RESEARCH MEMORANDUM

Addressing Judicial Corruption– Integrity Testing and Other Measures

September 2016

With Contributions from INPROL Members and Other Experts:
Simon Butt, Moeen Cheema, Matt Ingram, Adrian Kingswell, Rick Messick, and Mark Radcliffe

Drafted By:
Lauren Gillespie and Lillian Dang (Ed.)
RESEARCH MEMORANDUM

Addressing Judicial Corruption – Integrity Testing and Other Measures

September 2016

Submitted By:
Melaine Dubreuil

With Contributions From INPROL Members and Other Experts:
Moeen Cheema, Nick Dove, Matt Ingram, Adrian Kingswell, Rick Messick, Mark Radcliffe

Written by:
Lauren Gillespie and Lillian Dang (Ed.)

Note:
All opinions stated in this Practitioner’s Guide have been made in a personal capacity and do not necessarily reflect the views of particular organizations. INPROL does not explicitly advocate policies.
Table of Contents

ACKNOWLEDGMENTS .............................................................................................................. 1

I. EXECUTIVE SUMMARY ...................................................................................................... 2

II. METHODOLOGY .................................................................................................................. 3

III. INTEGRITY TESTING AND OTHER INTEGRITY MEASURES ........................................ 3

IV. CANADA ............................................................................................................................ 8
   A. STRUCTURE ...................................................................................................................... 9
   B. TARGETING STRATEGIES .............................................................................................. 10
   C. PROCEDURES .................................................................................................................. 12
   D. SANCTIONS ..................................................................................................................... 12
   E. STRENGTHS .................................................................................................................... 13
   F. LIMITATIONS .................................................................................................................. 14

V. INDONESIA ....................................................................................................................... 14
   A. STRUCTURE ...................................................................................................................... 14
   B. TARGETING STRATEGIES .............................................................................................. 16
   C. PROCEDURES .................................................................................................................. 16
   D. SANCTIONS ..................................................................................................................... 17
   E. STRENGTHS .................................................................................................................... 18
   F. LIMITATIONS .................................................................................................................. 18

VI. PAKISTAN .......................................................................................................................... 19
   A. STRUCTURE ...................................................................................................................... 19
   B. TARGETING STRATEGIES .............................................................................................. 19
   C. PROCEDURES .................................................................................................................. 20
   D. SANCTIONS ..................................................................................................................... 21
   E. STRENGTHS .................................................................................................................... 21
   F. LIMITATIONS .................................................................................................................. 22

IV. FBI STING OPERATIONS .................................................................................................. 22
   A. BACKGROUND .................................................................................................................. 22
   B. STRUCTURE ..................................................................................................................... 23
   C. TARGETING ..................................................................................................................... 23
   D. PROCEDURES .................................................................................................................. 24
   E. SANCTIONS ..................................................................................................................... 25

VII. POLICE ........................................................................................................................... 25
   A. STRUCTURE ...................................................................................................................... 26
   B. TARGETING ..................................................................................................................... 27
   C. PROCEDURES .................................................................................................................. 29
   D. SANCTIONS ..................................................................................................................... 31
   E. STRENGTHS .................................................................................................................... 33
   F. LIMITATIONS .................................................................................................................. 34

VIII. CONCLUSION AND RECOMMENDATIONS .................................................................. 34

IX. ENDNOTES ....................................................................................................................... 35
Acknowledgments

This memorandum was drafted by Lauren Gillespie and was edited by Lillian Dang. INPROL Director Lelia Mooney provided substantive comments to the framing, outline and several versions of the draft. Special thanks go to Chelsea Dreher for her conscientious support in finalizing this memorandum.

INPROL members who contributed to this memorandum were invaluable in guiding the direction of the research. Rick Messick’s response on the INPROL forum was informative. His thoughtful answer was used in this project. SUNY Professor Matt Ingram provided guidance and substantial background knowledge about the general field of integrity testing. Next, Simon Butt, Associate Director of the Centre for Asian and Pacific Law at University of Sydney, contributed experience from his work researching corruption in Indonesia. Moeen Cheema, lecturer at the Australian National University, shared his thorough understanding of Pakistan’s institutions. Nick Dove, Mark Radcliffe, and Adrian Kingswell provided invaluable concrete insights into integrity testing practices in law enforcement.
I. Executive Summary

This research memorandum has been prepared in response to a request by the rule of law team of the United Nations Assistance Mission in Afghanistan (UNAMA) to identify good comparative examples of standard operating procedures, methodology, guidelines, and training materials of judicial integrity testing that have worked in other countries. Particular emphasis was placed on entrapment prevention and targeting strategies. UNAMA is supporting the Afghanistan Supreme Court’s Care and Control Department to examine exemplary approaches to integrity testing of the judiciary.

INPROL found there are few examples of integrity testing of judges involving undercover agents and simulated ‘test’ scenarios by agencies outside of the police. Police, however, do not apply integrity testing to the judiciary as an institution, but target judges on an individual basis, with investigations being criminal in nature. An exception is the “Greylord Operation” in the US in the 1980’s, where corruption within Cook County, Illinois, had become so endemic that the police investigation was analogous to an ‘integrity test’ of the entire judiciary.

There are few examples since of integrity testing being applied to the judiciary. A key challenge is the potential for integrity testing to undermine judicial independence. The European Commission for Democracy through Law (Venice Commission) recently found that an integrity testing law passed by Moldova in 2014 posed great risk to judicial independence, the principles of the separation of powers and the rule of law. The Venice Commission also found that Moldova’s integrity testing law risks violating citizens’ right to a fair trial and the right to privacy. Recognizing the limitations of integrity testing, the scope of research was broadened to examine other judicial integrity measures in addition to integrity testing.

As this memorandum was initially drafted to inform the work of the Care and Control Department of the Afghanistan Supreme Court, it focuses on integrity measures undertaken by similar internal departments or bodies. It also looks at approaches undertaken by anticorruption commissions given their relatively higher success rate in combatting judicial corruption. In addition, this memorandum examines police integrity testing practices. Police departments have a significant body of practice in running integrity testing of their own officers, and the Federal Bureau of Investigation (FBI) also runs sting operations targeted at public officials.

In examining how other countries regulate the conduct of judges and address judicial corruption, this memorandum identifies a number of effective approaches outside of integrity testing such as monitoring and surveillance. Monitoring approaches generally involve investigation through document review and interviewing witnesses. Surveillance is more intrusive and can
involve wiretapping and other audio-visual recording. Surveillance is distinct from integrity testing or a sting operation in that it does not involve the use of undercover agents and the stimulation of a ‘test’ scenario.

To understand how judicial integrity measures are applied in practice, this memorandum analyzes the judicial integrity frameworks of three countries: Canada, Indonesia, and Pakistan. Though many political, economic, and social factors distinguish them, these three countries were chosen to give a comparative understanding of integrity measures being used in a diversity of contexts: while no country is ever completely free of corruption, Canada experiences relatively low corruption in its government; Indonesia battles pervasive corruption, but has made strides with anticorruption reform; finally, Pakistan is worth examining to understand the strategies of addressing judicial corruption where there is both a lack of political will, and a high degree of political interference into the work of the judiciary.

II. Methodology

Upon receiving a request from UNAMA, this query was initially posted to INPROL’s rule of law discussion forum in April 2016. UNAMA found INPROL member’s answers helpful, and accepted INPROL’s offer to conduct additional research.

This memorandum relied on a mix of primary and secondary research methodology. INPROL commenced with a literature review of integrity testing generally, and testing as applied to the judiciary. Finding limited examples of integrity testing of the judiciary, INPROL sought to examine how judicial integrity is promoted, regulated, and enforced more generally in three case studies: Canada, Indonesia and Pakistan. The rationale for the country selection has been discussed in the Executive Summary. INPROL obtained copies of laws, by-laws, procedures, and guidelines regulating judicial integrity from the target countries. INPROL then conducted semistructured interviews with experts and scholars in the field of anticorruption, judicial integrity and police integrity testing to examine how these laws, by-laws, procedures and guidelines were applied in practice.

III. Integrity Testing and Other Integrity Measures

As an anticorruption measure, an integrity test has been defined by the United Nation Office on Drugs and Crime (UNODC) as the use of “undercover agents who offer officials opportunities to engage in corruption in circumstances where evidence of their reaction can be easily and credibly gathered.” This definition highlights one benefit of integrity test; namely, evidence that may
not be attained through other methods can be captured. Integrity tests are intended to deter crime by creating a “sense of omnipresence.” The subject of an integrity test is placed in a simulated scenario. As a subset of sting operations, integrity tests have the same four elements of a sting operation – but instead of testing a criminal, the test aims to ensure the integrity of an institution.

The UNDOC definition does not fully illuminate the technical aspects of an integrity test. First, tests must give the subject a choice to obey or break the law. Therefore, it is helpful to consider the New York Police Department’s definition of an integrity test: “the creation of an artificial situation or condition which is designed to provoke a reaction by the subject of a test. The subject is allowed the complete freedom to perform, or fail to perform, in a manner consistent with department and legal guidelines.” It is important to note the inclusion of free choice. The test must have an element of freedom so that the subject of the test does not feel persuaded to commit an illegal or unethical act. Integrity tests can only provide admissible evidence if the subject commits the act of their own volition.

Because this method is intrusive, integrity tests normally require approval from an institutional supervisor, but not always court oversight. For example, in Romania’s law enforcement institutions, integrity test are seen as an “administrative tool...[which] does not require the prosecutor’s approval.” Still, departments must be careful to respect the privacy of their subjects.

Integrity testing can be divided into two main categories: targeted tests and random tests. A targeted test is aimed at individuals or groups suspected of engaging in corrupt behavior. Targeted tests usually occur following a trigger event such as a “complaint, allegation, identified pattern of behaviour [sic] or some other basis that gives rise to suspicion” A random test occurs without any incident triggering suspicion of corruption. In practice, the distinction between targeted and random testing can be blurred. An organization may be targeted on the basis of higher corruption risk without any intelligence of actual corrupt behavior. The goal of targeted testing is generally investigative, whilst the goal of random testing is broadly deterrent.

Integrity testing was pioneered in the policing sector by the New York Police Department (NYPD) in the 1970s, and was adopted in the 1990s in countries such as Australia and the United Kingdom. Integrity testing has also been applied to the public sector by the Hong Kong Independent Commission Against Corruption. Integrity testing of the judiciary is most famously associated with “Operation Greylord,” a 1980s undercover operation conducted jointly by US federal agencies into corruption in the judiciary of Cook County, Illinois, in the United States. Despite the relative success of Operation Greylord, integrity testing of the judiciary is rarely conducted. A number of factors limit the widespread application of integrity testing to the
judiciary, including a generally highly-regulated process of judicial appointment, well-defined code of ethics and professional responsibilities, the availability of internal disciplinary mechanisms within the judicial structure, and most significantly, the principle of judicial independence.

Judicial independence, and the separation of powers between the judiciary and other branches of government, presents significant risks to the design of an integrity testing program for the judiciary because government actors may use testing as a way to punish judges whose opinions they dislike. To have true judicial independence, judges must be able to make decisions without fear of reprisal. Laws that apply “test” scenarios to judges have been critiqued because they present an opportunity for abuse by the executive or legislative branch.

Moldova’s controversial integrity testing law demonstrates the challenges of applying a “test” scenario to judges. Recently the European Commission for Democracy through Law (Venice Commission) found that Moldova’s 2014 Law on Professional Integrity Testing “has the potential of negatively interfering with the principles of judicial independence, the separations of powers and the rule of law.” Therefore, the Venice Commission recommends “laws regulating the assessment or evaluation of the professional duties of judges must be worded and applied with great care and the role of the executive or legislative branches of government in this process should be limited to the extent absolutely necessary.” In particular, there is a need for strong safeguards “against any undue or illegitimate influence by the executive branch on disciplinary proceedings.”

The Venice Commission also considered possible human rights infringement based on fair trial principles and the right to private life. Based on fair trials principles, integrity testing will need to uphold, amongst other things, the presumption of innocence, the provision of an independent and impartial tribunal, the entitlement to a public hearing, and the right to an effective and efficient defense. The Venice Commission also considered case law by the European Court of Human Rights on the use of undercover agents. The European Court of Human Rights has articulated the following guiding principles for involving an undercover agent:

- Prior reasonable grounds to suspect that the targeted individual is involved in a similar criminal activity or has committed a similar criminal act before;
- Formal legal authorization of an undercover agent’s activity. An administrative decision not containing full information regarding the purpose and reason for the undercover method is not sufficient;
- An undercover agent is allowed to join an ongoing criminal act but must abstain from inciting the target individual to commit a criminal act i.e. acting as ‘agent provocateur’.
As a result, the Venice Commission finds that the use of surveillance without safeguards or counterbalance could undermine judicial independence and may be used incorrectly to discipline judges. In addition, the use of undercover agents presents significant risk of entrapment and should be approached with great care.

Since integrity testing of the judiciary presents significant challenges, oversight institutions have tended to employ other measures not involving undercover agents or a simulated ‘test’ scenario. Oversight institutions with a mandate to investigate judicial corruption vary by country, and some general examples include:

- **Anticorruption Commissions:** With a broad mandate, anticorruption commissions target corruption in any branch of government. These commissions are generally not able to sanction judges for ethical violations or breaches of professional duties. Rather, an anticorruption commission investigates criminal corruption.

- **Ombudsman Office or Inspector General:** An executive or legislature may create an ombudsman office to watch for misconduct in the government. The ombudsman office will assign an ombudsman to monitor a specific department and report back to the ombudsman office. Ombudsman are ideally placed to detect corruption within a court. However, if the ombudsman is not independent, they may be absorbed into the court and function in a manner similar to that of an internal department.

- **Internal Department of the Supreme Court or Independent Judge-Composed Bodies:** The Supreme Court may include an internal oversight department or the Executive may create an independent body to detect and penalize misconduct in the courts. This body may be composed of judges or legal professionals, and may target only judges or all court staff. Internal departments or independent bodies are capable of issuing sanctions that rehabilitate judges instead of removing them. This self-accountability works well when the Supreme Court is willing to punish judges. However, internal departments stumble when the Supreme Court wants to protect judges. Without strong public support, internal departments may be undermined by the judges that they are charged with disciplining.

There are strengths and limitations to giving the above bodies a mandate to oversee the conduct of judges. Executive agencies run the risk of encroaching on judicial independence by imposing their political agenda under the guise of battling corruption; meanwhile, internal oversight departments or majority-
judge composed bodies are criticized for valuing judicial independence over transparency. The institutions must balance fighting judicial corruption with the right of the judiciary to be free from political interference. In regulating judicial integrity, a key distinction is made between assessing the “conduct” of judges and the “decision-making” of judges. The former is permissible to ensure compliance with lawfully stipulated professional duties and ethical standards, whereas the later must be addressed through a legal appeal process.21

Measures to regulate judicial integrity can be administered at different times within a judge’s career. Scholars categorize these integrity measures into two fields: pre-employment and post-employment. Pre-employment measures involve administering a test to judges before they are given their position. Aside from academic qualifications, the integrity check can also measure a judge’s penchant to commit certain crimes. For example, a test could be designed to see how likely a judge may be to engage in corruption or other ethical violations. In Austria, for example, law graduates who intend to enter the additional three years of training needed to apply for judicial positions have to undertake not only written and oral exams but also a set of psychological tests. The tests examine personal skills such as intelligence, personality, and capacity to concentrate.22 These tests aim to promote professionalism and weed out technically qualified professionals with weak moral character, and thus prevent a corrupt court. However, this model is rarely adopted.

Many institutions favor using post-employment measures, which are administered after a judge has begun serving in office. Within the post-employment spectrum, there are various strategies, including:

- **Monitoring:** Court monitoring bodies typically respond to public complaints about judicial misconduct. If the complaint alleges ongoing misconduct, a monitoring body may read all court cases that come from the relevant judge’s chambers and look for irregularities.23 However, if the complaint alleges past misconduct, a monitoring body will only read documents from the relevant time period. They may also call upon witnesses to testify about the judge’s conduct; sometimes a judge will be called to testify in his or her own defense. Monitoring bodies may also read relevant news articles to determine the complaint’s context.24 The monitoring approach never calls for undercover agents or raids; it is the least invasive form of judicial integrity testing. Sweden’s National Courts Administration has an Internal Audit Office that engages in monitoring.25

- **Surveillance:** A more intrusive approach would be to conduct surveillance of judges. This surveillance may include listening to
phone conversations or reading mail that leaves a judge’s chambers. Oversight bodies may conduct surveillance themselves, or, if they lack the capacity or authority, may ask a police or intelligence agency to conduct wiretapping. In some countries, secret surveillance is legal, but other countries consider it illegal. Regarding admissibility of illegal wiretapping, Dr. Tilman Hoppe explains, “there is no general practice among national laws, but rather a diversity of approaches. Whereas the United Kingdom allows for the use of illegally obtained audio-visual recordings in civil procedures, and to some extent in criminal procedures, they are never admissible in Germany.”

Egypt’s Supreme Judicial Council, however, uses surveillance techniques to study the activity of their judges.

The objective of surveillance operations is to amass enough evidence to convict the judge of bribery. However, some surveillance operations gather evidence to determine when a bribe will occur and then proceed to catch the public official accepting a bribe. In this scenario, both bribe-giver and bribe-acceptor will be arrested. This is distinguished from a sting operation because the bribe was not offered by an undercover law enforcement officer.

- **Integrity Testing or Sting Operations:** The most intrusive way that an organization can test the judiciary is to conduct sting operations. In a sting operation, an undercover police officer will present a bribe to a public official. If the official accepts the bribe, they will be arrested. These operations require extensive research to determine when and how corruption occurs in a court. A sting operation that is not supported by contextual research will not be effective. Hardly any states employ this strategy because of the risk of entrapment. Entrapment occurs when a law enforcement official lures a person to commit a crime that they otherwise would not have committed. In some states, an arrest procured by entrapment is void. For example, the United States considers entrapment a complete defense to a criminal charge when government agents implant the idea of committing a crime into an innocent person’s mind.

**IV. Canada**

Canada has multiple mechanisms to prevent corruption in its public sector. First, Canada promulgates laws to avoid conflicts of interest. For the judiciary, these laws require judges to recuse themselves when a case involves some personal interest. Canada’s laws also encourage transparency and protection for whistleblowers. Next, civilian groups monitor different
government entities. For example, the Canadian Association for Civilian Oversight of Law Enforcement monitors police activity and publishes investigative reports.34

The government also has oversight institutions, most notably the Auditor General. The Office of the Auditor General audits government programs and reports its findings to Parliament.35 This external body does not review legal decisions, provide legal opinions, or audit matters that are before the courts; instead, the Auditor General examines financial documents to determine the efficiency of an institution.36 The Auditor General supervises more than 100 federal departments, agencies, corporations, and local governments.37

To ensure judicial integrity, the judiciary in Canada also has a dedicated body that oversees the ethical conduct of judges. The Canadian Judicial Council (“CJC”) was created by the Canadian Federal Parliament in 1971, and given powers by the Judges Act of 1985 to handle issues of integrity within the federal justice system.38 The objective of the CJC is to "promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.”39 To achieve this objective, the CJC is mandated (amongst other things) to investigate any complaint or allegation made in respect to the conduct (not decision) of a judge of a superior court by the general public40 and the Attorney-General.41 The CJC receives roughly 156 complaints per year.42 The CJC reports the results of its investigation to the Minister of Justice or the Attorney-General of a province, and can recommend the removal of a sitting judge.43 The removal of a federally appointed judge from office requires the approval of both the House of Commons (lower house) and the Senate of the Canadian Federal Parliament. The removal of a superior court judge from office is rare, with only five judges being recommended for removal since 1867, and all but one resigning to avoid dismissal.44 The CJC has authority over more than 1,100 federally appointed judges in Canada.45

For the purpose of this memorandum, the CJC is considered an exemplary model of judicial integrity oversight for the following reasons: it is an independent body that is led by the Chief Justice of the Supreme Court; it conducts investigations into judges with thoughtful consideration of due process and entrapment; it presents an exemplary model of targeting.

A. Structure

In Canada, judicial accountability is handled by statutory judicial councils. At the provincial level, local judicial councils govern the conduct of provincial-level judges. Each province and each territory in Canada has one judicial council.46 The make-up of local councils is varied; some councils are comprised only of judges while other councils are served by people with more diverse backgrounds.47
At the federal level, accountability is handled by the CJC. This body, which, monitors the entire federal circuit, is comprised solely of judges. Canada’s Chief Justice serves as the Chairman of the Council. The rest of the CJC is comprised of the Chief Justice of the Court Martial Appeal Court of Canada, and of senior judges Canada’s superior courts and territorial courts. However, members may appoint a substitute member to perform their duties on the Council for any period of time.

The CJC is guided in its work by the “Procedures for the Review of Complaints or Allegations about Federally Appointed Judges.” The CJC’s tasks are facilitated by an operational staff, which includes an Executive Director. The current Executive Director is a lawyer with experience in administrative and constitutional law. The Executive Director is responsible for screening complaints from the public.

The CJC’s approach presents a high burden for those who wish to remove judges. In a recent case, the CJC found a judge had committed inappropriate and unacceptable actions, but “the test for recommending his removal had not been met”. However, the Council can still censure judges who commit less serious violations. For example, in consultation with the judge’s chief justice and with the judge’s consent, the CJC may recommend counselling or other remedial measures to address the issue identified.

**B. Targeting Strategies**

The CJC targets its investigations based on a complaint system. Complaints of judicial misconduct can be made to the CJC from the public, from within the judiciary, and from other governmental branches. Complaints must be in writing, but can be delivered by mail or email. There is no special form and no fee. However, CJC does not launch a full investigation into every complaint. Instead, the complaints are screened by the Executive Director. To pass muster, the complaint must be about the conduct of a judge, not their decision-making. The Executive Director will dismiss complaints about anything other than a judge’s conduct and complaints that concern provincial, not federal, judges.

Then, the complaint is forwarded to the Chairperson. To prevent a conflict of interest, the Chairperson cannot be from the same court as the judge who is the subject of the complaint. If the complaint is deemed serious enough, then the Chairperson refers it to a five-member Review Panel. The panel conducts an investigation; if they find evidence of wrong-doings, they can submit the complaint to an Inquiry Committee, comprised of both Council members and other legal professionals.
Thus the CJC’s complaint system operates as a series of decision points. Judges are only subjected to a full investigation after multiple units have analyzed the complaint and passed it through to the next round of scrutiny. This series of checks prevents an ad hoc administration of justice. Furthermore, it preserves resources. The CJC is free to devote time and energy to serious cases once the frivolous complaints have been screened. In fact, less than 0.5 percent of complaints face a full Inquiry Committee.62
C. Procedures

In conducting an investigation, the CJC is deemed to be a ‘superior court.’ It has powers to summon witnesses, and to compel the attendance of witnesses and production of documents. Enquiries can be held in public or private, and the CJC can prohibit the publication of information and documents related to its investigation when deemed not in the public interest. These measures can protect the anonymity of a judge while an investigation is underway. Unless a compliant results in an inquiry, the Council will not disclose the judge’s name, province, or the results of the investigation. While some people decry this practice as “secretive,” the CJC will not release the names of judges who do not merit a full inquiry.

When gathering information, the CJC may hire an investigator. The tactics used to gather information depend on the nature of the complaint, but investigators have looked at transcripts from court cases. Investigators also conduct confidential interviews. Lastly, the investigators may consider relevant news articles.

The CJC does not perform sting operations. Instead of catching judges “in the act,” the CJC analyzes documents to find evidence of past misdeeds. The CJC asks people who file complaints to be as fact-specific as possible to narrow the scope of the investigation. Because the investigations are conducted post-hoc, the CJC procedures have no risk of entrapment.

Canada’s procedures are minimally invasive to judges, possibly because of the public esteem for the judiciary. While investigating, Council members are called to keep the affair private to prevent a trial by public opinion. Additionally, the CJC procedures require that the Executive Director seek comments from the judge suspected of a violation and their chief justice. These procedures show a respect for the role of the judiciary in Canada.

D. Sanctions

According to the Judges Act, the CJC can take action against a judge for the following reasons: (a) age or infirmity, (b) having been guilty of misconduct, (c) having failed in the due execution of that office, or (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office. The CJC is charged with maintaining the good image of the judicial branch to foster public support of the institution. Judges can be investigated for violating the code of ethics and for behaving in a manner that is “inappropriate” for a representative of the judiciary.

The CJC can sanction in two ways: (a) grant a leave of absence to any judge found to be incapacitated or disabled for such a period as deemed appropriate in view of all the circumstances, and (b) grant annuity to any judge found to be incapacitated or disabled, if the judge resigns. The CJC does not have the
power to remove a judge of the superior court from office. This power resides with the Parliament and is rarely exercised. Often judges can resign or retire before the decision for removal is made.\(^{76}\)

Still, the CJC may apply sanctions that aim to rehabilitate the judge instead of punish him or her. Judge Matlow, who was investigated by the CJC in 2008, received these rehabilitative sanctions. After finding his conduct “inappropriate,” the Council ordered Matlow to write apology letters to the people that he had offended and to participate in a judicial ethics course.\(^{77}\) Furthermore, he was required to seek approval from the Council before participating in public debates. These sanctions reform judges instead of removing them.

Rehabilitative sanctions keep competent judges on the bench instead of removing them for minor violations. The Executive Director of the CJC defended the sanctions with the following statement: “Judges are subject to a lot of scrutiny, day in and day out, to every case they hear. We have extremely competent judges in Canada, and misconduct is a rare occurrence.”\(^{78}\) Indeed, Canada was ranked among the top ten most independent judiciaries by the World Economic Forum.\(^{79}\) Furthermore, these rehabilitative sanctions prevent the CJC from becoming a tool for disgruntled litigants to punish a judge for an adverse ruling. Instead of unduly penalizing judges, these sanctions foster increased professionalism.

E. Strengths

Assessing against principles of judicial independence, transparency and efficacy in addressing corruption, the CJC exhibits the following strengths:

- **Transparency:** The CJC model is marked by transparency at nearly every level. Citizens can find the code of conduct for judges online and instructions about how to file a complaint when they believe that code has been violated. A person who files a complaint will normally receive feedback from the Executive Director. Furthermore, the CJC provides documents from their inquiries as a resource for lawyers and the public.

- **Public access:** The CJC’s online interface welcomes complaints from the public, which is helpful in soliciting public support for the institution. By making model complaints available online, the CJC may receive less erroneous complaints.

- **Multiple decision-point complaint system:** A complaint must pass many levels of scrutiny before a full inquiry is launched. CJC’s complaint system weeds out frivolous complaints.

- **Access to inquiries:** The process of publishing documents balances the judges’ right to privacy with access to information for the public.
• **Right to self-defense**: The CJC gives judges a chance to defend themselves, which protects due process rights.

• **Rehabilitative sanctions**: Instead of only penalizing judges, the CJC offers judges a chance to reform and continue to serve their office.

**F. Limitations**

The following limitations are worth noting:

• **Privacy**: Critics argue that all investigations should be made public, even those screened by the Executive Director.

• **Membership**: The CJC faces criticism because it is comprised solely of judges. Although its committees include lay people, the CJC may be seen as prejudiced for not having members outside the judiciary.

**V. Indonesia**

Indonesia faces corruption in every level of its bureaucracy. After the retirement of President Suharto in 1998, Indonesia experienced a period of governmental reform. To specifically stem misconduct in the judiciary, Indonesian lawmakers mandated the formation of a Judicial Commission in 2001. The Judicial Commission (Commission) procedures were promulgated by Law 22 of 2004. Until recently, the Commission was tasked with the dual roles of appointing judges and disciplining judges. Now, their sole focus is judicial accountability.

Subsequently, citing an “extraordinary level of corruption,” the President of Indonesia created the Corruption Eradication Commission or Komisi Pemberantasan Korpsi (KPK) to identify corruption by law enforcement officers, including judges. While the KPK has become less effective at battling corruption, the KPK boasts a high conviction rate; in 2013, the KPK won guilty verdicts in all 236 cases it prosecuted.

This section will examine both the Judicial Commission and the KPK’s approach to investigating corrupt judges.

**A. Structure**

Indonesia’s Judicial Commission is a constitutional body tasked with overseeing the judicial branch. The Commission is comprised of seven professionals from various backgrounds; namely, former judges, law practitioners, and legal academics. These members are appointed by the President and approved by the House of Representatives. Within the
Commission, members elect their own leadership. Once appointed, the members become government employees and are duly paid from the state budget. Because the Commission is provided for by the Indonesian Constitution, it is regulated by Parliament.

Based on its powers to “uphold the honor and dignity of judges and control their attitudes,” the Judicial Commission is tasked with investigating judicial integrity. It does not handle personnel, financial, or other administrative matters. However, the Commission does consider out-of-court to fall within its purview; recently, for instance, the Commission investigated a judge for having an extramarital affair.

The Judicial Commission does not have authority to directly punish judges, but can propose the imposition of sanctions on judges to the Supreme Court. Further, the Judicial Commission can participate in the Honorary Assembly of Judges – a forum through which representatives from the Supreme Court and Judicial Commission decide on a punishment for a judge who has violated the ethics code (the judge is able to defend himself/herself). Due to resistance within the Supreme Court, however, the Judicial Commission is not an effective player in disciplining judges for corruption crimes.

The KPK is a much larger, external organization with roughly 750 staff. At last count, the KPK had seventy-five investigators. Within this large organization, power is centralized. One person, known as the Pimpian, oversees all KPK functions. Although created by the President, the KPK does not consider itself bound to report to any higher authority; one politician described it as “only accountable to God.”

The KPK aims to “empower authorized institutions to become more effective,” but the KPK reserves the right to prosecute when any of the following occur:

- “a public corruption report is not acted upon...[there are] delays in corruption cases without sufficient reason, there is “suspected bias in favor of perpetrator(s)...[or] obstructions to the handling of a corruption case due to executive, judicial, or legislative intervention...or [there are o]ther circumstances which have hindered the capability of the Police or the Prosecutor's Office to conduct a proper investigation.”

If the KPK decides that a case cannot go through traditional legal channels, the case is tried by Indonesia’s Special Court for Corruption Crimes. In an attempt to remove any political bias from the proceedings, the Special Court employs a majority of “ad-hoc, or non-career judges” who are typically retired judges or legal experts. While regular judges may sit on the Special Court, three of the five judges on a case must be “ad hoc.” From 2004-2011, this Court had a “nearly 100 per cent conviction rate.” Now, as Indonesia attempts to bring the Court to more regions, the conviction rate has dropped slightly.
Nevertheless, the Special Court strengthens the KPK by convicting almost every person that the KPK targets.

B. Targeting Strategies

Both the Judicial Commission and the KPK accept complaints from the public, but their targeting approaches vary. In addition to “tip-offs” from the public, the Judicial Commission may also solicit reports from court bodies about judges’ “attitudes.”

Due to pressure from the Supreme Court, the Commission recently focused on judges for “immoral” behaviors, such as having an extramarital affair.

While the Commission has moved more towards the enforcement of moral crimes, the KPK's mandate only authorizes it to investigate if there is (a) involvement of law enforcement, state officials, and other powerful individuals, (b) significant public concern, and (c) at least one billion rupiah in value involved in the outstanding issue. According to a Reuters' Special Report, KPK “investigators choose the most high profile corruption cases in the hope that it will be enough to deter others.”

KPK's approach targets “big fish” or higher level officials in order to “shock” the system. This approach earns them the support of the public.

Once a complaint has been screened, the KPK gathers extensive research on the judge to catch him or her in the act of taking a bribe. For example, the KPK used warrantless wiretapping to learn the location of a money exchange and then arrested two corruption court judges taking bribes in the court’s parking lot. Though lawmakers threaten to strip the KPK of this power, the KPK does not need a warrant to surveil their targets.

But the difference between the two approaches is also a matter of scope. The Commission only has the power to investigate judges within the Indonesian court system. By contrast, the KPK can investigate any person in law enforcement, including police and judges, but only if that person is a public figure and accused of accepting a large bribe. The KPK catches public officials in the midst of committing a corrupt action, but they do not present opportunities for corruption. Because the KPK investigators do not present a criminal opportunity to their targets, they do not risk entrapment.

C. Procedures

Similar to the Canadian Judicial Council, the Commission takes a monitoring approach and examines documents. Essentially, the Commission collects documents from courts and examines them for evidence of past misconduct. The Commission may also conduct interviews with the people involved with the violation. In 2011, the House of Representatives explicitly denied the Commission the ability to wiretap. The Commission may request that
another organization wiretap for their investigation, but they need approval from a district judge.\textsuperscript{114}

The KPK, on the other hand, is not bound by such restrictions. Like the Judicial Commission, the KPK may look at documents and conduct interviews. However, the KPK has additional surveillance powers and the ability to conduct ‘raids.’ The KPK also has the power to audit the wealth of state officials. Scholars say that the KPK gets most of its evidence through wiretapping without a warrant.\textsuperscript{115} Once a judge has been identified, the KPK will begin surveillance. The investigators gather mass amounts of information. By analyzing the data, they look for patterns of corruption. Once they have identified a scenario in which a particular judge might have committed a corrupt action, the KPK conducts a raid.\textsuperscript{116} There have been reports of the KPK headquarters having holding cells, which presumes the power to arrest.\textsuperscript{117} Because there is no oversight and no legal framework, each raid risks violations of due process.

\textbf{D. Sanctions}

The Commission’s review procedures give strict timelines for investigations to prevent backlog; for example, a judge has 14 days to respond to a complaint. If a judge does not reply within this timeline, the Commission can issue punishments.\textsuperscript{118}

The Commission, through the Honorary Assembly of Judges, can remove a judge who grievously violates the ethics code. Known as “dishonorable discharge,” this is the most severe punishment that the Honorary Assembly can pass.\textsuperscript{119} However, if the violation is less serious, the Honorary Assembly may choose to issue a written reprimand or suspend a judge without pay.\textsuperscript{120} In the case of the judge who had an extramarital affair, the Honorary Assembly reprimanded her and docked her monthly pay.\textsuperscript{121} These lighter punishments allow qualified judges to stay within the system but adjust their behavior.

As an external body, the KPK handles sanctions differently. Because it has no sentencing authority, the KPK prosecutes its cases within the Indonesian legal system or, as previously mentioned, the Special Corruption Court. The KPK has a highly trained prosecution team that utilizes the evidence gathered during the investigation to make a case.\textsuperscript{122} Due to Indonesia’s lofty reform goals, the criminal sanctions for corruption are harsh. The former Chief Justice of Indonesia’s Constitutional Court, who was arrested in 2012, was sentenced to life in prison for corruption.\textsuperscript{123} Unlike the Judicial Commission and Canada’s Judicial Council, the KPK offers no lighter sanctions.
E. Strengths

The following positive elements of the Judicial Commission and KPK are worth noting:

**Judicial Commission**

- **Internal cooperation**: the Judicial Commission can make recommendations to the Supreme Court and can participate in the Honorary Assembly of Judges.
- **Composition**: because the Commission is itself comprised of a blend of judges and other legal professionals, outsiders can contribute their perspective to the proceedings.
- **Lighter sanctions**: the Commission has options beyond removal of judges; it can issue lighter sanctions and allow judges to continue serving in their office.

**Komisi Pemberantasan Korpsi (KPK)**

- **Independence**: the KPK cannot be limited by the Supreme Court because of its position outside of any branch of government.
- **Research**: the use of the surveillance approach is effective because it gives the KPK a trove of evidence to use at trial. The research also provides the KPK a way to identify scenarios in which bribery occurs.
- **Special Corruption Courts**: the specialized anticorruption courts offer a legal framework for prosecution of KPK investigations. Furthermore, the ad hoc judges may be less partial to the proceedings because they are removed from the ordinary court system.

F. Limitations

The following limitations are worth noting:

**Judicial Commission**

- **Dependence on the Supreme Court**: Indonesia’s Commission shows the challenges that a disciplinary body can face when it attempts to internally sanction members.
- **Lack of sanctioning power**: The Commission has a strong framework for investigations, but it is seen as weak because it cannot directly punish unethical judges. However, there is some power in investigating a judge: a formal investigation may cause the judge to retire or take notice that their behavior is being monitored.
Komisi Pemberantasan Korpsi (KPK)

- **Wiretapping**: the KPK runs the risk of violating human rights with its wiretapping and raids because neither activity requires a warrant.
- **Arrest Powers**: the KPK’s arrests may violate due process because there are no procedures for bail and other fair trial rights.

VI. Pakistan

Pakistan is a conflict-affected state with a vibrant legal community. Despite setbacks, anticorruption remains a priority on Pakistan’s national agenda. In a 2002 Transparency International study that surveyed 3,000 households in Pakistan, 96% of respondents reported encountering corruption when they dealt with the judiciary.124 This memorandum will examine two of the organizations battling judicial corruption in Pakistan’s bureaucracy. First, Pakistan’s Supreme Court is monitored by the Supreme Judicial Council. Like Indonesia’s Judicial Commission, the Supreme Judicial Council (SJC) takes its mandate from the country’s constitution. Pakistan also has a National Accountability Bureau (NAB). Formed in 1999, this external body prosecutes public officials for corruption. Currently, the NAB does not investigate judges. Still, the NAB’s practices proves informative because the Bureau effectively uses surveillance to target and prosecute corrupt public officials.

A. Structure

The SJC is comprised solely of judges; namely, the chief justice of Pakistan, the two next most senior Judges of the Supreme Court, and the two most senior chief justices of the High Courts.125 The SJC investigates complaints of judicial misconduct and reports recommendations to the President of Pakistan.126

The NAB is an external body that investigates corruption in political entities across the country.127 At its head, the NAB is decentralized, being led by two “principal officers.”128 The first is the Chairman, who supervises NAB’s investigations. The Chairman serves for four years. The second is the Prosecutor General of Accountability, who leads prosecutions and serves a three year term. The NAB’s structure also includes branches for Inquiries and Recoveries. Together, the four branches of NAB collect information and form a case against the accused. Like the KPK, NAB prosecutes cases in special accountability courts. By using these separate court systems, NAB hopes to avoid the corruption within the judiciary.

B. Targeting Strategies

The SJC was created with the specific mandate to discipline judges who perform unethically. However, the SJC does investigate public officials besides
judges. For example, in 2014, the SJC began investigating the Auditor General of Pakistan. Still, NAB has a much broader authority because its investigations are not confined to any profession. The NAB can investigate any act of corruption in the public sector. Like the KPK, the NAB was designed to go after the “Big Fish.” NAB’s Annual Report prioritizes cases based on “the basis of gravity of the offence, the profile of the accused person and the amount of corruption involved.” This approach garners them a significant amount of public support.

NAB does not investigate or prosecute judges or members of the military. While NAB claims that it abstains out of respect for the independence of the judiciary and the military, scholars speculate that the NAB is fearful of engaging in a power struggle with these two powerful institutions.

Both the SJC and the NAB accept complaints from the public, but both are more likely to respond to a complaint filed by a government authority, such as the Attorney General or the Public Accounts Commission. Unlike the CJC in Canada, neither SJC nor NAB provides the public with a model complaint.

To file a complaint with the SJC, a person must “identify himself properly,” meaning there is no way to anonymously submit a judge’s name. The SJC also reserves the right to punish a person who submits false accusations with the intent to malign that judge. This system is designed to prevent people from using the SJC as a tool to discredit judges and to prevent frivolous complaints from bogging down the SJC. Nevertheless, the SJC receives hundreds of complaints a year and only a small percentage are investigated. Even fewer are prosecuted.

The NAB has no such restrictions on complaints. In 2015, the organization received nearly three thousand complaints. According to the NAB’s website, “this amplifies the growing confidence of the general public in NAB.”

C. Procedures

In its Procedure of Inquiry guidelines, the SJC has the power to summon accused judges to testify. The SJC also has the power to gather documentary evidence. Furthermore, the SJC can call upon the person who submitted the complaint to clarify the charges. The SJC also has the power to call upon experts. Finally, the SJC’s reserves the right to any “inherent powers to adopt any procedure... considered...just and proper.” In text, the SJC’s powers may seem broad – but in reality, they are limited. The SJC has no mechanism to compel judges to testify. Additionally, it is often undermined by the Supreme Court. In 2009, for instance, the Supreme Court dismissed the SJC’s call for 72 judges to appear. Since 2009, there have been efforts to restore more power to the SJC, but each effort is met with resistance from the Supreme Court.
Court. Like the Judicial Commission, the SJC shows how self-accountability is difficult to maintain without goodwill from higher authorities.

By contrast, NAB’s powers are not constrained by a higher authority. While it too collect documents, the NAB also has the power to seize assets, freeze bank accounts, and arrest suspected criminals. The power to arrest is vested in the Chairman, who may delegate that power at his or her discretion. NAB officers do not need warrants when they arrest; they merely file a report 90 days after the arrest has occurred.

Neither SJC nor NAB conducts sting operations. The SJC uses the monitoring approach to determine if past conduct was illicit. The NAB’s raids are covert operations, but they do not use undercover officers to offer bribes. Critics claim these raids, which are sensationalized in the media, gives judges a trial by public opinion.

D. Sanctions

The SJC does not directly sanction judges. Rather it investigates charges brought by the public and then reports its findings to the President. The Office of the President has the power to officially sanction a judge that is found guilty by the SJC. Due to resistance from the Supreme Court, only a handful of judges have ever been found guilty. In fact, Pakistan’s Chief Justice admitted that 90 percent of judges charged by the SJC with serious complaints simply retire and collect their pensions.

The NAB, on the contrary, frequently convicts those that have been charged with corruption. When a person has amassed wealth from his or her corrupt practices, NAB will impose fines or seize financial assets as punishment. However, the NAB is not as harsh as the KPK. It has a system of “Voluntary Surrender,” in which a person investigated by the NAB can forfeit their ill-gotten gains and avoid trial.

E. Strengths

The following positive elements of the Supreme Judicial Council and NAB are worth noting:

Supreme Judicial Council:
- **Independence**: the SJC’s investigative powers are not dependent on cooperation with any other branch of government.
- **No entrapment**: SJC’s powers (summoning judges and witnesses) pose no risk of entrapment because they occur post-hoc.

National Accountability Bureau:
- **Public support**: NAB’s success is based largely on public support for the “big fish” targeting approach.
• **Lighter sanctions**: unlike the KPK, the NAB does provide a way for judges to renounce their criminal actions and avoid prison with the Voluntary Surrender procedure. (These sanctions are not as well designed as the CJC’s rehabilitative sanctions, because the NAB targets such a wide population.)

**F. Limitations**

The following limitations are worth noting:

*Supreme Judicial Council*

• **Privacy**: the public mistrusts the SJC’s lack of transparency because all investigations are held in-camera.

• **Dependent on political will**: like Indonesia’s Judicial Commission, the SJC is undermined by the judges that it is meant to investigate. The SJC was not given enough powers to shift political tides.

*National Accountability Bureau*

• **Size**: the NAB’s massive scope could prove unwieldy in the context of judicial integrity testing. In addition, the decentralized offices leave room for potential corruption and inconsistency.

• **Presumption of innocence**: NAB should be wary of the media’s coverage of its raid because the coverage could lead the public to assume the judges are guilty, and ultimately the judge in question could be denied an impartial trial.

**IV. Federal Bureau of Investigation Sting Operations**

**A. Background**

INRPOL found few examples of departments within judiciaries that run integrity tests on judges. Integrity testing is more frequently undertaken within and by law enforcement agencies. An exception was in the US “Operation Greylord;” a 1980s undercover operation conducted jointly by a number of US federal agencies in the United States. The Federal Bureau of Investigation (FBI) was responsible for gathering evidence through informants and surveillance during the operation, and by the time it concluded, 19 judges and 49 lawyers were convicted.

Following the relative success of Operation Greylord, the FBI led similar operations into legislators, city council members, and other public officials. However, judicial integrity test of this scope and nature did not become
commonplace. The US, and most countries, exercise respect for judicial independence. Operation Greylord was unique because of the pervasive, systematic corruption in the locale that was under investigation.

B. Structure

The FBI is an executive agency tasked with investigating federal crimes and national security threats in the US. The FBI maintains field offices in 56 US cities and in US embassies abroad. These offices all report to a centralized hierarchy based in Washington, DC. The FBI often coordinates with local partners to investigate serious crimes and national threats.148

Because many forms of corruption are federal crimes (including bribery and racketeering), the FBI tackles public corruption through different investigative units. International corruption investigations are run by the FBI’s International Corruption Unit.149 Local corruption is often investigated by a field office in conjunction with a state or federal prosecutor.150

C. Targeting

The FBI receives public complaints online and over the phone. On its website, the FBI provides a simple form for reporting federal crime or national security threats.151 The website warns that providing false information could result in monetary fines or imprisonment.152 Complainants may also call local FBI US offices or international attaché offices. Additionally, the FBI has specialized hotlines for different types of complaints. For example, callers with information about a cybercrime can call the Internet Crime Complaint Center. The FBI requests that every complainant from a member of the public include a name, address, and phone number. With so many avenues for complaints, the FBI reports that it is not able to reply to every submission. Its elaborate complaint system may not be practical for smaller, more centralized agencies that could become overwhelmed with public complaints.

Upon request from state, local, or tribal agencies,153 the FBI may provide investigative assistance into matters involving federal crimes or threats to national security.154 The FBI has developed relationships with law enforcement agencies, which allow these agencies to report crimes and threats to the FBI through a specialized portal. The FBI offers resources to law enforcement through this portal,155 but if the complaint involves a federal crime, the FBI may launch an investigation. Operation Greylord is an apt example; the local officials knew that the court system was corrupt, but could not get lawyers or people affected to testify. According to former Assistant United States Attorney Agent Sklarsky, “[t]he whole idea of an undercover project was based on the idea that nobody wanted to testify against judges.... It became clear we had to do this with undercover FBI agents who could
provide the testimony." Lawyers and others who were too afraid to testify still gave useful information to investigators. Sklarsky noted that cooperation from sources inside the court was instrumental in evidence gathering. Investigations are dependent on specialized local knowledge, thus the FBI's style may be difficult to transpose to a centralized agency with no informants in a particular court.

D. Procedures

Sting operations aimed at public corruption make up only a small percentage of the FBI's covert operations. Within that subset of operations, only a handful target members of the judiciary. Judges are subject to sting operations when the FBI receives word that a judge has committed a public corruption offense. The Attorney General's Guidelines for Domestic FBI Operations are broad, and encompass all operations undertaken by the FBI. However, prosecutors in Operation Greylord developed six fundamental rules for conducting an undercover operation specifically targeting the judiciary:

“There should be no feasible alternative to the undercover operation...[c]areful target selection...[c]areful case selection...[c]areful and continuous supervision...[m]inimization of evidence gathering...[a]nd [n]otification to appropriate authorities in the judiciary and local law enforcement.”

Because of the invasive nature of these operations, FBI sting operations are never random. The FBI will spend months gathering data about a subject before the sting operation occurs. Operations that involve public officials are statutorily “sensitive” and must be coordinated with FBI Headquarters. A sensitive operation cannot last for more than six months without review and approval for extension. The FBI conducted Operation Greylord for more than three years.

This timeframe differs from that of police random integrity tests, which also require planning but are generally aimed at catching only one police officer in the act of committing a crime. By contrast, FBI operations may forgo the dramatic “gotcha” moment in favor of recording multiple instances of corrupt activity over time. By covertly collecting data over long stretches of time, FBI also has the option of discovering networks of corruption.

One tactic used in Greylord relied on “dummy defendants,” who were undercover agents arrested on spurious charges. When brought before a judge, the agent would wear a recording device or the judge’s chamber would be bugged. Next, the agent would attempt to bribe the judge. The FBI noted that it had to use dummy defendants instead of real criminals in Operation Greylord. As Tom Sullivan, former U.S. attorney for the Northern District of Illinois (where Greylord took place) explained: "If we use real cases and [the
prosecutor or judge] takes a bribe and a guy is released from a minor crime and then goes out and commits a really horrible crime, I’m going to get blamed for it. So you can’t use real cases; you have to use fake cases.”

The FBI’s undercover agents are trained in the scope and purpose of the operation and should understand the conduct expected of them. Under the Attorney General’s Guidelines, undercover agents can receive prior approval to commit certain nonviolent, illegal activity in situations to further the operation. For example, a supervising investigator may authorize an agent to offer a bribe to a public official. Though this activity is illegal under federal law, the agent’s criminal liability is waived. Undercover agents must be diligent to avoid entrapment. If an agent pressures a judge who has never accepted a bribe before, the agent has violated entrapment. Therefore, it is important for FBI agents to understand exactly what they are permitted to do and say during the sting operation.

E. Sanctions

Because it is only an investigative body, the FBI does not directly sanction corrupt public officials. Instead, the cases are turned over to a prosecutorial body, normally the Attorney General. In Washington, DC, the penalties can be as high as 10 years in prison and $25,000 in fines. In Greylord, one judge convicted of bribery (among other corruption charges) was sentenced to 3 years in jail and fined $50,000.

After Greylord, Cook County had to put in place a temporary system to handle the cases that would normally go through the corrupt court system. With 19 judges removed from the bench and other legal staff fired, the county’s residents were forced to bring their cases in suburban court. Meanwhile, the Cook County court system underwent structural and administrative changes. For example, under new procedures, judges could no longer dismiss cases in their chambers; dismissals must be discussed in court and on the official record. These changes helped reestablish judicial integrity, but an agency should have a plan for mitigating the increased workflow to other judges if one is replaced.

VII. Police

Police integrity testers in the police force operate within the police department, analogous to how the CJC operates within the Canadian federal judiciary. However, police departments face different scenarios than judiciaries. Some procedures will not be applicable to judges because they do not represent situations that judges will typically encounter. Still, police integrity tests provide a useful framework for integrity tests.
In UK police departments, corruption is handled by Professional Standards Departments (PSDs) and Anti-Corruption Units (ACUs). PSDs deal with minor administrative misconduct, such as incivility; ACUs handle more serious crimes and misconduct. Though sometimes the departments will be merged, this memorandum focuses on ACUs because they undertake integrity tests. These tests create a realistic condition or situation designed to generate a reaction by an individual or individuals so that their conduct, behavior and professional standards can be assessed. These situations mirror what an officer would face in the everyday course of their duty.

Police departments in the UK do not conduct random integrity tests. Though there have been many attempts to introduce random testing, the tactic is not currently allowed in UK. According to some police officers, random testing would be counterproductive to the ACU’s mission:

"Don’t alienate the people you want to protect. We’re only out to catch the bad apples, not all the apples. This way, the department supports us in our goal of keeping the institution at a high standard."

-Detective Inspector Mark Radcliffe, North Wales Anti-Corruption Unit

In the USA, internal police oversight is handled by Internal Affairs Bureaus (IABs). The New York City Police Department’s IAB pioneered integrity testing in the 1970s. Like their counterparts in the UK, IABs undertake intelligence led integrity tests. However, IABs may also undertake random integrity tests. Several major police departments, including the Los Angeles Police Department, the New York City Police Department, and the New Orleans Police Department, routinely conduct random integrity tests of their officers. These cities have enough resources and large enough police departments to justify the expensive operations; smaller cities in the United States do not conduct random integrity tests.

A. Structure

In both the UK and the US, the units that test the integrity of police officers are considered “a force within a force.” These units are staffed by police officers, but they are separate from the larger police force. The officers still receive police training, but they use these skills to promote institutional integrity.

Former police operative Nick Dove says that UK police departments aim to recruit talented detectives for the ACU. According to Mr. Dove, policing in the UK changed in 2000, when Parliament passed the Regulations for Investigative Powers Act (RIPA). Before RIPA, a supervising officer could order an officer to conduct surveillance as the detective found appropriate, and sting operations were applied on an ad hoc basis. There was no standard threshold of misconduct required to launch operations. Instead, unit leaders acted with autonomy and wide discretion. RIPA introduced new approval
requirements at multiple levels. Now, police must follow a strict chain of authority to receive approval for electronic surveillance and other invasive investigative techniques. Indeed, only the director of intelligence can authorize a sting operation under RIPA.

In the US, the majority of IAB investigators are sergeants. Most of the remaining investigators are detectives and only a limited number are police officers. Groups are subdivided into teams, and lieutenants act as team leaders within most groups. Captains, Deputy Inspectors, or Inspectors command a majority of the groups. The Chief of Internal Affairs commands IAB and is assisted by an executive staff.\textsuperscript{173}

Departments in both the UK and US vary on just how separate their internal investigative units will be from the larger police force. In North Wales, Detective Inspector Mark Radcliffe makes sure other officers know the ACU because “police are more likely to report to someone they know.”

Due to the sensitive nature of their investigations, internal investigative units have a modified common structure/hierarchy of authority. In the UK, ACU leaders consult directly with the Deputy Chief Constable.\textsuperscript{174} In the NYPD’s IAB, there is also a quicker route to central authority for internal investigative officers: Police Commissioner Kelly met with the IAB’s leader daily.\textsuperscript{175} This streamlined structure aims to minimize access points for possible corruptors and leaks from within the unit.

Safeguards are built into these streamlined structures to prevent the IAB or the Met from simply pursuing personal vendettas. DI Radcliffe says the issue of “who will watch the watchmen” is solved by Tasking and Coordinating meetings in which the ACU report their intelligence and seek approval to move forward. The ACU must receive approval from the higher authorities at this meeting to use certain surveillance measures, like human intelligence gathering. The IAB must receive similar approval from a higher ranking officer. Additionally, the IAB must consult a District Attorney Liaison to discuss the relevant legal considerations of each integrity tests.\textsuperscript{176}

**B. Targeting**

Police integrity tests can be either targeted or random. Legislation governing police tactics in the UK provides an interesting look at the evolving disciplinary ecosystem of a police unit. However, the UK does not allow random testing. The difference between an intelligence led test and a random integrity test is the motivation. Random tests, when well-executed, can create a strong corruption deterrent by “transforming every assignment into a potential integrity test in the mind of a police officer.”\textsuperscript{177} Targeted integrity tests, on the other hand, are used to gather evidence about an officer who has evaded traditional corruption detection.
There are four ways in which police forces in the UK are alerted to police wrongdoing by officers. These are: (a) public complaints; (b) internal reports or other agencies; (c) intelligence gathered through covert means or anonymously through Crimestoppers; and (d) active monitoring of force computer systems and processes, to look for irregularities. Police are careful not to fall foul of the privacy and human rights standards of the European Convention on Human Rights.

An Example of Privacy Protection

Some police departments use a third party “whistleblowing hotline” to process complaints about police misconduct. One such company that works with the UK’s ACUs is Safecall. An operator at Safecall will type or write down a complaint that they receive during a telephone call. A complainant’s voice is never recorded. Safecall also does not record where the call originated or the call’s number. There is no trace of who filed the complaint. Before ending the call, the Safecall operator will give the complainant a PIN number. This PIN number allows the caller to check on the status of their complaint if they choose to call back. Finally, Safecall will send the anonymous complaints to the ACU. If the ACU needs clarifying information about the complaint, they will use the PIN number to communicate with Safecall, so that the operator can ask the complainant for more information if they call back.

Once the force receives intelligence regarding police misconduct, an officer must decide if the conduct alleged in the complaint reaches the threshold for gross misconduct or criminal liability. If the complaint does not meet this threshold, it can be investigated by a different unit. These minor misconduct cases can potentially be resolved within 24 hours. However, if the complaint alleges gross misconduct or criminal acts, the ACU launch a covert investigation.

In New York, the IAB’s complaint system is guided by four principles: the system should be comprehensive; accessible; fair and thorough; and transparent. The IAB’s Command Center operates 24 hours a day, 7 days a week. Members of the public and Department personnel can contact IAB via the telephone, email, mail, or in person at any Department facility. The Department also has a non-recorded, anonymous tip line. Similar to ACUs, complaints in the IAB are sorted before an investigation begins. The IAB analyzes incoming complaints, which are then and “assigned to an investigative group.” The IAB has a classification scheme, which designates cases based on the seriousness. Some minor misconduct cases can be handled at the command level. Corruption cases contain the most serious allegations and are assigned to a geographic or specialty group within the IAB.
However, the IAB also conducts random integrity tests. These test scenarios have no regard for which officer will be the ultimate subject. The term “random” may be misleading because these tests require the same diligent preparation and research before they are conducted. Though not targeted at a specific officer, the test will likely target a pre-identified department or region. Often, these tests are built from public or inter-agency complaints. Therefore, the random test should still aim to expose the behavior identified in the complaint.

C. Procedures

Before an integrity test is authorized, an ACU or IAB would need to consider all less intrusive tactics, including monitoring and surveillance. Most police departments ban integrity tests when the evidence can be obtained through less intrusive means or through the use of any statutory authority.

If an integrity test is deemed to be the only way forward, then matters of human rights, collateral intrusion, and tactical methodology must be clearly articulated before authority to proceed is granted. In targeted tests, prior complaints and cases involving the subject officer should be “analyzed and reviewed to identify patterns of corruption.” The scope of the test is then constrained by tight governance and a specified period of time.

However, officers do not always have clear criteria for passing or failing an integrity test. The benefit of undefined criteria is that the subject can be cited for any unethical behavior that occurs outside the scope of the complaint. In the UK system, a court would allow evidence recovered outside the initial scope of the test if the state’s conduct was deemed “fair.” This gives officers
the flexibility to collect evidence regarding other crimes, unethical behavior, or possible networks of corruption.

Unlike their British counterparts, the IAB does conduct random integrity tests. The Bureau’s Sixteenth annual report explains, “IAB undercover investigators engage in integrity testing in which they create situations typically faced by police officers to determine if their responses are lawful and consistent with Department guidelines.” Once an integrity test is authorized, the IAB must conduct thorough research. Indeed, according to a performance review of the New York City IAB’s integrity testing program, “the investigating officer should determine whether there is a pattern of allegations within a command where no particular officer is identified as a subject and review prior similar cases within the command.” The goal of the research is to design the most realistic test.

Once the scenario is developed, the investigator must choose a test site. For police officers, this may be somewhere they go regularly or even in their office. An internal review of NYPD procedures recommends that the location be at a location where prior allegations have occurred. Investigators should also conduct a survey of the site to determine if the location is practicable for an integrity test. According to the 2000 NYPD review, site survey should include the following considerations:

- Will the investigator overlap with other law enforcement in the area?
- What criminal activity occurs at the selected location?
- Do members of the department live near the location? (This might raise privacy concerns.)

**Capacity**

Integrity testing requires trained detectives, and surveillance equipment that average police forces generally possess. Although not all investigations are well-organized, police departments have the innate capacity to carry out integrity tests. In fact, integrity tests often use the same protocols that are used for ordinary criminal investigations.

This capacity does not exist in judicial branches. Running integrity tests from the judiciary would require developing capacity in intelligence gathering and police work. Integrity tests bear no connection to the work that a judiciary normally undertakes. This may explain why so few judiciaries employ an internal integrity testing body.

The NYPD review stresses using appropriate and reliable props. In the police context, these props may be drug paraphilia if the undercover agent is posing
as a drug dealer. If the judge realizes that the props are fake, the test will not achieve its goal of observing a normal reaction.

Next, the NYPD provides guidelines for any undercover agents, who are investigators that present a false identity during the sting. The undercover agent should have a fictitious identity that has been checked for warrants. Additionally, the agent must have a prepared “cover story” to explain his or her presence in case he or she is identified as a member of the police force. The agent should familiarize himself/herself with the story and the location. The IAB will also provide agents with a script, which tells an agent exactly what to say when interacting with the subject officer. The script aims to ensure that the subject is led to the “bait,” and that the agent avoids entrapment. Agents should memorize the script.

The proper use of equipment is essential to capturing the integrity test. Any electronic equipment that is to be used should be tested at the proposed site. Ideally, equipment should be itemized and an equipment manager should be designated. Furthermore, everyone who was part of the sting operation should write down exactly how they saw the subject behave. In the event that the subject is tried before an administrative or criminal court, these worksheets will help the IAB remember the event. The information gathered at a test can be used to make later tests more realistic. Legal conclusions, such as “pass” or “fail” will not be useful to IAB members conducting future tests, nor will they help a prosecutor.

D. Sanctions

The UK’s ACUs are not responsible for disciplining the officers they investigate. Rather, each ACU gathers information and makes a recommendation to higher authorities. Depending on the severity of the charge, ACUs may meet offending officers to issue an informal warning, but that is as far as their sanctioning powers reach. If the charge is gross misconduct or criminal offense, ACUs must present their cases to the Head of the Professional Standards Department or the Crown Prosecution Service respectively.

After the initial investigation, the case can go two ways based on the seriousness of the allegation. If the misconduct falls short of gross misconduct, discipline will be handled by the subject’s supervisor. An officer who commits misconduct may be reassigned to a less prestigious role. If the investigation determines that it is gross misconduct, officer will face a panel, which includes a department chair, a police officer, and a human resources representative. The panel can impose more severe sanctions than the senior officer, such as dismissal from the force.
Likewise in the US, IABs have a variety of administrative sanctions available. For example, the NYPD can force officers to forfeit vacation days and receive remedial training from the Police academy. Officers may also be placed on conditional leave (pending the outcome of a criminal case) or probation. If the misconduct is serious enough, the officer will be dismissed.

In a criminal case, the prosecution must convince a judge of an officer’s guilt beyond a reasonable doubt. Contrarily, civil and administrative cases only require a preponderance of the evidence, which means an adjudicator will decide the case in favor of the side who proves their case by as little as 51% of the evidence.
**Giglio-Impaired**

In the US, police departments have an incentive to dismiss officers who have been found unethical in an IAB investigation. An unethical officer’s reputation may jeopardize future police cases. After the Supreme Court decided Giglio v. United States, investigative agencies like the IAB must disclose potential impeachment evidence to the court. Evidence from an IAB investigation may portray an officer as untrustworthy. Therefore, the defense will be able to argue that the “Giglio-impaired” officer cannot be trusted to exercise sound judgment or tell the truth in court. Prosecutors may chose not to pursue a case that relies heavily on the testimony of a Giglio impaired officer. If a police officer is not dismissed, an IAB investigation may still harm his or her career.

The Department Advocate’s Office, an internal prosecutorial body, represents the administrative cases against members of the service based on evidence from the investigations. An officer is always entitled to appeal the decision. Ultimately, the Police Commissioner is responsible for the final decision regarding guilt and the penalty in all cases.202

**E. Strengths**

The following strengths are worth noting:

- **Evidence gathering:** targeted integrity testing has been hailed as an effective means to gather evidence on a corrupt police officer who has evaded traditional internal discipline. When a police officer undertakes sophisticated criminal activities, an integrity test may be the only way to penalize that person.

- **Information gathering:** random integrity tests also provide a barometer to assess the level of corruption. Whereas targeted tests only provide information on allegedly corrupt officers, random integrity tests may provide data about how much corruption actually exists. However, if these tests are not designed well, officers will not engage in an accurate way and the data will be skewed.

- **Deterrent effect:** once instituted, integrity tests may deter police officers from illegal activity for fear of surveillance. Ideally, police officers will view every interaction as a potential integrity test. However, this may cause low morale (see below).
F. Limitations

The following limitations are worth noting:

- **Entrapment**: as explained above, entrapment occurs when a person, not predisposed to committing a crime, is given the idea to commit a crime by an *agent provocateur*. If an officer can successfully use an entrapment defense, the entire integrity test has failed and valuable resources have been wasted. Furthermore, officers may feel targeted by the integrity testers and unwilling to cooperation on subsequent investigations.

- **Damage to morale**: when integrity tests are random, officers with no prior offenses may be subject to criminal proceedings and dismissal from the force. This has a potentially devastating effect on police department morale. Because the tactics of integrity tests are invasive and normally reserved for criminals, police officers may feel degraded after being the subject of such a test. Agencies that conduct random integrity tests should keep in mind the possibly deleterious effects of these operations on morale.

- **Expensive**: Integrity tests require the time and efforts of trained staff. These test require planning and realistic props. Furthermore, the test must be equipped with functioning recording technology. Each of these items makes the integrity test an expensive endeavor, especially when compared with other tactics such as monitoring or prevention.

VIII. Conclusion and Recommendations

Integrity testing of the judiciary is one possible measure to combat judicial corruption, but presents significant risks to judicial independence, the right to a fair trial and the right to privacy. Globally, integrity testing of the judiciary has rarely been carried out by institutions other than the police. The use of undercover agents to simulate a ‘test’ scenario presents high risk for entrapment. Other strategies, such as monitoring and surveillance, are worth considering, and can prove effective in addressing integrity concerns. Pre-employment screening can also be a useful prevention tool.
IX. Endnotes

5 “[S]tging operations contain four basic elements: 1) an opportunity or enticement to commit a crime, either created or exploited by police, 2) a targeted likely offender or group of offenders for a particular crime type, 3) an undercover or hidden police officer or surrogate, or some form of deception, 4) a “gotcha” climax when the operation ends with arrests;” in Graeme R. Newman, “Negative Features of Sting Operations,” Community Oriented Policing Services, October 2007, 3, http://ric-zai-inc.com/Publications/cops-p134-pub.pdf.
9 Ibid.
10 Ibid.
11 Ibid.
at 18 para 93.
16 Ibid, 6 para 22.
17 Ibid, 6 para 21.
18 Ibid, 16 para 82.
19 Ibid, 18 para 94.
20 Ibid, 19 para 97.
32 Conflict of Interest Act (S.C. 2006, c. 9, s. 2).
33 Section 10(1) Freedom of Information Act, R.S.O, 1900, F.31.
36 Ibid.
37 Ibid.
Ibid, 60(1).
Ibid, 63(2).
Ibid, 63(1).
Ibid, 59 (1)(a).
“Each member of the Council may appoint a judge of that member’s court to be a substitute member of the Council and the substitute member shall act as a member of the Council during any period in which he or she is appointed to act, but the Chief Justice of Canada may, in lieu of appointing a member of the Supreme Court of Canada, appoint any former member of that Court to be a substitute member of the Council,” See Ibid, at 59 (4)
Ibid, 3.
Ibid.
Ibid.
Ibid, 4.3.
Ibid, 4.5.
Judges Act (R.S.C., 1985, c. J-1), 63(4)
Ibid, 63(6)
Ibid, 63(5)

Ibid.

CJC, “Procedures for the Review of Complaints or Allegations,” 9.1

CJC, “Procedures for the Review of Complaints or Allegations,” 9.2; CJC Inquiry Committee, “Report to the Canadian Judicial Council of the Inquiry Committee Appointed Pursuant to Subsection 63(1) of the Judges Act to conduct an Inquiry Concerning Mr. Justice Bernard Flynn.”

“Making a Complaint.”

“Ibid.”

CJC, “Procedures for the Review of Complaints or Allegations,” 9.1

Part II Judges Act § 63(6)

Part II Judges Act § 2(a-d).


Ibid, 66(3).

CJC, “Making a Complaint.”

Carville, “Retiring Federal Judge Lashes out at Watchdog.”

Carville and Mendelson, “Complaints against Federal Judges.”


Ibid.

Ibid, 267.

Interview with Simon Butt, June 14, 2016.

Ibid.


Law 22 on Judicial Commission, 2.2 article 6, 2004.


Ibid, art 7.

Ibid, art. 9.

Article 13(b) of the Law on Judicial Commission.


Interview with Simon Butt, June 14, 2016.


Ibid.
98 Ibid.
100 Ibid.
102 Ibid.
103 Ibid.
106 Independent Commission against Corruption in Hong Kong, “Background.”
108 Ibid.
109 Ibid.
114 Ibid.
115 Interview with Simon Butt, June 14, 2016.
116 Ibid.
120 Ibid.
121 Parlina, “More Judges Sacked.”
122 Interview with Simon Butt, June 14, 2016.
Article 209 (2) of the Pakistan Constitution.

Ibid, (6).


Federal Bureau of Investigation, “Forms: FBI Tips and Public Lead.”

A tribal agency is a police agency for Native American tribes.


LEEP: Law Enforcement Enterprise Portal, accessed July 14, 2016, [https://](https://)

157 Ibid.


159 The “Attorney General’s Guidelines for Domestic FBI Operations” (September 2008) defines a sensitive investigative matter as “an investigative matter involving the activities of a domestic public official or political candidate (involving corruption or a threat to the national security), religious or political organization or individual prominent in such an organization, or news media, or any other matter which, in the judgment of the official authorizing an investigation, should be brought to the attention of FBI Headquarters and other Department of Justice officials.” See Office of the Director of National Intelligence, “AG Guidelines for Domestic FBI Operations,” VII (N).


161 Office of the Director of National Intelligence, “AG Guidelines for Domestic FBI Operations,” V (C) 3(d).


167 See generally Jason Bennetto, “Black Officers to Entrap Racist Police,” *The Independent*, November 26, 1998, [http://www.independent.co.uk/news/black-officers-to-entrap-racist-police-1187508.html](http://www.independent.co.uk/news/black-officers-to-entrap-racist-police-1187508.html) (explaining “Scotland Yard will also introduce random “integrity” testing, which will include placing marked piles of cash in police stations to discover whether officers are honest,” a plan which was never supported by legislation).


169 Interview with Mark Radcliffe, July 10, 2016.


Her Majesty’s Inspectorate of Constabulary (HMIC) “Integrity Matters,” 3.6.

Al Baker and Jo Craven McGinty, “N.Y.P.D. Confidential.”


Ibid, 2.

Her Majesty’s Inspectorate of Constabulary (HMIC) “Integrity Matters,” 3.11.


Interview with Mark Radcliffe, July 10, 2016, discussing incivility complaints.


Ibid, 5.

Ibid, 3.


Ibid, 4, cautioning “even random tests should concentrate on commands with identified corruption trends or hazards.”


Ibid, 11.

Ibid, 12.

Ibid, 12.

Interview with Mark Radcliffe, July 10, 2016.

Commission to Combat Police Corruption, “Sixteenth Annual Report of
the Commission,” see “Miscellaneous General Cases, 65-77.
201 Ibid, 206-19, 203-04 ("Not Fit for Duty") & 205-38 ("Retaliation Against Another Officer").