

**The 2015 Power-Balancing Reform in Colombia: A Missed Opportunity to Disrupt
the Ecosystem of Structural Clientelism in the Halls of Justice**

*Pablo Echeverri*¹

The role of the judiciary in the democratic state has been the subject of endless debate among jurists and political scientists. While most agree that a functioning democracy requires an independent judiciary, there is broad disagreement regarding the meaning of judicial independence and how it affects the judiciary's role in relation to the other branches of government. The traditional American conception of judicial independence is largely based on Alexander Hamilton's vision of a system with judges appointed for life and imbued with the power of judicial review, as well as the duty to protect individuals and minorities from injustice and oppression.² This vision gave life to a constitutional tradition fueled by *Marbury v. Madison*,³ in which the courts have played an essential role in shaping the nation's societal structure by ruling on pivotal issues such as segregation⁴ and

¹ Post-Doctoral Fellow, Robbins Collection at the University of California, Berkeley School of Law; J.D. University of California, Berkeley; B.A. in political science with concentration in comparative politics, University of Pennsylvania. Former member of the Latin America Practice at Milbank, Tweed, Hadley & McCloy in New York.

² THE FEDERALIST NO. 78 (Alexander Hamilton).

³ 5 U.S. 137 (1803). Although the Constitution of the United States does not explicitly grant the power of judicial review to the courts, it was first used by the Supreme Court in *Marbury v. Madison* and has since been the pillar of American judicial tradition.

⁴ See e.g. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (ordering the desegregation of public schools).

abortion,⁵ striking down or upholding historic legislation,⁶ and even sealing the fate of a controversial presidential election.⁷ However, the judiciary's bold participation has not been without detractors, many of whom decry "judicial activism," and yearn for a type of idealized judges who are apolitical and take a back seat to the elected branches of government.⁸

Apolitical judges are a fiction in constitutional democracies with enshrined traditions of judicial review. The judiciary is and must be political, in the Aristotelian sense of participating in the matters of the *polis* and doing so with the powers with which it is entrusted. What members of the judiciary should not do, however, is improperly use their judicial and administrative powers for their personal or political benefit, which is referred to as *politiquería*⁹ in Spanish or politicking¹⁰ in English.

Although Colombia has a very different legal tradition than the United States, it is a constitutional democracy with a blossoming culture of judicial review championed by a

⁵ See e.g. *Roe v. Wade*, 410 U.S. 113 (1973) (establishing the extent of a woman's right to have an abortion).

⁶ See e.g. *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2748 (2012) (upholding most of President Obama's healthcare reform, commonly known as "Obamacare").

⁷ *Bush v. Gore*, 531 U.S. 98 (2000) (resolving the disputed 2000 presidential election).

⁸ See Laurent Mayali, *Democracia, Sociedad Política y El Poder Judicial*, in *Instituciones Judiciales y Democracia*, INSTITUTO FRANCÉS DE ESTUDIOS ANDINOS 73 (Lima, Perú: Instituto Francés de Estudios Andinos, 2011) (Discussing the role of the judiciary in the political order of the United States where, despite ample evidence of the Supreme Court's enormous political influence, the idea persists in many circles that judges should be apolitical.)

⁹ *Politiquería*, ENCICLOPEDIA DE LA POLÍTICA DE RODRIGO BORJA, available at <http://www.encyclopediadelapolitica.org/Default.aspx?i=&por=p&idind=1201&termino=>.

¹⁰ Merriam-Webster Dictionary, Definition of Politick ("to engage in often partisan political discussion or activity"), <http://www.merriam-webster.com/dictionary/politick>. Although "politicking" does not necessarily carry the same strong connotation of impropriety as *politiquería*, it will be used throughout this paper as if it were an exact translation.

vocal Constitutional Court.¹¹ Unfortunately, Colombia's constitutional design created a system of incentives that transformed the justice system into fertile ground for politicking and corruption. Aiming for an independent and strong judiciary, the drafters of the Constitution granted the High Courts significant administrative powers, in addition to their judicial powers. Under the Constitution, High Courts play an active role in nominating and/or appointing High Court judges¹² and heads of Control Entities¹³ (collectively, "Judicial Officers").¹⁴ These enhanced powers give High Court judges a prominent place in the favor-trading market that is normally reserved to the political branches. With time, this market has achieved such levels of disrepute that it became known as the *puerta giratoria* (the "Revolving Door").

The Revolving Door has been signaled as one of the primary causes of the deep and broad crisis affecting the Colombian justice system.¹⁵ As a reflection of this crisis,¹⁶ when asked whether they trust the country's various institutions, 82% of those polled answered that they do not trust the justice system and 78% answered that they do not trust the High

¹¹ To facilitate the reading of this paper, I have translated from Spanish the names of several institutions mentioned throughout the document. Please refer to the Appendix for a list of translated terms.

¹² CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 239 (the Supreme Court and Council of State must nominate candidates for the Constitutional Court); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 231 (the Supreme Court and the Council of State must fill vacancies within their respective tribunals).

¹³ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 276 (the Supreme Court and the Council of state must each nominate a candidate for Inspector General).

¹⁴ The Constitution makes the distinction between the Judicial Branch, composed by the courts and the Prosecutor General's Office, and independent Control Entities, consisting of the Public Ministry (composed of the Inspector General's Office and the Ombudsman's Office), and the Comptroller General's Office.

¹⁵ *Las cinco claves de la receta para sacar de la crisis a la justicia*, EL TIEMPO (March 25, 2015) available at <http://www.eltiempo.com/politica/gobierno/medidas-del-gobierno-para-sacar-de-la-crisis-a-la-justicia/15458022>.

¹⁶ *See generally* CONSEJO PRIVADO DE COMPETITIVIDAD, INFORME NACIONAL DE COMPETITIVIDAD 2016-2017 216-233 (chapter regarding the Colombian justice system), available at http://compite.com.co/wp-content/uploads/2016/11/CPC_Libro_Web_2016-2017.pdf.

Courts.¹⁷ Moreover, in recent years, the goodwill of several crucial institutions has suffered significant erosion in national polls. The Prosecutor General's office had favorable ratings oscillating between 50% and 77% from February 2000 to August 2014, when it fell to 41%.¹⁸ It then remained at or below 42% until the June 2015 poll.¹⁹ The Supreme Court has seen a steady decline in favorability, going from 60% in June 2008 to 29% in June 2015.²⁰ The Constitutional Court has also seen a recent decrease in its favorable ratings. Whereas it had consistently remained above 54% since July 2002, in June 2012 its favorable rating dropped to 48%.²¹ Favorability then straddled the 50% line until August 2014, when it dropped to 41%, with an unfavorable rating (43%) surpassing the favorable rating for the first time since 2000.²² In June 2015, the Constitutional Court had favorable and unfavorable ratings of 33% and 56%, respectively.²³

The Revolving Door is not, however, the only possible cause of Colombians' severe lack of trust in judicial institutions. In the past 25 years, Colombian justice has been at the center of a number of highly visible scandals that likely contributed to the erosion of the population's trust in the system. Since 1990, one of the six people who served as Inspector General was convicted for narco-trafficking-related charges²⁴ while another was removed

¹⁷ *Colombia Opina Julio de 2015 – La Gran Encuesta*, REVISTA SEMANA (Colom.) (July 2015), at 15. http://static.iris.net.co/semana/upload/documents/Documento_436907_20150731.pdf

¹⁸ *Gallup Poll- #107 Colombia Junio 2015*, Gallup Colombia (June 2015), at 79, <http://www.larepublica.co/sites/default/files/larepublica/Resultados%20de%20Gallup.pdf>

¹⁹ *Gallup Poll- #107 Colombia Junio 2015*, Gallup Colombia, (June 2015), at 79. <http://www.larepublica.co/sites/default/files/larepublica/Resultados%20de%20Gallup.pdf>

²⁰ *Id.* at 93.

²¹ *Id.* at 86.

²² *Id.* at 86.

²³ *Id.* at 86.

²⁴ Supreme Court Decision in Process No. 17703, September 2, 2002, available at <http://corte-suprema-justicia.vlex.com.co/vid/n-suprema-penal-02-septiembre-2002-44160455>.

for appointing to public office family members of Supreme Court judges who intervened in his own nomination,²⁵ one of the seven who served as Prosecutor General has been the subject of criminal investigations, and four of the seven appointed Comptroller General have been convicted or investigated. Since 2013, one High Court judge has been suspended from office by the Senate and is now under criminal investigation by the Supreme Court on corruption charges, while at least six other High Court judges have been the subject of criminal investigations.²⁶ Based on information from the Prosecutor General's Office, *Revista Semana* asserts that 25 high-level judges may have been involved in a recent corruption scandal known as the “*carrusel de las pensiones*.”²⁷ Moreover, it has become common for political and/or personal enmities among Judicial Officers to be the subject of major headlines (to the point of being dubbed “train collisions” (*choques de trenes*))²⁸, which likely erodes the public's trust in the institutions they represent.

In 2015, Colombia placed third out of 59 countries, behind the Philippines and Mexico, in the *Centro de Estudios sobre Impunidad y Justicia's* Global Impunity Index, which measures the countries with the highest levels of impunity.²⁹ Journalists in the justice

²⁵ Council of State Decision, Process Nos. 11001-03-28-000-2013-00011-00, 11001-03-28-000-2013-00012-00, 11001-03-28-000-2013-00008-00 (joined), September 7, 2016, *available at* <https://www.ambitojuridico.com/BancoMedios/Documentos%20PDF/sent-11001032800020130001100%20-16.pdf>.

²⁶ *Fiscalía investiga a tres magistrados de la Judicatura*, EL HERALDO (Jan. 30, 2015), *available at* <https://www.elheraldo.co/nacional/fiscalia-investiga-tres-magistrados-de-la-judicatura-182372> (last visited April 22, 2017); *Comité de la Libre determinará si otorga condecoración a magistrados investigados*, W Radio, April 15, 2015, <http://www.wradio.com.co/noticias/actualidad/comite-de-la-libre-determinara-si-otorga-condecoracion-a-magistrados-investigados/20150415/nota/2718826.aspx> (last visited Feb. 15, 2016).

²⁷ *Hay más magistrados en el carrusel de las pensiones*, REVISTA SEMANA (August 29, 2013), *available at* <http://www.semana.com/nacion/articulo/hay-mas-magistrados-carrusel-pensiones/355733-3>

²⁸ *See e.g. Diferencias de fondo detrás del nuevo choque de trenes*, EL TIEMPO (October 13, 2015) *available at* <http://www.eltiempo.com/archivo/documento/CMS-13119524>

²⁹ CENTRO DE ESTUDIOS SOBRE IMPUNIDAD Y JUSTICIA, ÍNDICE GLOBAL DE IMPUNIDAD (IGI) 2015, *available at* <http://www.udlap.mx/cesij/resultadosigi2015.aspx>. It is worth noting that, due to lack of data,

section of *El Tiempo* reviewed statistics from the national police and concluded that in 2014 nine out of ten homicides in Colombia went unpunished, and only in two out of ten homicide cases, suspects were brought before a judge.³⁰ Though accurately measuring impunity is without a doubt a very difficult task and statistics in this area are often misinterpreted,³¹ the subject of impunity is nevertheless a constant theme in Colombian society. In 2015, for example, *El Tiempo* alone published over 30 articles addressing the issue of impunity (not counting those related to the transitional justice in the context of the “peace process” with the FARC, which is a separate problem).³²

Moreover, Colombians’ perception of corruption and insecurity could be interpreted as yet another indictment of the justice system: rampant corruption and insecurity are a sign that justice is failing. For instance, Gallup’s June 2015 poll shows that from April 2008 to June 2015, the percentage of Colombians who consider that corruption in the country has gotten worse increased from 49% to 84%.³³ Similarly, the percentage of Colombians who think

the index includes only 59 of 193 United Nations member states. The index thus excludes all African countries and other major countries like Brazil and India, which would very likely affect Colombia’s ranking.

³⁰ *Nueve de cada diez asesinatos en Colombia quedan impunes*, EL TIEMPO (July 18, 2015), available at <http://www.eltiempo.com/politica/justicia/impunidad-en-colombia/16115768>.

³¹ See Elvira María Restrepo and Mariana Martínez Cuellar, *Impunidad penal: mitos y realidades*, UNIVERSIDAD NACIONAL PERIÓDICO 64 (October 3, 2004), available at <http://historico.unperiodico.unal.edu.co/ediciones/64/08.htm>.

³² See e.g. Vladdo, *La impunidad nuestra de cada día*, EL TIEMPO (November 3, 2015), available at <http://www.eltiempo.com/opinion/columnistas/la-impunidad-nuestra-de-cada-dia-vladdo-columna-el-tiempo/16420375>; Jineth Bedoya Lima, *La tragedia que se vive por impunidad en feminicidios*, EL TIEMPO (July 27, 2015), available at <http://www.eltiempo.com/politica/justicia/feminicidios-en-colombia/16153458>; *Las nueve decisiones judiciales en Bogota que siguen en el limbo*, EL TIEMPO (December 30, 2015), available at <http://www.eltiempo.com/bogota/decisiones-judiciales-en-bogota-que-siguen-en-el-limbo/16469783>; Alfonso Gómez Méndez, *Responsabilidad política sin impunidad*, EL TIEMPO (March 3, 2015), available at <http://www.eltiempo.com/opinion/columnistas/responsabilidad-politica-sin-impunidad-alfonso-gomez-mendez-/15334416>.

³³ *Gallup Poll- #107 supra* note 18 at 9.

that insecurity has worsened has steadily increased from 41% in October 2008 to 87% in June 2015.³⁴

In more general international reports Colombia does not fare well either. The World Justice Project ranks Colombia 62nd out of 102 countries in its 2015 Rule of Law Index³⁵ and Transparency International ranks the country 94th out 175 countries in its Corruption Perceptions Index (2014).³⁶ The World Bank gives Colombia a score of -0.3 in a -2.5 to 2.5 scale in its 2014 Rule of Law estimate, placing it in the 42.3 percentile.³⁷ For comparative purposes, it is interesting to consider the table below, which shows that while Colombia's rule of law situation is poor, this is a problem shared by many Latin American nations.³⁸

Country	Score	Percentile
Venezuela	-1.9	0.5
Ecuador	-1.0	13.5
Argentina	-0.9	18.3

³⁴ *Id.* at 16.

³⁵ WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2015 6 (2015), *available at* <http://worldjusticeproject.org/rule-law-around-world>. The WJP Rule of Law Index 2015 is “based on the experiences and perceptions of the general public and in-country experts worldwide” and “presents a portrait of the rule of law in each country by providing scores and rankings organized around eight factors: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice

³⁶ This report covers the public sector as a whole.

³⁷ THE WORLD BANK, WORLDWIDE GOVERNANCE INDICATORS, *available at* <http://databank.worldbank.org/data/reports.aspx?source=worldwide-governance-indicators>. “Rule of Law captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence. Estimate gives the country’s score on the aggregate indicator, in units of a standard normal distribution, i.e. ranging from approximately -2.5 to 2.5.”

³⁸ The table also suggests, however, that Latin America is not condemned to dysfunctional justice systems and unsafe societies (e.g. Chile and Uruguay).

Peru	-0.6	33.2
El Salvador	-0.5	35.6
Mexico	-0.5	38.0
Colombia	-0.3	42.3
Brazil	-0.1	55.3
Uruguay	0.7	76.0
Chile	1.4	88.4
France	1.5	88.5
United States	1.6	89.9

In response to this crisis, the Colombian government attempted and subsequently failed to pass a reform to the justice system in 2012. In 2014, the government tried again and by June 2015, it managed to get through Congress the *Reforma de Equilibrio de Poderes* (the “2015 Reform” or “Reform”). This effort to amend the Constitution was intended to clarify the interaction between the different branches of government so as to restore legitimacy to the country’s much discredited democratic institutions. One of the central goals was to strengthen the country’s battered justice system by disrupting the ecosystem of structural clientelism that has plagued the justice system: The Revolving Door.³⁹

³⁹ Presidencia de la República – Sala de Prensa, *Reforma de equilibrio de poderes busca proteger y defender el Estado Social de Derecho: Presidente Santos* (Sept. 10, 2014), http://wp.presidencia.gov.co/Noticias/2014/Septiembre/Paginas/20140910_01-Reforma-de-equilibrio-de-poderes-busca-proteger-y-defender-el-Estado-Social-de-Derecho-Presidente-Santos.aspx (last visited January 8, 2016).

In this paper, I will argue that the 2015 Reform was a missed opportunity to engage in a serious re-design of the justice system and thus eradicate the negative effects of the Revolving Door. First, I will describe and discuss the problem that the reform intended to address: clientelism in the justice system. Second, I will describe the Reform's approaches to solving the different concrete manifestations of the Revolving Door, and show that each of them is flawed and unlikely to succeed. As I conduct a thematic critique of the Reform, I will argue that alternate, common sense options could have been considered and I will discuss those options in detail. Finally, the appendix contains a description of the judicial institutions referenced throughout the paper and of the selection mechanisms applicable to each of them.

I) The Problem: The Revolving Door

The Revolving Door is an umbrella term encompassing all forms of clientelism in the selection system of Judicial Officers and other high-level officials. For the sake of discussion and analysis, I have broken down this concept into two concrete practices: (1) public officials using their nomination or appointment powers to favor their own relatives or to gain favor from other public officials by nominating or appointing them or their relatives ("Improper Appointments"); and (2) High Court judges and other Judicial Officers benefiting from the general endogamy of the selection mechanisms to rotate between high judicial offices (e.g. from one court to the other or from a High Court to the Public Ministry), using their position as a springboard toward elected office or high

government positions, or using the influence gained from their time in office to serve private interests (“Rotations”).

It is important to note that this ecosystem of clientelism is not an underground web of illegal activity but rather an institutionalized *modus operandi* encouraged by the set of incentives inherent in the structure and design of the justice system.⁴⁰ In this respect, the Constitution has two essential flaws: (1) it gives Judicial Officers a central role in the nomination and appointment of other Judicial Officers (see figures 1 and 2 below) and (2) it imposes few or no restrictions on the professional activities of outgoing Judicial Officers. This gives birth to a favor-trading market where Judicial Officers can use their nomination and appointment powers, as well as their influence, for personal gain and advancement (*i.e.* the Revolving Door).

It is also crucial to consider that while Improper Appointments are by definition improper, Rotations are not inherently negative if they occur within a logical structure that establishes a hierarchy of positions, like the one I suggest in section II(b) below. The essential problem with the Revolving Door is the perception that the top positions in the High Courts and Control Entities are reserved for a specific group of people and treated like political jobs to serve the ambitions of those who hold them.

⁴⁰ Refer to the appendix for a detailed description of the selection mechanisms of Judicial Officers.

Figure 1. The selection mechanism for High Court judges and Supreme Judicature Council judges

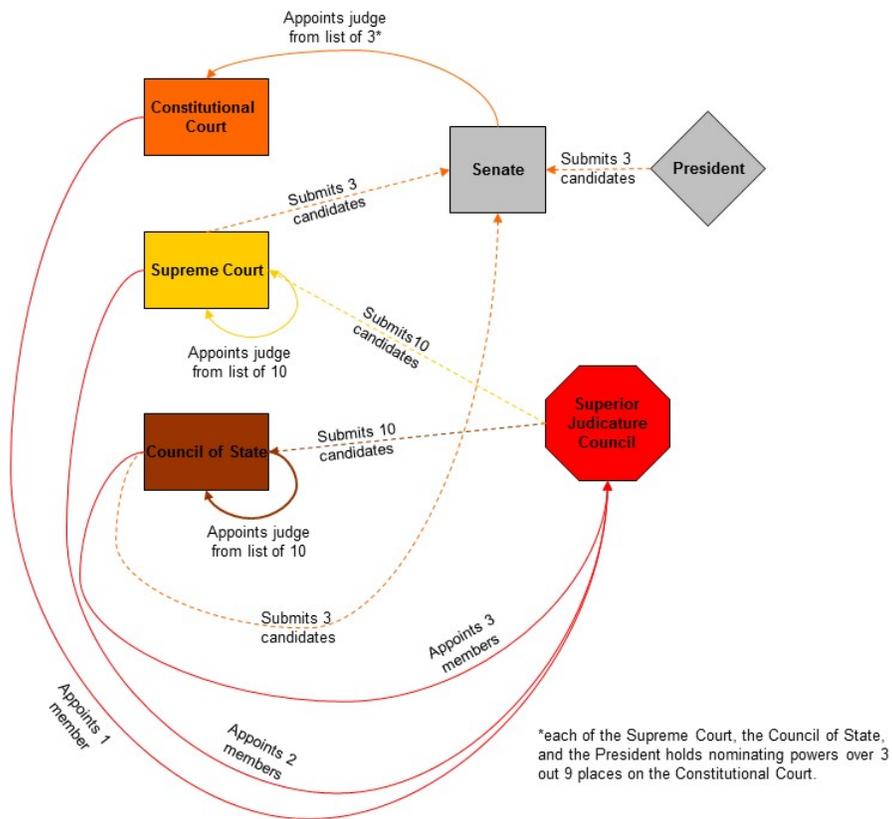
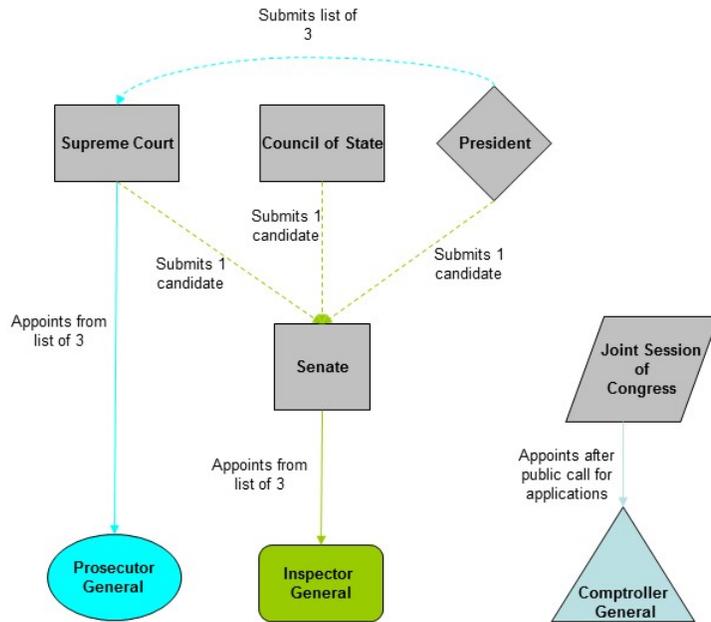


Figure 2. The selection mechanism for the Inspector General, Prosecutor General, and Comptroller General.



This perception is not gratuitous, however. Since the creation of the Constitutional Court by the 1991 Constitution, 31 judges have served on the court (excluding those who only served in the transition Court). Of those 31, six (19.4%) previously served on another High Court or the Superior Judicature Council, two (6.4%) were previously involved in electoral politics, four (12.9%) became involved in electoral politics after leaving the Court, one (3.2%) became Prosecutor General after serving on the Court, and four (12.9%) were

elected to the Court by Congress after being nominated by the High Court on which they had recently served.

Since 1990, there have been seven Inspectors General, seven Prosecutors General, and seven Comptrollers General (collectively, “High Officers”), the three most important offices in the justice system outside of the High Courts. Of these 21 High Officers, two (9.5%) have held two of these offices, which reduces the number of people having held these positions to 19. Before these 19 people became High Officers, six (31.4%) served on a High Court or on the Superior Judicature Council, nine (47.4%) were involved in electoral politics, and six (31.6%) had been cabinet ministers. Of the 17 people who previously served as High Officers, four (23.5%) went on to participate in electoral politics, one (5.9%) became a cabinet minister, and four (23.5%) were named ambassadors. One of these 19 High Officers was nominated by the High Court on which he served immediately before his election.⁴¹

Recognizing that the Revolving Door weakens the public’s trust in the justice system, the government made it a priority to address it in the 2015 Reform.⁴²

II) The attempted solution and its flaws

⁴¹ Author compiled this data in his research and calculated the percentages above.

⁴² Presidencia de la República – Sala de Prensa, *Reforma de equilibrio de poderes busca proteger y defender el Estado Social de Derecho: Presidente Santos* (Sept. 10, 2014), http://wp.presidencia.gov.co/Noticias/2014/Septiembre/Paginas/20140910_01-Reforma-de-equilibrio-de-poderes-busca-proteger-y-defender-el-Estado-Social-de-Derecho-Presidente-Santos.aspx (last visited January 8, 2016).

The 2015 Reform was advertised as major overhaul of justice that would, among other things, eliminate the Revolving Door.⁴³ The Reform was introduced by the government, which had a strong supporting coalition in the Senate⁴⁴ and the Chamber of Representatives.⁴⁵ Although initially even the main opposition coalition led by former president Alvaro Uribe recognized the need for a reform that would end the Revolving Door, the government's version of the Reform never received opposition support.⁴⁶ This was in part due to the fact that the opposition called for stronger measures against the Revolving Door, such as taking nominating powers away from the High Courts.⁴⁷ The opposition did, however, actively negotiate with the government's coalition until several weeks before the final vote, when it finally announced that it would vote against the Reform.⁴⁸

⁴³ Presidencia de la República – Sala de Prensa, *Reforma de equilibrio de poderes busca proteger y defender el Estado Social de Derecho: Presidente Santos* (Sept. 10, 2014), http://wp.presidencia.gov.co/Noticias/2014/Septiembre/Paginas/20140910_01-Reforma-de-equilibrio-de-poderes-busca-protger-y-defender-el-Estado-Social-de-Derecho-Presidente-Santos.aspx (last visited January 8, 2016).

⁴⁴ Registraduría Nacional del Estado Civil – República de Colombia, Elecciones de Congreso y Parlamento Andino, 9 de Marzo de 2014 – Senado, http://www3.registraduria.gov.co/congreso2014/preconteo/99SE/DSE9999999_L2.htm. The presidential coalition, *Unidad Nacional*, is composed of *Partido de la U* (15.58%), Partido Liberal Colombiano (12.22%), Partido Cambio Radical (6.96%), and Partido Opción Ciudadana (3.68%). The *Partido Alianza Verde* (3.94), and *Polo Democratico Alternativo* (3.78%) often vote with the presidential coalition. The main opposing party is the *Centro Democratico Mano Firme Corazon Grande* (14.29%).

⁴⁵ Registraduría Nacional del Estado Civil – República de Colombia, Elecciones de Congreso y Parlamento Andino, 9 de Marzo de 2014 – Cámara, http://www3.registraduria.gov.co/congreso2014/preconteo/99CA/DCA9999999_L1.htm. The Chamber of Representatives is composed as follows: *Partido de la U* (16.05%), Partido Liberal Colombiano (14.13%), Partido Conservador Colombiano (13.17%), Centro Democrático Mano Firme Corazón Grande (9.47%), Partido Cambio Radical (7.74%), Partido Alianza Verde (3.35%), Partido Opcion Ciudadana (3.26%), Polo Democratico Alternativo (2.89%), Movimiento “Mira” (2.87%) (this list excludes parties with less than 2% support).

⁴⁶ *Uribismo y Gobierno no logran acuerdo en reforma de equilibrio de poderes*, CARACOL RADIO (Aug. 25, 2014), http://caracol.com.co/radio/2014/08/25/nacional/1408963020_382569.html.

⁴⁷ *Id.*

⁴⁸ *El malestar del uribismo con la reforma de equilibrio de poderes*, EL ESPECTADOR (June 10, 2015), available at <http://www.elespectador.com/noticias/politica/el-malestar-del-uribismo-reforma-de-equilibrio-de-poder-articulo-565563>.

Despite the political disagreements, which were not unexpected, the government continued to advertise the Reform as the end of the Revolving door. In September 2014, as the Reform was being debated in Congress, President Santos stated in a speech that one of the Reform's objectives was to prohibit the Revolving Door among High Court judges.⁴⁹ Major newspapers and magazines echoed the government's message with headlines like "The end of the 'I elect you, you elect me,' reelection and the 'revolving door'" and "Power balancing: no more revolving door in the High Courts and control entities."⁵⁰

As the Reform coursed through Congress, it picked up several new enemies who vowed to challenge its constitutionality. After it was signed into law, the Reform was in fact the subject of four high-profile actions. Two of them were dismissed by the Constitutional Court on February 10, 2016 for lacking sufficient specificity to permit a ruling on the merits.⁵¹ The two remaining ones challenged the structural changes made to the judicial branch and were resolved largely in favor of the petitioners on June 1, 2016⁵² and July 13,

⁴⁹ Presidencia de la República – Sala de Prensa, *Reforma de equilibrio de poderes busca proteger y defender el Estado Social de Derecho: Presidente Santos* (Sept. 10, 2014), http://wp.presidencia.gov.co/Noticias/2014/Septiembre/Paginas/20140910_01-Reforma-de-equilibrio-de-poderes-busca-protger-y-defender-el-Estado-Social-de-Derecho-Presidente-Santos.aspx (last visited January 8, 2016).

⁵⁰ See e.g. Cristina Castro, *El fin del "Yo te elijo, tú me eliges", la reelección y la "puerta giratoria"*, REVISTA SEMANA (Feb. 6, 2015), available at <http://www.semana.com/contenidos-editoriales/equilibrio-de-poderes-asi-cambiara-el-estado/articulo/el-fin-del-yo-te-elijo-tu-me-eliges-la-reeleccion-la-puerta-giratoria-por-la-reforma-de-equilibrio/429962-3>; *Equilibrio de poderes: No más puerta giratoria en las Altas Cortes y organismos de control*, EL HERALDO (June 9, 2015), available at <http://www.elheraldo.co/politica/equilibrio-de-poderes-no-mas-puerta-giratoria-en-las-altas-cortes-y-organismos-de-control>; *Cámara aprobó en su totalidad reforma al equilibrio de poderes*, EL COLOMBIANO (June 9, 2015), available at <http://www.elcolombiano.com/aprobado-fin-de-la-puerta-giratoria-en-la-reforma-al-equilibrio-de-poderes-AE2107354>.

⁵¹ Corte Constitucional [CC] [Constitutional Court] Decision C-053/16, 10 febrero 2016, available at <http://www.corteconstitucional.gov.co/relatoria/2016/C-053-16.htm>.

⁵² Corte Constitucional [CC] [Constitutional Court] Decision C-285/16, 1 junio 2016, available at <http://www.corteconstitucional.gov.co/comunicados/No.%2023%20comunicado%2001%20de%20junio%20de%202016.pdf>.

2016,⁵³ respectively. Decision C-285/16 reversed the creation of the Council of Judicial Government to replace the Administrative Chamber of the Superior Judicature Council.⁵⁴ Similarly, Decision C-373/16 erased the newly minted Special Commission (*Comision de Aforados*) that was intended to investigate High Court judges and the Prosecutor General (among others).⁵⁵

The reasoning of the Court in both cases rests on the judicially crafted theory that the structural changes to the judicial branch constituted a “partial substitution of the basic principles of separation of powers, judicial autonomy and independence as expressed in the model of judicial self-government provided by the constitutional assembly of 1991.”⁵⁶ Essentially, the Court considered that restructuring the judicial branch subverted the basic principles of the Constitution, even if the amendment process was correctly followed.⁵⁷ The rulings, however, did not affect the provisions of the Reform intended to address the Revolving Door, which are discussed below.

a. *The Reform’s attempt to end Rotations*

⁵³ Corte Constitucional [CC] [Constitutional Court] Decision C-373/16, 13 julio 2016, *available at* <http://www.corteconstitucional.gov.co/comunicados/No.%2029%20comunicado%2013%20julio%20de%202016.pdf>.

⁵⁴ CC Decision C-285/16, 1 junio 2016.

⁵⁵ CC Decision C-373/16, 13 julio 2016.

⁵⁶ CC Decision C-373/16, 13 julio 2016; CC Decision C-285/16, 1 junio 2016 (ruling that the new system to investigate and judge High Court Judges and the Prosecutor General substituted the “defining axis” of “separation of powers and judicial autonomy and independence.”)

⁵⁷ The essence of this theory, which was developed by the Constitutional Court when it struck down a proposed constitutional amendment to allow for a second re-election of President Alvaro Uribe, is to prevent constitutional amendments that would change the basic nature of the Colombian state. For example, if Congress were to pass an amendment transforming the state into a monarchy, the Court could apply this “subversion” theory to strike it down.

Rotations consist of Judicial Officers and other public officials (1) benefiting from the general endogamy of the election systems⁵⁸ to rotate between high judicial offices (e.g. from one court to the other or from a High Court to the Public Ministry) (“*Position Jumping*”), (2) using their position as springboard toward elected office or high government positions (“*Self-promotion*”), and (3) using the influence gained during their time in office to serve private interests (a very common practice in the United States, where former high-level government attorneys are often hired by law firms to represent private interests) (“*Influence Peddling*”).

Self-promotion

Self-promotion and Position Jumping were both partially addressed in proposed modifications to Article 232 of the Constitution, which establishes the requirements to be a High Court judge.

To curb Self-promotion, the Reform amended Article 232 to include a requirement of 15 years of experience practicing or teaching law to become a High Court judge.⁵⁹ There was previously no such requirement. With this change, Congress hoped to ensure that a High Court judgeship would henceforth be treated as the last step of a successful legal career, rather than just another line in a resume.⁶⁰

⁵⁸ See figures 1 and 2 for a visual depiction of this endogamous system.

⁵⁹ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 232; ACTO LEGISLATIVO 02 DEL 1 DE JULIO DE 2015 [Acto 02], art. 12 (Colom).

⁶⁰ The translated quote is “... establish the high judgeship as the last step in a successful legal career, rather than as an additional line in the *curriculum vitae* of a career on the rise.”

Although this amendment was certainly a step in the right direction, it is patently insufficient to curb Self-promotion, given that most legal careers in Colombia can start at age 23, upon completion of a five-year law program. This means that by age 37, most lawyers would be eligible for a High Court judgeship, which is limited to eight years. It would certainly be unreasonable to expect that prestigious jurists complete the “last step” in their legal career by age 45 or even 50 (the initial proposal was a 20-year requirement, which was negotiated down to 15). This is a simple case of lack of political will to do what is necessary to achieve a stated goal: if congress wanted High Court judgeships to be the pinnacle of a legal career reserved for those with extensive experience (while avoiding the thorny issue of lifetime appointments), it should have established, at a minimum, a 35-year experience requirement, which would translate into a *de facto* minimum age requirement of approximately 58. This would mean that most High Court judges would finish their term by age 66, a reasonable age for full or partial retirement.

Position Jumping

The first draft of the bill⁶¹ partially addressed Position Jumping by including in Article 232, in addition to the new experience requirement, a prohibition for judges of the Supreme Court, Constitutional Court, and Council of State from ever serving on more than one of

⁶¹ Legislative history is recorded in *Gacetas del Congreso*. To consult them, visit <http://www.imprenta.gov.co/gacetap/gaceta.portals>, click on “*Historico Gacetas*,” “*Consultar por Numero de la Gaceta*,” and enter number and year.

those tribunals.⁶² This would have, at least, ended Position Jumping within the High Courts (but not from the Courts to other positions). The clause containing this prohibition survived from the first debate until the fifth, when it was eliminated without a satisfactory explanation.⁶³

Figure 3. Article 17 of the ponencia (draft) for the fifth debate – proposed modifications to Article 232 of the Constitution.

Texto conciliado primera Vuelta	TEXTO PROPUESTO
<p>Artículo 17. Frente al artículo 17 del texto conciliado en primera vuelta, que modifica el artículo 232 de la Constitución Política proponemos mantener el requisito de veinte años de experiencia para acceder a la magistratura. Esta propuesta busca establecer la magistratura como el último paso en una carrera jurídica exitosa, y no como una anotación en la hoja de vida de una carrera ascendiente. Con respecto al texto aprobado en primera vuelta, proponemos que la inhabilidad posterior sea la general, regulada en el artículo 126.</p> <p>Artículo 17. Modifíquese el numeral cuarto y adiciónese un numeral quinto al artículo 232 de la Constitución Política, los cuales quedarán así: (2) 4. Haber desempeñado, durante veinte años, cargos en la Rama Judicial o en el Ministerio Público, o haber ejercido, con buen crédito, por el mismo tiempo, la profesión de abogado o la cátedra universitaria en disciplinas jurídicas en establecimientos reconocidos</p>	<p>Artículo. Modifíquese el numeral cuarto y adiciónese un numeral quinto al artículo 232 de la Constitución Política, los cuales quedarán así: (2) 4. Haber desempeñado, durante veinte años, cargos en la Rama Judicial o en el Ministerio Público, o haber ejercido, con buen crédito, por el mismo tiempo, la profesión de abogado o la cátedra universitaria en disciplinas jurídicas en establecimientos reconocidos</p>
<p>oficialmente. Para el cargo de Magistrado de la Corte Suprema de Justicia y del Consejo de Estado, la cátedra universitaria deberá haber sido ejercida en disciplinas jurídicas relacionadas con el área de la magistratura a ejercer, en establecimientos reconocidos oficialmente.</p> <p>5. No haber desempeñado en propiedad el cargo de Magistrado de la Corte Constitucional, de la Corte Suprema de Justicia, del Consejo de Estado, del Tribunal de Aforados, Consejo Nacional Electoral o Comisión Nacional de Disciplina Judicial.</p>	<p>oficialmente. Para el cargo de Magistrado de la Corte Suprema de Justicia y del Consejo de Estado, la cátedra universitaria deberá haber sido ejercida en disciplinas jurídicas relacionadas con el área de la magistratura a ejercer. en establecimientos reconocidos oficialmente.</p> <p>5. No haber desempeñado en propiedad el cargo de Magistrado de la Corte Constitucional, de la Corte Suprema de Justicia, del Consejo de Estado, del Tribunal de Aforados, Consejo Nacional Electoral o Comisión Nacional de Disciplina Judicial.</p>

The details surrounding this elimination are confusing but worth exploring (see figure 3):⁶⁴

⁶² GACETA DEL CONGRESO [GC] [Congress Gazette] 458, 03/09/2014, art. 13 (Colom). The proposed legislation would have modified Article 232 of the Constitution as follows “*Para ser Magistrado de la Corte Constitucional, de la Corte Suprema de Justicia y del Consejo de Estado se requiere: [...] 5. No haber desempeñado en propiedad el cargo de Magistrado en alguna de estas corporaciones.*”

⁶³ GACETA DEL CONGRESO [GC] [Congress Gazette] 138, 23/03/2015, D. Pliego de Modificaciones. art. 17.

⁶⁴ Refer to figure 3 for a visual of the *ponencia*, which will make it easier to follow the description.

- Article 17 of the *ponencia* (draft) for the fifth debate⁶⁵ contained the proposed changes to Article 232, which were adopted without modification after the debate.
- The proposed changes to Article 232 are presented in two columns and two rows. The column on the left shows the text as it was approved in the previous debate and the column on the right shows the text (in “strikethrough”) with the changes that are being introduced in the fifth debate. The first row addresses the years of experience required to be a High Court judge (discussed above) and the second row the prohibition from serving on more than one High Court.
- The header above the columns contains an explanation for the proposed changes (or lack thereof).
- The first two sentences of the header state that there are no proposed changes to the experience requirement as initially included in the bill.
- The following sentence addresses the proposed changes to the prohibition clause: the prohibition from serving on more than one High Court will be deleted and the matter should instead “be governed by the general prohibition contained in Article 126.”⁶⁶
- This “general prohibition” was added to Article 126 in the fifth debate and reads:

“Anyone having held any of the offices listed below may not be reelected to said office and may not be nominated for any of the other offices listed

⁶⁵ The *ponencia*, which translates directly as “presentation,” is the initial draft of the bill presented at the start of every debate. It contains all proposed changes to the draft approved in the prior debate with the corresponding explanations, as depicted in figure 3.

⁶⁶ GC 138, 23/03/2015, D. Pliego de Modificaciones. art. 17. Unfortunately, Gaceta 28 of 2015, which contains the transcript of the joint session of Congress that approved this *ponencia* and could shed some light on the motives behind this modification is not available in the government’s database.

or hold any elected office during a one-year period after leaving such office:

(i) a judge of the Supreme Court, Constitutional Court, Council of State, Judicial Discipline Commission, (ii) Inspector General, (iii) Prosecutor General, (iv) Ombudsman, (v) Comptroller General, and (vi) National Registrar.”⁶⁷

The problem is that, substantively, the deleted prohibition and the “general prohibition” are completely different: the former is a permanent disqualification whereas the latter is a one-year waiting period. And no explanation was provided for this enormous substantive change.

Instead, as discussed above, the section of the *ponencia* discussing Article 232 (figure 3) simply stated that the issue of disqualification should be governed by Article 126. This creates the impression that the justification for the modification can be found in the section discussing Article 126. But it is not. The section discussing Article 126 ignores the deletion of the permanent ban altogether. It merely states that the one-year disqualification is being added to Article 126 as a drafting improvement that avoids redundancy by grouping all waiting periods applicable to different offices in a single article, as opposed to having them in the article that governs each office.⁶⁸

⁶⁷ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 126; Acto 02, art. 2.

⁶⁸ GC 138, 23/03/2015, D. Pliego de Modificaciones, art. 5. The exact language of the aesthetic explanation is: “*Finalmente, con el objetivo de mejorar la redacción en conjunto de la reforma, se toman las inhabilidades que en texto conciliado aparecen a lo largo de varios artículos y se incluyen todos en un solo texto compuesto por dos incisos, los cuales consagran, la prohibición de reelección, el cierre de la llamada puerta giratoria y la inhabilidad que era reiterante en el texto anterior, con lo cual se logra una mejor unidad en el texto constitucional y se armonizarán las disposiciones contrarias en el respectivo artículo de vigencia, concordancias y derogatorias.*”

This utter lack of substantive elucidation creates a misleading sense of false equivalency between the one-year waiting period in Article 126 and the lifetime disqualification deleted from Article 232, which are treated as interchangeable even though they are entirely different.

It requires only basic common sense to conclude that a one-year waiting period is an innocuous measure against Position Jumping and unwanted Rotations in General. While it does cover a longer list of influential offices rather than just High Court judgeships, it imposes a toothless time restriction. Thus, instead of imposing common-sense limitations on undesired Rotations, it ends up legitimizing them. Outgoing Judicial Officers now have a constitutionally mandated one-year sabbatical to effectively utilize their network to secure their next position (*Position Jumping or Influence Peddling*) or to campaign for public office (*Self-promotion*).

Influence Peddling

In the fifth debate, Congress tried to address Influence Peddling by introducing a five-year waiting period for former High Court judges to litigate before the court on which they previously served.⁶⁹ This would have replaced the two-year disqualification that already

⁶⁹ GC 138, 23/03/2015, D. Pliego de Modificaciones, art. 18. The exact language was the following: “*Quien haya ejercido en propiedad el cargo de Magistrado de la Corte Constitucional, Corte Suprema de Justicia o Consejo de Estado, no podrá actuar como apoderado ante la corporación de la cual hizo parte, ni asesorar a partes interesadas en relación con procesos ante la misma, sino cinco años después de haber cesado en sus funciones.*”

existed under statutory law. The language imposing the five-year waiting period was the subject of extensive and heated discussion during the sixth debate in the Senate, which was held on April 28, 2015.⁷⁰ During and after the debate, numerous senators denounced that they were subjected to improper pressures from a representative of the Prosecutor General's Office to vote against imposing the five-year disqualification on the Prosecutor General (they even had this person expelled from the Senate floor).⁷¹ The five-year disqualification covering only High Court judges was finally approved by a 55-19 vote.⁷² On April 29, 2015, however, the Senate reopened the vote on Article 233 and the five-year ban was removed altogether by a 60-14 vote.⁷³ The transcript of the session reveals that the Senate and the government allegedly reached a consensus that the five-year disqualification was excessive and would discourage qualified candidates from accepting High Court judgeships.⁷⁴ The logic was that, although it would be preferable for former High Court judges not to litigate, this should be achieved by structuring their terms in a manner that allows them to comfortably retire after their term expires.

⁷⁰ GC 644, 31/08/2015.

⁷¹ See e.g. *¿Quién era la 'lobbista' del Fiscal que apareció en el Congreso?*, EL TIEMPO (Col.), April 29, 2015, available at <http://www.eltiempo.com/politica/congreso/denuncian-lobbista-en-congreso-para-fiscal-montealegre/15650115>; *Nuevos dardos del Consejo de Estado al equilibrio de poderes*, EL TIEMPO (April 29, 2015), available at <http://www.eltiempo.com/politica/congreso/reforma-del-equilibrio-de-poderes-criticas-del-consejo-de-estado/15650900>; *Senado hundió inhabilidad de 5 años para magistrados*, EL TIEMPO (May 2, 2015), available at <http://www.eltiempo.com/politica/congreso/se-hundio-inhabilidad-de-5-anos-para-magistrados/15670983>.

⁷² GC 644, 31/08/2015. The transcript of the debate shows that the language was hotly debated in the Senate and finally approved as five-year ban by a 54-19. *El Tiempo* and other media outlets also reported on April 29, 2015 that the five-year ban was approved despite pressure from the Prosecutor General's Office to exclude the Prosecutor General from the ban. *Nuevos dardos del Consejo de Estado al equilibrio de poderes*, EL TIEMPO (April 29, 2015), available at <http://www.eltiempo.com/politica/congreso/reforma-del-equilibrio-de-poderes-criticas-del-consejo-de-estado/15650900>.

⁷³ GC 727, 22/09/2015.

⁷⁴ GC 727, 22/09/2015.

A plain reading of the transcript tells the story of a Senate that was aware of the insufficiency of the measures it was adopting and of the need for deeper structural reform. It also tells the story of a government and a Congress that had been working on this legislation for ten months and wanted to move ahead with it, regardless of whether crucial points were being dropped.⁷⁵

Congress thus failed to address Rotations in a meaningful way: (1) it added a 15-year experience requirement, which is positive but insufficient to curb Self-promotion, (2) it imposed a mere one-year disqualification to rotate between high offices, which is absolutely innocuous against Position Jumping and Self-Promotion, and (3) it left intact a two-year statutory waiting period for former High Court judges to litigate before the court on which they served, thus choosing to ignore the problem of Influence Peddling. Had Congress chosen to meaningfully engage with the structure of judicial powers,⁷⁶ there were options available that it could have considered.

b. How Rotations could have been addressed: meaningful restrictions on outgoing Judicial Officers

Ironically, controlling unwanted Rotations was perhaps the simplest task that Congress had set for itself. The first step should have been to articulate that the objective was not to end

⁷⁵ GC 727, 22/09/2015. During the debate, the minister of justice stated “this reform is advancing in a very important way and there is no reason to, for the sake of improving justice, incorporate a waiting period longer than what is already contemplated under statutory law.”

⁷⁶ That is, the structure of the powers assigned to the judicial branch, not the structure of the judicial branch itself which, as we now know, is ever more difficult to reform considering the Constitutional Court’s position on the matter.

all Rotations but rather to identify and curb those that are problematic because they are against the public interest. Some Rotations are logical and positive steps, as they allow public servants who have accumulated experience and performed well to move up the ladders of the justice system (as further discussed below).

The second step should have been, rather than imposing a meaningless one-size-fits-all waiting period, to craft restrictions based on specific goals and to apply such restrictions to each relevant office in a tailored manner. The following list of restrictions is an example of how this could have been achieved:

Affirming the independence and finality of the highest judicial offices

High Court judgeships should be treated and regarded as the final and most prestigious step in a successful legal career.⁷⁷ This should also be true of the Inspector General's office. Although the Inspector General's Office is not by definition a court, it wields prosecutorial, adjudicative, and punitive powers.⁷⁸ Unlike the High Courts, which are collegial bodies, the Constitution vests powers in the Inspector General himself,⁷⁹ making the office equally or more powerful than a High Court judgeship. Accordingly, High Court judges and the Inspector General should be subject to mandatory retirement after their term is served. Retirees would be limited to academic positions and strictly prohibited from litigating, holding any other government position or seeking elected office.⁸⁰ Because these

⁷⁷ See Figure 3.

⁷⁸ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 277.

⁷⁹ *Id.*

⁸⁰ This is the approach taken by Brazil with regard to their Federal Supreme Court Ministers.

restrictions would severely limit their ability to work, it is of extreme importance that their pension benefits be generous and that there be a high minimum age requirement to be named to any such office. An increased age requirement would help weed out inexperienced candidates and avoid the potential injustice of forbidding young ex-judges or Inspectors General from practicing the legal profession. Moreover, it is necessary that the Inspector General, like the Prosecutor General, be subject to the same eligibility requirements as High Court judges. It is surprising that the Constitution would provide a very specific set of qualifications to access other important offices but fails to provide any for what is arguably the single most powerful public office after the Presidency.⁸¹

Preventing the use of investigative offices for political gain

The Prosecutor General has no formal adjudicative powers yet holds enormous political and legal influence because his office is highly visible and his investigations are often the subject of extensive coverage and controversy. Although the Comptroller General has some administrative adjudicative powers, he may only impose financial penalties and his rulings (and his office's rulings) are subject to direct review by administrative courts, unlike the Inspector General's.⁸² Accordingly, the Comptroller General's power, like the Prosecutor General's, stems from the visibility of his office and investigations. Accordingly, outgoing Prosecutors and Comptrollers General should be barred from

⁸¹ See e.g. Ordóñez, *¿el hombre más poderoso de Colombia?*, REVISTA SEMANA (Oct. 10, 2013), available at <http://www.semana.com/nacion/articulo/ordonez-es-el-hombre-mas-poderoso-de-colombia/367790-3>; *Así está el debate sobre las facultades del Procurador General*, EL UNIVERSAL (Dec. 9, 2013), available at <http://www.eluniversal.com.co/politica/asi-esta-el-debate-sobre-las-facultades-del-procurador-general-144980>

⁸² CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 267, 268; Law 610 of 2000, art. 59.

running for elected office or from seeking elected office or any position in the executive branch for an eight-year period. This period would cover the presumed terms of the two immediate successors of the Prosecutor General and Comptroller General. This interlude should be sufficient to let the influence of their respective former office wane. This would serve two essential purposes: (1) dissuade career politicians from seeking these offices, which would reinforce the independence of the office, and (2) dissuade the holder of the office from using his official and unofficial powers as a springboard toward electoral politics or government positions. Although such limitations can hardly guarantee that these offices will not be politicized, they certainly make them less attractive career options for politicians and reduce the potential political rewards of holding such positions.

Maintaining distance between the guardians and the guarded

It is essential that officials with oversight responsibilities be subject to waiting periods before being eligible for offices subject to their jurisdiction. The goals here are (1) to ensure that no person may replace or succeed anyone whom they investigated and (2) to immediately become subject to the jurisdiction of their former office, where many of their former peers and/or subordinates still work.

In light of this, the Prosecutor General and the Comptroller General should be ineligible to hold each other's office or the office of Inspector General for a period of eight years (presumed term of two immediate successors).

With regard to private sector activities, the Prosecutor General should only be subject to a waiting period of four years (the term of his immediate successor) before litigating or advising clients in any capacity regarding criminal matters. The Comptroller General should be subject to the same blackout period with regard to companies that receive public funds and are thus subject to his jurisdiction. The Ombudsman should also be barred from litigating cases in which his former office is involved for the same period.

The Judicial Discipline Commission investigates and imposes disciplinary sanctions on attorneys and judicial branch employees who are not subject to special jurisdictions (High Court judges and the Prosecutor General).⁸³ Because the entity has jurisdiction over all of the employees of the Judicial Branch, including the staff of the High Court judges and the Prosecutor General, its judges could have significant informational leverage over such institutions. The Commission, however, is a collegial body whose jurisdiction is limited mostly to lower-level judicial branch employees, which limits the visibility of its investigations and its individual members. As such, outgoing Judicial Discipline Commission judges should only be subject to a waiting period of four years before taking offices over which they formerly had jurisdiction. This would allow them to climb up the ladder to a High Court judgeship (a natural progression) or to be considered for other high offices for which they may be qualified. No restrictions for taking political office seem necessary, given that the Commission does not provide enough visibility to be an attractive stepping stone to career politicians (but they may be worth imposing, for the sake of consistency).

⁸³ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 257; Acto 02, art. 19.

Specific restrictions

The Ombudsman is charged with the promotion and the dissemination of human rights.⁸⁴ This office has no adjudicative powers and very narrow investigative powers,⁸⁵ which translates into limited political influence. Accordingly, the current constitutional restrictions on outgoing Ombudsmen seem appropriate (e.g. the one-year waiting period), except with regard to litigating cases in which the Office of the Ombudsman is involved, in which case a four-year waiting period should apply, as discussed above.

Protecting Positive Rotations

Members of the Superior Judicature Council, the entity in charge of judicial administration, are considered high-level judges (*magistrados*),⁸⁶ even though the Council is not a tribunal. Because the role of these judges in the administration of justice is crucial to the maintenance of judicial independence,⁸⁷ they should be subject to the same restrictions as judges of the Supreme Court, Constitutional Court, and Council of State, except that they could be appointed to one of those courts. Forbidding these judges from entering the legislative and executive branches, and from using their acquired influence to litigate

⁸⁴ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 282.

⁸⁵ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 284. The Ombudsman may request from the authorities information necessary for the exercise of his functions, except as otherwise provided by the Constitution and the law.

⁸⁶ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 255.

⁸⁷ See CC Decision C-373/16, 13 julio 2016 (reversing the replacement of the Superior Judicature Council due to great significance of its role in safeguarding judicial independence by providing judicial self-government).

before the High Courts would help insulate the judicial branch from politicking. The Superior Judicature Council can reasonably be perceived as laying a single step below the High Courts in terms of judicial hierarchy, and as such, it is reasonable that its members only be permitted to take that final step up.

Similarly, neither of the Prosecutor General nor the Comptroller General should be prohibited from holding a judgeship in a High Court. If High Courts are to be treated as the highest step in a successful legal career, these positions should be considered a step below (outside of the judicial branch). The experience and substantive knowledge gained in these positions could be a valuable asset for a High Court judge.

Other Rotations not specifically restricted should be permitted but heavily publicized and explained, so as to combat the perception of impropriety that accompanies Rotations.

c. *The Reform's attempt to end Improper Appointments*

Improper Appointments consist of public officials using their administrative powers to favor their own relatives or to gain favor from other public officials by nominating or appointing them or their relatives. While the occurrence of Rotations is highly visible because it involves a limited number of high-profile people changing roles, Improper Appointments often occur at lower levels and in such high numbers that they are likely harder to identify,⁸⁸ which makes it difficult to properly address them normatively.

⁸⁸ Though this is clearly not always the case. Consider the recent high profile destitution of the most recent Inspector General by the Council of State for having appointed family members of High Court judges who

To address Improper Appointments, the Reform took two major steps. First, it contained a provision that prohibits all public servants from appointing, nominating or entering into state contracts with their relatives, any person who intervened in such public servant's own nomination or appointment, and any such person's relatives, unless such appointments are merit-based career appointments or promotions made in accordance with the applicable rules and regulations (this provision is hereafter referred to as the "Prohibited Appointments" provision).⁸⁹ Second, it required that the selection of public servants be preceded by a public call for applications regulated by law, and such law must contain requirements and procedures guaranteeing transparency, civic participation, gender equity and the use of merit-based selection criteria (this provision is hereafter referred to as the "Public Call" provision).⁹⁰

The Prohibited Appointments provision is a normative attempt to regulate the hiring and public contracting practices of public servants but is nothing more than a detailed constitutional amendment that says "corruption and nepotism are forbidden." The Public

participated in his nomination for re-election to positions in his office (undeniably a case of Improper Appointments).

⁸⁹ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 126; Acto 02, art. 2. The language of the provision can be translated as "public servants may not, in the exercise of their functions, appoint, nominate or contract with related persons within the fourth degree of consanguinity, second degree of affinity, first civil degree, or with persons with whom they are related through marriage or permanent union. Public servants are also prohibited from appointing or nominating as public servants or entering into state contracts with any person who intervened in such public servant's own nomination or appointment, or with any other person who is related to such person as set forth above [...] Appointments made in application of valid norms regarding the entrance and promotion to career positions based on merit."

⁹⁰ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 126; Acto 02, art. 2. The language of the provision can be translated as "other than entrance exams regulated by law, the election of public servants by public organs must be preceded by a public call for applications regulated by a law containing requirements and procedures guaranteeing the principles of publicity, transparency, civic participation, gender equity and merit-based selection criteria"

Call provision, on the other hand, is a decorative attempt to make public hiring more transparent by ensuring that positions are publicly posted and that the process takes into account “merit-based” criteria. Although the intention behind these provisions is positive, their impact will likely be insignificant.

d. Why this normative approach to end Improper Appointments will be ineffective

The Prohibited Appointments and Public Call provisions will very likely fail to achieve their goals (at least within the justice system). Rather than focusing on regulating the conduct of Judicial Officers, the provisions purport to regulate the conduct of all public servants. Thus, by trying to do too much, they end up doing very little. To illustrate the problem, under the Prohibited Appointments provision a Supreme Court judge may not nominate for a Constitutional Court vacancy a member of the Superior Judicature Council who participated in generating the candidate list from which such judge was chosen. A Supreme Court judge, however, can still nominate another member of the Superior Judicature Council, or his wife, son, nephew or friend. Although the Prohibited Appointments provision’s specificity limits the extent to which favors may be traded, it merely adds additional hoops through which judicial officials need to jump to make the appointments that they want to make.

As for the Public Call provision, it only succeeds at creating the illusion of additional transparency. In reality, because selecting officials retain broad discretion to make

selections from within the pool of applicants, a call for applications only gives the public the chance to apply but does nothing to ensure a merit-based selection. Moreover, requiring that the “principle” of “merit-based selection criteria” be taken into account when enabling legislation is drafted guarantees nothing. The concept of “merit-based criteria” is overly broad and is bundled with several other “principles” that must be taken into account. Unless enabling legislation seriously takes the unlikely step of limiting discretion by imposing objectively verifiable criteria that officials must follow when making appointments or nominations, this provision merely forces them to devise plausible pretexts to justify any Improper Appointment they wish to make.

e. The Reform’s vision problem: attempting to regulate behavior without redesigning incentives

The Reform’s essential flaw in its approach to the Revolving Door is that it opted for an insufficient normative approach rather than dealing with the larger, more difficult issue of constitutional design.

Rather than attempting to regulate behavior, the focus of the Reform should have been to redesign the roles of Judicial Officers to remove the type of incentives that contribute to the undesired politization of justice (politicking). This could have been achieved by (1) stripping Judicial Officers of all nomination and appointment powers, except for the hiring of their own staff and other purely administrative roles, (2) establishing a solid retirement and pension system that counterbalances the heavy restrictions discussed in section II(b)

and enables Judicial Officers to retire comfortably after their service, rather than focusing on securing their next position, and (3) imposing a set of tailored restrictions on outgoing Judicial Officers, as discussed above.

It is interesting to note that this type of radical redesign was contemplated under the official objectives of the proposed bill, which included (1) “reformulating the election or nomination of public servants that are the purview of the courts and that are not directly related to the administration of justice,” (2) adopting rules to impede the exchange of favors between controllers and “controllees,” (3) adopting, generally, objective, transparent and public procedures for the nomination and election of candidates to Control Entities, and (4) prohibiting reelection and approving grounds for disqualification to aspire to elected office to impede the use of judicial office to gain political advantages.⁹¹

As discussed above, however, these objectives were only partially addressed. The resulting legislation was a lukewarm effort in the pursuit of lofty goals that is very unlikely to yield any significant results.

III) Conclusion

As Colombia advances toward the likely implementation of a “peace agreement” with the FARC, the time to solve the justice crisis seems to have expired. Despite the uncertainty generated by the electorate’s narrow rejection of the plebiscite to approve the initial

⁹¹ GC 458, 03/09/2014, Exposición de Motivos, El Objetivo de la Reforma de Equilibrio de Poderes y Reajuste Institucional.

agreement, it seems likely that some sort of compromise will be reached among the Government, the opposition that promoted the vote against the agreement, and the FARC. If this is the case, a transitional justice system will be necessary as a temporary mechanism to deal with specific crimes committed in relation to the armed conflict, but it will not secure the adequate functioning of the judicial apparatus once the dust settles. Without a functional and legitimate judicial system, Colombia will not be able to quench the ever-growing thirst for justice that will only increase during the implementation of the “peace agreement.” If no compromise is reached and the peace process fully collapses, the state of the justice system is likely to be the least of the country’s problems.

In either case, what seems clear is that the combination of an inefficient and ineffective political process and the Constitutional Court’s reluctance to accept structural changes to the judicial apparatus makes it extremely unlikely that meaningful judicial reform can be achieved through the amendment process.

For better or for worse, it seems that the only way to restructure judicial power in a cohesive manner is to return to the drawing table and bid the 1991 Constitution farewell. With the possibility of FARC joining political society, however, this is an extremely risky proposition that begs the question of whether structural reform is even desirable. Perhaps Colombia’s justice system will only improve if the country’s political culture begins to change as a new generation takes the reins of power.

Appendix: A Brief Overview of Colombia's Justice System

D) Glossary of Institutional Names

To facilitate the reading of this paper, I have translated from Spanish the names of several institutions mentioned throughout the document:

Chamber of Representatives: *Cámara de Representantes*

Comptroller General: *Contralor General de la República*

Control Entities: *Organismos de Control del Estado*

Constitutional Court: *Corte Constitucional*

Council of Judicial Government: *Concejo de Gobierno Judicial*

Council of State: *Concejo de Estado*

High Courts: *Altas Cortes* (Constitutional Court, Supreme Court, and Council of State)

Inspector General: *Procurador General de la Nación*

Judicial Discipline Commission: *Comisión Nacional de Disciplina Judicial*

National Police: *Policía Nacional*

National Electoral Council: *Consejo Nacional Electoral*

National Registrar: *Registrador Nacional del Estado Civil*

Ombudsman: *Defensor del Pueblo*

President: *Presidente de la República*

Prosecutor General: *Fiscal General de la Nación*

Prosecutor General's Office: *Fiscalía General de la Nación*

Public Ministry: *Ministerio Público*

Senate: *Senado de la República*

Special Commission: *Comisión de Aforados*

Superior Judicature Council: *Consejo Superior de la Judicatura*

II) Colombia's Judicial Institutions

Supreme judicial authority in Colombia is shared by the Constitutional Court, the Supreme Court, and the Council of State (the "High Courts"). The Constitutional Court is the supreme tribunal of the constitutional jurisdiction and its essential role is to protect the Constitution through a broad power of constitutional judicial review of laws, decrees, treaties, court decisions.⁹² The Constitutional Court is also the ultimate arbiter of jurisdictional conflicts.⁹³

The Supreme Court is the ultimate appellate court of the ordinary jurisdiction, which encompasses civil litigation and criminal matters.⁹⁴ The Supreme Court also has direct jurisdiction (with nuances) over criminal charges against the President, High Court judges, the Prosecutor General, members of Congress, the Vice-President of the Republic, cabinet ministers, the Inspector General and his delegates, the Ombudsman, among others.⁹⁵

⁹² CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 241.

⁹³ *Id.*

⁹⁴ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 234.

⁹⁵ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 235.

The Council of State is the supreme tribunal of the administrative jurisdiction, which consists of administrative law disputes.⁹⁶ The Council also acts as a consultative body to the government on matters of administrative law and military arrangements with foreign nations involving national territory, among other matters.⁹⁷ The Council also prepares and proposes laws and constitutional reform projects.⁹⁸

Given the Constitutional Court's elimination of the Council of Judicial Government,⁹⁹ the Administrative Chamber of Superior Judicature Council remained in charge of the administration of justice and the judicial profession.¹⁰⁰ It is also highly influential in the composition of the Council of State and the Supreme Court because it is in charge of creating candidate lists from which each court appoints its judges when vacancies arise.¹⁰¹ The functions of the Disciplinary Chamber of the Superior Judicature Council, however, were given to a newly created entity named the Judicial Discipline Commission, which is in charge of the oversight and discipline of members of the judicial branch and litigating attorneys.¹⁰²

The Public Ministry is a Control Entity, which is constitutionally independent from the judicial branch (and all other branches) and is headed by the Inspector General, as its

⁹⁶ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 236, 237.

⁹⁷ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 237.

⁹⁸ *Id.*

⁹⁹ *See* CC Decision C-373/16, 13 julio 2016.

¹⁰⁰ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 256.

¹⁰¹ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 254; Acto 02, art. 15 (the Constitutional Court did not strike down the requirement that vacancies in the Council of State and Supreme Court be filled from lists of 10 put together by the Council of Judicial Government. The Court simply assigned this function to the Administrative Chamber of the Superior Judicature Council.

¹⁰² CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 257; Acto 02, art. 19.

“supreme director.”¹⁰³ The Constitution grants the Inspector General a long list of powers, including safeguarding the Constitution and the law, and protecting human, social and collective rights. However, the Inspector General’s most important powers are, arguably, the powers to subpoena information from any entity, and to investigate and impose disciplinary sanctions on any person holding public office, including elected officials (except for those who are specifically subject to other disciplinary jurisdictions, such as the President).¹⁰⁴ Such sanctions include suspensions, limited-term destitutions and permanent bans from public office.¹⁰⁵

The Prosecutor General, as the nation’s chief prosecutor, is the head of the Prosecutor General’s Office, which is responsible for investigating and prosecuting criminal offenses before the nation’s courts and has jurisdiction over the entire national territory. The Constitution grants the Prosecutor General’s Office a long list of powers necessary to perform its investigative and prosecutorial roles, such as directing the National Police’s judicial police functions.¹⁰⁶ Although the Prosecutor General’s Office is part of the judicial branch, it has administrative and budgetary autonomy.¹⁰⁷

The Comptroller General is the chief auditor of public finances charged with overseeing all matters relating to the use of public funds. The Comptroller General provides oversight

¹⁰³ C.P., art. 275.

¹⁰⁴ *Id.* Note that the Constitution grants these Powers to the Inspector General himself, which he can exercise through his delegates, rather than to the Public Ministry.

¹⁰⁵ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 277.

¹⁰⁶ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], arts. 249-253. It is interesting to note that unlike the Inspector General, it is not the Prosecutor General himself who holds constitutional powers but the Prosecutor General’s Office.

¹⁰⁷ C.P., art. 249.

over of all entities managing public funds, including, in certain cases, private companies that have been awarded government contracts.¹⁰⁸ As such, he has adjudicative powers over “financial liability proceedings”¹⁰⁹ (administrative proceedings to determine civil responsibility for the misuse of public funds), as well as very significant investigative faculties, including judicial police powers (e.g. issuing subpoenas, conducting investigative hearings etc.).¹¹⁰ Rulings issued by the Comptroller General or his delegates can be directly appealed to the administrative courts, unlike rulings issued by the Inspector General’s Office.¹¹¹

Finally, the Ombudsman is charged with the promotion, the exercise and the dissemination of human rights.¹¹² His duties include guiding and informing the population with regard to the exercise and defense of their rights before the authorities or private entities, invoking the right to Habeas Corpus, organizing and directing the public defender service, among others.¹¹³ Even though the Office of the Ombudsman enjoys operational and budgetary autonomy (further enhanced by the Reform¹¹⁴), the Ombudsman has no adjudicative powers and very narrow investigative powers.¹¹⁵

III) The current selection system for Judicial Officers

¹⁰⁸ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 267.

¹⁰⁹ In Spanish, “*juicios fiscales*” or “*procesos de responsabilidad fiscal*.”

¹¹⁰ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 268; Law 610 of 2000, August 15, 2000 (regulating financial liability proceedings).

¹¹¹ Law 610 of 2000, art. 59, August 15, 2000.

¹¹² CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 282.

¹¹³ *Id.*

¹¹⁴ *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 281; Acto 02, art. 24.

¹¹⁵ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 284. The Ombudsman may request from the authorities information necessary for the exercise of his functions, except as otherwise provided by the Constitution and the law.

The 2015 Reform modified, among other things, several constitutional provisions regarding the selection mechanisms of several Judicial Officers. This section describes the selection mechanisms as they stand after the Reform but is careful to point out which provisions were modified or added by the Reform.

a. The High Courts

The Constitution provides that each of the Constitutional Court, Supreme Court, and Council of State shall have an odd number of judges, each of whom is elected for individual periods of eight years and may not be reelected. Their tenure is subject to good conduct, satisfactory performance, and not reaching the age of mandatory retirement.¹¹⁶

The requirements to be a judge in these three courts are the following:

- To be Colombian by birth and a citizen in good standing.
- To be a lawyer.
- To not have been condemned by a court sentence to imprisonment, except for political crimes or strict liability crimes.
- To have filled, for 15 years¹¹⁷, positions in the judicial branch or the Public Ministry, or to have exercised honorably for a like period the profession of lawyer or university professor in the legal disciplines in officially recognized institutions. To become a judge of the Supreme Court or Council of State, a

¹¹⁶ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 233.

¹¹⁷ Amended from 10 to 15 years.

professor's academic focus must be in disciplines related to the area of the judgeship in question.¹¹⁸

- Clarification (*paragrafo*): In order to be a judge of these courts it is not necessary to be a public employee of the judicial ranking system.¹¹⁹

As amended in 2015, the Constitution also provides that, when there is a vacancy in their respective court, the judges of the Supreme Court or the Council of State, as the case may be, appoint a judge to fill the vacancy from a list of ten candidates submitted by the Superior Judicature Council after a public call for applications.¹²⁰ Throughout the selection process, the participating bodies must take into account the “selection criterion” of achieving a balance between candidates coming from law practice, the judicial branch, and academia.¹²¹ The Supreme Court and the Council of State each have the prerogative of establishing their own voting procedures, including the delay for filling a vacancy.¹²²

In the case of the Constitutional Court, the Constitution provides that its judges are selected by the Senate from a list of three candidates submitted by the President, the Council of State or the Supreme Court, depending on the vacancy.¹²³ The Constitution further dictates that (1) the bodies participating in the selection process must take into account the goal of designating judges with diverse legal specialties and (2) no judge may be appointed to the

¹¹⁸ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 232. Acto 02, art. 12. This last sentence was added by the reform.

¹¹⁹ C.P., art. 232.

¹²⁰ C.P., art. 231. Acto 02, art. 11. The amended provision added the requirement that the list contain ten candidates and be drawn following a public call for applications. It also replaced the Superior Judicature Council with the newly created Council of Judicial Government as the body charged with creating the list.

¹²¹ C.P., art. 231. Acto 02, art. 11.

¹²² C.P., art. 231. Acto 02, art. 11.

¹²³ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 239.

Constitutional Court who acted as cabinet minister, Supreme Court Judge or Council of State judge during the prior year.¹²⁴ The law establishes that the Court must be composed of nine judges, three of whom are selected from the President's list, three from the Council of State's, and three from the Supreme Court's.¹²⁵ Thus, if the term of a judge selected from the President's list expires, the President must present a list of three candidates from which the Senate must select the replacement.

b. The Superior Judicature Council

The Administrative Chamber of the Superior Judicature Council, although not a tribunal, wields enormous power as the administrating and regulating body of the judicial branch and the legal profession, and as the entity charged with creating and submitting lists of candidates for the Supreme Court and the Council of State. The Council is composed of six members appointed as follows: One by the Constitutional Court, two by the Supreme Court, and three by the Council of State.¹²⁶

c. The Judicial Discipline Commission

The Commission is composed of seven judges, each of whom will serve a non-renewable term of eight years. Four judges are elected by a joint session of Congress from lists of candidates submitted by the Council of Judicial Government following a public call for applications. The remaining three judges are elected by a joint session of Congress from lists of candidates submitted by the President, following a public call for applications.

¹²⁴ *Id.*

¹²⁵ Ley 270 de 1996, art. 40.

¹²⁶ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art 254.

Candidates for this Commission must meet the same eligibility requirements imposed on Supreme Court judges.

d. The Inspector General (head of the Public Ministry)

The Inspector General is elected by the Senate from a list of three composed of candidates chosen by the President, the Supreme Court, and the Council of State (each selects one).¹²⁷

The Inspector General has full control in the selection and removal of his delegates and agents¹²⁸, who act as prosecutors and adjudicators in disciplinary actions against public officials and whose decisions can only be appealed to the Inspector General himself. There are no constitutional requirements to become Inspector General.

e. The Prosecutor General

The Prosecutor General is elected for a non-renewable four-year term by the Supreme Court from a list of three candidates submitted by the President. The Prosecutor General must meet the same eligibility requirements to which High Court judges are subject.¹²⁹

f. The Comptroller General

The Comptroller General is elected by a joint-session of Congress for a non-renewable period equal to that of the President (four years) from a list of candidates put together after a public call for applications.¹³⁰ The constitutional eligibility requirements for the office of

¹²⁷ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 276.

¹²⁸ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 278, No. 6.

¹²⁹ C.P., art. 249.

¹³⁰ C.P., art. 267; Acto 02, art. 22. Before the Reform, the Comptroller General was elected from a list of three candidates composed of candidates submitted by each of the Council of State, Constitutional Court, and Supreme Court. It is not clear yet which entity will be in charge of putting together the list.

Comptroller General are (1) to be Colombian by birth and in good standing, (2) to be older than 35 years of age, (3) to have a university degree or have been a university professor for no less than five years, and (4) to meet any other requirements established by law. Anyone having been a member of Congress or held a public position at the national level, except for a teaching position, during the year immediately preceding the election, is ineligible for the office of Comptroller General. Anyone convicted and sentence to prison for a felony is also ineligible for this office. Finally, no person within the fourth degree of consanguinity, second degree of affinity, first civil degree, or to whom a candidate is related through marriage or permanent union, may participate in the nomination or election of such candidate for the office of Comptroller General.¹³¹

g. The Ombudsman

The Ombudsman is elected by the Chamber of Representatives for a four-year period from a list of three candidates submitted by the President. There are no additional requirements for the office of the Ombudsman.¹³²

h. The one-year waiting period applicable to all of the above

The 2015 Reform added an additional eligibility requirement to holders of high offices in judicial entities and Control Entities. Anyone having held any of the offices listed below may not be reelected to said office and may not be nominated for any of the other offices listed or hold any elected office during a one-year period after leaving such office: (1) a judge of the Supreme Court, Constitutional Court, Council of State, Judicial Discipline

¹³¹ C.P., art. 267.

¹³² CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 281.

Commission, (2) Inspector General, (3) Prosecutor General, (3) Ombudsman, (4) Comptroller General, and (5) National Registrar.¹³³

¹³³ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 126; Acto 02, art. 2.