal systems. For instance, Šipulová and Kosař argue that several “institutions, practices, or constitutional conventions . . . fill the gaps in incomplete formal institutions, support them, or accommodate ineffective ones.”⁸² Invariably, system designers cannot plan for every possible contingency. That is when norms step in.

Other common roles include the coordination of political actors, substitution of weak or unenforceable formal systems, and, finally, the subversion of formal processes. Helmke and Levitsky explain that informal institutions can emerge due to “incompleteness of formal institutions,” the “lack of power to carry out formal institutional change”; “institutional weakness”; or “to pursue publicly (or internationally) unacceptable goals.”⁸³ Moreover, “[b]ecause coordination often takes place in a context in which power and resources are unevenly distributed, informal institutions are cast as the culmination of a bargaining process in which actors seek to maximize their benefits, given their beliefs about the strategies available.”⁸⁴

⁷⁷ Posner, *supra* note 67, at 7-8.

⁷⁸ Ellickson, *supra* note 65, at 3.

⁷⁹ There appear to be no German statutes or potential claims that govern the matter.

⁸⁰ Ellickson, *supra* note 65, at 3.

⁸¹ *Id.*

⁸² Katarína Šipulová & David Kosař, *Decay or Erosion? The Role of Informal Institutions in Challenges Faced by Democratic Judiciaries*, 24 GERMAN LAW JOURNAL 1577 (2023) at 1587.

⁸³ Helmke & Levitsky, *supra* note 75, at 19-20

⁸⁴ *Id.* at 21

Relatedly, note that some informal norms may qualify as “conventions,” a term with deep roots in constitutional theory.⁸⁵ In the commonwealth context, British scholars have long-recognized conventions that govern constitutional affairs. While legal rules “are enforceable by courts,” conventions constitute “extrajudicial unwritten norms” enforced by the threat of “political sanctions.”⁸⁶ More recent commentators have highlighted that constitutional conventions are not directly enforceable by courts, yet legal actors often treat them as binding constraints on how public power is exercised and can cite them as a rule.⁸⁷ The informal norms we discuss here are a broader category, encompassing any unwritten, socially shared practice that shapes judicial selection.⁸⁸ One difference between norms and conventions is that conventions carry a stronger sense of binding force, at least for those actors who see themselves as constitutionally obligated to follow them. By contrast, some “informal norms” we document—such as subtle patronage dynamics or “judicial guild” clientelism—are not always perceived as obligatory or tied to a constitutional principle of governance. They may simply be entrenched practices or patterns of behavior, lacking the internal sense of duty that typically characterizes conventions.⁸⁹ This means that some informal norms are conventions—and can be cited as a rule—but other norms are more subtle social expectations that cannot be cited as a rule (and are therefore not conventions). Conventions also specifically relate to the functioning of the constitution, while many informal norms we discuss here—like the role of judicial guilds—are not constitutional.

Bringing all of these features of norms together, Brinks argues that informal institutions can be identified via five questions:

1. Are behaviors consistent with the proposed informal institution observed?
2. Do people describe those behaviors in terms of a rule of conduct?
3. Is there evidence that relevant actors understand the rule, foresee consequences of breaking it and adjust their behavior accordingly?
4. Are deviations from the prescribed behaviors punishable and punished by other relevant social actors?

⁸⁵ Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913, 1914–15 (2020); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165 (2013); Colin Munro, *Laws and Conventions Distinguished*, 91 L. Q. REV. 218, 228 (1975).

⁸⁶ Vermeule, *supra* note 85 at 1182. For a discussion of judicial appointments in commonwealth countries, see J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law).

⁸⁷ Farrah Ahmed, Richard Albert, & Adam Perry, *Judging Constitutional Conventions*, 17(3) INT’L J. CONST. L. 787 (2018) (showing that some courts even enforce conventions).

⁸⁸ Some U.S. scholars have drawn on the British literature on conventions to study informal norms. See Samuel Issacharoff & Trevor Morrison, *supra* note 85.

⁸⁹ Ahmed, et al. *supra* note xx at xx.

5. Is the behavior in question observed and not punished by officials in charge of sanctioning it?⁹⁰

* * *

The upshot is that one cannot begin to understand judicial appointments without taking norms into account. As Helmke and Levitsky have previously argued, “informal rules shape how democratic institutions work. They reinforce, subvert, and sometimes even supersede formal rules, procedures, and organizations.”⁹¹ Helmke and Levitsky stress that “[w]hereas some informal rules compete with and subvert democratic institutions, others complement and even help sustain them.”⁹²

Yet, while scholars recognize the importance of informal norms or conventions in constitutional practice, there is not yet an adequate account of how informality bleeds into judicial appointments. This area is ripe for exploration because of the gap between best-practice formal rules and the reality of judicial appointments. Moreover, whether informal norms are predictably good or bad for a judiciary is an important subject we take up in Part V.A.

II. Norms of Judicial Appointments in Comparative Perspective: The Case of Colombia

Keeping the distinction between formal and informal systems in mind, this Part dives into our main case study, Colombia. Specifically, the Colombian system illustrates the relationship between formal and informal norms and how norms can support or subvert the formal design of judicial appointments. As we will explain, a bevy of informal norms has penetrated the formal process for appointing judges in Colombia, from the judicial career all the way to the Supreme Court.

A. The Formal System: High Courts and the Judicial Career

The 1991 Colombian constitution outlines appointment processes for several different courts, but we will focus on three here: (1) the Constitutional Court, (2) the co-optation mechanism for the other High Courts (Supreme Court, Council of State, and the Superior Council of the Judiciary) and (3) a judicial career for lower courts.

1. The Constitutional Court

Let’s begin with the well-known case of the Constitutional Court, one of the most independent high courts in the world.⁹³ The Constitutional Court is composed of nine justices serving non-renewable eight-year tenures, fostering a sense that these

⁹⁰ Pozas-Loyo & Ríos-Figueroa, *supra* note 10 at 649 (quoting Brinks, 2006).

⁹¹ Helmke & Levitsky, *supra* note 75, at 2.

⁹² *Id.* at 3.

⁹³ See e.g., Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Case of Mexico and Columbia*, 16 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 173 (2009).

justices are “to some extent, beyond the regular justices of the other Courts.”⁹⁴ Specifically, the Colombian Constitution provides that other High Courts—the Supreme Court and Council of State—and the President of the Republic nominate magistrates of the Constitutional Court in groups of three (*terna*), of which one is confirmed by the Senate to fill any vacancy.⁹⁵ For any single vacancy, only one of the High Courts or the President will nominate a *terna*. In the aggregate, however, the Constitutional Court is composed of three justices selected by the President, three by the Supreme Court, and three by the Council of State. Once a nominee is placed on the *terna*, the Senate holds public hearings where nominated candidates present themselves along with their vision of the Constitutional Court. This process is widely disseminated by the media. This system thus employs an appointment model that relies on several institutions to jointly select a relatively small number of justices. This process has helped ensure the court’s legitimacy and diverse representation.⁹⁶

This system has successfully produced a high degree of judicial independence. As recently discussed, “[w]ith its newly designed structural independence and constitutional vehicles, the Constitutional Court quickly developed a strong reputation for innovative recognition of human rights . . . [T]he Court has decriminalized abortion and euthanasia, limited the emergency powers of presidents, and protected the civil rights of minorities. Repeatedly, the Court has declared presidential actions unconstitutional.”⁹⁷ Despite its successes, some scholars argue that the current model places too much emphasis on “judicial adjudication and political discretionary powers”⁹⁸ and others have called for greater transparency in the nomination process.⁹⁹

2. The Other High Courts

The Constitution creates three other high courts: the Supreme Court (the ultimate appellate court in ordinary matters), the Council of State (the ultimate appellate court in administrative matters), and the Superior Council of the Judiciary (*Consejo Superior de la Judicatura*) (tasked with administering the entire judiciary, including the judicial career and merit examinations).¹⁰⁰ The Supreme Court and Council of State both employ a co-optation mechanism in which the magistrates themselves select their successors. However, as described below, the system also gives an important role to the Superior Council in the pre-selection of candidates. Keep in mind that, unlike the

⁹⁴ Diego Andres Gonzalez, *The Colombia Constitutional Court: Building Legitimacy in its First Period*, UNIVERSIDAD EXTERNADO 4, available at <https://www.law.uchicago.edu/files/Session%20VI_Gonzalez.pdf>

⁹⁵ 1991 Col. CONST article 239 and COL. ADMINISTRATION OF JUSTICE STATUTE (Law 270), (1996) at art. 44.

⁹⁶ Luz Estella Nagle, *Evolution of the Colombian Judiciary and the Constitutional Court*, 6 IND. INT’L & COMP. L. REV. 59, 81 (1995); see also Gonzalez *supra* note 94.

⁹⁷ Diego A. Zambrano et al., *How Latin America’s Judges Are Defending Democracy*, 35 JOURNAL OF DEMOCRACY 118 (2024) at 121.

⁹⁸ Zambrano, *supra* note 97 at 33.

⁹⁹ *Id.*

¹⁰⁰ Article 254. COL. CONST., (1991), https://www.constituteproject.org/constitution/Colombia_2015 (last visited Jul 28, 2024).

Constitutional Court process, the President of the Republic has no role in the appointment of other High Court justices. Specifically, the process works as follows:¹⁰¹

- When a vacancy in the 23-person Supreme Court or 31-person Council of State arises, the Superior Council kicks off the process with a public announcement calling for applications.
- The Superior Council then creates a shortlist of 15-30 candidates and publicizes that list. The Council then begins a period of public comments in which anyone can file a comment for or against a candidate.
- The Superior Council then interviews all of the candidates before finalizing its list and transmitting it to the relevant High Court.
- The Supreme Court/Council of State considers the Council's list of 15-30 candidates and deliberates in private.
- The Supreme Court/Council of State selects and votes on a candidate in secret. A candidate is appointed only if he/she receives a two-thirds supermajority vote.

In short, Supreme Court and Council of State magistrates select their successors from a list created by the Superior Council. Similarly, the six magistrates of the Superior Council are themselves selected by the Council of State, the Supreme Court, and the Constitutional Court, (three, two, and one, respectively).¹⁰²

3. The Lower Courts and the Judicial Career

Most Latin American countries have adopted judicial careers as “a sort of judicial civil service system . . . with guaranteed (sometimes permanent) tenure in office thereby protecting the seated bench from the vicissitudes of political change.”¹⁰³ More recently, Latin American countries have incorporated merit-based selection and promotion processes into their judicial careers. These reforms seek to insulate judges from external pressures because, as scholars have found, a “merit-based appointment process . . . for judges can bolster judicial independence.”¹⁰⁴ More specifically, merit-based appointments can diminish the probability of political influence, nepotism, and *quid pro quo* dynamics between judges and the politicians who appoint them.

Following this model, Colombia employs a career system for lower court judges that it calls a *curso-concurso*—combining merit-based examinations and required classes from a judicial school (*Escuela Judicial Rodrigo Lara Bonilla*).¹⁰⁵ Colombian law

¹⁰¹ Magistrados de la Corte Suprema de Justicia, ELECCIÓN TRANSPARENTE, <https://cei.org.co/eleccion-transparente/corte-suprema-de-justicia/proceso-de-eleccion> (last visited Jul 28, 2024).

¹⁰² *Id.*

¹⁰³ Linn Hamnergren, “The Judicial Career in Latin America: An Overview of Theory and Experience”, unpublished paper, https://www.academia.edu/78550792/The_Judicial_Career_in_Latin_America_An_Overview_of_Theory_and_Experience(last visited Jul 30, 2024) at 2.

¹⁰⁴ Bill Chávez, *supra* note 4 at 33.

¹⁰⁵ COL. ADMINISTRATION OF JUSTICE STATUTE (Law 270), (1996) at Article 176.

empowers the Superior Council to administer the entire process.¹⁰⁶ Implemented in 1970, Colombia's merit-based selection process for lower courts has been touted as an important safeguard against judicial incompetence and corruption.

The process consists of two phases: selection and classification. In the first phase, candidates take a test—developed by top Colombian universities—that measures their aptitude and knowledge. Along with testing candidates' knowledge of the law, the current version of the exam (“*Convocatoria 27*”) includes a “psychological” or “psycho-technical” portion that evaluates whether the candidate possesses the “personal profile” necessary to serve as a judge. This component of the exam does not eliminate candidates but is instead used to classify candidates later in the process. In the second phase of classification, candidates are ranked based on their exam scores, experience, and education on a list known as the Register of Eligibles (“*Registro de Elegibles*”). Upon assignment to their posts, candidates secure permanent positions as judges, entering the judicial career track. From this point onward, Colombian statutes only vaguely provide for promotions.¹⁰⁷

Reviewing the Colombian judicial career, the UN Special Rapporteur for Judicial Independence found that “[t]he entrance and promotion exams to the judicial career are generally objective. They usually develop without external interference through an eliminatory process. Once appointed, [they] have career stability, which is extremely important to guarantee their independence and impartiality.”¹⁰⁸

Beyond the formal process lies a provisional appointment process. To staff lower courts while the *curso-concurso* takes place, the law provides for the appointment of provisional judges. Specifically, a Colombian statute allows provisional appointments to fill both permanent and temporary positions. For permanent positions, provisional appointments may occur until the formal legal process takes place, not to exceed six months. For temporary posts, a provisional appointment can also happen when there is no interim assignment or if it lasts longer than one month.¹⁰⁹

B. The Informal System

Beyond the rules and statutes lies a layer of informal understandings about judicial power and selections in Colombia. Here, drawing on our extensive interviews, we lay out a few common themes and areas of agreement among judges, lawyers, academics, and government officials. All of these relate to the selection of judges.

¹⁰⁶ *Id.* placing Colombia's Judicial Academy under the Administrative Chamber of the Superior Council of the Judiciary.

¹⁰⁷ One statute specifically allows promotions “as dictated by the service” or “the requirements of the service.” COL. ADMINISTRATION OF JUSTICE STATUTE (Law 270), (1996), Article 134.4.

¹⁰⁸ GABRIELA CARINA KNAUL DE ALBUQUERQUE E SILVA, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, (2010), [https://documents.un.org/doc/undoc/gen/g10/129/59/pdf/g1012959.pdf?token=UUOxgpx\]JM7QQbTWAO&fe=true](https://documents.un.org/doc/undoc/gen/g10/129/59/pdf/g1012959.pdf?token=UUOxgpx]JM7QQbTWAO&fe=true) (last visited Jul 28, 2024).

¹⁰⁹ COL. ADMINISTRATION OF JUSTICE STATUTE (Law 270), (1996) provides the following in Article 132.

1. Pre-Selection and Vetting at the High Courts

One important gap in the formal appointment process is that it does not fully specify how to generate the initial list of judicial candidates for High Courts. For the Constitutional Court, each of the other High Courts and the President develop their own private system. For Supreme Court or Council of State vacancies, the Superior Council is in charge of the process. As discussed above, the Superior Council generates a list of 15-30 candidates and calls for public comments.¹¹⁰ Yet this process is not only non-public—it is inevitably opaque.

The Superior Council's pre-selection power creates an opening for many informal practices. For example, one interviewee told us about a *quid pro quo* dynamic between the Superior Council and the Council of State.¹¹¹ Because both institutions play a role in the selection of magistrates to the other court—the Council of State appoints three magistrates out of six in the Superior Council—this dynamic generates political arrangements and handshake deals. As a result, some legal commentators believe that to get on the Superior Council's pre-selection list, you need to have supporters in the Council of State lobbying for you. Critics therefore believe that the Superior Council should not participate in the selection of magistrates at all. Elaborating on this, one interviewee stated that, “due to the structure, [the Judicial Council] is politicized” since “the magistrates who are appointed to the Superior Council are not nominated for their legal qualities, but for their political connections.”¹¹² It is simply not clear how the Superior Council generates these initial lists, but legal observers suspect that political capital and judicial networks play a role.

To make matters worse, the Superior Council is also in charge of disciplining judges for violations of judicial ethics or illegal acts. Some note that the pre-selection power undermines the Council's legitimacy as a disciplinary authority.¹¹³ Many judges argued that the Superior Council should not play a role in the disciplinary process. Moreover, other interviewees criticized the administration of the Superior Council and advocated for a more “serious judicial management body.”¹¹⁴ The UN Special Rapporteur similarly found that the Superior Council's “Disciplinary Chamber is accused of being open to pressure when it comes to presenting candidates to join the High Courts and of lack of transparency in the selection of candidates.”¹¹⁵

On the whole, while the judicial council is supposed to prepare a meritocratic list of candidates for other high courts, the current process is opaque, may not sufficiently prioritize competence, and can be overly political.

¹¹⁰ Magistrados de la Corte Suprema de Justicia, *supra* note 84,

¹¹¹ Interview with Scholar, Bogotá, 2023. (“[N]obody knows [about the] bad practices in choosing The Superior Council [] is the one that makes the shortlist [for the Council of State candidates], but it turns out that . . . the shortlists that the Superior Council of the Judiciary puts forward are decided by the Council of State beforehand . . .”).

¹¹² Interview with Lawyer, Bogotá, 2023.

¹¹³ Interview with Lawyer, Bogotá, 2023.

¹¹⁴ GLOBAL TRENDS IN JUDICIAL REFORM: COLOMBIA FIELD STUDY TRIP REPORT, (2023) (unpublished report available with authors at 21).

¹¹⁵ GABRIELA CARINA KNAUL DE ALBUQUERQUE E SILVA, *supra* note 108.

2. Strong Culture of Judicial Independence from the President

Informally, Colombian judges, lawyers, and academics agree that the judiciary has developed a strong culture of judicial independence. This is an impressive achievement given that in 1999, “judicial independence . . . exist[ed] nowhere in Latin America.”¹¹⁶ In fact, most observers agree that judicial independence from the executive branch is a core strength of the Colombian judiciary. For example, some attorneys claim that the judiciary is the “most independent public power in Colombia . . . much more than . . . the Attorney General’s Office, the Comptroller’s Office, [and] the Prosecutor’s Office.” Some of this judicial independence traces back to the 1991 Constitution and the Constitutional Court. But it is difficult to attribute all of it to the formal rules of the 1991 constitution given that, unlike with the other High Courts, the 1991 Constitution empowered the President of the Republic to appoint a third of the justices to the Constitutional Court. In other words, the 1991 constitution increased the executive’s influence on the judiciary. Yet judges agree that judges throughout the judiciary developed a strong sense of independence from the executive.

Colombian judges and political elites have developed two related norms of judicial independence. First, judges have developed a strong identity as judges that is independent from other public sector positions. Some of this is a guild-like mentality among judges that derives from their common interests and backgrounds, likely fostered in yearly judicial conferences, common experiences throughout the judicial career, similar law school backgrounds, and common concerns within the judiciary (regarding salaries, etc.). Importantly, this identity leads to a strong rejection of any interference in the judiciary by the President of the Republic. For example, judges have clashed with the executive whenever it attempted to intrude into judicial selections or even sought to expand administrative bodies that could exercise limited judicial power.¹¹⁷ Colombian magistrates and lawyers repeatedly emphasized that judges close ranks and protect each other from outsider political pressure.¹¹⁸

Second, there is a norm against political party affiliations among High Court justices. Even for justices of the Constitutional Court selected by the President, elite legal actors claim that “justices go out of their way to be ungrateful to the president that appointed them.”¹¹⁹ This seems to demonstrate a strong informal norm of judicial independence given that judges expect each other to perform or display independence in ostentatious ways. Relatedly, despite the political nature of campaigning in the Senate (to obtain an appointment), the political give-and-take is not supposed to be partisan. For example, one magistrate acknowledged that they had to lobby politicians to be appointed and that it “pays off to have friends in the Senate.”¹²⁰ But they asserted that they “do not receive pressure[] from [the senators] who elected them.”¹²¹ Supporting this claim, another magistrate pointed to the Courts’ track record of maintaining judicial independence in the face of extreme political pressure. According

¹¹⁶ David G Becker, *Latin America: Beyond “Democratic Consolidation,”* 10 JOD 138 (1999).

¹¹⁷ Interview with Justice, Higher Court, Bogotá, 2023.

¹¹⁸ Interview with Justice, Higher Court, Bogotá, 2023.

¹¹⁹ Interview with Justice, Constitutional Court, Bogotá, 2024.

¹²⁰ Interview with Magistrate, Constitutional Court, Bogotá, 2023.

¹²¹ *Id.*

to this magistrate, the Courts' decision to decriminalize abortion illustrates this point, given the significant pressure from the President.¹²²

All of this suggests that there is a conception of judicial independence that is explicitly non-partisan and even apolitical.

3. Political (But Not Partisan) Influence in Selections to the Constitutional Court

While observers agree that judicial independence from the President has become a foundational value, many disagree over the role of political pressures in general. Some lower court judges claim that higher court magistrates take into account the political consequences of their decisions. Many see this as highly inappropriate and an unfortunate consequence of the 1991 constitution. Others disagree and see it as an appropriate part of the role to do so. Particularly, some claim the appointment process of Constitutional Court magistrates is politicized because they are ultimately selected by the Senate, which means that candidates are those “most capable of lobbying.”¹²³ Some justices consider this process as “campaigning” rather than lobbying.

As discussed above, however, politicization does not appear to be partisan—it is not a matter of determining a candidate's judicial ideology. Rather, legislators want justices to take into account the give-and-take of politics, legislative preferences, and similar considerations. Still, the contrast between co-optation at the High Courts and the judicial career generates accusations of politicization and lack of competence. Some lawyers claim that “there is more independence and autonomy in the lower courts than in the higher courts,” and that in the higher courts, the lack of “objective conditions to make an adequate selection . . . has resulted in [judicial corruption].”¹²⁴

Despite these claims, the background and credentials of most Constitutional Court magistrates demonstrate a high degree of preparation and apparent competence. One [lawyer/judge] argued that a public competition would be “superfluous” for Constitutional Court candidates because they are “accredited” by their “life record.”¹²⁵ In that vein, a circuit judge opined that the judiciary needs “examination[s] for all positions in the judicial branch, except for the Constitutional Court” which he said should be “by congressional majorities [] similar to the United States.”¹²⁶ That is because the selection of Constitutional Court magistrates is publicized since “it is more important for the whole of society,” and that, as a result, politicians are “a little bit careful in appointing people who have the competencies.”¹²⁷

¹²² Interview with Magistrate, Constitutional Court, Bogotá, 2023.

¹²³ Interview with Judge, Circuit Court, Bogotá, 2023.

¹²⁴ Interview with Judge, Circuit Court, Bogotá, 2023.

¹²⁵ Interview with Magistrate, Superior Judicial Council, Bogotá, 2023.

¹²⁶ Interview with Judge, Circuit Court, Bogotá, 2023.

¹²⁷ *Id.*

4. The Role of Civil Society

Civil society organizations have found different ways to influence the appointment process for the High Courts, with varying degrees of success. As discussed above, the Superior Council explicitly welcomes public comments during its pre-selection process. According to some judges and scholars, the Superior Council takes into account serious complaints against potential candidates—including accusations of sexual harassment or serious malpractice. Some organizations within Colombia have tried to participate systematically in this process, with only partial success. For example, “[i]n 2009 a group of Colombian organizations created Elección Visible . . . as a citizen oversight coalition to monitor the process of selecting the new justices. Their objective was to demand from the nominators and electors that all the candidates included in their slates would be qualified and independent; that political agreements would play no role in their selection; and that there should be no ‘filler’ candidates but only a list of persons who in the nominating body’s view were the best possible candidates to fill their positions. The coalition successfully persuaded the Supreme Court to adopt the transparency measures.”¹²⁸ But that coalition broke up after 2010 and there hasn’t been a similar effort to systematically influence selections. One interviewee mentioned that the coalition broke up because of disagreements over judicial candidates. Apparently, many organizations favored candidates that had some affiliation with the organization.¹²⁹

5. The Role of Judicial Networking

One major area of agreement by nearly all lawyers, judges, and scholars is that judicial networks and personal relationships within the judiciary influence the appointment of judges. Some lawyers and judges claim that the Supreme Court and Council of State give preference to personal acquaintances within the judiciary. One judge who was a candidate for a high court appointment argued that he was passed over in favor of someone less qualified who personally knew a Council of State magistrate, enabling a “clientelist practice.”¹³⁰ As a solution, one scholar suggested that an open merit competition should be used to fill all vacancies in the higher courts. Yet, some judges point out that passing a knowledge test does not prevent the selection of corrupt candidates. And it isn’t at all clear if the current process feeds corruption—many systems around the world depend on appellate judges evaluating the performance of lower court judges.

Still, many judges, academics, and lawyers agree that there are judicial clientelist networks, for good or ill. A few interviewees noted that municipal judges are evaluated by the circuit judges sitting above, and “promotions are dependent on [their] ability to establish relationships with them.”¹³¹ Reflecting this concern, one interviewee noted that a “lower judge does not want to contradict his superior, because the superior is

¹²⁸ J van Zyl Smit, *Judicial Appointments in Latin America: The Implications of Tenure and Appointment Processes*, Bingham Centre for the Rule of Law, 2016., available at [\[permalink\]](#) at 24.

¹²⁹ Interview with NGO representative, Bogotá, 2023.

¹³⁰ Interview with Scholar, Bogotá, 2023.

¹³¹ Interview with Lawyer, Bogotá, 2023.

the one who is going to evaluate him.”¹³² This interviewee added that, as a result, judges may prioritize “keeping their position” over the “quality of their ruling.”¹³³

6. The Judicial Career, Merit Exams, and the Pipeline of Competent Candidates

While the judicial career is well-designed, it suffers from an important problem: the best law students are not interested in joining the lower courts. This problem aligns with the literature, which finds that in developing countries, “[g]raduates of elite institutions typically gravitate towards private practice or academia, leaving judicial positions mostly to those for whom a judicial career is the best available option.”¹³⁴

It appears that students from top Colombian universities prefer to join law firms rather than the lower courts. Particularly, one lawyer said that “students from universities that are ranked in the top five or top ten do not want to enter the judicial service.”¹³⁵ Another lawyer explained that students “don’t think the judiciary has the prestige or the reputation that should be associated with [their] own name.”¹³⁶ Instead, these top students would rather become magistrates or law firm attorneys than “municipal judges.”¹³⁷ Along these same lines, a magistrate explained that the judicial exam “is not a competition among the best students,” but rather a competition “among those who present themselves.”¹³⁸

One exception to the lack of prestige in the judiciary is the position of clerking for the Constitutional Court. Almost all observers agree that high-achieving students do want to clerk at the Constitutional Court. And it does appear that clerks at that level come from the best law schools in Colombia. Meanwhile, the lower courts are populated by students from less prestigious schools.¹³⁹ Even more, many of the current clerks of the Constitutional Court are themselves interested in becoming magistrates of the Court. They see clerking for the Court as a stepping-stone to serving on it.

Despite all of this, interviewees generally agreed that both judges and magistrates are competent except for some “isolated cases [of] bad apples.”¹⁴⁰

7. Subversion of the Judicial Career and Provisionality

While the judicial career is supposed to be a meritocratic contest centered around formal examinations, the system has practically collapsed—the examination process has stalled for years under legal challenges by exam-takers, forcing the system

¹³² Interview with Scholar, Bogotá, 2023.

¹³³ *Id.*

¹³⁴ Mohan Gopal, *Development and Implementation of Reform Initiatives to Ensure Effective Judiciaries, in Asia Pacific Judicial Reform Forum, Searching for Success in Judicial Reform* 44, 62 (Oxford Univ. Press 2009).

¹³⁵ Interview with Lawyer, Bogotá, 2023.

¹³⁶ Interview with Lawyer, Bogotá, 2023.

¹³⁷ Interview with Scholar, Bogotá, 2023.

¹³⁸ Interview with Magistrate, Constitutional Court, Bogotá, 2023.

¹³⁹ Interview with Magistrate, Special Jurisdiction for Peace, Bogotá, 2023.

¹⁴⁰ Interview with Magistrate, Constitutional Court, Bogotá, 2023.

to rely on provisional appointments. Here is where informality comes in: some interviewees told us that current judges benefit from the breakdown of the examinations because when the process stalls, the system empowers existing judges to name provisional judges. And so, it appears that current judges are comfortable with a stalled process that lets them retain provisional appointment power, turning over the entire system into informal judicial networks.

In theory, the merit-based judicial career system in Colombia promotes judicial competence and independence. In particular, the meritocratic nature of the process, with its emphasis on aptitude instead of professional connections, approaches the best practices in the world. Moreover, the judicial career is inclusive because opportunities are determined mostly by the exam.¹⁴¹

In practice, however, the examination process has stalled due to continuous litigation by candidates. Interviewees noted that “too many people tak[e] the exam,” and, unsatisfied with its content or their results, turn to legal challenges. This leads to a significant amount of litigation that delays the selection process over several years. The ease of filing a legal claim means that applicants challenge nearly every aspect of the exam: particular questions, particular answers, and the grading process. While these challenges are pending in court, the entire system is put on pause. Currently, the process has stalled for six years, with the last successful competition taking place in 2018.¹⁴² These delays are not uncommon. As explained by one NGO representative, “since 1998 [], no competition has taken less than five years to become final.”¹⁴³ This is surprising because the exam is supposed to take place every two years.

While examinations are paused, the system turns to provisional appointments. As discussed above, Colombian law provides for provisional appointments under certain circumstances. But there are two sobering facts about the current state of the provisional system. First, the sheer number of provisional judges is unexpectedly large—at least one-third of all Colombian lower court judges are provisional appointees, serving either for a few months or many years.¹⁴⁴ The second major problem is that there is no formal appointment process for provisionals—it is mostly informal and dominated by the influence of judicial networks. The relevant statute provides only that “[i]n the event a permanent post becomes vacant, a provisional appointment shall be made until such time as the appointment can be made according to the legally established procedure.”¹⁴⁵ By most accounts, informal judicial relationships and patronage networks govern this process. One judge noted that judges who are appointed on a “provisional basis are our friends” and are “appointed by hand.”¹⁴⁶ One magistrate explained that “[t]here are nominators who use [provisionality] to do favors . . . but there are others who are very responsible and bring in very good people.”¹⁴⁷ Others, however, defended the competence of

¹⁴¹ Interview with Scholar, Bogotá, 2023.

¹⁴² Interview with Lawyer, Bogotá, 2023.

¹⁴³ Interview with NGO Representative, Bogotá, 2023.

¹⁴⁴ Judicial Independence in Latin America, supra note **Error! Bookmark not defined.**

¹⁴⁵ COL. ADMINISTRATION OF JUSTICE STATUTE (Law 270 of 1996) provides the following in art. 132.

¹⁴⁶ Interview with Judge, Circuit Court, Bogotá, 2023.

¹⁴⁷ Interview with Magistrate, Constitutional Court, Bogotá, 2023.

provisional judges. It is possible, but unlikely, that the informal system of appointments—despite being the opposite of a formal test—actually approximates a formal meritocratic selection fairly well.

Finally, many interviewees expressed concerns about the effect of this provisionality on judicial independence and competence. This is especially so because serving as a provisional can count as a plus in the formal appointment process.¹⁴⁸ One judge explained that although they are confident in the autonomy of career judges, they “can’t say the same for those who are on provisional duty.”¹⁴⁹ Another judge expressed concern about the effect on judicial competence: “I believe that this may be an important factor as to why judicial decisions are not being made as they should be or as they would be . . . [by] a career judge.”¹⁵⁰ Interviewees noted that provisional judges are especially prevalent in rural areas since most qualified candidates do not want to work in remote locations—“it’s too far or it’s too violent or it’s too poor.”¹⁵¹

* * *

Stepping back and comparing the formal and informal systems shows that informality seeps into judicial appointments in several different ways. Some of it is through underspecified pre-selection processes or the role of judicial networks. Some of it is also a consequence of the breakdown of formal appointments due to external circumstances. Below is a table summarizing the contrast between the formal and informal systems in Colombia:

Selection	Formal	Informal
Constitutional Court	Selection of a <i>terna</i> by other High Courts or the President of the Republic + Vote by the Senate.	Candidates are expected to campaign and lobby in front of the Senate; Candidates may offer clerkship positions to politically connected lawyers; Political considerations are relevant.
Other High Courts	Superior Council pre-selects a shortlist of candidates and solicits public comments + Internal secret vote in the Supreme Court/Council of State.	<i>Quid pro quo</i> political deals in the pre-selection process ; Superior Council is perceived as political (disciplinary chamber succumbs to political pressures); civil society and NGOs sometimes provide public comments.
Judicial Career	<i>Curso-Concurso</i> : merit-based examinations and required classes from judicial school + Selection by Superior Council.	System is stalled due to legal challenges, devolving into provisional appointments; judicial networks and informality control provisional appointments.

¹⁴⁸ Interview with Judge, Circuit Court, Bogotá, 2023.

¹⁴⁹ Interview with Judge, Municipal Court, Bogotá, 2023.

¹⁵⁰ Interview with Judge, Circuit Court, Bogotá, 2023.

¹⁵¹ Interview with NGO Representative, Bogotá, 2023.

Judicial Culture	Constitution calls for judicial independence but provides no mechanism to promote it.	Robust culture of judicial independence; guild-like mentality and defense of the judiciary from the President; norm against party affiliations in the Constitutional Court; norm that political considerations should not be explicitly partisan; top law students do not join lower courts due to lack of prestige.
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III. Shadow Case Studies: Mexico, the United States, and Eastern Europe

With the Colombian case in mind, in this Part we explore other countries that have seen similar developments in the context of informal norms. These shadow case studies complement and contrast with our analysis of informal norms in Colombia. As discussed above, we selected these countries because they present contrasting appointment systems that nonetheless seem influenced by the same forces as in Colombia: judicial networks, the pre-selection of candidates, and political pressures.

We attempted to avoid cherry-picking by selecting (a) the largest Latin American country (Mexico) with an established democracy that is culturally comparable to Colombia but with a different judicial appointment process; (b) countries that are culturally distant from Colombia but that have experienced recent and intense judicial reforms, mostly to their formal systems (Eastern Europe); and (c) a developed country with a mature democracy that is heavily formal (the United States). This allowed us to control for culture, judicial structure, mature vs. recent democracy, and recent efforts to reform the judiciary vs. an established judicial branch.

A. The Mexican Supreme Court: Powerful Judicial Networks

The story of the Mexican Supreme Court mirrors the story of Mexican democracy—for a century it was subject to the corruption of a single ruling party until a rebirth at the end of the twentieth century. Yet its operations were always shaped not by the formal rules of Mexican democracy. Rather, at the core of judicial appointments there was an informal arrangement whereby justices of the Supreme Court hand-picked all other members of the judiciary within a clientelist patronage system. Mexico, then, like Colombia, shows the significant role of judicial networks.¹⁵²

Stepping back, between 1917 and 1994, the formal appointment process in Mexico was a classic mix of executive and legislative selection and confirmation for Supreme Court justices. And that system continues today for the highest court in the country, the *Suprema Corte de Justicia de la Nación* (the “Supreme Court”), the final arbiter

¹⁵² As noted in the introduction, the Mexican Congress recently adopted a significant reform to the judiciary, turning the whole system over to elections. Discussing that change is beyond the scope of this Article.

on all ordinary or constitutional matters.¹⁵³ The most recent constitution provides for Presidential nomination of a list of three candidates and then approval by the Senate by a two-thirds vote. The Senate's role, however, has always been *pro forma*. By all accounts, the court has historically lacked independence from the executive. For much of the twentieth century, Mexico had a hyper-presidential system known as *Presidencialismo* (1917-1994)—vesting complete power in the Executive and the ruling political party, the *Partido Revolucionario Institucional*. With regard to the lower courts, the Constitution empowered sitting justices of the Supreme Court to appoint federal district and circuit court judges by a joint vote.

Yet every political actor knew that behind the formal system was an informal arrangement between judges, a so-called “Gentleman’s Pact.”¹⁵⁴ Between 1917 and 1994, the formal system was entirely supplanted by a judicial clientelist network governed by Supreme Court justices. In practice, the justices were the leaders of *corrales* (farmyards), a patronage network involving the justices and their proteges within the judiciary. Those justices, in consultation with their *corrales*, decided on judicial appointments throughout the judiciary.¹⁵⁵ Rather than voting as a joint body (as contemplated in the Constitution), justices agreed to rotate among themselves, giving a single Justice unilateral power to appoint any judge to the relevant vacancy. Justices maintained an informal list that decided the order in which each of them would have control over filling the next lower court vacancy. When it was their turn, each justice had sole discretion to choose the person to be appointed, and once a justice proposed a candidate, it was informally understood that the other justices would automatically approve the appointment without review. Each justice would have an opportunity to make an appointment before returning to the top of the list.

Julio Ríos-Figueroa further describes the system as follows:

[M]ost judgeships were staffed from bureaucratic insiders personally connected to Supreme Court Justices. Dense patronage networks developed, and the Supreme Court itself became increasingly dominated by judges with long lineages within the corporation. These judicial elites enjoyed great margins of discretion to manage judicial careers and resources in exchange for discipline vis-à-vis the executive branch in Mexico’s dominant-party authoritarian regime.¹⁵⁶

Perhaps the most interesting aspect of this informal system is that justices built a clientelist network that relied mostly on former clerks. Indeed, the justices implicitly agreed with each other to appoint candidates who had previously worked for them as clerks. Once appointed, the new lower court judges would continue to be mentees of their appointing justice—a kind of apprenticeship model—and receive ongoing supervision, evaluation, and potential promotion. As Garcia Miron concludes, “quickly

¹⁵³ Manuel Martínez Pérez, *Legal Systems in Mexico: Overview*, Westlaw (Dec. 1, 2022), <https://us.practicallaw.thomsonreuters.com/w-017-6016>.

¹⁵⁴ Pozas-Loyo & Ríos-Figueroa, *supra* note 25.

¹⁵⁵ *Id.* at 650.

¹⁵⁶ Julio Ríos-Figueroa, *The Double-Edged Sword of Bureaucratic Autonomy and Judicial Corporatism* (2024), unpublished paper prepared for the Roundtable on the Rule of Law, Stanford Law School.

learning ‘how things are done’ and being loyal, both to your hierarchical superior and to the institution, were characteristics that the system valued and rewarded. Therefore, it is not surprising that this apprenticeship system was very effective at creating a strong and closed institutional culture inside the federal judiciary.”¹⁵⁷ While many justices defended the system during this period—as one that promoted greater accountability and higher-quality selections—several studies found that it fostered significant inefficiency and corruption.¹⁵⁸

This system came to an end in 1994 and 1995, when President Ernesto Zedillo pushed a constitutional amendment to change the composition, structure, and function of the Supreme Court. The changes reduced the number of Supreme Court justices from twenty-six to eleven, enacted more stringent qualifications for nominations, limited their tenure to fifteen years, and created a new judicial administrative body—the *Consejo de la Judicatura Federal* (Council of the Federal Judiciary). President Zedillo effectively remade the Supreme Court into a powerful and independent body capable of ruling against the interests of the other political branches.

Yet, scholars argue that the informal clientelist networks have remained influential. While the 1994 amendments vested the judicial council with appointment power, the underlying culture of relationships and patronage remained influential. For example, Professor Ríos-Figueroa has argued that the Supreme Court is profoundly divided between “insiders” (justices who joined the court from the judicial career, as it was molded by the “gentleman’s pact”) and “outsiders” (justices without significant prior experience within the judiciary). This division doesn’t map neatly onto party lines, but it’s the primary fault line between justices on many important matters. This includes the process of appointing the President of the Supreme Court, who is chosen by secret ballot from among the current justices in an election that is always divided between “insiders” and “outsiders.” The narrow informal norm of presidential selection itself has significant repercussions since “justices who want to become President of the Supreme Court must carefully manage the relationships with their colleagues and start building coalitions from the moment they arrive,” including potentially modifying their votes in sensitive cases.¹⁵⁹

B. The U.S. Supreme Court: The White House Pre-Selection Process, Senate Judiciary Vetting, and the ABA

The United States federal judiciary is puzzling—by all accounts, it retains a high degree of competence, prestige, and independence. But you wouldn’t expect it from its appointment process: it follows the antiquated presidential appointment plus senatorial confirmation mix.¹⁶⁰ This same exact system has failed to produce judicial independence or high competence around the world. What seems most relevant about the United States, then, is the set of norms underlying judicial selections and

¹⁵⁷ Miron, *supra* note **Error! Bookmark not defined.**, at 109.

¹⁵⁸ See José Ramón Cossío Díaz, *Jurisdicción federal y carrera judicial en México* (1996) and Andrea Pozas-Loyo & Julio Ríos-Figueroa, *supra* note 25.

¹⁵⁹ *Id.*, at 2, fn 4.

¹⁶⁰ U.S. CONST, art. 3.

independence. American judicial appointments thus present a good case study of norms in judicial appointments.

Before diving into informality, let's first acknowledge that the U.S. system is highly formal. By that, we mean that political and legal actors closely follow the written legal rules and maintain the basic framework as prescribed in the Constitution. Congress has rarely strayed from the system. More than that, litigants can easily challenge any faults in the appointment process. Even more, while in many countries the legislature's involvement is a fig leaf, the U.S. Senate plays a real role in the review of Presidential nominees. Unlike in Mexico and other countries, individual senators even retain the power to stall Presidential nominations unilaterally.¹⁶¹ Finally, until the 2010s, the Senate stuck to a rule—derived from the so-called filibuster—that a super majority of 60 senators had to approve every judicial nominee. As discussed above, this system has produced a high-quality judiciary by any measure.

Yet, even in a highly formal judicial appointment process, like the United States, informal norms have thrived in the pre-selection process of nominees:

White House Pre-Selection. Every presidential administration is different, but when it comes to judicial appointments, most have followed a common pre-selection process. Historically presidents relied on the Department of Justice or offices within the White House to create pre-selection lists of potential judicial nominees. After World War II “the Office of the Deputy Attorney General handled most of the work regarding lower-court nominations. Usually, the staff of the deputy’s office obtains information on prospective candidates and makes lists of possible nominees in conjunction with or after negotiations with other powerful interests, including party officials, bar leaders, and especially senators from the state in which the vacancy exists.”¹⁶² Legal networks played an important role; many officials within the Department of Justice used “their vast network of friends, acquaintances, and friends of friends as a source of possible appointees.”¹⁶³ Following a recommendation from the DOJ, White House officials traditionally considered political consequences. Some scholars referred to this process as governed by “norms” within the Executive.¹⁶⁴

More recent presidents, however, have departed from established norms and increased the involvement of political officials. At first, President Carter “sought to ensure merit selection of federal judges by establishing nominating commissions for district courts and courts of appeal.”¹⁶⁵ But President Reagan rejected this approach and “shifted the selection focus . . . to the Office of Legal Policy” as well as “the President’s Committee on Federal Judicial Selection” a group composed by the attorney general, chief of staff, and other political advisers, along with top justice department officials.¹⁶⁶ President Bush continued this move away from the DOJ,

¹⁶¹ See Brannon P. Denning, *The “Blue Slip”*: Enforcing the Norms of the Judicial Confirmation Process, 10 WM. & MARY BILL RTS. J. 75 (2001).

¹⁶² Michael J. Gerhardt, *The Federal Appointment Process* (2000).

¹⁶³ Gerhardt, *supra* note 162.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

shifting “the principal responsibility for judicial nominations into the White House counsel’s office,” which became “primarily responsible for evaluating prospective judicial nominees’ ideological credentials.”¹⁶⁷ President Obama continued this trend by giving the White House Counsel’s Office the “primary responsibility for compiling a list of prospective judicial candidates, for vetting those candidates, and, generally, for shepherding nominees through the judicial appointment process.”¹⁶⁸ President Trump arguably completed the trend by giving complete power to the White House Counsel, Don McGahn, “his deputy, Robert Luther, and about 10 associate counsels identifying and then scrutinizing candidates.”¹⁶⁹

Senate Vetting. Once the President nominates a candidate, the Senate kicks off a process of examining the candidate. Political considerations have historically been near the center of this process. Senators not only consider partisanship and specific positions on political questions but they may also “exchange support or opposition for certain nominees for other legislative favors.”¹⁷⁰ This is especially likely with lower court nominees. Much of this, however, occurs “behind closed doors.”¹⁷¹ Prior to the recent era of extreme partisan polarization, presidents sometimes even traded appointments with powerful senators.¹⁷² Most importantly, the Senate has always performed a robust scrutiny of Supreme Court nominees (and some appellate court nominees as well). Much of that scrutiny, however, has been political rather than merit-based. It is widely accepted that “political factors, including a judicial nominee’s political or constitutional views . . . are the most important reason for failed Supreme Court nominations [and to] other Article III courts.”¹⁷³

Finally, scholars have long highlighted that “Presidents and senators routinely consult friends and other interested individuals about possible nominations and confirmations. The significance of such consultations is that they occur informally and are thus virtually impossible to monitor and control.”¹⁷⁴

Outside Organizations. Non-governmental organizations outside of formal government play a powerful role in the pre-selection and vetting of judicial candidates. Some of these organizations are political but others remain nominally apolitical. Setting aside most lobbying groups, two organizations represent the pole ends of the process:

¹⁶⁷ *Id.*

¹⁶⁸ Nancy Kassop, *Obama’s White House Counsels: Serving the President With No Margin for Error*1 (2023), <https://www.hofstra.edu/sites/default/files/2024-02/kassop-obama-white-house-counsels.pdf> (last visited Jul 28, 2024).

¹⁶⁹ Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, THE NEW YORK TIMES MAGAZINE, Aug. 2018, <https://www.law.uh.edu/faculty/thester/courses/Statutory2019/How%20the%20Trump%20Administration%20Is%20Remaking%20the%20Courts%20-%20The%20New%20York%20Times.pdf> (last visited Jul 28, 2024).

¹⁷⁰ Gerhardt, *supra* note 162.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Gerhardt, *supra* note 162.

¹⁷⁴ *Id.*

the American Bar Association and the Federalist Society. Despite their very different goals and ideological roles, both show how important NGOs can be in the process.

Consider, then, the ABA. Since 1952, the ABA has adopted the mission of improving the quality of the legal profession and judicial system by “evaluating prospective [and actual] judicial nominees.”¹⁷⁵ Unlike most interest groups, the ABA claims to “represent impartial, special expertise about judicial qualifications rather than the interests of its members.”¹⁷⁶ While the ABA’s influence has changed over the years, at one point in the late twentieth century, the ABA was given a “privileged position in testifying on judges.”¹⁷⁷ The ABA process for vetting Supreme Court candidates is extensive and involves “peer reviews of each nominee’s integrity, professional competence, and judicial temperament.”¹⁷⁸ The process begins with hundreds of confidential interviews by all members of the ABA Standing Committee. It is paired with “[a] team (or teams) of distinguished law school professors [that] examines the nominee’s legal writings.”¹⁷⁹ Finally, “[a] national team of leading practicing lawyers with Supreme Court experience . . . also examines the legal writings of the nominee.” At the end of the process, the ABA announces whether the nominee is “Well Qualified,” “Qualified,” or “Not Qualified.”¹⁸⁰

At the other end of the partisanship spectrum, recently the conservative Federalist Society “has played a crucial in putting conservative jurists on the bench.”¹⁸¹ Media has extensively reported on the Federalist Society’s critical role in assembling lists of potential judicial nominees for the Trump Administration, as well as staffing the White House counsel’s office.¹⁸²

Culture. Scholars have argued that U.S. political elites have stuck to informal norms that protect the judiciary from political meddling. Professor Grove, for instance, has identified a set of governmental norms related to U.S. federal courts that aim to protect the court’s independence.¹⁸³ In the United States, “political actors have over time built conventions that prohibit the removal of federal judges outside the impeachment process; the obstruction of federal court orders; and packing the Supreme Court. These conventions serve as superprotections for judicial independence – protections that work over and above legal rules.”¹⁸⁴

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Supreme Court Evaluation Process: Evaluations of Nominees to the Supreme Court of the United States, ABA, https://www.americanbar.org/groups/committees/federal_judiciary/ratings/supreme-court-evaluation-process/ (last visited Jul 28, 2024).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Zengerle, *supra* note 169.

¹⁸² Zengerle, *supra* note 169.

¹⁸³ Tara Leigh Grove, The Origins (and Fragility) of Judicial Independence, 71 VAND. L. REV. 465 (2018)

¹⁸⁴ *Id.* at 544-545.

C. Eastern European Vetting and Ukrainian High Courts

Eastern European countries are also interesting examples of how informal norms impact judicial selection and reforms. Despite adopting multiple best practices (e.g., increasing self-governance, civil society participation, and transparency), countries like Ukraine, Georgia, and Slovakia maintain low-quality judiciaries. One common variable is that reformist governments have had a difficult time replacing judicial networks that emerged during the institutional transformation of the early post-communist years and consolidated rent-seeking. In this section, we focus on Ukraine, Georgia, and Slovakia's judiciaries to show how new informal norms either emerge or survive in the context of extensive judicial reforms. To be clear, we focus on discrete periods of reform, but we are not making generalized claims about the current state of the judiciary in these countries.

Consider, then, Ukraine, a country that has faced a tumultuous series of political changes in the past decade. One of these, the reforms introduced after the 2014 Euromaidan revolution, became a watershed for the Ukrainian judiciary.¹⁸⁵ Historically, Ukrainian courts were packed with politicized, corrupt, and dependent judges, causing widespread public distrust.¹⁸⁶ After 2014, a reformist government pursued a series of judicial reforms as part of a larger anti-corruption and European integration effort. Among other measures, the government (1) sought to dismiss an older generation of judicial leaders, (2) re-booted the previous High Qualification Commission of Judges (HQCJ) and gave it a mandate to reassess the competence and integrity of existing judges, (3) changed the selection process for most judicial posts, and (4) established a powerful and innovative Anti-Corruption Court.¹⁸⁷

Formally, these reforms followed international best practices, increasing judicial self-governance, transparency, meritocracy, and civil society participation in the selection and assessment of judges.¹⁸⁸ In pursuit of judicial independence, a new statute re-booted an existing body run by judges—the High Council of Justice (HCJ)—to improve its membership, and increase its management power over judicial careers and budgets. This body is composed of twenty-one magistrates, mostly selected by the judiciary. The new system also assigned six positions to associations of lawyers, legal scholars, and prosecutors.¹⁸⁹

In addition, the reforms also restructured judicial selection and imposed a reassessment process on tenured judges. As to the selection process, the reforms required an assessment of every potential judicial candidate based on their professional background, personal abilities, social skills, professional ethics, and integrity.¹⁹⁰ This

¹⁸⁵ Lashyn, Leshchynshyn & Popova, *supra* note 35, at 1490.

¹⁸⁶ GEORG STAWA, WILMA VAN BENTHEM & REDA MOLINE, *Selection and Evaluation of Judges in Ukraine*, (2018), <http://www.pravojustice.eu/storage/app/uploads/public/5c0/fcd/a31/5c0fcd3162ea473697034.pdf> (last visited Jul 27, 2024).

¹⁸⁷ For a detailed description on these reforms, see Popova & Beers, *supra* note 5, at 120-122.

¹⁸⁸ Stawa, Benthem & Moline, *supra* note 186, at 6.

¹⁸⁹ Popova & Beers, *supra* note 5, at 122.

¹⁹⁰ Stawa, Benthem & Moline, *supra* note 186, at 20.

process occurs in two stages. First, the HQCJ administers a multiple-choice and case-studies exam that tests the candidate's professional competence and abilities. Then, in the second stage, the HQCJ evaluates the candidate's competence and social and psychological abilities, including an assessment of their ethics and integrity. This phase involves a psychological exam, the assessment of third-party reports on each candidate, and an open interview with the candidate and members of civil society organizations.¹⁹¹ Similarly, the process to reassess tenured judges comprises an evaluation of their ethics and integrity. Importantly, however, it also explicitly empowers civil society actors to produce a report and recommendation to the HQCJ on whether to approve the candidates. Specifically, the Public Integrity Council (PIC) assists the HQCJ by attesting whether judicial candidates comply with professional ethics and integrity requirements.¹⁹² This body comprises esteemed and politically impartial representatives from human rights organizations, legal scholars, attorneys, and journalists.¹⁹³ Both processes are transparent and allow public participation. Therefore, theoretically, they should ensure that only the most competent and ethical candidates are selected for and remain in the judiciary.

At first, the reforms seemed to force a significant change in the judiciary. Roughly 30% of all judges resigned.¹⁹⁴ In parallel, the HQCJ re-assessed the performance and qualifications of more than 6,000 magistrates.¹⁹⁵

Yet, despite these headline figures, the reforms were slow to produce the expected changes. Corrupt judicial clans tried to use the new self-governance powers to protect their grip on the judiciary.¹⁹⁶ According to Maria Popova, these judicial clans perpetuated themselves in power, allowing current judicial leadership to promote their allies to new leadership positions and, at the same time, to punish dissenters via the disciplinary process. Popova analyzed the 2014 election of court chairs and concluded that 80% of leaders maintained their positions.¹⁹⁷ In other words, while the reforms were designed to displace existing judicial elites, in practice, replacement turned out to be difficult. Partly, this is because lower court judges maintained loyalty to the previous leaders. Same, too, for the appointment of new Supreme Court justices. The old judicial elite seized this opportunity to nominate allies, maintaining the *status quo*.¹⁹⁸

The reforms also fostered clashes between the HQCJ and civil society actors over the new process of judicial appointments. As discussed above, formally, the HQCJ administers judicial selections and qualification re-assessments.¹⁹⁹ And the PIC

¹⁹¹ *Id.* at 26.

¹⁹² *Id.* at 13.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 6.

¹⁹⁵ *Id.*

¹⁹⁶ Svitlana Morenets, *Ukraine: Why Justice Reform Is More Vital Than Ever*, INST. FOR WAR & PEACE REPORTING, Aug. 23, 2022, <https://iwpr.net/global-voices/ukraine-why-justice-reform-more-vital-ever> (last visited Jul 27, 2024).

¹⁹⁷ Popova and Beers, *supra* note 5, at 124.

¹⁹⁸ Morenets, *supra* note 196.

¹⁹⁹ Stawa, Benthem & Moline, *supra* note 186, at 13.

reviews whether candidates meet the relevant professional and ethics requirements.²⁰⁰ The problem is that PIC recommendations are not binding on HQCJ. Instead, the commission may overrule their recommendation by a qualified majority of at least 11 (out of 16) members.²⁰¹ Thus, in practice, these two bodies have repeatedly clashed. In 2018, for instance, PIC threatened to suspend its involvement in the re-qualification process, alleging that this procedure was not transparent and that HQCJ had restricted its role.²⁰² More recently, another government body released wiretaps revealing a conspiracy among senior judges to secure the appointment of loyalists to the HQCJ and protect their colleagues from the PIC's evaluations.²⁰³ In the recorded conversations, conspirators also discussed the possibility of forming a coalition “to sabotage the appointment of some of the Supreme Court judges.”²⁰⁴ Again, the new process did not work as expected because of repeated clashes between incumbent judicial elites and civil society.

One take away is not that the formal reforms were counterproductive, but that they are not sufficient to produce overnight change in behavior. Instead, reformers must be vigilant and persistent in order to prevent entrenched judicial networks from using the formal reforms to their own benefit. Slowly, the Ukrainian reforms do seem to be shifting the balance of power within the judiciary and producing renewal.

Just like Ukraine, other Eastern European countries experienced a similar divergence between formal judicial reforms and the persistence of corrupt judicial networks. Professor Tsereteli, for instance, argues that in Georgia, the judiciary continues to be governed by networks that stem from the judiciary's hierarchical structure and an old culture of obedience to judicial leaders.²⁰⁵ This is despite the fact that in 2007, Georgia's government created a judicial council to administer judicial careers and selection.²⁰⁶ Despite reform efforts, dissenters failed to raise enough support, and the old judicial elites won the elections for the judicial council, retaining their dominant positions.²⁰⁷ They then pressured the government to end attempts to break up the elites' grip on the judiciary.²⁰⁸ Since then—and despite other reform efforts—the dominant coalition has remained in control of the Georgian judiciary.²⁰⁹

Like Ukraine and Georgia, Slovakia also invested in judicial self-governance as part of its accession to the European Union, launching a judicial council to manage judicial careers in 2002. But, again, old norms persisted inside the courts. Samuel Spáč

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Stawa, Benthem & Moline, *supra* note 186, at 16.

²⁰³ Thomas Barrett, *OLIGARCHS AND JUDGES*, 18 IPJ 260 (2021) at 270.

²⁰⁴ Halyna Chyzhyk, *Is Zelensky Involved in Covering up Corrupt Judges?*, UKRAINE TODAY, Aug. 24, 2020, <https://ukrainetoday.org/halyna-chyzhyk-is-zelensky-involved-in-covering-up-corrupt-judges/> (last visited Jul 27, 2024).

²⁰⁵ Nino Tsereteli, *Backsliding into Judicial Oligarchy? The Cautionary Tale of Georgia's Failed Judicial Reforms, Informal Judicial Networks and Limited Access to Leadership Positions*, 47 *Review of Central and East European Law* 167 (2022) at 170. *See also* Tsereteli (2023), *supra* note 27, at 1486.

²⁰⁶ Nino Tsereteli (2023), *supra* note 27, at 1473.

²⁰⁷ *Id.* at 182-183

²⁰⁸ Nino Tsereteli (2023), *supra* note 27, at 1474.

²⁰⁹ Nino Tsereteli (2022), *supra* note 205, at 186.

analyzed 126 selection procedures for district court held from 2012 to 2015 and concluded that some candidates were more prone to be selected.²¹⁰ In particular, those whose families had another judge or who had previously served in the same court as at least one committee member.²¹¹ This finding, Spáč argues, indicates that merit is a secondary factor guiding the recruitment process. Primarily, judges are interested in selecting candidates who will reproduce old norms and systems.²¹²

As we explore in the next Part, Mexico, the United States, and Eastern Europe show a range of experiences with judicial appointments but also some similarities. In most of these countries, informal judicial networks have significant influence over appointments and sometimes go directly against the formal process. The Mexican “gentleman’s pact,” judicial networks in Eastern Europe, and the White House’s network outside of government all play a similar role: to generate judicial nominees and appointments outside of the formal system. But, as discussed below, there are also similarities involving the role of civil society and the clash between judicial reforms and pre-existing practices. The lesson from this Part is that different judicial systems give way to the powerful influence of informality.

Country	Formal	Informal
Mexico	Judicial career + Presidential nomination and Senate Confirmation for High Court	Gentlemen’s pact – high court judges rotated unilateral appointment of lower courts; judicial clientelist networks and hierarchical relationships; Senate rubber stamped presidential choices; insiders vs. outsiders at the Supreme Court.
United States	Presidential nomination and Senate Confirmation	White House pre-selection process handled by DOJ and then White House counsel; political considerations are critical to Senate and White House; senators trade support for appointments; ABA and now Federalist Society have a privileged role in the process.
Eastern Europe (Ukraine)	Reforms attempted to dismiss old generation of judges and transform the judiciary; reforms created a commission that runs vetting and pre-selection.	Judicial clans maintained power and sabotaged reforms; commission’s work is overridden by existing judicial networks and corruption; civil society plays a major role in the process.

²¹⁰ Samuel Spáč, *The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia*, 69 PROBLEMS OF POST-COMMUNISM 528 (2022) at 528.

²¹¹ *Id.* at 536.

²¹² *Id.*

IV. Sites of Informality in Judicial Appointments

Thus far, this Article has demonstrated that informality pervades judicial appointments across a range of political systems and countries. This Part brings all the examples together—Colombia, Mexico, the United States, Ukraine, Georgia, and Slovakia—to argue that there are at least three common sites of informality: (1) the pre-selection and vetting process for judicial candidates, (2) the power of judicial networks and (3) the influence of non-governmental organizations. We argue that these three sites provide fertile ground for informality and find a way to seep into formal appointment processes. It is these three sites that seem responsible for the divergence between the judicial career and provisional appointments in Colombia, the failure of judicial reforms in Eastern Europe, the political power of outside organizations in the United States, and the rise of judicial “insiders” in Mexico.

To be clear, these three sites are not exhaustive or even a causal account of informality in judicial appointments. Rather, we aim only to analyze three common and powerful sites of norms and practices that are not recognized by formal law or explored in the scholarly literature.

A. Preselection and Vetting

Every judicial appointment process must begin with a pre-selection of potential nominees alongside some form of vetting to review the credentials of potential judges. The goal is to select candidates of high competence, integrity, and excellent professional credentials. Yet, as we will discuss here, pre-selection provides an opening for informality to creep in, empowering politicians, judicial networks, or even corruption. Vetting, then, needs to be at the forefront of judicial reform.

Defining pre-selection and vetting is a complicated task. We use “pre-selection” to mean the process by which a government assembles an initial list of potential judicial candidates. While that is straightforward enough, vetting, by contrast, refers to the tricky process of scrutinizing the competence, integrity, and professional credentials of a candidate.²¹³ These two processes are related but distinct. Marina Matic Boskovic—a scholar of transitional vetting in post-Soviet states—defines vetting as the “processes for assessing an individual’s integrity as a means of determining his or her suitability for public employment.”²¹⁴ This can be done either alongside pre-selection or after it. The United Nations employs a similar definition, describing “vetting” as “assessing integrity to determine suitability for public employment.”²¹⁵

²¹³ Recently, scholars have used the term vetting to refer to the process for transitioning a judiciary from an authoritarian government to a democracy. We are using the concept differently here. We refer instead to the initial decision to appoint a judge.

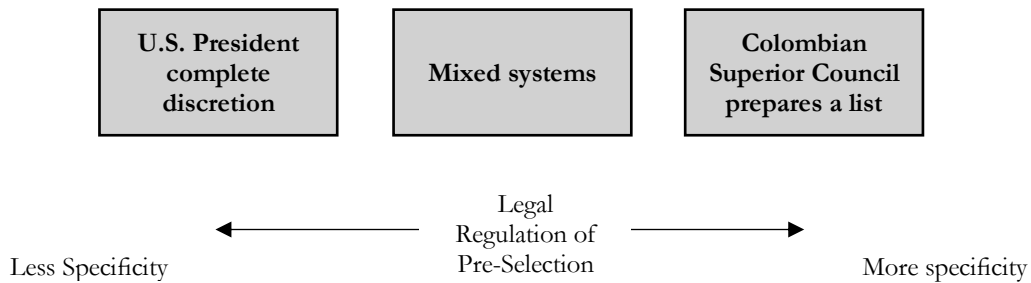
²¹⁴ Marina Matic Bošković, *Vetting Of Judiciary In Transitional Countries – Successful Tool Or Entry Point For Political Influence*, 61 SPZ 137 (2017) at 2, https://www.researchgate.net/publication/340102070_Vetting_of_judiciary_in_transitional_countries_-_successful_tool_or_entry_point_for_political_influence, (last visited 07/28/2024).

²¹⁵ RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES. VETTING: AN OPERATIONAL FRAMEWORK, (2006), <https://www.ohchr.org/sites/default/files/Documents/Publications/RuleoflawVettingen.pdf> (last visited Jul 28, 2024) at 4. The OHCHR goes on to define “integrity” as “an employee’s adherence to international standards of human rights and professional conduct.” *Id.*

Scholarship on vetting is sparse, but some scholars have argued that vetting is an important means to increase public trust in institutions and weaken the ability of criminal networks to influence the judiciary.²¹⁶ Either way, at its core, vetting involves the review of a candidate’s professional background.

Taking the definition as stated, as an initial matter, a few design features are important to pre-selection and vetting. First, the legal system can either specify how pre-selection should take place or it can simply delegate it to a particular institution. On one end of the spectrum, countries like Colombia provide for a robust pre-selection process that empowers an institution separate from the one that selects and appoints judges. By way of reminder, the Colombian constitution tasks the Superior Council with assembling a list of 15-30 potential candidates for the Supreme Court or Council of State. It also details how the Superior Council should prepare that list (via a public announcement, period of notice and comment, and considering candidates’ competence and credentials). This is a highly detailed process that seeks to leave very little to the discretion of the Superior Council. By contrast, the U.S. Constitution does not at all specify how presidents should prepare a list of potential nominees. It merely provides that the President shall nominate justices and judges, subject to Senate confirmation. In other words, it delegates complete discretion. Figure 1 below summarizes the spectrum of potential approaches here:

Figure 1: Level of Specificity in Pre-Selection



Second, the pre-selection process might also specify what kind of vetting is required. Beyond merely assembling a list, vetting criteria might include scrutinizing a candidate’s personal or professional background, financial history, professional experience, competence, and even psychology. The European Union’s Venice Commission specifies that vetting may involve integrity checks—“conducted to verify the identity of the subject, employment history, the right to work in the country, and

²¹⁶ Serge Rumin, *Gathering and Managing Information in Vetting Processes*, in *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Alexander Mayer-Rieckh & Pablo de Greiff eds., 2007), https://s3.amazonaws.com/ssrc-cdn1/crmuploads/new_publication_3/justice-as-prevention-vetting-public-employees-in-transitional-societies.pdf (last visited Jul 28, 2024), at 405.

to ascertain any unserved criminal sentence.”²¹⁷ The Commission differentiates this from “performance appraisals” that address “competence and potential.”²¹⁸

Defining judicial competence is a difficult task for vetting processes. Generally, the goal is to select a capable judge who is prepared and can handle judicial tasks. Consider Ukraine’s state-of-the-art vetting process that includes a second-stage review via examinations, professional scrutiny of a candidate’s competence and social and psychological abilities, and an assessment of ethics and integrity. Some of this involves an open interview with candidates and members of civil society organizations. And a commission even administers a psychological exam. Both Ukraine and Colombia provide for a period of notice and comment when any member of the public can file complaints about a candidate. The United States is again a laggard here, requiring no formal vetting process.

Third, if a country decides to specify a pre-selection process, it must face an important question of institutional competence—what types of institutions should perform the pre-selection or vetting process? Countries consider whether an institution is subject to political influence, independent of the executive, harbors deep expertise on judicial questions, and whether it recruits talented officials, or is subject to corrupt influences. Again, vetting institutions range from administrative councils like Colombia’s Superior Council to judicial councils, parliamentary committees, specific offices within the executive, or simply whatever the executive prefers. To protect the independence of the judiciary, a common practice is to delegate vetting programs to an independent commission of judges.²¹⁹ Relatedly, many countries now include international observers in vetting commissions. There is a difficult political choice over whether the international community should play a role in the reassessment or initial vetting of judges. On the one hand, vetting processes spearheaded by domestic actors can avoid resentment against external actors, provide a better basis for local buy-in, and ensure that knowledge of local conditions is incorporated into the process.²²⁰ On the other hand, vetting programs are often carried out in unstable political environments, making international contributions potentially useful.²²¹

Setting aside these legal requirements, however, every appointment system appears to incorporate practices and norms that go beyond formal rules. As our case

²¹⁷ EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), *Kosovo: Concept Paper on the Development of the Vetting Process in the Justice System*, (2022), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2022\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2022)005-e) (last visited Jul 28, 2024) at 67.

²¹⁸ *Id.*, at 68.

²¹⁹ Alexander Mayer-Rieckh, *On Preventing Abuse: Vetting and Other Transitional Reforms*, in JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES (Alexander Mayer-Rieckh & Pablo de Greiff eds., 2007), https://s3.amazonaws.com/ssrc-cdn1/crmuploads/new_publication_3/justice-as-prevention-vetting-public-employees-in-transitional-societies.pdf (last visited Jul 28, 2024) at 491.

²²⁰ RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES, *supra* note 215, at 7.

²²¹ *Id.*

studies demonstrate, informality finds a way to creep into the process of pre-selection and vetting in the following ways:

Political Influences in Pre-Selection. Regardless of where the pre-selection process takes place, it is sufficiently underspecified that political handshake deals can bleed in. Consider countries at both ends of the specificity spectrum, Colombia and the United States. In Colombia, the Superior Council is staffed by magistrates who are themselves nominated by other courts. Some magistrates and lawyers confessed that members of the Superior Council tend to be political operators. And because the Superior Council in turn prepares a pre-selection list of 15-30 candidates for the other High Courts, this can lead to a *quid pro quo* dynamic between the courts. Some members of the High Courts can trade deals with the Superior Council—agreeing to nominate specific lawyers to join the Council—in exchange for promises that the Superior Council will include in the pre-selection list some specific lawyers or judges preferred by the High Courts. Moreover, the Special Rapporteur for Judicial Independence has complained that the Superior Council does not sufficiently prioritize competence in pre-selection.

At the other end of the specificity spectrum, the pre-selection process in the United States seems even more open to political influence and even corruption. Return to the basics: the U.S. president has complete discretion over pre-selection. By all accounts, presidents have historically emphasized both competence and political considerations. As discussed above, some presidents empowered the Office of the Deputy Attorney General to prepare lists of possible nominees while more recent presidents have given complete power to the White House Counsel's Office. Either way, pre-selection involves negotiations with “powerful political interests, including senators, party officials, and bar leaders.”²²² Informal norms and networks play an important role; officials within the White House or DOJ populate their lists from “their vast network of friends, acquaintances, and friends of friends.”²²³ One problem with the U.S. process is that it has arguably trended away from emphasizing competence, transparency, and professional abilities.

Colombia and the United States impart a few lessons about pre-selection. One is that regardless of specificity, political considerations will be important. And political considerations are appropriate in a democratic judiciary, especially to prevent courts' isolation from the public. The problem is when political considerations turn into *partisan* pressures. Colombia seems to have avoided that thus far. The United States has not—the judiciary is increasingly consumed by partisan infighting. Norms have a genuine role to play in policing the boundary between politics and partisanship. The more that pre-selection can emphasize competence and lack of partisanship, the better for the judiciary. Another lesson is that institutions empowered with pre-selection authority develop informal norms. For example, the Superior Council may consider the High Courts' preferences even during pre-selection. Or the White House may incorporate feedback from outside entities like the Federalist Society. These norms may be in flux, but they are critical to judicial appointments.

²²² Gerhardt, *supra* note 162.

²²³ *Id.*

Informality in Vetting. Countries have had difficulty prescribing an appropriate vetting process, allowing informality to govern. In Colombia, the Superior Council vets its pre-selected list of nominees but does not have an explicit rubric that it follows.²²⁴ In the United States, once the President nominates a candidate, the Senate kicks off a vetting-like process. But because there are no prescribed rules, political considerations are near the center of this process. Senators not only consider partisanship and specific positions on political questions, they may also “exchange support or opposition for certain nominees for other legislative favors.”²²⁵

Eastern European countries, however, have been at the forefront of developing vetting processes for older sitting judges. Return to Ukraine, where reforms required an assessment of every potential judicial candidate based on their professional background, personal abilities, social skills, professional ethics, and integrity.²²⁶ This process involves a mix of substantive exams, case studies, and even psychological evaluations, all administered by a commission of domestic and international judges. Ukraine’s effort is the most cutting-edge attempt to formalize the vetting process. Yet, by many accounts, as we discuss below, judicial networks have found a variety of ways to corrupt the process.

Again, all of these examples impart a few lessons about vetting. The process need not be specified as long as the right institutional incentives are in place. In the United States, the details of the Senate’s vetting process was completely informal and yet it actually produced a high-quality judiciary for decades. In Ukraine, a highly specified process is producing mixed results. Colombia is in the middle—a highly specified process that produces some high-quality appointments to the high courts. The key is the political incentives in place. In the United States, the process worked because the Senate followed non-partisan norms of cooperation and even reliance on non-partisan commissions. The same is true in Colombia—the process produces healthy results because there is sufficient pressure on the Superior Council by outside organizations and political actors. In Ukraine, by contrast, pressure from outsiders tends to corrupt the process. That is why the next Subpart highlights the importance of these outside political influences.

B. The New Judicial Guilds and Corporatism

This Subpart describes the role of judicial networks as a source of informal norms across our case studies. At the core of the argument is that a sociological model of judging puts judicial networks at the center of judicial appointments. Judicial networks influence the recruitment of judges to the career in the cases we examine, including the appointment of judicial leadership in Ukraine and provisional judges in Colombia, the pre-selection of judges in the United States, and the judicial career in Mexico. Whether this is a normatively desirable source of informality is complicated. We argue that judicial networks can have both positive and negative effects. For example, judicial networks can help construct a corporatist, guild-like identity among

²²⁴ Interview with Justice, Higher Court, Bogotá, (2024).

²²⁵ Gerhardt, *supra* note 162.

²²⁶ Stawa, Bentham & Moline, *supra* note 186, at 20.

judges, which can promote independence from the executive. But, at its core, judicial networks are a source of informality, impacting judicial selections in a variety of ways.

Scholars have recently begun to focus on the sociology of networks within the judiciary.²²⁷ This is a departure from traditional studies of judicial behavior with an individualist model in mind, investigating, for instance, how magistrates' personal traits or political preferences affect decisions.²²⁸ This limited view, however, disregarded the importance of the judiciary as an institution composed of groups of judges, subject to sociological pressures like reputational costs and benefits, political and partisan dynamics, social networking, peer-to-peer pressures and influence, and hierarchical structures.²²⁹ An individual model of judging also neglects that social relationships can generate and enforce informal norms and practices. That is why a new set of scholars is instead focusing on the judiciary's sociology, uncovering how judges reproduce consistent practices and conventions, and even traditional behavioral patterns taught by senior judges through personal, academic, or professional connections.

A sociological model of judging places the idea of networks at the heart of the judiciary. By that we mean the relationships between judges based on shared interests, personal and professional connections, and career goals. Across our case studies, these networks impact selection in the following ways:

Incumbent Leaders and Appointment of Judges. Judicial networks operate as a source of informality in the context of judicial recruitment, penetrating directly and indirectly. Directly, judicial networks can push institutions to recruit new judges who are loyalists to incumbent leaders. Consider, for instance, how Ukrainian, Georgian, and Slovakian judicial elites sabotaged merit-based reforms to maintain their recruitment pipelines. In Ukraine, judges pushed the non-partisan commission, HQCJ, to hire candidates who were connected with those elites.²³⁰ Similarly, in Georgia, incumbent judicial leaders promoted allies to new leadership roles, despite existing reforms.²³¹ More indirectly, in Slovakia, there is clear evidence that having family connections or prior experience in the same court as a selection committee member boosted a candidate's chances of being appointed to the judiciary.²³²

Selection into the Judicial Career. Judges can also serve as gatekeepers to the judicial career through clerkships or provisional appointments. From a comparative perspective, one key factor is whether the judiciary is structured as a centralized bureaucracy—with built-in mechanisms for review by senior judges—or instead a loose hierarchy like in the United States. Another institutional factor that seems relevant is whether judges are unionized and can strike. Regardless of these differences, however, in every country we studied, clerkships offer a leg-up in the process of

²²⁷ Matthew C. Ingram, *Networked Justice: Judges, the Diffusion of Ideas, and Legal Reform Movements in Mexico*, 48 J. Lat. Amer. Stud. 739 (2016) at 746.

²²⁸ *Id.*

²²⁹ Ingram, *supra* note 227, at 747; *See also* Lawrence Baum, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2008).

²³⁰ Barrett, *supra* note 203, at 270.

²³¹ Nino Tsereteli (2022), *supra* note 205, at 186.

²³² Spáč, *supra* note 210.

becoming a judge. Mexican judges, for instance, followed a practice of appointing candidates who had previously worked for them as clerks. Once nominated, the new lower court judges continued to be mentees of their appointing justice, receiving rewards and prizes for their loyalty.²³³ In Georgia, incumbent judicial leaders appointed former clerks to leadership positions inside the courts to perpetuate their power and influence.²³⁴

In addition, clerkship positions can serve as bargaining chips to leverage a candidate's likelihood of nomination. Our interviews revealed, for instance, that senators sometimes ask candidates for the Colombian Constitutional Court to hire politically connected lawyers as clerks in exchange for support of their candidacy. This dynamic is an informal aspect of the selection process that is hard to track and control through formal norms and can directly impact a recruitment process's result.

Or return to the provisional appointment of Colombian judges as a playground for judicial networks. Unlike in Eastern Europe, judicial networks in Colombia exert influence through the provisional system rather than formal selection. Because the formal process has stalled, judges retain the power to select provisional judges. Yet, by many accounts, these provisional judges are often personal acquaintances of current judges. Some lawyers and judges have claimed a similar dynamic influences selection to the Supreme Court and the Council of State. Some of this happens because some parts of the selection are inevitably subjective. Networks can thus penetrate the process, twisting how judges or the Superior Council decide who meets the formal criterion or pre-selects eligible candidates.

More generally, external networks (i.e., groups outside the judiciary) can also informally influence the recruitment of new magistrates. The American selection system, for instance, involves negotiations between White House or DOJ staff and party officials, bar leaders, and senators to fill state vacancies. Similarly, officials within the DOJ, presidents, and senators often use personal acquaintances as sources of appointees. This dynamic is also present in Colombia, where the Constitutional Court's candidates need to receive support from Congress.

All these examples show that even when the selection system adopts best practices, networks can informally penetrate the process, affecting its results. Worse, they can lead to clientelist relationships and *quid pro quo* dynamics, like those in Mexico, where the selection committee recruits only candidates who will reciprocate their appointment by following old norms or maintaining the *status quo*.

Judicial Guilds and Corporatism. One important consequence of judicial networking and judicial self-governance is the growth of what some scholars call corporatism and we refer to it as the new judicial guilds.²³⁵ The argument is that judges have developed a guild-like identity, along with internal cohesion on a group-wide scale. Joining the judiciary is seen as joining a particular career, with particular practices, interests, and common objectives. When that corporatist identity emerges,

²³³ Miron, *supra* note 25, at 44-45.

²³⁴ Nino Tsereteli (2022), *supra* note 205, at 177-178. See also Nino Tsereteli, *supra* note 27, at 1477.

²³⁵ Ríos-Figueroa, *supra* notes 29 and 156.

judges can sometimes behave cohesively to protect the common interests of the judiciary from external attacks. Professor Ríos-Figueroa has developed this model in the context of Mexico’s judiciary. Here, we extend this model to study how it affects judicial appointments more generally.

In the context of judicial recruitment, guild identity can be as important as formal rules to protect judicial independence.²³⁶ Consider Colombia, where judges have clashed with the executive whenever it attempted to intrude into judicial selections or expand administrative bodies that could exercise limited judicial power. For example, the Colombian Congress created a series of administrative courts (*superintendencias*) endowed with judicial-like powers to decide certain cases. In our interviews, Colombian judges admitted that judges universally see the *superintendencias* as a threat to the independence of the judiciary because they are ultimately controlled by the President of the Republic. In addition to opposing these incursions on judicial power, judges increasingly close ranks and protect each other from outside pressure.²³⁷ This corporatist identity has helped the Colombian judiciary stop external interventions and safeguard its independence.

Mexican judges have arguably developed a similar guild identity. As discussed above, Ríos-Figueroa has highlighted the distinction between “insiders” (career judges) and “outsiders” (justices without significant prior experience within the judiciary) in the Mexican judiciary as a consequence of corporatism.²³⁸ Even Supreme Court justices behave differently depending on whether they are insiders or not.²³⁹

Another side to judicial corporatism is that it can be an important vehicle for collective mobilization and resistance. When studying off-bench resistance and the relationship between judges and their allies, Trochev and Ellet identified several strategies judges have used in post-communist and sub-Saharan countries to withstand attacks on their independence.²⁴⁰ Judges sometimes tried to negotiate secretly with the politicians who were attacking them or they sought to mobilize judicial allies.²⁴¹ When these strategies failed, judges went public.²⁴² In contexts of democratic backsliding, judicial corporatism can be an important source of resistance against authoritarians.

It is difficult to draw a line between corporatism and guilds, on the one hand, and corrupt networks within the judiciary, on the other. One potential argument is that the *bad* side of corporatism does not lead to the kind of judicial independence that is valuable for the rule of law—it is simply a guild-like corporate autonomy that

²³⁶ See e.g., Björn Dressel, Raul Sanchez-Urribarri & Alexander Stroh, *The Informal Dimension of Judicial Politics: A Relational Perspective*, ANNU. REV. LAW SCI. 413 (2017) (highlighting the increasing evidence that judicial networks are relevant in safeguarding judicial independence and encouraging assertive actions against other political branches).

²³⁷ Interview with Justice, Higher Court, Bogotá, 2023.

²³⁸ Ríos-Figueroa, *supra* notes 29 and 156.

²³⁹ *Id.*

²⁴⁰ Alexei Trochev & Rachel Ellett, *Judges and Their Allies. Rethinking Judicial Autonomy Through the Prism of Off-Bench Resistance*, 2 JOURNAL OF LAW AND COURTS 67 (2014) at 68.

²⁴¹ *Id.* at 73.

²⁴² *Id.* at 78-79.

maximizes the narrow interests of judicial networks.²⁴³ That is the case of Ukraine and other Eastern European countries. But the positive side of corporatism is that high-quality institutions always seem to have a strong *esprit de corps* and narratives of independence from other institutions. As Popova and Beers argue, when judges lack strong advocates to represent their interests and reputations, “the reform process can be demoralizing and disempowering to the very actors it is meant to protect and embolden.”²⁴⁴ In this sense, having a strong *esprit de corps* can help articulate and implement reforms more effectively.

C. Non-Government Players

Informality is at the center of the relationship between outside organizations and the selection of judges. Non-governmental organizations and political forces routinely find a way to influence judicial appointments. They often do this, however, without any regulation or even recognition in the formal process. In this Subpart, we highlight how governments choose either to empower expert and non-partisan non-governmental actors or political, partisan, and even corrupt organizations. This is an area where governments increasingly formalize the informal role of outsiders.

As a descriptive matter, let’s address several key dimensions of this source of informal norms: *what* outside organizations can do in judicial selections; at what stage or *when* in the process they intervene; *which* organizations are allowed to participate in the process; and *whether* the legal system invites or disallows this intervention.

What. Scholars have recently addressed the role of civil society and other organizations in “designing and monitoring” judicial reforms and selection processes.²⁴⁵ Maria Dakolias, for instance, argues that engaging civil society actors is an avenue for increasing “commitment and ownership” of judicial reforms.²⁴⁶ That is especially relevant in corrupt contexts, where the judiciary may avoid implementing more profound structural changes to safeguard the status quo.²⁴⁷ Civil society helps guarantee accountability, transparency, and hard-to-implement reforms in these scenarios.²⁴⁸ Moreover, these organizations can ultimately aggregate expertise,

²⁴³ Kosar, D. and Spáč, S., 2017. Conceptualization (s) of judicial independence and judicial accountability by the European network of councils for the judiciary: Two steps forward, one step back. In *IJCA* (Vol. 9, p. 44); Popova, Maria. "Be careful what you wish for: a cautionary tale of post-communist judicial empowerment." *Demokratizatsiya* 18, no. 1 (2010): 56-73.

²⁴⁴ Popova & Beers, *supra* note 5, at 136.

²⁴⁵ Maria Dakolias, *Legal and Judicial Development: The Role of Civil Society in the Reform Process*, 24 *FORDHAM INT’L L. J.* S26 (2000-2001). See also Łukasz Bojarski, *Civil Society Organizations for and with the Courts and Judges – Struggles for the Rule of Law and Judicial Independence: The Case of Poland 1976-2020*, 22 *GERMAN LAW JOURNAL* 1344 (2021) (explaining the relevance of civil society organizations in fighting the rule of law backsliding in Poland); Eszter Bodnár, *The Selection of Supreme Court Judges, What Can the World Learn from Canada, What Can Canada Learn from the World?*, *ELITE LAW JOURNAL* 103 (2017) (stressing the relevance of civil society participation in the selection of Supreme Court justices).

²⁴⁶ Dakolias, *supra* note 245, at S31.

²⁴⁷ *Id.* at S32

²⁴⁸ *Id.* at S32.

workforce, and assets to judicial reform initiatives, which can help governments identify new problems and better solutions to overcome them.²⁴⁹

Civil society and other outside organizations can play different roles in judicial selections. Non-partisan “good governance” organizations can help the judiciary identify the most qualified candidates during a pre-selection phase. In the vetting process, these entities can increase the judiciary’s power to conduct background checks and qualification reassessment of judges and candidates. Moreover, their presence can potentially increase the accountability of the bodies in charge of nominating or appointing judges. They can, for instance, prompt media coverage of attempts to nominate candidates with doubtful backgrounds and ethics. For example, as discussed above, “[i]n 2009 a group of Colombian organizations created Elección Visible . . . as a citizen oversight coalition to monitor the process of selecting the new justices.”²⁵⁰ This group sought to promote candidates who are qualified, independent, and apolitical. “The coalition . . . persuaded the Supreme Court to adopt the transparency measures.” Accordingly, at their best, NGOs’ presence can enhance the recruitment process’s legitimacy, promoting competent and ethical candidates.

When. Most judicial appointment processes unfold in several stages and any one of them can be a source of informal influence by organizations. As discussed above, legal systems often provide for pre-selection, vetting, nomination, and confirmation of judges. Judicial careers for lower court judges occur in an even longer time frame that can be fertile ground for informal influences. Either way, organizations strategically participate at different stages.

Consider the role of notice and comment in the pre-selection stage. Countries around the world increasingly provide for a formal period by which members of the public can submit comments on proposed candidates. Return to Colombia, where the process for selecting Colombian High Court Magistrates begins with pre-selection by the Superior Council quickly followed by a public notice and comment period. This is when lawyers and NGOs present complaints about the process. And specific non-governmental organizations are given a privileged role.²⁵¹ The goal is to smoke out major concerns with potential nominees, including links to crime, corruption, or simple lack of competence. Organizations focus on submitting comments during this period, and our interviews with NGOs in Colombia revealed that judges take these comments seriously. For their part, organizations are eager to contribute to increasing the professionalism and competence of the judiciary.

By contrast, some countries accommodate outside entities only after a nominee is announced. That is why the ABA’s role in vetting judicial candidates in the United States takes place after a Presidential nomination. One drawback of incorporating NGOs at this late stage is that their role is diminished because the process of replacing a nominee is more arduous than simply replacing a name on a pre-selection list.

²⁴⁹ *Id.* at S33.

²⁵⁰ Van Zyl Smit, *Judicial Independence in Latin America*, *supra* note **Error! Bookmark not defined.**

²⁵¹ Interview with Justice, Higher Court, Bogotá, March 2023.

Which Organizations. The key variable here is whether the outside entities are partisan or not. The United States seems to be moving away from a *status quo* where the only major organization with credibility in judicial selections (the ABA) was non-partisan, to one where each political party depends on a deeply partisan organization, like the Federalist Society. Like Colombia's Eleccion Visible, in Ukraine multiple civil society organizations formed a powerful coalition of civil society observers devoted to judicial reform. This group has served as a relevant forum for exchanges between other important civil society organizations.²⁵² Together, these actors have actively monitored the Ukrainian courts, triggering media coverage and international attention.

Another important stakeholder is the international community. In Ukraine, for instance, NGOs commonly receive financial support from international organizations.²⁵³ Moreover, international groups like the United Nations and non-governmental networks rely on information provided by local NGOs to assess the state of the Ukrainian judiciary. For instance, some civil society organizations in Ukraine advise the Venice Commission. However, these groups do not always agree on specific judicial reforms.²⁵⁴ Nonetheless, these entities can be an avenue through which international groups operate in the country.

Whether it is Formalized or Not. As far as we can tell, it used to be rare for countries to formalize the role of outside organizations in judicial selections. At most, the role of organizations like the ABA became entrenched as a strong norm but was never recognized by the legislative rules, executive orders, or statutes. The tide, however, seems to be turning, and an increasing number of countries are formalizing this role. Take Ukraine as an example of a country where civil society's engagement in judicial selection is formalized. As discussed above, the 2014 and 2016 judicial reforms explicitly integrated the role of NGOs within a commission, the PIC. That commission was given a formal role assisting the Judicial Appointments Commission (HQCJ). Part of this role involves preparing reports on candidates' and judges' ethics and integrity. The PIC commission includes esteemed and politically impartial representatives from human rights organizations, legal scholars, attorneys, and journalists.²⁵⁵ Thus far, they have been vocal about weak candidates—on issues like income-property discrepancy or intentional income misreporting. Their influence, however, has been weakened by the HQCJ's attempts to restrict their role and relevance in the selection and reassessment processes.

Like in the United States—where the ABA remains a powerful informal actor—in Ukraine, civil actors informally monitor the Ukrainian judiciary by participating in legislative debates, sharing expert insight, calling on the media's attention, and participating in international judicial reform forums.²⁵⁶ Some scholars consider Ukraine's civil society organizations as “external judicial informal institutions,”²⁵⁷ and “their omnipresence in political discussions and public debate has

²⁵² Serhii Lashyn, Anastasia Leshchyshyn & Maria Popova, *supra* note 35, at 1490 and 1491.

²⁵³ *Id.* at 1491.

²⁵⁴ *Id.* at 1500.

²⁵⁵ Stawa, Benthem & Moline, *supra* note 186, at 13.

²⁵⁶ Serhii Lashyn, Anastasia Leshchyshyn & Maria Popova, *supra* note 35, at 1492.

²⁵⁷ *Id.*

become expected, valued, and ultimately institutionalized.”²⁵⁸ Unlike Ukraine, civil society organizations operate informally in Georgia, monitoring the judiciary and engaging in national and international conferences.²⁵⁹

* * *

This Subpart demonstrates that informality bleeds into judicial appointment through at least three powerful sites: (1) the pre-selection and vetting process for judicial candidates, (2) the power of judicial networks, and (3) the influence of non-governmental organizations. It is these three sites that seem responsible for the divergence between the judicial career and provisional appointments in Colombia; the failure of judicial reforms in Eastern Europe; the political power of outside organizations in the United States; and the rise of judicial “insiders” in Mexico.

V. Planning Ahead: A Few Thoughts to Seed The Field of Norms

In order to understand how informality can help or hinder the goals of judicial reformers, a broader research agenda must focus on the positive and negative consequences of informal norms. A full exploration of those principles is beyond the scope of this piece, but we can begin to sketch a few design principles for informality:

A. Beneficial vs. Harmful Norms in the Judiciary

Given the importance of norms, one key question is whether some emerging practices are predictably beneficial or harmful for the judiciary. The key criterion for determining this should be whether norms promote or degrade three core institutional values: separation of the judiciary from political interference, maintenance of high judicial competence, and preservation of public legitimacy. Across our case studies—whether in Colombia, Mexico, the U.S., or Ukraine—we find that wherever norms reinforce these three values, the judiciary tends to exhibit higher levels of performance. Conversely, wherever informal networks focus on patronage or partisan loyalty, judicial outcomes suffer. Given that criterion, here are some preliminary thoughts on the normative value of norms based on our comparative study above:

First, informal practices that insulate judicial selection from partisan political interference while maintaining democratic accountability tend to enhance judicial independence. The United States historically exemplified this through norms that encouraged consultation between the president and senators from both parties, reliance on merit-based evaluations from the ABA, and rejection of explicitly partisan litmus tests. These norms helped maintain judicial independence even within a politically-appointed system. By contrast, informal practices that inject partisan politics or corrupt networks into ostensibly merit-based systems—like Ukraine’s experience with judicial networks sabotaging reforms—predictably undermine independence.

Second, informal practices that prioritize professional competence and integrity in selection processes strengthen judicial institutions. Colombia’s informal

²⁵⁸ *Id.* at 1500.

²⁵⁹ Tsereteli, *supra* note 27, at 1483-1484.

norm that Constitutional Court candidates should have distinguished academic or professional records has helped maintain that court's quality and legitimacy. Similarly, the Mexican Supreme Court's old practice of drawing heavily from experienced career judges helped develop judicial expertise, even if the system had other flaws. Conversely, informal practices that prioritize personal or political connections over merit—like the growing role of ideological networks in U.S. judicial selection—tend to degrade institutional quality over time.

Third, informal practices that enhance transparency and civil society oversight while preserving necessary confidentiality in deliberations strengthen judicial independence. Colombia's practice of allowing civil society organizations to comment on High Court nominees has improved accountability without compromising the selection process. Ukraine's formal incorporation of civil society into judicial vetting shows promise, even if currently imperfect. By contrast, completely opaque practices that shield selections from any public scrutiny—like some provisional appointments in Colombia—enable corruption and undermine legitimacy.

This framework suggests several predictive principles for determining the positive or negative qualities of norms: (1) Informal norms that create multiple, overlapping accountability mechanisms (to different branches of government, civil society, and the legal profession) tend to enhance independence by preventing capture by any single group; (2) Practices that develop organically from within the judiciary and legal profession are more likely to promote independence than those imposed by political actors or special interests; (3) Informal systems that provide clear professional rewards for maintaining independence and high standards are more sustainable than those relying purely on individual integrity; (4) Practices that balance confidentiality in deliberations with transparency in outcomes and criteria tend to work better than extremes of either total opacity or complete public exposure; and finally, (5) Informal norms that help defend judicial independence during periods of political pressure are particularly valuable for long-term institutional development.

The key question, then, is whether system designers can identify and cultivate beneficial informal practices that comply with these principles and disrupt harmful ones. The answer is likely *yes*. System designers can create opportunities for the organic development of professional networks and mentorship systems that reward merit and independence; they can support civil society organizations that can provide meaningful oversight without partisan agendas; and they can establish clear professional incentives for maintaining independence and high standards. For example, given the growth of judicial guilds, legal systems that have struggled to ensure judicial independence from other branches of government should focus on developing a distinctive judicial identity through conferences, social events, or mentorship opportunities that are exclusive to the judiciary. Reformers can focus on legal narratives that cultivate pride in the role of a judge and confidence in judicial competence. Tara L. Grove explains in the U.S. context that conventions for judicial independence “depend in part on narratives crafted by our legal and political culture.”²⁶⁰ In this sense, “legal narratives could influence what future generations deem to be ‘self-evident truths’ about the

²⁶⁰ Grove, *supra* note 183, at 471.

federal judiciary.”²⁶¹ It is difficult to specify how this process may play out. But, at the very least, the existence of an institutional narrative within the judiciary—one that emphasizes competence, professionalism, and independence—is critical to the emergence of a high-quality judiciary.

B. Research and Design Principles

Setting aside the normative valence of norms, our comparative study also has implications for judicial or constitutional studies. First, differences in informal rules likely contribute to differences in de facto judicial independence. As discussed above, norms can determine whether judges are insulated from political pressure, whether the judiciary maintains high standards, and whether judges develop a collective commitment to independence. In this way, they can have a significant effect on measurable variables. The relationship, however, is complicated because similar informal practices can produce different outcomes depending on contextual factors like the political environment, historical legacies, or other institutional actors. For example, the same informal norm (e.g., judicial self-selection) may enhance independence in stable democracies but enable corruption in weaker democracies. Informal norms, by themselves, will not determine judicial outputs without considering historical legacies, institutional complementarities, and economic incentives. It is, therefore, possible that, just like with formal rules, there could be countries with similar informal practices but very different levels of de facto independence. Nonetheless, informal norms will be a significant part of the equation.

Because of their importance, our study of norms should contribute to a shift in comparative law scholarship from formal institutions to informal ones. As Chilton and Versteeg have argued, formal constitutional provisions do not, by themselves, guarantee improvements in democracy and rule-of-law outcomes.²⁶² Studies that focus solely on formal institutions therefore miss an essential part of the operation of judiciaries and legal structures. One implication, then, is that scholars and actual practitioners must target informal institutions to the extent possible. This may be difficult because norms are sometimes opaque and are socially sticky. Still, there is room for more scholarship and experimentation on the deliberate design of norms. For instance, judicial reformers might focus on finding and recruiting an inaugural set of incumbents that can kick-start a positive process of norm-building.²⁶³

Second, and relatedly, informality works best when it is properly cabined by a functioning formal system. But the formal system should not try to micromanage selection and appointment decisions. Instead, it should focus on maintaining a few effective and credible formal rules that can seed positive informal norms. By credible rules, we mean “rules and procedures that exist on paper [and] are enforced and complied with in practice.”²⁶⁴ When formal institutions are not effective or credible, they invite negative informal norms that subvert the formal system. For example, one

²⁶¹ *Id.* at 472.

²⁶² See e.g., A. Chilton & M. Versteeg, *supra* note 37.

²⁶³ Maria Popova, *The War in Ukraine and Transition: In Conversation with Maria Popova*, (2023), <https://revdem.ceu.edu/2023/06/20/the-war-in-ukraine-and-transition/> (last visited Jul 28, 2024).

²⁶⁴ Helmke & Levitsky, *supra* note 75, at 728.

foundational rule is that some judges can be politically minded but should never be partisan. That rule should be enforced via impeachments and rigorous selection criteria that disqualify partisans. To be sure, the precise level of political influence might vary between different types of courts (i.e., constitutional courts are appropriately more political than lower courts). Moreover, informality operates well when formal rules are effective and continue to be enforced—not ignored—by the relevant authorities.²⁶⁵ By increasing the effectiveness and credibility of formal norms, system designers can reduce the chances of the emergence of competing informal structures that conflict with the existing formal norms' goals. That is why in Germany, where rules are effective and credible, formal rules support and work alongside informal norms.

Third, scholars and legal designers need to understand and disseminate informal norms so that the system is legible to outsiders. Among other things, system designers can identify norms and communicate them to applicants for judicial careers or politicians. Administrators should clearly state the goals of both formal and informal norms and communicate them to a broad audience. Communicating is relevant to increasing legal certainty and reducing informational asymmetry. Even more, a systematic understanding of informal norms can allow for political support for these norms. Judicial reforms and proper selection processes operate well only when they are legitimate and supported by political institutions. Otherwise, outside political forces will threaten and undermine judicial independence. That is why in Georgia, “the political elite deliberately strengthened the judicial oligarchy in exchange for guaranteed outcomes in politically sensitive cases. The changes that could have dismantled the existing hierarchies and emancipated rank-and-file judges were reversed, blocked, or delayed.”²⁶⁶

Conclusion

This study of judicial appointments reveals that a subterranean layer of informal norms and conventions influence the appointment and evaluation of judicial candidates. Generalizing from our case studies, we argue that there are three common and powerful sites of informality: (1) the pre-selection and vetting process for judicial candidates, (2) the power of judicial guilds, and (3) the active influence of non-governmental organizations. These three sites provide fertile ground for informality. It is these three sites that seem responsible for (1) the divergence between the judicial career and provisional appointments in Colombia, (2) the failure of judicial reforms in Eastern Europe, (3) the growing role of the Federalist Society and the waning role of the ABA in the United States, and (4) the rise of judicial “insiders” in Mexico. On a more prescriptive note, we sketch out a few normative and design features that need to be developed in future scholarship. We argue that differences in informal norms help explain variations in judicial independence across countries, even those with similar formal rules. While informal practices alone do not determine outcomes, certain combinations of informal rules may reliably enhance independence by creating multiple accountability mechanisms and rewarding merit, while others predictably undermine it by enabling political interference or corrupt networks. At the very least,

²⁶⁵ *Id.* at 732.

²⁶⁶ Tsereteli, *supra* note 27, at 189-190.

countries need to plan for informality by seeding the ground for healthy norms to develop around judicial appointments. For example, countries can encourage norm entrepreneurship to influence judicial networks and recruiting efforts. Or they can develop more thorough vetting processes, even if they remain informal.

Appendix A - Methods

To facilitate further research, the appendices to this paper have been published online, and the latest public version is available at: [\[link\]](#).