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Informal Norms in Judicial Selection[†]

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, Ukraine, 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 preselection and vetting, the role of judicial guilds or corporatism, and the involvement of non-

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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.

Keywords: informal norms, judicial selection, judicial independence, vetting, and judicial corporatism

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. 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 are one of the best methods for ensuring judicial independence and competence.³ Overall, the message from decades of studies is straightforward: to achieve an 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 (criticized for inefficiency and corruption) with the the United States (relatively high performing)—while countries with different processes some-

1. See Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103, 103 n.1 (2009) (listing sources, including Richard Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice*, 1990 BYU L. REV. 827; 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); 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 (2004).

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. INST. FOR PEACE (Jan. 2009), https://comparativeconstitutionproject.org/files/judicial_appointments.pdf?5a70b3; Lee Epstein et al., *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7 (2001); Eur. Comm’n for the Democracy Through Law (Venice Comm’n), *Judicial Appointments Opinion No. 403/2006*, CDL-AD(2007)028 (2007), [https://www.venice.coe.int/webforms/documents/?pdf=C-DL-AD\(2007\)028-e](https://www.venice.coe.int/webforms/documents/?pdf=C-DL-AD(2007)028-e).

times 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 and 2018, but by 2021, many informal practices that had long undermined judicial performance and trust in the judiciary remained in place.⁵ Worse still, authoritarian countries, 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 set-up in determining the degree of judicial independence and, even more crucially, the competence of a country's judiciary.⁸ Maria Popova, for instance, 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, except for a few case studies,¹⁰ there is little comparative scholarship on informal norms in 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, lacks a systematic understanding of how norms and informal mechanisms develop, or exactly how informality bleeds into

4. See, e.g., WORLD JUSTICE PROJECT, RULE OF LAW INDEX (2023), <https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIndex2023.pdf>; 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).

5. Maria Popova & Daniel J. Beers, *No Revolution of Dignity for Ukraine's Judges: Judicial Reform After the Euromaidan*, 28 DEMOKRATIZATSIYA 113 (2020).

6. See Rogelio Pérez-Perdomo, *Judicialization and Regime Change: The Venezuelan Supreme Court*, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 133, 133–59 (Rachel Sieder, Line Schjolden & Alan Angell, eds., 2005).

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)*, 79 COLOMBIA INT'L 155 (2013); Popova & Beers, *supra* note 5; see also Bill-Chavez, *supra* note 4.

8. See, e.g., Popova & Beers, *supra* note 5, at 116; David L. Weiden, *Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia*, 64 POL. RSCH. Q. 335, 335 (2011); Paul W. Kahn, *Independence and Responsibility in the Judicial Role*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA 73, 84 (Irwin P. Stotzky ed., 1st ed. 1993); Hubert Smekal, *Informality as a Virtue: Exploring Positive Informal Judicial Institutions*, 24 GER. L.J. 1555 (2023).

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

10. Rebecca Bill-Chavez, Maria Popova, Julio Ríos-Figueroa, and Ana Maria Montoya, among others, have highlighted informal judicial institutions in Argentina, Ukraine, Mexico, and Colombia. See Montoya, *supra* note 7; Popova & Beers, *supra* note 5; Bill-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 INT'L POL. SCI. REV. 647 (2018); see also Santiago Basabe-Serrano, *Informal Institutions and Judicial Independence in Paraguay, 1954–2011*, 37 LAW & POL'Y 350 (2015).

judicial selection.¹¹ Our comparative approach allows us to answer a clear question: How exactly do informal norms influence judicial selection?

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 informal arrangements in Colombia, Mexico, Ukraine, 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 over 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

This 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, it shows that three institutional mechanisms are responsible for most norms in this area: (i) the process of preselection and vetting, (ii) the role of judicial guilds or corporatism, and (iii) the involvement of non-governmental organizations throughout 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 once formal rules prove inconclusive, a focus on informal norms is critical. We identify combinations of informal practices that tend to enhance independence (including norms that create multiple accountability mechanisms), and others that reliably undermine it (e.g., prioritizing 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 defines 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. Consider the following examples:

11. See, e.g., *supra* note 10.

12. [Appendix A](#) describes our interview methodology.

- 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.¹³
- 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.”¹⁴
- Many countries maintain conventions on the representation of minorities in their highest court. In Ireland, for example, it is customary to appoint at least one non-Catholic judge to the Supreme Court, and gender balancing has emerged as a recent norm.¹⁵ In the nineteenth and early twentieth centuries, U.S. politicians followed a norm of regional balancing of Supreme Court justices.¹⁶

The common thread across these examples is the divergence between formal law and the actual practice of judicial appointments. To demonstrate the fragility of formal systems, we gathered data from the Comparative Constitutions Project on every major change to judicial appointments in the past fifty years. Applying statistical methods, we found no evidence of correlation between changes to formal appointment processes and the current measurements of de facto judicial independence within the scope of our models.

Moving beyond common examples, Parts II and III of this Article explore how norms and informal mechanisms manifest in different regimes. Examining processes in Colombia, Mexico, Ukraine, and the United States, we show how informality grows around judicial appointments at all levels of the judiciary, influencing judicial performance. Our main case study is on the Colombian judiciary, which includes some of the world’s most independent and powerful courts.¹⁷ Through our interviews, we found strong norms of judicial independence among judges and lawyers.¹⁸ But Colombian judges have also embraced more questionable informal processes, including a convention that Constitutional Court nominees need to lobby and campaign for the position in the Senate and, in the lower courts, a provisional system dominated by informal judicial networks.¹⁹

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

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

15. Smekal, *supra* note 8, at 1564.

16. See, e.g., William E. Hulbary & Thomas G. Walker, *The Supreme Court Selection Process: Presidential Motivations and Judicial Performance*, 33 WEST. POL. Q. 185, 186 (1980).

17. See, e.g., Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia*, 16 IND. J. GLOB. LEGAL STUD. 173 (2009).

18. Interview with attorneys and academics, Bogotá (Mar. 29-30, 2023).

19. Montoya, *supra* note 7.

While Colombia is our main case study, the other countries serve as shadow case studies complementing our analysis. In both Mexico and Ukraine, 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 “gentlemen’s pact” between the justices gave rise to a system of patronage within the judiciary.²⁰ Similarly, in Ukraine, patronage networks within the judiciary have stalled reforms.²¹ Both Eastern European and Latin American countries have been particularly innovative in the field of judicial reform, engaging in wide-ranging reforms to judicial selection in the 1990s and 2000s. But our discussion of both Mexico and Ukraine is mostly historical and focuses on the judiciaries before recent reforms.²²

Finally, we also include the United States as a useful contrast—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.²³ 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 several informal institutions.

Drawing from these countries, Part IV then offers a typology of sites of informality that seem important in most countries: (i) the pre-selection and vetting of judicial candidates, (ii) the power of judicial guilds or networks, and (iii) the involvement of non-governmental organizations.²⁴ We use the term the “new judicial guilds” to describe the development of a judicial “*esprit de corps* and institutional identity”²⁵ that prioritizes the interests of the judiciary. In the context of judicial recruitment, guilds can be as important as formal rules in protecting judicial independence. But networks can also foster and sustain corruption by promoting the selection of loyalists. These three sites of norms

20. Pozas-Loyo & Ríos-Figueroa, *supra* note 10.

21. Popova & Beers, *supra* note 5, at 124.

22. Alfonso Cortez-Fernandez et al., *Mexico: Constitutional Amendment Introduces Popular Elections for Judicial Positions*, BAKER MC KENZIE INSIGHTPLUS (Sept. 17, 2024), <https://insightplus.bakermckenzie.com/bm/dispute-resolution/mexico-constitutional-amendment-introduces-popular-elections-for-judicial-positions>.

23. ADAM BONICA & MAYA SEN, *THE JUDICIAL TUG OF WAR: HOW LAWYERS, POLITICIANS, AND IDEOLOGICAL INCENTIVES SHAPE THE AMERICAN JUDICIARY* (2021).

24. See, e.g., Denis Preshova, *Informal Constraints and Judicial Councils as Fourth Branch Institutions in the Western Balkans* (European Consortium for Political Research (ECRP), ECRP General Conference, Charles University, 05/09/2023), <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), www.wilsoncenter.org/article/zaldivars-resignation-and-double-edged-sword-judicial-corporatism; Tim Bunjevack, *The Rise of Judicial Self-Governance in the New Millennium*, 44 MELB. U. L. REV. 812 (2021).

25. Ríos-Figueroa, *supra* note 24.

and practices are common to multiple countries, yet not recognized by formal law or explored in the scholarly literature.

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. Rather, our normative take is more nuanced and depends on the specific country and practice.²⁶ 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. Nevertheless, similar informal practices can produce different outcomes depending on factors like the political environment and institutional complementarities, suggesting that informal rules are necessary but not sufficient for achieving judicial excellence.

In Part V.B, we also sketch out a few preliminary research and design principles. We argue that our findings on the relevance of informal norms should contribute to a shift in the focus of comparative law scholarship from formal institutions to a more nuanced understanding of formal and informal levers that truly influence judicial behavior.²⁷

I. FINDING NORMS IN JUDICIAL APPOINTMENTS

We begin by providing an overview of formal versus informal appointment processes. Briefly, formal systems derive from written legal rules and are binding and enforceable. Conversely, informal norms are unwritten, derive from social networks, and are not legally enforceable. In the context of judicial appointments, scholars have not yet appreciated the significance of informal norms.

A. *The Formal System*

To staff judicial systems, countries must establish a reliable and institutional way to select judges. They generally do this through formal systems that are (i) written, (ii) binding, and (iii) enforced through official channels. Formal systems are written in a constitution or statutes that must be followed to appoint judges. Those rules are public, widely accessible, 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 law of standing,

²⁶. We understand that Hubert Smekal recently made a very similar argument. See Smekal, *supra* note 8, at 1555.

²⁷. This argument aligns with scholarship evaluating the null effects of formal political or constitutional reforms on democracy and rule-of-law outcomes. See, e.g., ADAM CHILTON & MILA VERSTEEG, *HOW CONSTITUTIONAL RIGHTS MATTER* (2020).

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.”²⁸ Tom Ginsburg has identified four approaches to judicial appointments: (i) by political institutions, (ii) by a judicial council, (iii) by the judiciary itself, or (iv) by an electoral system.²⁹ One common approach is to empower the political branches—usually allowing the executive to nominate and the legislature to confirm an appointee. Conversely, a more recent but increasingly common framework involves empowering 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.³⁰ However, despite the popularity of judicial councils, “they do not by themselves guarantee the substantive outputs of independence and quality.”³¹ But many countries do not 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 that the formal method of appointment does not determine the actual performance of judiciaries.

First, countries with similar appointment processes have widely divergent judicial outcomes.³² Second, the obverse is also true: countries with different processes 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, the Netherlands, Canada, Australia) employ a mix of appointment systems for their high

28. See Garoupa & 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).

29. See Garoupa & Ginsburg, *supra* note 1.

30. *Id.*

31. See Garoupa & Ginsburg, *supra* note 1, at 105.

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

courts.³³ Third, adopting the standard package of reforms can have little to no effect on judicial performance.³⁴ As we explore below, Ukraine adopted every best practice in the book in the 2010s, yet it maintained corruption and weak judicial performance.³⁵ 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.³⁶ Fourth, some of the most corrupt countries have excellent written rules for appointments, yet informal practices dominate.³⁷

To explore the weakness of formal systems, we gathered data from the Comparative Constitutions Project (CCP)³⁸ on every major change to judicial appointments around the world between 1960 and 2012.³⁹ Specifically, we worked with two sets of judicial reforms. Group 1 included reforms that enhanced judicial self-governance by (i) adding, (ii) increasing, or (iii) concentrating the authority to nominate and/or approve justices for the highest ordinary court on the judiciary or judicial council.⁴⁰ Nine constitutions 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).⁴¹ Group 2 comprised reforms that

33. See, e.g., WORLD JUST. PROJECT, RULE OF LAW INDEX 2023, <https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIndex2023.pdf> (last visited May 31, 2024).

34. 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, 348–50 (Erik G. Jensen ed., 2003).

35. 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 GER. L.J. 1257 (2014).

36. Bobek & Kosař, *supra* note 35, at 1282.

37. See Bobek & Kosař, *supra* note 35 (discussing how judicial councils produced problematic outcomes in transitional settings); Rogelio Pérez-Perdomo, *supra* note 6, at 131–59 (discussing corruption in the Venezuelan judiciary).

38. Elkins, Zachary & Tom Ginsburg, 2022 “*Characteristics of National Constitutions, Version 4.0*,” COMPAR. CONST. PROJECT, <https://comparativeconstitutionsproject.org> (last modified: Oct. 24, 2022).

39. We used two key variables from the CCP dataset—*SUPNOM* and *SUPAP*—on authorities responsible for nominating and approving justices to the highest ordinary court. We recoded them into two categorical variables with 13 institutional arrangements (e.g., Executive, Legislative, Judicial Council, Lawyers, Universities, Electoral college and combinations thereof). We manually reviewed constitutions originally coded as “other” (none of the previous categories) and recoded accordingly. To track changes in judicial selection, we compared consecutive country-year observations and flagged the shifts using an indicator. To capture more complex changes (e.g., shifts involving nomination and approval), we create a specific variable. We also identified and excluded linguistic changes to avoid misinterpreting superficial adjustments as substantive reforms. Finally, we consolidated all substantive reforms into a new variable. See [Appendix A](#) for further details.

40. We first identified sixty-nine potentially relevant reforms that occurred between 1960 and 2012. We then reviewed all to ensure they met five requirements: (i) ten years before and after stability, (ii) complete data on all covariates, (ii) no overlapping of reforms, (iv) not enacted under provisional or interim constitutions, and (v) a preestablished judicial selection system. See further [Appendix A](#).

41. Most countries initially concentrated the selection process in the Executive. Colombia and Benin were exceptions with the legislature playing a role in the process. These reforms shifted the nomination authority to judicial council and maintained the approval power on the executive or legislative branches.

concentrated the power to nominate and/or approve candidates for the highest ordinary court in the political branches. Four constitutions implemented these changes and stayed in place for at least ten years: Finland (1999), the Netherlands (2002), Trinidad and Tobago (1976), and Zambia (1991).

As our outcome variable, we used a modified version of Linzer and Staton's (2015) indicator, a composite metric that combines eight other measurements of de facto judicial independence.⁴² We specifically excluded Cingranelli and Richards's measurement from the original metric to avoid endogeneity, as it attributed higher scores to countries where the Executive had no power to appoint justices.⁴³

Drawing on Adam Chilton and Mila Versteeg's work,⁴⁴ we used two research designs: two-way fixed effects (TWFE) regressions and a stacked event study. The latter allowed us to build better counterfactuals and 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.⁴⁵

For each approach, we 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.⁴⁶ 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. Each treated country, however, 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. On average, we identified thirty-two control countries for each treated constitution, including those that enhanced judicial self-governance (treatment group 1) and those that concentrated the selection process in the political branches (treatment group 2).

The Appendix reports our findings in detail. Briefly, [Table 1](#) shows that Models 1 and 2 of the TWFE regressions identified evidence of a statistically significant association at the 10% level be-

42. Drew A. Linzer & Jeffrey K. Staton, *A Global Measure of Judicial Independence, 1948–2012*, 3 J. LAW & CT. 223 (2015).

43. See [Appendix A](#).

44. CHILTON & VERSTEEG, *supra* note 27; Adam Chilton & Mila Versteeg, *The Effect of Constitutional Gender Equality Clauses*, 51 J. LEGAL STUD. 329 (2022).

45. See Andrew C. Baker, David F. Larcker & Charles C.Y. Wang, *How Much Should We Trust Staggered Difference-in-Differences Estimates?* (Harv. Bus. Sch., Working Paper No. 21-112, 2021), www.hbs.edu/ris/Publication%20Files/21-112_8a5a4ab3-b9e7-447d-a0fe-a504b3890fb9.pdf (arguing that difference-in-differences estimates in staggered event study settings may be biased).

46. To identify the control group, we also disregarded provisional, interim, reinstated, and suspended constitutions and considered the availability of data for the outcome and control variables. See [Appendix A](#).

TABLE 1. TWFE OLS REGRESSIONS (TEN YEARS BEFORE AND AFTER).

	Judicial Self-Governance Reforms			Political Appointment Reforms		
	Model 1	Model 2	Model 3	Model 1	Model 2	Model 3
Treatment	0.093*	0.100*	0.019	0.072	0.078	0.044
	(0.050)	(0.051)	(0.034)	(0.066)	(0.072)	(0.051)
Log GDP Per Capita		0.026	0.037***		0.049**	0.040***
		(0.019)	(0.011)		(0.025)	(0.011)
Log Population		0.001	−0.008		−0.006	−0.042
		(0.090)	(0.067)		(0.082)	(0.066)
Political Regime			0.564***			0.558***
			(0.057)			(0.056)
Observations	1,319	1,319	1,319	1,575	1,575	1,575
R2	0.925	0.926	0.954	0.926	0.929	0.954
R2 Within	0.045	0.058	0.418	0.011	0.058	0.389
R2 Within Adjusted	0.044	0.055	0.416	0.010	0.056	0.387

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

Note: This table reports the TWFE OLS regressions for Linzer and Staton’s modified indicator of de facto judicial independence. They include fixed effects at country and year levels, ensuring that the analyses focus on within-country variations and controls for time-invariant characteristics and common shocks. Standard errors, clustered by country, are reported in parentheses.

tween 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 adjusted within R-squared value, which indicates a better fit, omitted variable bias may have driven the initial significance of Model 2. Table 2 and Figure 1 report the findings of the stacked event study design. This approach also did not identify a statistically significant association between either set of reforms and the outcome variable. In summary, all models and research designs show no evidence of 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 within their scope.

To assess whether the statistically insignificant results indicated truly negligible effects, we used Rainey’s “two one-sided” test.⁴⁷ Following Cohen’s guidelines⁴⁸ and Chilton and Versteeg’s approach, we

47. Carlisle Rainey, *Arguing for a Negligible Effect*, 58 MIDWEST POL. SCI. ASS’N 1083 (2014).

48. JACOB COHEN, *STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES* (1988); see also Chilton & Versteeg, *supra* note 44.

TABLE 2. STACKED EVENT STUDY (TEN YEARS BEFORE AND AFTER).

	Judicial Self-governance Reforms			Political Appointment Reforms		
	Model 1	Model 2	Model 3	Model 1	Model 2	Model 3
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	0.961	0.961	0.961
R2 Within	0.335	0.335	0.336	0.403	0.403	0.408
R2 Within Adjusted	0.335	0.335	0.336	0.402	0.402	0.406

*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 country, year, and treatment levels, but the small sample size of political appointment reforms causes 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. Results for judicial self-governance reforms remain consistent across Models 2 and 3, suggesting the simplification does not affect the estimates significantly.

defined negligible correlations as those between -0.2 and $+0.2$ standard deviations of the outcome variable.⁴⁹ In TWFE regressions, Models 1 and 2 showed non-negligible associations for both groups. Model 3, which controlled for political regime, approached the negligible threshold. The stacked event study consistently indicated negligible relationships across all models.⁵⁰ Overall, these results suggest that our models rule out the possibility of a large association between both groups of reforms and de facto judicial independence.

While our study did not identify evidence of a statistically significant correlation between the considered judicial selection reforms and

49. Chilton & Versteeg, *supra* note 44.
50. See Appendix A, Figures A.3, A.6.

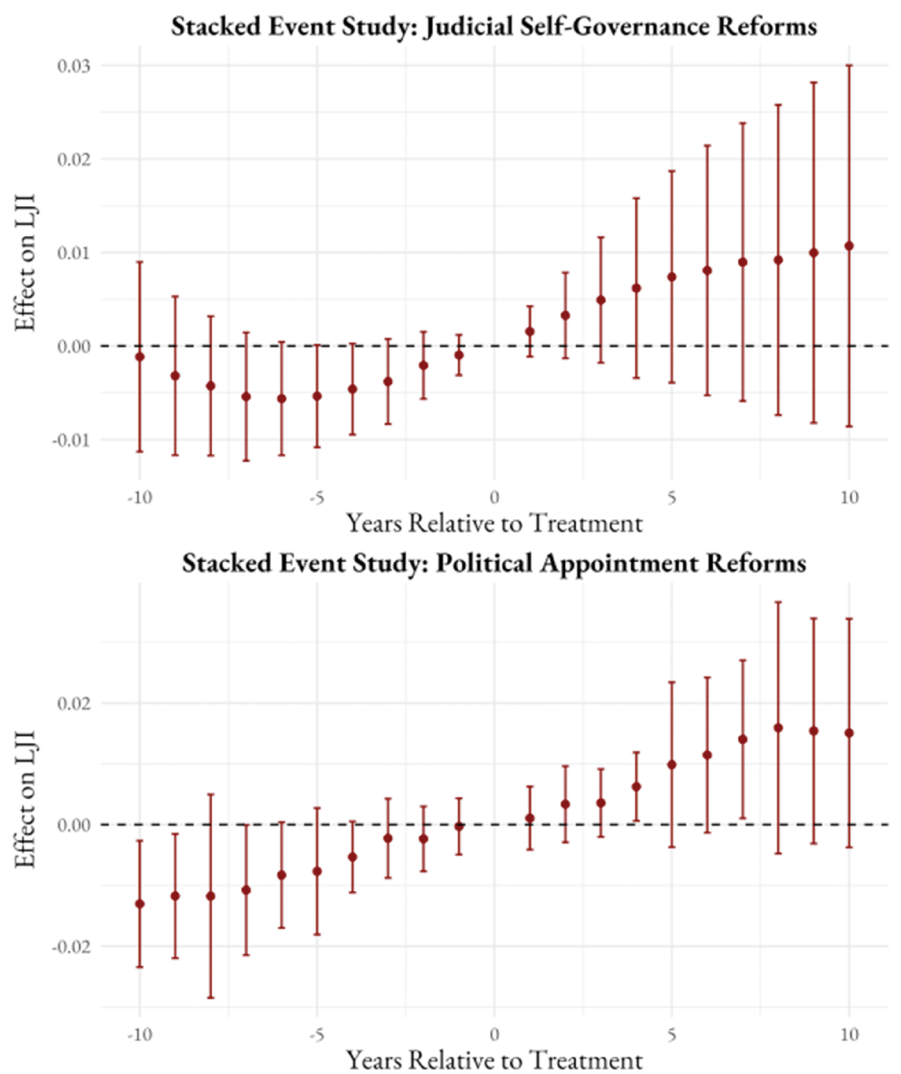


FIGURE 1. STACKED EVENT STUDY ESTIMATES BY TREATMENT TIME (TEN-YEAR EVENT WINDOW).

Note: These graphs present stacked event study estimates (Table 2, Model 3). While the x-axis represents years relative to the reform, with zero indicating the year of implementation, the y-axis shows the estimated change in de facto judicial independence for each period within the event window. Each point represents the coefficient estimate for a given event time, and the vertical lines indicate 95% confidence intervals. Pre-treatment estimates are close to zero, suggesting no strong pre-trends, while post-treatment estimates show an upward trend, particularly for self-governance reforms. The widening confidence intervals over time indicate increasing uncertainty in later years.

the outcome variable, we do not interpret these findings as evidence of no causal relationship. This limitation arises from (i) the observational nature of this study, (ii) the potential existence of unobserved confounders, and (iii) 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.⁵¹ We encourage further research to establish causality, considering the potential for heterogeneous treatment effects across countries and over time.

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.”⁵² 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, which can be more efficient than formal legal rules when it comes to dispute resolution.⁵³ Similarly, Stewart Macaulay revealed how businesses frequently rely on informal norms rather than formal contracts to regulate their relationships.⁵⁴ In a study of how communities manage shared resources, Elinor Ostrom emphasized the need for theories that explain how groups create their norms.⁵⁵ Policy prescriptions can produce unexpected outcomes when applied to different contexts, justifying the need for empirical research into how groups behave.⁵⁶ 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.

51. See, e.g., Andrew C. Baker, David F. Larcker, Charles C.Y. Wang, *How Much Should We Trust Staggered Difference-in-Differences Estimates*, 144 J. FIN. ECON. 370 (2022); Kirill Borusyak, Xavier Jaravel & Jann Spiess, *Revisiting Event-Study Designs: Robust and Efficient Estimation*, 91 REV. ECON. STUD. 3253 (2024).

52. Gretchen Helmke & Steven Levitsky, *Introduction*, in INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA 1, 5 (Gretchen Helmke & Steven Levitsky eds., 2006).

53. Robert Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986).

54. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55 (1963).

55. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 22 (2015).

56. *Id.* at 23–25.

1. Informal norms emerge from social interactions

In the judicial appointment context, norms emerge from arrangements among politicians, executive officials, legislators, and other political players.⁵⁷ 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 whereby each political party selects “its” justice.⁵⁸ This agreement comes solely from political leaders, not the law.

Notice that one key goal of norms is to “structure the behavior of a group of people,” mostly judges, lawyers, and political actors.⁵⁹ 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.”⁶⁰ Far from emerging from diffuse social norms, however, these norms result from what Robert Ellickson identifies as “purposive actions of discrete individuals.”⁶¹ 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.”⁶² The literature also identifies these actors as “norms entrepreneurs.”⁶³ The German example illustrates this dynamic: politically connected leaders with deep institutional knowledge and clear incentives crafted the appointment-sharing arrangement.

2. Informal norms are 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 in 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 preexistence.”⁶⁴

57. Cf. Helmke & Levitsky, *supra* note 52, at 18–19.

58. Kischel, *supra* note 14.

59. Diego A. Zambrano, *The Unwritten Norms of Civil Procedure*, 118 Nw. U. L. REV. 853, 867 (2024).

60. *Id.* at 867.

61. Robert Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1, 2 (2001).

62. *Id.*

63. See, e.g., ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2d ed. 2002).

64. Zambrano, *supra* note 59, 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).

3. Informal norms are 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.”⁶⁵ For them, “informal institutions must be enforced in some fashion”;⁶⁶ there must be sanctions for noncompliance. 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 rational self-interest to reinforce the norm.⁶⁷ 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.⁶⁸

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.⁶⁹

4. Informal norms persist over time

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.⁷⁰ Yet norms can also persist without internalization when informal sanctions create sufficient incentives for compliance.⁷¹

65. Helmke & Levitsky, *supra* note 52, at 1, 5.

66. *Id.* at 5.

67. POSNER, *supra* note 63, at 7–8.

68. Ellickson, *supra* note 61, at 3.

69. There appear to be no German statutes or potential claims that regulate the matter.

70. Ellickson, *supra* note 61, at 3.

71. *Id.*

5. Informal norms present multiple roles in the selection process

As we will explore below, informal norms play multiple roles in judicial appointment processes. 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.”⁷² Invariably, system designers cannot plan for every contingency. That is when norms step in.

Other common roles include the coordination of political actors, substitution for 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.”⁷³ 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.”⁷⁴

Relatedly, some informal norms may qualify as “conventions,” a term with deep roots in constitutional theory.⁷⁵ 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.”⁷⁶ More recent commentators have highlighted that constitutional conventions are not directly enforceable by courts, yet legal actors often treat them as binding and can cite them as a rule.⁷⁷ The informal norms we discuss here are a broader category, encompassing any unwritten, socially shared practice that shapes judicial selection.⁷⁸ 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 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. They may simply be entrenched prac-

72. Katarína Šipulová & David Kosař, *Decay or Erosion? The Role of Informal Institutions in Challenges Faced by Democratic Judiciaries*, 24 GER. L.J. 1577, 1587 (2023).

73. Helmke & Levitsky, *supra* note 52, at 1, 19–20.

74. *Id.* at 21.

75. Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CAL. 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 LAW Q. REV. 218, 228 (1975).

76. Vermeule, *supra* note 75, at 1182. For 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* (2015), www.biicl.org/documents/689_bingham_centre_compendium.pdf.

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

78. See Issacharoff & Morrison, *supra* note 75.

tices, lacking the internal sense of duty that characterizes conventions.⁷⁹ Some informal norms, then, 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 are not constitutional.

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

- i. Are behaviors consistent with the proposed informal institution observed?
- ii. Do people describe those behaviors in terms of a rule of conduct?
- iii. Is there evidence that relevant actors understand the rule, foresee consequences of breaking it, and adjust their behavior accordingly?
- iv. Are deviations from the prescribed behaviors punishable and punished by other relevant social actors?
- v. Is the behavior in question observed and not punished by officials in charge of sanctioning it?⁸⁰

The upshot is that one cannot begin to understand judicial appointments without considering norms. As Helmke and Levitsky have previously argued, informal norms sometimes reinforce, sustain, and complement formal democratic institutions, and at other times, they subvert or suspend them.⁸¹ However, 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.

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 to the Supreme Court.

79. Ahmed, Albert & Perry, *supra* note 77.

80. Pozas-Loyo & Ríos-Figueroa, *supra* note 10, at 649, quoting Daniel M. Brinks, *The Rule of (Non) Law: Prosecuting Police Killings in Brazil and Argentina*, in *INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA* 201, 202-208 (Gretchen Helmke & Steven Levitsky eds., 2006).

81. Helmke & Levitsky, *supra* note 52, at 1, 2-3.

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: (i) the Constitutional Court, (ii) the co-optation mechanism for the other high courts (Supreme Court, Council of State, and the Superior Council of the Judiciary), and (iii) a judicial career for lower courts.

1. The Constitutional Court

Let us begin with the well-known case of the Constitutional Court, one of the most independent high courts in the world.⁸² The Constitutional Court is composed of nine justices serving nonrenewable eight-year tenures, fostering a sense that they are “to some extent, beyond the regular justices of the other Courts.”⁸³ Under the Colombian Constitution, the Supreme Court, the Council of State, and the President nominate magistrates of the Constitutional Court in groups of three (*terna*), with the Senate confirming one nominee.⁸⁴ For any single vacancy, only one nominating authority (i.e., the high courts or the President) submits 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.⁸⁵

This system has successfully produced a high degree of judicial independence. As recently discussed, the Court’s structural independence and constitutional authority allowed it to establish a strong reputation for defending human rights, limiting presidential authority, and protecting minority rights.⁸⁶ Despite its successes, some scholars argue that the current model places too much emphasis on “judicial adjudication and political discretionary powers.”⁸⁷

82. See, e.g., Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Columbia*, 16 IND. J. GLOB. LEG. STUD. 173 (2009).

83. Diego Andres Gonzalez, *The Colombia Constitutional Court: Building Legitimacy in its First Period* (U. EXTERNADO 2019).

84. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 239; L. 270/1996, Marzo 07, 1996, Diario Oficial [D.O.] (Colomb.), art. 44.

85. 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 83.

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

87. Everaldo Lamprea, *When Accountability Meets Judicial Independence: A Case Study of the Colombian Constitutional Court’s Nominations*, 10 GLOB. JURIST (2010).

2. The Other High Courts

The Constitution establishes 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).⁸⁸ The Supreme Court and Council of State both employ a co-optation mechanism in which the magistrates themselves select their successors. More specifically, when a vacancy in the twenty-three-person Supreme Court or thirty-one-person Council of State arises, the Superior Council publicly announces the opening of a selection process, shortlists fifteen to thirty candidates, and invites public comments. After interviewing all candidates, it submits the final list to the relevant high court. The justices then deliberate privately and elect a candidate by secret ballot, requiring a two-thirds majority for appointment.⁸⁹ As for the Superior Council, the Supreme Court, Council of State, and Constitutional Court appoint their justices (three, two, and one, respectively).⁹⁰

3. The Lower Courts and the Judicial Career

Following this model, Colombia employs a career system for lower court judges. The selection system, known as *curso-concurso*, combines merit-based examinations and required classes from the Judicial School (*Escuela Judicial Rodrigo Lara Bonilla*),⁹¹ with the Superior Council administering it entirely.⁹²

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; instead, it is used to classify them 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 with assured tenure. From this point onward,

88. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] ART. 254.

89. *Magistrados de la Corte Suprema de Justicia*, ELECCIÓN TRANSPARENTE, <https://cej.org.co/eleccion-transparente/corte-suprema-de-justicia/proceso-de-eleccion> (last visited Sept. 19, 2025).

90. *Id.*

91. L. 270/1996, Marzo 07, 1996, Diario Oficial [D.O.] (Colomb.), art. 176.

92. *Id.* (placing Colombia’s Judicial Academy under the Administrative Chamber of the Superior Council of the Judiciary).

Colombian statutes only vaguely provide for promotions.⁹³ Overall, the UN Special Rapporteur for Judicial Independence concluded that this process is “generally objective [and free from] external interference,” and the career stability safeguards judges’ independence and impartiality.⁹⁴

In addition to 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.⁹⁵

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.

1. Preselection 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 the Constitutional Court, the Supreme Court, and the Council of State, as well as for the President, each actor develops their own private system. At the Supreme Court and Council of State levels, the Superior Council shortlists fifteen to thirty candidates and calls for public comments.⁹⁶ Yet these processes are not only nonpublic—they are inevitably opaque.

The Superior Council’s preselection power creates an opening for many informal practices. For example, one interviewee described a *quid pro quo* dynamic between the Superior Council and the Council of State.⁹⁷ Because both institutions play a role in the selection of

93. One statute specifically allows promotions “as dictated by the service” or “the requirements of the service.” L. 270/1996, Marzo 07, 1996, Diario Oficial [D.O.] (Colomb.), art. 134.4.

94. U.N. HUMAN RIGHTS COUNCIL, GABRIELA CARINA KNAUL ALBUQUERQUE E SILVA, REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS: ADDENDUM—MISSION TO COLOMBIA, U.N. Doc. A/HRC/14/26/Add.2 (Apr. 16, 2010), <https://digitallibrary.un.org/record/681973?ln=en&v=pdf>.

95. L. 270/1996, Marzo 07, 1996, Diario Oficial [D.O.] (Colomb.), art. 132.

96. *Magistrados de la Corte Suprema de Justicia*, *supra* note 89.

97. Interview with scholar n. 19, Bogotá (Mar. 29, 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 . . .”).

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 preselection list, a candidate needs to have supporters in the Council of State lobbying for them. Critics, therefore, argue 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.”⁹⁸ 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 responsible for disciplining judges for violations of judicial ethics or illegal acts. Some note that the preselection power undermines the Council’s legitimacy as a disciplinary authority.⁹⁹ 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.”¹⁰⁰ 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 a lack of transparency in the selection of candidates.”¹⁰¹

Overall, 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.

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 judicial independence has been rare in Latin America.¹⁰² In fact, most interviewees 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

98. Interview with lawyer n. 27, Bogotá (Mar. 30, 2023).

99. *Id.*

100. Global Trends in Judicial Reform Policy Practicum, Colombia Field Study Trip Report 21 (2023) (unpublished manuscript) (one file with authors).

101. U.N. HUMAN RIGHTS COUNCIL, *supra* note 94.

102. David G. Becker, *Latin America: Beyond “Democratic Consolidation,”* 10 J. DEMOCRACY 138 (1999).

to attribute all of it to the formal rules of the 1991 Constitution, given that—unlike with the other high courts—the 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, across the judiciary, a strong sense of independence from the executive has taken root.

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 stems from their common interests and backgrounds, likely fostered through judicial conferences, shared career experiences, similar law school backgrounds, and common concerns within the judiciary (e.g., salaries). Importantly, this identity leads to a strong rejection of any interference in the judiciary by the executive branch. 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.¹⁰³ Colombian magistrates and lawyers repeatedly emphasized that judges close ranks and protect each other from outside political pressure.¹⁰⁴

Second, there is a norm against political party affiliations among high court justices. Even for Constitutional Court's justices selected by the President, interviewees mentioned that "justices go out of their way to be ungrateful to the president who appointed them."¹⁰⁵ This seems to demonstrate a strong informal norm of judicial independence, given that judges expect each other to perform—or at least 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."¹⁰⁶ But they asserted that they "do not receive pressure[] from [the senators] who elected them."¹⁰⁷ Supporting this claim, another magistrate pointed to the Courts' track record of maintaining judicial independence in the face of extreme political pressure. According to this magistrate, the Court's decision to decriminalize abortion illustrates this point, given the significant pressure from the President.¹⁰⁸

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

^{103.} Interview with Higher Court justice n. 30, Bogotá (Mar. 30, 2023), Interview with Constitutional Court justice n. 2, Bogotá (March 27, 2023) and Interview with Lawyer n. 28, Bogotá (March 30, 2023).

^{104.} *Id.*

^{105.} Interview with Constitutional Court magistrate n. 8, Bogotá (Mar. 28, 2023).

^{106.} Interview with Constitutional Court magistrate n. 2, Bogotá (Mar. 27, 2023).

^{107.} *Id.*

^{108.} Interview with Constitutional Court magistrate n. 8, Bogotá (Mar. 28, 2023).

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

While interviewees 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 consider the political consequences of their decisions. Many see this as highly inappropriate and an unfortunate consequence of the 1991 Constitution. Others disagree and view it as an appropriate part of the role. In particular, 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.”¹⁰⁹ Some interviewed 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 consider the give-and-take of politics, legislative preferences, and similar concerns. Still, the contrast between co-optation at the high courts and the judicial career generates accusations of politicization and lack of competence. Some interviewed 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].”¹¹⁰

Despite these claims, the background and credentials of most Constitutional Court magistrates demonstrate a high degree of preparation and apparent competence. One interviewee argued that a public competition would be “superfluous” for Constitutional Court candidates because they are “accredited” by their “life record.”¹¹¹ In that vein, a participant 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.”¹¹² 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.”¹¹³

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 preselection process. According to some

¹⁰⁹. Interview with Circuit Court judge n. 11, Bogotá (Mar. 28, 2023).

¹¹⁰. *Id.*

¹¹¹. Interview with Superior Judicial Council magistrate n. 23, Bogotá (Mar. 29, 2023).

¹¹². Interview with Circuit Court judge n. 11, Bogotá (Mar. 28, 2023).

¹¹³. *Id.*

judges and scholars, the Superior Council considers 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:

In 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.¹¹⁴

But that coalition broke up after 2010, and there has not been a similar effort to systematically influence selections. One interviewee mentioned that the coalition broke up because of disagreements over judicial candidates.¹¹⁵

5. The Role of Judicial Networking

One major area of agreement among nearly all interviewed lawyers, judges, and scholars is that judicial networks and personal relationships within the judiciary influence the appointment of judges. Some participants claim that the Supreme Court and Council of State give preference to personal acquaintances within the judiciary. One participant, 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.”¹¹⁶ 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 is not at all clear that the current process feeds corruption—many systems around the world depend on appellate judges evaluating the performance of lower court judges.

Still, many participants agree that judicial clientelist networks exist, for good or ill. A few interviewees noted that municipal judges are

114. JAN VAN ZYL SMIT, JUDICIAL INDEPENDENCE IN LATIN AMERICA: THE IMPLICATIONS OF TENURE AND APPOINTMENT PROCESSES 24 (2016), <https://binghamcentre.biicl.org/publications/judicial-independence-in-latin-america>.

115. Interview with Panel of NGO representatives and scholars, Bogotá (Mar. 29, 2023), Interview with Constitutional Court Justice n. 4, Bogotá (Mar. 27, 2023), and Interview with Scholar n. 18, Bogotá (Mar. 29, 2023).

116. Interview with scholar n. 19, Bogotá (Mar. 29, 2023).

evaluated by the circuit judges sitting above them, and “promotions are dependent on [their] ability to establish relationships with them.”¹¹⁷ Reflecting this concern, one interviewee noted that “a lower judge does not want to contradict his superior, because the superior is the one who is going to evaluate him.”¹¹⁸ This interviewee added that, as a result, judges may prioritize “keeping their position” over the “quality of their ruling.”¹¹⁹

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.”¹²⁰

Interviews suggested that students from top Colombian universities prefer to join law firms rather than the lower courts. One participant, in particular, said that “students from universities that are ranked in the top five or top ten do not want to enter the judicial service.”¹²¹ Another participant explained that students “don’t think the judiciary has the prestige or the reputation that should be associated with [their] own name.”¹²² Instead, these top students would rather become magistrates or law firm attorneys than “municipal judges.”¹²³ Along these same lines, another interviewee explained that the judicial exam “is not a competition among the best students,” but rather a competition “among those who present themselves.”¹²⁴

One exception to the lack of prestige in the judiciary is the position of clerking for the Constitutional Court. Almost all interviewees 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.¹²⁵ Even more, many Constitutional Court clerks are themselves interested in becoming magistrates of the Court. They view clerking for the Court as a stepping stone to serving on it.

117. Interview with lawyer n. 29, Bogotá (Mar. 30, 2023).

118. Interview with scholar n. 19, Bogotá (Mar. 29, 2023).

119. *Id.*

120. Mohan Gopal, *Development and Implementation of Reform Initiatives to Ensure Effective Judiciaries*, in *SEARCHING FOR SUCCESS IN JUDICIAL REFORM: VOICES FROM THE ASIA PACIFIC EXPERIENCE* 44, 62 (2009).

121. Interview with lawyer n. 28, Bogotá (Mar. 30, 2023).

122. *Id.*

123. Interview with scholar n. 19, Bogotá (Mar. 29, 2023).

124. Interview with Constitutional Court magistrate n. 4, Bogotá (Mar. 27, 2023).

125. Interview with Constitutional Court Justice n. 2, Bogotá (Mar. 27, 2023).

Despite all of this, interviewees generally agreed that both judges and magistrates are competent except for some “isolated cases [of] bad apples.”¹²⁶

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

In theory, Colombia’s merit-based judicial career system promotes judicial competence and independence by prioritizing aptitude rather than professional connections, which aligns with international best practices. Moreover, its reliance on an exam makes the system relatively inclusive.¹²⁷

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 results in a significant amount of litigation, delaying the selection process for several years. The ease of filing a legal claim means that applicants challenge nearly every aspect of the exam: questions, 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 seven years, with the last successful competition taking place in 2018.¹²⁸ These delays are not uncommon. As explained by one participant, “since 1998 [], no competition has taken less than five years to become final.”¹²⁹ This is surprising because the exam is supposed to occur every two years.

While examinations are paused, the system turns to provisional appointments. As discussed above, Colombian law allows them under specific 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.¹³⁰ Second, there is no formal appointment pro-

126. Interview with Constitutional Court magistrate n. 2, Bogotá (Mar. 27, 2023).

127. Interview with scholar, Bogotá (Mar. 29, 2023).

128. Interview with lawyer, Bogotá (Mar. 30, 2023).

129. Interview with NGO representative n. 20, Bogotá (Mar. 29, 2023).

130. SMT, *supra* note 114.

cess for provisionals with the relevant statute providing 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.”¹³¹ As a result, the system is mostly informal and dominated by the judicial networks and patronage. One participant noted that judges who are appointed on a “provisional basis are our friends” and are “appointed by hand.”¹³² 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.”¹³³ Others, however, defended the competence of 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.¹³⁴ One participant 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.”¹³⁵ Another interviewee 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.”¹³⁶ They 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.”¹³⁷

Stepping back and comparing the formal and informal systems shows that informality seeps into judicial appointments in several different ways—through vague preselection processes, the influence of judicial networks, and the breakdown of formal appointments due to external circumstances. Table 3 summarizes the contrast between the formal and informal systems in Colombia.

III. SHADOW CASE STUDIES: MEXICO, THE UNITED STATES, AND UKRAINE

With the Colombian case in mind, this Part explores 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. We selected these countries because they present contrasting appointment systems that nonetheless seem influenced by the same forces as in Colombia: judicial networks, the preselection of candidates, and external pressures from NGOs.

131. L. 270/1996, Marzo 07, 1996, Diario Oficial [D.O.] (Colomb.), art. 132.

132. Interview with Circuit Court judge n. 11, Bogotá (Mar. 28, 2023).

133. Interview with Constitutional Court magistrate n. 4, Bogotá (Mar. 27, 2023).

134. Interview with Circuit Court judge n. 11, Bogotá (Mar. 28, 2023).

135. Interview with Municipal Court judge n. 03, Bogotá (Mar. 27, 2023).

136. Interview with Circuit Court judge n. 11, Bogotá (Mar. 28, 2023).

137. Interview with NGO representative n. 17, Bogotá (Mar. 29, 2023).

TABLE 3. 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 preselects 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 preselection 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.
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.

We attempted to avoid cherry-picking by selecting: (i) the largest Latin American country (Mexico), with an established democracy that is culturally comparable to Colombia but with a different judicial appointment process; (ii) a country that is culturally distant from Colombia but has experienced recent and intense judicial reforms, mostly to its formal systems (Ukraine); and (iii) 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 its 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 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.¹³⁸

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. That system continued until 2024 for the highest court in the country, the Suprema Corte de Justicia de la Nación, the final arbiter on all ordinary or constitutional matters.¹³⁹ Before 2024, the Constitution required the president to shortlist three candidates, with the Senate approving one by a two-thirds vote. The Senate's role, however, has always been *pro forma*. By all accounts, the court 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. As for 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.”¹⁴⁰ 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 protégés within the judiciary. Those justices, in consultation with their *corrales*, decided on judicial appointments throughout the judiciary.¹⁴¹ 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. They 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

138. As noted in the Introduction, the Mexican Congress recently turned the whole system over to elections. Discussing that change is beyond the scope of this Article.

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

140. Pozas-Loyo & Ríos-Figueroa, *supra* note 10.

141. *Id.* at 650.

the corporation.”¹⁴² 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 García Mirón concludes, “quickly 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.”¹⁴³ 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.¹⁴⁴

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 deeply divided between “insiders” (justices who joined the court from the judicial career, as it was molded by the “Gentlemen’s Pact”) and “outsiders” (justices without significant prior experience within the judiciary). This division does not map neatly onto party lines, but it is the primary fault line between justices on many important matters.¹⁴⁵ This includes the process of appointing the president of the Supreme Court, who is chosen by secret

¹⁴² Julio Ríos-Figueroa, *The Double-Edged Sword of Bureaucratic Autonomy and Judicial Corporatism* (Paper presented at the Stanford Rule of Law Roundtable, Stanford Law School, June 14, 2024) (on file with authors).

¹⁴³ Rolando García Miron, *The Construction of a Constitutional Court in an Emerging Democracy: The Mexican Supreme Court (1994–2018)*, 109 (2023) (Ph.D. Dissertation, Stanford University), <https://searchworks.stanford.edu/view/in00000033515>.

¹⁴⁴ See JOSÉ RAMÓN COSSÍO DÍAZ, *JURISDICCIÓN FEDERAL Y CARRERA JUDICIAL EN MÉXICO* (1996); Pozas-Loyo & Ríos-Figueroa, *supra* note 10.

¹⁴⁵ Ríos-Figueroa, *supra* note 142.

ballot from among the current justices in an election that is always divided between “insiders” and “outsiders.”¹⁴⁶

B. The U.S. Supreme Court: The White House Preselection Process, Senate Judiciary Vetting, and the American Bar Association

The United States federal judiciary is puzzling—by all accounts, it retains a high degree of competence, prestige, and independence. But, surprisingly, it follows the antiquated presidential appointment plus senatorial confirmation mix.¹⁴⁷ This exact system has failed to produce judicial independence or high competence in many other countries. What seems most relevant about the United States is the set of norms underlying judicial selections and judicial independence. American judicial appointments thus present a good case study of norms in judicial appointments.

Before diving into informality, let us first acknowledge that the U.S. system is highly formal. That is, 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 defects in the appointment process. Even more notably, 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.¹⁴⁸ Finally, until the 2010s, the Senate adhered to a rule—derived from the filibuster—that a supermajority of sixty senators had to approve every judicial nominee. As discussed above, this system has produced a high-quality judiciary by most measures.

Yet, even in a highly formal judicial appointment process like that of the United States, informal norms have thrived in the preselection process of nominees.

1. White House Preselection

Every presidential administration is different, but most judicial appointments have followed a common preselection process. Historically, presidents relied on the Department of Justice or offices within the White House to create preselection 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

¹⁴⁶. Miron, *supra* note 143, at 151, 156.

¹⁴⁷. U.S. CONST. art. 3.

¹⁴⁸. See Denning, *supra* note 13.

the vacancy exists.”¹⁴⁹ 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.”¹⁵⁰ Following a recommendation from the DOJ, White House officials would then consider the political consequences. Some scholars have described this process as governed by internal “norms” within the executive branch.¹⁵¹

More recent presidents, however, have departed from these 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.”¹⁵² But President Reagan rejected this approach and “shifted the selection focus . . . to the Office of Legal Policy,” as well as to “the President’s Committee on Federal Judicial Selection,” a group composed of the attorney general, chief of staff, and other political advisers, along with top Justice Department (DOJ) officials.¹⁵³ President George W. Bush continued this move away from the DOJ, 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.”¹⁵⁴ President Barack Obama continued this trend by giving the White House Counsel’s Office the “primary responsibility for compiling a list of prospective judicial candidates” and “for vetting those candidates.”¹⁵⁵ President Donald J. 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.”¹⁵⁶

2. Senate Vetting

Once the President nominates a candidate, the Senate examines the nominee. Political considerations have historically been near the center of this process, with senators weighing partisanship, specific positions on political questions, and at times trading support for nominees in

149. MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENT PROCESS* (2000); see also Jonathan Remy Nash, *Interparty Judicial Appointments*, 12 J. EMPIR. LEGAL STUD. 664 (2015) (examining an informal arrangement between New York senators to divide judicial recommendations to the president).

150. Gerhardt, *supra* note 149.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. NANCY KASSOP, *OBAMA’S WHITE HOUSE COUNSELS: SERVING THE PRESIDENT WITH NO MARGIN FOR ERROR* (2023), www.hofstra.edu/sites/default/files/2024-02/kassop-obama-white-house-counsels.pdf.

156. Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES MAGAZINE (Aug. 22, 2018), www.law.uh.edu/faculty/thester/courses/Statutory2019/How%20the%20Trump%20Administration%20Is%20Remaking%20the%20Courts%20-%20The%20New%20York%20Times.pdf.

exchange for legislative favors.¹⁵⁷ This is especially common with lower court nominees. Much of this activity, however, occurs “behind closed doors.”¹⁵⁸ Prior to the recent era of extreme partisan polarization, Presidents even occasionally traded appointments with powerful senators.¹⁵⁹ Most importantly, the Senate has consistently performed robust scrutiny of Supreme Court (and at times appellate court) nominees. Much of that scrutiny has been politically driven, with failed nominations typically stemming from political factors (e.g., political and constitutional views),¹⁶⁰ rather than merit.

Finally, scholars have long highlighted that “[p]residents 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.”¹⁶¹

3. Outside Organizations

Non-governmental organizations outside the formal government play a powerful role in the preselection and vetting of judicial candidates. Some of these organizations are political, while others remain nominally apolitical. Setting aside most lobbying groups, two organizations represent opposite poles of influence: the American Bar Association and the Federalist Society. Despite their differing goals and ideological roles, both underscore the importance of NGOs in the appointments process.

Consider, then, the American Bar Association (ABA). Since 1952, the ABA has sought to improve the quality of the legal profession and the judiciary by evaluating judicial nominees.¹⁶² Unlike most interest groups, the ABA claims to “represent impartial, special expertise about judicial qualifications rather than the interests of its members.”¹⁶³ While the ABA’s influence has changed over time, it once held a “privileged position in testifying on judges.”¹⁶⁴ The ABA’s vetting process for Supreme Court nominees—formerly highly influential, included “peer reviews of each nominee’s integrity, professional competence, and judicial temperament.”¹⁶⁵ The process began with confidential interviews conducted by all members of the ABA Standing Committee, followed by a review of the nominee’s legal writings by distinguished law professors and

¹⁵⁷. Gerhardt, *supra* note 149.

¹⁵⁸. *Id.*

¹⁵⁹. *Id.*

¹⁶⁰. *Id.*

¹⁶¹. *Id.*

¹⁶². *Id.*

¹⁶³. *Id.*

¹⁶⁴. *Id.*

¹⁶⁵. *Supreme Court Evaluation Process: Evaluations of Nominees to the Supreme Court of the United States*, AM. BAR ASS’N, www.americanbar.org/groups/committees/federal_judiciary/ratings/supreme-court-evaluation-process/ (last visited Sept. 19, 2025).

prominent practitioners with experience before the Supreme Court.¹⁶⁶ The result was a rating of the nominees as “Well Qualified,” “Qualified,” or “Not Qualified.”¹⁶⁷ Although this process persisted for decades, the ABA’s influence has waned in recent years. President Trump publicly accused the ABA of partisanship, instructed his nominees not to respond to its questionnaires, and denied the organization access to their bar records.¹⁶⁸ As a result, the ABA’s role in judicial vetting is now uncertain.

At the other end of the partisanship spectrum, the conservative Federalist Society “has played a crucial role in putting conservative jurists on the bench.”¹⁶⁹ Media coverage has extensively reported on the Society’s role in assembling judicial nominee lists for the Trump Administration, as well as in staffing the White House Counsel’s Office.¹⁷⁰

4. Culture

Scholars have argued that U.S. political elites have adhered to informal norms that protect the judiciary from political meddling. Professor Tara Grove, for instance, has identified a set of governmental norms aimed at safeguarding judicial independence.¹⁷¹ 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.”¹⁷²

C. Vetting and Ukrainian High Courts

Eastern European countries, particularly Ukraine, 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), Ukraine maintains a low-quality judiciary. 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 show how new informal norms either emerge or survive in the context of extensive judicial reforms.

Consider, then, Ukraine, a country that has faced a tumultuous series of political changes in the past decade. One of these, the reforms

^{166.} *Id.*

^{167.} *Id.*

^{168.} Nate Raymond, *Justice Department Curtails ABA Role in Vetting Trump’s Judicial Nominees*, REUTERS (May 30, 2025), www.reuters.com/legal/government/justice-department-curtailed-aba-role-vetting-trumps-judicial-nominees-2025-05-29/.

^{169.} Zengerle, *supra* note 156.

^{170.} *Id.*

^{171.} Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465 (2018).

^{172.} *Id.* at 544–45.

introduced after the 2014 Euromaidan revolution, became a watershed for the Ukrainian judiciary.¹⁷³ Historically, Ukrainian courts were packed with politicized, corrupt, and dependent judges, causing widespread public distrust.¹⁷⁴ 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 (i) sought to dismiss an older generation of judicial leaders, (ii) rebooted the previous High Qualification Commission of Judges (HQCJ) and gave it a mandate to reassess the competence and integrity of existing judges, (iii) changed the selection process for most judicial posts, and (iv) established a powerful and innovative Anti-Corruption Court.¹⁷⁵

Formally, these reforms followed international best practices, increasing judicial self-governance, transparency, meritocracy, and civil society participation in the selection and assessment of judges.¹⁷⁶ In pursuit of judicial independence, for instance, a new statute rebooted the judge-led High Council of Justice (HCJ) to improve its membership and increase its control 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. To improve ethics and integrity, the reforms mandated a reassessment of sitting judges.¹⁷⁷ More specifically, the reforms established a two-stage procedure for the selection and reassessment of judges. First, an exam tests the candidate's professional competence and abilities. The second stage then 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.¹⁷⁸ While the HQCJ administers both processes,¹⁷⁹ the Public Integrity Council (PIC) assists by attesting whether judicial candidates comply with professional ethics and integrity requirements.¹⁸⁰ Both procedures 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.

Initially, the reforms seemed to force a significant change in the judiciary. Roughly 30% of all judges resigned.¹⁸¹ In parallel, the HQCJ

173. Serhii Lashyn, Anastasia Leshchyshyn & Maria Popova, *Civil Society as an Informal Institution in Ukraine's Judicial Reform Process*, 24 GER. L. J. 1488, 1490 (2023).

174. GEORG STAWA, WILMA VAN BENTHEM & REDA MOLINE, *PRAVO-JUSTICE ASSESSMENT REPORT, SELECTION AND EVALUATION OF JUDGES IN UKRAINE* (2018), www.pravojustice.eu/storage/app/uploads/public/5c0fcd/a31/5c0fcd3162ea473697034.pdf.

175. For a detailed description on these reforms, see Popova & Beers, *supra* note 5, at 120–22.

176. STAWA, BENTHEM & MOLINE, *supra* note 174, at 6.

177. *Id.*

178. *Id.* at 26.

179. *Id.* at 13.

180. *Id.* at 13.

181. *Id.* at 6.

reassessed the performance and qualifications of more than 6,000 magistrates.¹⁸²

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.¹⁸³ 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.¹⁸⁴ 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. The same was true for the appointment of new Supreme Court justices. The old judicial elite seized this opportunity to nominate allies, maintaining the status quo.¹⁸⁵

The reforms also fostered clashes between the HQCJ and civil society actors over the new process of judicial appointments. Formally, the PIC reviews the candidates' professional and ethical qualifications,¹⁸⁶ but its recommendations are nonbinding and the HQCJ can overrule them with a qualified majority of at least eleven (out of sixteen) members.¹⁸⁷ In practice, these two bodies have repeatedly clashed. In 2018, for instance, the PIC threatened to suspend its involvement in the requalification process, alleging a lack of transparency and undue restriction on its role.¹⁸⁸ More recently, wiretaps revealed a conspiracy among senior judges to protect their colleagues from the PIC's evaluations.¹⁸⁹ In the recorded conversations, conspirators also discussed the possibility of forming a coalition "to sabotage the appointment of some of the Supreme Court judges."¹⁹⁰ These developments, therefore, illustrate how groups within the judiciary resisted the external oversight, sabotaging the reforms.

One takeaway is not that the formal reforms were counterproductive, but that they are insufficient to produce overnight change in behavior. Instead, reformers must be vigilant and persistent to prevent entrenched judicial networks from using the formal reforms to their

182. *Id.*

183. 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>.

184. Popova & Beers, *supra* note 5, at 124.

185. Morenets, *supra* note 183.

186. STAWA, BENTHEM & MOLINE, *supra* note 174, at 13.

187. *Id.* at 13.

188. *Id.* at 16.

189. Thomas Barrett, *Oligarchs and Judges*, 18 IDEOLOGY & POL. J. 260, 270 (2021).

190. 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/>.

TABLE 4. FORMAL AND INFORMAL ASPECTS OF JUDICIAL SELECTION ACROSS COUNTRIES

Selection		
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 preselection process handled by Department of Justice and then-White House counsel; political considerations are critical to Senate and White House; senators trade support for appointments; American Bar Association and now Federalist Society have a privileged role in the process.
Ukraine	Reforms attempted to dismiss old generation of judges and transform the judiciary; reforms created a commission that runs vetting and preselection.	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.

own benefit. Slowly, the Ukrainian reforms do seem to be shifting the balance of power within the judiciary and producing renewal.¹⁹¹

As we explore in the next Part, Mexico, the United States, and Ukraine show a range of experiences with judicial appointments but also some similarities. Table 4 summarizes the formal and informal aspects of their judicial selection systems. In most of these countries, informal judicial networks have significant influence over appointments and sometimes go directly against the formal process. The lesson from this Part is that different judicial systems are open to the influence of informality.

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 case studies together to argue that there are at least three common sites of informality: (i) the preselection and vetting process for judicial candidates, (ii) the power of judicial networks, and (iii) 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

191. For other Eastern European examples, see 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 REV. CENT. & E. EUR. L. 167, 170 (2022).

appointment processes. They seem responsible for the divergence between the judicial career and provisional appointments in Colombia, the failure of judicial reforms in Ukraine, 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 areas 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 preselection 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, preselection 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 preselection and vetting is a complicated task. We use “preselection” to mean the process by which a government assembles an initial list of potential judicial candidates. Vetting, conversely, refers to the tricky process of scrutinizing a candidate’s competence, integrity, and professional credentials. 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.”¹⁹² This can be done either alongside preselection or after it. The United Nations employs a similar definition, describing “vetting” as “assessing integrity to determine suitability for public employment.”¹⁹³ Vetting can be an important means to increase public trust in institutions and weaken the ability of criminal networks to influence the judiciary.¹⁹⁴ Either way, at its core, vetting involves the review of a candidate’s professional background.

Taking the definition as stated, a few design features are important to preselection and vetting. First, the legal system can either specify how preselection 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 preselection process that empowers an institution (the Superior Council) separate from the one that selects and appoints judges (the courts themselves). By contrast, the U.S. Constitution does

192. Marina Matic Bošković, *Vetting of Judiciary in Transitional Countries: Successful Tool or Entry Point for Political Influence*, 61 STRANI PRAVNI ŽIVOT 137, 138 (2017) www.researchgate.net/publication/340102070_Vetting_of_judiciary_in_transitional_countries_-_successful_tool_or_entry_point_for_political_influence.

193. OFFICE OF THE U.N. HIGH COMM’NR FOR HUMAN RIGHTS, RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: VETTING: AN OPERATIONAL FRAMEWORK, HR/PUB/06/5, at 4 (2006), www.ohchr.org/sites/default/files/Documents/Publications/RuleoflawVetting.pdf.

194. See also Christina Murray & Jan van Zyl Smit, *Global Standards on Judicial Independence and Removal: Grappling With Vetting and Fresh Appointment*, 2 COMP. CONST. STUD. 315 (2024).

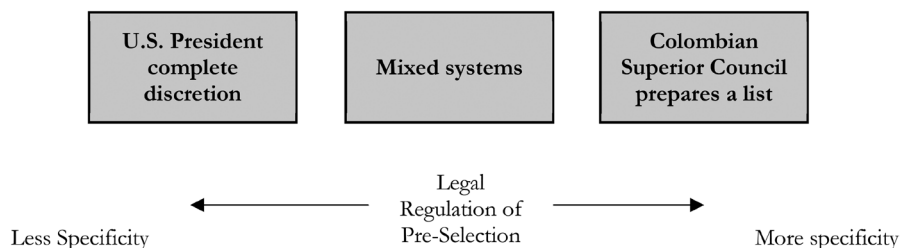


FIGURE 2. LEVEL OF SPECIFICITY IN PRESELECTION.

not specify how presidents should prepare a list of potential nominees at all. It merely provides that the President shall nominate justices and judges, subject to Senate confirmation. In other words, it delegates complete discretion. Figure 2 summarizes the spectrum of potential approaches here.

Second, the preselection process may also specify the type of vetting. It may include scrutinizing a candidate's personal or professional background, financial history, professional experience, competence, and even their psychological profile. The European Union's Venice Commission, for instance, recommends integrity checks—"to verify the identity of the subject, employment history, the right to work in the country, and to ascertain any unserved criminal sentence."¹⁹⁵ While the Commission differentiates this from "performance appraisals" that address "competence and potential," we think the vetting process should encompass performance evaluations.¹⁹⁶

Including performance, then, the focus should be on the concept of judicial competence, a difficult notion to operationalize. 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, which includes a second-stage review via examinations, professional scrutiny of a candidate's competence and social and psychological abilities, and an assessment of their 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, requiring no formal vetting process.

Third, if a country decides to specify a preselection process, it must face an important question of institutional competence—what types of institutions should perform the preselection or vetting process? Countries consider whether an institution is subject to political influence,

¹⁹⁵ Eur. Comm'n for Democracy Through Law (Venice Comm'n), *Concept Paper on the Development of the Vetting Process in the Justice System*, CDL-REF(2022)005, at 67 (Feb. 9, 2022), [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2022\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2022)005-e).

¹⁹⁶ *Id.* at 68.

independent of the executive, harbors deep expertise on judicial questions, and whether it recruits talented officials, or is subject to corrupt influences. In practice, vetting institutions range from administrative councils, like Colombia's Superior Council, to judicial councils, parliamentary committees, specific offices within the executive, or 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.¹⁹⁷

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.¹⁹⁸ On the other hand, vetting programs are often carried out in unstable political environments, making international contributions potentially useful.¹⁹⁹

Setting aside these legal requirements, however, every appointment system appears to incorporate practices and norms that go beyond formal rules. As our case studies demonstrate, informality finds a way to creep into the process of preselection and vetting in the following ways:

1. Political Influences in Preselection

Regardless of where the preselection process takes place, it is often 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 interviewees revealed that members of the Superior Council tend to be political operators. This can lead to a *quid pro quo* dynamic, where High Court members support specific nominees to the Council in exchange for the Council shortlisting their preferred candidates for judicial appointments.

At the other end of the specificity spectrum, the preselection 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 preselection. While some presidents delegated this task to the Office of the Deputy Attorney General, more recent ones have given complete authority to the White House Counsel's Office. Either way, preselection involves negotiations with "powerful political inter-

197. Alexander Mayer-Rieckh, *On Preventing Abuse: Vetting and Other Transitional Reforms*, in JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES 482, 491 (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.

198. OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 193, at 7.

199. *Id.*

ests, including senators, party officials, and bar leaders.”²⁰⁰ 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.”²⁰¹ 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 preselection. First, regardless of specificity, political considerations will be important—and even appropriate—in a democratic judiciary, especially to prevent courts from becoming isolated from the public. The problem arises 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 play a genuine role in policing the boundary between politics and partisanship. The more that preselection can emphasize competence and lack of partisanship, the better for the judiciary. Second, institutions empowered with preselection authority develop informal norms. For example, the Superior Council may consider the High Courts’ preferences even during preselection. 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.

2. Informality in Vetting

Countries have struggled to establish an effective vetting process, allowing informality to prevail. In Colombia, the Superior Council vets its preselected list of nominees but does not have an explicit rubric to follow.²⁰² In the United States, once the President nominates a candidate, the Senate initiates a vetting-like process. But because there are no prescribed rules, political considerations lie near the center of this process. Senators not only consider partisanship and specific positions on political questions, but may also “exchange support or opposition for certain nominees for other legislative favors.”²⁰³

Eastern European countries, however, have been at the forefront of developing vetting processes for older sitting judges. Consider Ukraine, where reforms required an assessment of every potential judicial candidate based on their professional background, personal abilities, social skills, professional ethics, and integrity.²⁰⁴ 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 represents one of the most cutting-edge attempts

200. Gerhardt, *supra* note 149.

201. *Id.*

202. L. 270/1996, Marzo 07, 1996, Diario Oficial [D.O.] (Colomb.), art. 85.

203. Gerhardt, *supra* note 149.

204. STAWA, BENTHEM & MOLINE, *supra* note 174, at 20.

to formalize the vetting process. Yet, by many accounts—as discussed below—judicial networks have found ways to subvert it.

These examples impart a few lessons about vetting. The process need not be fully codified if the right institutional incentives are in place. In the United States, the Senate's entirely informal vetting process produced a high-quality judiciary for decades. In Ukraine, a highly specified process is yielding mixed results. Colombia lies somewhere in the middle: a relatively specified process that has produced some high-quality appointments to the high courts. The key variable is the political incentives in place. In the United States, the process worked because the Senate adhered to nonpartisan norms of cooperation and, at times, relied on nonpartisan commissions. The same is true in Colombia, where the process has produced relatively healthy outcomes due to external pressure on the Superior Council from political actors and civil society. In Ukraine, by contrast, outsider pressure tends to distort the process.

B. The New Judicial Guilds and Corporatism

This section describes the role of judicial networks as a source of informal norms across our case studies. Scholars have recently focused on the sociology of judicial networks,²⁰⁵ viewing the judiciary as an institution composed of groups of judges subject to sociological pressures, political and partisan dynamics, social networking, and hierarchical structures.²⁰⁶ Building on this sociological model, our research indicates that judicial networks influence the selection of judges in all case studies. Whether this is a normatively desirable source of informality is a complicated matter. We argue that judicial networks can have both positive and negative effects. At its core, judicial networks are a source of informality that influences judicial selections in different ways.

1. Incumbent Leaders and Appointment of Judges

Judicial networks operate as a source of informality in the context of judicial recruitment, exerting both direct and indirect influence. Directly, judicial networks can push institutions to recruit new judges who are loyal to incumbent leaders. Consider, for instance, how Ukrainian

²⁰⁵ Matthew C. Ingram, *Networked Justice: Judges, the Diffusion of Ideas, and Legal Reform Movements in Mexico*, 48 J. LAT. AMER. STUD. 739, 746 (2016); see also Björn Dressel, Raul Sanchez-Urribarri & Alexander Stroh, *The Informal Dimension of Judicial Politics: A Relational Perspective*, 13 ANN. REV. L. SOC. SCI. 413 (2017); Björn Dressel, Raul Sanchez-Urribarri & Alexander Stroh, *Courts and Informal Networks: Towards a Relational Perspective on Judicial Politics Outside Western Democracies*, 39 INT'L POL. SCI. REV. 573 (2018).

²⁰⁶ Ingram, *supra* note 205, at 747; see also LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2008); Raul A. Sanchez Urribarri, *Judges and Their Loyalties: A Comparative Study Focused on the Venezuelan Supreme Court* (2010) (Ph.D. dissertation, Univ. S. Carolina), <https://scholarcommons.sc.edu/etd/398/>.

judicial elites sabotaged merit-based reforms to maintain their recruitment pipelines. In Ukraine, judges pressured the nonpartisan commission, HQCJ, to hire candidates who were connected with those elites.²⁰⁷

2. Selection into the Judicial Career

Judges can also serve as gatekeepers to the judicial career through clerkships. In every country we studied, clerkships offer a leg-up in the process of 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.²⁰⁸ This suggests that clerkship serves as an entry point, reinforcing networks of loyalty and patronage.

Additionally, 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 difficult to track or control through formal norms and can directly impact the result of the recruitment process.

Networks also shape judicial careers through provisional appointments. Unlike in Ukraine, judicial networks in Colombia exert influence through the provisional system rather than formal selection. With the formal process stalled, sitting judges have retained the authority to appoint provisional judges to lower courts, often selecting personal acquaintances. Some interviewees alluded to a similar dynamic at the Supreme Court and the Council of State levels. Because some parts of the selection are inevitably subjective, networks can penetrate the process, influencing how judges or the Superior Council decide who meets the formal criteria or preselects 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 the White House or the 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 candidates for the Constitutional Court 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

²⁰⁷. Barrett, *supra* note 189, at 270.

²⁰⁸. Miron, *supra* note 143, at 44–45.

committee recruits only candidates who will reciprocate their appointment by following old norms or maintaining the status quo.

3. Judicial Guilds and Corporatism

One important consequence of judicial networking and judicial self-governance is the growth of what some scholars call *corporatism*, which we term the *new judicial guilds*.²⁰⁹ 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 unique practices, interests, and common objectives. When that corporatist identity emerges, 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.²¹⁰ 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.²¹¹ 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.²¹² 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 because of corporatism.²¹³ Even Supreme Court justices behave differently depending on whether they are insiders or not.²¹⁴

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

209. Ríos-Figueroa, *supra* note 24; Ríos-Figueroa, *supra* note 143.

210. Ríos-Figueroa, *supra* note 24; Ríos-Figueroa, *supra* note 143.

211. See, e.g., Dressel, Sanchez-Urribarri & Stroh, *Courts and Informal Networks*, *supra* note 205 (highlighting evidence that judicial networks help safeguard judicial independence and promote assertiveness toward other branches).

212. Interview with Higher Court justice n. 14, Bogotá (Mar. 28, 2023) and Interview with scholar n. 19, Bogotá (Mar. 29, 2023).

213. Ríos-Figueroa, *supra* note 24; Ríos-Figueroa, *supra* note 142.

214. Ríos-Figueroa, *supra* note 24; Ríos-Figueroa, *supra* note 142.

the kind of judicial independence that is valuable for the rule of law—it is simply a guild-like corporate autonomy that maximizes the narrow interests of judicial networks.²¹⁵ That is the case of Ukraine. However, the positive side of corporatism is that high-quality institutions consistently exhibit 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.”²¹⁶ 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 without any regulation or even recognition in the formal process. Below, we highlight how governments choose either to empower expert and nonpartisan non-governmental actors or political, partisan, and even corrupt organizations. This is an area where governments increasingly formalize the informal role of outsiders.

1. What Non-Government Players Can Do in Judicial Selections

Scholars have recently addressed the role of civil society and other organizations in “designing and monitoring” judicial reforms and selection processes.²¹⁷ In the context of judicial reforms, Maria Bakolias argues that engaging civil society actors fosters greater commitment, accountability, and transparency.²¹⁸ These organizations can ultimately aggregate expertise, workforce, and assets to judicial reform initiatives, which can help governments identify new problems and better solutions to overcome them.²¹⁹

In judicial selections, civil society and other outside organizations can also play different roles. Nonpartisan “good governance” organizations can help the judiciary identify the most qualified candidates during a preselection 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

²¹⁵ Maria Popova, *Be Careful What You Wish For: A Cautionary Tale of Post-Communist Judicial Empowerment*, 18 DEMOKRATIZATSIYA 56 (2010).

²¹⁶ Popova & Beers, *supra* note 5, at 136.

²¹⁷ Maria Bakolias, *Legal and Judicial Development: The Role of Civil Society in the Reform Process*, 24 FORDHAM INT’L L.J. S26 (2000); see also Eszter Bodnár, *The Selection of Supreme Court Judges, What Can the World Learn from Canada, What Can Canada Learn from the World?*, 2 ELITE L.J. 103 (2017) (stressing the civil society’s role in selecting Supreme Court justices).

²¹⁸ Bakolias, *supra* note 217, at S32.

²¹⁹ *Id.* at S33.

nominating or appointing judges by drawing public attention to questionable nominations. For example, as discussed above, in 2009, Colombian groups formed *Elección Visible*, an oversight group that promoted qualified, independent candidates and successfully pushed for the Supreme Court to adopt transparency measures. Accordingly, at their best, NGOs can enhance the recruitment process's legitimacy, promoting competent and ethical candidates.

2. When Non-Government Players Intervene

Most judicial appointment processes unfold in several stages, and any one of them can be a source of informal influence by organizations. Many countries are increasingly providing for a formal notice-and-comment period during judicial preselection, allowing the public to submit input on nominees. In Colombia, this stage follows the Superior Council's shortlist and enables lawyers and NGOs to raise concerns about the candidates' qualifications, integrity, or ties to corruption. Specific non-governmental organizations are given a privileged role.²²⁰ And our interviews 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 used to take place after a presidential nomination. One drawback of incorporating NGOs at this late stage is that their role is diminished as the process of replacing a nominee is more arduous than simply replacing a name on a preselection list.

3. Which Organizations are Non-Government Players

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 in which the only major organization with credibility in judicial selections (the ABA) was nonpartisan, to one where each political party depends on a deeply partisan organization, like the Federalist Society. Like Colombia's *Elección 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.²²¹ 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.²²²

²²⁰. Interview with Higher Court justice n. 11, Bogotá (Mar. 28, 2023).

²²¹. Lashyn, Leshchyshyn & Popova, *supra* note 173, at 1490–91.

²²². *Id.* at 1491.

4. Formalized and informal Non-Government Players

As far as we can tell, it used to be rare for countries to formalize the role of outside organizations in judicial selection. At most, the role of organizations like the ABA became entrenched as a strong norm but was never recognized by legislation, executive orders, or statutes. The tide, however, seems to be turning, and an increasing number of countries are formalizing this role. In Ukraine, for instance, the 2014 and 2016 judicial reforms explicitly integrated NGOs in the selection process through the PIC, which formally assists the HQCJ by preparing reports on the ethics of candidates and judges. The PIC commission includes esteemed and politically impartial representatives from human rights organizations, legal scholars, attorneys, and journalists.²²³

Like in the United States—where the ABA has long been 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.²²⁴ Some scholars consider Ukraine's civil society organizations as “external judicial informal institutions,”²²⁵ and “their omnipresence in political discussions and public debate has become expected, valued, and ultimately institutionalized.”²²⁶

This section has demonstrated that informality bleeds into judicial appointment through at least three powerful sites: (i) the preselection and vetting process for judicial candidates, (ii) the power of judicial networks, and (iii) the influence of nongovernmental 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 Ukraine, 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

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 Article, 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, an assessment of their impact should consider whether they promote or degrade three core institutional values: separation of the judiciary from political interference, maintenance of high judicial competence, and preservation of public

²²³. STAWA, BENTHEM & MOLINE, *supra* note 174, at 13.

²²⁴. Lashyn, Leshchynshyn & Popova, *supra* note 173, at 1492.

²²⁵. *Id.*

²²⁶. *Id.* at 1500.

legitimacy. Across our case studies—whether in Colombia, Mexico, the United States, 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, we offer 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 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—degrade institutional quality over time.

Third, informal practices that enhance oversight while preserving necessary confidentiality in deliberations strengthen judicial independence. Colombian civil society comments in the High Court nomination process have improved accountability without compromising the selection process. Ukraine’s formal incorporation of civil society into judicial vetting shows promise, albeit currently imperfect. Conversely, 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: (i) 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; (ii) 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; (iii) informal systems that provide clear professional rewards for maintaining independence and high standards are more sustainable than those relying purely

on individual integrity; (iv) 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 (v) 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. 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. Additionally, 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.”²²⁷ It is difficult to specify how this process may unfold. But, at the very least, the existence of an institutional narrative within the judiciary 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 yield different outcomes depending on contextual factors like the political environment, historical legacies, or other institutional actors. 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.

Given 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.²²⁸ 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

²²⁷ Grove, *supra* note 171, at 471.

²²⁸ See, e.g., CHILTON & VERSTEEG, *supra* note 27.

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.²²⁹

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.”²³⁰ When formal institutions are not effective or credible, they invite negative informal norms that subvert the formal system. For example, one 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. Moreover, informality operates well when formal rules are effective and continue to be enforced—not ignored—by the relevant authorities.²³¹ 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 to politicians. Administrators should clearly state the goals of both formal and informal norms and communicate them to a broad audience. Communication 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.

CONCLUSION

This study of judicial appointments reveals that a subterranean layer of informal norms and conventions influences the appointment and evaluation of judicial candidates. Generalizing from our case stud-

²²⁹ Maria Popova, *The War in Ukraine and Transition: In Conversation with Maria Popova*, REV. DEMOCRACY (2023), <https://revdem.ceu.edu/2023/06/20/the-war-in-ukraine-and-transition/>.

²³⁰ Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 PERSPECTIVES ON POL. 725, 728 (2004).

²³¹ *Id.* at 732.

ies, we argue that there are three common and powerful sites of informality: (i) the preselection and vetting process for judicial candidates, (ii) the power of judicial guilds, and (iii) the active influence of non-governmental organizations. It is these three sites that seem responsible for (i) the divergence between the judicial career and provisional appointments in Colombia, (ii) the failure of judicial reforms in Ukraine, (iii) the growing role of the Federalist Society and the waning role of the ABA in the United States, and (iv) 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, 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.

SUPPLEMENTARY MATERIAL

Supplementary material is available online at *The American Journal of Comparative Law* (<https://academic.oup.com/ajcl>).