

Pre-Trial Judicial Control in The Common Law Tradition: Functional Equivalents of The Investigating Judge and Lessons for Uzbekistan

Zafarjon Rakhmonalievich Omonov

PhD in Law, Lecturer, Academy of Justice of the

Republic of Uzbekistan, Tashkent, Uzbekistan

E-mail: z.omonov@sudacademy.uz; Tel.: +998 91 664-11-94

ORCID: <https://orcid.org/0009-0007-5125-8748>

	Abstract This article offers a comparative legal analysis of pre-trial judicial control in England and Wales, the United States and Canada. It examines how the common law, which has no investigating judge in the continental sense, secures judicial oversight of interferences with personal liberty and privacy, and what lessons this experience holds for the investigating judge introduced in Uzbekistan in 2025. Drawing on functional comparison and case-law analysis, the study shows that magistrates, federal magistrate judges and examining justices perform no investigative function and are confined to authorising and reviewing coercive measures. Pre-trial control in this tradition rests on the combination of two mechanisms: prior judicial authorisation (ex ante) and the subsequent exclusion of unlawfully obtained evidence (ex post). The article argues that the Uzbek investigating judge, despite its continental name, is functionally a “judicial control judge”, and that the approval of nearly 95 per cent of detention requests points to a risk of “legal translation”, whereby a transplanted institution is reshaped by the earlier practice of prosecutorial sanction. Specific amendments to the Criminal Procedure Code of Uzbekistan are proposed.
	Keywords: Investigating judge; pre-trial judicial control; common law; magistrate; exclusionary rule; ladder principle; legal translation; Uzbekistan.

Introduction

The investigating judge (juge d’instruction in French, Ermittlungsrichter in German) has traditionally been regarded as a hallmark of the continental legal family. The institution took shape in the French Code of Criminal Instruction of 1808 and was subsequently received, in various forms, into the legislation of Germany, Italy, the Netherlands and a number of post-Soviet states [1]. In the common law tradition, by contrast, criminal procedure is built on the adversarial principle: the police gather evidence, the prosecution decides whether to bring charges, and the judge acts as an impartial arbiter between the parties. The very notion of an investigating judge is therefore alien to this system. Yet it was the common law that created the oldest judicial safeguards against arbitrary deprivation of liberty – habeas corpus and the judicial warrant.

The question is of immediate practical relevance for Uzbekistan. Pursuant to Presidential Decree No. PF-89 of 10 June 2024 and Law No. ZRU-1022 of 28 January 2025, the office of investigating judge was established in district (city) criminal courts with effect from 1 January 2025, and the Criminal Procedure Code (CPC) was supplemented by Article 31¹ defining its powers [2; 3]. According to the Supreme Court, investigating judges considered 52,120 applications in 2025, while the rejection rate for applications for detention on remand stood at 5.1 per cent [4]; in other words, nearly 95 per cent of such applications were granted.

The article addresses three questions. What powers do the functional equivalents of the investigating judge possess in the common law tradition? Which mechanisms make pre-trial judicial control effective there? To which model does the Uzbek investigating judge belong, and what can usefully be borrowed?

2. Methodology

Institutions were compared not by their names or formal status but by the function they perform, namely ensuring independent judicial control over interferences with individual rights (the functional method of comparison). The study analyses statutes and the case law of the highest courts of England and Wales, the United States and Canada. Its theoretical framework draws on Mirjan Damaška's distinction between hierarchical and coordinate structures of authority [5; 6] and on Máximo Langer's concept of "legal translation" [7], according to which an institution borrowed from another system is transformed by local procedural traditions and may even produce results contrary to its original purpose. Conclusions on national practice are based on official statistics provided by the Supreme Court of Uzbekistan in response to the author's request and on the author's earlier study of judicial rulings [4; 8].

3. Results and Discussion

3.1. Structural differences and historical origins

In Damaška's account, hierarchical structures of authority establish the truth through an official inquiry, whereas in coordinate structures the judge's task is not to conduct an inquiry but to resolve a dispute between parties of equal standing [5; 6]. This explains why the continental investigating judge personally performs investigative tasks such as gathering evidence, questioning witnesses and ordering expert examinations [9], whereas the common law judge merely rules on applications submitted by the parties.

The roots of pre-trial judicial control go back to chapter 39 of Magna Carta (1215), while the Habeas Corpus Act 1679 placed on a statutory footing the procedure for bringing a detained person before a court and examining the lawful basis of the detention [10; 11]. At the same time, as John Langbein has shown, the modern adversarial trial emerged relatively late, between about 1730 and 1780, as lawyers gradually entered the criminal courtroom [12]. The principle of the judge as a neutral arbiter is thus not an unbroken historical inheritance but the outcome of the consistent introduction of procedural safeguards – a finding of particular relevance to post-Soviet states.

3.2. England and Wales

In England and Wales, almost all criminal cases begin in the magistrates' courts. Magistrates decide on remand in custody or release on bail and issue search and arrest warrants, but they never

direct the investigation or gather evidence [13]. The examining justices, who in committal proceedings determined whether there was sufficient evidence to send a serious case for trial, were long regarded as the closest common law analogue of the investigating judge. Committal proceedings were, however, progressively abolished by legislation of 1998 and 2003, the relevant provisions being fully in force from 2013 [14].

With regard to pre-trial detention, section 4 of the Bail Act 1976 establishes a presumption in favour of bail: a defendant may be refused bail only on the grounds listed in Schedule 1 to the Act, namely where there are substantial grounds for believing that, if released, he or she would fail to surrender to custody, commit an offence or obstruct the course of justice [15]. The exhaustive list of grounds in practice places the burden of justification on the prosecution: liberty is the rule, and custody is an exception that must be justified. In the field of covert surveillance, the Investigatory Powers Act 2016 introduced a “double lock”, under which a warrant issued by the executive takes effect only once approved by an independent Judicial Commissioner [16]. Section 78 of the Police and Criminal Evidence Act 1984 empowers the court to exclude evidence whose admission would have an adverse effect on the fairness of the proceedings [17]. Control over investigative bodies is therefore exercised not through a separate complaints procedure but primarily through the question of the admissibility of evidence.

3.3. The United States and Canada

In the US federal courts, magistrate judges issue arrest and search warrants, conduct initial appearances and preliminary hearings, and decide on release pending trial [18]. The key requirement of prior authorisation is the neutrality of the authorising official. In *Johnson v. United States* (1948), the Supreme Court held that the question whether a search is justified must be decided by a “neutral and detached magistrate”, and in *Coolidge v. New Hampshire* (1971) it held that a state official actively engaged in the investigation and prosecution of the case cannot be such a magistrate [19; 20]. *Franks v. Delaware* (1978) gave the defence the right to show that a warrant was obtained on the basis of deliberately or recklessly false statements; where this is established, the evidence obtained is excluded [21]. In *Riley v. California* (2014), the warrant requirement was extended to the search of data on a mobile phone seized upon arrest [22].

The second, ex post mechanism is the exclusionary rule for evidence obtained in violation of the Constitution. In *Mapp v. Ohio* (1961), evidence seized in a warrantless search was held inadmissible and the rule was extended to the states [23]. The defence motion to suppress creates the strongest possible incentive for investigators: evidence obtained unlawfully yields no procedural advantage [24]. *Gerstein v. Pugh* (1975) and *County of Riverside v. McLaughlin* (1991) require that a person arrested without a warrant ordinarily be brought before a neutral judge for a probable cause determination within 48 hours, while *United States v. Salerno* (1987) upheld pre-trial detention on grounds of dangerousness only where dangerousness is proved by clear and convincing evidence [25; 26; 27]. In addition, pretrial services officers provide the court with independently verified information on the defendant’s background, employment and family circumstances [28].

The Supreme Court of Canada, in *R. v. Antic* (2017), affirmed the “ladder principle”: the judge must start with the least onerous form of release and may move up the ladder only after explaining why each lower rung is inadequate, detention being the highest rung [29]. In *R. v. Myers* (2019),

the Court held that detention must be reviewed at a full hearing every 90 days and that such review must not be a formality [30].

Pre-trial judicial control in the common law tradition thus rests on the combination of prior authorisation and the subsequent exclusion of evidence, which secures effective oversight without assigning any investigative function to the judge.

3.4. The reality of judicial control and lessons for Uzbekistan

In 1977, Abraham Goldstein and Martin Marcus argued that pre-trial judicial supervision in France, Italy and Germany was largely illusory [31], whereas John Langbein and Lloyd Weinreb contended that their conclusions were methodologically flawed [32]. The main lesson of this debate is that the real degree of judicial control is determined not by the name of the institution but by how independently and substantively the judge decides in practice. The functional equivalents in the common law tradition perform no investigative function and are limited to authorisation and review; they may conveniently be described as a “judicial control judge” model. Nikolay Kovtun and Tatyana Bukhranova likewise observe that the “specialised investigating judge” in certain jurisdictions is, in substance, closer to the common law magistrate [33].

The Uzbek investigating judge, too, neither gathers evidence nor directs the investigation, but is confined to authorising coercive measures and investigative actions (Article 31¹ CPC) [3]. Despite its continental name, it therefore belongs functionally to the judicial control judge model. While the *ex ante* element of this model is in place, its other elements remain weak. Article 158¹ CPC provides that a search carried out without prior authorisation in urgent circumstances must be reviewed by the court within 48 hours and that evidence obtained in an unlawful search is inadmissible, yet in practice such review is often a formality [8]. The rejection rate for applications to extend detention (1.7 per cent) is roughly three times lower than for initial applications [34], which suggests that a measure, once imposed, is in effect extended automatically. Nor is there any procedure for challenging the decisions of investigative bodies directly before a court. At the same time, the verbatim transplantation of foreign rules carries its own risk of legal translation. What should be borrowed is their function: shifting the burden of justification to the prosecution, obliging the judge to give reasons on each statutory condition, and making the procedural consequences of unlawfulness inevitable.

4. Conclusion

First, the common law has no investigating judge in the continental sense, but its functional equivalents – magistrates, federal magistrate judges and examining justices – perform no investigative function and are confined to authorisation and review. Together they may be described as a “judicial control judge” model.

Second, the effectiveness of pre-trial control in this model is secured by the combination of prior authorisation (*ex ante*) and the exclusion of evidence (*ex post*), supplemented by the presumption of liberty, an exhaustive list of grounds for detention, the neutrality of the authorising judge and periodic review of detention.

Third, the Uzbek investigating judge belongs functionally to the judicial control judge model; however, the approval of nearly 95 per cent of detention requests indicates that the institution still

operates under the influence of the former practice of prosecutorial sanction, that is, it faces the risk of legal translation.

Fourth, the institution should be strengthened not by assigning investigative tasks to the judge but by reinforcing the control function. To this end, the following amendments to the CPC are proposed: in Article 236, a rule that detention must rest on specific circumstances and that the gravity of the offence alone is not a sufficient ground; in Article 243, a requirement to consider preventive measures starting from the least restrictive (the ladder principle); in Article 247 and a new Article 240¹, a duty to verify on extension that the original risks persist, together with the right of the defence to apply directly to the investigating judge; in Article 158¹, a reduction of the period for subsequent review to 24 hours and the liability of the official for the accuracy of information in the application. It is further proposed to empower the investigating judge to hear complaints against decisions of investigative bodies and to require that every application for detention be accompanied by verified information on the defendant.

References

1. Ibrokhimov B.T. (2025). Jinoyat protsessida prokuror va sud nazoratining o'zaro mutanosibli giga oid masalalar [Issues of the correlation between prosecutorial and judicial control in criminal procedure] (PhD dissertation). Tashkent, pp. 137–139. (In Uzbek)
2. Decree of the President of the Republic of Uzbekistan No. PF-89 of 10 June 2024 “On measures to further strengthen guarantees of reliable protection of the rights and freedoms of the individual in operational-search and investigative activities”. National Database of Legislation. <https://lex.uz> (In Uzbek)
3. Criminal Procedure Code of the Republic of Uzbekistan of 22 September 1994 (as amended by Law No. ZRU-1022 of 28 January 2025). <https://lex.uz/docs/111460> (In Uzbek)
4. Supreme Court of the Republic of Uzbekistan (2026). Letter No. 07-14/26-85375 of 8 September 2026 with statistical annexes (reply to the author's request). Unpublished. (In Uzbek)
5. Damaška, M. R. (1975). Structures of authority and comparative criminal procedure. *Yale Law Journal*, 84(3), 480–544.
6. Damaška, M. R. (1986). *The faces of justice and state authority: A comparative approach to the legal process*. New Haven: Yale University Press.
7. Langer, M. (2004). From legal transplants to legal translations: The globalization of plea bargaining and the Americanization thesis in criminal procedure. *Harvard International Law Journal*, 45(1), 1–64.
8. Omonov, Z. (2026). Tergov sudyasi qarorlarining qonuniyligi, asosliligi va adolatliligi mezonlari: nazariy tahlil va sud amaliyoti asosida baholash [Criteria of legality, validity and fairness of investigating judges' decisions: A theoretical analysis and assessment based on judicial practice]. *Jamiyat va innovatsiyalar [Society and Innovations]*, 7(4), 261–268. (In Uzbek)
9. Berndt, E. (2023). Sledstvennyi sud'ya ili prokuror? [Investigating judge or prosecutor?] (E. E. Konovalova, Trans.; S. G. Konovalov, Ed.). *Vestnik Moskovskogo universiteta. Seriya 11. Pravo [Moscow University Bulletin. Series 11. Law]*, (4), 87–114. (In Russian)
10. Habeas Corpus Act 1679 (31 Cha. 2 c. 2) (England).
11. Muminov, B. A. (2020). Jinoyat ishlarini sudga qadar yuritish ustidan sud nazorati [Judicial control over pre-trial proceedings in criminal cases] (DSc dissertation). Tashkent. (In Uzbek)

12. Langbein, J. H. (2003). The origins of adversary criminal trial. Oxford: Oxford University Press, pp. 1–2, 106–113.
13. Ashworth, A., & Redmayne, M. (2010). The criminal process (4th ed.). Oxford: Oxford University Press.
14. Criminal Justice Act 2003 (c. 44), Schedule 3 (England and Wales).
15. Bail Act 1976 (c. 63), s. 4 and Schedule 1 (England and Wales).
16. Investigatory Powers Act 2016 (c. 25), s. 23 (United Kingdom).
17. Police and Criminal Evidence Act 1984 (c. 60), s. 78 (England and Wales).
18. Federal Rules of Criminal Procedure (United States), Rules 4, 5, 5.1 and 41; 28 U.S.C. § 636.
19. Johnson v. United States, 333 U.S. 10 (1948).
20. Coolidge v. New Hampshire, 403 U.S. 443 (1971).
21. Franks v. Delaware, 438 U.S. 154 (1978).
22. Riley v. California, 573 U.S. 373 (2014).
23. Mapp v. Ohio, 367 U.S. 643 (1961).
24. LaFave, W. R., Israel, J. H., King, N. J., & Kerr, O. S. (2017). Criminal procedure (6th ed.). St. Paul: West Academic Publishing.
25. Gerstein v. Pugh, 420 U.S. 103 (1975).
26. County of Riverside v. McLaughlin, 500 U.S. 44 (1991).
27. United States v. Salerno, 481 U.S. 739 (1987).
28. Pretrial Services Act of 1982, Pub. L. No. 97-267 (18 U.S.C. §§ 3152–3155).
29. R. v. Antic, 2017 SCC 27 (Supreme Court of Canada).
30. R. v. Myers, 2019 SCC 18 (Supreme Court of Canada).
31. Goldstein, A. S., & Marcus, M. (1977). The myth of judicial supervision in three “inquisitorial” systems: France, Italy, and Germany. Yale Law Journal, 87(2), 240–283.
32. Langbein, J. H., & Weinreb, L. L. (1978). Continental criminal procedure: “Myth” and reality. Yale Law Journal, 87(8), 1549–1569.
33. Kovtun, N. N., & Bukhranova, T. S. (2011). Institut sudebnogo sledovatelya i spetsializirovannogo sledstvennogo sud’i v kontekste opyta stran kontinental’noi sistemy prava [The institutions of the judicial investigator and the specialised investigating judge in the light of the experience of continental law countries]. Nizhny Novgorod: HSE University. (In Russian)
34. Supreme Court of the Republic of Uzbekistan (2026). Letter No. 07-14/26-77801 of 18 August 2026 with statistical annexes (reply to the author’s request). Unpublished. (In Uzbek)