Latif v. Obama: The Epistemology of Intelligence Information and Legal Evidence

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By Richard Morgan

“All the business of war, indeed all the business of life, is to endeavor to find out what you don’t know by what you do.” – Arthur Wellesley, 1st Duke of Wellington (1769-1852).

Introduction

On October 14, 2011, the Court of Appeals for the D.C. Circuit issued its opinion in Latif v. Obama, a Guantanamo habeas corpus case concerning the detention of a Yemeni national alleged to have been a member of the Taliban. The U.S. District Court for the District of Columbia granted Latif’s petition, in part because the Court found that the intelligence report upon which the government primarily relied “was not sufficiently reliable to support a finding...that Latif was recruited by an al Qaeda member or trained and fought with the Taliban.”

Writing for the majority of the D.C. Circuit panel, Judge Janice Rogers Brown ruled that the District Court had erred by not affording the intelligence report proffered by the government a rebuttable “presumption of regularity,” which “supports the acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” Thus, the presumption of regularity merely permits a court “to conclude that the statements in a government record were actually made” but “says nothing about whether those statements are true.”

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3 Latif v. Obama, 666 F.3d 746, 747 (C.A.D.C. 2011)


5 Latif, 666 F.3d at 747.

6 Latif, 666 F.3d at 748.

7 Latif 666 F.3d at 755.
Judge David S. Tatel strongly dissented from the majority’s position, making clear that he did not believe that the intelligence report in question had sufficient indicia of reliability to support a presumption of regularity. Judge Tatel noted that the report was “produced in the fog of war by a clandestine method that we know almost nothing about. It is not familiar, transparent, generally understood as reliable, or accessible.”

The opaqueness surrounding intelligence reports stood in contrast to other forms of evidence that receive a presumption of regularity; “state court judgments and fact findings,” for example, “arise out of a formal and public adversarial process where parties generally have attorneys to zealously guard their interests, and where neutral state court judges...pledge to apply the law faithfully.” Thus for Judge Tatel, the central question in Latif was whether “the challenged document emerged from a process that we can safely rely upon to produce accurate information.”

The majority rejected Judge Tatel’s requirement that a presumption of regularity only apply where the proffered evidence were produced through a process that was transparent and familiar, stating that the presumption of regularity is “founded on inter-branch and inter-governmental comity,” not courts’ “own judicial expertise with the relevant government conduct.” Nevertheless, Judge Brown felt compelled to note that the court knew “far more about the personnel, process, and standards involved in producing intelligence reports” than about “the foreign and state organs whose records we also presume to be reliable, and we have no reason to suspect that such documents are fundamentally unreliable.”

In considering the Latif case, the three-judge panel of the Court of Appeals did not act in a vacuum; they were part of a larger process, involving numerous actors at varying stages of judicial proceedings. The Latif proceedings, like all judicial proceedings, are an interactive process, designed in

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8 Latif, 666 F.3d at 772.
9 Latif, 666 F.3d at 772.
10 Latif, 666 F.3d at 772.
11 Latif, 666 F.3d at 752.
12 Latif, 666 F.3d at 752.
part to determine questions of “fact.” In other words, judicial proceedings may be described as a social, veritistic process. Furthermore, at the heart of the Court of Appeals’ opinion is the question of what weight (if any) courts should give to information derived from another social veritistic process, i.e. the intelligence cycle. Although the Supreme Court denied certiorari in Latif, the issue remains a pressing one, as numerous Guantanamo habeas proceedings remain active, and is likely that intelligence information will be introduced as evidence in the planned Guantanamo military commissions.

This article examines this question, and proposes a framework for admitting and weighing intelligence information as evidence, placing primacy on the value of achieving veritistic efficacy. Part I of this article sets forth three epistemological criteria for evaluating the efficacy of social veritistic processes. In parts II and III, these criteria are respectively applied to the judicial process and intelligence cycle. Finally, part IV of this article addresses the epistemological challenges associated with considering “facts” from one social process in making veritistic determinations in the other social process.

I. Social Epistemology

Epistemology, as defined in the Oxford English Dictionary, is “the theory or science of the method or grounds of knowledge.” According to Alvin Goldman, traditional epistemology is “highly individualistic, focusing on mental operations of cognitive agents in isolation or abstraction from other

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13 No. 11-1027
16 Oxford English Dictionary, ___.

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persons.” However, while human beings may acquire knowledge individually under certain circumstances (Goldman provides the example of an individual looking outside to determine whether it will rain), a great amount of human knowledge is derived from interaction with other human beings (for example, the individual curious about the possibility of rain will listen to a weather forecaster). Thus, social epistemology is concerned “not with individual knowers but with the social processes and practices that inculcate belief.” Beyond this, however, Goldman’s work focuses not simply on providing a positive description of how social processes inculcate belief, but also on the more normative study (what Goldman calls “social veritistic epistemology) of “which practices have a comparatively favorable impact on knowledge as contrasted with error and ignorance?”

In attempting to answer the question “which social practices have a favorable impact on knowledge,” one quickly realizes that several predicate questions may be posed, which in turn draw on numerous academic disciplines. For example, one may ask the philosophical question of what comprises “knowledge” or “truth.” Alternatively, one may turn to psychology to ask how human beings form beliefs, or adopt a sociological approach by examining how society structures itself in order to render judgments. Indeed, within the social epistemology literature, some commentators have argued for one approach over another. For example, advocates of the “replacement naturalism” school of epistemology embrace a purely psychological approach, arguing that philosophical attempts at providing accounts of how individuals justify believe face insurmountable challenges, such as the fact that all justifications are ultimately based on sensory perceptions. Thus, replacement naturalism seeks to merely explain how knowledge and beliefs are formed, rather than try to make normative determinations as to which methods are more likely to result in justifiable, accurate, or true beliefs.

17 ALVIN GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD, 4 (1999).
18 ALVIN GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD, 3-4 (1999).
20 ALVIN GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD, 5 (1999).
Foundational questions such as whether “truth” exists are not trivial, as is attested to by the amount of literature dedicated to answering such questions. However, the intent of this paper is not to address such questions, nor is it an effort to advocate for a particular approach to social epistemology. Instead, the purpose of this paper is to (1) provide a positive description of the social epistemic processes of the intelligence cycle and judicial proceedings, and (2) highlight the normative problems inherent in using “knowledge” derived through one process as a factual “input” in another process. Nonetheless, accomplishing this goal does require making some predicate assumptions. Thus, I assume that objective truth can be known, and that certain epistemic processes produce better veritistic results than other processes.

To this end, some criteria are required in order to assess the efficacy of a social process in producing veritistic results. For simplicity’s sake, I will employ three criteria: first, whether a social process is likely to achieve the “desideratum of completeness”; second, whether actors within the social process are likely to effectively communicate information to each other; and third, whether the dialogical process of argumentation within the social process is designed to achieve better veritistic results.

The first criterion, the desideratum of completeness, or the “rule of total evidence” requires that veritistic conclusions be based on all of the evidence available. As Susan Haack notes, “[f]or evidence to have probative force, it must be not only correct, it must be complete; evidence which is true so far as it goes but which omits some essential point can be thoroughly misleading.”

Imagine, for example, that a marketing firm wishes to determine what genre of motion picture is preferred by audiences in a particular community. In order to determine this, the marketing firm sends a researcher to the local movie theater. After reviewing the yearly ticket sales for the theater, the researcher discovers that ten percent of all tickets sold were for romance films, twenty percent were for action

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films, another twenty percent were for dramas, and fifty percent were for comedies. Based on this information, the researcher could conclude that comedy is the most popular genre of motion picture in the community. However, if the researcher failed to notice that a second theater exists in the community, and as a result the ticket sales of the second theater were not included in the researcher’s data, then drawing the inference that comedy is the most popular genre may not be warranted.

One important limitation to the desideratum of completeness should be noted. When Haack states that evidence may be misleading if it omits “some essential point,” she makes an important qualification, which is that the rule of total evidence practically means the ‘rule of total, relevant evidence.’ Because social epistemology necessarily deals with human actors, we must make concessions to human ability. Consideration of all information that may pertain to a certain factual proposition may be impractical, and perhaps beyond human comprehension. Thus, in setting forth the criterion that a social veritistic process ought to consider all information, we are constrained by Goldman’s proposition that “ought implies can.” Turning to the movie theater example, evidence of the seasonal weather conditions in the community studied, or whether the community has a public library may affect the question of whether community members go to the cinema. However, such information is not likely to greatly impact the decision of which film cinema patrons see once they are at the theater, or such information is likely to have such an attenuated effect that its consideration by the marketing firm would be distracting or wasteful.

The desideratum of completeness is not unique to social epistemology, and may apply equally whether a veritistic conclusion is being made by an individual, or by a group. However, the second criterion, i.e. that information is effectively communicated, is essential for evidence held by the individual to be converted into “social” knowledge. To this end, Richard Friedman identifies four

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24 Under the Federal Rules of Evidence, the definition or “relevant evidence” is “evidence having any tendency to make the existence of any fact...more probable or less probable than it would without the evidence.” See FED. R. EVID. 401.
testimonial capacities, i.e. perception, memory, sincerity, and articulateness. Thus, for a fact $X$ to become testimony $X$, a witness must (1) perceive $X$, (2) accurately remember $X$ at the time of testimony, (3) intend to communicate fact $X$, and (4) adequately articulate fact $X$. If the witness fails in any of these capacities (e.g. if the witness forgets some facet of $X$) then the effectiveness of the testimony will be degraded. Drawing on the film genre example above, if the researcher mischaracterized the genre of films (e.g. if the researcher included a particular film’s ticket sales in the “action” genre, when it was in fact a “drama”), then the researcher committed a failure of perception, and as a consequence the researcher’s report to the marketing firm would be incorrect. Alternatively, if the researcher could not later recall the percentage of audiences for each genre, then he would have committed a failure of memory. Likewise, if the researcher falsified his results, he would have committed a failure of sincerity, or if the marketing firm interpreted the researcher’s report of the high percentage of comedy film tickets sold to mean that drama was the most popular genre, then a failure of articulateness would have occurred.

The final criterion by which the social veritistic processes of the intelligence cycle and judicial proceedings will be judged is whether such processes employ dialogical argumentation (whereby two or more individuals discourse with each other) that are designed to achieve better veritistic results. Alvin Goldman notes several requirements for effective dialogical argumentation, which may be summarized as follows: first, each speaker has a justified belief in his premises, which support the speaker’s conclusions. Second, the speaker communicates his premises and conclusions to his audience clearly, and the argument is credible and novel to at least some of the audience. A speaker’s argument may be effectively rebutted by (a) defeating a premise of the argument, or providing an additional premise which undermines the conclusion, (b) denying the truth of a premise, or (c) denying the strength of the

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27 Goldman, *Knowledge in a Social World*, at 134-138
premises-conclusion relationship. Additionally, Goldman notes several fallacies which undermine effective argumentation, including appealing to authority, syllogistic argumentation (which Goldman calls “begging the question”), *ad hominem* attacks (i.e. attacking the speaker, rather than the argument), and the use of straw man argument (i.e. mischaracterizing an argument to make it easier to attack).

To return to the film example, let us assume that the researcher reports his observations to the marketing firm, which must interpret the results to determine which genre was the most popular. If a given member of the firm believed the results provided by the researcher (i.e. she believed in the premise of the argument), then she could logically argue to her coworkers that, because fifty percent of theater audience ticket sales were for comedy films, comedy was the most popular genre in the community studied. According to Goldman, a dissenting member of the firm could potentially argue against such a conclusion by noting that the premises of the argument were incorrect – e.g. the researcher only studied one theater in the community, and ignored data from other theaters. Alternatively, the dissenter could note that the connection of the premise to the conclusion was weak – for example, simply because a majority of theater audiences preferred comedies, it does not follow that the entire community prefers that genre (perhaps members of the community who watch movies at home prefer dramas). According to Goldman, such counterarguments demonstrate weaknesses in the original argument, and thus lead to better veritistic results. In contrast, lines of argument such as *ad hominem* personal attacks (“she’s new to the office...she knows nothing”) or appeals to authority (“the managing partner says that dramas are the big thing this year, so the research must be wrong”) leave the firm no closer to discovering which genre is the most popular.

The three criteria above (desideratum of completeness, effective communication, and effective dialogical argumentation) provide a framework against which social practices may be compared in order to assess the practices’ veritistic effectiveness. Employing this framework, I shall next respectively

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28 *Goldman, Knowledge in a Social World*, at 140.
examine the social veritistic processes of judicial proceedings and the intelligence cycle, before undertaking an evaluation of the interaction between the two veritistic processes.

II. The Veritistic Process of Juridical Factfinding

A. Perception and Cognitive Errors

This section will explore how facts become “known” in the U.S. judicial system. Of course, to conduct a comprehensive examination of the rules of evidence and judicial procedure is beyond the scope of this paper. Instead, the intent of this section is to provide a brief overview of the juridical process, and to note aspects of the system which reveal it to be a sequential series of discrete veritistic judgments, rather than a coherent, linear process. Furthermore, while veritistic judgments are conducted both in civil and criminal litigation, I shall confine my review to criminal prosecution for the sake of brevity and simplicity. That said, many of the epistemological observations – particularly those concerning discovery obligations, and the presentation and consideration of evidence at trial – apply equally to judicial proceedings concerning the adjudication of private disputes as they do to criminal trials.

As Haack notes, a trial “is a late stage of a whole process in which a decision is made as to a defendant’s guilt.”29 In this process, numerous evidentiary assessments must be made by a host of official actors long before a criminal defendant ever appears before a jury of his peers. To begin with, a crime must be investigated by law enforcement personnel, who through the collection of physical evidence and interviewing of witnesses, identify an individual as a suspect in the crime.

During this process, however, the individuals involved (e.g. witnesses, law enforcement personnel, and forensic investigators) may be affected by any one of several common cognitive flaws that influence how beliefs about factual events are formed, decisions are made, and contradictory

information is considered. A large body of psychological research has been conducted on the subject of cognitive decision making, and it is beyond the scope of this paper to evaluate the validity of the various current hypotheses in the field. However, because the potential for individual cognitive error exists not only for those actors involved in the pre-trial stage of judicial factfinding, but rather for any human actor at any stage of both the judicial and intelligence processes, mention of some of the potential bases for cognitive error is appropriate.

For example, we tend to perceive what we expect to perceive, and we use our prior experience to ‘fill in the gaps’ of our actual perception. Perceptions and beliefs, once formed, tend to persistent, and information that is subsequently learned is assimilated to existing belief. Not surprisingly, therefore, we tend to give greater credence to information that confirms to our existing beliefs, and discredit information which is contradictory. Incorrect perceptions that are based off of ambiguous initial information may be stubbornly persistent, requiring exposure to increased amounts of unambiguous information before the incorrect perception is corrected.

The manner in which we perceive information may also affect our cognitive assessment of that information, with vivid and personally perceived information impacting our thinking more so than abstract information. Furthermore, we may be disposed towards patterns, constancy, and order. If we detect a pattern of internal consistency in our informational perception, we will ascribe a greater

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33 HEUER, at 11, quoting ROBERT JERVIS, PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS, 195 (1976).
36 HEUER at 116. Drawing on the work of Richard Nisbett, Lee Ross
degree of confidence in judgments derived from those perceptions.\textsuperscript{37} We tend to seek cause and effect,\textsuperscript{38} and to ascribe centralized direction to events, rather than perceiving such events as potentially random and unrelated.\textsuperscript{39} Similarly, we tend to view the actions of others as being the product of their nature, while we view our own personal behavior has being conditioned by the situation and context in which we find ourselves.\textsuperscript{40}

B. The Investigation Phase: The Halsey Case Study

As noted above, cognitive flaws may affect any actor at any stage of the judicial process. Furthermore, because the judicial process is sequential in nature, the possibility exists that a factual omission or error that is the result of a cognitive error early in the process could be compounded by similar cognitive errors at later stages of prosecution. Consider, for example, the case of Byron Halsey, whose conviction in New Jersey for the sexual assault and murder of two children was overturned following DNA testing.\textsuperscript{41} In 1985, Halsey was living with Margaret Urquhart and her two children. On the night of 14 November 1985, a man named Cliff Hall, who lived in the same apartment building as Halsey and Urquhart, drove Halsey across town so that Halsey could visit friends. For the two hours after dropping off Halsey, Hall’s whereabouts were unknown. During that time period, however, Halsey’s presence with his friends was corroborated by several witnesses. After a couple hours of socializing, Halsey walked home, where he discovered that Urquhart’s children were missing. That night, Halsey called Urquhart at her place of work several times, and asked friends and family for information about the whereabouts of the children. The following morning, the bodies of the children were discovered in the basement of the apartment building.

\textsuperscript{37} HEUER at 120. Drawing on the work of Amos Tversky and Daniel Kahneman.
\textsuperscript{38} HEUER at 129.
\textsuperscript{39} HEUER at 131-132.
\textsuperscript{40} HEUER at 135.
\textsuperscript{41} http://www.innocenceproject.org/Content/After_19_Years_in_Prison_for_One_of_the_Most_Heinous_Crimes_in_NJ_History_Byron_Halsey_Is_Proven_Innocent_through_DNA.php
Although they initially suspected Hall, the investigating police extensively interrogated Halsey. Halsey, who had severe learning disabilities and only a sixth grade education, had little sleep during the 30-hour interrogation, leading one of the detectives present to characterize Halsey’s statements as “gibberish.”42 Moreover, Halsey routinely gave incorrect answers concerning aspects of the crime, and had to repeatedly guess before providing accurate details.43 The resulting interrogation report – prepared by the police and signed by Halsey – contained only the accurate details Halsey eventually guessed, and not the inaccurate statements he initially provided.44 Due to Halsey’s “confession,” the police stopped investigating Hall as a suspect. Based in large part on his signed confession and testimony from Hall, Halsey was subsequently convicted of sexual assault and murder, and sentenced to two consecutive life terms.45 Nineteen years following Halsey’s conviction, a DNA test revealed that it was Hall who committed the crimes that Halsey was convicted of, and Halsey’s conviction was subsequently vacated.

This example demonstrates how cognitive errors by actors early on in an investigation may affect, or be compounded by similar errors at subsequent stages of trial. For example, consider the information the interrogating police likely knew at the time they interrogated Halsey: first, they were likely aware of his relationship to the children; second, they likely knew details of the crime scene and the sequence of events surrounding the crime. Setting aside questions of police misconduct in the length and manner in which they questioned Halsey, if the facts already known to the police made them consider that Halsey could be the culprit, then the fact that the police gave greater weight to Halsey’s

43 Specifically, Halsey described a pair of scissors found at the scene. However, he initially described them as being much larger than their actual size, and Halsey reduced the size of scissors after further questioning. Halsey’s erroneous initial description was not included in the interrogation report. State v. Halsey, 329 N.J.Super. 553, 558 (N.J. Super. Ct. App. Div., 2000).
later accurate descriptions than his earlier inaccurate statements may be a product of the psychological proclivity to give greater credence to information that confirms preexisting beliefs.

If cognitive errors on the part of the interrogating police contributed to the creation of the false signed confession, then those errors may have contributed to, and been compounded by, subsequent cognitive failures on the part of the prosecutor. It is likely that the prosecutor in Halsey’s case had access to at least two sources of information. First, the prosecutor would have had access to Halsey’s signed confession; second, it is likely that the prosecutors had opportunities to speak with the interrogating detectives. One may assume that these two sources of information were highly consistent with each other, and if the prosecutor had any existing belief that Halsey was guilty, the signed confession and statements of the detectives would have provided strong psychological support for that position. Furthermore, if the confession and detectives’ statements were the first pieces of information about Halsey’s potential guilt that the prosecutor received, then cognitive psychology suggests that those false beliefs would have been resistant to change, in light of other information (such as other witnesses’ testimony at trial).

Employing the three assessment criteria, the cognitive failures outlined above may undermine the veritistic efficacy of judicial proceedings by providing a false sense that the desideratum of completeness has been fulfilled, e.g. the police may not have sought out additional evidence concerning who committed the crime, because Halsey’s confession provided all of the information they required. Additionally, cognitive failures may also undermine the criterion of effective communication, due to a failure to meet the requirement of accurate perception of the information to be communicated. Thus, cognitive failures on the part of the investigating police officers caused them to inaccurately communicate information concerning the crime to the prosecutor, and the prosecutor’s cognitive failures in turn resulted in inaccurate communication to the court.

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46 Due to the rules of professional conduct, see Model Rules of Prof’l Conduct R. 4.2 (2004), it is unlikely that the prosecutors met with Halsey, at least without his court appointed counsel present.
C. Prosecutors and Selection of Charges: The Gray Case Study

Failures in communication to the prosecutor (or failures of perception on the part of the prosecutor) may further undermine the veritistic efficacy of judicial proceedings due to the numerous conscious choices made by prosecutors that impact the nature and course of trials. First, the prosecutor has discretion over which crimes to charge. So long as the charge chosen is supported by “probable cause,” Rule 8 of the Federal Rules of Criminal Procedures provides that “the indictment or information may charge a defendant in separate counts with two or more offenses if the offenses charged...are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.” Thus, the prosecutor is not required to indict on all conceivable counts arising out of a “common scheme or plan.” Conceivably, a prosecutor may select charges based on a variety of factors; charges may be selected based on perceptions that a jury may be emotionally swayed to convict on one charge, rather than another. Alternatively, a prosecutor may select charges based on the mandatory minimum sentences associated with an offense (in order to incentivize a defendant to plead guilty), or in order to bring a crime within the jurisdiction of the court. Regardless of the rationale for selecting one charge over another, the resulting effect is that evidence will be selected for presentation to the finder of fact based not on the likelihood of the evidence to contribute to the desideratum of completeness, but rather on the relationship between the evidence and the elements of the crime charged.

Additionally, the prosecutor has discretion to choose whom to bring charges against. In addition to making assessments about the sympathetic appeal that a potential defendant may have with a jury, a prosecutor may also consider factors such as whether to grant immunity to an individual associated with

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47 See MODEL RULES OF PROFESSIONAL CONDUCT
48 FED. R. CRIM. P. 8. (emphasis added).
a crime, so as to secure that individual’s testimony against another defendant. In such cases, any ensuing trial is likely to produce disproportionately more information about the defendant’s role in the criminal enterprise than information about the role of the witness; information concerning the latter would likely only come into evidence as a foundation for the witness’s testimony about the defendant, or through impeachment on cross-examination.

Consider, for example, United States v. Gray, a case concerning the prosecution of three correctional officers working at a private correctional facility in New York.\textsuperscript{50} On 1 April 2010, supervising Lieutenant Marvin Wells overheard one of the prisoners at the facility, Rex Eguridu, make a sexual remark toward another correctional officer. In response, Wells instructed two other correctional officers (Kirby Gray and Stephan Rhodes) to move Eguridu to the shower room. There, Wells, Gray and Rhodes strip searched Eguridu, and repeatedly struck him in the head and throat. After forcing Eguridu to apologize, Wells threatened to kill Eguridu if he said anything about the incident. Following these events, Wells, Gray and Rhodes filed reports in which they denied assaulting Eguridu. When the Department of Justice subsequently investigated the matter, Wells and Rhodes represented to the federal investigator that their falsified reports were truthful.

Based on the above facts, one might be surprised to find that Wells and Rhodes were ultimately convicted of, \textit{inter alia}, obstruction of justice by filing false reports, and making a false statement.\textsuperscript{51} Intuition would suggest that the defendants should have been charged (at the very least) with assault, since the beating of Eguridu was arguably the more heinous offense, and was the event that triggered the subsequent false statements. However, several factors may have caused the prosecutors to shift their focus away from the precipitating event, and focus more on the subsequent cover-up. First, the

\textsuperscript{50} \textit{--- F.3d ---, 2011 WL 1585076 (C.A.2 (N.Y))}

\textsuperscript{51} It should be noted that Wells was indicted with deprivation of civil rights by the use of excessive force in violation of 18 U.S.C. §242, which would have required the prosecution to show that Wells committed the kind of acts that would have constituted assault. However, the record indicates that Wells was not convicted for violating 18 U.S.C. §242, which suggests that the jury felt that the prosecution had not sufficiently proven its case on that charge.
federal assault statute applies “within the special maritime and territorial jurisdiction of the United States.” The attack on Eguridu occurred in a private correctional facility (albeit one housing federal prisoners), and thus the prosecutors may have felt that there was a weak basis to assert federal jurisdiction. In contrast, because Wells and Rhodes lied to a federal investigator, their actions during the cover-up fell squarely within the jurisdiction of the federal statutes prohibiting making false statements and falsifying records relevant to a federal investigation.

Second, even if the federal government had jurisdiction to bring an indictment for assault, the prosecutors may have been dissatisfied with the evidence surrounding the attack. Because the federal investigation began several months after the precipitating event, it is probable that (other than the records of Eguridu’s medical treatment) most of the physical evidence was lost. As a result, the prosecution would have had to rely on witness testimony, most likely from Eguridu himself. Such a prospect may have been discouraging to the prosecution, since as a federal prisoner Eguridu may have appeared less than sympathetic as a victim, and less than trustworthy as a witness. In contrast, the evidence in the cover-up case was simultaneously compelling and well-documented. Not only did the prosecution have the false reports filed by the defendants, but also the testimony and conflicting reports of two other correctional officers (Hananiah Day and Leslie Andrews) whom Wells pressured to file false reports.

Regardless of the motivation behind the decision to focus more on the cover-up than the precipitating assault, the resulting effect was a distortion of the trial as a veritistic process in fulfilling the desideratum of completeness. For example, while Wells was indicted for the deprivation of civil rights by the use of excessive force (a charge that would have required the presentment of evidence concerning the assault), no such charge was brought against the other correctional officers (Rhodes,
Gray, and Day) who participated in the assault. While it is possible that testimony about the actions of those officers was elicited during impeachment or foundational testimony, the jury was not formally charged with determining the degree of responsibility that those officers bore for the attack. Therefore, while the Eguridu trial may have resulted in the prosecution of the correctional officers for illegal behavior (and thus succeeded as a judicial process), what it likely did not accomplish was a complete examination of all of the information surrounding the actions of the officers, and thus may leave something to be desired as an veritistic process.

D. Pretrial Discovery

In federal felony cases, the indictment of a defendant is followed by arrest and arraignment. Theoretically, up until this point, there exists an asymmetry in the information possessed by the prosecution and defense. On the one hand, the prosecution is aware of the evidence in its possession, which the prosecution plans to introduce at trial. On the other hand, the defendant presumably knows whether she committed the acts of which she is accused. The pretrial discovery process attempts to reduce this asymmetry, by providing both sides with opportunities to examine information available to the other side. For example, Rule 15 permits both sides to depose prospective witnesses, Rule 17 provides both sides with the opportunity to serve subpoenas, and while Rule 16(a)(1)(E) requires the prosecution to make available (upon the defendant’s request) documents and objects in the government’s possession, Rule 16(b)(1)(A) provides a reciprocal opportunity for the prosecution to inspect documents and objects in the possession of the defendant.

However, pretrial discovery obligations are not borne equally by both parties. Rule 16 imposes certain production burdens (e.g. statements made by the defendant, and the defendant’s prior

criminal record\textsuperscript{58}) not shared by the defendant. Furthermore, following the holding of \textit{Brady v. Maryland}, prosecutors are required to produce “evidence favorable to [the] accused,”\textsuperscript{59} in contrast the Fifth Amendment protects the defendant from being forced to provide evidence favorable to the prosecution through self-incrimination.\textsuperscript{60} \textit{Giglio v. United States} extended the ruling of \textit{Brady}, requiring prosecutors to produce information concerning the credibility of government witnesses.\textsuperscript{61} Beyond a symmetrical requirement that the parties produce relevant statements of their witnesses,\textsuperscript{62} the defense is not required to produce to the prosecution any \textit{Giglio}-like material that would tend to undermine the credibility of those testifying on the defendant’s behalf. However, while the discovery production burden falls primarily on the prosecution, it must be noted that the defense’s right to information in then the possession of the government is not total; for example, Grand Jury transcripts, generally speaking, are exempt from disclosure.\textsuperscript{63}

When one considers in aggregate the parties’ respective discovery production burdens, it becomes evident that pretrial discovery may distort the veritistic process of the trial in two ways. First, pretrial discovery may limit the total volume of information presented to the trier of fact, thus once again undermining the desideratum of completeness. To use the \textit{Gray} example above, the officers involved in the assault of Eguridu (Wells, Gray, and Rhodes) almost certainly possessed information about events prior to, during, and after the assault, which, due to their constitutional right against self-incrimination, was not presented to the court. Second, limited discovery between the two parties may affect each party’s perception of the case, and thus color their respective presentation of their arguments to the judge and jury. If one views a trial as a dialectic discourse, then the asymmetry in pretrial discovery could therefore reduce the degree to which the parties are justified in their beliefs.

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\item \textsuperscript{58} \textit{Fed. R. Crim. P.} 16(a)(1)(D).
\item \textsuperscript{59} 373 U.S. 83, 87 (1963).
\item \textsuperscript{60} \textit{U.S. Const.} amend. V.
\item \textsuperscript{61} 405 U.S. 150, 154 (1972).
\item \textsuperscript{63} \textit{Fed. R. Crim. P.} 16(a)(3)
\end{itemize}
which from a veritistic perspective calls into question the effectiveness of “argumentation” being conducted at trial.

E. Trial

Once the parties have assembled their evidence and formed their theories of the case, the issue moves to a trial. However, at this point it is important to note that in the U.S. judicial process, the vast majority of criminal cases are resolved through pleas of guilt or no contest.64 In such cases, the truth-finding aspect of criminal prosecution essentially ceases, with the exception of the limited judicial inquiry required under Rule 11 before a judge may accept a defendant’s plea of guilt.65

Assuming, however, that the defendant does not elect to plead guilty, the prosecution will likely result in a trial. In the common law system of jurisprudence, the defining feature of the judicial process is its adversarial nature, the premise of which is that “partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”66 In this system, each side presents evidence in a manner that tells a story supportive of their position, and the factfinder must decide between these two positions.67 In order to present the most compelling argument to the jury, the adversarial parties will have incentives to emphasize that information that supports their case. Likewise, the parties will also likely give less priority to (if not outright exclude) information that is less supportive for their case, provided that doing such does not violate exculpatory burdens, or violate the duty of candor to the court. Thus, the polemic nature of adversarial proceedings works against the desideratum of completeness. Furthermore, the defense may have an incentive not only to exclude

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64 For example, between 1 October 2007 and 30 September 2008, 82,833 of 91,728 defendants were convicted in the federal system. Of those convicted, 79,762 (or 96%) entered pleas of guilt or no contest. See Bureau of Justice Statistics, http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/tables/fjs08st402.pdf
65 FED. R. CRIM P. 11(b)(3).
67 For a discussion on how an adversarial bias may affect the reliability of scientific evidence, see Susan Haack, What’s Wrong With Litigation-Driven Science, 38 SETON HALL L. REV. 1053 (2008).
information, but also to actively mischaracterize information; for example, a defense attorney who is aware that her client is guilty will likely nonetheless profess innocence to the jury.\textsuperscript{68} Thus, the defense may knowingly communicate information they know not to be true, thus violating the second criteria of effective communication.

Beyond the polemic nature of the adversarial advocacy, several other aspects of the common law judicial system influence the manner in which information is introduced and considered at trial. First, evidence is presented in a sequential manner, revealing portions of the argument to the trier of fact one bit at a time. Although some jurisdictions permit opening statements by counsel, often times the factfinder is not presented with a complete picture of the evidence until closing arguments.\textsuperscript{69} Such sequential presentation may affect decisions about evidence admission; while certain pre-trial proceedings and \textit{ex parte} proffers may alert the judge to contentious issues which may arise, for the most part the judge reviews the information at the same time that it is presented to the jury. Thus, the judge must act “in spasms and sudden flashes” to determine the admissibility of evidence,\textsuperscript{70} with only her experience from pre-trial proceedings and the evidence already admitted to guide her decision of whether evidence being offered is relevant or prejudicial. It is possible, therefore, that a judge may exclude potentially relevant information (undermining the desideratum of completeness), because the relevance of the information was not immediately apparent at the time the evidence was offered.\textsuperscript{71}

\textsuperscript{68} For an exposition of a kind of “strong adversarialism” which condones such actions by a defense attorney, see Michael Asimow & Richard Weisberg, \textit{When The Lawyer Knows The Client Is Guilty: Client Confessions in Legal Ethics, Popular Culture, and Literature}, 18 S. CAL. INTERDISC. L.J. 229, 234-235 (2009).

\textsuperscript{69} Ronald J. Allen & Brian Leiter, \textit{Naturalized Epistemology and the Law of Evidence}, 87 VA.L.REV. 1491, 1506 (2001) (“Factfinders typically have no good sense of what is going on until the end of the trial at closing arguments.”)

\textsuperscript{70} Marvin E. Frankel, \textit{The Search for Truth}, 123 U.P.A.L.REV. 1031, 1042 (1975). It should be noted that Judge Frankel was writing before the introduction of the Federal Rules of Evidence.

\textsuperscript{71} Under the issue of “conditional relevancy,” the admissibility of fact A (e.g. a statement putting plaintiff on notice about product’s defect) is dependent on fact B (e.g. that the plaintiff heard the statement), see Craig Callen, \textit{Rationality and Relevancy: Conditional Relevancy and Constrained Resources}, 2003 MICH. ST. L. REV. 1243, 1249-1250 (2003). Presumably, the exclusion of conditionally relevant information would be prevented by Federal Rule of Evidence 104(b), which states that “when the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of
Furthermore, it should also be noted that it is possible that presentation of evidence in a sequential manner may reinforce psychological and cognitive biases of the jury, in particular by playing to our predisposition to giving greater weight to consistent information, continuing to give weight to evidence even once it has been discredited, and the bias towards perceiving cause and effect.

Finally, in addition to bias of common law trials to sequential, narrative evidence presentation, judicial proceedings are also heavily reliant on visual and oral evidence, which may contribute to practical limit on the technical sophistication of evidence that can be presented in judicial proceedings. The epistemological effects of these characteristics of judicial trials is first that it may undermine the desideratum of completeness, as attorneys presenting evidence may produce only that evidence which judges and juries immediately understand, or can comprehend with fairly little explanation. Second, the need to translate highly technical information into oral testimony could lead to a failure of communication, either through a failure of the testifying expert to understand the information he is presenting, through a failure of the expert to adequately explain the technical concepts while on the stand, or through the jury not comprehending the testimony provided to them.

E. Jury Deliberations

the fulfillment of the condition.” That rule aside, the possibility still exists that exclusion could occur, perhaps because the moving party fails to adequately articulate the additional fact upon which the admission of the evidence in question is conditioned.

72 HEUER, at 120.
73 HEUER, at 124.
74 HEUER, at 127-130.
75 Bert Black et al., Science And The Law In The Wake Of Daubert: A New Search For Scientific Knowledge, 72 Tex. L. Rev. 715, 788 (1994)(noting that in reviewing scientific evidence, juries depend on oral testimony, whereas judges have the benefit of written reports).
76 See e.g. Valerie P. Hans, Judges, Juries, and Scientific Evidence, 16 J.L. & Pol’y 19, 36-40 (2007) (study showing that after being presented with testimony about mitochondrial DNA, judges and juries could answer true/false questions about such DNA accurately, but not perfectly).
In common law trials, upon conclusion of testimony and closing arguments, the question of guilt or innocence is committed to the trier of fact, be it a judge or jury. However, describing the social process of fact finding at trial is difficult, because generally speaking, we do not know how juries make decisions, although a considerable amount of research has been dedicated to the subject. To some degree, this lack of knowledge can be attributed to two features of common law juries. First, juries conduct their deliberations in secret, and jurors in the federal system are precluded from testifying about their deliberations. Second, common law juries are ad hoc, in that they are assembled for a specific trial, and disband once the trial has concluded.

In U.S. judicial proceedings, the opaqueness of jury deliberations is tempered by jury instructions, such as those setting forth elements and standards of proof. Effective application of some jury instructions may have positive veritistic effects; for example, the rationale for exhorting jurors to refrain from forming an opinion until the end of trial may assist in achieving the desideratum of completeness. Nonetheless, due to courts applying an irrebuttable presumption that jurors understand and follow jury instructions, we do not have insight into the juror’s comprehension of, nor degree of adherence to the instructions they are given. Additionally, instructions are usually not provided to the jury until the end of the trial, with the result that jury members may not be aware of the parameters of

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78 Douglas G. Smith, Structural And Functional Aspects Of The Jury: Comparative Analysis And Proposals For Reform, 48 Ala. L. Rev. 441, 497 (1997).
79 Fed. R. Evid. 606(b)(1) (“During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment. The court may not receive a juror’s affidavit or evidence of a juror’s statement on these matters.”)
82 Gacy v. Welborn, 994 F.2d 305, 313 (7th Cir. 1993).
their adjudicatory role when such knowledge is most important, i.e. as the evidence is presented to them.84

Jurors do not enjoy complete and unfettered access to evidence once they have begun deliberations,85 with the result that jurors must rely in large part on their memory to recollect facts that are pertinent to their decision making process. The faulty recall of evidence may reduce the verisitic effectiveness of deliberations in at least three ways. First, the desideratum of completeness could be undermined, by reducing the total amount of information that jurors consider. Second, one of Friedman’s criteria for effective testimony is that the testifying individual accurately remembers the information he or she wishes to convey; such a requirement applies equally to jurors communicating with each other during deliberations (e.g. “I remember witness A saying fact X”). Thus, failure by a jury member to accurately remember and communicate evidence during jury discussions could distort other jury members’ individual understanding of the evidence presented. This possibility leads to a third way in which veritistic effectiveness could be reduced, which is that (under Goldman’s model) effective argumentation could be frustrated if faulty recollection of evidence results in a juror adopting faulty premises for their arguments.

A couple final observations about judicial proceedings are warranted. First, judicial proceedings must produce an answer – either conviction, acquittal, or mistrial.86 Second, judicial proceedings are time limited;87 as a practical matter, juries cannot be empanelled forever, and as a constitutional matter, the Sixth Amendment guarantees a “quick and speedy trial.” Thus, courts cannot continue proceedings indefinitely until the evidentiary record supports adjudication. The practical effect of these two

85 KEVIN O’MALLEY, JAY GRENIG, & WILLIAM LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS, 887 (6th Ed.)
86 See e.g. F.R.CRIM.P. 29; F.R.CRIM.P. 31.
characteristics is that judicial proceedings must culminate in a point of decision, regardless of whether the proceedings have produced veritistic results.

III. The Veritistic Process of Intelligence.

Having explored the veritistic process of judicial factfinding, we must now examine the social processes associated with the collection and use of “intelligence.” However, before embarking on such an examination, some definitions are required. In particular, two terms must be distinguished from each other: information and intelligence. The definition of foreign intelligence, as stated in statutory law, is “information relating to the capabilities, intentions, or activities of foreign governments, or elements thereof, foreign organizations, or foreign persons, or international terrorist organizations.” 88 However, this statutory definition omits a distinction that is essential to intelligence professionals. According to the Department of Defense, “[i]nformation on its own is a fact or a series of facts that may be of utility to the commander, but when related to other information already known about the operational environment and considered in the light of past experience regarding an adversary, it gives rise to a new set of facts, which may be termed ‘intelligence.’” 89 Thus, this doctrinal definition reveals the veritistic process in its most succinctly stated form, i.e. that a piece of data is collected, examined, and that a subjective assessment is made as to its degree of truth. Within the Intelligence Community, the input of this system is referred to as “information,” while the output is deemed “intelligence.”

Beyond applying the correct terminology, an additional challenge complicates the attempt to understand the social system of “knowing” with regards to Intelligence, namely the secrecy that shrouds the entire process. It is intuitive that states may need to keep their methods and means of acquiring

88 50 U.S.C. §401a(2). The definition utilized in the Foreign Intelligence Surveillance Act is similar; it includes “information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to (A) the national defense or security of the United States; or (B) the conduct of the foreign affairs of the United States.” 50 U.S.C. §1801(e)(2).
national security information secret, since an information source that is known to a state’s adversaries can be manipulated, appropriated, or silenced. Thus, limited officially acknowledged information exists in the public record concerning the process, standards, and limitations of the U.S. Intelligence Community’s methods of acquiring and verifying information. However, while we may not be able to examine the intelligence process to the same level of fine detail that we study the juridical process, there are nonetheless several aspects of the intelligence process that are openly acknowledged.

A. The Intelligence Cycle

According to U.S. Intelligence Community doctrine, the intelligence cycle consists of six steps, which may be repeated continually. The initial step in the process is “planning and direction,” in which “decisions are made regarding what types of information to collect and how to collect it.” This step is followed by “collection,” wherein “[t]he Intelligence Community gathers the raw data used to produce finished intelligence products. Collection can be from open sources, such as newspapers, or from clandestine sources, such as other people or technical means.”

Broadly speaking, collection occurs through the main intelligence “disciplines,” which include Human intelligence (HUMINT), wherein intelligence is, “derived from information collected and provided by human sources. This intelligence includes overt data collected by personnel in diplomatic and consular posts, as well as otherwise unobtainable information collected via clandestine sources of information, debriefings of

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90 Because most of the details concerning intelligence processes are classified, this article will rely on public sources, e.g. public statutes, as well as public directives and doctrinal works published by the Director of National Intelligence and Department of Defense, to provide a basic model of the intelligence process.
93 DIRECTOR OF NATIONAL INTELLIGENCE, INTELLIGENCE COMMUNITY: A CONSUMER’S GUIDE, 17 (2009), available at http://www.dni.gov/reports/IC_Consumers_Guide_2009.pdf. See also DEPARTMENT OF DEFENSE, JOINT PUBLICATION 2-0, JOINT INTELLIGENCE at I-11 (“a variety of collection sources are required so that information from one source can be tested or confirmed by others.”)
foreign nationals and U.S. citizens who travel abroad, official contacts with foreign governments, and direct observation.”

An additional discipline is Imagery Intelligence (IMINT), which is “derived from the exploitation of imagery collected by visual photography, infrared sensors, lasers, multispectral sensors, and radar.” Furthermore, Measurement and Signature Intelligence (MASINT), is “technically derived intelligence” whereby “quantitative and qualitative analysis” is conducted of the “physical attributes of targets and events in order to characterize and identify them.” Collection in the MASINT discipline includes “radar, spectroradiometric, electro-optical, acoustic, radio frequency, nuclear detection, and seismic sensors.”

Additional intelligence collection is conducted through the disciplines of Open Source Intelligence (OSINT), which is “produced from publicly available information,” and Signals Intelligence (SIGINT), which is “produced by exploiting foreign communications systems and noncommunications emitters.”

After collection, the intelligence cycle moves to the “processing and exploitation” step, during which “raw collected data is converted into forms readily useable by commanders, decisionmakers at all levels, intelligence analysts, and other consumers.” The process is followed by the “analysis and production step,” when “intelligence production occurs...[a]ll available processed information is integrated, evaluated, analyzed, and interpreted.” The differences between these two steps

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95 DEPARTMENT OF DEFENSE, JOINT PUBLICATION 2-0, JOINT INTELLIGENCE AT I-22.
96 DEPARTMENT OF DEFENSE, JOINT PUBLICATION 2-0, JOINT INTELLIGENCE AT I-22.
98 Id. at 1-23.
99 Id. The Department of the Army also classifies Counterintelligence, Geospatial Intelligence, and Technical Intelligence as disciplines. However, these three disciplines utilize information acquired through another discipline in order to develop an intelligence assessment; for example, Geospatial Intelligence may draw on imagery acquired through Imagery Intelligence.
100 DEPARTMENT OF THE ARMY, FM 2-0 INTELLIGENCE, 2-6 (2010).
101 The National Security Act requires that analysis be derived from all sources, and that the intelligence community “regularly conduct competitive analysis of analytic products.” See 50 U.S.C. §403-1(h). Furthermore, the Director of National Intelligence has established a community policy that analysis “should be informed by all relevant information that is available to the analytic element.” OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE,
illustrate the definitional distinction discussed above; in the former step, data is aggregated, whereas in the latter step, the information is analyzed in order to create an intelligence ‘product.’

Once intelligence has been ‘produced,’ the intelligence cycle moves into the “dissemination and integration” step, wherein “intelligence is delivered to and used by the consumer.” According to the National Intelligence Strategy of 2009, such consumers include policymakers, as well as “diplomats, military units, interagency organizations in the field, and domestic law enforcement organizations at all levels.” Finally, after receipt of the intelligence by the consumers, the final step in the intelligence cycle occurs, “evaluation,” when “intelligence personnel at all levels assess how well each of the various types of intelligence operations are being performed.” Presumably, intelligence officials use the feedback and evaluations they have received so as to plan and improve future intelligence operations; and so the cycle begins again.

B. Observations on the Intelligence Cycle

This description of the intelligence process, while general and somewhat opaque, does permit a few general observations. First, from the description of the “analysis and production step,” we know that information is not considered intelligence until it has been vetted through all-source intelligence, i.e. a specific piece of information is more likely to be true if it is confirmed by multiple sources, and through multiple intelligence disciplines.

Second, we can see that intelligence is an iterative process, where numerous actors may contribute data, and may also make analytical assessment about the accumulated pool of information.


102 DEPARTMENT OF THE ARMY, FM 2-0 INTELLIGENCE, 2-6.


Thus, the intelligence process may be characterized as dialectic in nature, where a given hypothesis arrived at through one intelligence discipline may be confirmed, revised, or rejected based on additional information acquired through other disciplines.

Here, an example might be illustrative. Suppose that policymakers, in trying to decide issues of military procurement, decide that the optimal structure of the armed forces will depend on the military capabilities of an adversarial state. Accordingly, the Intelligence Community plans and conducts collection through the various ‘intelligence disciplines,’ e.g. imagery of the adversary’s weapons systems are obtained, and human sources with knowledge of the adversary’s military are recruited. The information collected through the various disciplines is pooled, and an assessment of the adversary’s strengths and weaknesses is made. This intelligence is disseminated to policymakers, who in turn use it to make their procurement decisions.

In the meantime, however, the adversarial state will not have remained inert; new technologies, political developments, changes in doctrine, and economic forces may all have altered the status of the adversary’s military. Thus, collection on the adversarial state will have to continue, and the new information collected will be used to verify, modify, or refute earlier intelligence assessments.

The example above demonstrates an important difference between intelligence and judicial evidence. Judicial trials are sequential processes which culminate in a single moment of factual determination, i.e. the verdict. This determination is made from the limited universe of information admitted into trial, and the verdict, once rendered, is unlikely to be revised.\footnote{The typical appellate standard for the review of factual matters is clear error. See Pierce v. Underwood, 487 U.S. 552, 558 (1998).} There are numerous rationales in the common law for the limited scope and finality of judicial proceedings, including judicial economy (it would be cumbersome to keep a jury continually empanelled), and the desire to prevent double jeopardy, which that Supreme Court has characterized as ensuring that,
“the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.”

In contrast, the iterative nature of the intelligence cycle could be perpetual; information on a given topic could constantly be collected, analytical assessments constantly revised, and feedback and evaluation reveal new facets of the problem requiring new information collection. The intelligence process may thus result in factual determinations that are constantly subject to revision.

Furthermore, because of the open-ended nature of intelligence assessments, options exist for intelligence collectors and analysts that are unavailable to their common law judicial counterparts. For example, intelligence collectors and analysts who find the record of information before them to be incomplete may direct further collection, or confirmation from a source. Alternatively, an analyst may consider a source’s reporting on tangential matters, so as to assess the record of credibility of the source over time. However, it is unlikely that a witness’s history of truthful testimony in previous trials would be admissible to prove the witness’s credibility, and courts generally do not order the prosecution to go out and collect additional evidence. Likewise, many jurisdictions discourage or outright prohibit

108 See OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE 203, 4 (2007) available at http://www.dni.gov/electronic_reading_room/ICD_203.pdf. (“Analytic products should deliver a key message that is either consistent with previous production on the topic from the same analytic element or, if the key analytic message has changed, highlights the change and explains its rationale and implications.”)
109 Rule 608 restricts the circumstances under which evidence may be introduced concerning the credibility of a witness. Generally speaking, such evidence may be admitted only to address the truthfulness of the witness, and evidence of truthful character may only be admitted after the witness’s character has been impeached. FED. R. EVID. 608(a). Thus, it is not clear that a witness’s history of accurate testimony would be admissible in a court proceeding.
110 Generally speaking, the Double Jeopardy clause precludes appellate review of a fact-based acquittal, but see United States v. Guadagna, 183 F.3d 122, 129 (2nd Cir., 1999) (appellate review is not prohibited following a judge-granted acquittal for insufficiency of the evidence following a jury’s verdict of guilty, since such requires no additional fact finding). Also, it should be noted that there are circumstances under which a court may order a mistrial due to an inability of the prosecution to secure a conviction, see e.g. Thompson v. United States, 155 U.S. 271 (1894). However, such cases generally pertain to procedural errors; for example, in Illinois v. Somerville, 410 U.S. 458 (1973), the court declared a mistrial when the prosecution realized that the indictment was fundamentally defective. Furthermore, “manifest necessity” may require mistrial (with the possibility of retrial) if the jury is unable to agree to a verdict. See United States v. Perez, 22 U.S. 579 (1824).
the practice of permitting juries to ask questions, although it has been suggested that permitting such questions produces positive effects, including helping jurors to discern the truth, increase juror attentiveness, and give jurors a greater sense of satisfaction in their service and confidence in their verdicts.

The iterative nature of the intelligence process, combined with the diversity of participants (e.g. collectors, analysts, etc.) and “customers” of intelligence (e.g. policymakers, diplomats, military units in the field, etc.), permits a third observation about the intelligence cycle, i.e. that communication within the cycle must be designed so as to distribute information expeditiously to individuals located across a vast physical expanse. For example, imagery intelligence that suggests that an adversarial state is about to launch a surprise attack against a U.S. ally must be quickly communicated to policymakers in Washington D.C., diplomats in the allied state, and U.S. military units in the region. Because it is impracticable and inefficient for the imagery analyst who perceived the pending attack to orally communicate with all of the “customers” who require such information, it is instead likely that the imagery – combined with a written analysis of its implications – would be distributed through electronic communications.

Thus, the intelligence cycle places greater emphasis on visual information and the written word, rather than oral communication. As a result, the recipients of intelligence reports lack the visual, oral, and physical cues available to the judicial fact finder for assessing the validity of information; degrees of uncertainty cannot be deciphered through tone of voice, and sincerity and deception cannot be be

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111 See State v. Costello, 646 N.W.2d 204 (Minn. 2002), and the Second Circuit has discouraged its use, see United States v. Bush, 47 F.3d 511, 515 (2nd Cir. 1995).
114 See e.g. DIRECTOR OF NATIONAL INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE 208, (2008) available at http://www.dni.gov/electronic_reading_room/ICD_208.pdf (requiring members of the Intelligence Community to write for “maximum utility,” so as to ensure that the Intelligence Community “produces intelligence that communicates the right information in the right form to the right people at the right time.”
assessed through body language. Instead, assessments of the credibility of the information underlying intelligence reports must be distilled into written caveats,\textsuperscript{115} with the necessary consequence that subtle shades of certainty and bias may be lost in translation. Thus, from a veritistic perspective, the criterion of effective communication may thus be slightly constrained by the need for efficient communication.

A fourth observation about the intelligence cycle that may be gleaned from the public record is that the intelligence cycle seeks not merely to make factual determinations about what \textit{is or has been}, but also to produce intelligence products that are predictive in nature.\textsuperscript{116} Although intelligence cannot “provide predictions of what will happen with absolute certainty,” it may “provide assessments of likely scenarios or developments.”\textsuperscript{117} Indeed, the Intelligence Community has been much praised or maligned, due to its success or failure to predict world events.\textsuperscript{118} Nonetheless, the predictive nature of the intelligence cycle stands in contrast to the judicial system, which seeks to fulfill the (relatively) narrow goal assigning legal rights and duties based on a factual determination of either events that have occurred in the past, or an assessment of the current state of events.

\section*{C. What cannot be gleaned from publically-available information.}

While the limited information that is publically-available permits us to make the above observations about the intelligence cycle, several gaps remain in the public record about the intelligence process from an epistemological perspective. First, it is not clear from the public record of when a factual conclusion is made in the intelligence process. Although the definition of intelligence cited

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\item \textsuperscript{115} See \textsc{Director of National Intelligence, Intelligence Community Directive 203} at 3 (“factors significantly affecting the weighting that the analysis gives to available, relevant information, such as denial and deception, source access, source motivations and bias, or age and continued currency of information, or other factors affecting the quality and potential reliability of the information, should be included in the [intelligence] product”), available at \url{http://www.dni.gov/electronic_reading_room/ICD_203.pdf}.
\item \textsuperscript{116} \textsc{Department of the Army, FM 2-0 Intelligence, 1-16}.
\item \textsuperscript{117} \textsc{Director of National Intelligence, IC Consumer’s Guide 2011} at 40, \textit{available at} \url{http://www.dni.gov/IC_Consumers_Guide_2011.pdf}.
\item \textsuperscript{118} See \textit{e.g.} \textsc{Final Report of the National Commission on Terrorist Attacks Upon the United States} (“The 9/11 Commission Report”), Ch. 8.
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above states that information does not become “intelligence” until it is vetted through all source intelligence, such analytic collaboration could take place at any one of numerous levels of the Intelligence Community. Returning to the military capacities example above, are the capabilities of the adversarial state “known” when analysts in a particular office of an intelligence agency combine IMINT, HUMINT, etc., to create an analysis of that status of the adversary’s forces? Alternatively, is the intelligence “known” when the analysis is confirmed at the agency level? Or does the information become known when the analytic conclusion is confirmed by an interagency body, such as the National Intelligence Council?119

Closely related to the issue of at what point in the intelligence cycle information becomes “known” is the question of what standard is employed for making the determination that a fact is true. While various juridical standards of proof have been set forth in case law and statutes,120 publically available information does not reveal the standards for determining what is “known” in intelligence. Indeed, the intelligence community may have incentives to not reveal their method for accepting or rejecting information, so as to not permit outsiders to influence the process through deception or manipulation.

One may speculate, however, that the standards for determining that a given fact has been “proven” in intelligence (or for that matter, when information can be considered in forming an intelligence analysis – the intelligence cycle equivalent of ‘admission into the record’) may vary depending on the purpose for which the intelligence is to be used. According to the Director of National Intelligence, such purposes are numerous, including “policy decisions, military actions, international negotiations, and interactions with working-level contacts in foreign countries ... in some circumstances,

119 See 50 USC § 403-3b.
120 For example “beyond a reasonable doubt”, “clear and convincing.”
it can also aid homeland security providers and first responders.” 121 When intelligence is being used for deliberative purposes that are not exigent in nature – such as the defense budget planning purposes in the example above – it is reasonable to assume that opportunities will exist for intra-agency and inter-agency all-source analysis. However, when more exigent circumstances exist, it is possible that far less collaboration is required; for example, if a military unit on patrol learns through a clandestine source that the unit is the target of an imminent ambush attack, it is unlikely that the military commander will seek confirmation from other intelligence disciplines before ordering defensive measures be taken. Thus, the context in which intelligence may be used may affect all three of the epistemological criteria above; the degree of exigency may dictate the amount of information that may be considered, the method by which information will be communicated, and the number of actors who will engage in dialogical debate to reach veritistic conclusions.

A third aspect of the intelligence cycle that cannot be determined from the public record is the effectiveness of institutional mechanisms for challenging assumptions and bias. No matter whether bias is unintentional (e.g. due to cognitive flaws) or by design, its effect may be to reduce the veritistic effectiveness of a process, perhaps by leading one to falsely assume that the desideratum of completeness has been achieved, or by causing an actor to adopt premises in their arguments that may not be justified. In judicial proceedings, the problem of bias is partially accounted for by the openly partisan roles that the prosecutor and defense counsel fulfill; the jury understands that information is introduced precisely because it supports the position of the party offering it into evidence.122 In contrast, the roles of the various actors in the intelligence process are less clear. Human sources may be motivated by any number of personal biases. An intelligence analyst may have subtle incentives to


reach a certain conclusion, so that her office continues to receive funding. At the very least, intelligence collectors will be budget constrained to collect only that information that they feel falls within U.S. national interests.\textsuperscript{123}

The problem of bias is recognized in the intelligence community,\textsuperscript{124} and has been addressed in regulation and statutory law. Broadly speaking, one may observe in intelligence law and policy three methods of accounting for bias. The first method is individual self-policing, based on regulatory exhortations to members of the intelligence community that they remain impartial. The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) requires that the Director of National Intelligence (DNI) implement policies and procedures “to encourage sound analytical methods and tradecraft throughout elements of the intelligence community.”\textsuperscript{125} Accordingly, Intelligence Community Directive 203 requires that “analysts and managers perform their analytic and informational functions from an unbiased perspective,” and that analysts and managers provide “objective assessments by available information that are not distorted or altered with the intent of supporting or advocating a particular policy, political viewpoint, or audience.”\textsuperscript{126} Likewise, U.S. military doctrine requires that “[t]he methodology, production, and use of intelligence must not be directed or manipulated to conform to a desired result; institutional position; preconceptions of a situation or an adversary; or predetermined objective, operation, or method of operations.”\textsuperscript{127}

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\item \textsuperscript{123} See \textsc{Department of Defense, Joint Publication 2-0 Joint Intelligence} at I-11 (“careful consideration must be given to having multiple collection sources performing redundant collection, as collection requirements will usually exceed collection systems/missions available.”)
\item \textsuperscript{124} For a brief history of the efforts of various officials within the Central Intelligence Agency to impose analytic standards prior to the Intelligence Reform and Terrorism Prevention Act, see \textsc{Richard Heuer}, “\textit{Psychology of Intelligence Analysis},” xiv-xxv (1999).
\item \textsuperscript{125} 50 U.S.C. §403-1(h)(1)(A).
\item \textsuperscript{126} \textsc{Office of the Director of National Intelligence, Intelligence Community Directive} 203 at 2, \textit{available at} \textsc{http://www.dni.gov/electronic_reading_room/ICD_203.pdf}.
\item \textsuperscript{127} \textsc{Department of Defense, Joint Publication 2-0 Joint Intelligence} at II-3. Additionally, Section 1017 of the Intelligence Reform and Terrorism Prevention Act requires the intelligence community conduct “alternative analysis (commonly referred to as “red-team analysis”) of the information and conclusions in intelligence products. Section 1020 requires the appointment of an officer within the ODNI charged with being available to “counsel, conduct arbitration, offer recommendations, and, as appropriate, initiate inquiries into real or perceived problems
However, it could be argued that self examination by itself is ineffectual, unless there is an institutional mechanism for challenging the assumptions and conclusions made during intelligence analysis. Thus, the IRTPA continues to require that the DNI ensure that “analysis is based on all sources available.”\textsuperscript{128} In theory, it is possible that the all-source intelligence requirement could have little effect in reducing the bias in a given intelligence analysis, as analysts seek or consider only intelligence from other disciplines that confirms established viewpoints. In practice however, an intelligence professional working on an all-source analytical assessment would likely need to reach out to her colleagues who specialize in different intelligence disciplines (e.g. an imagery analyst reviewing the capacity of an adversary military may need to reach out to a HUMINT analyst, in order to incorporate information on the subject from a human source). Such collaboration would, hopefully, produce a kind of dialectic discussion between analysts of different fields, thus potentially helping to challenge faulty assumptions and biases.

Beyond self-policing and dialectic debate, however, the IRTPA provides a third method for challenging bias in intelligence reporting; the DNI is required to “implement a process and assign an individual or entity the responsibility for ensuring that, as appropriate, elements of the intelligence community conduct alternative analysis (commonly referred to as ‘red team analysis’) of the information and conclusions in intelligence products.”\textsuperscript{129} By challenging the premises and conclusions of a given intelligence assessment, and offering alternative conclusions, such alternative analysis may be said to be a kind of polemic method of bias correction, similar to the adversarial method used in the common law system.

However, whereas the biases of the litigating parties in a judicial trial are relatively clear (e.g. the prosecution contends that the defendant is criminally liable, and presumably the defense challenges of analytic tradecraft or politicization, biased reporting, or lack of objectivity in intelligence analysis.” See Pub.L. 108-458.
\textsuperscript{128} 50 U.S.C. §403-1(h)(1)(B).
\textsuperscript{129} P.L. 108-458, December 17, 2004, §1017. This section was codified at 50 U.S.C. §403-1(h)(1)(C).
that contention), the IRTPA does not make evident what is to comprise the “alternative” paradigm of the “red team” analysts. According to Richard Heuer, such alternative analysis could take at least one of three forms, including a “crystal ball” or “thinking backwards” technique, wherein analysts assume that a hypothetical future event contrary to their assessment occurs, or that a hypothetical intelligence report undermines a key assumption; analysts then work backwards from their “faulty” conclusions, in order to determine where their analysis went “wrong.” Second, a “red team” could adopt the “devil’s advocate” form of alternative analysis, in which analysts will strenuously advocate a hypothesis rejected in the primary assessment. Finally, alternative analysis could be conducted through role-playing, wherein “red team” analysts assume the point of view of the adversary.130

Returning to the example of the adversarial state military capacities study demonstrates how each method of challenging biases might be employed. Let us assume that the information collected through HUMINT, imagery, and other intelligence sources indicates that the naval ships of the adversary are in a declining state of repair; from this, the primary intelligence assessment concludes that the adversarial military’s capacity for personnel training and equipment maintenance are poor. In contrast, a “red team” using the “devil’s advocate” approach may review the same information, yet argue for an alternative conclusion, e.g. that the adversary military has ceased to expend funds on equipment maintenance, because it plans to procure newer, more advanced ships. The implication of the first assessment is that the adversary is struggling to defend its national interests, whereas the implication of the second is that the adversary is about to have a significantly greater capacity to do so. Alternatively, a role-playing “red team” may begin its review not from the information concerning the readiness of the adversary’s fleet, but instead from an assessment of the adversary’s strategic political interests. Such an assessment may conclude that the adversary’s interests lie not in its ability to project naval power, but instead on its ability to defend its internal land borders. If such an assessment is correct, then the

130 HEUER at 71-72.
information on the fleet’s readiness is not evidence of the adversary’s ability to defend its national interest, but instead evidence that those national interests are different than previously assumed, or may have changed.

This example shows that the paradigms underlying the alternative analysis employed may dramatically impact the conclusions drawn from them. However, the public record does not indicate which, if any, of the forms of alternative analysis set forth above are utilized in carrying out the mandate of the IRTPA. Furthermore, while the IRTPA requires that alternative analysis be conducted, it does not indicate the degree and scope to which “red team” analysis is to be employed; in other words, we do not know if every intelligence product, or only a fraction thereof, is subject to alternative analysis. Finally, we do know whether analysis advocating competing alternative analysis employ the type of effective argumentation dictated by the third epistemological criterion above. Thus, while we know that the IRTPA requires a kind of polemic debate as a method of correcting bias, the public record nonetheless provides us with no method of assessing the effectiveness of that corrective device.

IV. Interaction between the two systems

From the above descriptions, some differentiating characteristics of judicial trials and the intelligence cycle may be summarized. First, the judicial processes may be described as sequential, adversarial, reliant on visual and oral presentation of information, and limited in temporal and topical scope. In contrast, the intelligence cycle is continuous, collaborative, dependent on multi-disciplined fact-finding, and unlimited in temporal or topical scope. Furthermore, both social processes concede a certain degree of veritistic effectiveness so as to accommodate other values. For example, several aspects of judicial proceedings may undermine the desideratum of completeness, including prosecutorial discretion, the right of confrontation, the presentation of evidence through the adversarial process, and the limited scope of the proceedings. With regards to the intelligence cycle, the need for
information to be distributed quickly and widely necessitates a communication style (i.e. primarily written and visual) that sacrifices the benefits of oral testimony; thus the criterion of effective communication may be subjugated to the need for efficient communication.

These characteristics of the judicial and intelligence processes are important not merely from a descriptive standpoint, but also because they provide the only framework available for comparing the two systems, and assessing how inclusion of information from one system will impact the other; empirical evaluation of the two systems does not appear possible. First, one might attempt an empirical analysis of how the two systems interact by comparing their relative veritistic efficacy, in order to assess the validity of claims that one system is inherently superior at discovering factual “truth” than the other. However, in order to determine which system was better able to produce a correct judgment about a specific fact in question, one would need to “know” the fact in question with veritistic certainty, independent of the two systems being studied. Assuming such was possible, one would still need to make an arbitrary determination of which point in each system to use as an epistemological point of comparison. As noted above, it is not clear when a fact is finally “known” in the continuous intelligence cycle; furthermore, as the Halsey case study above demonstrates, even a criminal conviction may not be the final judicial determination about the fact of guilt or innocence.

Neither may it be empirically possible to determine whether the inclusion of information from one system improves the veritistic efficacy of the other. As Goldman notes, there are inherent challenges in assessing how changing one information variable (e.g. the inclusion or exclusion of intelligence information at trial) affects the epistemological properties of a social process. Goldman hypothesizes in examining a different aspect of judicial proceedings (i.e. attorney performance), that such an experiment would require two trials, in each of which the same judge and jury hear the same evidence, elicited by the same attorneys from the same witnesses, with the only difference being the variable being examined. Furthermore, one would have to ensure that the jury rendering the judgment
in the second iteration of the trial was not influenced by information learned (or withheld) in the first iteration. Of course, imposing such restrictions makes such an experiment impossible, and thus there appears to be no practical way of empirically assessing whether the inclusion or exclusion of intelligence reports in judicial proceedings leads to better veritistic results.

Thus, with empirical assessments of the two systems and their interactions with each other appearing problematic if not impossible, any examination of how and whether intelligence should be used in judicial proceedings must rely on theoretical assessments, based on the characteristics of the two systems as outlined above. This section thus examines the issue of the inclusion of intelligence information from a theoretical perspective, utilizing the three epistemological criteria.

A. Use of Intelligence Information and the Desideratum of Completeness

The principle behind the desideratum of completeness is that the most probative pool of evidence is that which contains all relevant information. This principle is embraced by the Federal Rules of Evidence, which state that “all relevant evidence is admissible,” due to such being a “presupposition involved in the very conception of a rational system of evidence.” Theoretically, in order to achieve the best veritistic results at trial, one would therefore wish to admit any evidence that met the standard of relevance, regardless of the social veritistic process that produced it – be it peer-reviewed scientific research, or the cinema attendance research in the example above, or the intelligence cycle.

One might argue, however, that there are circumstances under which the consideration of relevant information may not necessarily lead to better veritistic results. Specifically, a given piece of information may be relevant to the factual point in question, yet be demonstrably false or of such

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131 ALVIN GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD, 97, 299.
132 FED. R. EVID. 402.
133 FED. R. EVID. 402, advisory committee’s note.
dubious reliability that reliance on the information is likely to reduce the chance to producing a correct factual determination. For example, consider the testimony “I just came in from outside, and it is 100 degrees” made by an individual covered in snow; while such a statement is relevant to the question of what the weather is like, reliance on the statement is unlikely to lead to a correct veritistic result.

From an epistemological perspective, there appear to be two methods of dealing with such problematic yet relevant information: first, one may consider the information, with the hope that a dialogical argument based on more credible information will ultimately prevail; second, one might exclude the information from consideration, at the expense of undermining the desideratum of completeness. Although both systems utilize the first option (i.e. all-source analysis in the intelligence cycle, and jury deliberations in judicial proceedings), it appears that the judicial system employs the second option while the intelligence cycle does not. With regards to judicial proceedings, several evidentiary rules exclude relevant information due to a lack of reliability; for example, Rule 602 excludes testimony from a witness that does not have personal knowledge of the matter in question,134 and Rule 701 generally precludes opinion testimony from lay witnesses.135 In contrast, it appears that intelligence collectors are encouraged to “report all information collected...[t]he collector should not filter information since all information is of interest to a [intelligence] analyst.”136 This is not to say, however, that relevant information of questionable reliability enters the intelligence cycle on equal footing with credible information; it appears that collectors may include in their reports an assessment of the reliability of the information collected.137

134 See Fed. R. Evid. 602 advisory committee’s note (“the rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact is a most pervasive manifestation of the common law insistence upon the most reliable sources of information”).
135 See Fed. R. Evid. 701 advisory committee note t (noting the requirement for first hand knowledge).
The explanation for why judicial proceedings ‘filter’ information while the intelligence cycle does not likely lies in the characteristics of the two processes. Because trials are limited in time and topical scope, judges must narrow the evidence to be considered to that most likely to aid a jury to reach a factual conclusion, a necessity articulated in Federal Rule of Evidence 403, which excludes relevant information that is found to be prejudicial, confusing, or “a waste of time.”\textsuperscript{138} In contrast, the continuous nature of the intelligence cycle may permit more time for analysts to fully consider relevant yet problematic information. Furthermore, whereas “evidence” in the judicial system tends to be collected for the purposes of making a specific veritistic judgment about a past event (i.e. the defendant’s guilt or innocence), the goal of intelligence to “warn of potential threats and opportunities” may necessitate the broad collection of information, the relevance or reliability of which is not immediately apparent.\textsuperscript{139}

Because it is almost impossible to empirically determine the veritistic effect of altering one variable in a social process, it is unclear whether the exclusion of relevant yet problematic information at the beginning of a social veritistic process leads to better results than inclusion and subsequent examination of the information. However, it shall suffice to comment here that in weighing whether to admit intelligence information into the record, judges should be aware of the differing approaches between the judicial and intelligence processes with regards to problematic yet relevant information. The exclusion of such information in the judicial system may serve goals such as judicial economy, yet come at the expense of the desideratum of completeness; at the same time, the inclusion of such information in the intelligence process may not necessarily result in reduced veritistic efficacy.

\textsuperscript{138} \textit{Fed. R. Evid. 403.}

\textsuperscript{139} Consider, for example, the “Phoenix Memo” prepared in July 2001 by an FBI field agent, which warned of the “possibility of a coordinated effort by Usama bin Ladin to send students to the United States to attend civil aviation schools.” \textit{See The 9/11 Commission Report} at 272 (internal quotations omitted). As the authoring field agent noted to the 9/11 Commission, “the Phoenix memo was not an alert about suicide pilots,” but was instead intended by its author to warn about “a Pan Am Flight 103 scenario in which explosives were places on an aircraft.”
Furthermore, it should be noted that the search for “truth” is not the only goal of judicial proceedings; trials are also about such other societal aims as promoting the rule of law, ensuring individual rights, and enhancing the legitimacy of the courts.\(^\text{140}\) Indeed, whereas the search for “truth” may be an implied aim of the U.S. judicial system, many of the goals that compete with it are explicitly stated in constitutional law, particularly in the Fourth, Fifth, and Sixth Amendments. In particular, the Fifth Amendment protection against self-incrimination is essential to prevent elicitation of evidence by torture and to ensure the rights and privacy of the individual,\(^\text{141}\) and the Confrontation Clause of the Sixth Amendment is designed to avoid the civil law practice of ex parte examination,\(^\text{142}\) and to permit cross examination.\(^\text{143}\) However, achieving these essential constitutional aims also comes at the expense of undermining the desideratum of completeness; for example, exclusion of self-incriminating evidence protects the rights of the individual, yet deprives judicial factfinders of the testimony the accused would provide. Likewise, the exclusion of hearsay evidence facilitates the goal of the right of confrontation, but removes many forms of evidence from consideration by the trier of fact.

Indeed, the evidentiary rules excluding hearsay create perhaps the most significant bar to the introduction of intelligence at trial. The need to protect confidential sources and clandestine agents of the Intelligence Community inhibits – if not prohibits – the use of such individuals as witnesses in public trials.\(^\text{144}\) Thus, testimony from such sources is likely to be communicated through either statements devoid of personally identifying information, or through intermediary witnesses. If the intelligence information communicated through the confidential reports or intermediary witnesses is offered as a


\(^{141}\) Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 55 (1964) (The Fifth Amendment privilege of self-incrimination reflects “our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates ‘a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load...’”).


\(^{144}\) U.S. CONST. amend. VII.
data point intended to contribute to a veritistic determination of guilt or innocence, then the
intelligence falls squarely within the hearsay definition of “a statement, other than one made by a
declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter
asserted” and would thus be generally inadmissible. 

However, the issue is less clear when one speaks of situations (immigration, Guantanamo
habeas corpus proceedings) where the application of certain constitutional rights is less clear. In the
context of the Guantanamo Habeas proceedings, the standards for the admission of evidence are more
permissive than those used in criminal proceedings, with hearsay being “always” admissible. Indeed,
the information at the heart of the Latif case may have constituted just this type of information.

If no constitutional bar otherwise prohibits the admission of intelligence information into trial,
the question turn to whether other societal values argue for or against admission. For example, it is
possible that the wholesale dismissal of intelligence by judicial actors may create a public perception
that intelligence is inherently unreliable, which in turn could undermine public confidence in
governmental action that relies on intelligence outside of the judicial realm. Indeed, intelligence
information informs numerous decisions that affect the interests of U.S. citizens, such as the movement
of U.S. military personnel, the ability of persons to travel internationally, and the ability of U.S.
persons to trade with individuals believed to be involved with acts of terrorism. Nonetheless, if
intelligence is included or excluded on such grounds, the rationale is not to achieve better veritistic
results, but instead to serve other societal interests.

145 FED. R. EVID. 801(c).
146 FED. R. EVID. 802.
147 See e.g. United States v. Verdugo-Urquidez, 494 U.S. 259, 271-275 (Fourth Amendment does not apply to non-U.S. citizen overseas); Shaughnessy v. United States, 345 U.S. 206, 212-13 (Constitutional Due Process does not apply to alien who has not entered the United States).
149 See e.g. Al Mutairi v. United States, 644 U.S. F.Supp.2d 78, 84 (D.D.C. 2009)
150 See http://www.fbi.gov/about-us/nsb/tsc/tsc_liberties and http://www.fbi.gov/about-us/nsb/tsc/tsc_faqs (the Terrorist Screening Center utilizes intelligence from other agencies in making its determinations on who to include on “no fly” lists, including “domestic terrorists”).
B. The Classified Information Procedures Act

Just as the Seventh Amendment right of confrontation facilitates achieving the Constitutional goal of securing “the Blessings of Liberty,” so too does effective national security policy-making, supported by efficient and effective intelligence, facilitate the constitutional goal of “providing for the common defence.” To this end, other constitutional values not derived primarily from concerns about individual liberty may affect the question of whether to include intelligence in judicial proceedings. Indeed, it may be argued that ‘providing for the common defence’ could require the exclusion of intelligence information. For example, one could argue that if confidential human sources are aware that the Seventh Amendment right of confrontation could make the sources’ identities discoverable in trial, such human sources will be reluctant to provide information. Along the same lines, producing technical intelligence at trial could enable the targets of intelligence collection to understand methods and means by which they are being surveilled.

In light of these concerns, various evidentiary procedures exist that seek to ‘square the circle’ of integrating intelligence into criminal justice proceedings while protecting intelligence sources and methods, and some mention of these procedures is appropriate. These procedures include the Classified Information Procedures Act (which establishes processes by which classified information is handled in civilian criminal discovery), Military Rule of Evidence 505 (setting forth substantially similar procedures for courts martial), and the Military Commissions Rule of Evidence 505 (with procedures similar to the first two regimes, yet making allowances for ex parte hearings), all of which generally follow the same procedure. First, they make provisions for courts to issue protective orders to prevent

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152 U.S. CONST. pmbl.
153 U.S. CONST. pmbl.
the disclosure of classified information produced by federal prosecutors during discovery.\textsuperscript{156} With this protective shield in place, the procedures then permit the substitution of classified information with an unclassified substitute, or permit the prosecution to admit relevant facts in lieu of disclosure.\textsuperscript{157} However, the propriety of a substitute is dependent on a judge finding that the unclassified statement or summary would “provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.”\textsuperscript{158} If the proffered summary or substitute is found to be deficient in this regard, the judge may either (a) dismiss specific counts of the indictment or information; (b) find against the United States on any issue as to which the excluded classified information related; or (c) striking or precluding all or part of the testimony of a witness.\textsuperscript{159} Interlocutory appeal is available to the federal prosecutors, should a judge determine that classified information must be disclosed during a prosecution.

With this overview, several points about CIPA and its analogues may be made. First, it should be noted that the primary purpose of CIPA is to protect the secrecy of intelligence information. Thus, it represents an attempt to balance the pragmatic need to maintain the secrecy necessary to protect intelligence sources and methods, against the societal values expressed in the Sixth Amendment guarantees of public trials, the right of confrontation, and compulsory process. However, while CIPA and its analogues represent an admirable attempt at balancing constitutional values against pragmatic considerations, they do not fully resolve the tensions that arise when information derived from the veritistic process of intelligence collection is introduced into the social process of judicial factfinding.

For example, the introduction at trial of highly technical intelligence information—particularly that derived from the SIGINT and MASINT disciplines—might require excessive testimony to establish

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{156} 18 U.S.C. App. §3.
\item \textsuperscript{157} 18 U.S.C. App. §4.
\item \textsuperscript{158} 18 U.S.C. App. §6(c)(1)(B).
\item \textsuperscript{159} 18 U.S.C. App. §6(e)(2).
\end{enumerate}
\end{footnotesize}
the necessary foundational understanding by the layperson jury and non-expert judge as to how the techniques collect relevant data, and how such data is translated into comprehensible information.

Second, it should be noted that CIPA is most effective at protecting classified information when such information is offered for exculpatory, rather than inculpatory purposes. To understand why, consider a hypothetical case where prosecutors intending to prosecute a defendant for possessing and distributing narcotics possess photographs of the property of the defendant, taken from an airplane.\textsuperscript{160} From the photographs, one could determine whether the foliage on the defendant’s property was a type of plant used to make narcotics. Consider the additional hypothetical fact that the overhead photographs were incidentally collected as part of classified program involving the Intelligence Community. In this scenario, under Section 6 of CIPA,\textsuperscript{161} the prosecution could prepare a summary which omitted the classified purpose that resulted in the incidental photography, instead leaving merely the photographs collected. If the photos are inculpatory (e.g. they show poppy plants), then the defendant would likely argue that he could not effectively make his defense without being able to challenge the accuracy of the information,\textsuperscript{162} through discovery into the chain of custody and the potentially classified topic of how the photographs were collected. However, if the information is exculpatory (e.g. that the plants are rhododendrons, rather than poppies), then it is likely that the defense will not wish to challenge the accuracy of the statement, and thus would permit the introduction of the evidence without seeking discovery into the classified means by which the information was acquired. Therefore, from an epistemological perspective, CIPA and its analogues are

\textsuperscript{160} These facts are derived from those in Florida v. Riley, 488 U.S. 445 (1989). However, in Riley, the photographs were collected by civilian law enforcement, and not the Intelligence Community. Thus, classified information was not at issue in Riley.

\textsuperscript{161} 18 U.S.C. App. §6(c)(1)

\textsuperscript{162} See 18 U.S.C. App. §6(c)(1)(B), permitting the United States to move for a court order providing for a substitution of the classified information. “The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with the same ability to make his defense as would disclosure of the specific classified information” (emphasis added).
likely asymmetrical in their impact on the desideratum of completeness, by facilitating more information being introduced for exculpatory, rather than incriminatory purposes.

C. Effective Communication

As noted above, the criterion of effective communication requires that for a fact \( X \) to become testimony \( X \), a witness must (1) perceive \( X \), (2) accurately remember \( X \) at the time of testimony, (3) intend to communicate fact \( X \), and (4) adequately articulate fact \( X \). From the review of the intelligence cycle and judicial proceedings, several ways suggest themselves in which information derived from the intelligence cycle may susceptible to testimonial “failure.” First, a trial judge is likely to require that an evidentiary foundation be established before any written document (be it an intelligence report, or more common evidence such a contract and will) is admitted at trial. For example, it is probable than a knowledgeable individual would have to testify about the authorship of a written intelligence report, that the intelligence report satisfies the “best evidence” rule, or if admitted under the ‘business records’ hearsay exception, that the report was made by a person with personal knowledge in the course of a “regularly conducted business activity.” Furthermore, the introduction at trial of highly technical intelligence information may necessitate the use of expert testimony, so that the information can be summarized verbally to the jury in layman’s terms.

In both cases, the use of a witness at trial to communicate information about an intelligence report to a jury adds an additional epistemic “step,” whereby the witness must effectively understand the information communicated in the intelligence report, and in turn effectively communicate that

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163 Friedman, Route Analysis of Credibility and Hearsay, 96 YALE L.J. 667, 685 (1987)
164 See MCCORMICK ON EVIDENCE, § 221, Vol. 2 pg. 56 (Sixth Ed), “the requirement of authentication requires that the proponent, who is offering a writing into evidence as an exhibit, produce evidence sufficient to support a finding that the writing is what the proponent claims it to be.”
165 See MCCORMICK ON EVIDENCE, § 221, Vol. 2 pg. 57 (Sixth Ed).
166 See MCCORMICK ON EVIDENCE, § 233, Vol. 2 pg. 90 (Sixth Ed).
information to the trier of fact at trial. This additional step increases the opportunity for testimonial failure to occur, with the consequence of a reduction in veritistic efficacy. Of course, all written and technical evidence is susceptible to this increased risk of testimonial failure; for example, had the prosecution in the Halsey case wished to introduce the police interview report into evidence, it is likely that one of the interviewing police officers would have testified, with the attendant increased risk that the officer would fail one of the steps of effective communication while authenticating the report.

However, because of the need to protect intelligence sources and methods, it is much less likely that the source or author will testify to “authenticate” a written intelligence report. If so, then any foundational testimony is likely to come from a witness other than the source or author, with the result of a greater risk of failure of effective communication due to flaws in the witness’s perception of the report, or failure of articulation about the details of the report.

Second, a lack of understanding of the role a given piece of information plays within either the social veritistic process that “produced” the information (the intelligence cycle) or the role the same information is subsequently “introduced” to (judicial proceedings) may result in a failure of adequate articulation. Consider, for example, the Guantanamo habeas corpus case of Al Mutairi v. United States, wherein the government offered into evidence information from the intelligence community that – while at least collected – apparently had not been subjected to the analysis step of the intelligence cycle, a fact noted by a cautionary statement on some of the written reports.\footnote{\textit{644 F.Supp.2d 78, 84 (D.D.C. 2009)}} For the intelligence community, such cautionary statements may not necessarily speak to the reliability of the information contained within the report.\footnote{Furthermore, the statement may merely indicate that the information in the report has not been combined with an analytical assessment; while such an assessment could bear on the report’s reliability, it could also take the form of a predictive analysis added to the descriptive information in the report. See \textit{e.g.} \textit{DEPARTMENT OF THE ARMY, FM 2-0 INTELLIGENCE, 1-16} (stating that intelligence may be predictive in nature).} Indeed, if one decides from an epistemological perspective that a fact is “known” for intelligence purposes only once the full intelligence cycle is complete, then such cautionary
statements may merely indicate that the reports constitute data points, which may be combined with other data points in order to draw a “final” veritistic determination. Thus, intelligence information that has not yet undergone the analysis step would be analogous to judicial evidence that has not yet been evaluated by a judicial factfinder as being dispositive on the issue of guilt or innocence.

If, however, such cautionary statements lead a judge to reject intelligence reports or to view them with a skepticism beyond that generally applied to other evidence in the record, then a failure of communication as occurred; the cautionary statement may have been intended to communicate that a veritistic determination had not been made with regards to the report (i.e. the information within the report has not been proven reliable or unreliable), whereas it is interpreted to mean that a veritistic presumption of unreliability had been applied.

Such a failure of communication may have occurred in Al Mutairi, where the cautionary statements were cited by Judge Colleen Kollar-Kotelly as a rationale – along with the possibility of mistaken translations and “multiple layers of hearsay” contained in the documents – for not applying the presumption of authenticity to the reports. Although Judge Kollar-Kotelly does not explicitly define the term, it appears that she adopts Judge Gladys Kessler’s definition in the Guantanamo habeas case of Ahmed v. Obama that the presumption of authenticity was equivalent to the “business records” hearsay exception. If the cautionary statement were intended to warn that, due to the lack of analysis, the circumstances surrounding the creation of the reports could not be verified, then denying the presumption of authenticity would have been appropriate. However, it is more likely that the cautionary statement was intended to warn that such “raw intelligence” had not been “fully analyzed for its ‘reliability, validity, and relevance’ in the context of other intelligence where ‘judgments about its

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170 644 U.S. F.Supp.2d 78, 84. Judge Kollar-Kotelly also declined to extend the presumption of accuracy to the reports.
collective meaning are made;”⁷² in other words, the cautionary statements signaled that the information contained within the reports may not have been verified, or used to make a final veritistic determination. If such is true, then Judge Kollar-Kotelly’s decision to deny a presumption of authenticity suggests that the cautionary statement was a failure of communication, in that the judge perceived a greater level of unreliability than the statement intended to convey.

D. Effective Argumentation

Finally, a few words on the effect the inclusion of intelligence information may have on effective argumentation at trial. There are numerous ways in which the inclusion or exclusion of a particular piece of information may either enhance or detract from effective argumentation; for example, as has been mentioned above, the exclusion of information may undermine the degree to which a speaker (be it a litigant presenting a case to the jury, or a members of the jury deliberating amongst themselves) is justified in their beliefs. Theoretically, such effects will generally result from the inclusion or exclusion intelligence information as much as any other proffered piece of evidence. The question then becomes whether there is any impact on effective argumentation that results exclusively – or a least disproportionately – from the admission or exclusion of intelligence information in particular.

Conceivably, the most likely effect to disproportionately result from the inclusion of intelligence information (as opposed to other evidence) is an increase in the occurrence of the ‘appeal to authority’ fallacy of argumentation. Such could occur if either litigants or jurors excessively relied on the reputation of the Intelligence Community in order to bolster their arguments. The mystique of certain intelligence agencies, or patriotic appeals to the role the Intelligence Community plays in defending the national security could be used to give undue weight to evidence produced through the intelligence cycle.

⁷² 644 U.S. F.Supp.2d 78, 84 (emphasis added).
If such an appeal were to be made by a litigant during the presentation of evidence or during closing arguments, then the effect could potentially be offset with an appropriate jury instruction. However, if the appeal to the Intelligence Community’s “authority” were to be made during jury deliberations, the only methods by which it could be corrected are either identification of the fallacy by other jurors, or through a superior counterargument. As noted above, the opaqueness of the jury deliberation process precludes an understanding of whether such “offsets” occur during deliberations.

That said, there is reason to believe that appeals to the Intelligence Community’s authority are either unlikely to be made, or if made, unlikely to have much appeal. Although polls have traditionally shown a high degree of public confidence the military and law enforcement,173 a 2005 Gallup poll suggested that a large percentage of respondents had low confidence in the Intelligence Community, with the percentage of respondents claiming they were “not too confident” or “not at all confident” ranging between 41% and 61%, depending on political affiliation.174 Of course, the Gallup poll is a snapshot of public opinion, taken at the height of the wars in Iraq and Afghanistan, and thus might not necessarily reflect public confidence in the Intelligence Community over the long term. Additionally, one cannot necessarily deduct from the poll the propensity of a given juror to share the poll’s low estimation of confidence in the Intelligence Community, or for a juror to make or refrain from appeals to the Intelligence Community “authority.” At the same time, however, the poll does at least suggest that we likewise cannot assume that jurors are particularly susceptible to appeals to the Intelligence Community’s “authority.” This suggestion is further supported by the fact that the 2005 poll indicated that only between 7% and 12% of respondents expressed being “very confident” in the Intelligence

173Gallup, Congress Ranks Last in Confidence in Institutions, (July 22, 2010) available at http://www.gallup.com/poll/141512/congress-ranks-last-confidence-institutions.aspx. In 2009 and 2010, 59% of respondents claimed to have a “great deal” or “quite a lot” of confidence in the police, while 82% and 76% respectively gave the same response for the military. Indeed, the military has either ranked first or second in Gallup’s public confidence poll each year since 1975.

Community, whereas a poll taken seven months later indicated that 53% of respondents were “very confident” with local police. Thus, to the extent that public polls provide any insight into potential juror behavior, they suggest that we should be no more concerned about an appeal to Intelligence Community authority than we should be about appeal to more traditional authority, i.e. law enforcement personnel.

V. Conclusion: A Framework for Assessing Latif

As the above discussion demonstrates, a judge confronted with the question of whether to admit intelligence reports into evidence faces a potentially daunting task. Despite Judge Brown’s statement in Latif that courts know more about the intelligence cycle than other social processes, the inherent secrecy that surrounds the Intelligence Community, combined with the relatively minor percentage of a judge’s case load that will invoke intelligence information likely means that many judges will share Judge Tatel’s sentiment that intelligence reports are generated in a process about which “we know almost nothing about.” Considering this, a framework is required that will permit judges to weigh the unique veritistic characteristics of the judicial and intelligence processes, as well as external values and policy considerations.

Such a framework begins with an assumption, based on the desideratum of completeness and Federal Rule of Evidence 402, that relevant intelligence information should generally be admitted into evidence. However, because other values may trump the purely truth-finding function of trials, any

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177 Latif at 752.
178 This assumes that intelligence information is most likely to be used in criminal prosecutions. For the year ending March 31, 2011, U.S. District Courts had 268,258 civil cases pending, see United States Courts, Caseload Statistics, Table C, available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C00Mar11.pdf, in contrast, the District Courts had 79,458 criminal cases pending, see Id. at Table D.
179 Latif at 772.
practical framework for evaluating whether intelligence information is to be included in judicial proceedings should proceed to an examination of the societal values and policy considerations at play. Because the intelligence cycle is shrouded in secrecy and is not “familiar, transparent...or accessible,” it may be tempting to justify the exclusion of intelligence information on veritistic reliability grounds alone. Nonetheless, because the relative veritistic inferiority or superiority of intelligence information cannot be empirically proven, exclusion purely on such grounds at best may not be justified, and at worst may serve to hinder public debate by obscuring larger policy questions. Those cases in which intelligence information appear most likely to be used – e.g. prosecution for terrorism offenses, espionage, or contraband smuggling – tend to be ripe with values-laden issues such as national sovereignty, individual rights, separation of powers, and the scope of government authority. Thus, if the exclusion of such intelligence information is warranted by societal values or policy concerns other than veritistic efficacy, then such should be articulated as the rationale for exclusion, in order to foster a frank public debate.

If no societal value categorically bars the exclusion of intelligence information, then the next step in the framework is to understand the role the intelligence information plays in the intelligence cycle, and for what purpose it is being considered in judicial proceedings. It is possible that the need to protect intelligence sources and methods may preclude anything more than a rudimentary discussion about the context in which a given intelligence report was generated. Nonetheless, any information that may be shared with the court – particularly the purpose of any caveats or assessments – could provide a more informed basis on which to decide the weight to accord an intelligence report entered into evidence.

Applying this framework to Latif, it should be noted as an initial matter that, because the Court of Appeals’ opinion is heavily redacted, we do not know what kind of intelligence report was at the

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180 Latif at 772.
subject of the *Latif* opinion. Let us assume for the sake of argument, however, that the report in
question was the kind of “raw intelligence” report that was at issue in *Al Mutairi*. Proceeding under this
assumption, the examination begins with the question of whether societal values argue for or against
the inclusion of the intelligence report. In the context of Guantanamo habeas corpus proceedings, the
usual values-based bar to the inclusion of intelligence information – i.e. that such information
constitutes hearsay, which would offend the Sixth Amendment right of confrontation – does not
apply.\(^{181}\) However, other values-driven policy considerations may argue for the exclusion of such
evidence. Indeed, some rationales for exclusion may at first glance appear to be aimed at including
veritistic efficacy, e.g. if the intelligence report were to be considered to be a “waste of time.”
Nonetheless, exclusion on these grounds may actually be serving other goals, such as judicial economy.
If so, then such rationales should be made explicit.

Turning to the evidentiary weight issue that is the heart of the *Latif* opinion, a primary problem
is the scope of the presumption of regularity, which appears to speak to both the admissibility of the
evidence, and the evidentiary weight to accord it thereafter. According to the majority’s view, the scope
of the presumption is closer to that of the presumption of authenticity (as articulated in *Ahmed v.
Obama*), in that it merely permits a court to presume that the report is what it purports to be,\(^{182}\) yet
does reach so far as to conclude that the information therein is true.\(^{183}\) In contrast, Judge Tatel appears
to view the presumption of regularity as being more equivalent to the presumption of accuracy, which
would speak to the weight to accord admitted evidence, by permitting a court to presume that the facts
in the report are accurate.\(^{184}\)

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\(^{182}\) See also *The Brookings Institution, The Emerging Law of Detention 2.0*, 49 (2011)

\(^{183}\) *Latif* at 755.

Assuming that the report at issue in Latif was similar to that in Al Mutiari, then we understand the role the report was designed to fulfill in the intelligence cycle, i.e. that it was data collected in the “ordinary course of business,” from which a final veritistic determination had yet to be made.\textsuperscript{185} Likewise, we understand that the likely purpose for which the intelligence was offered into evidence was to provide generally relevant information concerning the propriety of the government’s detention of Latif. Up to this point in the analysis, one would desire to admit the report, so as to contribute to the desideratum of completeness. Furthermore, absent some indicia that the reports were falsified, mistakenly labeled, or somehow other than what the purport to be, etc., then the policy goal of judicial economy would argue for applying a presumption of authenticity, lest excessive time and effort be spend in trivial evidentiary foundation issues.

An understanding of the role of the report in question played in the intelligence cycle would also help to inform the question of what weight to accord it once admitted into evidence, although the results might differ based on judicial temperament and philosophy. Consider, for example, if the intelligence information at issue in Latif was not “raw intelligence” of the kind that was at issue in Al Mutiari, but instead a “finished” intelligence product, along the lines of a National Intelligence Estimate.\textsuperscript{186} On the one hand, the fact that a National Intelligence Estimate officially represents “the judgment of the intelligence community as a whole”\textsuperscript{187} suggests that such reports are the kind of “official Executive branch record” about which “the horizontal separation of powers” justifies a presumption of regularity or accuracy. Alternatively, because a National Intelligence Estimate is an assessment, it is possible that a judge might find the opinions and conclusions contained therein do not bear sufficient indices of trustworthiness to merit admission under the “public records” hearsay


\textsuperscript{186} 50 U.S. §403-3b(c)(1).

\textsuperscript{187} 50 U.S. §403-3b(i).
exception, to say nothing of a presumption of reliability. Under such circumstances, it is possible that a “raw intelligence” report – i.e. a report that contains only information and lacking an analysis – might be admissible, whereas the “finished intelligence” report would not.

Thus, breaking the presumption of reliability into separate presumptions of authenticity and accuracy, the framework suggests that the intelligence report at issue in Latif likely merited a rebuttable presumption of authenticity. It is also possible that a presumption of accuracy could have been applied to the report as well; however, the decision of whether to grant such a presumption need not derive from a lack of understanding about the process that produced the information. Indeed, as the discussion above demonstrates, even the most rudimentary understanding of the role that a given intelligence report plays within the intelligence process would provide some basis for decision about the weight such evidence should receive in judicial proceedings.

In conclusion, both the intelligence cycle and judicial proceedings are social processes for making factual determinations, and each concede a degree of veritistic efficacy in order to serve social values and policy considerations other than the pursuit of truth. As a consequence, the incorporation of intelligence information into judicial proceedings will likely always create conceptual and procedural challenges, and often such inclusion will be barred by constitutional principles. Nonetheless, to the degree that intelligence can contribute to the veritistic results of trials, its inclusion is to be desired from an epistemological perspective. The debate about whether and how such inclusion is to occur is perhaps just beginning. It is fitting, however, that the debate will require participants in each social veritistic process to learn about the other; hopefully this article has provided a “data point” which may aid in this effort.

188 See Beech Aircraft Corporation v. Rainey, 488 U.S. 153, 167 n. 11 (1988)(noting four factors helpful in assessing the trustworthiness of opinion in factual reports: “(1) the timeliness of the investigation; (2) the investigator’s skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation”).